13 WC 41989

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Eileen Perkins,
Petitioner,

vs.

NO: 13 WC 41989
consol. 13 WC 19882

City of Chicago,
Respondent.

16IWCC0001

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the sole issue of the nature & extent of Petitioner's permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 5, 2015 is hereby affirmed and adopted.

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

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

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

DATED: JAN 4 - 2016
MJB:ell
O-12/14/15
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PERKINS, EILEEN
Employee/Petitioner

Case# **13WC041989**
13WC019882

CITY OF CHICAGO
Employer/Respondent

16IWCC0001

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

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

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

0320 LANNON LANNON & BARR LTD
MICHAEL S ROLENC
200 N LASALLE ST SUITE 2820
CHICAGO, IL 60601

0113 CITY OF CHICAGO
STEPHANIE LIPMAN
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Eileen Perkins
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **13** WC **41989**

Consolidated cases: **13 WC 19882**

16IWCC0001

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **February 20, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 18, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**16,256.25**; the average weekly wage was $**312.62**.

On the date of accident, Petitioner was **67** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**1,116.37** for other benefits, for a total credit of $**1,116.37**.

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

ORDER

All issues are addressed in the Award of the companion claim under case number 13 WC 19882.

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

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

Signature of Arbitrator

May 5, 2015
Date

MAY 5 - 2015

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Andrew Beltz,

Petitioner,

vs.

NO. 14WC 32315

16IWCC0002

McDowell Enterprises,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 17, 2015 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $9,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:
SJM/sj JAN 4 - 2016
o-11/5/15
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

BELTZ, ANDREW
Employee/Petitioner

Case# **14WC032315**

16IWCC0002

McDOWELL ENTERPRISES
Employer/Respondent

On 4/17/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0250 HOWERTON DORRIS & STONE
STEPHEN W STONE
300 W MAIN ST
MARION, IL 62959

4476 KELLY LAW
RYAN L POWERS
4801 N PROSPECT RD
PEORIA HEIGHTS, IL 61616

16IWCC0002

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Andrew Beltz,
Employee/Petitioner

v.

McDowell Enterprises,
Employer/Respondent

Case # **14** WC **32315**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin, Illinois**, on **March 12, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **7/16/14**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**53.771.12**; the average weekly wage was $**1,034.06**.

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

Petitioner was entitled to temporary total disability benefits from July 16, 2014 through November 24, 2014 and Respondent shall be given a credit of $**10,734.47** for TTD benefits paid during that period of time.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**689.37/ week** for **14** weeks, commencing **November 25, 2014** through **March 2, 2015**, as provided in Section 8(b) of the Act.

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

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

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

Nancy Lindsay
Signature of Arbitrator

April 13, 2015
Date

APR 17 2015

Andrew Beltz v. McDowell Enterprises,
14 WC 32315 (19(b))

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner sustained an undisputed accident on July 16, 2014 which arose out of and in the course of his employment with Respondent. At the time of arbitration, the only issue in dispute was Petitioner's entitlement to temporary total disability benefits from November 25, 2014 through March 2, 2015. The parties stipulated at the time of hearing that any issue as to medical bills was being reserved for a future hearing. (AX 1) Petitioner was the sole witness testifying at the hearing. Respondent tendered no exhibits.

The Arbitrator finds:

Petitioner has worked for Respondent as a truck driver for over nineteen years. He drives a flatbed and a dump trailer hauling rock, sand, and coal. His duties include driving and climbing in and out of the trailer to sweep the bed.

On July 16, 2014 Petitioner was involved in a motor vehicle accident when another semi-truck rear-ended Petitioner's truck. Petitioner sustained a head injury but did not recall being hit. Petitioner was transported by ambulance to Hardin County Hospital for further care. (PX 1, Red Tab 3)

Petitioner was diagnosed with a right forehead laceration and concussion. His forehead laceration was closed with sutures. CT scans of Petitioner's head, neck, chest, abdomen, and pelvis revealed no acute findings.

He was released from work until seen by his primary care physician or Respondent's occupational doctor. (PX 1, Red Tab 3, p. 7/27[1])

Thereafter, Petitioner came under the care of his primary care physician, Dr. Hastie, who kept him off work as of Petitioner's first visit on July 24, 2014 through August 8, 2014 when Petitioner was released to light duty. (PX 1, Red Tab 3, pp. 5/27, 7/27, and 11/27; PX 2)

Petitioner underwent an MRI of his brain at Saline Valley Radiology on August 28, 2014. It showed a small subdural fluid collection on the right side. (PX 1, Red Tab 6) Petitioner also underwent a CT scan of the cervical spine. (PX 1, Red Tab 6)

Petitioner continued on a light duty basis until September 4, 2014 when Dr. Hastie again took him off work. (PX 1, Red Tab 3, p. 13/27; PX 2) As of September 4, 2014 Dr. Hastie noted Petitioner was still having issues with driving, concentration, and occasional headaches and neck pain. He was seeing Dr. Weaver and undergoing physical therapy. Petitioner remained off work, was told to avoid aggravating and exciting factors such as extreme lifting and to follow his neurosurgeon's orders. (PX 1, Red Tab 3, p. 11/18; PX 2)

Dr. Weaver examined Petitioner on September 3, 2014, Petitioner having been referred due to a "brain bleed" seen on the August 28, 2014 MRI. According to Dr. Weaver's notes, Petitioner had a "significant injury" when driving a truck with a lot of soft tissue pain from the neck and scapular regions radiating into the shoulder and "a bit" into the subdeltoid region on the left

[1] The "7/27" refers to page numbers located in the upper right hand corner of PX 3).

side. Petitioner was also experiencing headaches which the doctor felt were probably more of a sequelae of the neck strain than anything else. Petitioner was advised to stay off work as there was some risk of seizure even with a small subdural. He was also prescribed therapy for his neck. Dr. Weaver anticipated a CT scan of the head in about a month. (PX 1 - Red Tab 6)

Petitioner followed up with Dr. Weaver on October 6, 2014 reporting some ongoing headaches, confusion and dizziness. He also complained of neck pain which was, however, improving. Dr. Weaver felt Petitioner's symptoms were consistent with his post-concussive syndrome and he recommended Decadron for the subdural. A repeat CT scan was also taken that day showing a small chronic right-sided subdural hematoma overlying the right frontal and parietal lobe. (PX 1, Red Tab 6)

As of October 7, 2014 Dr. Hastie continued to keep Petitioner off work. Petitioner was also still undergoing physical therapy and seeing the neurosurgeon. (PX 1, Red Tab 3, 9/18)

Dr. Weaver examined Petitioner on November 10, 2014. Dr. Weaver felt Petitioner was suffering from fairly classic post-concussion syndrome symptoms of headache, dizziness, and short term memory loss. He felt Petitioner would continue to improve over time. (PX 1, Red Tab 6)

Dr. Hastie continued Petitioner off work as of November 11, 2014. (PX 1, Red Tab 3, p. 7/18)

Petitioner was receiving temporary total disability benefits throughout the foregoing time period. However, temporary total disability benefits were terminated as of November 23, 2014. (PX 2)

Petitioner returned to see Dr. Hastie on November 25, 2014. Petitioner still wasn't feeling well and was reporting he didn't feel quite ready to go back to work. He still reported headaches. Given the longevity of his symptoms and the force of his impact at the time of the accident, Dr. Hastie referred Petitioner to neurology for further evaluation and back to physical therapy. Petitioner remained off work. (PX 1, Red Tab 3, p. 5/18; PX 2) As of December 29, 2014 Petitioner was advised to continue his current therapy and referred to a neurologist. He remained off work. (PX 1, Red Tab 3, p. 6/9; PX 2)

Petitioner was examined by Dr. Trivedi at the Brain & Spine Institute on January 19, 2015. Petitioner was prescribed Tramadol. (PX 3)

Dr. Hastie's office notes indicate that Petitioner's headaches were improving as of January 29, 2015. Petitioner reported the medication prescribed by Dr. Trivedi was helping. Petitioner was kept off work until seen in follow-up with Dr. Trivedi. (PX 1, Red Tab 3, p. 7/10; PX 2) As of February 13, 2015 Petitioner was reporting fewer headaches with less severity. As Dr. Hastie had not seen any of the neurologist's reports, he kept Petitioner off work. According to the doctor's notes, once he received those, he would review Petitioner's clearance for work. (PX 1, Red Tab 3, p. 5/10; PX 2)

Petitioner testified that Dr. Hastie kept him off work past February 20, 2015, releasing him back to work on March 3, 2015. According to Petitioner,

his employer would not allow him to return to work from the accident until all doctors provided him with a release. Petitioner testified he returned to work on March 3, 2015, and continues to work, having benefitted from medications prescribed by the neurologist.

The Arbitrator concludes:

Issue (L) - Petitioner's entitlement to Temporary Total Disability Benefits.

Petitioner is awarded temporary total disability benefits beginning July 16, 2014 through March 2, 2015, a period of 32 weeks. The parties stipulated that Petitioner was temporarily totally disabled from July 16, 2014 through November 24, 2014. (AX 2) No explanation for Respondent's termination of benefits is in the record. Dr. Hastie has continued to keep Petitioner off work through March 2, 2015 when he was released to return to work. (PX 1, Red Tab 3; PX 2) During this time Petitioner has been treated for a subdural hematoma, concussion, blurred vision, and neck pain. There being no contrary evidence that Petitioner was restricted from work November 25, 2014, through March 2, 2015, Petitioner is entitled to benefits for that time period. He has remained under the care of his doctor during that time and with instructions to remain off work.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANDREW TULL,

Petitioner,

vs. NO: 13 WC 42121

EVERGREEN FS, INC.,

Respondent.

16IWCC0003

DECISION AND OPINION ON REVIEW

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Respondent runs a fertilizer warehouse, and Petitioner worked 27 years as Respondent's Facility Manager.

2. On July 11, 2013 Petitioner was helping co-workers open a railcar. He crawled under the railcar to hook a come-along to it. The ground was wet due to rain, and they were unloading DAP, which is a very slick substance. As the workers were pulling on the come-along Petitioner slipped and fell on his left knee and shoulder.

3. Petitioner underwent chiropractic care, and Dr. Li ordered lumbar and left shoulder

MRI's. The left shoulder MRI revealed a moderate to high grade partial thickness bursal surface tear, while the lumbar MRI revealed multi-level disc bulges and endplate spurring throughout the lumbar spine, multi-level facet arthrosis, and multi-level mild foraminal narrowing. He was diagnosed with a left shoulder rotator cuff tear and a lumbar spine herniated disc or possible T12 compression fracture.

4. Petitioner eventually underwent 2 left shoulder surgeries in August 2013, followed by physical therapy for his left shoulder and low back.

5. During physical therapy, Petitioner noted that his right shoulder began bothering him because he was using it more, due to his left shoulder issues.

6. A right shoulder MRI was performed in December 2013, and revealed mild to moderate supraspinatus tendinosis without tear, possible biceps tendinosis, possible labral degeneration and possible subacromial decompression.

7. In January 2014 Dr. Li diagnosed a right shoulder biceps and SLAP tear.

8. Petitioner subsequently underwent right shoulder surgery on April 1, 2014. After additional physical therapy, Petitioner was released to work on August 18, 2014.

9. Petitioner travelled from his home in Colfax, IL to Bloomington, IL for medical treatment.

The Commission affirms the Arbitrator's rulings on the issues of accident, causal connection, medical expenses, temporary total disability and permanent partial disability. However, the Commission vacates the award for mileage.

Petitioner travelled approximately 40 miles round trip to and from his medical providers' place of business for treatment. This mileage calculation does not exceed local travel standards, thus Petitioner is not entitled to reimbursement for such travel.

~~IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to~~ Petitioner the sum of $633.26 per week for a period of 19-6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $569.93 per week for a period of 112.5 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused a 12.5% loss of use of Petitioner's person as a whole for his left shoulder injury and a 10% loss of use of Petitioner's person as a whole for his right shoulder injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner medical expenses in the amounts of $42,271.40 to Orthopedic and Shoulder Center, $27,603.00 to Ireland Grove Surgery Center, $358.20 to Ambulatory Anesthesia, and $4,656.51 to Prescription Partners under §8(a) of the Act.

16IWCC0003

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

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

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TULL, ANDREW
Employee/Petitioner

Case# **13WC042121**

EVERGREEN FS INC
Employer/Respondent

16IWCC0003

On 4/2/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0564 WILLIAMS & SWEE LTD
JEAN SWEE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

0000 RUSIN & MACIOROWSKI LTD
JENNIFER MEJIA
2506 GALEN DR SUITE 108
CHAMPAIGN, IL 61821

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Andrew Tull
Employee/Petitioner

v.

Evergreen FS Inc.
Employer/Respondent

Case # **13** WC **042121**

Consolidated cases: _____

16IWCC0003

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Bloomington, Illinois**, on **February 24, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **7-11-13**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**49,394.28**; the average weekly wage was $**949.89**.

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

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

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

Respondent shall be given a credit of $**5,699.38** for TTD, $**4,798.12** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**10,497.50**.

Respondent is entitled to a credit of $**1,332.80** under Section 8(j) of the Act. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

ORDER

The Arbitrator finds that all temporary total disability and temporary partial disability benefits due and owing Petitioner prior to April 1, 2014 has been paid and that the credit of $10,497.50 applies to this period of time. Additionally, Respondent shall pay Petitioner additional temporary total disability benefits of $633.26/week for 19-6/7 weeks, commencing April 1, 2014 through August 17, 2014, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $42,271.40 to Orthopedic and Shoulder Center, $27,603.00 to Ireland Grove Surgery Center, $358.20 to Ambulatory Anesthesia, and $4,656.51 to Prescription Partners, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $569.93/week for 112.5 weeks, because the injuries sustained caused the 12-1/2% loss of the person as a whole for the left shoulder and 10% loss of the person as a whole for the right shoulder, as provided in Section 8(d)2 of the Act.

Respondent is ordered to reimburse Petitioner in the amount of $2,217.60 for mileage of 3960 miles at $.56 per mile.

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

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

Signature of Arbitrator

3/31/15
Date

APR 2 - 2015

FINDINGS OF FACT:

Petitioner had been employed by Respondent, Evergreen FS Inc., as a fertilizer plant manager for approximately 26 years prior to July 11, 2013. On that date, Petitioner was called to the plant floor to help open a railcar. Petitioner said that he was using a come-along to pry open the railcar and was pulling with both arms when "something gave." When this occurred Petitioner slipped on a wet floor and went down on his left arm, shoulder and left knee.

Petitioner testified that he noticed immediate pain in his left shoulder, left knee and back. Petitioner said that he continued to work but he noticed left shoulder pain and increasing low back pain.

On July 16, 2013 and July 19, 2013, Petitioner treated with Dr. Duncan, a chiropractor in Colfax. Dr. Duncan's initial intake form and records give a history of accident and symptoms consistent with Petitioner's testimony. Dr. Duncan treated Petitioner's low back and spine. (PX 5)

Petitioner reported his work accident to Respondent and filled out an employee's report of injury for the workers' compensation carrier on July 29, 2013. Both of these forms give a history of work accident and symptoms consistent with Petitioner's testimony. (PX 3, PX 4)

On July 25, 2013, Petitioner treated with his family doctor, Dr. Hancock. Dr. Hancock took a history of accident consistent with Petitioner's testimony. Dr. Hancock's record states that Petitioner had left shoulder and neck pain and that he suspected a rotator cuff tear. Dr. Hancock's record also states that Petitioner had low back pain radiating to his posterior thighs with prior history of degenerative disc disease. Dr. Hancock prescribed light duty work and referred Petitioner to Dr. Li, an orthopedic surgeon. (PX 2)

On July 31, 2013, Petitioner treated with Dr. Li. Dr. Li recorded a history consistent with Petitioner's testimony. Dr. Li rendered an initial diagnosis of left shoulder rotator cuff tear with a lumbar spine herniated disc or possible T12 compression fracture. (PX 19) Dr. Li ordered a MRI of Petitioner's left shoulder and low back on July 31, 2013. With respect to the left shoulder, the radiologist indicated same showed a focal moderate to high grade partial thickness bursal surface tear involving the anterior insertional fibers of the distal supraspinatus tendon, a Grade I to II AC joint separation, and a small amount of fluid in the glenohumeral joint and subacromial-subdeltoid bursa. (PX 6) Petitioner's low back MRI was read as multi-level mild disc bulges without dominant disc herniation or severe spinal stenosis, multiple mild facet arthrosis, and multi-level mild foraminal narrowing. (PX 7)

Petitioner returned to Dr. Li on August 2, 2013. After documenting the MRI results, Dr. Li assessed Petitioner with a left shoulder high grade partial tear of the supraspinatus tendon. Dr. Li recommended surgery for the left shoulder. Dr. Li also assessed Petitioner with a lumbar spine strain and ordered physical therapy. (PX 19)

Dr. Li performed surgery on Petitioner's left shoulder on August 19, 2013 consisting of a left shoulder rotator cuff repair, arthroscopic subacromial decompression, and extensive debridement of anterior, superior and posterior Type I labral tear. Dr. Li's post-operative diagnosis was left rotator cuff tear; impingement syndrome; and Type I anterior, superior and posterior labral tear. (PX 8)

On August 28, 2013, Dr. Li ordered a post-operative CT of Petitioner's left shoulder. The radiologist, Dr. Wong, stated that the anchor device located in the very anterior aspect of the greater tuberoscity of the humeral

head was half embedded within the bony confines of the greater tuberosity and was half outside the bony cortex and extended into the superior aspect of the bicipital groove. (PX 9) Dr. Li recommended a second surgery to remove the suture anchor and revise repair arthroscopically. (PX 19)

On August 30, 2013, Dr. Li performed another left shoulder surgery to debride scar tissue and revise the rotator cuff repair as well as removal of the hardware from the bicipital groove. (PX 10)

Post-operatively, Petitioner underwent physical therapy through Dr. Li's office. Petitioner underwent a few sessions for his lower back and the therapist performed passive range of motion on his left shoulder. Petitioner last received therapy for his low back on September 19, 2013. At that time, the therapist noted Petitioner reported significant improvement with his low back symptoms. It was noted he had returned to full functional mobility. (PX 19)

On October 2, 2013, Petitioner reported to Dr. Li and advised the doctor that his left shoulder pain and mobility was improving. Dr. Li continued physical therapy but noted that Petitioner could stop using the CPM machine and Game Ready compression therapy for his left shoulder. Petitioner continued with left shoulder physical therapy. The physical therapy records indicate that Petitioner began using one to five pound weights during therapy between October 2, 2013 and October 31, 2013. During that period, or specifically October 7, 2013, Dr. Li released Petitioner to return to work with restrictions. (PX 19)

Petitioner testified that he had noticed some right shoulder pain shortly after his accident, but it came and went. Petitioner said that during therapy, he was using the weights with both of his hands and that he was increasing the use of his right arm. Petitioner said that, as the therapist increased the poundage of the free weights he was using, he began to experience increasing right shoulder pain. Petitioner said that the therapist had also recommended home exercises using bands and free weights. Petitioner said that he performed range of motion with the different bands attached to a door. Petitioner said that as he performed these exercises, his right shoulder pain increased and it became more difficult to perform the exercises.

Petitioner testified that on November 8, 2013, he informed his physical therapist that he was having some pain in his right shoulder. Petitioner provided that the pain in his right shoulder after his July 11, 2013 accident was different than the pain he had in the past and as such he mentioned it to his therapist. Therapy records from November 8th, show Petitioner informed the therapist of experiencing pain and weakness of the right rotator cuff. (PX 19)

On November 11, 2013, Petitioner reported that his left shoulder was great, but his right shoulder was sore. Petitioner also provided that he had been performing his Home Exercise Program with one (1) set of ten (10). (PX 11) On November 15, 2013, Petitioner reported that his right shoulder " ...has been bothering me lately..∴ I'm doing more with it than usual." (PX 12) By November 22, 2103, Petitioner complained his right shoulder hurt worse than his left. (PX 13) Petitioner testified that by November 22, 2013, he was lifting up to fifty (50) pounds during therapy.

Therapy notes from December 3, 2013 show Petitioner reported that "[his left shoulder] motion is really good but I can tell my strength isn't all the way back yet. My right shoulder has been bothering me and I want to get my strength all the way back with the left. I'm going to need this left shoulder to be strong because I've been over using my right lately and it's been hurting. I have had problems with my right shoulder in the past so I really need this left shoulder to be full strength." (PX 15)

On January 3, 2014, the therapist's progress note stated that Petitioner had some mild impairment in his left shoulder consisting of weakness doing yard work, hobbies and work. The therapist noted that Petitioner had good range of motion in the left shoulder but still demonstrated mild weakness in the left shoulder

abduction and external rotation. The therapist stated that Petitioner's shoulder strength was 4+/5. The therapist felt Petitioner met all his goals regarding the left shoulder. However, Petitioner was still expressing concerns about his right shoulder. (PX 15)

At Dr. Li's request, Petitioner underwent a MRI of the right shoulder on January 10, 2014. The radiologist stated that Petitioner had mild to moderate supraspinatus tendinosis without tear, possible biceps tenodesis, and a hyper intensive signal along the base of the superior labrum as well as multifocal post-operative changes. (PX 16) Dr. Li diagnosed Petitioner as having a right shoulder biceps and SLAP tear. (PX 17)

On February 10, 2014, Dr. Li reported Petitioner could advance activities as tolerated and had reached maximum medical improvement with respect to his left shoulder. Dr. Li also provided Petitioner required additional treatment for his right shoulder in the form of a right shoulder arthroscopic shoulder surgery. (PX 19)

Petitioner returned to Dr. Li on March 31, 2014. Dr. Li noted Petitioner wanted to discuss his injury at work related to his right shoulder complaints. Dr. Li recorded the following, "He denies any Right shoulder injury before accident and denies any accident since. He was pulling a comealong with both hands and slipped, falling on his left shoulder. However, he was pulling with his Right shoulder when he slipped but did not fall on it. He noticed more pain with [his] Right shoulder as he was rehabilitating [the] left shoulder. He has had previous Bristow procedure which is extra-articular and is unrelated to current Biceps and Labral pathology." (PX 19)

On April 1, 2014, Dr. Li performed a right shoulder arthroscopy with arthroscopic subacromial decompression, extensive debridement of the anterior, superior and posterior labral tears as well as a partial thickness rotator cuff tear, and biceps tenodesis. Dr. Li's post-operative diagnosis was a right shoulder biceps tendon tear; partial thickness rotator cuff tears; superior labral tear, anterior labral tear, and posterior labral tear; and impingement syndrome. (PX 18)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Michael Cohen on July 9, 2014. In his narrative report Dr. Cohen stated that Petitioner reported that he did not have pain in his left shoulder, however he still had weakness with overhead activities and that his function was pretty close to normal. On the right side, Petitioner reported continued catching in his right shoulder with some decreased strength. Petitioner felt he was 75% to 80% better on the right side than he was pre-operatively. On exam, Petitioner had full abduction and internal rotation which was symmetric in both shoulders. He had full supraspinatus bilaterally with no pain. He had negative impingement signs bilaterally and he had negative Speed's and Yergason's tests on the right shoulder. His right biceps muscle was distally displaced. Dr. Cohen opined Petitioner was at maximum medical improvement on the left shoulder and that the July 11, 2013 accident caused Petitioner's left shoulder condition requiring surgery. Dr. Cohen further opined that because Petitioner did not lodge complaints concerning his right shoulder to Dr. Duncan, Dr. Li, or the physical therapist until November 11, 2013, he did not believe Petitioner had any significant injury to his right shoulder during his work accident on July 11, 2013. Dr. Cohen indicated he would expect Petitioner to be performing most activities with his dominant right arm even without injury. Dr. Cohen opined that the subsequent treatment to the right shoulder was not causally related to said accident. (RX 1)

Post-operatively, Petitioner underwent physical therapy at Dr. Li's office through August 13, 2014. On said date, the therapist recorded Petitioner conveyed right shoulder muscle soreness and a dull ache with 1 out of 10 pain level. The therapist noted that Petitioner's pain was occasional, dull, and aching; Petitioner still had an occasional report of "impingement" type symptoms with overhead work and that he was instructed to take frequent breaks while performing overhead work. Lastly, the therapist noted a slight restriction in range of motion and 4+/5 strength. Petitioner was discharged from therapy with a note that he had met all goals of therapy. (PX 19)

Dr. Li released Petitioner to return to full duty work on August 13, 2014 with instructions to continue his home exercise program. (PX 19)

On September 3, 2014, Dr. Li authored a narrative report. Dr. Li noted that Petitioner was pulling a come along with both hands and slipped and fell on his left shoulder while at work on July 11, 2013. Dr. Li stated that Petitioner sustained a rotator cuff tear and required surgery on his left shoulder. Dr. Li stated that as Petitioner was rehabilitating his left shoulder, he was relying more on his right arm for daily activities and began to develop pain in his right shoulder. Dr. Li stated that Petitioner required surgery on his right shoulder to address the labral tear and biceps tendon tear. Dr. Li stated that it was his opinion within a reasonable degree of medical certainty that the July 11, 2013 accident contributed to the injury to both of Petitioner's shoulders. Dr. Li stated that the left was more severely injured and more painful than the right. Dr. Li stated that the right shoulder injuries consisting of the labral tears and the biceps tendon tear produced less symptoms and only manifested when he started to resume more normal activities. Dr. Li stated that Petitioner had a previous Bristow procedure in 1983 and that he had not had problems in his right shoulder until after the July 11, 2013 accident. (PX 1)

Petitioner saw Dr. Li on September 10, 2014. At that time, Dr. Li noted Petitioner was tolerating work but that some duties temporarily aggravate his shoulder. The doctor recommended that Petitioner continue his home exercise program and that he advance to activities as tolerated. Dr. Li released Petitioner to full duty work. (PX 19)

On December 3, 2014, Petitioner, at Respondent's request, was evaluated by Dr. Fletcher, for an AMA impairment rating. On exam, Petitioner had tenderness over the anterior right shoulder with some restriction of motion. In his report, Dr. Fletcher stated that Petitioner had a status post-left shoulder rotator cuff repair, impingement syndrome, and Type I anterior, superior and posterior labral tear; a status post-right shoulder biceps tendon repair, partial thickness rotator cuff tear, superior labral tear, anterior labral tear and posterior labral tear, impingement syndrome; and a lumbar strain superimposed on pre-existing degenerative disc disease. Dr. Fletcher gave Petitioner a 0% permanent impairment rating under the AMA guidelines, 6th edition, for the lumbar sprain; 5% for the right shoulder; and 4% for the left shoulder. (RX 2)

Records submitted show Petitioner underwent a right shoulder MRI, at Dr. Li's request, on December 5, 2014. The MRI showed mild to moderate supraspinatus tendinosis without tear; possible biceps tenodesis; possible residual labral degeneration and/or tear, and possible subacromial decompression. (PX 16) Petitioner testified that he returned to Dr. Li on December 8, 2014. At that time the doctor did not recommend any further treatment.

At the time of arbitration, Petitioner testified that his left shoulder improved since the surgery. Petitioner said that he still has some pain in his left shoulder when he reaches over his head and behind himself. Petitioner said that he does not have the strength in his left shoulder that he had before the accident. Petitioner said that he experiences a pinching sensation in his left shoulder when he lifts above shoulder height.

Petitioner denied any problems with his left shoulder before his accident on July 11, 2013. Petitioner stated that he had experienced low back problems ever since he was a young man and that same was intermittent. Petitioner also testified that he had undergone right shoulder surgery approximately 28 years ago. Petitioner said that prior to his July 11, 2013 work accident, he had some aches and pains in his right shoulder that he attributed to as arthritis. Petitioner said that there was physically nothing wrong with his right shoulder when he arrived at work on July 11, 2013. Petitioner provided that currently, his right shoulder is a lot weaker than his left shoulder. He is right hand dominant and his activities are limited with his right shoulder. Petitioner also complained of right shoulder clicking and stiffness.

Petitioner testified that he underwent a physical examination for work at Medical Hills Internists with Dr. Hancock on July 10, 2012. Petitioner testified and the records show he complained of right anterior shoulder pain around his previous surgical site. He also complained of pain with internal external rotation. An x-ray performed that day showed evidence of a prior surgical procedure from 28 years ago. There was a surgical threaded screw in the glenoid. Also noted were mild degenerative changes. (RX 6) Petitioner testified that Dr. Hancock did not treat him for his right shoulder on July 10, 2012 and that the x-ray was part of the physical exam. Petitioner said that after his accident on July 11, 2013, he did not have any other injury or insult to his right shoulder

Petitioner testified on cross examination that he had undergone a few physical therapy sessions for his back after his accident and that he believed his back returned its prior baseline. Petitioner also testified that although he has a full release to return to work and that he has resumed his duties managing the fertilizer plant, he and Respondent agreed that he should no longer climb or unload railroad cars.

Lastly, Petitioner testified that he lives in Colfax and that there is no orthopedic or medical doctor in Colfax. Petitioner said that, in accordance with Petitioner's Exhibit 22, he made 48 trips at 40 miles a trip to treat at Dr. Li's office before January 10, 2014 and that he made 51 trips at 40 miles a trip thereafter.

With respect to issue (C), Did an Accident Occur That Arose Out of and In the Course of Petitioner's Employment by Respondent, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner sustained a work related accident on July 11, 2013 that arose out of and in the course of his employment with Respondent when he was using a come-along with both arms to open a rail car and "something gave" causing him to slip on a wet floor and fall on his left arm, shoulder and left knee.

With respect to issue (F), Is Petitioner's Current Condition of Ill-Being Causally Related to the Injury, the Arbitrator finds as follows:

The Arbitrator finds that, as a result of the accident on July 11, 2013, Petitioner sustained an injury to his left and right shoulder and that he sustained a temporary aggravation of his low back.

Respondent's Section 12 examiner, Dr. Cohen, agrees with Dr. Li that a causal relationship exists between the accident sustained and Petitioner's left shoulder condition which required surgery on July 31, 2013 and August 19, 2013. With respect to his lumbar condition, the Arbitrator relies on Dr. Li's records and finds that Petitioner sustained a temporary aggravation of his pre-existing degenerative lumbar disc disease as a result of the aforementioned accident.

Regarding the right shoulder, the Arbitrator relies on Dr. Li's September 3, 2014 narrative report, the treating physical therapy records, and Petitioner's testimony and finds that Petitioner aggravated his right shoulder condition during the July 11th accident while he was pulling on the come-along and "something gave." In his narrative report, Dr. Li stated that during the accident, Petitioner's left shoulder was more severely injured than his right shoulder and was more painful. Dr. Li stated that Petitioner's right shoulder injuries consisting of labral tears and a biceps tendon tear produced less symptoms than his left shoulder rotator cuff tear and that his right shoulder symptoms manifested when Petitioner began to resume more normal activities. The Arbitrator finds it reasonable to conclude, as Dr. Li and the physical therapy records demonstrate, then when Petitioner was rehabilitating his left shoulder, he was using his right arm more and began to develop more pain and symptoms in his right shoulder.

The Arbitrator notes that, although Petitioner had some ongoing pain in his right shoulder since his Bristow procedure in 1983, it was intermittent and he did not seek medical care until after the July 11, 2013 accident. After the accident, Petitioner was sedentary and his right shoulder symptoms did not manifest until he became more progressively physically active in rehabilitation for his left shoulder. The Arbitrator notes that Petitioner did not begin lifting one pound free weights with both arms until October 2013. Petitioner voiced complaints to the therapist by November 8, 2013 as the level of weights and activity increased. The Arbitrator finds it significant that Petitioner did not have any other injury or insult to his right shoulder after his July 11, 2013 work accident. The Arbitrator also finds compelling Dr. Li's March 31, 2014 notation that Petitioner's previous Bristow procedure was extra-articular and not related to Petitioner's current biceps and labral pathology.

With respect to issue (J), Were the Medical Services that were Provided to Petitioner Reasonable and Necessary? Has Respondent Paid All Appropriate Charges for All Reasonable and Necessary Medical Services, the Arbitrator finds as follows:

Having found that Petitioner's right and left shoulder conditions requiring surgery and Petitioner's low back condition is causally related to Petitioner's work accident, the Arbitrator orders Respondent to pay the following reasonable and necessary medical bills under the fee schedule:

Orthopedic and Shoulder Center	$47,271.40
Ireland Grove Surgery Center	$27,603.00
Ambulatory Anesthesia	$358.20
Prescription Partners	$4,656.51.

Respondent shall be given a credit of $1,332.80 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

With respect to issue (K), What Temporary Total Disability Benefits Are In Dispute, the Arbitrator finds as follows:

The parties stipulated and the Arbitrator finds that Petitioner was temporarily totally disabled and temporarily partially disabled from his left shoulder condition through February 7, 2014. The parties further stipulated, and the Arbitrator finds that all temporary total disability benefits and temporary partial disability benefits for that period of time have been paid.

Petitioner underwent right shoulder surgery on April 1, 2014. Dr. Li released Petitioner to return to work full duty on August 18, 2014. Having found the requisite causal relationship, the Arbitrator therefore awards additional temporary total disability benefits for 19-6/7 weeks, from April 1, 2014 through August 17, 2014.

With respect to issue (L), What is the Nature and Extent of the Injury, the Arbitrator finds as follows:

Pursuant to Section 8.1(b) of the Act, the Arbitrator, in determining the level of permanent partial disability, must use the following factors:

i. The reported level of impairment;
ii. The occupation of the injured employee;
iii. The age of the employee at the time of the injury;
iv. The employee's future earning capacity; and
v. Evidence of disability corroborated by the medical records.

With regard to (i.) of Section 8.1(b) of the Act:

The Level of impairment reported by Dr. Fletcher pursuant to the American Medical Association's Guide to the Evaluation of Permanent Impairment, 6th Edition, is 0% for the lumbosacral strain; 5% for the right shoulder; and 4% for the left shoulder.

With regard to (ii.) of Section 8.1(b) of the Act:

Petitioner's occupation has been as a facility manager for Respondent, a fertilizer plant, for 26 years. Petitioner's work included some climbing, lifting, and heavy work activities. Petitioner testified that, although he was released to full duties by Dr. Li, he and his employer had made modifications for his work and he no longer climbs or unloads railroad cars since his accident.

With regard to (iii.) the age of employee at the time of the injury:

Petitioner was 55 years old as of the date of loss and had over 10 years to work before retirement age.

With regard to (iv.) of Section 8.1(b) of the Act:

Petitioner's future earning capacity, at the present time, appears to be undiminished as a result of the injuries.

With regard to (v.) of Section 8.1(b) of the Act:

Petitioner has demonstrated evidence of disability corroborated by his treating medical records. Petitioner has credibly testified that he experiences a pain and pinching sensation in his left shoulder when he lifts above shoulder height or behind himself. The Arbitrator finds it credible that Petitioner has less strength in his left shoulder than he had before the accident as this is consistent with a left rotator cuff repair, subacromial decompression and extensive debridement of anterior, superior, and posterior Type I labral tears requiring two surgeries. The Arbitrator notes the January 3, 2014 physical therapy notation that Petitioner had weakness in his left shoulder doing yard work, hobbies and work, and that he had mild weakness in the left shoulder on abduction and external rotation with a 4+/5 shoulder strength. Petitioner's complaints are consistent with Dr. Cohen's report of July 9, 2014 when Petitioner informed Dr. Cohen of pain in his left shoulder and weakness with overhead activities and Dr. Fletcher's AMA impairment examination on December 3, 2014.

As it relates to the lumbosacral pain, Petitioner testified that after physical therapy through Dr. Li's office, he resumed his pre-injury baseline pain.

As it relates to the right shoulder, Petitioner credibly testified that his right shoulder was weaker than his left shoulder and that it was not at full capacity. Petitioner testified that he gets a clicking in his right shoulder and that it is often stiff. Petitioner's testimony is consistent with the therapist's August 13, 2014 note which stated that Petitioner has occasional reports of "impingement" type symptoms with overhead work, a slight restriction in range of motion, and 4+/5 strength in the right arm and shoulder. Petitioner's testimony is consistent with Dr. Li's September 10, 2014 record stating that he was tolerating work but that some duties temporarily aggravate his right shoulder and with Dr. Fletcher's December 3, 2014 AMA impairment report. The Arbitrator notes that Petitioner had a pre-existing right shoulder condition which produced some occasional discomfort prior to his work related accident.

After considering all five factors, the Arbitrator finds that as a result of the accident sustained, Petitioner is permanently disabled to the extent 12-1/2% under Section 8(d)2 of the Act for his left shoulder condition of ill-being; 10% man as a whole for his right shoulder condition of ill-being; and 0% permanency for the aggravation of Petitioner's pre-existing low back condition.

With respect to issue (O), Mileage, the Arbitrator finds as follows:

Petitioner lived and worked in Colfax, Illinois, a rural town 40 miles from Bloomington, Illinois. This necessitated that Petitioner travel 40 miles round trip to Bloomington to treat with his orthopedic surgeon, Dr. Li. Petitioner made a total of 99 trips at 40 miles a trip, or 3,960 miles, to treat with Dr. Li and to attend physical therapy post-accident. In 2014, the IRS allowed $.56 per mile.

The Arbitrator therefore orders Respondent to reimburse Petitioner in the amount of $2,217.60 for mileage.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHARLES DAVID HUITE,

Petitioner,

vs. NO: 10 WC 46272

PINCKNEYVILLE CORRECTIONAL CENTER,

Respondent.

16IWCC0004

DECISION AND OPINION ON REVIEW

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mario Basurto

Stephen Mathis

DISSENT

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

David L. Gore

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

HUITE, CHARLES
Employee/Petitioner

Case# **10WC046272**

STATE OFILLINOIS/PINCKNEYVILLE CORR CTR
Employer/Respondent

16IWCC0004

On 5/27/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

0558 ASSISTANT ATTORNEY GENERAL
KENTON OWENS
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0498 STATE OF ILLINOIS
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100 W RANDOLPH ST 13TH FL
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1350 CENTRAL MANAGEMENT SYSTEMS
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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 27 2015

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

16IWCC0004

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Charles Huite
Employee/Petitioner

v.

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

Case # 10 WC 46272

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **March 18, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **October 1, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$56,793.00**; the average weekly wage was **$1,092.17**.

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

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

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

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

ORDER

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

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

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

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

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

Signature of Arbitrator

5/18/15
Date

ICArbDec19(b)

MAY 27 2015

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

16IWCC0004

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CHARLES HUITE
Employee/Petitioner

v. Case # 10 WC 46272

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

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

Correctional Officer magnify greatly during lockdown:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

by Respondent?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Paul Lowther,

Petitioner,

vs. NO. 14WC006442

16IWCC0005

Decatur Ambulance,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2015 is hereby affirmed and adopted.

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

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

16IWCC0005

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $22,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 5 - 2016
SJM/sj
o-11/5/2015
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LOWTHER, PAUL
Employee/Petitioner

Case# **14WC006442**

16IWCC0005

DECATUR AMBULANCE
Employer/Respondent

On 4/2/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0246 HANAGAN & McGOVERN PC
STEVE HANAGAN
123 S 10TH ST SUITE 601
MOUNT VERNON, IL 62864

3150 JAMES M KELLY
4801 N PROSPECT RD
SUITE 832
PEORIA HEIGHTS, IL 61616

STATE OF ILLINOIS)SS.
COUNTY OF CHAMPAIGN)

16IWCC0005

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

PAUL LOWTHER
Employee/Petitioner

Case # **14** WC **6442**

v.

Consolidated cases: _____

DECATUR AMBULANCE
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the **Honorable Molly Dearing,** Arbitrator of the Commission, in the city of **Urbana**, on **January 30, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 10, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$25,361.14**; the average weekly wage was **$575.20**.

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

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

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

Respondent shall be given a credit of **$6,122.48** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$8,950.20** in non-occupational indemnity disability benefits.

Respondent is entitled to a credit for **all medical bills** paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

ORDER

Respondent shall pay all reasonable and necessary medical services with dates of service through March 13, 2014, as provided in Sections 8(a) and 8.2 of the Act, and subject to the fee schedule. All medical bills for services rendered after March 13, 2014 are denied as unrelated to Petitioner's work injury.

Respondent shall pay Petitioner temporary total disability benefits of $383.47/week for 13 weeks, commencing December 13, 2013 through March 13, 2014, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $345.12/week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Arbitrator Molly Dearing

March 31, 2015
Date

APR 2 - 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

PAUL LOWTHER
Employee/Petitioner

v. Case # 14 WC 6442

DECATUR AMBULANCE
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

The parties stipulated that Petitioner sustained an injury that arose of out and in the course of his employment with Respondent on December 10, 2013. Arb. X 1. At the time of his accident, Petitioner was fifty two years of age and he was employed by Respondent as a paramedic. He had been employed in a capacity as a paramedic for 30 years. Petitioner's job duties for Respondent included performing rig and equipment inspections, cleaning, and responding to emergency and non-emergency calls. In his capacity as a paramedic, Petitioner may be required to lift a patient from the basement of a house, from a 50-foot ravine in a car, or in a confined space in an industrial plant, and he testified that the physical demands of his position depended upon the situation of the call. Transporting patients required placing the patient on a stretcher weighing 60 pounds and the average size of a patient was approximately 250 pounds. Petitioner generally had a partner and a fireman present to assist him in responding to calls. At the time of his accident, Petitioner estimated he responded to eight to twelve calls per shift and worked 56 hours per week.

Petitioner denied any spinal difficulties at the time he began working for Respondent. He testified that over the course of the past ten years, he experienced intermittent, recurrent back pain four to five times per year as a result of both work and home activities. In those instances, he took over-the-counter medication and returned to his next work shift. Petitioner may have taken a sick or personal day to recuperate. Petitioner testified that on one or two occasions, when bringing a patient to the emergency department, he requested a muscle relaxant from the emergency room physician, which he accompanied with rest.

On May 24, 2013 Petitioner was working in a storage unit when he moved a tool box and had an onset of back pain. He presented to the emergency room at Decatur Memorial Hospital on June 1, 2013 and then to Dr. David Fletcher on June 26, 2013. Petitioner reported to Dr. Fletcher injuring his lumbar spine when he lifted a 60-pound tool box. Petitioner complained of a dull aching pain in his low back with intermittent stabbing pains and intermittent pain that radiated into his hips. Petitioner reported that standing, walking and medications help decrease his pain. Dr. Fletcher noted a past medical history of degenerative disc disease and disc herniation, as well as diabetes, heart disease, and obesity. Dr. Fletcher ordered an x-ray of Petitioner's pelvis and hips to rule out degenerative joint disease of the hips, which were interpreted as normal. Dr. Fletcher ordered a CT myelogram of Petitioner's lumbar spine. He referred Petitioner to Dr. Huss for a hip examination and to Dr. Trudeau for lower extremity nerve studies. Dr. Fletcher removed him from work and noted that "I question his ability to do paramedic work; I would suggest he consider

applying for SSDI." PX 2. Petitioner testified that he was advised by Dr. Fletcher to consider applying for Social Security Disability benefits following the May 24, 2013 incident, but denied that Dr. Fletcher advised him he was unable to return to work as a paramedic. He followed Dr. Fletcher's recommendation and applied for Social Security Disability sometime between May 2013 and October 2013 even though he was only temporarily disabled and had reason to believe he would improve. Petitioner testified that at the time he applied, he was uncertain whether he would return to work. He acknowledged that the May 24, 2013 incident was not work related.

Petitioner underwent a lumbar myelogram and CT scan on July 5, 2013. The myelogram revealed moderate anterior epidural defects at L2-3 and L3-4 due to predominant osteophyte formation, some degree of narrowing of the thecal sac at L2-3 and L3-4, and some degree of central spinal stenosis at the mid lumber level. The post-myelogram CT performed the same day showed the lumbar vertebrae to be normally aligned without fracture, deformity, or lesion, a mild disc bulge at L1-2, a moderately large disc/osteophyte complex posteriorly causing a moderate to severe central spinal stenosis at L2-3, marked narrowing of disc space and moderate disc/osteophyte complex posteriorly causing moderate central spinal stenosis at L3-4, marked narrowing of the disc space and small disc/osteophyte complex posteriorly causing at L4-5 and L5-S1, and no definite disc herniations or foraminal stenosis. PX 3.

Petitioner presented to Dr. Edward Trudeau on July 8, 2013 and complained of bilateral low back pain and intermittent pain that radiated into his hips. Electrodiagnostic studies revealed bilateral L3 radiculopathies, left greater than right in electroneurophysiologic testing, and no evidence of other radiculopathy. Dr. Trudeau opined that Petitioner may desire to consider further conservative modalities of treatment, such as physical therapy, stretches, or medication, or more aggressive measures, including injections or an evaluation with a spinal specialist for the possibility of a decompressive surgical procedure. PX 2.

Petitioner presented to Dr. Timothy VanFleet on July 10, 2013. Petitioner reported low back pain and pain radiating to his buttocks and posterior thighs bilaterally. Dr. VanFleet noted bilateral leg weakness, muscle spasms in his legs, but no numbness or weakness of the legs or feet. Upon examination, Dr. VanFleet noted symmetric strength, reflexes and sensation, and no evidence of any tension signs. Dr. VanFleet diagnosed Petitioner with lower back pain and lumbar canal stenosis. Dr. VanFleet opined that Petitioner was symptomatic due to his underlying spinal stenosis. He ordered Petitioner undergo an epidural injection and he removed Petitioner from work. On July 16, 2013, Petitioner underwent left L5 and right L3 transforaminal epidural steroid injections with Dr. Paul Smucker. PX 2.

Petitioner returned to see Dr. Fletcher on July 24, 2013. Petitioner complained of weakness in his legs and a dull pain in his bilateral hips. He reported undergoing an epidural steroid injection that was successful in relieving his pain. Dr. Fletcher received an incident report from Petitioner dated July 8, 2013, wherein Petitioner stated that, "Throughout the past several years I have had episodes of low back pain from work, which were resolved with ICE and Advil for 2-3 days, and also sometimes with a muscle relaxer at home. On 5/24/2013 I was lifting a box of tools when the sharp pain in my back, came back. The latest episode could not be resolved and I was given pain RX and sent home and followed up with my primary M.D., Hima Atluri on 6/4/2013...I was referred to a DR. Trudeau that based on the results of the Myelogram and current condition of my back was a direct result of my job, of being a Paramedic, lifting and twisting, going up and down stairs, carrying Patients, some being very heavy for several years...I have been advised by my

doctors to file for workman's comp benefits." PX 3, RX 12. Dr. Fletcher continued Petitioner's off-work status, and noted that Petitioner had presented a convincing history that his present condition was work related and an aggravation of his pre-existing condition. PX 3, RX 12.

Petitioner presented to Dr. Stephen Huss on August 6, 2013. Petitioner completed a questionnaire dated August 2, 2013 in which he stated that he was seeing Dr. Huss for an injury to both hips that had been reported to workers' compensation, but was denied. Petitioner also completed a pain diagram, wherein Petitioner noted complaints with respect to his low back and lateral buttocks, bilaterally. His chief complaint on August 6, 2013 was a complex of pain involving his back and hips including lateral hips and occasionally descending down to his knees. Dr. Huss injected the right greater trochanteric region and trochanteric bursa with Depomedrol. He diagnosed a lumbosacral strain with spinal stenosis and radicular pain from spine to knees. RX 12.

Petitioner returned to Dr. VanFleet on August 21, 2013 and reported feeling much better following a left L5 and right L3 epidural steroid injection, though he continued to have low back pain after sitting for long periods of time. Dr. VanFleet ordered physical therapy for core muscle conditioning and noted that Petitioner would likely return to work in three to four weeks. PX 2.

On September 25, 2013, Petitioner returned to Dr. VanFleet, at which time Petitioner noted some back pain with improved leg pain. A physical examination demonstrated no evidence of any tension signs, no leg or foot numbness, but continued bilateral leg weakness. Petitioner felt additional therapy would help with his leg weakness. Dr. VanFleet ordered four additional weeks of physical therapy and noted that he anticipated a release thereafter. PX 2.

On October 25, 2013, Petitioner followed-up with Dr. VanFleet after having completed physical therapy, and Petitioner reported feeling well and wanted to return to work. Dr. VanFleet noted that Petitioner was doing well and allowed Petitioner to return to work without restrictions the following day. Petitioner was discharged from Dr. VanFleet's care at that time. Dr. VanFleet ordered additional physical therapy of twice a week for two weeks. PX 2. Petitioner testified he did not undergo the additional two weeks of physical therapy because he was feeling well and that he notified Dr. VanFleet of same. Petitioner testified that at the time of his release to return to work, he felt fine, was without pain, and was able to perform his job. Petitioner returned to working 56-hours per week, and he denied taking any sort of medication, pain relievers, or muscle relaxers at that time.

A physical therapy note from St. John's Hospital Rehabilitation of November 11, 2013 documents a telephone call with Petitioner on that date. Petitioner reported 0/10 pain, good functionality following a return to work full duty, and that he had not attended any therapy visits after October 21, 2013. PX 2.

On December 10, 2013, Petitioner responded to a call at work in which a 300-pound patient had fractured his ankle. Petitioner and his partner lifted the patient from the ground to the gurney when Petitioner's feet slipped out from underneath him and he fell on his buttocks. Petitioner testified he felt immediate pain across his low back, though they were able to move the patient onto the stretcher and transport him to the hospital. Petitioner completed his shift. Thereafter, he rested, applied heat to his back, and took Skelaxin on his following two days off.

objective basis." He opined that Petitioner's work injury aggravated his extensive underlying degeneration and his symptoms had persisted despite conservative care. Dr. Butler noted that Petitioner had exhausted conservative measures for his lumbar condition, and both surgical and nonsurgical options were presented to Petitioner for consideration. Dr. Butler recommended surgical treatment by virtue of a multi-level decompressive laminectomy and spinal fusion from L2 to S1, and Petitioner elected to proceed with surgical treatment. PX 4.

Thereafter, Petitioner returned to Dr. Fletcher on a periodic basis without significant change. Dr. Fletcher continued to excuse Petitioner from work through January 9, 2015. PX 4, 5.

Petitioner testified that he elected not to proceed with Dr. Butler's recommendation of surgical intervention because of the extensiveness of the surgery, his multiple medical problems of diabetes and heart difficulties, and the lack of lumbar mobility the surgery may pose. Petitioner testified that his condition has worsened since the accident and is more severe than it was following the May 24, 2013 incident. He continues to have pain across his lower back and down the lateral sides of both hips. Petitioner testified that his pain oftentimes goes down the back of one leg down into his knee and sometimes into both knees. Petitioner testified that he currently experiences increasing pain towards his mid-thoracic level in his back. He is unable to sit for extended periods of time without pain and he has a limited ability to stand. Petitioner cannot walk extended distances before stopping and he has increased weakness in his legs. Petitioner takes Norco and generic Flexeril four to five days per week, and Tylenol or Advil on other days to avoid narcotic prescription addiction.

Dr. David Fletcher testified by way of evidence deposition on June 19, 2014. Dr. Fletcher is board certified in occupational medicine. Dr. Fletcher testified that he initially treated Petitioner in July 2013 following a non-work related lifting incident with complaints of significant back pain without radicular type pain. At that time, Petitioner related to Dr. Fletcher that his back pain was simply one of many instances of back pain he had while working as a paramedic. Dr. Fletcher indicated that Petitioner provided to him a history of a cumulative trauma origin of his condition at due to the nature of his job duties. Dr. Fletcher opined that Petitioner's job duties as a paramedic over the course of 30 years of bending, lifting, twisting and oftentimes lifting heavy patients would be a causative factor in the development of Petitioner's degenerative lumbar spinal condition. Dr. Fletcher was of the opinion at that time that Petitioner was incapable of returning to work as a paramedic based upon his pre-existing condition. Dr. Fletcher recommended that Petitioner not return to work as a paramedic, consider himself disabled, and apply for disability. PX 1.

Dr. Fletcher testified that following Petitioner's work accident of December 10, 2013, he referred Petitioner to Dr. Jesse Butler, as Petitioner did not wish to return to see Dr. VanFleet because Dr. VanFleet did not operate on him following his injury in May 2013. Dr. Fletcher testified that Dr. Butler recommended a multi-level lumbar fusion from L2 through S1 due to the extensive amount of degenerative disc disease and disc collapse. Dr. Fletcher opined that said procedure was reasonable and necessary in Petitioner's care and treatment given Petitioner's clinical presentation "and the fact that he is no going to get much better to be able to increase his functional activities unless the degenerative disc disease is dealt with...." Dr. Fletcher opined that Petitioner should not return to work as a paramedic even if he were to undergo surgery. Without undergoing surgery, Dr. Fletcher opined that Petitioner could not perform the job tasks of a paramedic because "to put him back as a paramedic at the current time would be like a ticking time bomb because of the amount of degenerative disc disease...It would be, in my opinion, a disaster to return him back

to work at the present time." Dr. Fletcher explained that Petitioner returning to his paramedic position places him at risk for reinjuring himself that could further incapacitate him. Dr. Fletcher opined that the work accident of December 10, 2013 was sufficient to aggravate his pre-existing condition so as to cause it become symptomatic and require treatment. Dr. Fletcher explained that his causation opinion was premised upon a lack of Petitioner having radicular symptoms prior to the work accident and Petitioner's improvement following his period of disability in 2013. He acknowledged that Petitioner reported pain on both sides of his lumbar spine into his buttocks and radiating distally down to at least his knees while undergoing treatment with Dr. Huss and that Dr. Trudeau assessed a L3 radiculopathy following EMG/NCV studies. Dr. Fletcher commented that he had "never been showed these before" when presented with medical records on cross examination. Dr. Fletcher testified that Petitioner suffered a progression in his lumbar pathology at L3-4, though he stated that the different magnets between the MRI and myelogram renders preciseness difficult, and Petitioner's large size compromised the clarity of the testing. He testified that Petitioner's history of smoking could compromise Petitioner's spine condition as smoking decreases the blood supply to discs causing them to degenerate faster than the normal aging process. Dr. Fletcher denied any indications of symptom magnification during his treatment of Petitioner. PX 1.

Petitioner underwent an examination with Dr. Morris Soriano on March 5, 2014 pursuant to Section 12 of the Act. After performing a physical examination of Petitioner, reviewing his medical records and diagnostic studies, and taking a history of accident and illness from Petitioner, Dr. Soriano diagnosed Petitioner with a lumbar strain as a result of his December 10, 2013 work accident. He opined that Petitioner's ongoing subjective complaints have no relationship to any objective findings on physical examination or any relationship to his long-standing multi-level degenerative disc disease in his lumbar spine. Dr. Soriano explained that he found three Waddell's signs upon examination consistent with symptom exaggeration and functional illness. He stated that Dr. Butler's recommendation to fuse L1 through S1 has no relationship to his work lifting injury, as he opined it was improbable that a single lifting injury aggravated five levels of the lumbar spine, the radiological studies do not evidence any acute aggravation of the lumbar spine, and "I know of no standard of care that would recommend complete spinal reconstruction for multi-level degenerative disc disease." Dr. Soriano further opined that Petitioner requires no further treatment for his work injury and that he reached maximum medical improvement from his lumbar strain. He testified that Petitioner could have returned to work from his lumbar strain within four weeks of his work accident, and that he has not suffered any disability pursuant to the AMA Guidelines, 6th Edition resultant from his work injury. RX 1.

Following his review of Petitioner's MRI of February 4, 2014, Dr. Soriano issued an addendum report and stated that he found no change between Petitioner's June 12, 2013 MRI and that of February 4, 2014. He opined that Petitioner's lumbar pathology at L1-2 and L2-3 were all present prior to the accident and were not aggravated by the single lifting indicant of December 10, 2013. His opinions remained unchanged from his report of March 13, 2014. RX 2.

Dr. Soriano testified by way of evidence deposition on October 2, 2014. Dr. Soriano is board certified in neurosurgery, and he is a fellow in the American Academy of Disability Evaluating Physicians. Dr. Soriano testified that, in formulating his opinions, he understood that Petitioner's condition platueaued and he returned to work from October 25, 2013 until December 10, 2013. Dr. Soriano noted that Petitioner's MRI of February 4, 2014 revealed that Petitioner's bones were virtually fused to themselves between L3 and S1 due to osteophyte complexes and because the discs

themselves were so collapsed "the bones are almost basically kissing each other." Dr. Soriano did not feel that the essential bone fusion in Petitioner's lumbar spine was caused or aggravated by his work accident, and he testified that he believes the collapsed disc spaces are sufficient to prevent pain emanating from the degenerative spine. Dr. Soriano opined that because Petitioner's bones are fused with bridging osteophytes, it is not possible, absent fractures of the osteophytes or evidence of spinal instability, for Petitioner to have aggravated his low back condition beyond a temporary aggravation of a facet. He explained that "[i]t would be hard to aggravate a spinal segment where it's already fused to itself from a fall on your buttocks." Dr. Soriano testified that he is familiar with the physical demands of a paramedic as a paramedic/EMT instructor. Dr. Soriano opined that fusing Petitioner from L1 to S1 would have rendered Petitioner totally disabled because he would not be able to bend, twist or turn. Dr. Soriano testified that Petitioner's continued complaints of pain and symptoms into his leg are resultant from nonorganic sources. He stated that, "I think this is a gentleman, as I said, that every quickly applied for Social Security disability, very quickly was off of work, is involved in a worker's compensation medicolegal claim. I think that there is a lot of signs of secondary gain here that might be a good explanation as to why the pain has not been temporary." RX 3.

CONCLUSIONS OF LAW

In regard to disputed issue (F), the Arbitrator finds that Petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being is causally related to his work accident. In so concluding, the Arbitrator finds probative Petitioner's treating record from Springfield Clinic of December 12, 2013, two days after his work accident, wherein Petitioner did not report any work injury or any low back complaints. While his appointment on that date was a follow-up visit regarding his type 2 diabetes mellitus, Petitioner apparently thought it significant to report to the physician that he had received his pneumococcal vaccine in November 2012, but did not report any work accident or low back complaints. The Arbitrator notes that Petitioner was reportedly in a "good mood" on that date and the physical examination did not reveal any lumbar symptomatology, which contradicts Petitioner's testimony regarding his condition in the two days following his work accident. If Petitioner had severe pain the morning following his work accident as he reported to Dr. Butler (PX 4), if Petitioner's pain level was indeed a seven out of ten when he reported to St. Mary's Occupational Health Services on December 13, 2013 (PX 3, RX 5), and if Petitioner's pain had remained constant since his work accident as he reported to Dr. Fletcher (RX 5, then it is reasonable to presume that Petitioner would have reported his complaints and/or his work accident while seeing his physician on December 12, 2013. The Arbitrator finds the absence of any such reports from Petitioner on that date demonstrates a lack of any causal relationship between his work accident and his current condition of ill-being.

The Arbitrator also finds the striking similarity of Petitioner's complaints before and after his work injury indicative of a lack of a causal connection between the work accident and his current condition of ill-being. Prior to the accident, Petitioner reported to Dr. VanFleet sharp low back pain that radiated into his buttocks bilaterally and his left and right posterior thighs, as well as spasms and weakness in his lower extremities. His pain was exacerbated by sitting and bending (PX 2), but Petitioner testified that his symptoms also manifested in the absence of any activity. Following his work accident, Petitioner reported complaints of spasms in his right leg, bilateral hip pain, and low back pain worsened by sitting and improved with walking, standing and lying flat. PX 3, RX 11. Essentially, Petitioner's current complaints of low back pain, bilateral hip pain, and lower extremity spasms remain unchanged following his accident when compared with those before December 10,

2013, as does the mechanism that primarily incites those symptoms, namely sitting. The lack of any change in symptomatology undermines the suggestion of a causal relationship between his current complaints his work accident, and instead, suggests his degenerative lumbar condition to be the sole cause of his pre-accident and present condition.

In concluding that Petitioner has failed to prove that his current condition of ill-being is causally related to his work accident, the Arbitrator finds the opinions of Dr. Soriano more persuasive than those of Dr. Fletcher. The Arbitrator notes that Dr. Soriano's opinions are well-informed in that he reviewed Petitioner's pre-accident and post-accident medical records and diagnostic studies when formulating his opinions, whereas it is unclear what Dr. Fletcher had reviewed, as he commented that "I've never been showed [sic] those before" when presented with records on cross examination. PX 1. The Arbitrator also notes Dr. Soriano's credentials and qualifications in comparison to that of Dr. Fletcher. Dr. Soriano is board certified in neurosurgery, treats conditions similar to that of Petitioner's, and regularly performs spinal surgical procedures (RX 3), whereas Dr. Fletcher practices occupational medicine and refers patients to spine surgeons for treatment. PX 1. The Arbitrator finds this distinction significant in this case, given the issue concerning the etiology of Petitioner's current lumbar condition, the nature of Petitioner's condition, and the extensive surgical treatment recommended by Dr. Butler, all of which the Arbitrator finds more properly postured to a neurosurgeon such as Dr. Soriano. The Arbitrator notes that Petitioner did not present any opinions from his treating spine surgeon, Dr. Butler. The Arbitrator also notes Dr. Soriano's experience with the position of a paramedic as an EMT/paramedic instructor (RX 1), whereas Dr. Fletcher's familiarity appears to be gleaned from the physical demands classification of a paramedic by the U.S. Dictionary of Occupational Titles (See PX 1), which goes to the weight of each physician's respective opinions regarding Petitioner's capability of working in that capacity and lends authority to Dr. Soriano's opinions that Petitioner is able to resume work as a paramedic without restrictions.

Further, the Arbitrator finds Dr. Fletcher's opinions unpersuasive in that his opinions are not well-founded in the record. Dr. Fletcher testified that his causation opinion was based upon Petitioner's improvement from his lifting injury on May 24, 2013 following a period of disability and his lack of radicular symptoms prior to the work accident of December 10, 2013. Dr. Fletcher originally believed that Petitioner had returned to work in August or September 2013 following his May 24, 2013 lifting incident, though the record reveals that Petitioner was not released to return to work without restrictions by Dr. VanFleet until October 25, 2013. PX 2. As such, in formulating his opinions, Dr. Fletcher was under the impression that Petitioner was disabled following his May 24, 2013 accident for a shorter time period prior to his work accident than what he actually was. Moreover, the Arbitrator finds that the record is replete with references to Petitioner's radicular symptomatology prior to his work accident, which contradicts a basis of Dr. Fletcher's causation opinion. Petitioner reported pain and weakness in his lower extremities to Dr. VanFleet (PX 2), and pain on both sides of his lumbar spine into his buttocks and radiating down to his knees while undergoing treatment with Dr. Huss. RX 12. Dr. Trudeau assessed a L3 radiculopathy following Petitioner's electrodiagnostic studies of July 8, 2013, and Dr. Fletcher's own records reflect that Petitioner complained of intermittent low back pain that radiated into his hips and weakness in his lower extremities. PX 2, 3. The Arbitrator finds that the evidence in the record undermines Dr. Fletcher's causation opinion, and the Arbitrator accordingly does not afford those opinions evidentiary weight.

The Arbitrator is further disinclined to afford the opinions of Dr. Fletcher weight in light of the totality of his opinions in the record. On June 26, 2013, only one month after Petitioner's May 24, 2013 lifting incident, Dr. Fletcher questioned Petitioner's "ability to do paramedic work; I would suggest he consider applying for SSDI." PX 2. The Arbitrator notes that Dr. Fletcher opined that Petitioner was permanently unable to return to work both before and after the work accident, and he additionally opined that following the work accident, Petitioner was unable to return to his former employment with or without surgical intervention. PX 1, 3, 4, 5. Dr. Fletcher proffered causation opinions in this case based upon an acute trauma theory and a cumulative trauma one, as he opined that Petitioner's current lumbar condition was both aggravated by his work accident of December 10, 2013 and by his general work duties as a paramedic for 30 years. Dr. Fletcher also opined that Petitioner's condition following his May 24, 2013 lifting incident was work related as an aggravation of his pre-existing condition (PX 3, RX 12), which the Arbitrator finds suspect given that Petitioner acknowledged that the May 24, 2013 incident was not work related in any way. The Arbitrator finds that, based upon the foregoing, Dr. Fletcher hastily opines Petitioner to be permanently and totally disabled from his position as a paramedic, and he appears to find Petitioner's incidents are work related irrespective of the facts or circumstances.

Lastly, the Arbitrator echoes the concerns of Dr. Soriano regarding the etiology of Petitioner's ongoing complaints and his motives in pursuing his present worker's compensation claim. The Arbitrator notes Petitioner's attempts at obtaining Social Security Disability very shortly after both his May 24, 2013 and December 10, 2013 incidents despite his acknowledgement that his disability was temporary and that he had reason to believe he would improve following the former injury, as well as his attempt at developing his condition following the May 24, 2013 incident, which he testified was unrelated to his employment, into a cumulative trauma worker's compensation claim. See PX 3, RX 12. This evidence suggests that Petitioner seeks to be deemed disabled by whatever means available, which goes to the reliability of his testimony.

Based on the foregoing and the record in its entirety, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being is causally related to his work accident of December 10, 2013.

In regard to disputed issue (J), consistent with the opinions of Dr. Soriano and the Arbitrator's foregoing conclusions, the Arbitrator finds that Respondent is liable for medical bills incurred in Petitioner's care and treatment up to and including March 13, 2014, the date of Dr. Soriano's report in which he opined that Petitioner required no further treatment relative to his work injury and was at maximum medical improvement. RX 1. Petitioner's treatment from the date of accident to March 13, 2014 was reasonable and necessary to treat his lumbar strain resultant from his work accident of December 10, 2013. Respondent shall pay all reasonable and necessary medical services with dates of service through March 13, 2014, as provided in Sections 8(a) and 8.2 of the Act, and subject to the fee schedule. All medical bills for services rendered after March 13, 2014 are denied as unrelated to Petitioner's work injury. Respondent shall be given credit for all medical bills that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In regard to disputed issue (K), Petitioner seeks temporary total disability benefits from December 13, 2013 through the present Arbitration hearing (Arb. X 1) in which Dr. Fletcher removed Petitioner from work following his work accident. PX 3, 4, 5. Consistent with the

opinions of Dr. Soriano and the Arbitrator's foregoing conclusions, Respondent shall pay Petitioner temporary total disability benefits for a period of 13 weeks, commencing December 13, 2013 through March 13, 2014, at which time Dr. Soriano opined Petitioner could have returned to work within four weeks of the work accident and that Petitioner was at maximum medical improvement for the lumbar strain resultant from his work accident of December 10, 2013. RX 1. All temporary total disability benefits for time periods thereafter are denied. Respondent shall be given a credit in the amount of $6,122.48 for temporary total disability benefits that has been paid, and a credit in the amount of $8,950.20 for nonoccupational indemnity disability benefits that has been paid, as stipulated by the parties.

In regard to disputed issue (L) and consistent with 820 ILCS 305/8.1b, permanent partial disability shall be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. No single enumerated factor shall be the sole determinant of disability. *Id.*

With regard to subsection (i) of 8.1b(b), the Arbitrator notes that Dr. Soriano was requested by Respondent to perform an impairment rating pursuant to the AMA Guides Sixth Edition, and he opined that "[o]n an objective radiological and physical exam basis, I do not believe he has sustained any permanent *disability* as a result of his employment, according to the 6th Edition of the AMA Guides." RX 1 (emphasis added). The Arbitrator recognizes that permanent partial disability and impairment as defined by the AMA Guides Sixth Edition are not the same, and the Arbitrator makes note of this distinction when assessing the weight given to Dr. Soriano's findings and in determining the permanency award. Because it is unclear as to whether Dr. Soriano appropriately applied the AMA Guides in formulating his opinion, the Arbitrator gives no weight to this factor.

With regard to subsection (ii) of 8.1b(b), Petitioner was employed by Respondent as a paramedic at the time of his accident, but he has not yet returned to his prior position. Dr. Fletcher testified that a paramedic is classified as a heavy demand position in the U.S. Dictionary of Occupational Titles (PX 1), and Petitioner testified that he transported patients weighing on average 250 pounds on stretchers that weigh 60 pounds. He further testified that he may be required to lift a patient from the basement of a house, from a 50-foot ravine in a car, or in a confined space in an industrial plant. Dr. Soriano, an EMT/paramedic instructor, opined that Petitioner can return to his position as a paramedic without restriction. The Arbitrator concludes that the heavy physical demands of Petitioner's position as a paramedic significantly affect his permanent partial disability, and the Arbitrator places great weight on this factor.

With regard to subsection (iii) of 8.1b(b), Petitioner was fifty two years of age at the time of the accident. Arb. X 1. There was no evidence presented at Arbitration as to how his age has affected any permanent partial disability, and as such, the Arbitrator gives no weight to this factor.

With regard to subsection (iv) of 8.1b(b) and in accordance with the opinions of Dr. Soriano, Petitioner can return to his position as a paramedic without restrictions, and as such, the Arbitrator concludes that Petitioner's work accident has not impaired his future earning capacity. The Arbitrator places some weight on this factor.

With regard to subsection (v) of §8.1b(b), as a result of his work accident, Petitioner sustained a lumbar strain that was treated conservatively with pain medications and physical therapy. Petitioner testified that he continues to have pain in his low back and bilateral hips worsened with sitting. He has pain across his lower back and down the lateral sides of both hips that oftentimes radiates into the back of one leg down into his knee or both knees. Petitioner testified that he also currently experiences pain towards his mid-thoracic level. He is unable to sit or stand for extended periods of time without pain, and he has difficulty with walking distances. On February 14, 2014, Petitioner reported to Dr. Butler suffering continued low back pain, and persistent radiation of pain to the anterior thigh and knee on the right, and Petitioner reported to Dr. Fletcher low back pain, right leg symptoms, and soreness in his low back and hips bilaterally. The Arbitrator finds that Petitioner's complaints following his work accident are corroborated by his treating records, and the Arbitrator places great weight on this factor.

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all the factors as stated in the Act in which consideration is not given to any single factor as the sole determinant. Based on the above factors, and the record in its entirety, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of his person as a whole, pursuant to Section 8(d)2 of the Act.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM BARNETT,

Petitioner,

vs. NO: 13 WC 27442

MAGNESIUM ELEKTRON,

16IWCC0006

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causation and medical expenses, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent on June 11, 2013. The Commission also awards benefits consistent with this decision. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Petitioner was a 21 year worker for Respondent, initially as a production supervisor from 1994 to 2003, and a production worker thereafter, noting he had worked the night shift for the 11 years prior to his testimony on December 23, 2014. He testified that his job involved the cleaning and packaging of magnesium products. In performing his work duties, he was required to use a variety of power and hand tools which appear to the Commission to have involved significant gripping and force. (Tr. 9-12, 29).

Petitioner testified that he performs "banding" activities for three to six hours per shift. He had used a manual banding tool up until 2013, when an electric bander was implemented.

(Tr. 12-13). As to the manual bander, he stated: "you press it to open it up, you feed the banding material into it and then you have a ratchet that you tighten it up . . . After you get it tight, then you – I use my left or my right hand for crimping it . . . You got two handles here, one you ratchet it up to tighten it then release that and you take the other handle. You crimp it with either hand but I use both hands when I'm banding". He noted that he would ratchet with the right hand and crimp with the left hand. When the electric bander came into play, Petitioner indicated he would have to depress a handle to feed in the banding material, use a button to tighten it, and another button that crimps the material. He would then engage it again and pull it off the banding material. (Tr. 12-15).

Petitioner testified his duties also included driving a fork truck, which he entered and exited approximately 64 times per twelve hour shift, and he gripped handles in doing so. He generally worked 8 hour shifts, but every six weeks there would be a two to three week period where he would work 12 hour shifts. He testified that on those shifts, about 10 of the 12 hours were spent banding material. Petitioner also testified that he would have to "flip" sheets of metal (either 48" x 108" or 52" x 108"), which varied in weight but were approximately 46 pounds, using both hands in order to inspect both sides before sending it to the oven or to be coated. (Tr. 15-19). He would have to recoil metal manually for years, noting "that really set me off". (Tr. 24-25).

On cross examination, Petitioner agreed that he uses the forklift on and off with varied frequency. The amount of metal flipping he did also varied, noting it could be done anywhere from once a month to ten times per week, and that it was performed more often on the day shift than the night shift. (Tr. 29-30). He also testified that he did use various hand tools around his home, and remodeled his kitchen and bathroom in 2007 or 2008, in the process using a grinder, staple gun, hammer, crescent wrench and screwdrivers. However, he had not used these tools for any other home projects since that time, other than occasionally tightening a screw. Petitioner has played drums since 1960, but was last in a band seven or eight years prior to his testimony, noting he since plays maybe once a week for a few minutes. He did not have hand symptoms while playing in the band, but did when he was remodeling his home, noting that when he experienced pain he would stop what he was doing. (Tr. 35-39). Petitioner agreed that recoiling metal became automated at some point prior to 2013, noting he and his work partner would do it nightly prior to that time. He couldn't recall when the process changed. (Tr. 39-40).

Petitioner testified that he began to develop hand symptoms over three to four years prior to his testimony, and completed an accident report for Respondent (Petitioner's Exhibit 7) on June 11, 2013, noting that he did not know his diagnosis at that time and just thought he had "sore hands". Petitioner agreed that he may have told Dr. Rotman, Respondent's Section 12 examining physician, in June, 2013 that he'd had symptoms since 2009. He testified that he first was diagnosed with carpal and cubital tunnel syndrome when he underwent EMG testing on May 16, 2013, and that this was when he first learned that his symptoms were work related. (Tr. 20-21, 24-27).

He initially sought treatment with his primary care provider, Dr. Kopjas, who referred him to Dr. Beatty. (Tr. 21-22).

Petitioner testified that he has been diagnosed with non-insulin dependent diabetes since 2005, and treated with practitioners he was referred to by Dr. Kopjas, and agreed on cross examination that it was often poorly controlled before the year prior to his testimony. (Tr. 19-20, 27-28).

Robb Woolen, Respondent's environmental health and safety manager, testified via deposition on December 18, 2014. (Respondent's Exhibit 2). He did not begin working for Respondent until October 14, 2013, but testified that he is familiar with Petitioner's job duties. He did indicate that when he began with Respondent, Petitioner was off work on non-occupational disability, and when he returned he was evaluated on the day shift, had no restrictions and so he was returned to the night shift. (Rx2, pp. 24-25).

Mr. Woolen noted that the banding activities mainly took place during the 4 pm to 12 am shift, so whether Petitioner would perform the task on the night shift depended whether there was a rush item that needed banding. He identified photos of both the manual and automated banding tools, banded product and the forklift, which were attached as exhibits to his deposition, as well as described how each are operated. (Rx2, pp. 8-13). In doing so, he testified that the manual banding process involved more manual work with the hands than the automated process, and that the night workers tended to drive from furnace to furnace using the forklift. He described manual banding as being similar to operating a car jack, with free movement until the tension builds, and then one or two cranks with tension. He indicated there would at most be minor vibration operating the forklift depending on the load. (Rx2, pp. 12-13). Mr. Woolen also prepared a "Job Physical Analysis" (Deposition Exhibit 7), testifying that it was a worst case scenario for all three shifts as far as physical requirements. Woolen testified that he himself had never been employed by Respondent as a production worker, but indicated he had performed all of the required duties at one time or another. The physical analysis lists various job activities, including but not limited to: a) pulling pumps and stirrers (90 to 125 pounds), rolling coils onto a cart (60 pounds force), metal bands from rolls, air and water hoses and slabs; b) lifting multiple items, alone or in tandem, weighing between 60 and 110 pounds; c) pushing 38 pound impact wrenches, loaded dollie carts of various weights, office furniture weighing up to 100 pounds; d) moving magnesium billets suspended from tongs, sheets of aluminum, and sample carts of varying weights; e) handling of tools and equipment including grinders, saws, vacuum cleaners, portable sprayers and pumps, roll grinding sled, common and power hand tools, banders, sledge hammers, coil grabs, sheet lifters and tongs; f) shoveling of aluminum chips. (Deposition Exhibit 7).

The records of Dr. Kopjas indicate that Petitioner initially complained of his hands on April 16, 2013, noting Petitioner's cervical therapists "keep asking him if he has had an NCV due to the fact that he has persistent pain/numbness radiating down his right arm". The referral noted: "paresthesias right arm for 5 months, PT no help". A May 16, 2013, right upper extremity

EMG/NCV was consistent with severe carpal tunnel syndrome, and bilateral testing on July 11, 2013 showed severe right and moderately severe left carpal tunnel syndrome, probable bilateral cubital tunnel and also underlying peripheral neuropathy most likely due to diabetes. The report also stated: "CTS and ulnar neuropathy are superimposed on the peripheral neuropathy which is by itself mild". (Petitioner's Exhibits 1, 2 & 3).

Dr. Beatty, a hand, plastic and reconstructive surgeon, initially saw Petitioner on June 10, 2013, and his notes indicate he was referred by Dr. Kopjas. Included in his records from that date is a document titled "Job Description". This document states as follows: "Recoiler 20+ times a day for several years (process now automated). Placing a round mandrel in-side of a coil & tightening coil by turning steel handle in a clockwise motion. Coil wt. up to 250#. Mount and dismount fork truck 30 to 60 times a shift. Climbing steel ladders. Variable # of times, as few as 0 & as many as 26 times in a shift to gain access to top of ovens. (stairs have been installed on several ovens). Banding tools, racheting motion to tighten & crimp. Squeezing motion to release". It was also noted that Petitioner used hand or power tools for 4 to 12 hours, depending on shift. (Petitioner's Exhibit 4).

Dr. Beatty testified via deposition on November 6, 2014. (Petitioner's Exhibit 5). Dr. Beatty diagnosed Petitioner with bilateral carpal tunnel syndrome, severe on the right, as well as bilateral cubital tunnel and triggering fingers at the time of the initial examination. His recommendation was bilateral carpal tunnel release surgery. He had no current recommendation regarding the cubital tunnel, noting he would need to examine Petitioner more currently. Dr. Beatty opined that both the carpal tunnel and cubital tunnel conditions were either caused or aggravated by Petitioner's work activities, in particular the banding activities. He noted that while he didn't know exactly how many hours per day Petitioner performed this activity, he stated: "it requires some degree of strength and hand-intensive activity with repetitive use and the gripping and the position of the wrist during this activity", and that this led to Petitioner's compressive neuropathies. (Px5, pp. 29-31). Dr. Beatty also opined that recoiler use, involving tightening a coil by turning a steel handle with the coil weighing up to 250 pounds, also could have caused Petitioner's condition. He acknowledged that Petitioner's diabetes could have also contributed to these diagnoses, but that this did not take away from the fact that the job duties also contributed to them. He testified on cross examination that he was not asked to offer an opinion with regard to the trigger fingers. It should be noted that Dr. Beatty also indicated that Petitioner is ambidextrous. (Px5).

Dr. Rotman examined Petitioner on behalf of the Respondent on May 19, 2014, and testified via deposition on August 4, 2014. His diagnosis was bilateral carpal tunnel syndrome with underlying diabetic peripheral neuropathy, bilateral wrist arthritis, middle finger triggering and mild Dupuytren's syndrome. He also noted that the EMG/NCV was suggestive of left cubital tunnel. He opined that none of these conditions were work related, based on Petitioner's multiple comorbidities: diabetes, age and being overweight. He did not change his opinion after being asked to assume the "Job Physical Analysis" prepared by Mr. Woolen was accurate regarding Petitioner's work duties. (Respondent's Exhibit 1).

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On cross examination, Dr. Rotman agreed that the Job Physical Analysis was significantly similar to what Petitioner reported to both himself and to Dr. Beatty. He indicated he had opined in the past that carpal tunnel was caused by diabetes, but if the person also had a repetitive, hand-intensive job with a lot of heavy gripping, the job could be an aggravating factor. He further opined that carpal tunnel in almost all cases is multifactorial, and that in a case like this you have to look at the severity of diabetes versus the intensity of the job duties in order to provide a causation opinion. While he agreed that the banding duties Petitioner performed at work was hand intensive, Dr. Rotman did not believe he performed it for long enough periods to be a risk factor in Petitioner's upper extremity conditions, noting he would need to be doing it for the majority of four hours per day. While other activities may or may not have been as hand intensive, Dr. Rotman believed that even four hours per day of hand intensive activity would not be causative, but is an aggravating factor. (Rx1, pp. 21-23).

The Commission finds that Petitioner sustained an accident arising out of and in the course of his employment on June 11, 2013. We believe that this date is when the Petitioner first reasonably knew both the fact of his injuries as well as the causal relationship of the injuries to his employment. It appears that as of his April 16, 2013 visit with Dr. Kopjas, Petitioner did not realize what his condition was or that it was causally related to his employment, as he was treating for his cervical spine at the time. He testified that he didn't realize he had specific upper extremity problems until after he underwent EMG/NCV testing on May 16, 2013. He then was not examined by a specialist in this regard until he saw Dr. Beatty on June 10, 2013. He was advised at that time to notify the Respondent, which he did the next day. (Petitioner's Exhibit 7). Based on the facts of the case, we find that June 11, 2013 is a proper manifestation date under the law, and that the Petitioner promptly provided notice to the Respondent.

While the Commission acknowledges the Arbitrator's decision, and notes that this was a difficult case to decide, we believe that the greater weight of the evidence indicates that the Petitioner's work activities were a causative factor in his development of his bilateral carpal tunnel syndrome and cubital tunnel syndrome conditions.

As our Supreme Court noted in *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003), a work related injury need not be the sole or principal causative factor in a claimant's injury, as long as it was a causative factor in the resulting condition.

We find the Petitioner was credible in describing both his work and non-work activities which involved the use of his upper extremities. The job he did for Respondent, particularly the manual banding job, involved significant gripping and force resulting in our finding, as opined by Dr. Beatty, that the job activities at least contributed to these conditions. While Mr. Woolen testified about his understanding of the Petitioner's job duties, he did not begin his employment with the Respondent until October 14, 2013, four months after the manifestation date. This is important in particular given the fact he was not present at Respondent's facility while the

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manual bender was being used. While the evidence presented certainly indicates other potential non-work related causative elements – diabetes, drumming, use of tools at home, a level of obesity – the Commission nevertheless believes the evidence also indicates a significant level and frequency of gripping force required in Petitioner's job with Respondent. As such, we find the opinion of Dr. Beatty to be more persuasive than that of Dr. Rotman.

The evidence in this case with regard to the cause of Petitioner's Dupuytren's syndrome and trigger fingers is lacking. As such, we have no solid evidentiary basis to find that these conditions are causally related to Petitioner's work. We find that Petitioner has failed to prove a causal relationship of these conditions to the work duties.

The Commission orders the Respondent to authorize carpal tunnel release surgery as recommended by Dr. Beatty. As noted above, the Commission does not order treatment for the trigger fingers and/or Dupuytren's syndrome, as Petitioner has failed to prove causal connection with regard to these conditions. With regard to cubital tunnel, the Commission finds that the evidence presented indicates that the diagnosis was made almost solely, if not solely, on the results of an EMG/NCV test. As the medical records do not reflect complaints by Petitioner that would be directed to the elbow(s), treatment for same is denied.

The Commission finds that Petitioner is entitled to payment of the medical expenses listed in Petitioner's Exhibit 6, totaling $306.00. The interest the provider is attempting to charge, $45.84, is denied, as this claim involved a reasonable dispute.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is reversed as noted above, to find that Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent on June 11, 2013.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $306.00 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize the carpal tunnel release treatments recommended by Dr. Beatty.

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

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

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Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 5 - 2016
TJT: pvc
O 11/09/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARK WITHERSPOON,

Petitioner,

16IWCC0007

vs.

NO: 07 WC 46762

WHITE COUNTY COAL,

Respondent.

DECISION AND OPINION ON REMAND

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

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

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

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

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

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

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

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

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

16IWCC0007

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $414.80 per week for a period of twenty-five (25) weeks, as provided in §8(b)2 of the Act, for the reason that the injuries sustained caused the 5% loss of use of the person as a whole.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court

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

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LUCIO MORENO,

Petitioner,

vs. NO: 11 WC 16460

SHOP N SAVE MARKET, LLC-ARCHER, 16IWCC0008

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of fact and conclusions of law

The Commission finds:

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

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

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

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

4. As Petitioner continued working, his abilities deteriorated.

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

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

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

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

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

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

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

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $319.00 per week for a period of 5-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner

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

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

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

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

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

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

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MORENO, LUCIO
Employee/Petitioner

Case# **11WC016460**

16IWCC0008

SHOP-N-SAVE MARKET LLC
Employer/Respondent

On 4/1/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

16IWCC0008

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

LUCIO MORENO
Employee/Petitioner

Case #11 WC 16460

v.

SHOP-N-SAVE MARKET, LLC.,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on March 18, 2015. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

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

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

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

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

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On March 13, 2011, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- On this date, the petitioner sustained injuries that arose out of and in the course of employment.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $12,600.00; the average weekly wage was $450.00.
- At the time of injury, the petitioner was 33 years of age, single with three children under 18.
- The parties agreed that the respondent paid $14,095.71 in temporary total disability benefits.

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $319.00/week for 5-3/7 weeks, from March 22, 2011, through April 28, 2011, which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay the petitioner the sum of $319.00/week for a further period of 10 weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 2% loss of the man as a whole.
- The amount of temporary total and permanent partial benefits owed is reduced by the $14,095.71 paid by the respondent.

- The respondent shall pay the petitioner compensation that has accrued from March 13, 2011, through March 18, 2015, and shall pay the remainder of the award, if any, in weekly payments.

- The medical care rendered the petitioner for his lumbar spine through April 28, 2011, and for his right foot through April 8, 2011, was reasonable and necessary and is awarded. The respondent is not liable for medical expenses incurred by the petitioner for his lumbar spine after April 28, 2011, and for his right foot after April 8, 2011. The respondent shall pay the medical bills in accordance with the Act, the lowest medical fee schedule or any prior adjustments or negotiated rate. Also, multiple billing for professional services for each chiropractic and physical therapy modalities and the cost for transportation services are denied. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.

- The petitioner's request for penalties and fees is denied.

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

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

Robert E. Williams

Signature of Arbitrator

April 1, 2015

Date

APR 1 - 2015

FINDINGS OF FACTS:

The petitioner, a butcher, sustained injuries while working on March 13, 2011. He continued working through March 22nd, at which time he sought chiropractic care with Dr. Perez at Marque Medicos for lower back pain and right ankle and foot pain. The assessment was lumber and right ankle/foot strains for which physical therapy, medication management by Dr. Engel and no work was recommended. X-rays of his right ankle and lumbar spine were negative for fractures. The petitioner reported continuing back pain at a follow-up on March 30th. An MRI the same day reportedly revealed a disc bulge at L5-S1 and a transitional lumbosacral vertebra with a rudimentary S1/S2 intervertebral disc. The petitioner worked the 9th and 10th of April and reported worsening symptoms on April 11th to Dr. Perez and numbness and tingling in his legs. Dr. Kane's assessment of the petitioner's feet the same day was bilateral plantar fasciitis, right worse than the left. An MRI of his right foot on April 12th indicated a partial-thickness tear of his peroneus longus tendon. Dr. Kane's diagnosis on April 25th was peroneal tendon tear of the petitioner's right foot. The petitioner treated with Dr. Kane through October 17th.

A neurological testing report on April 22nd indicated evidence of bilateral S1 involvement due to the absence of the H-reflexes. Dr. Levin evaluated the petitioner pursuant to Section 12 on April 28th. Dr. Engel gave the petitioner right L5 and S1 transforaminal epidural steroid injections on May 11th, which did not provide the petitioner any pain relief. The petitioner saw Dr. Erickson on June 24th, who opined that the MRI showed a small disc herniation at L4-5. Dr. Erickson performed a L4-5

discectomy and right foraminotomies over the L4 and L5 nerve roots on July 27th. At the request of the respondent, the petitioner was evaluated by Dr. Bernstein on December 1st.

The petitioner followed up with Drs. Perez, Erickson and Engel and continued physical therapy through January 5, 2012, at which time, he reported increased symptoms, aching right low back pain and right lateral thigh numbness to Dr. Perez. An MRI on January 7th showed post-operative changes at L5-S1 related to a right hemilaminectomy and a right paracentral/foraminal protrusion at L5-S1. The petitioner worked for two days after January 15th. Dr. Erickson opined on January 20th that the MRI showed a right paracentral disc herniation. Dr. Engel gave the petitioner right L5 and S1 transforaminal epidural steroid injections on April 4th. On July 3rd, Dr Erickson performed a transforaminal interbody fusion on the right at L4-5, foraminotomies over the L4 and L5 nerve roots and a total facetectomy and ostectomy over the L4-5 segment. On August 27th, the petitioner reported improvement with surgery but increased back pain since an auto collision on August 24th. The petitioner was re-evaluated by Dr. Bernstein in October 2012. The petitioner followed up with Drs. Perez, Erickson and Engel and continued physical therapy through November 29th, at which time he was discharged by Dr. Engel. On December 4th, the petitioner denied any radicular pain or the need for medication for mild back pain. Dr. Erickson limited the petitioner to 50 pounds of frequent lifting.

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

The medical care rendered the petitioner for his lumbar spine through April 28, 2011, was reasonable and necessary and is awarded. The respondent is not liable for medical expenses incurred by the petitioner for his lumbar spine after April 28, 2011.

The medical care rendered the petitioner for his right foot through April 8, 2011, was reasonable and necessary and is awarded. The medical care rendered the petitioner for his right foot after April 8, 2011, was not reasonable or necessary and is denied. The petitioner had only a right ankle sprain. He worked April 9th and 10th, 2011 and when he started treatment with Dr. Kane on April 11, 2011, it was for bilateral plantar fasciitis, right worse than the left. The physical therapy and treatment after April 8, 2011, was not reasonable or necessary to relieve the petitioner of the effects of his right ankle injury and is denied.

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

Based upon the testimony and the evidence submitted, the petitioner proved that his condition of ill-being with his lumbar spine through April 28, 2011, and with his right foot through April 8, 2011, was causally related to the work injury. The March 30, 2011, MRI study showed only a 2 mm disc bulge with no evidence of stenosis. Dr. Levin opined on April 28, 2011, that the MRI was relatively unremarkable and revealed just minimal bulging of the L5/S1 disc with no disc herniation or nerve impingement. On May 13, 2011, Dr. Levin opined that based on his examination, the EMG studies and the normal Achilles reflexe, the petitioner did not have any radiculopathy. Dr. Bernstein opined on January 30, 2014, that the MRI was normal without a disc herniation or nerve root compression. Pursuant to a utilization review, Dr. Baylas opined that the lumbar decompression at L4/5 on July 27, 2011, was not medically necessary based on the clinical guidelines, a normal EMG, a 2 mm disc bulge and no stenosis on the MRI, 5/5 motor strength, symmetric reflexes and minimal sensory change.

Also of concern is Dr. Bernstein's finding that there was no evidence of a surgery or entry into the spinal canal on the MRI study of the petitioner on January 7, 2012. Moreover, in *Martin Martinez v. Hot & Fresh, Inc. d/b/a KFC, 14 IWCC 1039 (Dec. 4, 2014,* a similar case involving lumbar surgery, the Commission found Dr. Engel and Dr. Erickson not credible.

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

The respondent shall pay the petitioner temporary total disability benefits of $319.00/week for 5-3/7 weeks, from March 22, 2011, through April 28, 2011, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The respondent shall pay the petitioner the sum of $319.00/week for a further period of 10 weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of2% loss of the man as a whole.

FINDING REGARDING PENALTIES AND FEES:

The petitioner's request for penalties and fees is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROMAN GRZYBOWSKI,

Petitioner,

vs. NO: 10 WC 2495

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

16IWCC0009

Respondent.

DECISION AND OPINION ON REVIEW

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

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

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

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

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

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

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

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

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

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

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

16IWCC0009

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

DATED: JAN 6 - 2016

MJB/tdm
O: 12-8-15
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

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

GRZYBOWSKI, ROMAN
Employee/Petitioner

Case# 10WC002495

16IWCC0009

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

On 8/9/2011, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

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

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

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Roman Grzybowski
Employee/Petitioner

Case # 10 WC 02495

v.

Consolidated cases: _____

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

16IWCC0009

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **03/18/2011, 03/22/2011, 04/13/2011**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Statutory Employer; P. Choice of Treaters under §8(a)**

FINDINGS

16IWCC0009

On the date of accident, **1/05/2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**2,974.65**; the average weekly wage was $**675.00**.

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

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

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

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

ORDER

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

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

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

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

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

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

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

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

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

Signature of Arbitrator

8/8/2011
Date

16IWCC0009

FINDINGS OF FACT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VICTOR SANTIAGO,

Petitioner,

vs. NO: 13 WC 8866

PREFERRED MEAL SYSTEMS, INC.,

16IWCC0010

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, prospective medical, temporary total disability (TTD), and penalties and being advised of the facts and applicable law, reverses the Decision of the Arbitrator for the reasons stated below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent. The Commission finds Victor Santiago's current condition of ill-being causally related to his undisputed work-related injury of January 9, 2013. Consequently, Petitioner is entitled to TTD benefits from January 19, 2013 through October 22, 2014. The Commission awards Petitioner prospective medical treatment as recommended by Dr. Ossama Abdellatif on July 10, 2014. Penalties are denied.

16IWCC0010

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Victor Santiago filed an Application for Adjustment of Claim on March 18, 2013. Santiago alleged injury to his back and legs while working on January 19, 2013. Per the Request for Hearing, the Respondent stipulated to accident.

2. The petitioner had been employed by the Respondent between 4 to 5 months at the time of the accident. His position required him to load and unload trucks. T.10. Santiago testified that he never missed a day of work prior to the accident and did not have any prior medical treatment. T.11.

3. On January 9, 2013, at 9:55 p.m., Santiago was loading a pallet onto a truck when the pallet got stuck. His left foot slipped as he pulled the pallet back causing his weight to shift onto his right side. He felt extreme pain and heat in his lower back along with pain in his right leg. T.12. Santiago continued to work until 3:30 a.m. at which time he left due to his pain. Petitioner did not work the next two days due to his pain and was then off for the weekend. T.15. He testified that he had trouble sleeping due to the pain and had swelling in his back. *Id.*

4. Petitioner presented to work on January 14, 2013 and was referred to the company clinic, U.S. Health Works. Petitioner was seen by Dr. Gerald Cerniak for right groin and right hamstring pain, and an interpreter was present. According to the patient history form, it was asked "have you had or do you commonly have…:" and petitioner selected "yes" to "joint pain or disease, neck or back injury and foot problems." He denied any prior injuries or pre-existing conditions. Petitioner reported his accident and that he felt a pain in his right groin and right hamstring. He denied feeling a pop or having any bruising. His current pain was 8 out of 10. Examination revealed tenderness to palpation in the right groin and mid right hamstring area; he did not have a hernia. He had no restricted range of motion. His hip flexion was mildly weak at 5-/5 on the right with mild pain and 5/5 on the left. The supine straight leg raise exam caused mild pain to the right groin area. The straight leg raise for sciatic nerve involvement was negative. His back examination was not abnormal. The pelvic x-ray revealed no acute fracture. The impression was right groin and right hamstring strain. He could work modified duty with a 10 pound lifting restriction and limited pushing and pulling. PX.1.

5. Santiago presented for follow-up at U.S. Health Works on January 17, 2013 with continued right groin and hamstring pain. Petitioner was better. He did not have an abnormal gait or posture. He did not have an abnormal back examination. He had a negative straight leg raise for sciatic involvement. He had no range of motion issues with the hip and no lower extremity weakness. PX.1.

6. Petitioner presented for follow-up at U.S. Health Works on January 18, 2013 with continued right groin and right hamstring pain. His pain was sharp and intermittent. He

favored his left side. He had tenderness to the buttock or thigh. He did not have an abnormal low back examination. A straight leg raise was not performed. His work restrictions were continued. PX.1.

7. Santiago was terminated on January 21, 2013.

8. Petitioner presented for follow-up at U.S. HealthWorks on January 24, 2013 with continued right groin and hamstring strain. He did not have an abnormal back exam. He had a negative straight leg raise for sciatic involvement. He had pain in the right groin during the supine straight leg raise. He had mild discomfort in the L/S spine. An added diagnosis of lumbar disc syndrome was added. It was noted that he had a 3 month history of a back injury. His pain was 8 out of 10. Petitioner began physical therapy PX.1.

9. Petitioner testified that he informed all of his doctors of his low back issues. However, it was not until January 24, 2013 that the doctor actually listened, which was why his back pain was reflected in the January 24, 2013 record. T.34.-T.35.

10. Petitioner testified that he never stated that he injured his back 3 months prior; rather, he informed the doctor that he injured his back 3 weeks prior, which was January 9, 2013. T.17.

11. Per the March 5, 2013 U.S. Health Work medical record, petitioner had right sided low back pain and tightness. PX.1.

12. Petitioner presented to Dr. Ravi Barnabas of Herron Medical Center on March 15, 2013. Petitioner reported his accident and that he felt a severe pain in his back. The pain started to radiate to his right hip and right femur. He was then taken to U.S. Health Works and diagnosed with a hip sprain and lumbar disc displacement. Petitioner reported that his back pain was worse with sitting, standing, walking, bending and driving. Dr. Barnabas performed an examination of the petitioner. The examination of the low back was normal. His gait favored the right side. He had tenderness to palpation at L4-L5, L5-SI. He could forward flex to 40 degrees with pain. He had a positive straight leg raise at 35 degrees in the back and right leg, the left was negative. The sitting straight leg raise was positive on the right and negative on the left. The sciatic notch was tender. Patrick's maneuver was positive on the right. The diagnosis was displacement of the lumbar intervertebral disc without myelopathy, thoracic or lumbosacral neuritis or radiculitis, lumbago, lumbar sprain, sprain of unspecified site of the hip and thigh. PX.3.

13. Petitioner underwent a lumbar MRI on March 18, 2013 at Lake Shore Open MRI. At L5-S1, there was a subligamentous posterior disk herniation with mildly extruding nucleus pulposus and a small annular tear that elevated the posterior longitudinal ligament and indented the ventral and slightly on the right side of the thecal sac without significant spinal stenosis. The MRI of the hip was unremarkable. PX.3.

14. Santiago was seen at Herron Medical on April 12, 2013. He again reported his accident and stated that he felt an immediate sharp pain in the back that radiated into the right leg. The MRI revealed an L5-SI disc herniation with an annular tear and disc extrusion on the right. The diagnosis remained the same. PX.3.

15. Petitioner underwent physical therapy at Alivio Physical Therapy from April 12, 2013 through July 1, 2013. Santiago again reported an immediate onset of back pain following the accident that radiated into his right leg. His therapy consisted of heat applications, EMS, ultrasound, spinal/pelvic manipulations and lumbar traction with left lateral flexion. PX.5.

16. Santiago underwent a Section 12 examination with Dr. Bryan Neal of Arlington Orthopedic & Hand Surgery Specialists on June 4, 2013. He noted petitioner referenced his right groin and thigh when asked about what body part he injured during his accident. He felt a sudden onset of pain. Dr. Neal diagnosed petitioner with right sided low back pain and right sided posterior thigh pain with right posterior thigh paresthesias of unknown etiology. He was unable to conclude that his symptoms were likely due to any lumbar disc phenomena or nerve root impingement. He could have a hamstring strain that would be consistent with the mechanism of injury, but he would not expect all of his complaints to be secondary to this injury. He was not at MMI. RX.3.

17. Santiago began treating with Dr. Ossama Abdellatif of Pro Clinics on June 20, 2013. Petitioner reported that he had immediate lumbar pain originating on the date of injury. PX.7. Petitioner underwent a series of injections.

18. Petitioner was seen at Elite Physical Therapy on July 26, 2013. Petitioner reported that he felt an immediate onset of low back pain and left hip pain following his work injury. PX.14.

19. Petitioner underwent a CT scan of the lumbar spine post discography study on October 16, 2013. No annular tears were seen at L2-L5. There was no extravasation of the contrast into the epidural space. PX.7.

20. Dr. Abdellatif reviewed the CT scan on October 29, 2013 and noted that it was positive on L4-L5 and L5-SI. An FCE was recommended. PX.7.

21. Dr. Neal authored an addendum on December 11, 2013. He found the medical records void of any clinically relevant information for an accurate diagnosis. His diagnosis remained the same. He noted that the medical records did not support any neurologic symptoms, neurologic injury or lumbar spine condition resulting from the work accident. He was at MMI and could work his regular job without restrictions. However, because he had an unrelated back issue, he needed restrictions. RX.3.

22. Petitioner was seen by Dr. Abdellatif on January 9, 2014. Dr. Abdellatif recommended percutanteous disc decompression at L4-L5 and L5-SI. PX.7.

23. Petitioner underwent an FCE on March 25, 2014. Petitioner was diagnosed with lumbar radiculopathy that was the result of his work injury when a pallet weighing 1400 pounds got stuck and fell on top of him. Petitioner's job classification was very heavy. Petitioner was capable of working at the light to medium physical demand level. PX.12.

24. Petitioner last saw Dr. Abdellatif on July 10, 2014. He had continued low back pain that he rated as 9 out of 10. Dr. Abdellatif made the following recommendation:

> Based on chief complaint, patient assessment/examination and current radiculopathy patient will be recommended to follow up with surgical consult for further evaluation and recommendation on further improvement of lumbar spine awaiting surgical intervention pending approval, patient is recommended to continue physical therapy and medications as needed to help maximize treatment patient is instructed to call office at any time or follow up when needed has had been currently discharged as he has reached maximum medical improvement he will continue with surgical consult as he awaits surgical intervention. PX.7.

25. Petitioner testified that he is currently in a lot of pain and his low back and leg hurts and his right leg is numb. T.25. He would like to undergo the proposed treatment. T.26.

26. Dr. M. Bryan Neal was deposed September 12, 2014. Dr. Neal is board certified in orthopedic surgery and performed a Section 12 examination on June 4, 2013. An interpreter was utilized during the examination. Dr. Neal noted that the discogram of October 16, 2013 revealed pain concordant with L4-L5 and L5-SI level. He noted that the medical records from January 2013 did not mention any lumbar or low back complaints. He later complained of low back pain. He found petitioner injured his right hip, groin and hamstring during the injury. There was no lumbar spine condition as a result of the injury. RX.3. pg.29.

27. He opined that the lumbar condition was not caused by the January 9, 2013 injury. RX.3. pg.29. His opinion was based on his experience, his review of the records, and the history provided by petitioner. Petitioner sustained a hip, groin and hamstring injury as a result of the injury. He was at MMI. RX.3. pg.31. He could work full-duty without restrictions. *Id.* However, he could not work full-duty with regard to his low back, which was not related. RX.3. pg.32. He noted petitioner did not have radicular symptoms or a spinal condition after the injury.

28. On cross-examination, Dr. Neal found petitioner to be average to above average in credibility and believed that petitioner had pain. He stated petitioner's right hip, groin, and hamstring condition was related to the injury, but the lumbar spine condition and the neurologic nerve root condition was not related. RX.3. pg.45.

29. Dr. Neal testified that the mechanism of injury would not refer up his back. RX.3. pg.58. He testified that there was no generally known concept that would explain a hamstring or groin pull that would refer pain up to the lumbar spine. *Id.* If there was a disc injury it could refer pain downward. RX.3. pg.59. He noted that the MRI revealed a small annular tear with some extrusion or herniation of the nucleus pulposus laterally. This was abnormal. It could produce pain or discomfort. *Id.* He stated that a small tear may or may not produce symptoms. However, he would not expect a small tear from that mechanism of injury to produce pain. RX.3. pg.64. He stated that the annular tear along with the pressure on the adjacent nerve root, would produce symptoms in petitioner's posterior thigh, hip and buttock. RX.3. pg.73.

The Commission is not bound by the Arbitrator's findings, and may properly determine the credibility of witnesses, weigh their testimony and assess the weight to be given to the evidence. *R.A. Cullinan & Sons v. Industrial Comm'n*, 216 Ill. App. 3d 1048, 1054, 575 N.E.2d 1240, 159 Ill. Dec. 180 (1991). It is the province of the Commission to weigh the evidence and draw reasonable inferences therefrom. *Niles Police Department v. Industrial Comm'n*, 83 Ill. 2d 528, 533-34, 416 N.E.2d 243, 245, 48 Ill. Dec. 212 (1981). Interpretation of medical testimony is particularly within the province of the Commission. *A. O. Smith Corp. v. Industrial Comm'n*, 51 Ill. 2d 533, 536-37, 283 N.E.2d 875, 877 (1972).

The Arbitrator found that Santiago proved that his current condition of ill-being with respect to his right groin, thigh and hamstring was causally related to the accident. However, the Arbitrator found petitioner failed to prove that his current lumbar condition was causally related to the work accident. In support of his Decision, the Arbitrator noted that the "initial complaints through March 5, 2013, were only for his right groin and thigh area and the clinical examinations of his lumbar spine were normal." The Commission finds that the medical records contradict the Arbitrator's findings relative to the lumbar spine.

Santiago first sought medical treatment at U.S. HealthWorks on January 14, 2013. Examination revealed pain in the right groin and he had mild hip flexion weakness. The supine straight leg raise caused mild pain to the right groin area. However, per the history section of the January 14, 2013 medical record, petitioner indicated that he had a neck or back injury. The history section corroborates Santiago's testimony that he was experiencing and reported back issues shortly after the accident.

Additionally, the January 24, 2013 U.S. Health Works medical record indicated that petitioner had an added diagnosis of lumbar disc syndrome. His work status report from this date also indicated a diagnosis of lumbar disc displacement. The Commission notes that this lumbar

diagnosis is only 15 days post accident, but a month and a half prior to March 5, 2013, the date which the arbitrator found the petitioner first reported a back injury.

Santiago underwent an MRI on March 18, 2013 that revealed the annular tear at L5-SI. The respondent offered little credible evidence to support that the tear was not caused by the accident. Rather, Dr. Neal testified that the mechanism of injury could cause the tear, which may or may not produce symptoms. The record, however, is void of any evidence demonstrating that petitioner had a pre-existing back condition or that he was under any restrictions prior to the undisputed accident. The Commission finds that the credible evidence demonstrates that the accident caused the tear, which is causing the symptoms and his need for further medical treatment.

The Commission finds little support in respondent's argument that the CT scan of October 16, 2013 did not show any annular tears. While accurate, the Commission notes that the annular tear was identified on the March 18, 2013 MRI at L5-SI. The October 16, 2013 CT scan, however, was of L2-L3, L3-L4, and L4-L5. The L5-SI disc is not referenced in the report. Further, during the follow-up examination of October 29, 2013, Dr. Abdellatif noted that the CT scan was positive at L4-L5 and L5-SI.

The Commission further finds petitioner's testimony credible. The Commission has reviewed the record, and finds no evidence of malingering or symptom magnification. Additionally, Respondent's expert testified that he found the petitioner credible.

Based upon petitioner's credible testimony and the medical records documenting back issues shortly after the undisputed work accident, the Commission finds petitioner's lumbar condition, in addition to his right groin, thigh and hamstring, causally related to the work accident.

The Commission finds petitioner is entitled to prospective medical treatment as recommended by Dr. Abdellatif during the July 10, 2014 examination. The Commission awards petitioner TTD benefits from January 19, 2013 through the date of hearing, October 22, 2014. The Commission finds that the respondent had a good faith objection to liability based upon the opinions of Dr. Neal; therefore, penalties are denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on November 19, 2014, is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $233.33 per week for a period of 91-4/7 weeks (January 19, 2013 through October 22, 2014), that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

16IWCC0010

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for prospective medical treatment as recommended by Dr. Abdellatif.

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 $21,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 6 - 2016

MJB/tdm
O: 11-23-15
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

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

SANTIAGO, VICTOR
Employee/Petitioner

Case# **13WC008866**

PREFERRED MEAL SYSTEMS INC
Employer/Respondent

16IWCC0010

On 11/19/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0579 FRIEDMAN & SOLMOR LTD
GARY B FRIEDMAN
200 N LASALLE ST SUITE 2750
CHICAGO, IL 60601

0075 POWER & CRONIN LTD
ROBERT LUEDKE
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

VICTOR SANTIAGO
Employee/Petitioner

Case #13 WC 8866

v.

16IWCC0010

PREFERRED MEAL SYSTEMS, INC.,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on October 22, 2014. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

~~B. ☐ Was there an employee-employer relationship?~~

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

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

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

L. ☒ Should penalties or fees be imposed upon the respondent?

M. ☐ Is the respondent due any credit?

N. ☒ Prospective medical care?

FINDINGS

- On January 9, 2013, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- On this date, the petitioner sustained injuries that arose out of and in the course of employment.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $18,200.00; the average weekly wage was $350.00.
- At the time of injury, the petitioner was 36 years of age, single with two children under 18.
- The parties agreed to reserve the issue of the necessary of any paid and unpaid medical services provided to the petitioner.

ORDER:

- The petitioner's request for benefits is denied and the claim is dismissed.

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

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

Robert E. Williams

Signature of Arbitrator

November 19, 2014

Date

NOV 19 2014

FINDINGS OF FACTS:

The petitioner, a food truck loader, sustained an injury while pulling/pushing a loaded pallet jack to a truck on January 9, 2013. His initial medical care was at HealthWorks with Dr. Cerniak for complaints of right groin and right thigh/hamstring pain. Tenderness was noted on examination and the petitioner was advised to ice his groin area, take Ibuprofen and to limit lifting to ten pounds. The petitioner completed a history questionnaire for Dr. Cerniak and indicated a prior neck or back injury. Dr. Cerniak noted that the back examination was not abnormal and the straight leg raise test for sciatic nerve involvement was negative. His diagnosis was a right groin/hamstring strain. The petitioner saw Dr. Khanna at HealthWorks on the 17th and Dr. Cerniak again on the 18th. Both doctors noted that the examination of the petitioner's back was not abnormal. Dr. Khanna added a diagnosis of lumbar disc displacement on the 24th but did not note any complaints of back symptoms or find an abnormal lower back examination or a positive straight leg raise test. The petitioner started physical therapy on the 30th and reported mild discomfort in his lumbosacral region and a prior back injury three months earlier. The therapist noted that the petitioner had full range of motion in his lumbar spine. He received nine therapy sessions for his thigh and hamstring through February 12th. The petitioner followed up for a right groin strain with Dr. Khanna on February 7th and Dr. Garala of HealthWorks February 14th.

On March 5th, the petitioner reported low back and right knee pain to Dr. Khanna. The doctor found that the back examination was abnormal and noted right-sided lower back pain and tightness. On March 15th, the petitioner started physical therapy with Dr. Santigo at Herron Medical Center for right leg and lower back pain and followed up three

to four times a month through August 14, 2013. MRIs of his right hip and lumbar spine on March 18th revealed an unremarkable hip and a 2-3 mm posterior subligamentous disc herniation at L5-S1 with mildly extruded nucleus pulposus and a small annular tear without significant spinal stenosis or neuroforaminal narrowing. He started chiropractic care with Dr. Nunzio Ambrosino at Alivio Physical Therapy & Chiropractic on April 11th and followed up approximately once a week through July 1, 2013.

The petitioner started care with Dr. Ossama Abdellatif at Pro Clinic on June 20, 2013. The petitioner started physical therapy with Elite Physical therapy on July 26th and continued therapy periodically through September 5, 2014. Dr. Abdellatif gave the petitioner an injection for myofascial pain on August 1, 2013. The petitioner reported a twenty percent improvement on August 20, 2013, after receiving a lumbar epidural steroid injection. No improvement was reported on September 3rd after receiving a second lumbar epidural steroid injection but he reported some improvement in pain on September 10th after a third LESI. Dr. Abdellatif opined on October 16th that his discogram revealed concordant pain at L4-5 and L5-S1. A post-discogram lumbar CT scan on October 16th was negative for any annular tears. On January 17, 2014, Dr. Abdellatif performed a percutaneous decompression at L4-5 and L5-S1. An FCE on March 25, 2014, resulted in a physical demand classification of light. The petitioner reported continued back pain with bilateral radiation to Dr. Abdellatif on July 10, 2014.

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

Based upon the testimony and the evidence submitted, the petitioner proved that his current condition of ill-being with his right groin, thigh and hamstring is causally related to the work injury.

The petitioner failed to prove that his current condition of ill-being with his lumbar spine is causally related to the work injury. His initial complaints through March 5, 2013, were only for his right groin and thigh area and the clinical examinations of his lumbar spine were normal. It is not believable that the petitioner reported lumbar spine pain and that his complaints were ignored by all the medical personnel. The petitioner failed to establish by a preponderance of evidence that he sustained an injury to his lumbar spine on January 9, 2013. The petitioner's request for benefits is denied and the claim is dismissed.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Gonzales,

Petitioner,

vs.

NO: 09 WC 47496
10 WC 25748

City of Chicago,

16IWCC0011

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

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective, and we have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent.

Respondent's argument on review is that the doctrines of "law of the case" and/or collateral estoppel apply in this matter. The Commission disagrees. As noted by Respondent in its Statement of Exceptions, under the doctrine of res judicata (law of the case), a final judgement issued by the court on the merits is conclusive as to the rights of the parties and their privies and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. The case at bar is a completely separate claim with a

completely different set of facts and accident date. Just because Petitioner suffered a second injury to the same body part as before, that does not mean that Petitioner is barred from ever pursuing a second claim for a completely different and unrelated accident. As such, the Commission finds that Respondent's argument under this theory has no merit.

The Commission also finds Respondent's argument of collateral estoppel is misplaced. Under the theory of collateral estoppel, re-litigation of an issue essential to and decided in an earlier proceeding is prohibited by the same parties or their privies. Again, this is a completely separate and distinct claim. Therefore, the Commission is not persuaded by this argument, as well.

Respondent argues that Petitioner's testimony regarding the accident is not credible. Respondent states that Petitioner is initially vague in his description of the accident. However, the Commission notes that as the Petitioner's testimony continues, Petitioner does clearly testify that he was picking up his tool bag when he felt a snap in his back, followed by back pain. The Commission further notes that Petitioner provided the same history of accident to all the doctors, i.e. lifting his tool bag. The record shows that Petitioner's testimony regarding the accident is unrebutted and there is nothing in the record that contradicts Petitioner's description of the June 21, 2010 accident. As such, the Commission finds that the Arbitrator's finding that Petitioner suffered a compensable work accident on June 21, 2010 is supported by the evidence.

With the above in mind, the Commission takes judicial notice of its March 3, 2010 Decision by which it found that Petitioner suffered a low back strain at work on July 6, 2009 and reached maximum medical improvement regarding that injury on October 23, 2009. (11IWCC0248) The Commission also found that Petitioner could return to work without restrictions. As a result, Petitioner returned to work, without restrictions, for Respondent on April 29, 2010. (T.7-8)

The Commission notes that Petitioner worked without any apparent problems until June 21, 2010. Following June 21, 2010, Petitioner complained of low back pain with radiation into his legs, just as he did following the July 6, 2009 accident and on June 14, 2010, seven days before the June 21, 2010 work accident. On November 22, 2010, Dr. Ronald Michael, Petitioner's treating physician, diagnosed Petitioner as having nonspecific lumbar radiculitis. (PX1)

The August 20, 2011 lumbar MRI showed extensive diffuse lower thoracic and lumbar spondylosis with associated diffuse degenerative disc disease, grade 1 retrolisthesis from L2-L3 through L4-L5, mild ventral wedging of the T12 vertebral body with a right central compression deformity of the superior endplate, mild loss of height of the L2-L5 vertebral bodies, disc bulges at all levels from L2-L3 through L5-S1 which combine with retrolisthesis, posterior endplate spurring, and prominent facet and posterior element hypertrophy to produce varying degrees of significant central canal and neural foraminal stenosis. (PX1) The Commission notes that this is about the same result shown in the October 8, 2009 lumbar MRI which showed multilevel degenerative disc disease and facet arthropathy with associated central spinal canal stenosis and neural foraminal narrowing, minimal degenerative dextrorotescoliosis of the midlumbar spine, increased adipose tissue, and degenerative discogenic endplate change and early patchy yellow

conversion most prominent within the sacrum. (PX1) Following the August 20, 2011 MRI and alleged failed conservative treatment, Dr. Michael ordered a lumbar fusion.

The Commission notes that in its March 3, 2010 decision, the Commission denied prospective medical care in the form of back surgery. Considering Petitioner's objective findings and complaints are the same as they were following the July 6, 2009 accident, the Commission finds the findings and opinions of Respondent's Section 12 examiner, Dr. Carl Graf, more persuasive than those of Dr. Michael.

In his January 29, 2014 Section 12 examination report, Dr. Graf explained that he was "unable to attribute [Petitioner's] claimed complete disability secondary to lifting up a bag of tools and his examination today demonstrates multiple inconsistencies and symptoms (sic) magnification....[Petitioner] has been offered a multilevel lumbar fusion. Regardless of causation, it is my opinion that he is not a surgical candidate for such. Further, it is apparent that he has been kept off work for the last four years. It is my opinion that he has long been at maximum medical improvement regarding such and there is no objective reason for any restrictions based upon the injury from lifting a tool bag in 2010....it is my opinion that [Petitioner's] diagnosis should be considered a lumbar strain with a significant preexisting degenerative condition. It is my opinion that he would be considered to be at maximum medical improvement regarding the lumbar strain six weeks thereafter. In my opinion his preexisting condition is well documented and bears no relation to his claimed two work injuries from 2010." (RX1-ERX2) Based on the totality of the evidence, the Commission finds that Petitioner suffered a lumbar strain on June 21, 2010, just as he did on July 6, 2009, and that Petitioner reached maximum medical improvement on January 29, 2014, the date of the Section 12 examination with Dr. Graf.

Based on the above, the Commission awards medical expenses until January 29, 2014 and denies Petitioner's claim for prospective medical care.

One should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on November 14, 2014 is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for medical expenses under Sections 8(a) and 8.2 of the Act through January 29, 2014.

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.

16IWCC0011

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

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

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

DATED:
MJB/ell
o-11/23/15
52

JAN 6 - 2016

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

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

GONZALES, MICHAEL
Employee/Petitioner

Case# **09WC047496**

10WC025748

CITY OF CHICAGO
Employer/Respondent

16IWCC0011

On 11/14/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% 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:

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

0766 HENNESSY & ROACH PC
JOSEPH ZWICK
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

MICHEAL GONZALES
Employee/Petitioner

Case #09 WC 47496
#10 WC 25748

v.

16IWCC0011

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 Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on October 10, 2014. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☒ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

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

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

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

M. ☐ Is the respondent due any credit?

N. ☐ Prospective medical care?

FINDINGS

- A Section 19(b) arbitration decision for claim #09 WC 47496 was filed on March 3, 2010, after a hearing on January 13, 2010. The decision was affirmed in the Decision and Opinion on Review #11IWCC0248 dated March 11, 2011. The petitioner was awarded temporary total disability benefits for 15-3/7 weeks from July 7, 2009, through October 23, 2009, and medical treatment through October 23, 2009.

- The parties agreed that the petitioner received temporary total disability benefits of $13,669.52 per the award and that the respondent is not liable for any unpaid cost for the medical services provided to the petitioner for claim #09 WC 47496.

- On June 21, 2010, the respondent was operating under and subject to the provisions of the Act. The incident is the subject matter of claim #10 WC 25748.

- On that date, an employee-employer relationship existed between the petitioner and respondent.

- In the year preceding the injury on June 21, 2010, the petitioner earned $80,288.00; the average weekly wage was $1,544.00.

- At the time of injury on June 21, 2010, the petitioner was 45 years of age, single with one child under 18.

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $1,029.33/week for 224-4/7 weeks, from June 22, 2010, through October 10, 2014, which is the period of temporary total disability for which compensation is payable.

- The medical care rendered the petitioner for his lumbar spine was reasonable and necessary. The respondent shall pay the medical bills in accordance with the Act, the medical fee schedule or any prior adjustments or negotiated rate. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.

- The petitioner is entitled to have from the respondent the reasonable and necessary cost for a posterior lumbar fusion.

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

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

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

Robert E. Williams

Signature of Arbitrator

November 13, 2014

Date

NOV 14 2014

FINDINGS OF FACTS:

16IWCC0011

After an adverse arbitration decision, the petitioner returned to his regular duties of a lineman with the respondent. On June 21, 2010, the petitioner received care at MercyWorks with Dr. Homer Diadula and reported injuring his low back while lifting his tools. He complained of bilateral radiating pain with numbness and tingling. Tenderness in the lumbosacral spine, the right lower paralumbar area and the right sacroiliac joint was noted. The petitioner was prescribed heat/icing, medication, home exercises and no work for a low back strain. He followed up with continuing complaints on June 25th and 30th.

On September 3, 2010, the petitioner sought chiropractic care with Dr. James Egan for a low back injury on June 21, 2010, while lifting his tools. Dr. Egan felt the petitioner had aggravated his pre-existing lumbar condition. The petitioner received chiropractic care approximately three times per week through October 12, 2010. On November 22, 2010, the petitioner saw Dr. Ronald Michael, whose assessment was nonspecific lumbar radiculitis. On December 17, 2010, and March 29, 2011, the petitioner saw Dr. Egan and reported constant lumbar pain and bilateral leg pain. On June 28, 2011, the petitioner reported to Dr. Egan constant lumbar pain that confines him to bed all day and bilateral leg pain. On August 29, 2011, Dr. Michael opined that the MRI showed disc herniations at the L4-5 and L5-S1. On January 9, 2012, Dr. Michael noted that three lumbar epidural steroid injections failed to provide any significant relief. Facet and caudal block injections also failed to provide the petitioner with any relief. Dr. Michael reported on June 26, 2012, that a lumbar discogram revealed L3-4, L4-5 and L5-

1 disc pathology and recommended a posterior lumbar fusion. The petitioner continued to treat with Dr. Michael for low back and bilateral leg pain through 2012, 2013 and 2014.

On January 29, 2014, at the respondent's request, the petitioner was evaluated by Dr. Carl Graf. Dr. Graf opined that the petitioner was not a surgical candidate, that his condition was a lumbar strain with a significant pre-existing lumbar disc degenerative condition and that his subjective complaints were not supported by objective findings. He felt that the petitioner had reached MMI and was capable of returning to work on a full-duty basis. Dr. Michael continued to recommend a posterior lumbar fusion for the petitioner as of June 3, 2014.

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

Based upon the testimony and the evidence submitted, the petitioner proved that he sustained an accident on June 21, 2010, arising out of and in the course of his employment with the respondent. The petitioner injured his lumbar spine picking up an approximately 30-pound tool bag. The petitioner sought immediate care after his injury. And, his complaints and treatment have been consistent and unrelenting since the injury. The petitioner sustained an injury to his lumbar spine on June 21, 2010, when he lifted his tool bag.

FINDINGS REGARDING WHETHER TIMELY NOTICE WAS GIVEN TO THE RESPONDENT:

The petitioner's supervisor, Nick Calace, was notified on June 21, 2010, which is established by the information he provided to MercyWorks that the petitioner was lifting his tools when he felt a sharp back pain. The respondent received timely notice of the petitioner's injury.

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

The medical care rendered the petitioner for his lumbar spine was reasonable and necessary. The June 21, 2010, lifting injury to the petitioner's lumbar spine resulted in his need for continuous medical care due to the unremitting lumbar and bilateral leg pain.

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

Based upon the testimony and the evidence submitted, the petitioner proved that his current condition of ill-being with his lumbar spine is causally related to the work injury on June 21, 2010. The petitioner was performing regular lineman job duties and had not sought any additional medical care for the low back strain he sustained on July 6, 2009, after returning to work in April 2010. After the re-injury to his low back while lifting an approximately 30-pound tool bag on June 21, 2010, the petitioner consistently sought medical care and continuously complained of lumbar and bilateral leg pain. The petitioner established that the lifting incident on June 21, 2010, caused his current condition of ill-being with his lumbar spine or aggravated his pre-existing lumbar spine condition. The petitioner's current condition of ill-being with his lumbar spine supersedes his prior lumbar strain. Dr. Carl Graf's opinions ignore the consistency of the petitioner's symptoms and the objective MRI findings. His opinions are given little weight.

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

The respondent shall pay the petitioner temporary total disability benefits of $1,029.33/week for 224-4/7 weeks, from June 22, 2010, through October 10, 2014, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner.

FINDING REGARDING PROSPECTIVE MEDICAL:

The petitioner proved that the posterior lumbar fusion recommended by Dr. Michael is reasonable medical care necessary to relieve the effects of the work injury on June 21, 2010. Although there is a concern about the validity of the discogram results, the test serves only to pinpoint the lumbar levels that need surgical attention but is not pertinent for determining whether a lumbar fusion is needed. The petitioner is entitled to have from the respondent the reasonable and necessary cost for a posterior lumbar fusion.

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

Charles Mack,

Petitioner,

vs. NO: 11 WC 25668

University of Illinois at Chicago,

16IWCC0012

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, and permanent disability benefits, hereby reverses the Arbitrator's Decision and finds that Petitioner's condition of ill-being is causally related to the May 23, 2011 work accident and that Respondent is liable for medical expenses incurred in the treatment of such accident.

The Commission notes that the May 23, 2011 accident is undisputed. The Commission further notes that Petitioner sought treatment about a month after the accident when the symptoms caused by the accident continued. When Petitioner saw Dr. Goldvekht on June 23, 2011, Petitioner clearly reported that he was having left leg pain following the work accident. (PX1) The record shows that Petitioner consistently complained of ongoing left leg pain following the May 23, 2011 undisputed work accident throughout his treatment. Therefore, the Commission hereby reverses the Arbitrator's finding on causal connection and finds that Petitioner's need for treatment following the May 23, 2011 accident was causally related to the work accident.

Based on the above finding, the Commission hereby awards medical expenses starting June 23, 2011. The Commission notes that the record shows that Petitioner underwent a month, eight sessions, of physical therapy. (PX1) When it was initially ordered, Dr. Goldvekht indicated that Petitioner was to "continue" physical therapy. However, the Commission notes that there is

nothing in the record to indicate that Petitioner had undergone physical therapy or any other form of treatment prior to June 23, 2011. In fact, Petitioner admitted that he did not seek any treatment until June 23, 2011. (T.9) Based on the totality of the record, the Commission finds that Petitioner only underwent physical therapy from June 28, 2011 through July 28, 2011. Since the September 11, 2014 Utilization Review based its decision to non-certify Petitioner's physical therapy on the belief that Petitioner had previously undergone physical therapy, the Commission finds its non-certification of the physical therapy unreliable and unpersuasive. The Commission finds that this is especially the case since it clearly states that eight sessions, which is what Petitioner underwent, is what the guidelines state would be appropriate in a case like this. (RX1)

The Commission notes that the Arbitrator indicated in his decision that Dr. Goldvekht's records "are unclear as to whether the Petitioner had ongoing treatment. The records are also unclear as to whether the continued care was a result of the work injury or some other cause." (Arbitrator.Dec.3) The Commission, however, does not find this to be the case. The medical records indicate when and why Petitioner's symptoms started, which was following the work accident. The physical therapy records note the types of therapy provided and the results. Finally, Dr. Goldvekht noted that Petitioner reported improvement as a result of the physical therapy. Therefore, the Commission finds that Petitioner has established that the physical therapy ordered by Dr. Goldvekht was reasonable and necessary treatment for the injury suffered as a result of the May 23, 2011 undisputed work accident. Based on the totality of the evidence, the Commission awards medical expenses totaling $2,638.62, the expenses incurred while treating with Dr. Goldvekht and the physical therapy ordered by Dr. Goldvekht.

Regarding permanent disability, the Commission notes that Petitioner did not miss any work due to the accident and continues to work without restrictions or difficulty. (T.11) Petitioner also testified that he has no residual pain as a result of the accident. (T.11) Petitioner has not suffered a disability as a result of the accident. Therefore, the Commission affirms the Arbitrator's decision denying Petitioner's claim for permanent disability benefits.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. Furthermore, we have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent. Finally, one should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

IT IS THEREFORE ORDERED BY THE COMMISSION that that the Decision of the Arbitrator, filed on November 3, 2014, is reversed as stated above.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay the sum of $2,638.62 in medical expenses pursuant to Sections 8(a) & 8.2 of the Act.

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

16IWCC0012

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

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

DATED: JAN 6 - 2016
MJB/ell
o-11/23/15
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MACK, CHARLES
Employee/Petitioner

Case# **11WC025668**

UNIVERSITY OF ILLINOIS AT CHICAGO
Employer/Respondent

16IWCC0012

On 11/3/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0263 JAMES ELLIS GUMBINER & ASSOC
CHRISTOPHER A TOMCZYK
180 N MICHIGAN AVE SUITE 2100
CHICAGO, IL 60601

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

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
LINDA ROBERTS
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

0902 UNIVERSITY OF IL/CLAIMS MGMT
CHUCK HUTCHISON
1737 W POLK ST M/C 940 STE B
CHICAGO, IL 60612

0904 STATE UNIVERSITY RETIREMENT SYS
PO BOX 2710 STATION A*
CHAMPAIGN, IL 61825

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

NOV -3 2014

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

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

CHARLES MACK,
Employee/Petitioner

Case # **11 WC 25668**

v.

Consolidated cases:

UNIVERSITY OF ILLINOIS AT CHICAGO,
Employer/Respondent

16IWCC0012

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DAVID KANE**, Arbitrator of the Commission, in the city of **CHICAGO**, on **October 24, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0012

FINDINGS

On **5/23/2011**, 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 ***isnot*** causally related to the accident.

In the year preceding the injury, Petitioner earned $; the average weekly wage was $.

On the date of accident, Petitioner was **60** years of age, ***single*** with **4** 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 is entitled to a credit of $ 0 under Section 8(j) of the Act.

ORDER

No benefits are awarded. Petitioner failed to prove by a preponderance of the evidence that his medical bills were reasonable and necessary and that he suffered a permanent injury to his left leg.

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

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

David A. Kane
Signature of Arbitrator

November 3, 2014
Date

NOV 3 - 2014

16IWCC0012

FINDINGS OF FACT

The Petitioner, Charles Mack, is a social worker for the University of Illinois at Chicago. Petitioner's job duties require him to talk to at risk youth at Christ Hospital. He works from 8am to 5pm and is assigned to Christ Hospital through the Cease Fire program.

On May 23, 2011 Petitioner was working at Christ Hospital. Petitioner ate breakfast at the cafeteria. When he returned his tray to the conveyor belt, a piece of metal fell off and struck the Petitioner's left shin and ankle. Petitioner testified that he refused medical treatment on that day. Petitioner continued to work. The Petitioner testified that he did not lose any time from work as a result of this injury.

Petitioner presented to Dr. Goldvekht on June 23, 2011. Petitioner reported to Dr. Goldvekht that a piece of sheet metal fell on his legs injuring the left more on the right. At trial, Petitioner testified that the sheet metal only struck his left leg. Dr. Goldvekht diagnosed the petitioner with bilateral leg contusion. Dr. Goldvekht prescribed "continue a course of therapy 2-3x/wk for the next four weeks." Petitioner testified that he first sought treatment on June 23, 2011; however Dr. Goldvekht prescribed continued physical therapy. (Petitioner's Exhibit 1).

Physical therapy notes state that the initial evaluation took place on June 28, 2011. The physical therapy notes do not identify what body part

was treated or the type of treatment administered. Petitioner continued with physical therapy through July 28, 2011. The therapist noted that the Petitioner had reached maximum medical improvement and discharged the Petitioner from care.

The Petitioner presented for a follow up visit with Dr. Goldvekht on October 6, 2011. The Petitioner reported continued localized pain over the shin. The Petitioner was diagnosed with a contusion to his bilateral legs. The Petitioner was discharged from care.

Respondent submitted into evidence utilization review of the physical therapy bills. The physical therapy was not certified because the therapy records do not show any functional gains. The medical records also state that Petitioner was to continue physical therapy. However there are no records indicating prior treatment. Petitioner's treating physician did not appeal this decision.

At trial, Petitioner testified that he does not have any residual pain to his shin. Petitioner continues to work with the Respondent as a social worker.

16IWCC0012

Conclusions of Law

A. In relation to (F) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

The Petitioner testified that he suffered an injury to his left leg on May 23, 2011 when a piece of metal struck his shin. The Petitioner testified that he refused treatment that day. On June 23, 2011 when the Petitioner presented to Dr. Goldvekht, Dr. Goldvekt recommended continued physical therapy for the Petitioner. The records of Dr. Goldvekht are unclear as to whether the Petitioner had ongoing treatment. The records are also unclear as to whether the continued care was a result of the work injury or some other cause.

As such, the Arbitrator finds that the Petitioner did not prove by a preponderance of the evidence that the Petitioner's medical treatment and need for physical therapy was causally related to the incident of May 23, 2011.

B. In relation to (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 the following:

The medical records are unclear as to whether the Petitioner was receiving treatment prior to May 23, 2011. Also the physical therapy notes do not indicate which body part was being treated. The physical therapy notes do not measure any objective measurements or gains.

There was no evidence presented that the utilization review determination was being appealed. It is the Petitioner's duty to prove by a preponderance of credible evidence that the medical bills are causally related to the injury and that the treatment was reasonable and necessary. In this case, the Petitioner failed to present credible evidence that he required 4 weeks of physical therapy for a shin contusion. Petitioner was able to work and did not suffer any lost time. He also testified that he did not need to seek immediate treatment. There isn't credible evidence that the Petitioner's physical therapy was reasonable or necessary. As such, the Arbitrator denies the Petitioner's petition for medical bills.

16IWCC0012

C. In relation to (L) what is the nature and extent of Petitioner's injuries, the Arbitrator finds the following:

The Petitioner testified that he has no ongoing residual shin pain. Petitioner did not testify to any impairments or limitations as a result of the incident. The Petitioner did not seek immediate medical treatment following the injury nor did the Petitioner lose any time from work. As such, the Arbitrator finds that the Petitioner did not suffer any permanent injury to his left leg.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☒ 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

RONDA YOUNG,

Petitioner,

16IWCC0013

vs. NO: 14 WC 16708

STATE OF ILLINOIS, DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, casual connection, medical expenses, temporary total disability, and 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.

On page four, paragraph five, sentence two, the Commission strikes the Arbitrator's statement with regard to the AMA impairment rating from: "Dr. Li did not state in either the report or his deposition testimony whether the AMA impairment rating was in regard to the right upper extremity or to the whole person." The Commission replaces this with "Dr. Li's Upper Extremity Impairment Evaluation of August 11, 2014 reflects that Petitioner's AMA impairment rating was 1% entrapment of the right upper extremity or 1% of the whole person." On page four, paragraph five, sentence three, the Commission corrects "minimal" to "moderate."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 20, 2015, as clarified herein, is hereby affirmed and adopted.

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

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

DATED: JAN 6 - 2016
KWL/kmt
11/09/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0013

YOUNG, RONDA
Employee/Petitioner

Case# **14WC016708**

ST OF IL DEPT OF HEALTH AND FAMILY SERVICES
Employer/Respondent

On 4/20/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0270 HOLLEY & ROSEN
STEVEN J ROSEN
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SPRINGFIELD, IL 62704

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

5002 ASSISTANT ATTORNEY GENERAL
JOSEPH P BLEWITT
500 S SECOND ST
SPRINGFIELD, IL 62706

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

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

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

APR 20 2015

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

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

16IWCC0013

Ronda Young
Employee/Petitioner

v.

State of Illinois Department of Health and Family Services
Employer/Respondent

Case # 14 WC 16708

Consolidated cases: n/a

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

DISPUTED ISSUES

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

FINDINGS

On June 14, 2013, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $55,826.76; the average weekly wage was $1,073.59.

On the date of accident, Petitioner was 39 years of age, married with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

Respondent is entitled to a credit of $4,459.53 under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 3, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of $4,459.53 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 $715.73 per week for six weeks commencing December 17, 2013, through January 27, 2014, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $644.15 per week for 23.75 weeks because the injuries sustained caused the 12 1/2% loss of use of the right hand, as provided in Section 8(e) of the Act.

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

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

William R. Gallagher, Arbitrator

April 15, 2015
Date

APR 20 2015

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained a repetitive trauma injury arising out of and in the course of her employment for Respondent. The Application alleged a date of accident (manifestation) of June 17, 2013, and that Petitioner sustained repetitive trauma to her right hand (Arbitrator's Exhibit 2). Respondent disputed liability on the basis of accident and causal relationship.

Petitioner began working as a caseworker for Respondent in January, 2007. Petitioner testified that her job consisted primarily of processing applications which required her to input significant amounts of data in a computer. Petitioner worked seven and one-half hours per day and she stated that she was typing approximately 90% of the time. Even when Petitioner received telephone calls, she would many times type simultaneously. Petitioner is right hand dominant and she also used her right hand for operation of the computer mouse.

Petitioner stated that sometime around the end of 2012, or beginning of 2013, she began to experience symptoms of pain, numbness and tingling in her right hand. These symptoms were more intense when she was typing.

Petitioner initially sought medical treatment from Dr. Hima Atluri, her family physician, sometime in late 2012/early 2013 (Dr. Atluri's records were not tendered into evidence). Dr. Atluri referred Petitioner to Dr. Douglas Dove, a neurologist.

Dr. Dove initially saw Petitioner on March 15, 2013, and he performed an EMG/NCV of both upper extremities which were positive for right carpal tunnel syndrome. He also ordered various lab tests, most of which were normal. At that time, he prescribed a wrist splint. Dr. Dove again saw Petitioner on June 17, 2013 (the manifestation date alleged in the Application), but her hand symptoms had not improved. Dr. Dove recommended referral to a surgeon (Petitioner's Exhibit 2).

On June 20, 2013, Petitioner completed and signed a Workers' Compensation Employee's Notice of Injury form wherein she reported that she sustained a repetitive motion injury to her right hand and that she had symptoms of pain, numbness and tingling in the right hand, wrist, fingers and arm (Respondent's Exhibit 2). On that same day, Petitioner's supervisor, Sally Longest, completed a Supervisor's Report of Injury or Illness which stated that Petitioner reported that she sustained a repetitive motion injury with pain in the right wrist and hand (Petitioner's Exhibit 1; Deposition Exhibit 3).

On October 16, 2013, Petitioner was seen by Dr. Michael Neumeister, a plastic surgeon. At that time, Petitioner informed Dr. Neumeister that 90% of her job involved typing and she wanted to know if this significantly contributed to the development of carpal tunnel syndrome. Dr. Neumeister indicated in his record of that date that it was a possibility (Petitioner's Exhibit 1; Deposition Exhibit 2).

Dr. Neumeister performed surgery on December 17, 2013, and the procedure consisted of an open right carpal tunnel release. Petitioner recovered from the surgery and remained under Dr.

Neumeister's care until he discharged her on February 13, 2014 (Petitioner's Exhibit 1; Deposition Exhibit 2).

At the direction of Respondent, Petitioner was examined by Dr. Lawrence Li, an orthopedic surgeon, on August 11, 2014. In connection with his examination of Petitioner, Dr. Li reviewed medical records provided to him by Respondent. He agreed that Petitioner's right carpal tunnel syndrome was properly diagnosed and treated; however, he opined that there was not a causal relationship between the condition and Petitioner's job duties of typing and filing. Dr. Li also opined that Petitioner had an AMA impairment rating of one percent (1%); however, it was not clear from the report whether the impairment was attributable to the right upper extremity or whole person (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Li was deposed on December 8, 2014, and his deposition testimony was received into evidence at trial. Dr. Li's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Dr. Li agreed that Petitioner had right carpal tunnel syndrome which was properly treated but he opined that the condition was not related to Petitioner's repetitive typing/keyboarding. Dr. Li testified that so long as there was not an ergonomic issue with Petitioner's workstation wherein she would have been required to maintain a wrist position of equal or greater than 40° of either extension or flexion, that the carpal tunnel syndrome was not related to typing/keyboarding (Respondent's Exhibit 1; pp 6-7, 10-11).

Dr. Li was cross-examined at length regarding his opinion as to causality. He agreed that he never saw Petitioner's workstation nor did he either perform or review an ergonomic study of it. Dr. Li opined that even if Petitioner's job required typing 100% of the time, that this, in and of itself, would not be causative of carpal tunnel syndrome (Respondent's Exhibit 1; pp 11-12, 17-18).

Dr. Li was also questioned about his impairment rating which he stated was pursuant to the AMA guidelines. He did not specifically testify whether it was to the right upper extremity or a person as a whole (Respondent's Exhibit 1; pp 27- 29).

Dr. Neumeister was deposed on January 28, 2015, and his deposition testimony was received into evidence at trial. Dr. Neumeister's testimony regarding his diagnosis and treatment of Petitioner's condition was consistent with his medical records. Although he could not produce a return to work slip for Petitioner, he testified that he authorized her to return to work on January 28, 2014 (Petitioner's Exhibit 1; pp 8-13).

In regard to causality, Dr. Neumeister was asked to assume various facts pertaining to Petitioner's job duties which included her typing 90% of the time and whether there was a causal relationship between her work duties and the right carpal tunnel syndrome. Dr. Neumeister testified that while he did not know "...exactly what caused the carpal tunnel", the work activity aggravated it. Dr. Neumeister further stated that he did not believe that there was a certain duration or number of activities that could precipitate carpal tunnel syndrome because everyone's anatomy is different. He specifically noted that some individuals have a larger carpal tunnel than others. Because of differences in everyone's physiology, various individuals will react differently to different durations and levels of activities (Petitioner's Exhibit 1; pp 15-20).

Petitioner testified that she returned to work for Respondent on January 28, 2014, and continues to work at present. Petitioner still has complaints of pain which she notices at work when she is typing. She also has experienced diminished grip strength.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner sustained a repetitive trauma injury to her right hand arising out of and in the course of her employment for Respondent that manifested itself on June 17, 2013, and that her current condition of ill-being is causally related to same.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony regarding her job duties and the repetitive use of her right hand was unrebutted.

Petitioner's primary treating physician, Dr. Neumeister, testified that Petitioner's repetitive work activity aggravated the carpal tunnel syndrome condition. He further testified that he did not believe that there was a specific duration or number of activities that could precipitate carpal tunnel syndrome because everyone's anatomy/physiology is different and, as such, various individuals will respond in different ways to repetitive activities.

Dr. Li testified that, in the absence of an ergonomic issue, the amount of typing Petitioner did on a daily basis, even if it was 100% of the time, did not matter. He still opined that Petitioner's carpal tunnel syndrome was not related to her repetitive work activities. Dr. Li did not have any specific knowledge as to whether or not there were ergonomic issues in regard to Petitioner's workstation.

The Arbitrator finds the opinion of Dr. Neumeister more persuasive than that of Dr. Li.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 3, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of $4,459.53 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In support of this conclusion the Arbitrator notes the following:

There was no dispute regarding the diagnosis of carpal tunnel syndrome and the reasonableness and necessity of the treatment Petitioner received.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of six weeks commencing December 17, 2013, through January 27, 2014.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner was totally disabled for the aforestated period of time.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 12 1/2% loss of use of the right hand.

In support of this conclusion the Arbitrator notes the following:

Dr. Li, Respondent's Section 12 examiner, stated in his report and, when deposed, that Petitioner had an AMA impairment rating of one percent (1%). Dr. Li did not state in either the report or his deposition testimony whether the AMA impairment rating was in regard to the right upper extremity or to the whole person. The Arbitrator gives this factor minimal weight.

Petitioner is a case worker and her job requires repetitive use of both upper extremities, in particular, her dominant right hand. The Arbitrator gives this factor significant weight.

Petitioner was 39 years old at the time of the manifestation. She will have to live with the effects of this injury for the remainder of her working and natural life. The Arbitrator gives this factor moderate weight.

There was no evidence that this injury will have any effect on Petitioner's future earning capacity. The Arbitrator gives this factor moderate weight.

The medical records revealed that Petitioner had right carpal tunnel syndrome which ultimately required surgery. Petitioner still has complaints of pain in the right hand especially when she is typing as well as diminished grip strength. These complaints are consistent with the injury Petitioner sustained. 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

Daniel Allen,

Petitioner,

vs. NO: 14 WC 41878

Skee Masonry,

16IWCC0014

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

The Petitioner worked forty hours in two weeks for the Respondent before his work accident. During that time, he was working as a union employee under a collective bargaining agreement through the Murphysboro Chapter of the Bricklayers and Allied Craftworkers International Union Local 8 of Illinois. It dictated that his standard work week was forty hours long and consisted of five, eight hour work days. The Petitioner's hours were reduced during the two weeks prior to the accident through no fault of his own.

The Commission agrees with the Arbitrator's analysis for calculating the Petitioner's average weekly wage, including his reference to Sylvester v. Indus. Comm'n (Acme Roofing & Sheet Metal Co.), 197 Ill. 2d 225 (Ill. 2001). In Sylvester, the Court discussed the four (4) methods by which the Average Weekly Wage is to be calculated, pursuant to Section 10 of the Act. Here, the Petitioner only worked for the Respondent for a period of two (2) weeks, prior to

16IWCC0014

his date of accident. Accordingly, of the methods of calculation listed in Section10, the third (3rd) method of calculation is most appropriate.

The 3rd method of calculation found in Section 10 of the Act states: "Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed."

In the case at bar, the Respondent and Petitioner were covered by a collective bargaining agreement, which set forth the requirements for a work week. Here the work week was forty (40) hours per week. We concur with the arbitrator as to his assessment that the time actually worked constituted one week of work and that the actual earnings should be used as a basis for the calculation.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $8,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 6 - 2016

TJT/ gaf
O: 11/9/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

ALLEN, DANIEL
Employee/Petitioner

Case# **14WC041878**

SKEE MASONRY
Employer/Respondent

16IWCC0014

On 4/2/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4689 HASSAKIS & HASSAKIS PC
JOSHUA A HUMBRECHT
206 S 9TH ST SUITE 201
MT VERNON, IL 62864

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
PO BOX 1545
MT VERNON, IL 62864

16IWCC0014

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)

Daniel Allen
Employee/Petitioner

v.

Skee Masonry
Employer/Respondent

Case # **14** WC **41878**

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 **Herrin**, on **February 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 and average weekly wage?
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

16IWCC0014

FINDINGS

On the date of accident, **October 14, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**1,186.80**; the average weekly wage was $**1,186.80**.

On the date of accident, Petitioner was **54** 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 $**6,738.92** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**6,738.92** as of March 10, 2015.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $791.60/week for 19 weeks, commencing 10/29/2014 through his release, as provided in Section 8(b) of the Act. From October 29, 2014 through March 10, 2015, 133 days, or 19 weeks have elapsed, resulting in TTD benefits in the amount of $15,040.32 owed to Petitioner as of March 10, 2015, less credits addressed below.

Respondent shall be given a credit for temporary total disability benefits that have been paid weekly in the amount of $354.68 commencing on October 29, 2014. Through March 10, 2015, 133 days, or 19 weeks elapsed resulting in credit in the amount of $6,738.92 as of March 10, 2015. Respondent shall receive credit for any weekly payments following March 10, 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.

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

3/27/15
Date

ICArbDec19(b)

APR 2 - 2015

16IWCC0014

STATE OF ILLINOIS)
)
COUNTY OF HERRIN)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 19(B)

Daniel F. Allen
Employee/Petitioner

v.

Skee Masonry
Employer/Respondent

Case # **14** WC 41878

Consolidated cases: **N/A**

FINDINGS OF FACT

Petitioner Daniel C. Allen filed his Application for Adjustment of Claim alleging he sustained injuries to his right shoulder and other body parts while employed with Respondent, Skee Masonry on October 14, 2014. At the time of his injury, Petitioner was employed with Respondent for just over two weeks serving as a union bricklayer on this particular job.

Petitioner testified that on Tuesday, October 14, 2014, he was working backwards spreading mortar along scaffolding when he went through a hole in the top of the scaffolding, causing him to fall and catch himself with his right arm. Petitioner had an immediate onset of pain related to his right shoulder. He sought treatment and on October 29, 2014 Petitioner was taken off work due to his work injuries. Thereafter, Petitioner began receiving weekly TTD from Respondent based on an average weekly wage of $532.02 and corresponding TTD rate of $354.68. The Arbitrator notes that at the time of hearing, Respondent's stipulated to an AWW of $893.79 and corresponding TTD rate of $596.16 and offered no evidence to support its prior calculation of $532.02.

Petitioner testified he is a union bricklayer through the Bricklayers and Allied Craftworkers International Union. Petitioner entered into evidence Px 7 and Px 8, which are the Bricklayers and Allied Craftworkers International collective bargaining agreements. Petitioner almost exclusively works through the Effingham, Illinois chapter and subject to the terms outlined in Px 8. However, Petitioner was working through the Murphysboro, Illinois chapter at the time of his injury and on that particular job was subject to the terms outlined in Px 7.

Px 7 and 8 set for the terms of his employment through the Bricklayers and Allied Craftworkers International. Both collective bargaining agreements set forth a standard work week, which consists of Monday through Friday, with each day representing an 8 hour workday. (See Px. 7 & 8) Petitioner's paystubs with Respondent show that in the two weeks prior to his injury he worked 24 hours one week and 16 hours another week. Further, Petitioner placed into evidence paystubs following the date of injury of October 14, 2014 which show Petitioner worked a forty hour week for respondent following his injury. (Px 9).

Prior to his work injury on October 14, 2014, Petitioner earned two full paychecks with Skee Masonry. His first check was paid on 10/2/2014 showing 24 hours of work, 3 days, and represented wages for the week of 9/26/2014 – 10/2/2014. During his second week of work, 10/3/2014 – 10/9/2014 he worked only two days with 16 hours of earnings. He further testified that while on this job in the two weeks prior to his injury there was rain that prevented Petitioner from working a full work week prior to his injury and issues with the employer having supplies on the job. Petitioner testified that but for the delays with the weather and the equipment, he would have worked a forty (40) hour week.

Petitioner admitted into evidence climatological data from the National Oceanic Atmospheric Administration for October, 2014 which confirmed Petitioner's testimony that there was significant rain from October 3, 2014 through

October 10, 2014 in further support that the weather prevented the work from being performed. (Px 6). The NOAA precipitation table for October, 2014 shows that for the town of Mt. Vernon, Illinois, the rainfall was as follows:

Friday, October 3, 2014	3.35 inches;
Saturday, October 4, 2014	0.07 inches;
Sunday, October 5, 2014	No Rain;
Monday, October 6, 2014	0.18 inches;
Tuesday, October 7, 2014	0.20 inches;
Wednesday, October 8, 2014	No Rain; and
October 10, 2014	0.10 inches.

Petitioner admitted into evidence Px 5, consisting of a cover sheet summarizing his earnings for multiple employers, including Respondent, in the 52 weeks prior to his work injury, as well as the corresponding paystubs for the 52 weeks. Based on Petitioner's status as a union bricklayer, he has worked for multiple different employers in the 52 prior to his October 14, 2014 incident.

In *Sylvester v. Industrial Commission*, 197 Ill.2d 237, (2001), the Illinois Supreme Court cited four methods for determining the average weekly wage of an employee. (1) Average weekly wage is actual earnings during the 52-week period preceding the date of injury, illness or disablement, divided by 52. (2) If the employee lost five or more days calendar days during that 52-week period, "whether or not in the same week," then the employees earnings are divided not by 52, but by "the number of weeks and parts thereof remaining after the time so lost has been deducted." (3) If the employee's employment began during the 52-week period, the earnings during employment are divided by "the number of weeks and parts thereof during which the employee actually earned wages." (4) Finally, if the employment has been of such short duration or the terms of employment of such casual nature that it is "impractical" to use one of the three above methods to calculate average weekly wage, "regard shall be had to the average weekly amount which during the 52 weeks previous to the injury, illness or disablement was being or would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer."

In *Peoria Roofing and Sheet Metal Co. v. Industrial Comm'n, et. al.*, 181 Ill.App.3d 616,620, 130 Ill.Dec. 314, (1989) the court held that "one day is, in fact, only a fraction of a work week." *Peoria Roofing*, 181 Ill.App.3d at 620. Further, in *Greaney v. Industrial Commission, et. al.*, 358 Ill.Appp.3d 1002, 295 Ill.Dec 180, (1st Dist. 2005) the Court was faced with calculation of an AWW for a worker with only 59 actual days worked in 17 weekly pay periods, it stated, "the number of days that a claimant worked prior to his injury should be divided by the number of days in a full workweek to arrive at the 'number of weeks and parts thereof' by which the claimant's pre-injury wages are to be divided. *Greaney*, 358 Ill.App.3d at 1018.

In *Buscemi v. Arthur Bonilla d/b/a Art Works*, 06 WC 1072, 09 IWCC 1278, (2009) the Commission was faced with a very similar situation. In *Buscemi*, the Petitioner was a union painter that did not consistently work forty hours per week. Following a 19(b) Petition, the Arbitrator took that petitioner's actual earnings and then divided by the number of weeks in which Petitioner had any earnings, resulting in an AWW of $499.39. On Appeal, the Commission, noted its application of the third method discussed in *Sylvester*, and divided the earnings by the actual number of weeks and parts thereof Petitioner had any earnings, resulting in the Commission increasing Petitioner's average weekly wage to $1,005.64, consistent with the Illinois Supreme Court's holding in *Sylvester*.

In the case at bar, Petitioner worked five days in two pay periods prior to sustaining injuries. He testified that he started working for Respondent in the middle of Respondent's standard pay period. He further testified that between rain and materials not being ready, there were several days in the two week period in which no work was completed. His collective bargaining agreement sets forth the standard work day and work week as being 8 hours per day, five days per week, with those days being Monday through Friday. (See Px. 7 & 8) Petitioner's actual earnings in the two pay periods preceding his injury were $1,186.80, with a total of 40 hours (5 days) in the two pay periods. The Arbitrator finds that petitioner's earnings were $1,186.80 with Respondent. When the earnings are divided by the 5 actual days worked, or 1 week, it yields an average weekly wage for Petitioner of $1,186.80 and all as consistent with the third method calculated in *Sylvester* and *Buscemi*, cited above.

CONCLUSIONS OF LAW

G. What were Petitioner's earnings and corresponding Average Weekly Wage

The Arbitrator concludes that Petitioner's earnings with Respondent in the 52 weeks preceding his injuries were $1,186.80. Petitioner had forty (40) hours of earnings in the two full weeks preceding his injury. Due to inclement weather and a lack of supplies, Petitioner's work hours were limited through no fault of his own. His collective bargaining agreement establishes his regular work week, which was 8 hours per day, 5 days per week. The Arbitrator concludes Petitioner's average weekly wage is $1,186.80.

L. What temporary benefits are in dispute?

By its own stipulation, Respondent has acknowledged it has substantially underpaid benefits to Petitioner. In light of the conclusions in regards to Petitioner's earnings and average weekly wage, the Arbitrator concludes that Petitioner shall be paid at a TTD rate of $791.60 commencing October 29, 2014 and until such time as Petitioner is released from his treating physician, or otherwise not entitled to temporary total disability.

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

Richard Brueggemann,

Petitioner,

vs. NO: 12 WC 42758

State of Illinois Menard Correctional Center, 16IWCC0015

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, temporary total disability, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 13, 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: JAN 6 - 2016
TJT:yl
o 12/14/15
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BRUEGGEMANN, RICHARD
Employee/Petitioner

Case# **12WC042758**

10WC047285
12WC040657

MENARD CORRECTIONAL CENTER
Employer/Respondent

16IWCC0015

On 1/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

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

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

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

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

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

JAN 13 2015

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

16IWCC0015

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

Richard Brueggemann
Employee/Petitioner

v.

Menard Correctional Center
Employer/Respondent

Case # 12 WC 42758

Consolidated cases:
10-WC-47285 & 12-WC-40657

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin, IL**, on **October 9, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0015

FINDINGS

On **11/01/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**78,228.00**; the average weekly wage was $**1,504.38**.

On the date of accident, Petitioner was **57** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit for all TTD/TPD and all other benefits previously paid.

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

ORDER

Because Petitioner failed to sustain his burden of proof on accident, notice, and causation, benefits are denied. All other issues are rendered moot.

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

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

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

Signature of Arbitrator

1/8/15
Date

JAN 13 2015

Richard Brueggemann v. Menard Correctional Center

IWCC Nos. 10-WC-47285; 12-WC-40657; 12-WC-42758

16IWCC0015

The Arbitrator finds the following facts:

Petitioner filed three applications for adjustment of claim with the Illinois Workers' Compensation Commission. On November 17, 2010, Petitioner alleges that he sustained injuries to his right and left hands and right and left arms due to repetitive trauma while employed at Menard Correctional Center. This case was assigned 10-WC-47285. On July 11, 2012, Petitioner filed an amended Application for Adjustment of Claim for this date of accident, now alleging repetitive trauma injuries to his right and left hands; right and left arms/elbows; right and left shoulders; body as a whole. On August 30, 2012, Petitioner alleges that he sustained accidental injuries to his bilateral shoulders due to lifting a garage door. This case was assigned 12-WC-40657. On November 1, 2012, Petitioner alleges that he sustained accidental injuries to his left shoulder when he stepped on a mouse. This case was assigned 12-WC-42758. The cases were consolidated and were heard before Arbitrator Edward Lee on October 9, 2014. The issues in dispute in all three cases included accident, notice, causal connection, medical, temporary total disability benefits, and nature and extent.

Petitioner began employment at Menard Correctional Center in May 5, 1978, as a correctional officer. Petitioner testified that he worked as a correctional officer for 8 ½ years. Petitioner testified that he became a supply supervisor I. Petitioner testified that he worked as a supply supervisor I for one year. He then transitioned to a supply supervisor II, which he worked for 18 ½ years. Then, he became a supply supervisor III. Petitioner testified that his current position at Menard Correctional Center is as a supply supervisor III.

Petitioner testified that he owns his own lawn and tree trimming business. He has been mowing lawns for 36 years. Petitioner testified that he has a riding lawnmower and self-propelled push mower. He also testified that he uses a 13 lb. chainsaw to do the tree trimming. He testified that he does all the tree climbing himself. Petitioner testified that he does this work after he gets off at the prison. Petitioner testified that he does tree trimming from October to March. He does lawn mowing from April to late October.

On November 17, 2010, Petitioner presented to Dr. David Brown at The Orthopedic Center of St. Louis. He was a 55 year old right hand dominant supply supervisor at Menard. He presented for evaluation and treatment for a problem with both his upper extremities. He explained he worked for the Illinois Department of Corrections since May of 1978. He works 7 ½ hours a day, 37 ½ hours a week. His job entailed repeatedly turning keys throughout the day, lifting supplies that weigh up to 50 pounds, doing handwritten reports and working on the computer. Petitioner explained that he had a two year history of pain and numbness in both his hands. He had worn a splint with no improvement in his symptoms. Past medical and surgical history was significant for a surgery on his right distal forearm in the past and after that he noticed loss of function of his thumb. Petitioner reported a history of high blood pressure. Examination revealed a scar over the right forearm from his previous surgery. He had good active range of motion of both extremities. He had a mildly positive Tinel's sign over the ulnar nerve at the right and

left cubital tunnels. Direct compression test and elbow flexion test were negative bilaterally. He had a mildly positive Tinel's sign over the right and left carpal tunnels. Direct compression/Phalen's test was positive bilaterally. Two point discrimination was 5 to 6 mm in the digits of both hands. He had loss of FPL function to the thumb and FDP function to the index finger on the right from his old injury. There was no obvious atrophy. He had intrinsic weakness. Grip strength: three trials right 26, 22, 25; three trials left 42, 43, 47. Key pinch: three trials right 6, 7, 6; three trials left 13, 13, 14. Dr. Brown noted that Petitioner had symptoms and findings on examination consistent with significant bilateral carpal tunnel syndrome, possibly a component of cubital tunnel syndrome. Dr. Brown recommended detailed nerve conduction studies of both upper extremities. In the meantime, Petitioner was given Titan wrist splints to wear over both his elbows at night. Nonsteriodal anti-inflammatory medication was also recommended. Dr. Brown opined that "[b]ased on Mr. Brueggemann's job description, combined with his duration of exposure to those activities, combined with his lack of medical problems that would put him at risk for a peripheral compression neuropathy I do believe his work for the Illinois Department of Corrections since 1978 would be considered in part an aggravating factor in the need for evaluation and treatment for carpal tunnel syndrome and cubital tunnel syndrome." Petitioner was to continue to work full duty, no restrictions. Dr. Brown authored an addendum after reviewing the nerve conductions duties by Dr. Daniel Phillips. The studies revealed electrodiagnostic evidence consistent with severe bilateral carpal tunnel syndrome, milder bilateral cubital tunnel syndrome. Dr. Brown's impressions were: severe bilateral carpal tunnel syndrome, chronic bilateral cubital tunnel syndrome. Due to the chronicity and severity of his compression neuropathies Petitioner was a candidate for surgical intervention.

On November 17, 2010, Petitioner underwent a nerve conduction study at Neurological & Electrodiagnostic Institute, Inc. performed by Dr. Daniel Phillips. Petitioner reported a complex history with his right upper extremity. In 1993, he fell out of a tree and sustained loss of right thumb flexion. In March 1993, he underwent a right distal flexor forearm surgery to repair a ruptured tendon, which wasn't found. Shortly later he underwent surgery on the right proximal flexor forearm presumably to decompress his anterior interosseous nerve. Petitioner reported he had a 70% loss of thumb function. Over the last 2 years, he described sharp/aching bilateral hand pain with global right hand numbness and preferentially involving the left third fourth and fifth fingers. Petitioner reported numbness and weakness in his arms. Physical examination revealed Petitioner to be 5'7", weighing 209 lbs. Petitioner exhibited a positive Tinels' sign at the left cubital tunnel. The right proximal flexor forearm longitudinal surgical scar was noted. There was a large adjacent lipoma. There was no tenderness over the lateral epicondyles. Petitioner exhibited positive Phalen's and Tinel's signs at the carpal tunnels. On the right side, Phalen's maneuver refers pain to his shoulder and reduplicates the totality of his symptoms. There is loss of right FPL and FDP function to the index finger. The studies revealed rather severe bilateral sensory motor median neuropathies across the carpal tunnels with sensory axonal involvement. There were mild bilateral ulnar neuropathies across the elbows. The physical exam was consistent with an old right anterior interosseous neuropathy.

On November 19, 2010, Richard Pautler, Business Administrator, completed a CMS Supervisor's Report of Injury or Illness. He reported that Petitioner supervises the stores, warehouse, and commissaries of

Menard Correctional Center. Petitioner had been in his current job for 5 years. His previous job titles included correctional supply supervisor II, correctional supply supervisor II, and correctional officer for 27 years. Petitioner reported to him an accident of November 17, 2010, when Petitioner had a nerve conduction test and was advised that he had carpal tunnel syndrome in both wrists and elbows.

On November 19, 2010, Richard Pautler, Petitioner's direct supervisor and the Business Administrator at Menard Correctional Center completed a CMS Demands of the Job on Petitioner. He noted that Petitioner used his hands for gross manipulation 0-2 hours per day and used his hands for fine manipulation 0-2 hours per day. In addition, Petitioner lifted 1-10; 11-20; 21-30; and 31-40 lbs. less than three times per week. Petitioner lifted 41-50; 51-60; 61-70; 71-80; 81-90; and 91-100 lbs. less than three times per month.

On December 1, 2010, Petitioner completed a CMS Workers' Compensation Employee's Notice of Injury. He reported a date of accident of November 17, 2010. Petitioner reported that he had sought medical treatment with Dr. David Brown, but he did not have the results back yet. Petitioner reported he was performing the duty of a correctional supply supervisor III at Menard Correctional Center turning keys, opening locks, writing reports, rapping bars as a correctional officer, opening doors. He described his injuries as bilateral cubital tunnel syndrome and bilateral carpal tunnel syndrome.

On January 12, 2011, Petitioner presented to Dr. James Krieg complaining of discomfort in both right and left hands, right being side-effects worse. Petitioner had been previously diagnosed with carpal tunnel syndrome. He saw Dr. Brown, surgeon in the St. Louis area, and he had him scheduled for repair in February. However, since this is workers' comp there are some potential problems with this. His file had been put on hold, and he is not certain as to when that is going to occur and wonders about pain relief. Examination revealed good muscle strength in the hand with no thenar atrophy. Petitioner had a negative Tinel's and Phalen's. Petitioner was assessed with carpal tunnel syndrome by history. He was given Lortab for pain.

On November 1, 2011, Petitioner's wife called Dr. Krieg's office requesting refill of pain medication for carpal tunnel. It was noted that Petitioner was given a prescription for Lortab last filled on 09/28/11. Dr. Krieg did not refill the Lortab. He noted that this is not the thing for CTS. He was given splints and Naproxen.

On November 2, 2011, Petitioner's wife called Dr. Krieg's office. She reported that Petitioner could not stand to wear splints. She wanted Lortab refilled. An appointment with Dr. Krieg was given on November 3, 2011.

On November 3, 2011, Petitioner presented to Dr. Krieg. He continued to complain of bilateral wrist, hand, and arm discomfort. Workers' comp has his evaluation in progress. He has been seen by the surgeon already, and the surgery was recommended, but the State is investigating this further. Splints do not seem to help much, but Lortab does and gives him enough relief that he can rest at night. Petitioner exhibited tenderness at both wrists extending up toward the elbows and forearms. ROM was adequate, but his strength and mobility were impaired. Petitioner was assessed with bilateral wrist, hand, and arm discomfort, possibly nerve entrapment syndrome. Petitioner was given a refill of Lortab.

On December 1, 2011, Dr. Anthony Sudekum of Missouri Hand Center completed a records review on Petitioner. Dr. Sudekum opined that based on the medical records Petitioner had a large lipoma adjacent to the right forearm surgical incision, which would place it in close proximity to the right median nerve. Lipomas are a known cause of compression neuropathies. The pre-existing severe posttraumatic right median neuropathy as well as the large lipoma in the volar forearm are both potentially important and relevant factors which should be taken into consideration when evaluating Petitioner's right upper extremity complaints and symptoms. Dr. Sudekum noted that Petitioner had some significant non-work-related risk factors that could predispose him to the development of carpal and/or cubital tunnel syndrome including his age over 55 years and comorbid conditions including obesity and hypertension. These factors significantly increased Petitioner's risk for development of upper extremity peripheral neuropathies. Petitioner also suffered from a chronic median neuropathy on the right side as well as right forearm lipoma, which could potentially cause compression of the median nerve in the right forearm, which could contribute to his constellation of neuropathic symptoms in his right upper extremity. Dr. Sudekum noted that there was no indication in the median records where Petitioner complained of or noticed any carpal or cubital tunnel symptoms prior to November 2008, and there was no indication that he complained of carpal or cubital tunnel symptoms while he was employed as a correctional officer at Menard prior to becoming a Corrections Supply Supervisor. Dr. Sudekum noted that according to Dr. Brown's notes, Petitioner's symptoms began two years prior to presentment (i.e. 2008) when Petitioner was employed as a Corrections Supply Supervisor III. Dr. Sudekum noted that the job from the information he received and the DVD/video that he viewed, did not appear to involve any significant strenuous manual activity. Dr. Sudekum noted that a potentially provocative job or work activity that may have been performed in the distant past, should not be considered a causative or aggravating factor I the etiology of a work-related repetitive/cumulative trauma condition, unless that individual presented with significant symptomatology at or near the time when the activity was being performed in the past. Dr. Sudekum opined that if an employee ceases to perform a potentially provocative job activity, but then subsequently develops symptoms of a repetitive trauma injury months or years after cessation of the potentially provocative job, then the prior potentially provocative job would not normally be considered a causative or aggravating factor in the etiology of the current condition or injury. Dr. Sudekum noted that he visited and toured Menard Correctional Center, where he observed many and performed some of the manual tasks and activities performed by Supply Supervisors there including manual keying to open locks, opening and closing doors, and record keeping, logging, and paperwork. Dr. Sudekum noted that the primary tasks and/or duties assigned to Correctional Supply Supervisors III at the Menard Correctional Center included observation and supervision of inmates and other DOC employees. The primary manual activities of Correctional Supply Supervisors III are intermittent and non-strenuous and included keying to open doors and padlocks, handling items such as radios, telephones and keys as well as clerical tasks including handwriting, making logbook and order entries as well as filing and light computer work. Dr. Sudekum did not identify any significant or sustained repetitive impact to the hand, repeated heavy gripping, grasping, or pounding with the hand, use of vibratory tools or abnormal sustained wrist or elbow postures involved in the job of a Correctional Supply Supervisors II at Menard Correctional Center. Dr. Sudekum opined that Petitioner first became symptomatic for carpal and/or cubital tunnel syndrome in 2008, while he was employed as a Supply Supervisor III, a job that was not manually intensive, strenuous

or repetitive. He did not feel that Petitioner's prior employment as a Correctional Officer at Menard Correctional Center caused, contributed or aggravated his carpal or cubital tunnel conditions or symptoms. Dr. Sudekum opined to a reasonable degree of medical certainty that Petitioner's job duties at Menard Correctional Center did not cause or aggravate carpal and/or cubital tunnel syndrome or affect his need to undergo treatment for same based upon his review of job descriptions, JSA, videos, medical records, and his tour of Menard Correctional Center.

On January 4, 2012, Petitioner called Dr. Krieg's office requesting a referral to see Dr. Young for CTS. It was noted that Tom Rich was Petitioner's attorney. Dr. Krieg said okay on 01/04/2012. Dr. Young referral faxed on 01/05/2012.

On February 17, 2012, Petitioner called requesting his records be faxed to SIOC—Dr. Young. Also, Dr. Young never received referral.

On March 5, 2012, the deposition of Dr. Anthony Sudekum, a hand and upper extremity specialist, was taken. He opined to a reasonable degree of medical certainty that Petitioner's bilateral carpal tunnel syndromes and bilateral cubital tunnel syndromes were not caused or aggravated by his job duties as a supply supervisor or his previous job as a correctional officer.

On April 20, 2012, Petitioner presented to Kevin Rainey, PA-C at Southern Orthopedic Associates, S.C. Petitioner completed a Patient Questionnaire. He reported he was 5'7", weighing 210 lbs. He reported he was referred by Tom Rich Attorney. Petitioner reported his right and left wrists, elbows and shoulders hurt for 8 years. He reported he did not know how this happened. He reported the severity of pain as a 10. He reported the pain as sharp and throbbing. He reported symptoms day and night. He reported associated symptoms of giving way, numbness, and radiating pain. He reported that his symptoms lessen when holding his arms by his side. He reported undergoing nerve conduction studies in the past. Petitioner reported about 8 years ago, he was involved in an accident in which a tree fell on his right upper extremity injuring his right upper extremity. He stated he had an open area in which he was taken to Barnes for reconstructive surgery. He stated since then he has developed numbness and tingling to his bilateral upper extremities. He had NCVs in the past which were significant for severe carpal tunnel and mild ulnar nerve neuropathy. The last NCVs that they had were in 2010. Petitioner stated his symptoms had much progressed since then and he has more numbness and tingling pain. He stated his pain was sharp and throbbing, 8 during the day and worst at night. He was giving way sensation, radiating pain in his right upper extremity. Past medical history was significant for hypertension. Surgical history was significant for reconstructive surgery of his right upper extremity after a tree incident. Review of systems was significant for numbness and tingling to bilateral upper extremities, weakness in bilateral upper extremities. There were well-healed incisions on the right upper extremity at the volar aspect of his right wrist and in the forearm. He had full movement of his bilateral upper extremities at the elbows into flexion, extension, wrist flexion, extension, supination, pronation, ulnar and radial deviation. He can make a full fist, extend his fingers past neutral. Grip strength was 5.5 on the right, grip on the left was 15.0. pinch on the right was 5.0, pin on the left was 2.5. Petitioner exhibited a positive Tinel's, positive Neer compression test at both wrists, and positive Tinel's at both cubital tunnels. NCVs of bilateral upper extremities in 2010 were consistent with severe

bilateral median neuropathy and mild bilateral ulnar neuropathy. PA Rainey assessed Petitioner with bilateral carpal tunnel syndrome, mild ulnar nerve neuropathy. Petitioner's symptoms had progressed, having more pain and numbness in his bilateral upper extremities especially at the elbows. Dr. Young recommended repeat NCVs of the bilateral upper extremities. The clinic notes from this examination revealed Petitioner had pain in bilateral elbows, shoulders and hands. He reported numbness to the whole hand. He reported having to sleep in a chair, can't lie down. He reported he drops a lot, can't pick up. He reported these symptoms have been for 8 years. He reported he uses Biofreeze to relieve pain. The braces did not work.

On April 20, 2012, Petitioner underwent a nerve conduction test at Rehabilitation Institute of Chicago performed by Dr. Brent Newell. Petitioner reported numbness and weakness in both hands. Petitioner reported pain with use of the arms. Petitioner reported radiation of symptoms to his shoulders. Petitioner had a history of previous problems with his nerves. Past medical history was significant for hypertension. The electrodiagnostic study revealed evidence of a moderate bilateral median neuropathy at the wrist (carpal tunnel syndrome) affecting sensory and motor components. There was no evidence noted on examination of ulnar neuropathy at the elbow, radial neuropathy, brachial plexopathy, or cervical radiculopathy.

On May 3, 2012, Petitioner returned for follow up after a nerve conduction study was performed. It showed moderate bilateral carpal tunnel syndrome. There was no evidence of ulnar neuropathy at the elbows. Petitioner had a positive Tinel's and positive median nerve compression test bilaterally, as well as a mildly positive Tinel's and ulnar nerve compression test bilaterally. He does have full range of motion of both elbows to include flexion and extension. He does have full range of motion of both wrists to include flexion, extension, pronation, supination, and radial and ulnar deviation. He was able to make a complete fist with both hands and extend to all the fingers past neutral. At this time, it was explained to the patient that they would suggest bilateral carpal tunnel releases. He stated he was under the impression he was there for a second opinion. He was going to get in contact with his lawyer to find out where he goes from here.

On May 31, 2012, Petitioner called Dr. Krieg's office requesting a referral to see Dr. Mirley for carpal tunnel. Dr. Krieg Okayed this. An appointment was scheduled for July 13, 2012, at 10:00 a.m.

On July 12, 2012, Petitioner called Dr. Krieg's office requesting a referral to Dr. Haueisen in South County instead. Dr. Mirly doesn't do elbows. An appointment was made for July 26, 2012, at 1:05 p.m.

On July 26, 2012, Petitioner presented to Premier Care Orthopedics and Sports Medicine and was seen by Dr. David Haueisen. He presented with bilateral hand pain, left shoulder pain, left elbow pain. Petitioner was 56 years old, right handed, 5'7" 215 lbs. He reported being a supply supervisor at an Illinois prison. He was seen for evaluation of bilateral hand, elbow, and shoulder pains. Petitioner reported he developed symptoms of numbness and tingling in both hands, and later saw Dr. David Brown. Nerve conduction studies apparently showed carpal tunnel syndrome. The studies were not available for review. Petitioner appeared to have been scheduled for bilateral carpal tunnel releases, but it was then felt that his job was not repetitive enough to qualify him for a carpal tunnel release

through the workers' compensation channels. He has now obtained legal representation. Petitioner notes his current job was as a supply supervisor III, involving mainly computer work and writing reports. In the past he has done various other activities, such as multiple lifting of boxes and unloading trucks. He apparently worked in various supply supervisory capacities over the past thirty ears. Dr. Haueisen did not have a list of his prior job responsibilities or activities. Petitioner noted an increased numbness felt in his hands when riding his bicycle. The numbness involved all of the fingers. Petitioner also complained of pains about the posterior aspects of both elbows, particularly when he lets the elbows rest down on firm surfaces. Petitioner also reported complaints about both shoulder girdles with overhead arm use. Dr. Haueisen discussed with Petitioner that if this is now a legal issue, if he has ongoing shoulder problems, he would refer him to one of the shoulder specialists in the group. Petitioner reported significant right arm trauma from some kind of tree injury in 1993. Petitioner reported his symptoms were worse with writing, pulling or pushing, or lifting. He felts better if he applies Max Freeze at night. He tried wearing a wrist splint which has also helped slightly. Past medical history was significant for hypertension. Physical examination revealed both of Petitioner's hands to have normal sensation to light touch. There was no thenar weakness or atrophy bilaterally. Tinel's test was 2 to 3+ positive over the median nerves at the wrist flexion creases bilaterally. Phalen's test was 2+ positive bilaterally. Petitioner's right thumb had a well-healed volar zig-zag incision extending from the pulp all the way back across the MCP joint flexion crease, apparently from prior exploration of the thumb FPL tendon. In addition, there was a longitudinal incision in the carpal tunnel region, presumably from where they opened the wrist to look for a retracted thumb flexor tendon. It was not clear if Petitioner had a complete carpal tunnel release performed at that time. Petitioner still did not seem to be able to properly flex the right thumb at the IP joint. Dr. Haueisen noted that Petitioner's grip seemed abnormally low, and there may be some lack of effort. Petitioner was assessed with carpal tunnel syndrome and pain in joint involving upper arm. Dr. Haueisen wanted to obtain Petitioner's old nerve conduction studies to see the severity of his median nerve compression. He noted that work causation was a gray area. Dr. Haueisen noted that Petitioner did not seem to have any significant risk factors as far as diabetes, rheumatoid arthritis, thyroid disease, or history of smoking. However, he was in the typical age group where carpal tunnel syndrome can be seen on an idiopathic basis. He is somewhat overweight which is also a risk factor. They discussed that Petitioner may have already had carpal tunnel release on the right side, where he had exploration for the possible FPL tendon rupture. They discussed that if he had already had a carpal tunnel release on the right side, a repeat release would likely not be effective. They would try to obtain his old operative note to see exactly what was done.

On August 8, 2012, Petitioner presented to Dr. Dennis Dusek at Premier Care Orthopedics and Sports Medicine on a referral from Dr. Haueisen for his bilateral shoulders. Dr. Haueisen was treating Petitioner for his hand and elbow problems, but would like Dr. Dusek to evaluate his shoulders. Petitioner reported he worked as a supply supervisor at Menard Correctional Facility. Petitioner has at other time over the years though, done more vigorous work requiring his arms and hands. He reported pain in both shoulders, anteriorly, as well as down both arms at the elbows and into the hands. He had previously seen Dr. David Brown in Chesterfield, who had done a nerve conduction study. Petitioner reports that after this study, he was told he needed a carpal tunnel release as well as elbow and shoulder surgery. However, he was trying to get this covered by State due to his job, and they

apparently cancelled the surgery and sent him for a second opinion. They then thought his job was not a contributing factor in the symptoms he was having. At any rate, he reported pain been going on for the last year and a half. He denied any particular injury. He reported his hand pain, as well as the numbness in his hand started before the shoulder. Petitioner denied any neck pain. He had numbness and tingling though, as well as weakness. It is worse with reaching his shoulder overhead or with holding the steering wheel while driving or riding his bicycle. Petitioner reported he is unable to sleep due to the pain in his shoulders, as well as his arms and hands. Petitioner pointed to anterolateral shoulder pain. He tried Biofreeze without relief. He denied any injections or shoulder x-rays. He could not tolerate Vicodin due to constipation. Past medical history revealed clavicle and scapula fracture, and hypertension. Past surgical history included a lower arm tore nerves apart on the right in 1993 and right thumb surgery in 1993. Employment history was noted to be a supply supervisor I. Physical examination revealed no evidence of distal biceps rupture, nor any proximal long head biceps rupture in either shoulder. He was able to actively flex the right shoulder to only 90 degrees, and on the left only 95 degrees. Passively, he could go to 150 degrees bilaterally, with significant pain. Cross body adduction did not provoke the AC joint, and there was no AC joint tenderness. Petitioner had grossly positive impingement signs bilaterally. Petitioner pointed anterolaterally in the subacromial space when asked to localize the pain. Belly press sign was negative bilaterally. Petitioner maintained excellent strength of internal and external rotation bilaterally, as well as forward flexion. He also maintained excellent strength of his biceps and triceps bilaterally. He had 2+ brachial and radial pulses. X-rays of the bilateral shoulders were ordered. The x-rays failed to show any evidence of fracture, dislocation, or subluxation. There was no glenohumeral joint narrowing in either shoulder. He did have narrowing of both AC joints without osteophyte formation. There was ossification off of the right greater tuberosity. He had a Type I acromion on the outlet view bilaterally. Dr. Dusek ordered MRIs of the bilateral shoulders.

On August 13, 2012, Petitioner underwent a MRI of the right shoulder which revealed the following: 1) full thickness defects of the supraspinatus and infraspinatus tendons with accompanying diffuse cuff tendinosis/tendionpathy; 2) glenohumeral joint space narrowing with degenerative labrum. Nondisplaced obliquely oriented tear posterosuperiorly; 3) longitudinal split tear of the long head biceps with large tendon sheath effusion; and 4) degenerative and inflammatory changes of the acromioclavicular joint likely contributing to a component of impingement/outlet stenosis.

On August 13, 2012, Petitioner underwent a MRI of the left shoulder which revealed the following: 1) distal supraspinatus and subscapularis tendinosis/tendinopathy with full thickness defect of the distal anterior supraspinatus tendon. High grade partial thickness to focal full thickness tear of the superior subscapularis, no significant retraction; 2) moderate glenohumeral degenerative change without definite displaced labral tear; 3) low lying acromion with mild degenerative and inflammatory AC joint changes. Question impingement/outlet stenosis; and 4) intact biceps tendon with tendon sheath effusion, suggesting peritendinitis/tenosynovitis.

On August 30, 2012, Petitioner returned to Dr. Dusek concerning his shoulders. They had the MRI results. The right shoulder shows a full thickness defect of the distal supraspinatus and anterior infraspinatus tendons and this was a complete thickness tear. The left shoulder showed a full thickness

tear of the distal supraspinatus tendon without significant retraction. There was some mention of a possible high grade to focal full thickness tear of the superior subscapularis as well on the left. It is the right shoulder that bothers him the most. As they spoke in detail about the onset of his symptoms, Petitioner told Dr. Dusek that the right shoulder, and to a lesser extent the left shoulder, started bothering him somewhere around the end of 2010 and that he filed a report at his work at the Correctional Center in February 2011. He states that his work over the last 6 years is involved heavily in the commissary. He loads and unloads trucks. When the prison is on "lock" he has to do all the work himself. He has to normally allow prisoners through a series of old heavy antiquated steel doors by using chains on cogwhells. Prior to six years ago, he had worked in the cold storage meat locker lifting 60-70 pound boxes. During deadlock, he would do this himself and other times he would supervise the prisoners. However, Petitioner also advised Dr. Dusek that he thought he had mentioned before, that he simultaneously works as a tree trimmer involving the use of a 13 pound chainsaw. There had been a serious accident back in 1993 when he was tied off to a limb, the limb broke out of the tree and he fell about 40 feet. However, at that time, he had no symptoms referable to his shoulders as he now reports. Petitioner confirmed that his pain in his shoulders especially the right, began in late 2010. Petitioner was assessed with a shoulder complete rupture of rotator cuff. Dr. Dusek recommended arthroscopic rotator cuff repair to both shoulders. Dr. Dusek notes that they would have to get resolution as to whether this was a work-related incident or not. Petitioner had retained an attorney and there may be some time before this is clarified. Dr. Dusek recommended that the right shoulder be done first.

On September 5, 2012, Petitioner completed an "Incident Report". He reported that on August 30, 2012, he had an appointment with Dr. Dusek and he set me an appointment to get an MRI done. Dr. Dusek informed him that they would need to make another appointment to go over the results. Dr. Dusek told him that he had four tears in his right rotator cuff and two in his left rotator cuff. Petitioner reported his job duties are to supervise inmates when unloading trucks and taking trash out. Petitioner noted that the garage door that he has to open is metal that rolls up when you pull on a chain. He had been doing this for approximately seven years. Petitioner noted that this reports goes with the previous report that he filed approximately two years ago.

On November 2, 2012, Petitioner completed a CMS Workers' Compensation Employee's Notice of Injury. He reported that on November 1, 2012, he was sweeping the floor in the store room in the commissary with a push broom. A mouse came out from under a skid. He tried to kill the mouse with but it jumped over the broom. He stepped on the mouse, slipped and fell on the pallet jack. He reported that he injured his right and left shoulders. Petitioner reported that Doug Sullins witnessed the accident.

On November 2, 2012, Douglas Sullins completed a Workers' Compensation Witness Report. He reported that while rotating stock in the commissary a mouse ran across the floor. Petitioner was trying to kill the mouse. The mouse turned and came at. While Petitioner was back stepping he fell back hitting the pallet jack then the floor. Petitioner stated that he was in pain after laying there for a few minutes and was able to get up.

On November 2, 2012, Richard Pautler completed a CMS Supervisor's Report of Injury or Illness. He reported that Petitioner was trying to kill a mouse with a push broom and fell backwards hitting his left shoulder on the back of the pallet jack. Petitioner described the injury as left shoulder/right arm.

On November 2, 2012, Richard Pautler completed a CMS Demands of the Job for Petitioner. He reported that Petitioner used his hands for gross manipulation 0-2 hours per day and for fine manipulation 0-2 hours per day. In addition, Petitioner lifted 1-10; 11-20; 21-30; and 31-40 lbs. less than three times per week. Petitioner lifted 41-50; 51-60; 61-70; 71-80; 81-90; and 91-100 lbs. less than three times per month.

On November 2, 2012, Petitioner completed an "Incident Report". He reported that on November 2, 2012, Doug Sullins was moving the skids of noodles out so they could put the skids of noodles to the back. As Sullins was moving the last skid, a mouse ran along the wall. Petitioner tried to kill the mouse with a push broom that he was sweeping with. The mouse jumped over the broom so Petitioner started to stomp on the mouse. After stomping several times, Petitioner was moving backwards. He stomped on the mouse and fell back and the back of his left shoulder blade hit the back of the pallet jack. He balanced off of the pallet jack and stuck his right arm out to cat the fall and all of his weight went on the right arm. Petitioner filled out the report so if he did any further damage to his right and left shoulders.

On November 19, 2012, Petitioner returned to Dr. Haueisen for follow-up regarding bilateral carpal tunnel syndrome. Dr. Haueisen reviewed the nerve conduction study from April 20, 2012, which showed evidence of bilateral moderate carpal tunnel syndrome. Petitioner noted that his hands continued to be very symptomatic. He had numbness involving all of the fingers of both hands, right worse than left. Petitioner reported increased numbness when his hands were elevated, such as when driving, and also increased numbness with writing activities. He reported that he does a lot of writing at work. He reported pains that radiate up to the elbows. Grip strength was noted to still be inordinately low, and measured 25 pounds, equal bilaterally. Dr. Haueisen noted that it would be appropriate to go ahead with a carpal tunnel release. Petitioner wanted this to be scheduled after his shoulder arthroscopy.

On November 26, 2012, Dr. Haueisen reviewed Petitioner's operative note of the right hand from 03/02/1994. Petitioner had been unable to flex the thumb at the IP joint. The FPL tendon was exposed at the distal insertion and found to be intact. The FPL tendon was explored proximally at the wrist and found to be intact. A carpal tunnel release was not performed. It was felt that Petitioner likely had inability to flex the thumb on the basis of an anterior interosseous nerve palsy.

On November 30, 2012, Petitioner underwent an arthroscopic right shoulder rotator cuff repair with subacromial decompression performed by Dr. Dennis Dusek at Old Tesson Surgery Center for a right shoulder rotator cuff tear.

On December 11, 2012, Petitioner returned to Dr. Dusek status post right shoulder arthroscopic rotator cuff repair with subacromial decompression 11 days ago. Petitioner reported his shoulder pain was tremendously better. He was to transition to outpatient physical therapy. Petitioner was reminded of no active shoulder flexion until he was six weeks postop. It was noted that Petitioner was scheduled to

have a right carpal tunnel release by Dr. Haueisen on December 17th. Petitioner was told he could go back to work light duty with no right shoulder use to do desk work in a couple of weeks depending on his recovery from Dr. Haueisen's surgery. Petitioner wanted to proceed with left shoulder rotator cuff repair. He was told they had to wait at least six weeks from this operation before he could be scheduled for that. Petitioner told Dr. Dusek he only has eight weeks of sick leave a year, but Dr. Dusek explained between the surgeries he is doings and the one Dr. Haueisen had in store, he would likely need more than that. Petitioner was to return in six weeks for follow-up. Petitioner could return to work on 01/02/2013 with work restrictions of light duty, one arm duty (no use of right arm) with minimal inmate contact.

On December 17, 2012, Petitioner underwent a right carpal tunnel release performed by Dr. Haueisen.

On December 21, 2012, Petitioner returned to Dr. Haueisen status post right carpal tunnel release. He was doing well with only mild postoperative pain. Petitioner could return to work light duty as of 01/02/2013.

On January 14, 2013, Petitioner returned to Dr. Haueisen. Petitioner reported good relief of preoperative symptoms of numbness and tingling in the right median nerve distribution, although he felt numbness in the ring and small fingers. Petitioner reported continued numbness in the left hand, particularly in the mornings. In order to minimize his downtime, Petitioner wanted to go ahead and schedule his left carpal tunnel release. He was going to need a left shoulder rotator cuff repair by Dr. Dusek later as well.

On January 22, 2013, Petitioner returned to Dr. Dusek. He reported much less pain in the shoulder than before he had surgery. He was beginning to feel quite a bit of improvement from his carpal tunnel release on the right done December 17, 2012.

On January 28, 2013, Petitioner underwent a left carpal tunnel release performed by Dr. David Haueisen for left carpal tunnel syndrome.

On February 1, 2013, Petitioner returned to Dr. Haueisen. He was doing fine with minimal postoperative pain to the left hand. His right hand was overall doing well following his carpal tunnel release.

On February 8, 2013, Petitioner underwent a left shoulder arthroscopic rotator cuff repair with subacromial decompression and arthroscopic SLAP repair performed by Dr. Dennis Dusek.

On February 9, 2013, Petitioner called Dr. Dusek's office. Petitioner had to break up a fight between his two dogs. His surgical arm came out of the sling but he did not believe he used the arm to pull the dogs apart. He didn't believe he hurt the surgery, but wasn't sure.

On February 11, 2013, Petitioner returned to Dr. Haueisen. Petitioner was to start wrist range of motion exercises, with night time splinting for one week.

On February 18, 2013, Petitioner returned to Dr. Dusek. He reported his right shoulder was doing very well and was pain free. Petitioner reported his left shoulder was sore, but already better than before surgery. Petitioner was to begin physical therapy for the left shoulder.

On February 26, 2013, Petitioner returned to Dr. Haueisen. Petitioner reported good relief of his preoperative symptoms of numbness and tingling in the median nerve distribution bilaterally. He still gets some occasional numbness felt in the ring and small fingers of his right hand when he had his elbow flexed, such as when talking on the phone.

On April 1, 2013, Petitioner returned to Dr. Dusek for follow-up of his bilateral shoulders. He was continuing physical therapy. Petitioner asked if he could start mowing his yard with a riding mower but with a push mower for some areas, and as long as he is mostly using his right rather than left shoulder to push the mower, we do not have a problem with this.

On April 8, 2013, Petitioner returned to Dr. Haueisen. Petitioner reported complete relief of his symptoms of numbness and tingling in the median nerve distribution of his right hand, but still had numbness in the ring and small fingers whenever his elbow was flexed, such as when talking on the phone. He had one set of nerve conduction studies that had showed cubital tunnel syndrome, but a second set that was negative. He was not having any symptoms of numbness remaining in his left hand. Dr. Haueisen discussed with Petitioner that given his ongoing clinical symptoms, even in the face of normal nerve conduction studies, it was probably best to go ahead with an in situ ulnar nerve decompression. Petitioner reported that he was hoping to go back to work after his rotator cuff repair surgery around June, so he wanted to have all of his surgeries done so that he did not have to take any further time off work.

On April 18, 2013, Petitioner underwent a right ulnar nerve decompression performed by Dr. David Haueisen for right cubital tunnel syndrome.

On April 24, 2013, Petitioner returned to Dr. Haueisen. He was doing just fine. He reported that this was the first time that his hands have not been numb. He had minimal postoperative pain.

On May 1, 2013, Petitioner returned to Dr. Haueisen. He was doing well, with good relief of preoperative symptoms of numbness and tingling. It was noted that Petitioner remained off work because of his shoulder surgery with Dr. Dusek.

On May 13, 2013, Petitioner returned to Dr. Dusek to follow up on both shoulders. On the right, he was pain free. The left shoulder still had soreness with physical therapy, but nothing that required a pain pill. Petitioner reported he wanted to be back to work full duty by June 15th.

On June 12, 2013, Petitioner returned to Dr. Haueisen. Petitioner reported that his hands were both doing fine now with complete relief of his preoperative symptoms of numbness and tingling. He was off of work currently because of his prior shoulder surgery by Dr. Dusek. Petitioner's grip strength showed marked improvement. His current grip was 60 right, 70 left. His elbow was moving well. Petitioner was

doing fine overall from the carpal tunnel releases and right in situ ulnar nerve decompression. He could return on a prn basis.

On June 17, 2013, Petitioner returned to Dr. Dusek. Petitioner was doing great with both shoulders. He had full motion of both shoulders and no pain at all on the right. On the left, he had mild soreness from time to time. Petitioner was to return to work full duty July 15, 2013. Petitioner was to return if he needed any thin in the future on a prn basis. He was placed at maximum medical improvement for his shoulders as of July 15, 2013.

On December 19, 2013, Dr. Sudekum examined Petitioner, reviewed additional medical records, and new workers' compensation claims information. Dr. Sudekum noted that three months prior to the mouse attack incident, Dr. Dusek recommended Petitioner undergo bilateral shoulder surgery for treatment of degenerative conditions affecting both shoulders. Dr. Sudekum opined that there was no indication in any notes from Dr. Dusek that the November 1, 2012, incident or his regular work duties as a Supply Supervisor III caused or altered any shoulder pathology or affect his decision regarding the possible need for Petitioner's shoulder surgery/treatment. Dr. Sudekum noted that the bilateral carpal tunnel surgeries recommended by Dr. Haueisen prior to November 1, 2012, incident and there was no indication that Dr. Haueisen's notes that the November 1, 2012, or Petitioner's regular work duties as a Supply Supervisor III caused, or altered any upper extremity neuropathology or decision regarding carpal/cubital tunnel surgery or treatment. Dr. Sudekum opined that there was no indication in the medical records that the mouse attack incident that occurred at work on November 1, 2012, resulted in the causation or aggravation of carpal tunnel syndrome, cubital tunnel syndrome, or any significant shoulder pathology. Dr. Sudekum noted that Petitioner had multiple risk factors which may have contributed to the development of his upper extremity tendinopathies, carpal tunnel syndrome, and cubital tunnel syndrome including his age over 58, degenerative changes of the bilateral shoulders, arthritis in the bilateral elbows/wrists, obesity, hypertension, and previous significant traumatic injury to the right upper extremity and right elbow including biceps tendon rupture and anterior interosseous nerve injury. Petitioner's job as a tree trimmer "involving the use of a 13 pound chainsaw" could also be considered a potential causal factor in the etiology of his bilateral shoulder conditions and/or peripheral neuropathies.

On January 21, 2014, Dr. Richard Lehman at U.S. Center for Sports Medicine examined Petitioner for an independent medical examination for his bilateral shoulders. Petitioner explained that he had pain in both of his shoulders due to repetitive use of his arms pulling and lifting heavy pallets. In addition, he reported that he fell backwards hitting both shoulders on a pallet jack on November 1, 2012. Petitioner informed Dr. Lehman that his chief complaint was years of repetitively using his arms working for the prison system mostly on the supply side. Petitioner informed Dr. Lehman that his symptoms began in 2007. After examining Petitioner, reviewing the medical records and diagnostic images, Dr. Lehman opined that Petitioner had partial rotator cuff tear in the right shoulder, impingement syndrome, and in the left shoulder SLAP tear, partial rotator cuff tear and impingement syndrome. Dr. Lehman also noted that Petitioner was diagnosed with degeneration, tendinosis in the biceps tendon bilaterally. Dr. Lehman opined that Petitioner's bilateral shoulder conditions were degenerative in nature and due to loss of blood supply at the insertion site of the rotator cuff consistent with the patient's stated age and

bilaterally symmetrical. Dr. Lehman noted that Petitioner did not have a pathological process that one could relate to his work activities either in a repetitive manner or as a fall landing on both shoulders. Dr. Lehman noted that clearly this pathology would not be consistent with a fall landing on both shoulders posteriorly. He did not believe the medical treatment was in any way related to the injury or related to the Petitioner's history of repetitive type activities.

On January 21, 2014, Petitioner took the deposition of Dr. Dennis Dusek. Dr. Dusek testified that Petitioner's work at Menard was a significant factor in the development of the pathology in both of his shoulders, being bilateral rotator cuff tears and left superior labral tear. He testified that it was due to repetitive pulling on a garage door chain and loading and unloading, especially above the chest level. On cross-examination, Dr. Haueisen testified that if Petitioner performed the duties of a Supply Supervisor III as outlined in the DVD where he supervised others, he would not find the rotator cuffs and tears had anything to do with his work at Menard Correctional Center. Dr. Haueisen testified that he did not have any medical records other than his own and Dr. Sudekum's.

On February 10, 2014, Petitioner took the deposition of Dr. David Haueisen. Dr. Haueisen opined that Petitioner's bilateral carpal tunnel syndrome and right cubital tunnel syndrome were caused or aggravated by his job duties at Menard Correctional Center. However, Dr. Haueisen did not have Dr. Brown's medical records, did not have Dr. Phillips' consultation note from 2010, did not know when Petitioner's complaints began, did not review medical records from Dr. Krieg, had not toured Menard Correctional Center, and did not know Petitioner owned a lawn mowing and tree trimming business. On cross-examination, Dr. Haueisen testified that using vibratory tools could contribute to the development of symptoms for both carpal and cubital tunnel syndrome. He further testified on cross-examination that using a 13 pound chainsaw to trim trees could aggravate carpal tunnel syndrome and cause irritation of the nerve at the elbow. Dr. Haueisen also testified that Petitioner had risk factors for the development of carpal and cubital tunnel syndrome including age and obesity. Dr. Haueisen also confirmed that hypertension is considered by some a risk factor for the development of carpal and cubital tunnel syndrome. Dr. Haueisen testified that Petitioner suffers from hypertension.

On June 12, 2014, the second deposition of Dr. Anthony Sudekum was taken. He opined to a reasonable degree of medical certainty that Petitioner's bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, and bilateral shoulder conditions were not in any way causally related or aggravated by the November 2012 incident involving the mouse or his continued duties as a Supply Supervisor III at Menard Correctional Center.

On July 14, 2014, the deposition of Dr. Lehman was taken. Dr. Lehman opined that Petitioner's bilateral shoulder conditions were degenerative in nature and were not related to either an incident occurring on November 1, 2012, or Petitioner's job duties at Menard Correctional Center. The continuing deposition of Dr. Lehman was taken on September 22, 2014.

Petitioner completed a "Work History Timeline/Job Description". He reported that from May 5, 1978-1985, he was employed as a correctional officer at Menard Correctional Center. He described job duties as follows: "[l]ock and unlock the inmate cell doors, run inmates line to breakfast, dinner, commissary,

yard and chapel. Lock the inmates up at the end of the day." Petitioner noted that from 1985-1992, he was a supply supervisor I at Menard Correctional Center. He described his job duties as follows: "[w]orked with the supply supervisor II. Help him fill the order that the inmate kitchen N-2 Employee Kitchen, MSU Kitchen. Help the supply supervisor II load and unload trucks, help with the back work and 100% inventory each month. Petitioner noted that from 1992-2005, he was a supply supervisor III at Menard Correctional Center. He was "[i]n charge of the store that he runs. Has the supply supervisor I help him with the book work, inventory, and fill all the store requisition and call the warehouse for a receiver and sent with doors the paperwork and take the requisitions off the books and put the receivers on the books." Petitioner noted that from 2005-2011, he worked as a supply supervisor III at Menard Correctional Center. He described his job duties as follows: "I am in charge of the supply department. I do a lot of paper work. Every day I have to fill out assignment sheet. I have to sign all the receiving tickets and store requisitions. I am in charge fourteen supply supervisors that I have to fill out DP201 evaluations. When we go on deadlock, I help the supply supervisor unload the trucks. I take the trash out with the inmates. I have to unlock the locks and you have to pull a chain to open the steel door. When we are shopping, I do this three times a day. I watch and help the inmates unload trucks that come in to the commissary. Every day that we are shopping I take an inmate with me to personnel property with the electronics that was sold the day before help unload them on the dock then load them on a wagon or dollies and take them into personnel property and unload them again. When I am in the commissary where my office is I have to get up and use two different keys to unlock the door and let staff and inmate in several times a day. When I have to do that the reason I'm in my office doing paper work which required a lot of writing."

Mr. Richard Pautler, Business Administrator III at Menard Correctional Center, described the job duties of a corrections supply supervisor I, corrections supply supervisor II, and corrections supply supervisor III as follows:

> Corrections Supply Supervisor I's are assigned to the Inmate Commissary. There they are required to grasp items purchased by the offender and swipe them over a bar scanner. A computer keyboard is used to complete the transaction. These types of repetitive motions are done on average 5-6 hours per day with rest intervals.
>
> Corrections Supply Supervisor II's may also be assigned to the Inmate Commissary as described above, and are also assigned to other assignments including Clothing House, Property Control and Warehouse. The repetitive motions involved with these assignments consistent of entering information on computer keyboards, completing logs and inventories using pen and paper, and turning locks to assignment areas averaging a total of 3-4 hours per day.
>
> Corrections Supply Supervisor III's are responsible for the supervision of Supply Supervisor I's and II's and offender workforce in the issuance and delivery of items. Ensures safety and security while overseeing

operation of the area. Provides supervision, monitors receiving operations, oversees inventory processes, reconciles invoices and purchase orders. Estimates needs while maintaining budget compliance. Approximately 2-3 hours per day spent completing various paperwork involved using pen and paper and computer input. Various padlocks to areas and keying required on gates and doors to access areas as performing inspections, approximately 1-2 hours per day.

Therefore, the Arbitrator concludes:

1. Petitioner failed to establish a manifestation of repetitive trauma injuries to his bilateral hands, elbows, or shoulders on November 17, 2010, that arose out of and in the course of employment at Menard Correctional Center. Petitioner testified that his symptoms for his bilateral carpal tunnel and cubital tunnel began in 2008. Yet, he did not inform Menard Correctional Center until November 2010. As such, Petitioner did not give timely notice under the Act. In addition, Dr. Sudekum reviewed job descriptions, a job site analysis and DVD from Genex regarding a correctional supply supervisors I, II & III, toured Menard Correctional Center, viewed and/or performed some of the tasks that Petitioner complained of including those of correctional officers and supply supervisors, and reviewed Petitioner's medical records. Dr. Sudekum opined that Petitioner's job duties at Menard Correctional Center as a correctional officer, correctional supply supervisor I, correctional supply supervisor II, and correctional supply supervisor III would not cause or aggravate carpal or cubital tunnel syndrome. Petitioner's claim for benefits for carpal and cubital tunnel syndrome is denied. Dr. Sudekum is more credible than Dr. Haueisen's opinions given that he had more knowledge and had performed and/or watched the tasks performed while at Menard Correctional Center. In addition, Dr. Lehman opined that Petitioner's job duties at Menard did not cause or aggravate his bilateral shoulder conditions. As such, Petitioner's claim for bilateral shoulder conditions is denied.
2. Petitioner failed to establish a manifestation of repetitive trauma injuries to his bilateral shoulders on August 30, 2012, that arose out of and in the course of employment at Menard Correctional Center. Petitioner testified that his symptoms began in 2010. Yet, he did not inform Menard Correctional Center until September 2012. As such, Petitioner did not give timely notice under the Act. In addition, Dr. Lehman reviewed job descriptions regarding correctional supply supervisors I, II & III, and reviewed Petitioner's medical records. Dr. Lehman opined that Petitioner's job duties at Menard Correctional Center as a correctional supply supervisor I, correctional supply supervisor II, and correctional supply supervisor III did not cause or aggravate Petitioner's shoulder conditions. Petitioner's claim for bilateral shoulder condition is denied.
3. Petitioner failed to establish that he sustained accidental injuries to his left shoulder on November 1, 2012, that arose out of and in the course of employment at Menard Correctional Center. Petitioner testified that his symptoms began in 2010. Both Dr. Sudekum and Dr. Lehman opined that Petitioner's bilateral shoulder conditions were

degenerative in nature and not due to the incident involving the mouse. Dr. Lehman explained that failing backwards would not cause a rotator cuff tear or labral tear. In addition, Dr. Dusek testified that the November 1, 2012, may have caused a sprain to the left shoulder. Dr. Dusek did not testify that it caused a rotator cuff tear or a labral tear. In fact, those findings were present before the November 1, 2012, accident according to the MRI studies.

4. Claim for benefits denied in 10-WC-47285; 12-WC-40657 and 12-WC-42758.

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

Richard Brueggmann,

Petitioner,

vs. NO: 10 WC 47285

16IWCC0016

State of Illinois Menard 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, temporary total disability, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 13, 2015, is hereby affirmed and adopted.

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

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

DATED: JAN 6 - 2016
TJT:yl
o 12/14/15
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BRUEGGEMANN, RICHARD
Employee/Petitioner

Case# **10WC047285**

12WC040657
12WC042758

MENARD CORRECRIONAL CENTER
Employer/Respondent

16IWCC0016

On 1/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

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

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

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

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

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

JAN 13 2015

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

16IWCC0016

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Richard Brueggemann
Employee/Petitioner

v.

Menard Correctional Center
Employer/Respondent

Case # **10** WC **47285**

Consolidated cases:
12-WC-40657 & 12-WC-42758

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin, IL**, on **October 9, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [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. [ ] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [x] Other **Exceeded choice of physician**

FINDINGS

On **11/17/2010**, 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 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 $**75,126.00**; the average weekly wage was $**1,444.73**.

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

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

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

Respondent shall be given a credit for all TTD/TPD and all other benefits previously paid.

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

ORDER

Because Petitioner failed to sustain his burden of proof on accident, notice, and causation, benefits are denied. All other issues are rendered moot.

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

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

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

Edward Lee

Signature of Arbitrator

1/8/15

Date

JAN 13 2015

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Richard Brueggeman,

Petitioner,

vs. NO: 12 WC 40657

16IWCC0017

State of Illinois Menard 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, temporary total disability, notice, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 13, 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: JAN 6 - 2016
TJT:yl
o 12/14/15
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BRUEGGEMANN, RICHARD
Employee/Petitioner

Case# **12WC040657**

10WC047285
12WC042758

MENARD CORRECTIONAL CENTER
Employer/Respondent

16IWCC0017

On 1/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

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FARRAH L HAGAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

JAN 13 2015

RACHEL A. GARCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0017

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Richard Brueggemann
Employee/Petitioner

v.

Menard Correctional Center
Employer/Respondent

Case # **12** WC **40657**

Consolidated cases:
10-WC-47285 & 12-WC-42758

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin, IL**, on **October 9, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [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. [ ] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [x] Other **Exceeded choice of physician**

FINDINGS

On **08/30/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**75,126.00**; the average weekly wage was $**1,444.73**.

On the date of accident, Petitioner was **57** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit for all TTD/TPD and all other benefits previously paid.

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

ORDER

Because Petitioner failed to sustain his burden of proof on accident, notice, and causation, benefits are denied. All other issues are rendered moot.

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

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

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

Signature of Arbitrator

1/8/15
Date

JAN 13 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stanley Carls,

Petitioner,

vs. NO: 14 WC 2573

State of Illinois - Secretary of State, 16IWCC0018

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, 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: JAN 6 - 2016
TJT:yl
o 12/14/15
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

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

CARLS, STANLEY
Employee/Petitioner

Case# **14WC002573**

SECRETARY OF STATE
Employer/Respondent

16IWCC0018

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

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

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

1157 DELANO LAW OFFICES LLC
PATRICK JAMES SMITH
1 SE OLD STATE CAPITAL PLZ
SPRINGFIELD, IL 62705

0514 ASSISTANT ATTORNEY GENERAL
GLISSON, RICHARD C
500 S SECOND ST
SPRINGFIELD, IL 62706

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

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

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

MAY 5 2015

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

16IWCC0018

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
19(b)

STANLEY CARLS,
Employee/Petitioner

v.

SECRETARY OF STATE,
Employer/Respondent

Case # **14** WC **2573**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **4/17/15**. 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 _____

FINDINGS

On the date of accident, **4/15/13**, 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 $**57,756.99**; the average weekly wage was $**1,155.14**.

On the date of accident, Petitioner was **61** 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 $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to her bilateral hands due to repetitive work activities, that arose out of and in the course of his employment by respondent and manifested itself on 4/15/13, and has failed to prove by a preponderance of the credible evidence that his current condition of ill-being is causally related to the alleged injury. Petitioner's claim for compensation is denied.

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

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

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

Signature of Arbitrator

5/1/15
Date

ICArbDec19(b)

MAY 5 - 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 61 year old maintenance laborer, alleges that he sustained accidental injuries to his bilateral hands due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 4/15/13.

Petitioner testified that as a maintenance laborer, he helps carpenters, plumbers, electricians, HVAC laborers, and is essentially the workforce for all trades people. In the warmer months he may work on road work that includes blacktop, asphalt, concrete repairs, and curbs. Petitioner testified that he poured concrete less than 10 times in 2014. While working on the roads petitioner may use a concrete cutter, gas powered compactor that vibrates, sledgehammers, crowbars, and jackhammers. Petitioner testified that he used a compactor last year about 12 to 14 times a month during the blacktop season. He testified that he does not use this equipment in the winter. Twice a year, petitioner will fill up the standby generators with a hand pump. In the winter months he may do some snow removal. When working with carpenters he will pick up material for them, load it into his truck, and take it back to the facility. He will also at times hold dry wall for the carpenters. He stated that this requires strong grip strength, and his hands ache when he does this. Petitioner also halls pipe for the plumbers, and holds it while they make connections. Petitioner testified that maintenance laborers are not allowed to perform trade laborers activities, they can only assist the trade laborers.

Petitioner testified that his work duties vary from day-to-day, and he never knows what he's going to be doing on any specific day. He may even do up to 20 different activities a day. Petitioner is right-hand dominant.

Petitioner is on medication for diabetes mellitus. Petitioner has had diabetes for 3 to 4 years, but did not start taking metformin for his diabetes until about a year ago. Petitioner testified that he was diagnosed with diabetes in about 2011, and that is when the problems with his hands started, before they got worse. Petitioner testified that specific tasks cause problems with his hands.

Petitioner presented to his primary care physician, Dr. Ellison. Dr. Ellison referred petitioner to Dr. Trudeau for an EMG/NCV. The only records from Dr. Ellison included in the record are a prescription for bilateral cock up wrist splints on 4/24/13 and a referral to Dr. Greatting on 4/24/13.

On 4/15/13 petitioner underwent an EMG/NCV performed by Dr. Trudeau. Petitioner reported that he had undergone an EMG two years ago for his lower extremities which determined he had neuropathy. He noted that petitioner had psoriasis on the elbows and was of the opinion that patients with psoriasis

may also have an associated sporadic arthropathy. Dr. Trudeau was of the opinion that petitioner could have several things going on. Based on petitioner's diffuse discomfort up and down both arms, he suspected some relationship to the psoriasis since patients with psoriasis may have an associated arthritis and sometimes getting the psoriasis completely under control can help the arthritis to a certain extent. The results of the EMG showed bilateral median neuropathies at the wrist, severe on both sides. There was no evidence of proximal median neuropathy, other entrapment neuropathy, cervical radiculopathy, or brachial plexopathy.

On 5/2/13 petitioner presented to Dr. Greatting, an orthopedic surgeon, for evaluation of bilateral hand numbness and tingling, and pain for about two years. Petitioner reported that it was slowly getting worse, and the pain was intermittent. He reported that his whole hand was a achy, and some of the achiness went into his volar forearms. Petitioner reported weakness and dropping objects as well. Petitioner gave a work history that included working for the State of Illinois for about 33 years, with the Secretary of State. He noted that he was a laborer and had been in his current job for 15 years. He reported that he does any type of labor needed for the state, such as pouring concrete, slow plowing, moving furniture, and digging holes for plumbers. Petitioner reported that all his work is repetitive. He reported that the numbness, tingling, and pain gets worse with his repetitive activities at work. Following an examination Dr. Greatting assessed carpal tunnel syndrome bilaterally. He recommended that petitioner use braces, but petitioner did not feel that they would help. As a result, Dr. Greatting recommended bilateral carpal tunnel releases. Dr. Greatting noted that repetitive activities have been proven to cause carpal tunnel, and petitioner does a lot of repetitive activities at work that aggravate his hands.

On 1/16/14 Mark Bertolino, Labor General Foreman, completed a Supervisor's Report of Injury or Illness. He indicated that petitioner was having some tingling and difficulty gripping with his hands on 4/15/13. He further indicated that petitioner was complaining of his hands and fingers going numb and tingling, and he could not grip anymore. He noted that petitioner indicated that he uses his hands for work on a daily basis, and does a lot of repetitive work running hand tools, power tools, and lifting and carrying materials.

On 1/26/14 petitioner completed a Worker's Compensation Employees Notice Of Injury. He noted problems with both wrists due to working as a maintenance laborer.

On 1/27/14 petitioner filed his Application for Adjustment of Claim. He alleged bilateral carpal tunnel syndrome due to repetitive work activities.

On 5/9/14 petitioner underwent a Section 12 examination, performed by Dr. Joseph Monaco, an orthopedic surgeon, at the request of the respondent. Prior to examining petitioner Dr. Monaco reviewed the job description of an Maintenance Laborer for the Office of the Secretary of the State of Illinois; the Supervisor's Report of Injury or Illness dated 1/16/14; Worker's Compensation Employees Notice of Injury; and records of care provided by Dr. Trudeau, with a date of service of 1/15/13. Dr. Monaco noted that petitioner was hired as a maintenance laborer on 8/11/99. He noted that petitioner was off work on a service-connected disability due to work-related injury from 5/17/04 to 6/7/04, and was off on a service-connected disability with leave of absence from 10/25/10 to 4/26/11, and from 9/24/12 to 10/9/12.

Petitioner reported to Dr. Monaco that he works eight hours a day with a half hour for lunch and two 15 minute breaks. Petitioner provided Dr. Monaco with a list of activities that he normally does on his job. They included running a jackhammer up to three times a week, up to five hours a day, in the summertime when doing quite a bit of road work; using an air hammer and chisel hammer once a month to knock out a wall; use of concrete saws which are gas powered and require the use of water; involvement in the demolition of walls, floors, and ceilings; using the vice grips to pull up glued down carpet at times; loading and carrying building materials and tools; cleaning up after construction and moving furniture; plowing snow in the winter with the use of a joystick, and using a bobcat which also has a joystick; shoveling rock and dirt; and excessive lifting of heavy objects.

Petitioner reported to Dr. Monaco that about 4 to 5 years ago he started having some discomfort over the dorsum of his wrists. Initially the pain was mild, without any radiation of pain. He stated that he did not report this discomfort until about a year ago. Petitioner reported that about a year ago he started having pain in the whole wrist, with occasional pain in the volar forearm from the wrist to the mid forearm. Petitioner reported no problems in his hands or fingers, with no complaints of numbness, tingling or pain. He complained of a weakness in his fingers, especially when trying to open a jar. Occasionally, petitioner will wake at night due to the pain. Petitioner reported that the pain he has in his wrist is worse on days when he has to run heavy equipment. Petitioner reported a history of diabetes and hypertension along with numbness and tingling.

Following an examination and record review, Dr. Monaco found no clinical findings consistent with carpal tunnel syndrome. He noted that on the patient pain drawing, petitioner drew a circle around the volar aspect of the wrist. He did not indicate on the pain drawing any numbness or tingling into the digits. Dr. Monaco also noted that petitioner denied any numbness or tingling of any kind and was complaining mostly of discomfort in both wrists. Dr. Monaco believed that based on petitioner's job

description, and his understanding of petitioner's job duties, petitioner's duties involved a variety of activities involving the upper extremities. Dr. Monaco noted that petitioner had a completely normal exam with negative Tinel's sign, negative nerve compression testing, and negative Phelan's test, and no evidence of any atrophy or decreased sensation, and intact two-point discrimination. Dr. Monaco was of the opinion that petitioner's functional history, as indicated in the QuickDASH outcome measure, was not consistent with this functional presentation. Dr. Monaco was of the opinion that there was no evidence of any specific injury to petitioner. He was further of the opinion that petitioner's complaints of nonspecific wrist pain were not due to any work related incident. He was of the opinion that petitioner had reached maximum medical improvement. Dr. Monaco was of the opinion that although there are electrodiagnostic findings consistent with median nerve neuropathy at the wrist, there is no evidence of any subjective complaints or clinical objective findings of carpal tunnel syndrome. Dr. Monaco was of the opinion that petitioner has abnormal electrodiagnostic studies without clinical findings consistent with carpal tunnel syndrome.

On 10/8/14 petitioner returned to Dr. Greatting for evaluation of his bilateral hand complaints. Petitioner again gave a history of working for the State of Illinois as a union laborer for the past 18 years. He reported that he does multiple different activities including activities such as running blacktop equipment, driving tractors, moving office furniture, occasional use of air hammers, chisel hammers and concrete saws, as well as walk behind saws. He also frequently does demolition activities in office spaces, and will move office furniture, as well as clean up after construction. Petitioner uses a joystick when riding a tractor to plow snow, as well as with the use of a bobcat. He reported that over time he has noticed pain, numbness and tingling in his hands, that bothers him during the night. He reported difficulty gripping objects and picking up small objects. Petitioner gave a history of diabetes mellitus with some peripheral neuropathy, as well as chronic kidney disease. He stated that he has worn a splint at night with no improvement in his symptoms. Following an examination Dr. Greatting assessed chronic bilateral carpal tunnel syndrome. Petitioner reported that his numbness is not constant, but feels like it is close to being constant. Dr. Greatting recommended carpal tunnel releases bilaterally. He also noted that petitioner does have significant diabetes which would make him more likely to develop carpal tunnel syndrome. Dr. Greatting was of the opinion that the type of work activities petitioner described to him that he has done over a period of many years would be a significant contributing factor, or a factor which could significantly aggravated or accelerate the symptoms related to his bilateral carpal tunnel syndrome.

Petitioner offered into evidence the Position Description for Maintenance Laborer. All maintenance laborers are required to be able to lift 0 to 90 pounds, push/pull 25 to 50 pounds, and carry 2 to 90 pounds. The duties of a maintenance laborer include performing a variety of tasks of a semi-skilled nature requiring the manual use of tools and some mechanical aptitude 10% of the time; cleaning, greasing, painting, and making minor repairs to machinery gears and other apparatuses 25% of the time; maintaining and making operating repairs to electrical equipment 15% of the time; perform carpentry, masonry, painting and plumbing tasks below the journeyman level 30% of the time; may sweep, clean, mop or polish floors, windows and furniture, or do other work of the janitorial nature 5% of the time; may make periodic rounds of buildings and grounds for inspection and protection against fire, theft, or other hazards 5% of the time; may drive a truck, operate power motors, snow removal equipment, or other power equipment 5% of the time; and perform other duties as required or assigned 5% of the time.

With respect to specific activities, the Maintenance Laborer will do lifting 0 to 10 pounds, pushing/pulling 25 to 50 pounds, and carrying 2 to 50 pounds continuously. Lifting 10 to 90 pounds, and carrying 51 to 90 pounds is performed frequently. Most work is performed indoors, but there is a lot of outdoor work also. With respect to use of arms and hands, the laborer must have full use of both hands and arms. The activities the laborer does was identified as delivering materials, moving furniture, removing debris, and assisting other trades shops. With respect to the physical ability requirements, repeating the same hand, arm, or finger motion many times was identified as being performed occasionally, or up to 33% of the time. Hand/grip strength was performed continuously, or over 66% of the time. Driving on the job, which includes loading and unloading, is performed continuously, or over 66% of the time. Petitioner does not perform any typing. With respect to manual dexterity, and finger dexterity, those tasks are performed occasionally, or up to 33% of the time. The laborers are required to push/pull frequently, or between 34 and 66% of the time. Laborers are also required to carry between 2 and 50 pounds continuously, and between 51 and 90 pounds occasionally. Laborers are also required to handle or be in machinery that is vibrating frequently, or between 34 and 66% of the time.

On 12/18/14 the evidence deposition of Dr. Monaco was taken on behalf of respondent. Dr. Monaco was of the opinion that diabetes is a very strong risk factor for the development of carpal tunnel. He noted that hypertension is not. Dr. Monaco was of the opinion that Dr. Trudeau's electrodiagnostic testing is not considered the gold standard for diagnosing carpal tunnel syndrome at this time. He stated that it was controversial. He was of the opinion that you cannot consider something to be the gold standard when you have individuals who have negative electrodiagnostic testing and actually have carpal

tunnel syndrome or the opposite, where they have positive findings on an EMG and they are asymptomatic in regards to carpal tunnel. Dr. Monaco was of the opinion that the American Academy of orthopedic Surgeons has issued guidelines for the use of carpal tunnel diagnosis and treatment. He noted that they indicate that the use of electrodiagnostic studies is mainly to confirm location in case surgery is anticipated, or if there are findings that are more specifically indicated like atrophy. Dr. Monaco testified that there may be some relation to repetitive activity with a combination of repetition with force and resistance in awkward postures. Dr. Monaco believed petitioner performed a variety of activities, and did not do the same activity every day. He was of the opinion that individually, none of these activities by themselves, would be likely risk factors for carpal tunnel syndrome. He also found it important that petitioner was not doing the same thing every day all day for 6 to 8 hours. Based on these findings, Dr. Monaco was of the opinion that there was not the required criteria for him to find petitioner was at risk for carpal tunnel syndrome based on his job activities. Dr. Monaco had no specific diagnosis for petitioner's wrist pain. Dr. Monaco categorized petitioner's work as heavy manual labor. Dr. Monaco did not review the records of Dr. Greatting.

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?

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case ... where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming an injuries to his bilateral hands, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury

"manifested itself". These dates could be based on one or more of the following, depending on the facts of the case:

1. The date the petitioner first seeks medical attention for the condition;
2. The date the petitioner is first informed by a physician that the condition is work related;
3. The date the petitioner is first unable to work as a result of the condition;
4. The date when the symptoms became more acute at work;
5. The date that the petitioner first noticed the symptoms of the condition.

Petitioner is alleging injuries to his bilateral hands due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 4/15/13. In order to meet this burden of proof it is imperative that the petitioner place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

With respect to specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc., petitioner testified that as a maintenance laborer, he helps carpenters, plumbers, electricians, HVAC laborers, and is essentially the workforce for all trades people. In the warmer months petitioner may work perform road work that includes blacktop, asphalt, concrete repairs, and curbs. However, he testified that he poured concrete less than 10 times in 2014. While working on the roads petitioner may use a concrete cutter, gas powered compactor that vibrates, sledgehammers, crowbars, and jackhammers, but testified that he only used the compactor last year about 12 to 14 times a month during the blacktop season. He testified that he does not use road equipment in the winter. Twice a year, petitioner fills up the standby generators with a hand pump. In the winter months he may do some snow removal. When working with carpenters he will pick up material for them, load it into his truck, and take it back to the facility. He will also at times hold dry wall for the carpenters. He stated that this requires strong grip strength, and his hands ache when he does this. Petitioner also halls pipe for the plumbers, and holds it while they make connections.

Petitioner testified that his work duties vary from day to day and he never knows what he may be doing on any given day. In fact, he stated that he may do up to 20 different activities a day.

On 5/2/13 petitioner also gave a history of his work duties to Dr. Greatting. He reported that he has worked as a laborer for the Secretary of State for 15 years. He reported that he does any type of labor that is needed, such as pouring concrete, slow plowing, moving furniture, and digging holes for plumbers. He stated that all his work is repetitive. On10/8/14 he gave Dr. Greatting a history of doing a multitude of different work activities that include running blacktop equipment, driving tractors, moving office furniture, occasional use of air hammers, chisel hammers and concrete saws, as well as walk behind saws. He reported that frequently he does demolition activities in office spaces, and will move office furniture, as well as clean up after construction. Petitioner reported that he uses a joystick when riding a tractor to plow snow, as well as with the use of a bobcat. He did not provide him with the frequency, duration, or manner in which he performed these activities.

Petitioner provided Dr. Monaco with a list of activities he did at work that included running a jackhammer in the summertime while doing road work up to three times a week, up to five hours a day; using an air hammer and chisel hammer once a month to knock out a wall; use of concrete saws which are gas powered and require the use of water; involvement in the demolition of walls, floors, and ceilings; using the vice grips to pull up glued down carpet at times; loading and carrying building materials and tools; cleaning up after construction and moving furniture; plowing snow in the winter with the use of a joystick, and using a bobcat which also has a joystick; shoveling rock and dirt; and excessive lifting of heavy objects. However, he did not provide Dr. Monaco with the frequency, duration, or manner in which he performed these activities.

Petitioner also offered into evidence the Job Description for Maintenance Laborer. This description listed a variety of tasks of a semi-skilled nature requiring the manual use of tools and some mechanical aptitude 10% of the time; cleaning, greasing, painting, and making minor repairs to machinery gears and other apparatuses 25% of the time; maintaining and making operating repairs to electrical equipment 15% of the time; perform carpentry, masonry, painting and plumbing tasks below the journeyman level 30% of the time; may sweep, clean, mop or polish floors, windows and furniture, or do other work of the janitorial nature 5% of the time; may make periodic rounds of buildings and grounds for inspection and protection against fire, theft, or other hazards 5% of the time; may drive a truck, operate power motors, snow removal equipment, or other power equipment 5% of the time; and perform other duties as required or assigned 5% of the time. With respect to repeating the same hand, arm, or finger motion many times was only identified as being done occasionally, or up to 33% of the time. None of these activities were performed more than 30% of the time.

Based on the above, the arbitrator finds that although the petitioner placed into evidence his work activities he failed to identify the frequency, duration, and manner in which he performed each of these activities, and also failed to provide the same to the medical experts. The arbitrator further finds the petitioner himself admitted that his work duties vary from day to day, and he may even perform up to 20 different activities a day.

Additionally, the petitioner testified at trial that he has had diabetes mellitus for 3-4 years and did not start taking medication for this condition until 2014. As such, the arbitrator finds that at the time of the onset of petitioner's complaints 4-5 years ago, petitioner had recently been diagnosed with diabetes mellitus. Even Dr. Greatting was of the opinion that petitioner has significant diabetes which would make him more likely to develop carpal tunnel syndrome. Dr. Monaco was also of the opinion that diabetes is a very strong risk factor for the development of carpal tunnel syndrome.

Based on the fact that petitioner's activities are so varied and numerous, up to 20 different activities a day; that the specifics of each job duty as to the frequency, duration, and manner of performing have not been detailed; the fact that the onset of petitioner diabetes mellitus took place on or about the same time as the onset of his carpal tunnel symptoms; and the fact that both Dr. Greatting and Dr. Monaco were of the opinion that petitioner has significant diabetes which would make him more likely to develop carpal tunnel syndrome, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his bilateral hands, that arose out of and in the course of his employment by respondent and manifested itself on 4/15/13, or that his current condition of ill being as it relates to his bilateral hands is causally related to the alleged injury on 4/15/13.

K. IS PETITIONER ENTITLED TO PROSPECTIVE MEDICAL CARE?

Given the fact that the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his bilateral hands arms due to repetitive work activities, that arose out of and in the course of his employment by respondent and manifested itself on 4/15/13, and that petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being is causally related to the alleged injury, the arbitrator finds this remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Billy Joe Aplin,

Petitioner,

vs. NO: 12 WC 23347

Caterpillar,

16IWCC0019

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

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

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

16IWCC0019

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

DATED:
TJT:yl JAN 6 - 2016
o 11/9/15
51

Kevin W. Lamborn

Michael J. Brennan

DISSENT

I respectfully dissent from the majority decision and would award benefits to the Petitioner. The Petitioner in this case was diagnosed with right cubital and right carpal tunnel syndromes after noticing pain in his right elbow while he was welding for Respondent. He subsequently had a successful right open cubital tunnel release procedure on April 30, 2013.

The Petitioner testified extensively regarding his work activities. He primarily worked as a welder in the Roll Over Protection System station and would have to manipulate various parts in order to assemble them correctly. Some of the parts were made of steel and were very heavy, including base plates that weighed approximately one hundred pounds. He would also have to do chipping and grinding work that was involved with working in the robot station. The hand grinder that he would use was a vibratory tool. The Petitioner testified to spending a significant amount of time welding and grinding every day. He further testified to working in the robot station one to two days per week and on the weekends because more employees would be missing on the weekends.

Dr. Blair Rhode, Petitioner's treating physician and surgeon, testified within a reasonable degree of medical and surgical certainty that there is a causal relationship between the Petitioner's occupation and his diagnosis of right cubital tunnel syndrome: "Based upon multiple patient interviews, with his job exposure over the course of an exposure time line of eight years...the fact that he didn't have significant preexisting factors or prior injury, it's my opinion that the patient's job was causative to his compressive neuropathy." Dr. Rhode further testified that whether or not the Petitioner was exposed to vibration, he had a "high force, high repetition job...[which] was still causative to the patient's cubital tunnel syndrome." Moreover, if the Petitioner had an asymptomatic preexisting condition, Dr. Rhode also opined that Petitioner's job activities could have aggravated that preexisting condition.

Although there was a dispute over how much time the Petitioner actually spent doing the chipping and grinding work, Dr. James Williams, Respondent's Section 12 examiner, testified: "I did feel that if indeed he did do [it] on a frequent enough basis, chipping and grinding, that...could indeed be aggravating or contributory to his cubital tunnel...and carpal tunnel." Indeed, we do not know at what point Dr. Williams would have deemed the Petitioner's work

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activities a 'frequent enough basis' to qualify as an aggravating or contributing factor. However, we do know that Dr. Williams wrote in his report that he considered the Petitioner to be honest, forthcoming, and found no evidence of symptom magnification or malingering.

Another issue in this case was the amount of time that the Petitioner spent in the robot station and engaging in the chipping and grinding work. The Respondent proffered Exhibit 5 as evidence of the amount of time that the Petitioner worked in the robot station. The work slips, also known as traceability sheets, were to be initialed by employees when they finished working on a particular part. The Respondent could only locate four work slips that showed that the Petitioner worked in the robot station between January and May of 2012. The Respondent's method for tracking which employee worked on a particular part was not fool proof: Respondent's witness and Petitioner's former supervisor, Chris Butler, testified that the employees did not always initial the work slips. He also thought that it was possible that the Petitioner actually worked one to two more times in the robot station per month from January to May of 2012 then what was annotated on Respondent's works slips. Thus, the evidence of the work slips does not appear to be a reliable gauge for how much time the Petitioner worked in the robot station.

For the aforementioned reasons, I would award this Petitioner workers' compensation benefits including medical expenses, temporary total disability, and permanent partial disability.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

APLIN, BILLY JOE
Employee/Petitioner

Case# **12WC023347**

CATERPILLAR
Employer/Respondent

16IWCC0019

On 2/24/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1824 STRONG LAW OFFICES
MICHAEL K BRANDOW
3100 NKNOXVILLE AVE
PEORIA, IL 61603

0000 CATERPILLAR INC
AMANDA WATSON
100 N E ADAMS ST
PEORIA, IL 61629

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BILLY JOE APLIN
Employee/Petitioner

v.

CATERPILLAR INC.
Employer/Respondent

Case # **12** WC **23347**

Consolidated cases:
16IWCC0019

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 **January 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. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ **TTD**
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **April 1, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this 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 **$40,227.70**; the average weekly wage was **$773.60.**

On the date of accident, Petitioner was **53** years of age, ***married*** with **0** dependent children under 18.

Respondent shall be given a credit of N/A for non-occupational indemnity benefits.

Respondent N/A to a credit for any bills paid by petitioner's group health insurance through Respondent under Section 8(j) of the Act.

ORDER

Because an accident did not arise out of and in the course of Petitioner's employment by Respondent and Petitioner's condition of ill-being is not causally related to his employment with Respondent, 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.

D. Dyla McCarthy

Signature of Arbitrator

Feb. 17, 2015

Date

ICArbDec p. 2

FEB 24 2015

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FACTS OF CASE

On April 1, 2012, Petitioner was employed as a welder in Respondent's Building LL in East Peoria, Illinois. Petitioner's primary workstation at that time was the ROPS (roll over protection system) tack station. (T37)

On April 25, 2012, Petitioner reported to his supervisor, Chris Butler, that he was having discomfort in his right elbow. Mr. Butler was Petitioner's supervisor at the ROPS tack station from October 2011 until April 2013. (T71-72) Upon Petitioner reporting the elbow issue, Mr. Butler sent Petitioner to the medical department for follow-up. Mr. Butler testified he recalled Petitioner complaining handling his parts and materials was bothering him. (T72-73) On April 25, 2012, Petitioner reported to Caterpillar medical that he was having sharp pain on the inside of his right elbow, which had been occurring for approximately two months. (Rx1) Petitioner was first able to see a Caterpillar physician on May 8, 2012. (Rx1) Petitioner reported to Caterpillar medical he noticed pain when he picks up things. He was not placed on any restrictions on that date and was told to use NSAIDS for discomfort. Again, on May 13, 2012 Petitioner complained of pain when lifting plates. Petitioner continued to work full duty, but on June 22, 2012 complained that his pain was getting worse. On that date, as causal connection between Petitioner's workstation duties and the injury was in question, Petitioner was told to follow-up with his own physician.

In fact, Petitioner sought out treatment with Dr. Blair Rhode in Peoria. (Px8) This initial office visit with Dr. Rhode occurred on June 27, 2012. On that date, Petitioner complained of medial-sided elbow pain with numbness and tingling to the ring and little finger. Petitioner gave a history of working for eight years as a welder and complained of having to lift heavy metal parts all day. He reported that his symptoms began on approximately April 1, 2012, although he continued to work full duty. Dr. Rhode categorized Petitioner's job as "highly repetitive" for the last eight years. Dr. Rhode sent Petitioner for an EMG and allowed Petitioner to continue full duty work. (Px8)

Petitioner underwent an EMG with Dr. Trudeau on July 12, 2012. (Px5) The EMG diagnosed cubital tunnel syndrome of the right elbow and mild carpal tunnel syndrome in the right wrist. (Px5) When Petitioner returned to Dr. Rhode on July 29, 2012, they discussed conservative treatment options and the possibility of an injection, which they decided against. Surgery was also discussed. Petitioner continued to work full duty with conservative treatment by Dr. Rhode through March 17, 2013, when he was placed on modified light-medium duty secondary to his continuing symptoms. When no relief was experienced, Petitioner decided in favor of undergoing the right cubital tunnel release at his March 28, 2013 visit with Dr. Rhode. (Px8) Petitioner went forward with a right cubital tunnel release on April 30, 2013. (Px9)

Prior to surgery, at Respondent's request, Petitioner attended an independent medical examination on February 20, 2013 with Dr. James Williams at Midwest Orthopaedic Center. (Rx2) As part of Dr. Williams' review, he was given what was entered at arbitration as Respondent's Exhibit 4, a detailed report of Petitioner's job duties at the ROPS tack station. As described in Dr. Williams' initial IME report and at his deposition, Dr. Williams went over the report of job duties with Petitioner in extensive detail. (Rx3, p. 9-13) Petitioner agreed Respondent's Exhibit 4 correctly represents Petitioner's job duties at the ROPS tack station, which was his primary workstation. (T37, Rx3, p. 11-12) However, Dr. Williams' IME report indicates that in addition to the ROPS tack station job duties described in Respondent's Exhibit 4, Petitioner claimed he also occasionally worked at a subsequent workstation called the robot cell, which included chipping and grinding duties. Petitioner claimed at the time of the IME he worked at the robot cell 2-3 times per week, approximately 4 hours per occasion. Petitioner told Dr. Williams the chipping and grinding involved vibration and Dr. Williams indicated in his report this was not stated in Respondent's Exhibit 4, given to him for review. (Rx3, p. 13)

At the time of arbitration, Petitioner testified he might work the robot cell 1-2 days a week. (T42) Petitioner testified there is no grinding at the ROPS tack station. (T30) Petitioner admitted there is no vibration when he

uses his welder. (T24) He also testified that at the time of his alleged injury he would normally be assigned to the ROPS tack station and a separate person assigned to the robot cell. (T41)

Dr. Williams indicated in his report Petitioner's work duties, as shown to him in Respondent's Exhibit 4, did not aggravate or contribute to Petitioner's right carpal tunnel syndrome or right elbow cubital tunnel syndrome. (Rx2) Specifically, Dr. Williams points out there is no vibration or sustained forceful gripping shown in the job duties included in Respondent's Exhibit 4. (Rx3, p. 17) But if Petitioner's representation that he was working in the robot cell station, where chipping and grinding occurred, 2-3 times per week for 4 hour intervals, he believed such activities could contribute to Petitioner's condition. (Rx2, Rx3, p. 16)

Andrew McGeehan appeared on behalf of Respondent and testified he prepared Respondent's Exhibit 4 based on his role in Environmental Health & Safety and his training in that area. In 2011, Mr. McGeehan was asked to determine risk at workstations in East Peoria which included performing risk assessments on workstations throughout Building LL, where Petitioner worked. (T47-48) He specifically performed a risk assessment in 2011 on the ROPS tack station and found it to be a low risk station, with primarily identified risk of "pinch hazard" when moving plates. (T50) Mr. McGeehan recalled Petitioner originally claimed lifting plates caused his left elbow pain, but the assessment indicated Petitioner was only doing this every 22 minutes or once every hour. (T54) Using his training, Mr. McGeehan found this to be relatively low risk based on the lift's frequency and how it was done. (T54) Mr. McGeehan defined repetitiveness as doing something every few seconds or every few minutes. (T54)

Mr. McGeehan indicated he was not aware Petitioner was making any claim his symptoms involved the "robot cell", the workstation that comes after the ROPS tack station in the production process (T38), until after receiving a copy of the independent medical examination report completed by Dr. Williams. (T55-56) Petitioner did not complain at the time of his initial investigation interview about the duties at the robot cell. (T59-60) Upon receiving this information, he went back and addressed the robot cell station. (T56) Mr. McGeehan testified the robot cell can only complete 3-4 parts per shift and each part required 45-60 minutes of non-continuous grinding. (T57) He also asked Chris Butler, the Petitioner's supervisor, to pull traceability sheets to see how much Petitioner was working at the robot cell for purposes of his risk assessment. (T59)

Chris Butler also appeared at trial on behalf of Respondent. Mr. Butler explained a traceability sheet follows each part through the production process. (T74-75) He testified Mr. McGeehan asked him to pull traceability sheets to determine how much Petitioner had been working at the robot cell in the months leading up to his alleged 2012 injury. Mr. Butler explained traceability sheets are only kept for approximately two years. In the spring of 2013, after Dr. Williams' IME, Mr. Butler was only able to pull sheets going back to January 2012 and the beginning portions of 2013. (T79) From January 2012 through the alleged April 2012 injury date, Mr. Butler found four traceability sheets for Petitioner from the robot cell. This means he was only able to identify four parts Petitioner worked on at the robot cell. (T95) While Mr. Butler admitted Petitioner could have worked on an additional 1-2 parts per month that may have slipped through documentation, Mr. Butler testified 95% of the time Petitioner worked for him it was in the ROPS tack station, not the robot cell. In support of his statement regarding the reliability of the traceability sheets, Mr. Butler testified Petitioner was a very reliable employee when it came to documentation and was one of his better employees when he supervised the area. (T78)

Upon receiving the additional investigation materials of Mr. McGeehan and Mr. Butler regarding the robot cell station, Respondent asked Dr. Williams to provide an addendum report. (Rx2) Respondent asked Dr. Williams to review the additional information indicating Petitioner only worked on four parts at the robot cell from January 2012 to when he reported the alleged injury on April 25, 2012 and that each part involved 45-60 minutes of intermittent grinding. Upon review of the new information, Dr. Williams did not believe the right carpal and right cubital tunnel syndrome was related to Petitioner's work activities. Dr. Williams found the frequency in which Petitioner performed his work duties, based on Respondent's Exhibit 4 and the additional

information provided by Mr. McGeehan and Mr. Butler, was intermittent in nature and did not aggravate or contribute to Petitioner's condition. (Rx2) Dr. Williams admitted at deposition holding one's elbow in a constant flexed position for a prolonged period of time is a risk factor for cubital tunnel. (Rx3, p.35-36) However, Dr. Williams defined "prolonged" as a matter of hours. (Rx3, p. 36) As Petitioner described being able to complete a side plate within 10 minutes, in Dr. Williams' opinion Petitioner's elbow flexion did not qualify as prolonged at the ROPS tack station. (Rx3, p. 38) Further, Dr. Williams does not believe lifting weight could rise to the level and length of flexion needed to cause or aggravate cubital tunnel syndrome. (Rx3, p. 37)

As noted above, Petitioner went forward with his right cubital tunnel release on April 30, 2013. Petitioner testified he returned to work shortly after his surgery and currently works his same position in the ROPS tack station. (T35) Petitioner testified he has no loss of strength of the right elbow. (T35) Petitioner also reported left elbow symptoms that developed over the course of his treatment with Dr. Rhode resolved after his right elbow surgery. (T35) Surgery was never performed to resolve Petitioner's right carpal tunnel syndrome, as those symptoms also resolved after the cubital tunnel release. (Px8)

Petitioner underwent an impairment rating with Dr. Rhode on August 1, 2013. (Px11) Dr. Rhode explained in the "History of Clinical Presentation" section of his report Petitioner worked for Caterpillar for approximately eight years as a welder and was required to lift heavy metal parts all day. The impairment rating report claims Petitioner ran the robot cell from 2008 until 2010. However, Petitioner did not testify to this information at the time of trial, rather he testified he'd been a welder in ROPS Division since 2004 and ROPS tack had always been his primary job. (T9, T41) The first report of the 2008 to 2010 work history appears in what is incorrectly labeled a July 3, 2013 medical record. (Px8; Px6, p. 17) The impairment rating performed by Dr. Rhode provided 0% impairment of the extremity and 0% impairment rating of the total whole person for Petitioner. The report also outlines Petitioner has full range of motion of his right elbow and has no loss of strength. (Px6, p. 24, Px11)

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 makes the following findings:

In a repetitive trauma claim, the issues of accident and causation are intertwined. The Petitioner must show that his work activities were causally related to his injuries. In weighing the testimony at arbitration, the Arbitrator finds Respondent's witnesses, Andrew McGeehan and Chris Butler, were more credible in their testimony supporting the fact Petitioner rarely worked at the robot cell station in the months leading up to his reported injury in April 2012. The testimony of Mr. Butler, Petitioner's direct supervisor from October 2011 through April 2013, indicates Petitioner worked at the ROPS tack station 95% of that time. While Mr. Butler would admit Petitioner possibly worked on more than 4 parts on the robot cell between January 2012 and April 2012, he believed at most it would be 1-2 parts per month. The documentation simply doesn't support Petitioner's allegation that he worked at the robot cell 2-3 times per week for up to 4 hours each time. Testimony of Mr. McGeehan also indicates that only 4 parts per day were created in the robot cell and required approximately 45-60 minutes of intermittent grinding, not 2-4 hours of continuous grinding as alleged by Petitioner. Petitioner's own testimony supports the intermittent nature of this total grinding time for each part. (T24-28)

Petitioner's history changed from working at the robot station 2-3 times per week, in Dr. Williams' report, to 1-2 times per week in his testimony at arbitration. (T42) While Petitioner initially complained that lifting parts bothered his elbow, he never mentioned the duties of the robot cell being an aggravation until the February 2013 IME with Dr. Williams. Yet, at hearing Petitioner testified he noticed his elbow when reaching into welds. Later, after Petitioner's cubital tunnel release by Dr. Rhode, for the first time there is a complaint of chipping and grinding from 2008-2010 being an aggravation to his elbow. (Px11) Yet, at trial Petitioner never testified regarding his work duties during the 2008 to 2010 time period, rather he testified ROPS tack had always been his primary job.

In all, the Arbitrator finds the credibility of Respondent's witnesses and the documentation of Respondent with regard to Petitioner's work duties outweighed the testimony, inconsistent at times, of Petitioner.

Based on the findings with regard to Petitioner's job duties above, the Arbitrator also finds the opinion of Dr. Williams more credible than the opinion of Dr. Rhode with regard to causal connection. The work history given to Dr. Rhode was not as specific or accurate as the exhaustive work history and job duties given to Dr. Williams for review. Furthermore, the records of Dr. Rhode indicate a reliance in finding causal connection on unsupported work duties at the robot cell. Dr. Rhode admitted at deposition if Petitioner's exposure was limited to manipulating plates using 46-48 pounds of force 8-10 times a day, he would not consider such duties repetitive. (Px6, p. 39) Dr. Rhode also was given a history by Petitioner that Respondent performed a "safety audit" and "agreed" there was a problem at his job site. (Px6, p. 11) This was inaccurate as Andrew McGeehan testified no changes were made to the ROPS tack station after his risk assessment, which evaluated the station as safe and low risk. (T50) At the time of arbitration, Petitioner testified the ROPS tack station, not the robot cell, had always been his primary workstation. (T37) Furthermore, Mr. Butler testified that from October 2011 until he left as Petitioner's supervisor in April 2013, Petitioner's primary workstation, where he worked 95% of the time, was the ROPS tack station (T86), the same ROPS tack station Petitioner admitted involves no grinding and no vibration. (T24, 30)

While Dr. Rhode generalized in his records Petitioner lifted "heavy metal parts all day" and had a "highly repetitive" job for eight years, Dr. Williams specifically addressed the number of times and length of time Petitioner performed each job duty, each shift. Dr. Williams addressed the position of Petitioner's elbow, in the agreed upon job duties, and the length of time such a position would be held by Petitioner. Further, Dr. Williams identified Petitioner's ulnar nerve subluxation, a pre-existing condition affecting 10-15% of the population, which put Petitioner at greater risk to cubital tunnel syndrome and is a medical issue not developed from traumatic injury. (Rx3, p. 15) Based upon his inquiry into these specific facts and the evidence provided to him regarding the limited amount of work Petitioner performed in the robot cell, Dr. Williams concluded Petitioner's job duties did not aggravate or contribute to Petitioner's conditions of right cubital or carpal tunnel syndromes. (Rx2, Rx3, p. 20)

Thus, the final opinion of Dr. Williams, as outlined in his reports and at the time of his deposition, is more reliable and credible based on the supported facts at the time of trial. As such, the Arbitrator finds the Petitioner has not proven an accident due to repetitive trauma which is causally related to his work duties and the diagnosis of right carpal tunnel syndrome or right cubital tunnel syndrome that lead to Petitioner's right cubital tunnel release.

As such, the claim is denied. All other issues become moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONNIE LYNCH,

Petitioner,

vs. NO: 14 WC 34468

METRO EAST INDUSTRIES,

16IWCC0020

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 permanency, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Based on the evidence presented on arbitration, the Commission finds that Petitioner sustained the loss of use of 25% of the left arm pursuant to Sections 8(e) and 8.1b.

Based on the accident occurring subsequent to September 1, 2011, the determination of permanent partial disability is governed by Section 8.1b of the Act. Pursuant to same, the issue of permanency is to be based on this Section's five enumerated factors.

The Commission initially notes that Petitioner has a congenital deformity involving the lack of fingers on his right hand. The accident at issue in this case involved an injury to the left elbow, and he was diagnosed with severe cubital tunnel syndrome, for which he underwent surgical decompression of the ulnar nerve with anterior transposition on July 11, 2014, along with myofascial lengthening of the flexor pronator tendon origin. He subsequently returned to full work duties and was released by Dr. Brown on October 15, 2014.

Petitioner worked and works for Respondent as a metal fabricator. He testified that the job involves repairing damaged locomotives, which included cutting, grinding, replacing and

welding steel.

With regard to an American Medical Association (AMA) impairment rating, we note that neither party entered such a rating into evidence. This factor will therefore not be taken into account.

As noted, Petitioner's occupation involves metal fabrication. Based on his unrebutted testimony, the job involves having to work with steel, grinders and welding equipment. As such, we believe that the job is significantly physical, in particular with regard to the use of the hands and arms. The clear implication is that the Petitioner is required to use his upper extremities to accomplish his work tasks.

The Petitioner was 37 years old at the time of the accident. He therefore still has a significant period of work life ahead of him before he reaches a general retirement age.

With regard to future earning capacity, no specific testimony was introduced. Petitioner testified that he returned to his full work duties with Respondent, and was earning the same wages he did prior to his injury.

Petitioner testified that his left arm remains weaker than it was pre-accident. He noticed that when performing his work duties, the arm would tire faster than it had in the past. He also noted some intermittent ongoing left elbow pain, noting it was not excruciating, but that it felt tight and that he would have to stretch it out. The august 20, 2014 report of Dr. Brown indicated Petitioner had no numbness or tingling, but did have some ongoing medial elbow edema, along with some soreness and weakness. His range of motion was good. At the last visit of October 15, 2014, Dr. Brown noted good active range of motion and that Petitioner had done very well. When asked on cross examination if the gradually improving grip strength noted by Dr. Brown had continued, Petitioner testified: "I think I basically have been stagnant. There's nowhere near the grip that I used to have." (Tr. 14-15).

The Petitioner is a relatively young man with significant a preexisting right hand disability. As such, he is forced to rely on his left upper extremity more than the typical person. The Petitioner credibly testified that while he has been able to continue working, he does have some ongoing weakness and pain in the left arm and elbow. Taking that into account along with the fact that his current job is significantly physical and clearly requires the use of the upper extremities, we believe that the Petitioner has sustained the loss of 25% of the left arm.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner's award for permanent partial disability is modified from 20% of the left arm to 25% of the left arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $507.02 per week for a period of 63.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 25% of the left arm.

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

16IWCC0020

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 $32,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 6 - 2016
TJT: pvc
O 11/23/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LYNCH, DONNIE
Employee/Petitioner

Case# **14WC034468**

METRO EAST INDUSTRIES
Employer/Respondent

16IWCC0020

On 5/20/2015, 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 0.08% 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:

1846 BROWN & CROUPPEN LAW FIRM
KERRY O'SULLIVAN
211 N BROADWAY SUITE 1600
ST LOUIS, MO 63102

0299 KEEFE & DEePAULI PC
JAMES K KEEFE SR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

16IWCC0020

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
NATURE AND EXTENT ONLY

Donnie Lynch
Employee/Petitioner

v.

Metro East Industries
Employer/Respondent

Case # **14** WC **34468**

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **3/19/15**. By stipulation, the parties agree:

On the date of accident, **4/30/14**, 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 $**43,942.08**, and the average weekly wage was $**845.04**.

At the time of injury, Petitioner was **38** years of age, ***single*** with **3** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

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**.

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.

16 IWCC0020

ORDER

Respondent shall pay Petitioner the sum of **$507.02**/week for a further period of **50.5** weeks, as provided in Section **8(e)(10)** of the Act, because the injuries sustained caused **20% loss of use of the left arm.**

Respondent shall pay Petitioner compensation that has accrued from **10/15/14** through **3/19/15**, and shall pay the remainder of the award, if any, in weekly payments.

The parties have stipulated that reasonable, necessary and related medical expenses have been or will be paid by Respondent per the Illinois Medical Fee Schedule.

The parties have stipulated that all temporary total disability benefits have been paid by Respondent.

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

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

Signature of Arbitrator — Date: 5/11/15

MAY 20 2015

Illinois Workers Compensation Commission

Donnie Lynch, Petitioner, v. Metro East Industries, Inc. Respondent.	)	14 WC 34468 16IWCC0020

FINDINGS OF FACT

Petitioner is 39 years old and has three minor children. He was worked as a fabricator for Respondent for three years. His job duties include welding, cutting bad steel out, replacing steel and repairing locomotives.

On April 30, 2014 he was injured when he was coming down off of a locomotive and he struck his left elbow on a metal door. He received treatment at Midwest Occupational and they ultimately referred him to Dr. David Brown.

Dr. Brown diagnosed ulnar neuropathy and cubital tunnel syndrome. On July 11, 2014, Petitioner underwent surgery with Dr. Brown which included decompression of the ulnar nerve, left cubital tunnel with anterior submuscular transposition of the ulnar nerve with myofascial lengthening of the flexor pronator tendon origin. Dr. Brown released Petitioner at maximum medical improvement on October 15, 2014.

Petitioner was born with no fingers on his right hand. As a result, he has never been able to lift, grab or manipulate with his right hand. He described himself as very left hand dominant.

Petitioner described his left arm as a lot weaker than it used to be. When doing grinding, cutting, welding and any of his jobs, his left arm is not as strong as it used to be and his left hand and arm tire a lot faster. He has pain that kind of comes and goes, not a constant pain. He has to stretch his left arm out a little bit because it gets tight. He has pain in his elbow. He is able to perform his job full duty. At the end of the work day he described his left arm as "really tired". This injury has affected his personal life because all of his children are involved in sports, but he has not tried to throw a ball. He is the vice president of the Little League Association and he has recruited help for heavy lifting.

Prior to working for Respondent, Petitioner was a pipefitter for 15 years. His job history also includes HVAC work and general labor. His entire adult life has been spent doing general labor, pipefitting, HVAC work and/or working for Respondent.

Pre-employment testing forms (Pet. Ex. 3) with Respondent show that his grip strength in the left hand was tested on July 5, 2012 and was 140 lbs, 135 lbs, and 130 lbs.

On October 15, 2014, when Dr. Brown released Petitioner at maximum medical improvement, Petitioner's grip strength was measured at 66, 81, 69.

CONCLUSIONS OF LAW

In determining the Petitioner's permanent partial disability pursuant to 820 ILCS 305/8.1(b), the Arbitrator relies on the following:

1) Neither party submitted a rating.

2) Petitioner's current occupation as a fabricator involves welding, cutting steel, replacing steel and repairing locomotives. Petitioner's entire adult life has been spent in working heavy physically demanding occupations such as general labor, HVAC, pipefitting and fabricating. The Arbitrator places great weight on this factor.

3) Petitioner was 38 years old at the time of the injury. Petitioner has years remaining in the work force. The Arbitrator places great weight on this factor.

4) Petitioner continues to work in the same position as prior to the work injury. However, his diminished grip strength may impact his future earnings capacity if he were to seek new employment in the physically demanding fields in which he is experienced. The Arbitrator places little weight on this factor.

5) Petitioner testified that he is very left hand dominant due to being born with no fingers on the right hand. He cannot lift, grab or manipulate with the right upper extremity, which places significant importance on the left arm. His left hand and arm tire faster and easier than they did pre-injury. He described largely decreased grip strength which is corroborated by pre and post injury records. The pre and post injury grip strength testing shows a decline from prior the injury of 140, 135 and 130 pounds, down to 66, 81 and 69 pounds at the time of maximum medical improvement. Objective medical testing shows a decrease in grip strength between his average pre-injury grip strength of 135 pounds down to an average post-injury grip strength of 72 pounds, which represents a 53% reduction in grip strength. The Arbitrator places great weight on this factor.

Based on the above review, the Arbitrator awards **20%** loss of use of the left arm.

14 WC 20129

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

Mark DeAngelo,
Petitioner,

vs. NO: 14 WC 20129

URS Energy & Construction, Inc.,
Respondent.

16IWCC0021

DECISION AND OPINION ON REVIEW

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

The Commission notes that while Respondent raised the issue of accident on its Petition for Review, it waived the issue at oral argument.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 2, 2015 is hereby affirmed and adopted.

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

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

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

14 WC 20129

16IWCC0021

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 6 - 2016
MJB:ell
O-12/14/15
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

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

DE ANGELO, MICHAEL
Employee/Petitioner

Case# **14WC020129**

UNITED RESEARCH SYSTEMS
Employer/Respondent

16IWCC0021

On 4/2/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1167 WOMICK LAW FIRM CHTD
CASEY VANWINKLE
501 RUSHING DR
HERRIN, IL 62948

0299 KEEFE & DePAULI PC
PATRICK M KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

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)

MICHAEL DE ANGELO
Employee/Petitioner

v.

UNITED RESEARCH SYSTEMS
Employer/Respondent

Case # **14** WC **020129**

Consolidated cases: _____

16IWCC0021

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **EDWARD LEE**, Arbitrator of the Commission, in the city of **HERRIN**, on **2-10-2015**. 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. ☒ 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, **02-25-2014**, 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 $**96,200.00**; the average weekly wage was $**1815.00**.

On the date of accident, Petitioner was **50** 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 $**28,014.43** for TTD, $**00** for TPD, $**00** for maintenance, and $**00** for other benefits, for a total credit of $**28,014.43**.

Respondent is entitled to a credit of $**28,014.43** under Section 8(j) of the Act.

ORDER

THE ARBITRATOR FINDS THAT AN ACCIDENT DID OCCUR THAT AROSE OUT THE PETITIONER'S EMPLOYMENT BY RESPONDENT AND THAT THE PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY HE SUSTAINED ON 2-25-2014. ARBITRATOR FINDS THAT THE PETITIONER IS ENTITLED TO PROSPECTIVE MEDICAL CARE BASED ON THE RECOMMENDATION OF DR. GORNET, I.E., SPINAL FUSION AT L5-S1. ARBITRATOR FINDS THAT PETITIONER IS ENTITLED TO TTD BENEFITS AND AWARDS TEMPORARY TOTAL DISABILITY FROM MAY 16, 2014 THROUGH FEBRUARY 10, 2015, REPRESENTING 36 WEEKS. RESPONDENT IS ENTITLED TO A CREDIT OF $28,014.43, REPRESENTING 23 AND 1/7 WEEKS, TOWARDS THE 36 WEEKS.

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

3/27/15
Date

ICArbDec19(b)

APR 2 - 2015

MARK DEANGELO V. UNITED RESEARCH SYSTEMS
IWCC #: 14 WC 020129

16IWCC0021

STATEMENT OF FACT

Petitioner has a claimed accident of February 25, 2014. Petitioner was working for URS as a pipefitter that night and was working the night shift. Petitioner testified he was setting up for a fresh air job and he and his partner had to go retrieve the fresh air cart that was approximately 300 yards away from where they needed it. Petitioner testified that when he pulled on the cart to try and get it moving, he felt a little snap and a sting in his back. The cart he was pulling on weighs approximately 1000 pounds. Petitioner proceeded to take the cart back to where they needed to set it up for working and when they arrived at that location, Petitioner felt that he had hurt himself. Petitioner continued to try and work through his shift but his back was hurting worse and worse and he eventually went and reported the situation to his general foreman. He was taken to the company safety department and they set him up to see the doctor that same morning.

The morning of the 26th of February, Petitioner saw Dr. Dierker at Midwest Occupational Medicine. Petitioner gave Dr. Dierker a consistent history of the accident. Over the next two weeks, Petitioner saw Dr. Dierker and reported pain radiating down the right lateral thigh and a burning feeling into the posterior calf. He had a similar complaint in the left calf. Petitioner also testified that he was having problems with his feet and being able to control them.

Petitioner told Dr. Dierker that he had not had any previous back injuries or surgeries. Petitioner testified at trial that he had gone for occasional chiropractic adjustments over the past several years with his chiropractor, Dr. Mark Bradley. Petitioner testified that he had used Dr. Bradley six or seven times times a year for the last several years for adjustments. Petitioner had seen Dr. Bradley four days prior to the work accident. On February 22, 2014, Petitioner had seen Dr. Bradley with a sore lower back giving him discomfort. He testified that he had Dr. Bradley adjust him and use

TENS machine on his low back to relax the muscles.

At hearing, when Petitioner was asked what was different about his back pain after his accident than before, he testified that, "It was very different. I had a stabbing pain in my lower back in the center, and I also had a burst that run up my back, and most of the pain was from my knees down, and there was the pains that would come and go, they were stabbing pains, and sometimes I would get them in my feet." (TR p. 16) When Petitioner was asked at trial if that was different than before his accident he replied, "Yeah, I never had that." (TR p. 16)

Dr. Dierker referred Petitioner to Dr. Katz. On June 13, 2014, Dr. Katz noted that Petitioner reported pain in both legs that started on the right with variable sensory symptoms below the knees bilaterally with stabbing and burning. Dr. Katz recommended physical therapy, which the Petitioner began.

Petitioner testified that he had to stop physical therapy because it was making him worse and was hurting him. Petitioner chose to get a second opinion on his back condition and was referred by his family physician, Dr. Graham, to Dr. Matthew Gornet.

Petitioner saw Dr. Gornet for his first evaluation on July 2, 2014. After realizing that Petitioner had discontinued care with him, Dr. Katz released Petitioner for full duty work on July 11, 2014.

During Dr. Gornet's July 2, 2014 visit, Petitioner gave a history of the work accident and complained of low back pain on both sides and bilateral leg pain. Petitioner told Dr. Gornet that he had low back pain in the past and had seen a chiropractor occasionally. Petitioner told Dr. Gornet that his symptoms were much worse and that he hadn't felt this type of pain before his work accident.

Dr. Gornet recommended steroid injections, physical therapy and chiropractic care after diagnosing Petitioner with an acute annular tear at L5-S1 after reviewing an MRI.

Petitioner testified that he underwent two epidural steroid injections that only helped briefly and then his pain returned.

Dr. Gornet stated that his opinion was that Petitioner's symptoms are related to his work injury. Dr. Gornet gave a recommendation after reviewing a CT discogram and a new MRI, that Petitioner needed a spinal fusion at L5-S1 for instability at that level.

Petitioner was seen for an independent medical examination by Dr. Lange on November 18, 2014. Dr. Lange, after reviewing Petitioner's MRI's, the discography, the electrical testing done by Dr. Phillips and performing a clinical evaluation of the Petitioner, opined that Petitioner had axial low back pain with multilevel degenerative change. Dr. Lange believed that Petitioner's condition is the same as it was prior to the work accident of February 25, 2014. Dr. Lange's opinion was that Petitioner did not need a spinal fusion at L5-S1 as recommended by Dr. Gornet and that his condition of ill-being was not work related.

In support of the Arbitrator's decision on Issue C: Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

Conclusion: The Aribitrator finds that on February 25, 2014, an accident did occur that arose out of the Petitioner's employment with Respondent.

In support of the Arbitrator's decision on Issue F: Is Petitioner's current condition of ill-being causally related to the injury?

Conclusion: The Arbitrator finds that after hearing the testimony of the Petitioner and taking into consideration the opinions of both Dr. Lange and Dr. Gornet, that the Petitioner is deemed credible and that the opinion of Dr. Gornet is more persuasive than that of Dr. Lange, and therefore, Petitioner's current condition is found to be related to the work injury of February 25, 2014.

16IWCC0021

In support of the Arbitrator's decision on Issue K: Is Petitioner entitled to any prospective medical care?

Conclusion: The Arbitrator finds the opinion of Dr. Gornet more persuasive and therefore awards the prospective medical treatment recommended by Dr. Gornet in the way of a spinal fusion at L5-S1.

In support of the Arbitrator's decision on Issue L: What temporary benefits are in dispute?

Conclusion: The Arbitrator finds that Petitioner has had work restrictions placed on him by various doctors since his lay-off of May 16, 2014. Those work restrictions are current through the day of hearing by Dr. Gornet. Therefore, Arbitrator awards temporary total disability from May 16, 2014 through February 10, 2015, representing 36 weeks.

In support of the Arbitrator's decision on Issue N: Is Respondent due any credit?

Conclusion: The Arbitrator finds that between May 16, 2014 and February 10, 2015, Petitioner has been paid a total of $28,014.43 in TTD payments representing 23 and 1/7 weeks. This amount will be given as a credit towards the 36 weeks owed to Petitioner.

Dated: _____

_____
Arbitrator

END ATTACHMENT

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

Claudio Rogel,

Petitioner,

vs. NO. 09WC 33752

16IWCC0022

Mike and Sons Construction
and the Illinois State Treasurer
as ex officio Custodian of the Injured Workers' Benefit Fund,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Illinois State Treasurer as ex officio Custodian of the Injured Workers' Benefit Fund and notice given to all parties, the Commission, after considering the issue of nature and extent of Petitioner's disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 3, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

16IWCC0022

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

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

Bond for removal of this cause to the Circuit Court is hereby fixed at the sum of $34,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 7 - 2016
SJM/sj
o-11/12/2015
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROGEL, CLAUDIO
Employee/Petitioner

Case# 09WC033752

MIKE AND SONS CONSTRUCTION AND THE ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN IF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

16IWCC0022

On 6/3/2015, 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 0.07% 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.

0233 DePAOLO ZADEIKIS & GORE
DANIEL H PERIASWAMY
309 W WASHINGTON ST SUITE 550
CHICAGO, IL 60606

0000 MIKE & SONS CONSTRUCTION
101 W NORTHWEST HWY
PALATINE, IL 60067

4980 ASSISTANT ATTORNEY GENERAL
COLIN KICKLIGHTER
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Claudio Rogel
Employee/Petitioner

v.

Mike and Sons Construction and the Illinois State Treasurer as *ex officio* Custodian of the Injured Workers' Benefit Fund
Employer/Respondent

Case # **09WC33752**

16IWCC0022

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **May 20, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 28, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**11,077.00**; the average weekly wage was $**503.50**

On the date of accident, Petitioner was **49** years of age, m*arried* with **2** dependent children under 18.

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of $**10,012.00**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $**335.67**/week for **2 3/7**^{ths} weeks, commencing **May 28, 2009** through **June 14, 2009**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**302.16**/week for **76** weeks, because the injuries sustained caused the **100%** loss of the **right thumb**, as provided in Section 8(e) of the Act.

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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

Milton Black
Signature of Arbitrator

June 3, 2015
Date

FACTS

JUN 3 - 2015

Petitioner was the only witness. He testified that he was born on December 20, 1959, is married to Irene Rogel and has twin daughters, Lizeth and Nereida, born on May 12, 1999. On or about May 28, 2009 he had been employed with Mike & Sons Construction, located at 101 W. Northwest Highway, Palatine, Il 60067, since 2007. Mike & Sons was a construction company that performed brick work, cinder block work, and demolition. Petitioner testified that he was a laborer. Petitioner testified that he made $17.00 per hour for 40 hours per week, sometimes more hours and sometimes less. He testified that there were no benefits or sick leave, that he did receive checks, and that he was issued W-2s.

Petitioner testified that he was working on May 28, 2009 for Mike & Sons. He was cutting out a door from a cinder block wall. He was removing blocks when a coworker hit a cinder block with a sledgehammer. Petitioner's right thumb was smashed between two cinder blocks.

Petitioner testified that his supervisor, Ziggy, was present at the time of the accident and took him to the emergency room at Condell Medical Center (PX2). He received emergency room care and was seen by Dr. DeLeon of the Illinois Bone and Joint Institute for follow-up treatment. Dr. DeLeon's initial assessment was right thumb radial digital nerve laceration as well as open fracture of the distal phalanx. He recommended a right thumb open reduction and internal fixation, digital nerve repair and revision wound repair with debridement (PX3). Petitioner testified that Dr. DeLeon gave him a note to be off work, which Petitioner presented to Ziggy.

Surgery was performed on June 2, 2009 at the Hawthorn Surgery Center. The procedure was revision amputation of right thumb with flap closure. The postoperative diagnosis was right thumb distal phalanx open fracture with crush injury (PX4).

Dr. DeLeon saw Petitioner on June 8, 2009. He noted Petitioner's concern about infection. Physical examination revealed serious drainage from the thumb and moderate ecchymosis. Dr. DeLeon prescribed Duricef and gave Petitioner an off work note (PX3). Petitioner testified that he presented the note to Ziggy.

Dr. DeLeon saw Petitioner on June 12, 2009. X-rays confirmed amputation just proximal to the interphalangeal joint of the right thumb. Dr. DeLeon's assessment was right thumb amputation. Dr. DeLeon prepared a work note stating no lifting more than 2 pounds with the right hand (PX3). Petitioner testified that he gave the note to Ziggy and returned to work with restrictions, approximately June 14, 2009. He testified that he thought he saw Dr. DeLeon at least one more time.

Petitioner testified that his medical bills (PX#5) were not paid. Petitioner testified that he did not receive any temporary total disability for his lost the time.

Petitioner testified that his current employment is with Interlink, as a driver and laborer. He uses a shovel to digs trenches for cable wire. Petitioner testified that his injury affects his current work, because he has difficulty grasping the shovel.

Petitioner testified that he experiences numbness in his right thumb and increased pain with cold weather. Petitioner testified that he is right-handed and has difficulty writing, eating with a fork, and grasping. He testified that he had no injuries or problems with his right thumb and right hand prior to the work accident on May 28, 2009.

CONCLUSIONS OF LAW

Respondent operating under and subject to the Act

The Arbitrator finds that the Respondent was operating under and subject to the Illinois Workers' Compensation Act. Petitioner testified credibly that Respondent was in the business of construction, specifically brick work and demolition.

Employee-Employer Relationship

The Arbitrator finds that there was an employee-employer relationship. Petitioner provided pay stubs (PX6) and tax returns with W-2 tax forms (PX7), and he testified credibly to that relationship, especially Respondent's control.

Accident Arising Out And In The Course Of Employment

The Arbitrator finds that an accident occurred on May 28, 2009 that arose out and in the course of Petitioner's employment by the Respondent. Petitioner testified credibly and in detail of the mechanism of injury on May 28, 2009. The Condell emergency records for the same date (PX2) corroborate the testimony.

Notice

The Arbitrator finds that timely notice was given to the Respondent. Petitioner testified credibly that his supervisor, Ziggy, was present at the time of the accident and took him to the emergency room. This is corroborated by the emergency records which state, "Additional history from work supervisor" (PX2, p2 of 6).

Causal Connection

The Arbitrator finds that Petitioner's present condition of ill-being is causally related to the injury. Petitioner testified credibly, the medical records (PX2, PX3, and PX4) are corroborative, and the sequence of events is consistent.

Earnings

The Arbitrator finds that in the year preceding the injury, Petitioner earned $11,077.00 and that the average weekly wage was $503.50. Petitioner provided pay stubs (PX6) as well as tax returns with W-2 tax forms (PX7) in support of his earnings.

Age and marital status

The Arbitrator finds that on the date of accident, Petitioner was 49 years of age, married to Irene with 2 dependent children, Lizeth and Nereida. Petitioner testified credibly to his date of birth (December 20, 1959, his 22 years of marriage to his wife Irene and to his twin daughters Lizeth and Nereida, in support thereof presented birth certificates (PX10).

Reasonable and necessary medical treatment and appropriate charges

The Arbitrator finds the medical services provided to Petitioner were reasonable and necessary to treat his injury. The medical records provided (PX2, PX3, and PX4) support the reasonableness and necessity of the medical treatment. Petitioner testified that Respondent did not pay any medical bills (PX5).

Temporary total disability

The Arbitrator finds that Petitioner was temporarily totally disabled from May 29, 2009 through June 14, 2009. Petitioner testified credibly that he lost time from work in accordance with medical notes and to presenting those notes to his supervisor, Ziggy. Petitioner testified that he did not receive any temporary total disability for the period of lost time.

Nature and extent

The Arbitrator finds the injuries sustained caused 100% loss to the right thumb. Dr. DeLeon records confirmed amputation proximal to the interphalangeal joint of the right thumb.

Injured Workers Benefit Fund

The Arbitrator finds that Respondent, Mike & Sons Construction, did not have Workers' Compensation insurance as shown on the NCCI Certification of Non-insurance (PX8) and that Mike & Sons Construction was provided notice of the proceedings before the Illinois Workers' Compensation Commission (PX9).

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Charles Benford,
Petitioner,
vs.

NO: 14WC 8009
14WC 8010

Bluestream Professional Services, LLC.,
Respondent,

16IWCC0023

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 and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 7, 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:
o121715
DLG/mw
045

JAN 8 - 2016

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BENFORD, CHARLES
Employee/Petitioner

Case# **14WC008009**
14WC008010

BLUESTREAM PROFESSIONAL SERVICES LLC
Employer/Respondent

16IWCC0023

On 5/7/2015, 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 0.07% 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:

4564 ARGIONIS & ASSOCIATES LLC
PETER VLANTIS
180 N LASALLE ST SUITE 2105
CHICAGO, IL 60601

0532 HOLECEK & ASSOCIATES
KENNETH SMITH
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF **WILL**)

16IWCC0023

- [ ] 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

Charles Benford
Employee/Petitioner

v.

Bluestream Professional Services, LLC
Employer/Respondent

Case # 14 WC **8009**

Consolidated cases: 14 **WC 8010**

An *Application for Adjustment of Claim* was filed in this matter, and a Notice of Hearing / Motion to Dismiss 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 **April 16, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [x] 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. [x] Other **Jurisdiction**

FINDINGS

On **11/26/13 & 12/10/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did not*** 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.

Petitioner earned an average weekly wage of $**640.00**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Petitioner has failed to meet his 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

5/1/14
Date

MAY 7 - 2015

FINDINGS OF FACT

Petitioner alleges an injury while working for the Respondent on November 26, 2013 and December 10, 2013. Petitioner resides in Illinois. Respondent is a corporation headquartered in Minnesota with its HR department and training facilities in Georgia. Petitioner was hired to work as a Tower Climber for Respondent. His injuries occurred in Minnesota. This case proceeded to hearing on Respondent's Motion to Dismiss, with the sole issue being jurisdiction.

Petitioner's testimony

Petitioner received an email from Jenny Hicks on behalf of the Respondent dated August 9, 2013, regarding an offer of employment. The email reads as follows:

> Congratulations! We are excited that you have accepted BlueStream's offer of employment. We are sending you this email so that you can begin our on-boarding process – your first steps to becoming a BlueStream employee. On your first day of employment please BRING the following: Signed Offer Letter…Voided Check…Copy of Resume and References…Valid Identification… Last, but not least, you will receive a separate email for your drug and background screens. Attached is your offer letter and a list of acceptable documents to bring for valid identification. If you have any questions at any time, feel free to contact me. Thanks and welcome! …Jenny Hicks…human resources…BlueStream (PX 1)

The actual offer letter is on letterhead indicating the Respondent's name, BlueStream Professional Services and also dated August 9, 2013. (PX 2) It is addressed to the Petitioner and is signed by Robin Schmidt, Human Resources Director. The offer letter has a section below Robin Schmidt's signature indicating: "I agree to the terms of the employment set forth above." Below that sentence is a signature line and a date line, both of which are blank. Petitioner testified that he signed this offer letter in Georgia, after he arrived for his training.

Petitioner testified that following his receipt of the offer letter, he underwent a background screening and a drug test – both of which were performed in Illinois. Petitioner further testified that following the results of his screening and drug test, he was instructed to go for training in Marietta, Georgia. Petitioner testified that at the time he was told to go for training, he was also told that he was hired. Respondent made the arrangements for Petitioner to travel to Georgia and paid for his air and hotel expenses while in training. Petitioner was paid salary during his training. Following his training, Petitioner returned to Chicago before he was sent to work in other states. Respondent paid for Petitioner's lodging whenever he travelled outside of Illinois. Petitioner was injured on two occasions while he was working for Respondent in Minnesota.

On cross-examination, Petitioner testified that he received his application for employment with the Respondent via email from the Respondent, and emailed the completed application back to Respondent. Petitioner further testified that he signed the offer letter in front of the Respondent's HR Department representative after he arrived in Georgia. This occurred prior to his training. Petitioner understood that he would be fired if he did not complete the training. Petitioner was given his employment handbook while in Georgia and remained in Georgia for 6 weeks during his training.

Jennifer Hicks' testimony

Jennifer Hicks testified on behalf of the Respondent via evidence deposition on September 4, 2014. Ms. Hicks is employed as a human resources generalist for Blue Stream and testified in regards to this matter. (RX 2, P 5).

She works out of the company's Marietta Georgia office. (RX 2, P.5-6). She is involved with and is familiar with the company's procedures for recruiting and hiring tower climbers. (RX 2, P 8). The company has a recruiter, named Chuck or Charles West who is a military veteran and helps the company recruit former military personnel into the company. (RX 2, P 9-10). Mr. West also works out of the Marietta office. In regards to the company's recruiting of military personnel, the company had a blanket approval where recruiters could offer an employee a job automatically if it was within a certain range salary range. (RX 2, P 14). Once the offer was made, the human resources department would send out a letter instructing the candidate to undergo a drug screen and a background check. (RX 2, P. 14). Once the drug screen is clear, Mr. West's department would send the applicant another e-mail providing them information on setting up travel to the HR department in Marietta, Georgia (RX 2, P. 14). In this particular matter Mr. Benford acknowledged that he was interviewed by Mr. West over the phone. Ms. Hicks provided a detailed explanation of the company's hiring policies.

She stated that :

> "On the first Monday that they come to the company in Marietta, that is when we have them sign their offer letters because they have three days to make sure that they get them to e-verify. And that's our process" (RX 2, P 14-15).

She stated that in this particular case, Mr. Benford physically arrived at the Marietta, Georgia, facility on August 19, 2013. (RX 2, P 18). She stated that at that particular time while he was in Marietta, Georgia, he signed the August 9, 2013, offer letter. (RX 2, P 20 referring to Hicks Deposition, Group 1, August 9, 2013, letter). She stated on the first day they report to HR in Georgia they (the human resources representative) pass out the employee folder. This is a fresh folder to each employee with all the documents that need to be completed including all the offers for the employee to sign in front of the HR representative. (RX 2, P 21). The reason they do that is because:

> "We want to make sure that your salary is correct, that you know you have your documentation. And each folder is empty. I mean blank until you actually sign because I have to have people sign in front of me (human resources representative) so I know they understand and two, three weeks from now they are not saying I d[id]n't know what I was signing. " (RX 2, P 21).

She stated that there is no indication that the offer letter could have possibly been signed off site because they give them a fresh offer letter in the file when they come to the Marietta Georgia office. (RX 2, P. 22). She specifically stated the company does not want the documents the employee might bring or send they prior to that time because she wants them to sign the documents she gives them "so we're all on the same page" (RX 2, P. 22).

Mr. Benford physically signed the August 9, 2013, offer letter, the Application for Employment and the Terms of Employment when he went to the Marietta, Georgia, office on August 19, 2013. (RX 2, P 22-23). She noted, additionally an application for employment is part of the folder and is actually filled out when they come to the human resources department in Marietta, Georgia. (RX 2, P 24). Ms. Hicks also testified that the Petitioner had to undergo a process called E-verify, which is a process that is started only after he fills out the above mentioned papers in Georgia. (RX 2, P 35). She testified that all of this paperwork must be completed in Georgia for the person to be considered an employee. Ms. Hicks testified Mr. Bedford was not initially hired until he arrived in Marietta and completed the paper work. (RX 2, P 37). The company had a requirement that a person has to fill out an employment application, and that was not done until he arrived in Marietta, Georgia (RX 2, P 50). The company's policy is that they are supposed to fill out an application and sign an offer, and they cannot be hired without performing those acts. (RX 2, Page 51).

CONCLUSIONS OF LAW

1. With regard to the issue of jurisdiction, the Arbitrator finds that the Petitioner has failed to meet his 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 Minnesota and there was no evidence solicited at hearing to warrant 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 Georgia, where he had to sign the offer letter to acknowledge that he understood the terms of his employment with the Respondent. It was only after Petitioner signed the offer letter that he began his training and at which point he began to receive his salary while training. 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. Accordingly, Petitioner's claim is denied.

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

Michelle Christerson,
Petitioner,

vs. NO: 10WC 35206

Stateville Correctional Center,
Respondent,

16IWCC0024

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, prospective medical, permanent partial disability, penalties, fees and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 7, 2015, is hereby affirmed and adopted.

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

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

DATED: JAN 8 - 2016
o121715
DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CHRISTERSON, MICHELLE
Employee/Petitioner

Case# **10WC035206**

11WC044608
14WC018924

STATEVILLE CORRECTIONAL CENTER
Employer/Respondent

16IWCC0024

On 5/7/2015, 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 0.07% 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:

0000 BRISKMAN BRISKMAN & GREENBERG
SUSAN FRANSEN
175 N CHICAGO ST
JOLIET, IL 60432

5132 ASSISTANT ATTORNEY GENERAL
STACEY LASKIN
100 W RANDOLPH ST 13TH F
CHICAGO, IL 60601

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

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

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

MAY 7 = 2015

DONALD A. RARICA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0024

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

Michelle Christerson
Employee/Petitioner

v.

Stateville Correctional Center
Employer/Respondent

Case # **10** WC **35206**

Consolidated cases: **11** WC **44608**
14 WC **18924**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **New Lenox**, on **March 9, 2015**. After reviewing all of the evidence presented, the undersigned Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 17, 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 as explained *infra*.

In the year preceding the injury, Petitioner earned $**57,931.64**; the average weekly wage was $**1,114.07**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **2** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services as explained *infra*.

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

Respondent shall be given a credit of $**37,455.08** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits (i.e., full salary paid from August 17, 2010 through August 28, 2010), for a total credit of $**37,455.08 + full salary credit as agreed**. *See* AX1.

Respondent is entitled to a credit **for all amounts previously paid directly to medical providers** under Section 8(j) of the Act. *See* AX1.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $742.71/week for 1 & 1/7th weeks, commencing September 18, 2011 through September 26, 2011, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from August 17, 2010 through March 9, 2015, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $37,455.08 for temporary total disability benefits that have been paid and for other benefits (i.e., full salary paid from August 17, 2010 through August 28, 2010) for a total credit of $37,455.08 + full salary credit as agreed.

Medical Benefits

Respondent shall pay reasonable and necessary medical services for dates of service beginning August 17, 2010 through September 26, 2011 from Dr. Avula/Advocate Medical Group and Dr. Richard Lim, the October 25, 2010 MRI, and the AthletiCo Physical Therapy bills for dates of service between August 17, 2010 and September 26, 2011pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. Petitioner's claim for bills from Dr. Roland and medical treatment after September 26, 2011 is denied[1].

Respondent shall be given a credit as agreed for all amounts previously paid directly to medical providers for medical benefits that have been paid for services claimed in relation to this accident, and Respondent shall

[1] The medical bills for treatment related to Petitioner's claimed accidents at work on October 3, 2011 and May 12, 2014 are addressed in the concurrent decisions in Case No. 11 WC 44608 and Case No. 14 WC 18924.

hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 12.5 weeks, because the injuries sustained caused the 2.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Penalties

As explained in the Arbitration Decision Addendum, Petitioner's claim for penalties as provided in Sections 16, 19(k) and 19(l) of the 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.

Signature of Arbitrator

May 5, 2015
Date

MAY 7 - 2015

16IWCC0024

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Michelle Christerson
Employee/Petitioner

v.

Stateville Correctional Center
Employer/Respondent

Case # **10** WC **35206**

Consolidated cases: **11** WC **44608**
14 WC **18924**

FINDINGS OF FACT

A consolidated hearing was held in all three of Petitioner's above-captioned cases. Arbitrator's Exhibit[2] ("AX") 1; AX2; AX3. The issues in dispute in this case include causal connection, Respondent's liability for certain unpaid medical bills, Petitioner's entitlement to temporary total disability benefits from September 18, 2011 through September 26, 2011[3], the nature and extent of Petitioner's injury, and whether Respondent is subject to penalties and attorneys' fees pursuant to Sections 16, 19(k) and 19(l) of the Act. AX1.

With regard to Petitioner's claim for payment of medical bills, the parties stipulated that if Petitioner met her burden of proof with regard to accident, causal connection, and the reasonableness and necessity of the medical bills (as reflected in the request for hearing forms for each case), Respondent's liability for such bills will be pursuant to Sections 8(a) and 8.2 of the Act. Tr. at 114-115. The parties also stipulated that if Petitioner meets her burden of proof with regard to each of the cases and the penalties being claimed in each of the cases, the award for penalties based on any medical bills will be calculated pursuant Sections 8(a) and 8.2 of the Act. Tr. at 115. The parties have stipulated to all other issues in this case. AX1.

The issues in dispute related to Petitioner's claimed accident on October 3, 2011 are addressed in the concurrent decision issued in Case No. 11 WC 44608. AX2. The issues in dispute related to Petitioner's claimed accident on May 12, 2014 are addressed in the concurrent decision issued in Case No. 14 WC 18924. AX3.

Background

Prior to August of 2010, Petitioner described her physical condition as good. Tr. at 14. She was not under a doctor's care for any reason, including depression, other than routine medical treatment. *Id.* She testified that she never sustained any type of injuries, accidents, at home incidents, or anything involving her hips, mid-back, or lower back. Tr. at 14-15.

Petitioner testified that she was employed by Respondent through Wexford, which is a contract company, for about a year and a half working at Stateville and was then hired as a state employee July 2009. Tr. at 15. Petitioner testified that she was employed as a correctional nurse, RN. Tr. at 16. She explained that she is a

[2] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party. Exhibits attached to depositions will be further denominated with "(Dep. Exh. _)." The Arbitration Hearing Transcript is denominated as "Tr." with corresponding page numbers.

[3] The parties stipulated to Petitioner's entitlement to temporary total disability benefits from August 17, 2010 through August 28, 2010 during which time she received her full salary and her entitlement to temporary total disability benefits from August 29, 2010 through September 17, 2011. AX1; Tr. at 5-6.

registered nurse and has been since 2001. *Id.* Petitioner testified that a registered nurse carries out doctor's orders and provides all realms of care for their patient. *Id.* She previously worked at private facilities from 2001 to 2007 at Christ Hospital in Oak Lawn, Silver Cross in Joliet, and the Will County Sheriff in Joliet. Tr. at 16-17. Petitioner testified that she also has a degree in paralegal studies, but she never worked as a paralegal. Tr. at 74-75.

Petitioner explained her duties at Stateville while working through Wexford to include passing medications, seeing patients, taking blood pressures, wound cares, lifting, total care patients and doing anything a nurse would do. Tr. at 17. Her duties stayed the same when she was hired by Stateville. *Id.*

Petitioner described the Stateville facility itself. Tr. at 17. She explained that it sits on acres and the buildings are very, very old with very poor ventilation. *Id.* In the summer, Petitioner explained that it was hot as well as in the winter. Tr. at 17-18. There are no elevators and the stairs in the general population area were high and extended up five floors. Tr. at 18. In the "F" house, which is the round house, there are four floors with no elevators. *Id.*

Petitioner testified that there is an infirmary in Stateville which is like a mini hospital where the chronic patients go. *Id.* This designated area has about 25 rooms and cells with two inmates per cell, but sometimes one. *Id.* Between 2007 and August 17, 2010, Petitioner testified that it depended on her assignment how long she would be in the infirmary. Tr. at 18-19. Some days she was assigned to work passing medications on different floors. Tr. at 19. Sometimes she worked with another nurse and sometimes passing medications by herself. *Id.*

August 17, 2010

On August 17, 2010, Petitioner testified that she was working the 3:00 p.m. to 11:00 p.m. shift. Tr. at 19-20. She did not recall her assignment. Tr. at 20. Petitioner testified that she went in the dining room to go sit down on the dining room chair and the chair broke away from the table and fell back causing trauma to her back and then the table fell on top of her chest. Tr. at 22-23. She estimated the weight of the table to be about 75-100 pounds. *Id.* Petitioner also explained that at Stateville everything is bolted down because of the inmates and the table was a round steel table with about six stools welded to it. Tr. at 23. She explained that when she sat on the chair it broke its connection to the table. *Id.*

Petitioner submitted a Supervisor's Report of Injury or Illness dated August 17, 2010 into evidence. PX20. Petitioner wrote the following details of accident and cause of accident:

> Sat down on dining room chair + the entire set collapsed + fell on me while I fell to the floor banging head + back on kitchen floor.
>
> Dining room set – chair collapsed + entire kitchen set fell on ground – not secured or intact.

PX20. The incident was witnessed by correctional officer Foster, who corroborated Petitioner's report. *Id.*

Petitioner testified that she felt immediate pain to her lower back and reported the incident. Tr. at 24. She reviewed Petitioner's Exhibit 20, which she explained is her supervisor's report of the accident. Tr. at 20-21. She completed the entire first page with the exception of the signature and the details of the accident section. Tr. at 21. Her supervisor completed the second page. Tr. at 22. Petitioner testified that she was sent to get medical care at Advocate Medical Group with her doctor, Dr. Avula, and then Dr. Lim. Tr. at 24-25. Petitioner

testified that she did not go to the emergency room immediately because it was late at night and she was able to get an appointment with her doctor the next day. Tr. at 25. On cross examination, Petitioner testified that when she fell, she initially complained of some headache pain. Tr. at 77. Petitioner did not recall seeing a physician at Stateville the same day. Tr. at 77-78.

Medical Treatment – Dr. Avula & Dr. Lim

The medical records reflect that Petitioner saw her primary care physician, Dr. Avula at Advocate Medical Group, on August 19, 2010. PX16 at 21-22. Dr. Avula noted Petitioner's report as follows:

> On 8/17/10: was going to sit down & chair & table set collapsed!! Pt landed on back, banged head, & hurt back and neck. c/o back & neck pain → neck pain on left side. was dizzy at time of injury but no loc.

Id. Petitioner called the following day asking for a referral and noted that the recommended tests were not going to be paid by her insurance. *Id.* When she returned to Dr. Avula for follow up on August 27, 2010, she was diagnosed with thoracic and lumbar paraspinal spasms status post fall. PX16 at 18-19. She reported that she was taking Naproxyn and that she had been to the Hedges Clinic. *Id.* Petitioner was referred to "chiropractic." *Id.* However, on cross examination Petitioner acknowledged that Dr. Lim recommended against a chiropractor. Tr. at 78.

On September 1, 2010, Petitioner reported worsening back pain with working last week and inability to stand for few hours so she had to be off work. PX16 at 16-17. Petitioner reported no radiating symptoms. *Id.* Dr. Avula diagnosed severe back pain, upper thoracic pain, and spasms status post fall. *Id.*

Petitioner testified that Dr. Avula referred her to Dr. Richard Lim ("Dr. Lim"). Tr. at 25. The medical records do not contain a referral to Dr. Lim; however, they show that Petitioner started treating with Dr. Lim on September 15, 2010. Tr. at 25; PX22 at 6-7. At that time, Petitioner reported the following:

> Michelle is a 47-year old female nurse with Stateville Correctional Center presenting with chief complaint of left sided neck and left sided lower back pain since 8/17/2010. On that day she was at work, she was sitting at lunch and apparently fell backwards landing on the hard floor and has had pain ever since in her left side of her neck and left side lower back. She denied any radiation of either pain. She denies numbness or tingling down the legs. She denies bowel or bladder incontinence. No prior history of similar complaints. She has not had any treatment to this point. She has been off work since her injury.

Id. Dr. Lim diagnosed Petitioner with a cervical strain and a lumbar strain. *Id.* He recommended physical therapy and he placed her off work. *Id.* Petitioner testified that she was initially taken off work and was provided various work notes. Tr. at 28.

On September 23, 2010, Petitioner had an initial physical therapy evaluation with Sean Campbell, PT, MPT, ATC ("Mr. Campbell") at AthletiCo as referred by Dr. Lim. PX22 at 14-15. Therapy was recommended twice a week for four-to-six weeks. *Id.* Mr. Campbell noted Petitioner's report of lumbar back pain and "some compensatory left ankle discomfort following poor gait mechanics...." *Id.* Petitioner stated that she was limited to walking two blocks and standing for only 10 minutes, but she did not demonstrate objective elicitation, worsening, or exacerbation of symptomatology with repeated mechanical motions of the lumbar and cervical spine. *Id.*

Mr. Campbell updated Dr. Lim on Petitioner's progress in a note dated October 12, 2010, after seven visits, in which he stated that Petitioner was not "appropriate for mechanical treatment for reduction of low back pain." PX22 at 12-13. He noted that "each approach is subjectively deemed unsuccessful in providing any longevity and sustained relief." *Id.* He further stated that her performance had been inconsistent throughout treatment and that her complaints had a poor prognosis for resolution with physical therapy. *Id.*

On cross examination, Petitioner testified that she stopped going to physical therapy after two visits because it was hurting her and not helping her; they were not treating her right. Tr. at 78.

Dr. Lim sent MRI of lumbar spine on October 25, 2010. Tr. at 26; PX7. The interpreting radiologist noted mild spondylosis changes, spinal stenosis demonstrated at T10/11, minimal disc bulging at L2-L3, mild disc bulging at L3-L4 with borderline right and mild left neural foraminal stenosis, disc bulging and mild endplate osteophyte formation at L4-L5 with mild right and borderline left neural foraminal stenosis and no spinal stenosis, and minimal disc bulging with borderline bilateral neural foraminal stenosis and no spinal stenosis at L5-S1. PX7. After the MRI, Petitioner testified that she saw Dr. Donald Roland ("Dr. Roland") from January of 2011 through February 3, 2012. Tr. at 27.

Petitioner was placed off work on September 15, 2010, October 13, 2010, and November 19, 2010. PX22 at 16-18. She discontinued treatment with Dr. Lim after November 19, 2010. PX22. Petitioner testified that Dr. Lim did not help her. Tr. at 38-39. On cross examination, Petitioner acknowledged that Dr. Lim did not recommend surgery. Tr. at 78.

Continued Medical Treatment – Dr. Roland

The medical records reflect that Petitioner saw Dr. Roland on January 11, 2011. PX27 at 2-4. She reported a mechanism of injury at work when she went to sit and a seat collapsed landing her on the left side and episodes occurring over the prior seven months. *Id.* On physical examination, Dr. Roland noted a tender midline, mildly decreased range of motion, tenderness bilaterally, and negative straight leg raise tests bilaterally. *Id.* He diagnosed Petitioner with lumbar/lumbosacral disc degeneration, sacroiliitis, and lumbosacral spondylosis. *Id.* Dr. Roland ordered Lidoderm, Skalaxin 800 TID, and a TENS unit. *Id.*; Tr. at 59.

On February 23, 2011, Dr. Roland recommended bilateral L4-5 and L5-S1 facet joint injections. PX27 at 5-6. Petitioner underwent the recommended facet joint injections on March 2, 2011. PX27 at 7-8. She returned to Dr. Roland on March 23, 2011 reporting 50% improvement after the injections. PX27 at 9-10. He recommended bilateral radiofrequency ablations from L3-S1. *Id.* When Petitioner returned to Dr. Roland on March 29, 2011 she requested Cymbalta instead. PX27 at 13-14.

At her next visit on June 15, 2011, Petitioner reported new pain in both feet and "still having LBP as well she had a facet injection it did help I then wanted to do RF procedure but not oked by work comp. She presented with low back pain. It is located on both sides. It is radiating to bilateral calf, bilateral leg, the left foot and the right foot. It is described as constant. The symptom is ongoing. The complaint is 4/10. The frequency of episodes is daily and increasing." PX27 at 15-16. Dr. Roland diagnosed Petitioner with facet syndrome, sacroiliitis, lumbosacral spondylosis, and lumbar/lumbosacral degenerative disc disease. *Id.* He ordered Norco, Mobic, an EMG, and bilateral radiofrequency ablations from L3-S1. *Id.*

Petitioner acknowledged that she told Dr. Roland at this visit that her back pain was radiating to her leg and calf. Tr. at 79. On re-direct examination, Petitioner clarified that this radiating pain to her leg and calf in June

of 2011 occurred prior to the second incident with the cart and that she was incorrect when she testified on cross examination that this was the first time she felt pain going into her leg. *Id.*

On June 16, 2011, Dr. Roland issued a narrative letter. PX25. Petitioner reported increased pain at that time and he ordered an EMG/NCV. *Id.* Dr. Roland noted his expectation that Petitioner would return to work as of August 12, 2011, but she called his office complaining of extreme pain so he scheduled a radiofrequency ablation procedure. *Id.* He noted that Petitioner should be back at full duty work five days after her procedure, which was scheduled for August 30, 2011. *Id.* Petitioner underwent the recommended bilateral lower extremity EMG/NCV on June 23, 2011. PX27 at 17, 20. The results were borderline for the lower extremities showing consistent findings for lower lumbar radiculitis, although no frank lumbar radiculopathy was seen. *Id.*

Petitioner also saw Tara Sakevich, D.P.M. ("Dr. Sakevich") for bilateral heel and arch pain beginning September 8, 2011. PX38. Dr. Sakevich's records do not contain any report by Petitioner to an injury involving the ankles or feet at work. *Id.*

Petitioner underwent the recommended bilateral radiofrequency ablations on September 20, 2011. PX27 at 23-24; Tr. at 28. She was released to light duty work. PX27 at 25.

Petitioner also had an initial physical therapy evaluation at AthletiCo on September 22, 2011 with Brad Svoboda, PT, ATC ("Mr. Svoboda"). PX27 at 26-27. Mr. Svoboda noted the following:

> Patient present to therapy with significant concern for return to work knowing the amount of walking she has to do and not feeling she is in condition to perform that since she has been unable to exercise secondary to high pain level over the last year. She does demonstrate reduced measurement for muscular strength and has a positive lumbar quadrant test eliciting her pain. *Patient reports functionally she is limited a lot with bathing or dressing herself, walking around the room, getting in and out of a chair, getting in and out of bed and walking one block. However patient able to sit to stand in clinic 3 times without reports of pain and she rode her bike to the clinic for her session.* Patient to benefit from physical therapy to improve muscular endurance and strength.

Id. (*emphasis* added).

Petitioner testified that she did not go back to work until September 26, 2011 approximately six days after the radio frequency ablation. Tr. at 28-29. She testified that she was still in pain, which had gotten a little better, but she was able to work. Tr. at 29.

When Petitioner returned to Dr. Roland on September 28, 2011, she reported 60% improvement after the radiofrequency ablation with continued low back pain radiating to the bilateral hips. PX27 at 28-30. Dr. Roland released Petitioner to work without restrictions. *Id.*

October 3, 2011

Petitioner testified that on October 3, 2011 she had been back at work approximately one week performing the same job as a registered nurse on the 3:00 p.m. to 11:00 a.m. shift. Tr. at 30. She was working alone on this date in the Stateville emergency room. *Id.* Petitioner explained her duties to include passing out medications and handling emergencies. *Id.*

Petitioner testified that she was doing her medications and bent over an old metal medicine cart that was about

50 years old, 3' x 3', and weighed about 100 pounds. Tr. at 31-33. She explained that the three drawers stick and she had to push them back in. *Id.* She added that the bottom drawer got stuck a lot and was bent. *Id.* Petitioner testified that she pulled the bottom drawer and it fell on her. *Id.* Petitioner testified that she hurt her back. *Id.*

Petitioner reviewed Petitioner's Exhibit 19, which she explained is an injury report written by her boss, Dolores Trevino. Tr. at 34, 36. She completed the description on page two of that exhibit and signed it. *Id.* The form indicates that this incident report was filled out at 7:28 p.m. on October 3, 2011. *Id.* The report is titled Adult and Juvenile Divisions Incident Report and reflects Petitioner's statement of facts as follows:

> On above date and approx time [Petitioner] notified this RNS that she had severe back pain while standing and packing medications for units D+E. [Petitioner] requested to go to hospital emergency room for further evaluation and treatment via ambulance. Shift Commander Major Fredericks rejected above Assistant Warden Edwards called and refused above. As per [Petitioner] transport to St. Joseph Hospital emergency room via [illegible] vehicle requested and Shift Commander .... HCS D.O.N. Cindy Garcia... directed [Petitioner] to [illegible] worker cmp with questions she has regarding workers cmp procedures, notification, and follow up.
>
> ....
>
> While standing in the back of the ER packing medications my back was aggravated as I bent over and pulled out bottom drawer. Pain is a 10 – lower back – shooting down left leg.

PX19.

Petitioner testified that she pulled the drawer out of the medicine cart and felt pain in her back going down her left leg. Tr. at 35. Petitioner testified that she did not feel pain in her back going down her left leg prior to that day. *Id.* She explained that her previous pain was located in the middle-to-lower part of her back. Tr. at 35-36. Petitioner testified that this pain intensified in her back. Tr. at 36.

On cross examination, Petitioner testified that she filled this form out directly after the claimed accident on October 3, 2011. Tr. at 79-80. She acknowledged that it is not a workers' compensation report form like she filled out with her first accident; rather it is an incident report form from the prison. Tr. at 80. Petitioner also explained that she did not mention in the report that the medication cart was broken because the cart was just there; it was just the equipment they used. Tr. at 81. She testified that her back started hurting again while she was at work and had just returned about one week earlier. *Id.* Petitioner described that her back condition was "aggravated" in the report. *Id.*

Medical Treatment – Dr. Roland, Dr. Mekhail & Dr. Hung

Petitioner returned to Dr. Roland on October 4, 2011 reporting the following:

> Patient says she went back to work without restrictions she says after lots of walking her back is killing her. Her supervisor sent her home told her to go to her doctor. The patient had radiofrequency procedure I sent her for PT she had only one visit I will have her finish PT then go back to work.
>
> She presented with low back pain. Patient's pain is worst on the left side. She states pain increases when she is at work since she has to walk several miles and go up the stairs.It is located on both sides. It is radiating to bilateral leg. It is described as shooting, constant and throbbing. The symptom is ongoing. The complaint is 5-10/10. The frequency of episodes is on and off. The symptom is exacerbated by physical activity and standing or walking.

PX27 at 31-35; Tr. at 36-37. Dr. Roland ordered physical therapy and a functional capacity evaluation. *Id.* Notably, Petitioner did not report her claimed accident at work allegedly occurring the prior day.

Petitioner testified on cross examination that she already had this visit scheduled with Dr. Roland before her claimed accident on October 3, 2011. Tr. at 81.

On October 28, 2011, Petitioner was discharged from physical therapy at AthletiCo after eight visits. PX27 at 37-38. At this time, she did not report another injury at work occurring on October 3, 2011. *Id.* Petitioner reported that she felt looser, that the therapy was helping, and that she wished to return to work. *Id.* The physical therapist, Mr. Svoboda, noted the following in pertinent part:

> *Patient observed to ride her bicycle to and from clinic appointments. No ambulatory deviation noted on level surface. No facial grimaces during bending activities.*

Id. (*emphasis* added).

Petitioner returned to see Dr. Roland on November 30, 2011. PX27 at 39-40. She reported the following:

> Oct 3rd hurt at work saw me on the 4th I sent for PT ordered PT and FCE. She was to return to work but she could not because of persistent pain. She says she did not have an order for the FCE. She has been finished with PT for 3 weeks.She called the office and asked for form to bde completed to be off work she was instructed to come in today.
>
> She presented with low back pain. Patient would like to get her work forms filled out. She states physical therapy did not help much.It is located on the left. It is radiating to the left buttock. It is described as intermittent and throbbing. The symptom is ongoing. The complaint is 4/10. The frequency of episodes is unchanged.

Id. Dr. Roland again ordered a functional capacity evaluation. *Id.*; PX31 at 13.

On December 27, 2011, Dr. Roland completed a physician's statement for authorization for disability leave and return to work after her functional capacity evaluation was completed. PX27 at 43-44.

On January 10, 2012, Petitioner underwent the recommended functional capacity evaluation. PX24 at 11-36. The test results were invalid. *Id.* The evaluating physical therapist summarized the findings as follows:

> The results of Mrs. Christerson's FCE are considered INVALID as they do not present an accurate depiction of her current functional capabilities. Mrs. Christerson's subjective reporting of pain and disability is considered: UNRELIABLE, as McGill, Dallas and Oswestry pain questionnaires were all indicative of excessive pain reporting in relationship to objective behaviors and observations. Mrs. Christerson also completed Hand and Spinal Sorts, in which she perceived her current abilities as Sedentary and Less than Sedentary, although she demonstrated greater functional abilities during her testing. Mrs. Christerson demonstrated LOW EFFORT today, evidenced with heart rate analysis of strength testing, including, Isoinertial lifting, and bimanual push & pull. She did not demonstrate competitive test behaviors traditionally observed throughout her exam, and reported subjective pain as primary limiting factor throughout her day. Her subjective pain ratings did not correlate with observed and expected behaviors & movement patterns.

> Mrs. Christerson demonstrated the ability to function at a Light Demand Level (20lbs) at Occasional Frequencies (0-33% of workday) for waist level work, and Medium Demand Level (20-50lbs) for Occasional Demand Level work at shoulder level. She demonstrated no significant limitations with positional tolerances including standing, sitting, or walking. She does not meet work demands as populated by the Dictionary of Occupational Titles to lift 50lbs to waist level at Occasional Frequency.

Id. The evaluating physical therapist noted specific inconsistencies between Petitioner's reported abilities as well as deficiencies in effort. *Id.*

On February 8, 2012, Petitioner reported low back pain to Dr. Roland and wanted to discuss her disability forms. PX27 at 41-42. Petitioner testified that she stopped treating with Dr. Roland because he was not helping her. Tr. at 37.

On March 5, 2012, Petitioner saw Anis Mekhail, M.D. ("Dr. Mekhail"), another orthopedic physician. Tr. at 37-38. The medical records reflect that she reported her fall off a stool at work in August of 2010 with pain continuing since that time and no relief from any treatment from Dr. Lim, physical therapy or facet blocks. PX24 at 2(a-b). Dr. Mekhail recommended light duty work, additional physical therapy and rehabilitation, and to try to advance her activities as tolerated. *Id.* He also advised her to "try to wean herself off of pain medication and seek help from pain management where she got the medication." *Id.* Petitioner testified that no light duty work was given to her. Tr. at 37.

Petitioner then saw another physician, Ming Hung, M.D. ("Dr. Hung") on March 22, 2012. PX30. Petitioner testified that she saw Dr. Hung at Midwest Rehabilitation Associates as referred by Dr. Mekhail. Tr. at 39. She reported the following:

> 49 yo female here for eval for low back and right foot pain. Fell off a stool at lunch when the stool gave way. Sustained injury to her back and feet. Pain worsened next day. Stabbing pain in lower back, left worse than right. Pain range from 0-9 depending on activity. Pain worsens with prolonged standing and walking. Right foot feels swollen with throbbing pain. Difficulty with descending stairs. No falls or give away leg weakness. Pain worse at end of day. No radiating pain to the extremities. No increase in pain with cough, sneeze, or bowel movement. Had therapy at AthletiCo with Sean Campbell but did not have lasting result and was stopped due to insurance. Back injection did not help. Traction treatment aggravated the pain. No bowel/bladder incontinence. Had MRI of back done in 2010 which showed bulging discs. Had EMG but unaware of any significant findings. Had tried Lyrica and Neurontin without benefit. Had also tried Robaxin, Skelaxin, Ultram, and Flexeril without benefit. Currently on Cymbalta and Zanaflex. Reports decreased sleep and weight gain of 50 pounds during this time period.

Id. Dr. Hung diagnosed low back pain, left sacroiliac joint dysfunction, left piriformis syndrome, and right ankle pain/pronation syndrome. *Id.* He ordered physical therapy, an SIJ belt, an injection with Dr. Sharma/Patel for the left glut/piriformis, and a Xanax trial. *Id.*; PX31 at 14.

Petitioner underwent another initial physical therapy evaluation at Provena St. Joseph Medical Center on April 18, 2012 as ordered by Marie Kirincic, M.D. ("Dr. Kirincic"). PX31 at 15-17. Petitioner attended physical therapy between April 18, 2012 and August 19, 2012 for approximately 32 visits. Tr. at 40; PX6 at 208-226; PX31. Petitioner testified that the physical therapy did not help her at all. *Id.*

Continued Medical Treatment – Dr. Kirincic & Dr. Foley

Petitioner explained that neither Dr. Roland nor Dr. Lim helped her so she saw Dr. Kirincic at Hinsdale Orthopedics on June 8, 2012 as referred by Dr. Mekhail. Tr. at 38-39; PX6 at 198-207. The medical records reflect that Petitioner saw Dr. Kirincic for her low back from June 8, 2012 through March 21, 2014. Tr. at 39. Petitioner testified that the steroid injections administered by Dr. Kirincic helped her condition. Tr. at 40.

Petitioner presented with complaints of low back pain after an accident at work on October 3, 2011. PX6 at 198-207. Dr. Kirincic noted the following history:

> A pleasant 49-year-old who complains about left lumbosacral pain and right foot pain. She has been in physical therapy under St. Joseph, improving, made progress in pain and functional level. Still unable to do stairs at times. Pain free. Has not been able to resume work and is unable to do lifting or repetitive movement secondary to pain complaints. She needs a new script. She has had pain treatment under Dr. Hung and Dr. Roland, and has been on Ambien, Norco 7.5, clonazepam from Dr. Lelio for anxiety. Reports she had an accident at work on August 2010. She had x-rays, spinal neurotomy, facet blocks, physical therapy, and pain is still up to 9/10 on the VAS scale. She usually has pain with treadmill, standing for prolonged times, and negotiating stairs. Stabbing pain. Stretching, certain exercise, and pain medication or helping. She has not been able to return as a correctional registered nurse to her work in Joliet. The patient is here with two children, and she has been suffering with right foot plantar fasciitis.

PX6 at 200. Dr. Kirincic reviewed Petitioner's October 26, 2010 lumbar spine MRI showing minimal disc bulging and facet arthropathy with left facet degeneration L4-L5, and borderline neural foraminal stenosis, L5-S1. *Id.* she diagnosed Petitioner with a lumbosacral strain initially work-related injury August 2010 with left sacroiliac joint, peer performance, gluteal myofascial pain, and difficulty with return to work, and chronic pain, muscle spasms, radicular symptoms, and lumbosacral segmental dysfunction. PX6 at 200-201. Dr. Kirincic administered a trigger point injection into the left gluteus/piriformis, discussed and obtained an opioid agreement from Petitioner, and placed her off work. *Id.* Notably, Petitioner did not report her claimed accident at work on October 3, 2011.

Petitioner also saw Michael Dorning, D.O. ("Dr. Dorning") beginning June 15, 2012 for a left foot and ankle injury sustained while walking her dog. PX34.

Petitioner testified that she then began treating with Dr. Nathan Foley ("Dr. Foley") because the physical therapy was not helping and they were not treating her right. Tr. at 41. Petitioner went to Foley Physical Medicine for chiropractic care and physical therapy from August 8, 2012 through March 15, 2013 for approximately 43 visits. PX2; Tr. at 41.

The medical records reflect that at her first visit on August 8, 2012, Petitioner reported low back pain and completed a pain chart in which she noted stabbing pain in the low back and left buttock, a burning pain in the low back, a stabbing pain in the left ankle, and pins and needles sensation in the right toes. PX2 at 2-4, 22-24. Petitioner reported the following:

> ... she has had chronic low back pain that radiates down the left buttock for years. She had an accident while at work many years ago and has since had many different low back problems. The current pain is slightly different from past pains in that it is over the entire low back as well as well [sic] down the left posterior thigh. ...The original injury was from sitting on a bench and it gave way landing her on her

buttock and left side. She states that she has been to many other doctors and physical therapists and has had no relief from the pain."

PX2 at 22-24. Petitioner continued to see Dr. Foley for chiropractic treatment as well as Dr. Kirincic. PX2; PX6. Petitioner was diagnosed with an opioid dependency, but complied with the drug screens ordered by Dr. Kirincic. PX6.

Section 12 Examination – Dr. Lami

On December 3, 2012, Petitioner submitted to a medical evaluation with Babak Lami, M.D. ("Dr. Lami") at Respondent's request. RX4 (Dep. Exh. 2). Petitioner testified that she did not recall seeing Dr. Lami at Respondent's request in December of 2012, but recalled the evaluation after Petitioner's counsel stipulated to her attendance. Tr. at 87.

Petitioner provided a history reporting "an injury to her lower back in August of 2010. The injury occurred when she was on her food break. She was trying to sit down on the chair when the chair and table gave way and she fell on the cement floor. RX4 (Dep. Exh. 2). Dr. Lami reviewed Petitioner's reports of injury in August 2010 and October 2011, treating medical records from Dr. Roland, Dr. Lim, and Dr. Mekhail, as well as physical therapy records and diagnostic reports including Petitioner's October 2010 MRI. *Id.*

Dr. Lami concluded that Petitioner's MRI report failed to show any significant finding other than degenerative changes. *Id.* He noted that Petitioner had been evaluated at that point by two orthopedic surgeons, Dr. Lim and Dr. Mekhail, who both recommended functional capacity evaluations. *Id.* Dr. Lami also noted Dr. Mekhail's recommendation that Petitioner come off her pain medications and increase her activities. *Id.*

Dr. Lami also stated that Petitioner's "subjective complaints and the amount of narcotic medication she is taking are out of proportion to objective physical findings. Irrespective of causation, there is no objective basis to support her significant amount of pain, disability, and need for the significant narcotic medications. I cannot support her current symptoms over two years after her fall, without any objective findings to be related to the fall of August 17, 2010 or subsequent aggravation by bending over to grab medication." *Id.* He opined that Petitioner was at maximum medical improvement and that she required no further treatment or medications as a result of her fall on August 17, 2010. *Id.*

Continued Medical Treatment and Return to Work

As of February 22, 2013, Dr. Kirincic noted that Petitioner was not allowed to return to work while on pain medications or with restrictions. PX6 at 151-156. Dr. Kirincic kept Petitioner off work or noted that her work would not accommodate light duty through November 14, 2014 when she was placed at maximum medical improvement. PX6.

Petitioner testified that she selected Dr. Foley through her husband's insurance card. Tr. at 82. She denied having acupuncture with him. *Id.* She testified that she had acupuncture once with Dr. Kirincic and she did not have that again because it made her pain increase from 0 to 10 in about 20 minutes. Tr. at 83; *see also* PX6 at 170-173 (November 16, 2012 office visit noting Petitioner's report of pain at a level of 10/10 after acupuncture).

Petitioner testified that she went back to full duty work in June of 2013. Tr. at 41-42; PX6 at 132-137 (Petitioner reported on May 31, 2013 to Dr. Kirincic that she would like to return to work the following week as

she was worried about her social security benefits). Petitioner explained that she still had pain that fluctuated and took narcotic pain medications including Norco, Opana ER, Percocet and also non-narcotic medications, but she was able to do her job. Tr. at 42-43. Petitioner testified that she then worked almost a full year. Tr. at 42.

Babak Lami, M.D. – Deposition Testimony

Respondent called Dr. Lami as a witness and he gave testimony at an evidence deposition on February 24, 2014. RX4. Dr. Lami is a board-certified orthopedic surgeon specializing in spinal conditions. RX4 at 4-6; RX4 (Dep. Exh. 1).

Dr. Lami testified that he noted that Petitioner reported a second injury in his review of the medical records, but Petitioner did not report a second injury to him. RX4 at 9-10. He noted no abnormalities in terms of Petitioner's orthopedic neurological examination and he could not identify the cause of Petitioner's low back pain with left buttock pain noting that "[s]he had very mild degenerative changes on her MRI. They were not significant, unremarkable I would say. Her symptoms were subjective. ... her diagnostics and examination did not point out to a particular source of pain." RX4 at 11-13. He testified that neither Dr. Lim nor Dr. Mekhail recommended surgery in the records that he reviewed. RX4 at 16.

Dr. Lami maintained that he could not identify any objective basis for Petitioner's pain complaints at the time of his evaluation, her need for prescription medications or further medical treatment, or work restrictions. RX4 at 13, 17. He opined consistent with his report that Petitioner's low back pain with left buttock pain noted two years after her reported fall and reported second injury (of 2011) could not be related to her employment or her fall at work on August 17, 2010. RX4 at 12, 16-17.

On cross examination, Dr. Lami acknowledged that Petitioner had no reported history of back pain prior to August 17, 2010. RX4 at 19. He testified that Petitioner could have pain from the reported fall of August 17, 2010. RX4 at 20. Dr. Lami also testified that he did not review medical records from Dr. Kirincic, a doctor that Petitioner reported to him was her primary care physician. RX4 at 30-31.

On re-direct examination, Dr. Lami testified that radiofrequency ablations are not generally reasonable or necessary to treat a back strain as was diagnosed by Dr. Lim shortly after Petitioner's first work accident. RX4 at 31.

May 12, 2014

Petitioner reviewed Petitioner's Exhibit 8, which is workers' compensation employee's notice of injury completed by Petitioner with notations by Dr. Kirincic. Tr. at 47. Petitioner's Exhibit 9 is a claim notification for occupational disability (a.k.a., "SRS") that Petitioner testified that she completed because her workers' compensation claim was denied. Tr. at 47-48. Petitioner testified that she did not get SRS benefits. Tr. at 48. Petitioner's Exhibit No. 10 is another request for temporary total disability benefits completed by Petitioner and Dr. Kirincic for the claimed date of accident of May 12, 2014. Tr. at 49.

Petitioner testified that on May 12, 2014 she was working the same 3:00 p.m. to 11:00 p.m. shift with a partner, Helen Ojei ("Ms. Ojei"), another nurse. Tr. at 44. She testified that she worked with Ms. Ojei for about two months in the infirmary every day. Tr. at 45. She described her relationship with Ms. Ojei to be that of a coworker and that she did not socialize with Ms. Ojei outside of work. Tr. at 45. Petitioner also testified that she did not ever discuss anything about her back with Ms. Ojei prior to this incident and that Ms. Ojei never

discussed anything with her regarding her back or prior incidents at work. Tr. at 45-46.

Petitioner testified that she was working with Ms. Ojei caring for a "total care" inmate in the infirmary named Joe Jones ("Inmate Jones") at about 7 o'clock. Tr. at 49. Petitioner testified that total care patients cannot do anything for themselves. *Id.* She explained that twice per shift she changes Inmate Jones' diapers, empties his Foley catheter, changes his wound dressings, lifts and rolls him in bed, and dresses him. Tr. at 49-50.

Petitioner explained that she and Ms. Ojei were in the room together taking care of Inmate Jones and had gotten to point where they had changed his Foley and diaper. Tr. at 51. She testified that they both lifted him up in bed, and when they did they always would say "let's lift on 3, 1, 2, 3" and then they would lift him up. *Id.* Petitioner testified that she said 1, 2, 3 and lifted up Inmate Jones, but did not think Ms. Ojei heard her and Ms. Ojei did not lift him up such that Petitioner got the brunt of the lift. *Id.* Petitioner testified that she and Ms. Ojei usually lifted the inmate after counting to three. Tr. at 88. They had done this previously more than 20 times. *Id.* Petitioner testified that she did not believe that Ms. Ojei ever heard her counting to three. *Id.* Petitioner estimated that Inmate Jones weighed approximately 200 pounds. Tr. at 51.

Petitioner described a trapezius mechanism as a free standing medical piece that hangs over the patient's bed with a triangle that he could use to pull himself up and down and maybe get some arm strength. Tr. at 52. She testified that she carried this mechanism into Inmate Jones' room the night before and he did not make any attempt to use the mechanism when she and Ms. Ojei were trying to move him the following day. *Id.* On cross examination, Petitioner testified that she brought the trapeze unit in for Inmate Jones to build his upper body strength. Tr. at 89.

Petitioner testified that when she lifted Inmate Jones, she immediately said to Ms. Ojei, "oh, I hurt my back." Tr. at 53, 89. She explained that she just felt everything on the left side crack. *Id.* Petitioner described this pain to be more severe than with her prior injuries and that the pain was in her low back, left thigh and her left buttocks. Tr. at 53-54. Petitioner testified that after she said that she hurt her back she left the room and went back to the nurse's station at almost exactly the same time her boss, Ms. Trevino came in, and she told her what had happened. Tr. at 54. Petitioner testified that she told Ms. Trevino that she had injured herself while lifting Inmate Jones, was in severe pain, and needed to go home and to go see the doctor. Tr. at 55.

Petitioner testified that she never had a conversation with Ms. Ojei regarding this incident, but she did tell her that she was in pain both after she lifted Inmate Jones when she said "oh, my back hurts" and when they went back again in the infirmary she told Ms. Ojei that she had injured herself so she had to go home. Tr. at 54-55. Petitioner testified that she went home about an hour after the incident, passed a couple of medications and finished her shift. Tr. at 55. Petitioner testified that she could not leave right away because there were three emergencies in the emergency room and Ms. Trevino told her to wait a few minutes. Tr. at 55-56. Petitioner did not recall what the emergencies were. Tr. at 56.

Petitioner testified that she knows a correctional officer, Erin Sheridan ("Officer Sheridan"). Tr. at 56. Petitioner testified that Officer Sheridan was there on the night of her claimed accident. *Id.* She understood Officer Sheridan's responsibilities to include those of a security officer, opening the cells and standing there while she takes care of the inmates. *Id.* Petitioner testified that Officer Sheridan was out in the hall while she was taking care of Inmate Jones. Tr. at 56-57. She testified that she did not have any conversations with Officer Sheridan about this incident. Tr. at 57.

On cross examination, Petitioner testified that only she, Ms. Ojei, Inmate Jones, and another total care patient

were in the room at the time. Tr. at 86. Officer Sheridan was in the hallway. *Id.* At a certain point during that day Petitioner testified that she felt that she needed to go home early after she hurt her back. *Id.* Petitioner completed an incident report on May 13, 2014. Tr. at 86-87; PX8; RX6. She indicated that the left leg, thigh and buttock injury occurred as follows:

> inmate was lying in bed – total care – lifted inmate without any assistance from him [and] while lifting a total care male patient my left thigh on up was pulled, sprained rendering me unable to continue shift

PX8; RX6. Petitioner wrote the name of Robin, which she explained referred to Robin Bumber ("Ms. Bumber") the workers' compensation counselor at Stateville, on this incident report. Tr. at 86-87; PX8; RX6.

On cross examination, Petitioner testified that she completed a form on May 15, 2014 claiming time off work under the FMLA. Tr. at 83-84; RX7. Petitioner reported that she had chronic and permanent back and buttock pain. Tr. at 84. She testified that the request was so that she only had to work one shift and did not have to work overtime. Tr. at 84. Petitioner previously testified that she did not do overtime often; she was only given overtime about four times per year before any of her accidents at work. Tr. at 61-62.

Petitioner also completed a claim notification form directed to the state retirement systems for occupational disability due to an accident on May 12, 2014. PX9. Petitioner stated that the injury occurred as follows:

> Inmate is a total lift and is a total dead weight lift. While lifting inmate this nurse injured [left] buttock + [left] thigh. I heard a cracking noise. Inmate has a portable trapeze but has minimal upper body strength. Tight after lifting inmate I told the other nurse Helen Ojei I hurt myself. She stated she does not want to be a witness.

PX9.

Medical Treatment

On May 16, 2014, Petitioner returned to Dr. Kirincic as scheduled at her March 21, 2014 visit. PX6 at 87-100 at 57. She saw Dr. Kirincic between May 16, 2014 and January 30, 2015. Tr. St 57; PX6. At the May 16, 2014 visit, Dr. Kirincic noted the following history:

> [Petitioner] returns to clinic for follow-up visit. Last seen in clinic 3/21/14. Request the medication stronger than Norco because it is not strong enough. Interested in cortisone injection. She has been treated for years for chronic lt. buttock pain. Tylenol-3 did not work. Would like to try Percocet. tid. She does not like having the trigger point injections. She would rather just have the injection at the one spot of her pain. Working as our and, no overtime. No longer seeing chiropractor occ brace for posture, slight worsening with workload in cold weather. No radiating pain, no bowel, bladder dysfunction, no nausea, vomiting, night sweats, fevers, no pain with Valsalva maneuvers.
>
> *Patient actually reports that she has now new (previous 2011) work-related injury on May 12, 2014, about 3 days ago when she was reportedly tricked by her coworker who said let's quickly lift this patient up and held only sheet when the patient lifted. The patient experienced a flare-up of severe left buttock pain similar to what she had before. She believes it will take her again several months to recover from this incident and will need stronger medication.* Also saw a foot doctor in March 2014 for orthotics and is determined to go back to her chiropractor who helped her in past. *Also would like stronger medications as the incident with a 200 pound patient, on May 12, 2014, created pain.* She has not been back at work. Requested several pages of 2 or 3 different paperworks for FMLA and work.

PX6 at 85-93 (*emphasis* added). Petitioner denied telling Dr. Kirincic that Ms. Ojei tricked her into lifting a patient by herself. Tr. at 88.

The medical records reflect that Dr. Kirincic asked Petitioner if she worried with a new injury whether she needed new imaging, but Petitioner declined the recommendation. *Id.* Dr. Kirincic administered a trigger point injection and noted that Petitioner had been 80% better at maximum medical improvement from her previous flareup with a return to work now being off work since May 12, 2014 after a lifting injury with flareup of her left lumbosacral pain. *Id.* She restricted Petitioner from lifting over 25 pounds. *Id.*

Dr. Kirincic also completed a physician's statement for authorization for disability leave and return to work on May 16, 2014 in which she diagnosed a lumbosacral strain, right lumbosacral myofascial, tenderness, and decreased range of motion. *Id.* She restricted Petitioner to light duty work with no lifting over 25 pounds and no standing, sitting or walking over 45 minutes. *Id.*

Sean Campbell – Deposition Testimony

Respondent called Sean Campbell, P.T., M.P.T., A.T.C. ("Mr. Campbell") as a witness and he gave testimony at an evidence deposition on July 10, 2014. RX3. Mr. Campbell is a physical therapist certified in administration of Matheson system functional capacity evaluations. RX3 at 4-7; RX3 (Dep. Exh. 1). Mr. Campbell is the physical therapist that administered Petitioner's functional capacity evaluation on January 10, 2012. RX3 (Dep. Exh. 2). He also previously treated her as her physical therapist from September 23, 2010 through October 12, 2010. RX3 at 8-9, 51.

Mr. Campbell explained some of the testing methods and observations that he made of Petitioner throughout her functional capacity evaluation. RX3. He explained that physical effort testing is performed throughout an examination as a way to gauge a patient's effort levels during tests to establish a clear picture of the effort given. RX3 at 17. He also explained that competitive test performance is a category of behaviors that he looks for throughout the testing day to determine if someone is giving their strongest performance in the testing. RX3 at 19. He testified that he observed Petitioner for signs of such performance, but they were absent during her testing day. *Id.* Mr. Campbell further described heart rate testing, grip strength testing, and rapid exchange grip testing which are used to measure effort related to various physical activities. RX3 at 17-20.

Mr. Campbell testified that Petitioner's physical effort was low during testing at her functional capacity evaluation and that she made subjective complaints that limited her performance. RX3 at 22-23. Among other findings, he noted that Petitioner's trunk mobility testing was significant in that her repeated trunk flexion exercise was 19 seconds with no pain, but when she reported pain at a level of 9/10 her time was 23 seconds, which was not significantly different. RX3 at 38-39. Mr. Campbell testified that he called Petitioner the day after the evaluation to follow up and she reported that "she took a Motrin and a Vicodin after her test, and she laid down after she got home; that she had no energy to do anything around the house after the test; that she did not eat dinner; that the next morning she was still having pain. Although, it was not as bad, although, and it was limiting. She said she had to wrap her ankle because she was having some ankle complaints." RX3 at 40-41.

Ultimately, Mr. Campbell concluded consistent with the findings in his report that Petitioner's subjective reports of pain and disability were unreliable based on all of the tests (physical, written, and observation-based tests) that were administered to Petitioner at her functional capacity evaluation. RX3 at 33-34. He also concluded that Petitioner's functional capacity evaluation results were invalid and not an accurate depiction of what her

then-current functional abilities were. RX3 at 41-42. Mr. Campbell based these conclusions on Petitioner's physical effort and the reliability of her reports noting that Petitioner showed low effort and unreliable reports. RX3 at 42-43.

On cross examination, Mr. Campbell testified that he was the only person at his facility who could administer a functional capacity evaluation, but they offered Petitioner the opportunity to go to another one of their centers, specifically to Tinly Park, and Petitioner declined. RX3 at 54-57. He also acknowledged that a functional capacity evaluation involves subjective components from both the examiner and examinee. RX3 at 65-66.

Continued Medical Treatment

Petitioner continued to see Dr. Kirincic through January 30, 2015 during which time she was restricted to light duty work. PX6 at 28-94. Petitioner also saw Dr. Foley on seven occasions after May 12, 2014 for what she described as some type of therapy. Tr. at 57. The medical records reflect that Petitioner reported the following:

> ...while working her job as a nurse at a Statesville [sic] prison she was attempting to lift a patient with another worker when she felt a pain in her low back and buttock region. The patient states that the pain level in the buttock is at an 7/10 [sic] burning type of pain on the left side from hip to lowest portion of the buttock. The low back pain is a 8/10 burning type of pain with a pins and needles sensation that is greater on the left side of the body but that it does include to a lesser degree the right side of the body. ...."

PX2 at 113-115. Petitioner received further chiropractic care through June 24, 2014. PX2 at 116-127.

Petitioner also treated at Integrated Physical Medicine with another chiropractor, Joshua Eldrenkamp, D.C. ("Dr. Eldrenkamp"), for 16 visits between September 19, 2014 and November 18, 2014. PX4; Tr. at 58-59. Petitioner testified that she went there because she was denied workers' compensation benefits and Dr. Foley was getting too expensive for her. Tr. at 58. She testified that she was making some of the payments in cash to Dr. Foley and Integrated Physical Medicine herself. *Id.*

The medical records reflect that Petitioner went to Dr. Eldrenkamp for an initial visit on September 19, 2014 and completed a health questionnaire in which she reported that the reason for her visit was "Periformis from 2010 injury + back pain." PX4 at 12-22. She also completed a pain drawing noting aching and stiffness pains in the low back and aching pain in the left buttock as well as pain at a level of 9/10 "while walking without medication." *Id.* Dr. Eldrenkamp's history notes the following:

> ... The mechanism of injury described by the patient involved a lifting injury. The symptoms have been present since the date of injury on 5/12/2014. .... She presents with primary chief complaints of lower back pain and left glute pain that has been bothering her for a few years now but seems to have been getting worse over the last few weeks. She states that the original injury was in 2010 when she fell out of a chair and landed on her buttocks. She has had pain since then and seen a number of different doctors and physical therapists over the last four years. She states that she was getting better with physical therapy and was discharged from care. She states that May 12th, 2014 she was lifting something heavy when she felt increased pain in the lower back. She notes that her left piriformis seems to spasm and remains sore since this incident. She denies radiating pain more distal that the left glute and denies numbness or tingling to the lower extremities bilaterally. ... She is having her case co-managed by her MD who has been administering injections into the left piriformis."

PX4 at 16. Petitioner's straight leg raise, heel and toe walk tests were negative bilaterally. PX4 at 17.

Petitioner's request for light duty was denied on October 17, 2014 in a letter stating that it could not be accommodated. PX11.

Petitioner returned to Dr. Kirincic on October 31, 2014. PX6 at 46-54. Dr. Kirincic administered a trigger point injection, noted that Petitioner's drug screen was consistent, and placed Petitioner at maximum medical improvement with a full duty return to work effective November 14, 2014. *Id.*

Dr. Kirincic also completed another physician's statement for authorization for disability leave and return to work on October 31, 2014 in which she diagnosed a resolving lumbosacral strain and chronic myofascial pain. PX4 at 34-36. She released Petitioner to light duty work effective October 31, 2014 and full duty work effective November 14, 2014. *Id.* Petitioner continued to attend physical therapy sessions through November 18, 2014. PX4.

Petitioner returned to Dr. Eldrenkamp who also completed a physician's statement for authorization for disability leave and return to work on November 18, 2014 in which he noted Petitioner's treatment including chiropractic manipulation. PX4 at 31-32. Dr. Eldrenkamp indicated that she could return to light duty work effective November 14, 2014 and full duty work effective December 1, 2014. *Id.*; PX12-PX13.

Petitioner testified that she was provided with several off work notes, which she provided to Respondent. Tr. at 60. Petitioner was off work from May 13, 2014 through November 30, 2014. *Id.* She received no benefits during this time, but she was under Dr. Kirincic's care and on medications. Tr. at 61.

Petitioner returned to work on December 1, 2014 and has worked full duty since then. Tr. at 60-61. She explained that when she returned to work she was feeling terrible, but she needed the money. *Id.* On cross examination she also testified that she is still using a TENS unit as prescribed by Dr. Roland. Tr. at 89. She explained that the TENS unit helped her minimally and she received one refill of the stickers for TENS unit. Tr. at 59. Petitioner also purchased a refill of those stickers approximately six months ago and paid for that in cash. Tr. at 59-60.

From December 11, 2014 through March 8, 2015, Petitioner testified that she has been on the following medications: Neurontin (300 milligrams at bedtime), Opana ER (20 milligrams twice a day), Tizanidine (6 milligrams at bedtime), Norco four times a day, Naproxen, Motrin, Robaxin and compound cream. Tr. at 62-63. Petitioner explained that these medications were for back pain and symptoms, and that she rubs the compound cream on her back and feet because now they hurt because she walks funny to compensate for her back. Tr. at 64-66. She testified that she has never had problems or pain in her feet like she has now before any of her accidents at work.

Petitioner testified that she last saw Dr. Kirincic on January 30, 2015. Tr. at 70-71. She explained that she does plan on seeing Dr. Kirincic in the future and that she will likely continue to see her for the rest of her life. Tr. at 71.

On cross examination, Petitioner acknowledged that Dr. Kirincic diagnosed her with opiate dependency and that when she sees her, she undergoes toxicity screens. Tr. at 82. Petitioner testified that Dr. Kirincic has discussed this issue with her. *Id.* She also testified that she has been trying to go off her medications, but she has pain when she does that. Tr. at 90.

Erin Sheridan

Respondent called Officer Sheridan as a witness. Tr. at 94. She testified that she was employed by Respondent on May 12, 2014 as a correctional officer. *Id.* Her duties included whatever was assigned on a given day, but she testified that she was posted to the infirmary, the health care unit, on May 12, 2014. Tr. at 94-95. On cross examination, Officer Sheridan testified that she was employed by Respondent for just under two years and she retired in June of 2014. Tr. at 97-98.

Officer Sheridan testified that she observed Petitioner on that day. Tr. at 95. She explained that Petitioner was a nurse in the infirmary with her, so she observed Petitioner throughout the day doing her duties. *Id.* At one point, Officer Sheridan testified that Petitioner was in a room with Ms. Ojei. Tr. at 95.

She testified that she was standing outside the door facing into the cell where Inmate Jones was located. Tr. at 95. Officer Sheridan observed the nurses turning Inmate Jones multiple times per day. *Id.* She testified that she did not remember that day specifically being different from any other day. Tr. at 96. Officer Sheridan testified that they would turn inmate Jones, change his bandages, rotate him in the bed, and then if they had to do something with the other inmate in the cell they would do that with the other inmate as well and leave the cell. Tr. at 96. Officer Sheridan would then close the door. *Id.*

Officer Sheridan further testified that on May 19, 2014 she completed a witness report, which is a true and accurate representation of what she observed in the cell on May 12, 2014. Tr. at 97; RX8. With regard to the report, Officer Sheridan testified on cross examination that she did not recall May 12, 2014 to be specifically different than any other day, but that Petitioner and Ms. Ojei turned Inmate Jones daily. Tr. at 97-98. The report reflects the following statement by Officer Sheridan:

> Every time I am assigned to the Stateville Infirmary with Michelle Christersen, she complains of back pain when turning inmate Jones in cell 158. Jones has to be turned multiple times daily. On the days that I work in the infirmary, I open the cell door for the nurses and stand in the doorway while they turn inmate Jones. I was assigned to the infirmary on Monday May 12th, 2014 with Nurse Christersen. I do not recall this day, or the turning of Mr. Jones, going any differently than any other day, other than Ms. Christersen saying she wanted to leave early because her back was hurting.

RX8.

Officer Sheridan acknowledged that if Petitioner or any employee had an accident at work, she was not the person to whom to report it. Tr. at 99. However, she recalled that Petitioner went home early that day, which she had not otherwise done, and complained of pain several times. Tr. at 99-101. Officer Sheridan also testified that Petitioner specifically told her that she had a back injury and back pain. Tr. at 100.

Respondent's Exhibit 8 reflects the following statement by Officer Sheridan: "I do not recall this day or the turning of Mr. Jones going differently than any other day other than Miss Christerson saying she wanted to leave early because her back was hurting." Tr. at 101; RX8.

Helen Salako-Ojei

Respondent called Helen Salako-Ojei ("Ms. Ojei") as a witness. Tr. at 102-103. She testified that she is

employed by Respondent as a nurse and has been so employed for almost two years. Tr. at 103. Her duties are to perform nursing work including providing medications and care. *Id.* Ms. Ojei characterized her relationship with Petitioner to be a good working relationship although they do not work together all the time, but when they do they try to perform their tasks as assigned before the next shift comes in. Tr. at 105.

Ms. Ojei testified that she was working with Petitioner on May 12, 2014. Tr. at 104-105. She explained that on she finished the 5 o'clock medication and was waiting for Petitioner to complete the 9 o'clock medications so they could perform direct patient care. Tr. at 105. She testified that they went to cell number 158 together to pick up the urinal and empty Inmate Jones' drainage bag. *Id.*

Ms. Ojei explained that when she finished the other inmate's dressings, she went to Inmate Jones to change his dressings. Tr. at 105. Ms. Ojei explained that Inmate Jones had a Stage III sacral wound and that she could smell the odor from the wound. Tr. at 106. She removed Inmate Jones' diaper and found a large bowel movement. *Id.* She cleaned him up and then tried to change the dressing while Petitioner was trying to walk out. *Id.*

Ms. Ojei testified that she said to Petitioner "please, can she just hold the inmate for me because there's no way I can use one hand to remove the -- she know, to clean up and do the dressing." *Id.* Petitioner complied and held him up so he would not fall back when Ms. Ojei changed the dressing; Petitioner was not lifting Inmate Jones at this time. Tr. at 106-107. Ms. Ojei testified that she finished the dressing and put a new diaper on him at which point it was time for them to move him. Tr. at 107. She explained that these are activities that they do every day with the inmates and that they turned Inmate Jones to prevent another decub (i.e., a sacral wound). Tr. at 107.

Ms. Ojei testified that she finished and immediately said that they needed to reposition Inmate Jones. Tr. at 108. She testified that Petitioner asked her why they could not use the inmate that walks inside the infirmary to help? *Id.* Ms. Ojei responded that it would take them less than three seconds to move Inmate Jones like they do on a regular basis. *Id.*

She also described an overhead trapeze on Inmate Jones' bed onto which he would hold so that they only thing that she and Petitioner were moving was the lower extremities. *Id.* Ms. Ojei testified that she told Petitioner and Inmate Jones that she would count to three and then move him. Tr. at 108-109. Petitioner was on the left side of the bed and she was on the right side. *Id.* She testified that she counted, told Inmate Jones to hold onto the trapeze, and then she and Petitioner lifted him like they normally did. Tr. at 109-110.

Ms. Ojei testified that Petitioner then "just stepped out of the room. She didn't tell me where she was going. She did not say anything to me." Tr. at 110. She believed that Petitioner went to use the washroom and she remained in the cell. Tr. at 110-111. This was the only occasion on which she moved Inmate Jones with Petitioner that day. *Id.*

On cross examination, Ms. Ojei testified that Petitioner and an officer brought the trapeze in for Inmate Jones months before. Tr. at 111-112. She believed that Inmate Jones had had plenty of time to practice using the trapeze. Tr. at 112. She also testified that on cross examination that she did not recall seeing Petitioner express any type of pain symptoms or expressions on May 12, 2014. *Id.*

Ms. Ojei further testified that she had a conversation with Petitioner when she complained that "she really hurt her back" and said that she did it in Inmate Jones' cell. Tr. at 113. Ms. Ojei testified that Petitioner left early

that day after completing her evening medications, which included pushing a cart around to 20 cells. *Id.*

Joe Jones

Petitioner called Joe Jones ("Inmate Jones") as a witness at an evidence deposition taken on November 26, 2014. PX15. Inmate Jones testified that he knew Petitioner as his nurse, but has not seen her since May 12, 2014. PX15 at 5-6. He also testified that he is familiar with Ms. Ojei, who is also his nurse and continues to care for him. PX15 at 7-8.

Inmate Jones testified that has cancer and is paralyzed from the waist down and requires care for all of his needs. PX15 at 3-4, 9-10,14. On or around May 12, 2014, he had a bed sore. PX15 at 10. Inmate Jones testified that the day before, Petitioner got him a device that he could hang onto. PX15 at 14-15.

Inmate Jones testified that Petitioner and Ms. Ojei turned him and he observed Petitioner with a frown on her face. PX15 at 11. He testified that "...it usually takes two nurses to turn me to the other side, and evidently I figured out somebody didn't pull their weight like they should have, and [Petitioner] frowned, flinched, like reflecting pain." *Id.*

Inmate Jones also testified that Ms. Ojei raised her voice at Petitioner and "she told her something about she should have positioned herself where she could have picked up more weight, something of that nature. I'm not quite sure." PX15 at 16. He believed that Ms. Ojei was referring to Petitioner and that Petitioner should have picked up more of his weight and he described Ms. Ojei's tone as harsh. PX15 at 16-17.

On cross examination, Inmate Jones testified that he was not aware of Petitioner having any back pain before May 12, 2014. PX15 at 21. He also testified that when they turned him, Ms. Ojei was on his right and Petitioner was on his left. PX15 at 21-22. He explained that he was placed on his side facing toward Ms. Ojei, but he testified that he could see both nurses. *Id.*

When asked on re-direct examination how he could see Petitioner's facial expression if he was facing Ms. Ojei, Inmate Jones clarified that he could not because he was not looking in that direction at the time, but "[a]fterwards like I have certain items on the other side of me, and [Petitioner] didn't have the cheerful expression that she usually have on her face." PX15 at 23. He testified that she looked like she was in pain. *Id.*

Marie Kirincic, M.D.

Petitioner called Marie Kirinicic, M.D. ("Dr. Kirinicic") as a witness at an evidence deposition taken on November 5, 2013. PX17. Dr. Kirinicic is a board-certified physician specializing in rehabilitation and pain management. PX17 at 4.

Dr. Kirinicic noted that Petitioner reported two accidents at work to her, one that was very remote occurring more than two years before she met Petitioner. PX17 at 9-10, 40-41. She understood that Petitioner's 2011 accident involved a bending mechanism of injury. PX17 at 42.

Dr. Kirinicic testified that Petitioner's buttock pain did not change throughout her treatment of Petitioner. PX17 at 12. She diagnosed Petitioner throughout her treatment to have a lumbosacral strain with some sacroiliac joint

dysfunction, piriformis/gluteal/muscular soft tissue pain, chronic/myofascial pain, and an aggravation of a pelvic obliquity and curvature. PX17 at 30-31.

With regard to Petitioner's October 26, 2010 MRI, Dr. Kirinicic testified that Petitioner had "[v]ery minimal age appropriate findings like 70 percent would have in that age group." PX17 at 14. She explained, however, that a patient could have these findings and be asymptomatic. *Id.* Dr. Kirinicic opined that Petitioner's August 17, 2010 accident at work probably caused an aggravation of Petitioner's pre-existing degenerative condition as shown in the October 26, 2010 MRI. PX17 at 15. She also opined that Petitioner's conditions, with the exception of a cervical spine condition, were causally related to her accidents at work. PX17 at 31-32.

Dr. Kirinicic also opined that Petitioner's October 3, 2011 accident may have aggravated Petitioner's pelvic obliquity and caused more like a biomechanical pain and soft piriformis type syndrome like myofacial, more spasms in the back area. PX17 at 15-16. She described Petitioner's symptoms to be more soft tissue in nature and did not believe that Petitioner was malingering. PX17 at 16. Dr. Kirinicic testified that she did not suspect that Petitioner was malingering, "but it was frustrating that nothing we were trying every month [including medications, anti-inflamatories, muscle relaxants, pain medications, acupuncture, TENS units, manipulations, chiropractic care, or traction] was making her better in any little way." PX17 at 22-23, 57.

Dr. Kirinicic testified that she kept Petitioner off work or on light duty, but understood that Respondent would not accommodate light duty restrictions at the prison. PX17 at 19-20, 49-50. She released Petitioner to full duty work as of June 5, 2013. PX17 at 21. Dr. Kirinicic opined that Petitioner's need to be off work was related to both her August 2010 and October 2011 accidents at work. PX17 at 21-22. Dr. Kirinicic also opined that Petitioner's medical treatment with her and the chiropractor, Dr. Foley, was needed relative to Petitioner's accidents at work. PX17 at 22-25, 29-30. However, on cross examination Dr. Kirinicic noted that Petitioner's chiropractic treatment was "a little more excessive than I usually see with that piriformis syndrome...." PX17 at 52. Dr. Kirinicic further opined that Petitioner's neck pain was not causally related to any accident at work. PX17 at 25-26.

On cross examination, Dr. Kirinicic acknowledged that she did not have all of Petitioner's treating medical records or physical therapy notes from before her first visit in June 2012. PX17 at 36, 45. She testified that she understood from Petitioner that she did not have much back pain before her accident in August 2010. PX17 at41. Dr. Kirinicic also testified that she did not see any functional capacity evaluation report for Petitioner. PX17 at 17, 46, 57.

Additional Information

Regarding her current condition of ill-being, Petitioner testified that she has daily pain in the back. Tr. at 66-67. Her pain level depends on what she does, but is somewhat controlled with the medication. Tr. at 67. Petitioner testified that she tried to go off the medication every couple of months, but experiences pain. *Id.* She has not lessened the medication that she takes. *Id.*

Petitioner localized her pain to the lower mid back and the worst is in the left buttocks and both feet. Tr. at 67-68. The buttock pain has been mainly since her May 12, 2014 accident. Tr. at 68. Petitioner also testified on cross examination that she believes that the pain in her feet is related to her accidents at work because she overcompensates. Tr. at 90. She testified that a foot doctor told her that, but she could not recall the doctor's name. *Id.* On re-direct examination, Petitioner recalled that it was Dr. Tara Sakevich. Tr. at 91.

Prior to August 17, 2010, Petitioner testified that she used to engage in various hobbies such as swimming, gardening, walking the dogs, and cooking. Tr. at 68. She testified that she no longer does these things, and she has walked her dog since her accident, but it is very difficult. Tr. at 68-69; *see also* PX16 at 4 (Dr. Avula October 24, 2012 note of Petitioner's report that she walks her dog daily). She explained that it is a large dog weighing about 150 pounds. Tr. at 90. Petitioner testified that she walked her dog since this accident and had her right ankle casted after she fell when walking the dog on the street. Tr. at 69. She denied injuring her back in that incident. *Id.*

Petitioner testified that she does not do anything that she used to do because she is too tired from work and pain. Tr. at 70. On cross examination, Petitioner acknowledged that none of her doctors have recommended surgery and that she had not had any surgery. Tr. at 78-79.

With regard to her medications, Petitioner testified that she takes medication for depression, Celexa, which she has taken for 10 years. Tr. at 71. She also takes Ambien for sleep. Tr. at 72. Petitioner testified that she is not claiming reimbursement for these medications. Tr. at 71-73. She also testified that portions of her bills were paid through her husband's insurance with Aetna. Tr. at 13.

Petitioner testified that after the August 17, 2010 and October 3, 2011 incidents, her back pain never completely went away. Tr. at 91-92. She also testified that after the May 12, 2014 incident, she began experiencing buttock pain which has not gone away. *Id.*

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (F), whether Petitioner's condition of ill-being is causally related to her accident at work, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's claimed current condition of ill-being in the low back is causally related to the injury sustained at work on August 17, 2010 through September 26, 2011 when she returned to full duty work after a release from Dr. Roland.

To recover in a preexisting condition case, a petitioner must establish a causal connection between her work-related injury and claimed current condition of ill-being by showing that her injury aggravated or accelerated the preexisting disease. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 204-206, 797 N.E.2d 665, 278 Ill.Dec. 70, (2003) (*citing Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36-37, 65 Ill. Dec. 6, 440 N.E.2d 861 (1982) (an accidental injury will be deemed compensable if it can be shown that the employment was also a causative factor)).

It has long been held that an employer takes its employees as it finds them. *Sisbro*, 207 Ill. 2d at 205 (*citing Baggett v. Industrial Commission*, 201 Ill.2d 187, 199, 775 N.E.2d 908 (2003)). As in this case, even where an employee has a pre-existing condition that renders her more vulnerable to an injury, "recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." *See Sisbro*, 207 Ill. 2d at 205 (*citing Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d at 36; *Williams v. Industrial Commission*, 85 Ill. 2d 117, 122, 51 Ill. Dec. 685, 421 N.E.2d 193 (1981); *County of Cook v. Industrial Commission*, 69 Ill. 2d 10, 18, 12 Ill. Dec. 716, 370 N.E.2d 520 (1977)).

Petitioner's accident at work is not in dispute. The medical records, accident report, and a witness all corroborate Petitioner's testimony that she fell to the floor when she sat on a broken chair that was connected to a table at the prison.

Petitioner then saw her primary care physician, Dr. Avula, on August 19, 2010. His records reflect that she was referred for chiropractic care on August 27, 2010, but at trial Petitioner testified that he recommended against it. By September 1, 2010, she was diagnosed severe back pain, upper thoracic pain, and spasms status post fall. Petitioner then began seeing Dr. Lim on September 15, 2010. He diagnosed her with a cervical strain and lumbar strain ordering physical therapy.

At her first physical therapy evaluation after the accident, the therapist, Mr. Campbell, noted Petitioner's report that she was limited to walking two blocks and standing for only 10 minutes, but she did not demonstrate objective elicitation, worsening, or exacerbation of symptomatology with repeated mechanical motions of the lumbar and cervical spine. This is the first, but not only, instance in which Petitioner's subjective complaints are specifically contradicted by a physical therapist or doctor.

The treating medical records reflect that Petitioner underwent diagnostic tests showing some degeneration in the spine. Petitioner's October 25, 2010 MRI reflects mild spondylotic changes and stenosis with minimal or mild disc bulging from L2-S1. There is no evidence that Petitioner had a prior history of back pain, symptoms in the

back, or the need for medical treatment before her fall at work. Respondent's Section 12 examiner, Dr. Lami, acknowledged that Petitioner had mild degenerative changes evidenced on her MRI and that she had no prior contributory history.

While it is clear from the record that Petitioner sustained an accident at work involving her low back resulting in some manifestation of symptoms that was not present prior to August 17, 2010, her ongoing subjective reports of pain and symptoms are not credible. The record reveals too many prominent inconsistencies between Petitioner's testimony at trial about her ongoing condition and her reports to treating physicians, physical therapists, and Respondent's Section 12 examiner. Petitioner's subjectively experienced pain, taken in light of the mild or minimal findings in her MRI, might arguably be reflective of an unusually severe result experienced by her. But, objective evidence from several sources controverts Petitioner's claims.

Petitioner's MRI report showed minimal degenerative findings. Her own treating physicians diagnosed no more than strains, subjectively reported pain, and muscle spasms. Petitioner's requests for increased narcotic drug dosages, additional narcotics, or repeated injections is reflected in Petitioner's treating medical records, Dr. Lami's Section 12 report, and throughout Dr. Lami's testimony. Petitioner's narcotic medications, injections, and invasive radiofrequency ablation procedures were based mostly on her subjective complaints, but they also occurred concurrently with physical therapy. It was during physical therapy that Petitioner was first observed engaging in physical activities outside of those she stated she was incapable of enduring.

As of October 12, 2010, after seven visits, Petitioner's physical therapist, Mr. Campbell, updated Dr. Lim on Petitioner's progress. He noted that Petitioner was not "appropriate for mechanical treatment for reduction of low back pain" and that "each approach is subjectively deemed unsuccessful in providing any longevity and sustained relief." Mr. Campbell also specifically noted that Petitioner's performance had been inconsistent throughout treatment and that her complaints had a poor prognosis for resolution with physical therapy. Petitioner testified that she stopped treating with Dr. Lim because he was not helping her. She also testified that she stopped going to physical therapy because they were not helping her and because they were harming her. Petitioner then chose to see Dr. Roland instead.

Just shortly before her release to full duty work by Dr. Roland, Petitioner was observed during physical therapy by another physical therapist, Mr. Svoboda, on September 22, 2011. On that date, he noted Petitioner's subjective report that she was functionally limited "a lot" in various activities of daily living including "bathing or dressing herself, walking around the room, getting in and out of a chair, getting in and out of bed and walking one block." However, Mr. Svoboda noted that Petitioner was nonetheless "*able to sit to stand in clinic 3 times without reports of pain and she rode her bike to the clinic for her session.*" This single instance of physical ability which is incongruent with Petitioner's reported pain and symptomatology might be negligible on its own, but not in light of the record as a whole.

The record reveals further inconsistencies between Petitioner's testimony and her subjectively reported symptoms. A pattern of these inconsistencies is evident beginning with her medical treatment for this accident at work (in instances as noted by Mr. Svoboda and Dr. Lami), continuing throughout treatment for her two subsequent claimed accidents. These issues, and the inconsistencies in Petitioner's reports and other evidence, are addressed in the concurrent decisions in Case No. 11 WC 44608 and Case No. 14 WC 18924.

Based on the foregoing, the Arbitrator finds that Petitioner's testimony is not credible and finds the opinions of Dr. Lami to be persuasive. Notwithstanding, it is also clear from the record that Petitioner sustained an accident at work involving her low back resulting in some manifestation of symptoms that were not present prior to

August 17, 2010. Thus, the Arbitrator finds that Petitioner's claimed current condition of ill-being in the low back is causally related to the injury sustained at work on August 17, 2010 through September 26, 2011 when she returned to full duty work after a release from Dr. Roland.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

The Arbitrator awards bills for dates of service beginning August 17, 2010 through September 26, 2011 from Dr. Avula/Advocate Medical Group and Dr. Richard Lim, the October 25, 2010 MRI, and the AthletiCo Physical Therapy bills for dates of service between August 17, 2010 and September 26, 2011. The Arbitrator denies all bills from Dr. Roland and denies all bills treatment after September 26, 2011. In so finding, the following provisions of Section 8(a) of the Act are pertinent:

> [T]he employer's liability to pay for ... medical services selected by the employee shall be limited to:
>
> (1) all first aid and emergency treatment; plus
>
> (2) all medical, surgical and hospital services provided by the physician, surgeon or hospital initially chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said initial service provider or any subsequent service provider of medical services in the chain of referrals from said initial service provider; plus
>
> (3) all medical, surgical and hospital services provided by any second physician, surgeon or hospital subsequently chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said second service provider or any subsequent provider of medical services in the chain of referrals from said second service provider. 820 ILCS 305/8(a) (LEXIS 2008).

Also "[u]nder section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (4th Dist. 2011) (*citing University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1st Dist. 1992)). Whether a medical expense is either reasonable or necessary is a question of fact to be resolved by the Commission, and its determination will not be overturned on review unless it is against the manifest weight of the evidence. *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 534 (1st Dist. 2001).

Petitioner initially went to Dr. Avula, her primary care physician, for medical treatment. While she testified that she was "sent" there, no evidence corroborates Petitioner's testimony that Respondent directed her to see her primary care physician for care after her accident. At her second visit on August 27, 2010, Petitioner reported that she had been to the Hedges Clinic for treatment. No medical records were submitted into evidence from this clinic. Petitioner then went to Dr. Lim who referred her for physical therapy. After finding his care to be

unsatisfactory, she chose to see Dr. Roland. Based on the foregoing, the Arbitrator finds that Petitioner sought medical treatment beyond her two allowable choices and the related chains of referral when she began treatment with Dr. Roland.

Also, as explained more fully above, the Arbitrator finds that Petitioner's low back condition is causally related to her accident only through her return to full duty work on September 26, 2011. Petitioner had no prior history of back problems and the Arbitrator relies on the opinions of Respondent's Section 12 examiner, Dr. Lami. The lack of reliability of Petitioner's subjectively reported pain and symptoms is also addressed in the analysis above.

Dr. Lami plausibly explained based on objective medical evidence, including Petitioner's October 2010 MRI report and her lack of prior low back treatment, that Petitioner could have experienced an aggravation of a pre-existing degenerative condition in the lumbar spine. But, he took exception to the extent of medical treatment provided to her. Specifically, Dr. Lami noted that the amount of narcotic pain medications, injections, and certainly the radiofrequency ablation procedure were not necessary to treat the low back strain sustained by Petitioner. The medical records of Dr. Roland note that he ordered a radiofrequency ablation based on Petitioner's purely subjective reported complaint of severe pain. Given the lack of reliability of Petitioner's subjectively reported pain in light of objective evidence in the record, the Arbitrator also finds the extensive treatment rendered by Dr. Roland to be unreasonable and not necessary.

Thus, the Arbitrator awards bills for dates of service beginning August 17, 2010 through September 26, 2011 from Dr. Avula/Advocate Medical Group and Dr. Richard Lim, the October 25, 2010 MRI, and the AthletiCo Physical Therapy bills for dates of service between August 17, 2010 and September 26, 2011. These bills incurred by Petitioner are to be paid by Respondent as provided in Sections 8(a) and 8.2 of the Act. The Arbitrator denies all bills from Dr. Roland and denies all bills treatment after September 26, 2011[4].

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

In light of the causal connection analysis explained above, the Arbitrator addresses Petitioner's claim that she is entitled to temporary total disability benefits for the disputed period beginning September 18, 2011 through September 26, 2011.

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at *28 (opinion filed June 26, 2014); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003).

This record reflects that Petitioner was undergoing active medical treatment and placed off work through September 28, 2011 as it related to her low back condition. However, Petitioner returned to work on September 26, 2011. There is no evidence in the record that Petitioner was able to work given the restrictions imposed through this date, that Respondent attempted to accommodate Petitioner's work restrictions, or that Respondent

[4] The medical bills for treatment related to Petitioner's claimed accidents at work on October 3, 2011 and May 12, 2014 are addressed in the concurrent decisions in Case No. 11 WC 44608 and Case No. 14 WC 18924.

obtained an evaluation pursuant to Section 12 establishing that Petitioner could work during this period of time.

Based on all of the foregoing, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the disputed time period from September 18, 2011 through September 26, 2011.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

Based on the record as a whole—which reflects that Petitioner sustained a strain of the low back aggravating a mild pre-existing degenerative condition necessitating conservative treatment as explained in detail above—the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 2.5% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

In support of the Arbitrator's decision relating to Issue (M), whether penalties or fees should be imposed upon Respondent, the Arbitrator finds the following:

Based on the record as a whole, the Arbitrator finds that no penalties or attorney's fees should be imposed on Respondent. In so concluding, Section 19(k) of the Act provides in pertinent part:

> In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act, shall be considered unreasonable delay. 820 ILCS 305/19(k) (Lexis 2010).

Section 19(l) provides in pertinent part:

> If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d). In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. 820 ILCS 305/19(l) (Lexis 2010).

Also, Section 16 of the Act provides for an award of attorney fees where an employer, its agent, or insurance carrier "has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee... or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier." 820 ILCS 305/16

(Lexis 2010).

Given the evidence, the Arbitrator finds that Respondent had a reasonable dispute as to whether Petitioner's injury at work resulted in the continuing physical symptoms as alleged. Respondent's conduct was not unreasonable, vexatious and/or in bad faith.

Based on all of the foregoing and the totality of the evidence, the Arbitrator denies Petitioner's claim for penalties and fees under Sections 19(k), 19(l) or 16 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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michelle Christerson,
Petitioner,

vs.

NO: 11WC 44608

Stateville Correctional Center,
Respondent,

16IWCC0025

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, prospective medical, permanent partial disability, penalties, fees and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 7, 2015, is hereby affirmed and adopted.

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

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

DATED: JAN 8 - 2016
o121715
DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CHRISTERSON, MICHELLE
Employee/Petitioner

Case# **11WC044608**

10WC035206
14WC018924

STATEVILLE CORRECTIONAL CENTER
Employer/Respondent

16IWCC0025

On 5/7/2015, 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 0.07% 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:

0000 BRISKMAN BRISKMAN & GREENBERG
SUSAN FRANSEN
175 N CHICAGO ST
JOLIET, IL 60432

5132 ASSISTANT ATTORNEY GENERAL
STACEY LASKIN
100 W RANDOLPH ST 13TH F
CHICAGO, IL 60601

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

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

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

MAY 7 - 2015

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

16IWCC0025

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

Michelle Christerson
Employee/Petitioner

v.

Stateville Correctional Center
Employer/Respondent

Case # **11** WC **44608**

Consolidated cases: **10** WC **35206**
14 WC **18924**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores,** Arbitrator of the Commission, in the city of **New Lenox,** on **March 9, 2015**. After reviewing all of the evidence presented, the undersigned Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **October 3, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$58,812.00**; the average weekly wage was **$1,131.00**.

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

Petitioner ***has*** received all reasonable and necessary medical services as explained *infra*.

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

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**. *See* AX2.

Respondent is entitled to a credit **$0** under Section 8(j) of the Act. *See* AX2.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner failed to establish that she sustained a compensable accident at work on October 3, 2011 as claimed. By extension, all remaining issues are rendered moot and all requested benefits and compensation are denied. Petitioner's claim for penalties is specifically 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

May 5, 2015
Date

MAY 7 - 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Michelle Christerson
Employee/Petitioner

v.

Stateville Correctional Center
Employer/Respondent

Case # **11** WC **44608**

Consolidated cases: **10** WC **35206**
14 WC **18924**

FINDINGS OF FACT

A consolidated hearing was held in all three of Petitioner's above-captioned cases. Arbitrator's Exhibit[1] ("AX") 2; AX1; AX3. The issues in dispute in this case include causal connection, Respondent's liability for certain unpaid medical bills, Petitioner's entitlement to temporary total disability benefits from October 4, 2011 through June 4, 2013, the nature and extent of Petitioner's injury, and whether Respondent is subject to penalties and attorneys' fees pursuant to Sections 16, 19(k) and 19(l) of the Act. AX2.

With regard to Petitioner's claim for payment of medical bills, the parties stipulated that if Petitioner met her burden of proof with regard to accident, causal connection, and the reasonableness and necessity of the medical bills (as reflected in the request for hearing forms for each case), Respondent's liability for such bills will be pursuant to Sections 8(a) and 8.2 of the Act. Tr. at 114-115. The parties also stipulated that if Petitioner meets her burden of proof with regard to each of the cases and the penalties being claimed in each of the cases, the award for penalties based on any medical bills will be calculated pursuant Sections 8(a) and 8.2 of the Act. Tr. at 115. The parties have stipulated to all other issues. AX2.

The issues in dispute related to Petitioner's accident on August 17, 2010 are addressed in the concurrent decision issued in Case No. 10 WC 35206. AX1. The issues in dispute related to Petitioner's claimed accident on May 12, 2014 are addressed in the concurrent decision issued in Case No. 14 WC 18924. AX3.

Background

Prior to August of 2010, Petitioner described her physical condition as good. Tr. at 14. She was not under a doctor's care for any reason, including depression, other than routine medical treatment. *Id.* She testified that she never sustained any type of injuries, accidents, at home incidents, or anything involving her hips, mid-back, or lower back. Tr. at 14-15.

Petitioner testified that she was employed by Respondent through Wexford, which is a contract company, for about a year and a half working at Stateville and was then hired as a state employee July 2009. Tr. at 15. Petitioner testified that she was employed as a correctional nurse, RN. Tr. at 16. She explained that she is a registered nurse and has been since 2001. *Id.* Petitioner testified that a registered nurse carries out doctor's orders and provides all realms of care for their patient. *Id.* She previously worked at private facilities from 2001 to 2007 at Christ Hospital in Oak Lawn, Silver Cross in Joliet, and the Will County Sheriff in Joliet. Tr. at 16-17. Petitioner testified that she also has a degree in paralegal studies, but she never worked as a paralegal.

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

Tr. at 74-75.

Petitioner explained her duties at Stateville while working through Wexford to include passing medications, seeing patients, taking blood pressures, wound cares, lifting, total care patients and doing anything a nurse would do. Tr. at 17. Her duties stayed the same when she was hired by Stateville. *Id.*

Petitioner described the Stateville facility itself. Tr. at 17. She explained that it sits on acres and the buildings are very, very old with very poor ventilation. *Id.* In the summer, Petitioner explained that it was hot as well as in the winter. Tr. at 17-18. There are no elevators and the stairs in the general population area were high and extended up five floors. Tr. at 18. In the "F" house, which is the round house, there are four floors with no elevators. *Id.*

Petitioner testified that there is an infirmary in Stateville which is like a mini hospital where the chronic patients go. *Id.* This designated area has about 25 rooms and cells with two inmates per cell, but sometimes one. *Id.* Between 2007 and August 17, 2010, Petitioner testified that it depended on her assignment how long she would be in the infirmary. Tr. at 18-19. Some days she was assigned to work passing medications on different floors. Tr. at 19. Sometimes she worked with another nurse and sometimes passing medications by herself. *Id.*

August 17, 2010

On August 17, 2010, Petitioner testified that she was working the 3:00 p.m. to 11:00 p.m. shift. Tr. at 19-20. She did not recall her assignment. Tr. at 20. Petitioner testified that she went in the dining room to go sit down on the dining room chair and the chair broke away from the table and fell back causing trauma to her back and then the table fell on top of her chest. Tr. at 22-23. She estimated the weight of the table to be about 75-100 pounds. *Id.* Petitioner also explained that at Stateville everything is bolted down because of the inmates and the table was a round steel table with about six stools welded to it. Tr. at 23. She explained that when she sat on the chair it broke its connection to the table. *Id.*

Petitioner submitted a Supervisor's Report of Injury or Illness dated August 17, 2010 into evidence. PX20. Petitioner wrote the following details of accident and cause of accident:

> Sat down on dining room chair + the entire set collapsed + fell on me while I fell to the floor banging head + back on kitchen floor.

> Dining room set – chair collapsed + entire kitchen set fell on ground – not secured or intact.

PX20. The incident was witnessed by correctional officer Foster, who corroborated Petitioner's report. *Id.*

Petitioner testified that she felt immediate pain to her lower back and reported the incident. Tr. at 24. She reviewed Petitioner's Exhibit 20, which she explained is her supervisor's report of the accident. Tr. at 20-21. She completed the entire first page with the exception of the signature and the details of the accident section. Tr. at 21. Her supervisor completed the second page. Tr. at 22. Petitioner testified that she was sent to get medical care at Advocate Medical Group with her doctor, Dr. Avula, and then Dr. Lim. Tr. at 24-25. Petitioner testified that she did not go to the emergency room immediately because it was late at night and she was able to get an appointment with her doctor the next day. Tr. at 25. On cross examination, Petitioner testified that when she fell, she initially complained of some headache pain. Tr. at 77. Petitioner did not recall seeing a physician at Stateville the same day. Tr. at 77-78.

16IWCC0025

Medical Treatment – Dr. Avula & Dr. Lim

The medical records reflect that Petitioner saw her primary care physician, Dr. Avula at Advocate Medical Group, on August 19, 2010. PX16 at 21-22. Dr. Avula noted Petitioner's report as follows:

> On 8/17/10: was going to sit down & chair & table set collapsed!! Pt landed on back, banged head, & hurt back and neck. c/o back & neck pain → neck pain on left side. was dizzy at time of injury but no loc.

Id. Petitioner called the following day asking for a referral and noted that the recommended tests were not going to be paid by her insurance. *Id.* When she returned to Dr. Avula for follow up on August 27, 2010, she was diagnosed with thoracic and lumbar paraspinal spasms status post fall. PX16 at 18-19. She reported that she was taking Naproxyn and that she had been to the Hedges Clinic. *Id.* Petitioner was referred to "chiropractic." *Id.* However, on cross examination Petitioner acknowledged that Dr. Lim recommended against a chiropractor. Tr. at 78.

On September 1, 2010, Petitioner reported worsening back pain with working last week and inability to stand for few hours so she had to be off work. PX16 at 16-17. Petitioner reported no radiating symptoms. *Id.* Dr. Avula diagnosed severe back pain, upper thoracic pain, and spasms status post fall. *Id.*

Petitioner testified that Dr. Avula referred her to Dr. Richard Lim ("Dr. Lim"). Tr. at 25. The medical records do not contain a referral to Dr. Lim; however, they show that Petitioner started treating with Dr. Lim on September 15, 2010. Tr. at 25; PX22 at 6-7. At that time, Petitioner reported the following:

> Michelle is a 47-year old female nurse with Stateville Correctional Center presenting with chief complaint of left sided neck and left sided lower back pain since 8/17/2010. On that day she was at work, she was sitting at lunch and apparently fell backwards landing on the hard floor and has had pain ever since in her left side of her neck and left side lower back. She denied any radiation of either pain. She denies numbness or tingling down the legs. She denies bowel or bladder incontinence. No prior history of similar complaints. She has not had any treatment to this point. She has been off work since her injury.

Id. Dr. Lim diagnosed Petitioner with a cervical strain and a lumbar strain. *Id.* He recommended physical therapy and he placed her off work. *Id.* Petitioner testified that she was initially taken off work and was provided various work notes. Tr. at 28.

On September 23, 2010, Petitioner had an initial physical therapy evaluation with Sean Campbell, PT, MPT, ATC ("Mr. Campbell") at AthletiCo as referred by Dr. Lim. PX22 at 14-15. Therapy was recommended twice a week for four-to-six weeks. *Id.* Mr. Campbell noted Petitioner's report of lumbar back pain and "some compensatory left ankle discomfort following poor gait mechanics...." *Id.* Petitioner stated that she was limited to walking two blocks and standing for only 10 minutes, but she did not demonstrate objective elicitation, worsening, or exacerbation of symptomatology with repeated mechanical motions of the lumbar and cervical spine. *Id.*

Mr. Campbell updated Dr. Lim on Petitioner's progress in a note dated October 12, 2010, after seven visits, in which he stated that Petitioner was not "appropriate for mechanical treatment for reduction of low back pain." PX22 at 12-13. He noted that "each approach is subjectively deemed unsuccessful in providing any longevity and sustained relief." *Id.* He further stated that her performance had been inconsistent throughout treatment and

that her complaints had a poor prognosis for resolution with physical therapy. *Id.*

On cross examination, Petitioner testified that she stopped going to physical therapy after two visits because it was hurting her and not helping her; they were not treating her right. Tr. at 78.

Dr. Lim sent MRI of lumbar spine on October 25, 2010. Tr. at 26; PX7. The interpreting radiologist noted mild spondylosis changes, spinal stenosis demonstrated at T10/11, minimal disc bulging at L2-L3, mild disc bulging at L3-L4 with borderline right and mild left neural foraminal stenosis, disc bulging and mild endplate osteophyte formation at L4-L5 with mild right and borderline left neural foraminal stenosis and no spinal stenosis, and minimal disc bulging with borderline bilateral neural foraminal stenosis and no spinal stenosis at L5-S1. PX7. After the MRI, Petitioner testified that she saw Dr. Donald Roland ("Dr. Roland") from January of 2011 through February 3, 2012. Tr. at 27.

Petitioner was placed off work on September 15, 2010, October 13, 2010, and November 19, 2010. PX22 at 16-18. She discontinued treatment with Dr. Lim after November 19, 2010. PX22. Petitioner testified that Dr. Lim did not help her. Tr. at 38-39. On cross examination, Petitioner acknowledged that Dr. Lim did not recommend surgery. Tr. at 78.

Continued Medical Treatment – Dr. Roland

The medical records reflect that Petitioner saw Dr. Roland on January 11, 2011. PX27 at 2-4. She reported a mechanism of injury at work when she went to sit and a seat collapsed landing her on the left side and episodes occurring over the prior seven months. *Id.* On physical examination, Dr. Roland noted a tender midline, mildly decreased range of motion, tenderness bilaterally, and negative straight leg raise tests bilaterally. *Id.* He diagnosed Petitioner with lumbar/lumbosacral disc degeneration, sacroiliitis, and lumbosacral spondylosis. *Id.* Dr. Roland ordered Lidoderm, Skalaxin 800 TID, and a TENS unit. *Id.*; Tr. at 59.

On February 23, 2011, Dr. Roland recommended bilateral L4-5 and L5-S1 facet joint injections. PX27 at 5-6. Petitioner underwent the recommended facet joint injections on March 2, 2011. PX27 at 7-8. She returned to Dr. Roland on March 23, 2011 reporting 50% improvement after the injections. PX27 at 9-10. He recommended bilateral radiofrequency ablations from L3-S1. *Id.* When Petitioner returned to Dr. Roland on March 29, 2011 she requested Cymbalta instead. PX27 at 13-14.

At her next visit on June 15, 2011, Petitioner reported new pain in both feet and "still having LBP as well she had a facet injection it did help I then wanted to do RF procedure but not oked by work comp. She presented with low back pain. It is located on both sides. It is radiating to bilateral calf, bilateral leg, the left foot and the right foot. It is described as constant. The symptom is ongoing. The complaint is 4/10. The frequency of episodes is daily and increasing." PX27 at 15-16. Dr. Roland diagnosed Petitioner with facet syndrome, sacroiliitis, lumbosacral spondylosis, and lumbar/lumbosacral degenerative disc disease. *Id.* He ordered Norco, Mobic, an EMG, and bilateral radiofrequency ablations from L3-S1. *Id.*

Petitioner acknowledged that she told Dr. Roland at this visit that her back pain was radiating to her leg and calf. Tr. at 79. On re-direct examination, Petitioner clarified that this radiating pain to her leg and calf in June of 2011 occurred prior to the second incident with the cart and that she was incorrect when she testified on cross examination that this was the first time she felt pain going into her leg. *Id.*

On June 16, 2011, Dr. Roland issued a narrative letter. PX25. Petitioner reported increased pain at that time

and he ordered an EMG/NCV. *Id.* Dr. Roland noted his expectation that Petitioner would return to work as of August 12, 2011, but she called his office complaining of extreme pain so he scheduled a radiofrequency ablation procedure. *Id.* He noted that Petitioner should be back at full duty work five days after her procedure, which was scheduled for August 30, 2011. *Id.* Petitioner underwent the recommended bilateral lower extremity EMG/NCV on June 23, 2011. PX27 at 17, 20. The results were borderline for the lower extremities showing consistent findings for lower lumbar radiculitis, although no frank lumbar radiculopathy was seen. *Id.*

Petitioner also saw Tara Sakevich, D.P.M. ("Dr. Sakevich") for bilateral heel and arch pain beginning September 8, 2011. PX38. Dr. Sakevich's records do not contain any report by Petitioner to an injury involving the ankles or feet at work. *Id.*

Petitioner underwent the recommended bilateral radiofrequency ablations on September 20, 2011. PX27 at 23-24; Tr. at 28. She was released to light duty work. PX27 at 25.

Petitioner also had an initial physical therapy evaluation at AthletiCo on September 22, 2011 with Brad Svoboda, PT, ATC ("Mr. Svoboda"). PX27 at 26-27. Mr. Svoboda noted the following:

> Patient present to therapy with significant concern for return to work knowing the amount of walking she has to do and not feeling she is in condition to perform that since she has been unable to exercise secondary to high pain level over the last year. She does demonstrate reduced measurement for muscular strength and has a positive lumbar quadrant test eliciting her pain. *Patient reports functionally she is limited a lot with bathing or dressing herself, walking around the room, getting in and out of a chair, getting in and out of bed and walking one block. However patient able to sit to stand in clinic 3 times without reports of pain and she rode her bike to the clinic for her session.* Patient to benefit from physical therapy to improve muscular endurance and strength.

Id. (*emphasis* added).

Petitioner testified that she did not go back to work until September 26, 2011 approximately six days after the radio frequency ablation. Tr. at 28-29. She testified that she was still in pain, which had gotten a little better, but she was able to work. Tr. at 29.

When Petitioner returned to Dr. Roland on September 28, 2011, she reported 60% improvement after the radiofrequency ablation with continued low back pain radiating to the bilateral hips. PX27 at 28-30. Dr. Roland released Petitioner to work without restrictions. *Id.*

October 3, 2011

Petitioner testified that on October 3, 2011 she had been back at work approximately one week performing the same job as a registered nurse on the 3:00 p.m. to 11:00 a.m. shift. Tr. at 30. She was working alone on this date in the Stateville emergency room. *Id.* Petitioner explained her duties to include passing out medications and handling emergencies. *Id.*

Petitioner testified that she was doing her medications and bent over an old metal medicine cart that was about 50 years old, 3' x 3', and weighed about 100 pounds. Tr. at 31-33. She explained that the three drawers stick and she had to push them back in. *Id.* She added that the bottom drawer got stuck a lot and was bent. *Id.* Petitioner testified that she pulled the bottom drawer and it fell on her. *Id.* Petitioner testified that she hurt her back. *Id.*

Petitioner reviewed Petitioner's Exhibit 19, which she explained is an injury report written by her boss, Dolores Trevino. Tr. at 34, 36. She completed the description on page two of that exhibit and signed it. *Id.* The form indicates that this incident report was filled out at 7:28 p.m. on October 3, 2011. *Id.* The report is titled Adult and Juvenile Divisions Incident Report and reflects Petitioner's statement of facts as follows:

> On above date and approx time [Petitioner] notified this RNS that she had severe back pain while standing and packing medications for units D+E. [Petitioner] requested to go to hospital emergency room for further evaluation and treatment via ambulance. Shift Commander Major Fredericks rejected above Assistant Warden Edwards called and refused above. As per [Petitioner] transport to St. Joseph Hospital emergency room via [illegible] vehicle requested and Shift Commander .... HCS D.O.N. Cindy Garcia... directed [Petitioner] to [illegible] worker cmp with questions she has regarding workers cmp procedures, notification, and follow up.
>
> ....
>
> While standing in the back of the ER packing medications my back was aggravated as I bent over and pulled out bottom drawer. Pain is a 10 – lower back – shooting down left leg.

PX19.

Petitioner testified that she pulled the drawer out of the medicine cart and felt pain in her back going down her left leg. Tr. at 35. Petitioner testified that she did not feel pain in her back going down her left leg prior to that day. *Id.* She explained that her previous pain was located in the middle-to-lower part of her back. Tr. at 35-36. Petitioner testified that this pain intensified in her back. Tr. at 36.

On cross examination, Petitioner testified that she filled this form out directly after the claimed accident on October 3, 2011. Tr. at 79-80. She acknowledged that it is not a workers' compensation report form like she filled out with her first accident; rather it is an incident report form from the prison. Tr. at 80. Petitioner also explained that she did not mention in the report that the medication cart was broken because the cart was just there; it was just the equipment they used. Tr. at 81. She testified that her back started hurting again while she was at work and had just returned about one week earlier. *Id.* Petitioner described that her back condition was "aggravated" in the report. *Id.*

Medical Treatment – Dr. Roland, Dr. Mekhail & Dr. Hung

Petitioner returned to Dr. Roland on October 4, 2011 reporting the following:

> Patient says she went back to work without restrictions she says after lots of walking her back is killing her. Her supervisor sent her home told her to go to her doctor. The patient had radiofrequency procedure I sent her for PT she had only one visit I will have her finish PT then go back to work.
>
> She presented with low back pain. Patient's pain is worst on the left side. She states pain increases when she is at work since she has to walk several miles and go up the stairs.It is located on both sides. It is radiating to bilateral leg. It is described as shooting, constant and throbbing. The symptom is ongoing. The complaint is 5-10/10. The frequency of episodes is on and off. The symptom is exacerbated by physical activity and standing or walking.

PX27 at 31-35; Tr. at 36-37. Dr. Roland ordered physical therapy and a functional capacity evaluation. *Id.* Notably, Petitioner did not report her claimed accident at work allegedly occurring the prior day.

Petitioner testified on cross examination that she already had this visit scheduled with Dr. Roland before her claimed accident on October 3, 2011. Tr. at 81.

On October 28, 2011, Petitioner was discharged from physical therapy at AthletiCo after eight visits. PX27 at 37-38. At this time, she did not report another injury at work occurring on October 3, 2011. *Id.* Petitioner reported that she felt looser, that the therapy was helping, and that she wished to return to work. *Id.* The physical therapist, Mr. Svoboda, noted the following in pertinent part:

> *Patient observed to ride her bicycle to and from clinic appointments. No ambulatory deviation noted on level surface. No facial grimaces during bending activities.*

Id. (*emphasis* added).

Petitioner returned to see Dr. Roland on November 30, 2011. PX27 at 39-40. She reported the following:

> Oct 3rd hurt at work saw me on the 4th I sent for PT ordered PT and FCE. She was to return to work but she could not because of persistent pain. She says she did not have an order for the FCE. She has been finished with PT for 3 weeks.She called the office and asked for form to bde completed to be off work she was instructed to come in today.
>
> She presented with low back pain. Patient would like to get her work forms filled out. She states physical therapy did not help much.It is located on the left. It is radiating to the left buttock. It is described as intermittent and throbbing. The symptom is ongoing. The complaint is 4/10. The frequency of episodes is unchanged.

Id. Dr. Roland again ordered a functional capacity evaluation. *Id.*; PX31 at 13.

On December 27, 2011, Dr. Roland completed a physician's statement for authorization for disability leave and return to work after her functional capacity evaluation was completed. PX27 at 43-44.

On January 10, 2012, Petitioner underwent the recommended functional capacity evaluation. PX24 at 11-36. The test results were invalid. *Id.* The evaluating physical therapist summarized the findings as follows:

> The results of Mrs. Christerson's FCE are considered INVALID as they do not present an accurate depiction of her current functional capabilities. Mrs. Christerson's subjective reporting of pain and disability is considered: UNRELIABLE, as McGill, Dallas and Oswestry pain questionnaires were all indicative of excessive pain reporting in relationship to objective behaviors and observations. Mrs. Christerson also completed Hand and Spinal Sorts, in which she perceived her current abilities as Sedentary and Less than Sedentary, although she demonstrated greater functional abilities during her testing. Mrs. Christerson demonstrated LOW EFFORT today, evidenced with heart rate analysis of strength testing, including, Isoinertial lifting, and bimanual push & pull. She did not demonstrate competitive test behaviors traditionally observed throughout her exam, and reported subjective pain as primary limiting factor throughout her day. Her subjective pain ratings did not correlate with observed and expected behaviors & movement patterns.
>
> Mrs. Christerson demonstrated the ability to function at a Light Demand Level (20lbs) at Occasional Frequencies (0-33% of workday) for waist level work, and Medium Demand Level (20-50lbs) for Occasional Demand Level work at shoulder level. She demonstrated no significant limitations with positional tolerances including standing, sitting, or walking. She does not meet work demands as

populated by the Dictionary of Occupational Titles to lift 50lbs to waist level at Occasional Frequency.

Id. The evaluating physical therapist noted specific inconsistencies between Petitioner's reported abilities as well as deficiencies in effort. *Id.*

On February 8, 2012, Petitioner reported low back pain to Dr. Roland and wanted to discuss her disability forms. PX27 at 41-42. Petitioner testified that she stopped treating with Dr. Roland because he was not helping her. Tr. at 37.

On March 5, 2012, Petitioner saw Anis Mekhail, M.D. ("Dr. Mekhail"), another orthopedic physician. Tr. at 37-38. The medical records reflect that she reported her fall off a stool at work in August of 2010 with pain continuing since that time and no relief from any treatment from Dr. Lim, physical therapy or facet blocks. PX24 at 2(a-b). Dr. Mekhail recommended light duty work, additional physical therapy and rehabilitation, and to try to advance her activities as tolerated. *Id.* He also advised her to "try to wean herself off of pain medication and seek help from pain management where she got the medication." *Id.* Petitioner testified that no light duty work was given to her. Tr. at 37.

Petitioner then saw another physician, Ming Hung, M.D. ("Dr. Hung") on March 22, 2012. PX30. Petitioner testified that she saw Dr. Hung at Midwest Rehabilitation Associates as referred by Dr. Mekhail. Tr. at 39. She reported the following:

> 49 yo female here for eval for low back and right foot pain. Fell off a stool at lunch when the stool gave way. Sustained injury to her back and feet. Pain worsened next day. Stabbing pain in lower back, left worse than right. Pain range from 0-9 depending on activity. Pain worsens with prolonged standing and walking. Right foot feels swollen with throbbing pain. Difficulty with descending stairs. No falls or give away leg weakness. Pain worse at end of day. No radiating pain to the extremities. No increase in pain with cough, sneeze, or bowel movement. Had therapy at AthletiCo with Sean Campbell but did not have lasting result and was stopped due to insurance. Back injection did not help. Traction treatment aggravated the pain. No bowel/bladder incontinence. Had MRI of back done in 2010 which showed bulging discs. Had EMG but unaware of any significant findings. Had tried Lyrica and Neurontin without benefit. Had also tried Robaxin, Skelaxin, Ultram, and Flexeril without benefit. Currently on Cymbalta and Zanaflex. Reports decreased sleep and weight gain of 50 pounds during this time period.

Id. Dr. Hung diagnosed low back pain, left sacroiliac joint dysfunction, left piriformis syndrome, and right ankle pain/pronation syndrome. *Id.* He ordered physical therapy, an SIJ belt, an injection with Dr. Sharma/Patel for the left glut/piriformis, and a Xanax trial. *Id.*; PX31 at 14.

Petitioner underwent another initial physical therapy evaluation at Provena St. Joseph Medical Center on April 18, 2012 as ordered by Marie Kirincic, M.D. ("Dr. Kirincic"). PX31 at 15-17. Petitioner attended physical therapy between April 18, 2012 and August 19, 2012 for approximately 32 visits. Tr. at 40; PX6 at 208-226; PX31. Petitioner testified that the physical therapy did not help her at all. *Id.*

Continued Medical Treatment – Dr. Kirincic & Dr. Foley

Petitioner explained that neither Dr. Roland nor Dr. Lim helped her so she saw Dr. Kirincic at Hinsdale Orthopedics on June 8, 2012 as referred by Dr. Mekhail. Tr. at 38-39; PX6 at 198-207. The medical records reflect that Petitioner saw Dr. Kirincic for her low back from June 8, 2012 through March 21, 2014. Tr. at 39. Petitioner testified that the steroid injections administered by Dr. Kirincic helped her condition. Tr. at 40.

Petitioner presented with complaints of low back pain after an accident at work on October 3, 2011. PX6 at 198-207. Dr. Kirincic noted the following history:

> A pleasant 49-year-old who complains about left lumbosacral pain and right foot pain. She has been in physical therapy under St. Joseph, improving, made progress in pain and functional level. Still unable to do stairs at times. Pain free. Has not been able to resume work and is unable to do lifting or repetitive movement secondary to pain complaints. She needs a new script. She has had pain treatment under Dr. Hung and Dr. Roland, and has been on Ambien, Norco 7.5, clonazepam from Dr. Lelio for anxiety. Reports she had an accident at work on August 2010. She had x-rays, spinal neurotomy, facet blocks, physical therapy, and pain is still up to 9/10 on the VAS scale. She usually has pain with treadmill, standing for prolonged times, and negotiating stairs. Stabbing pain. Stretching, certain exercise, and pain medication or helping. She has not been able to return as a correctional registered nurse to her work in Joliet. The patient is here with two children, and she has been suffering with right foot plantar fasciitis.

PX6 at 200. Dr. Kirincic reviewed Petitioner's October 26, 2010 lumbar spine MRI showing minimal disc bulging and facet arthropathy with left facet degeneration L4-L5, and borderline neural foraminal stenosis, L5-S1. *Id.* she diagnosed Petitioner with a lumbosacral strain initially work-related injury August 2010 with left sacroiliac joint, peer performance, gluteal myofascial pain, and difficulty with return to work, and chronic pain, muscle spasms, radicular symptoms, and lumbosacral segmental dysfunction. PX6 at 200-201. Dr. Kirincic administered a trigger point injection into the left gluteus/piriformis, discussed and obtained an opioid agreement from Petitioner, and placed her off work. *Id.* Notably, Petitioner did not report her claimed accident at work on October 3, 2011.

Petitioner also saw Michael Dorning, D.O. ("Dr. Dorning") beginning June 15, 2012 for a left foot and ankle injury sustained while walking her dog. PX34.

Petitioner testified that she then began treating with Dr. Nathan Foley ("Dr. Foley") because the physical therapy was not helping and they were not treating her right. Tr. at 41. Petitioner went to Foley Physical Medicine for chiropractic care and physical therapy from August 8, 2012 through March 15, 2013 for approximately 43 visits. PX2; Tr. at 41.

The medical records reflect that at her first visit on August 8, 2012, Petitioner reported low back pain and completed a pain chart in which she noted stabbing pain in the low back and left buttock, a burning pain in the low back, a stabbing pain in the left ankle, and pins and needles sensation in the right toes. PX2 at 2-4, 22-24. Petitioner reported the following:

> ... she has had chronic low back pain that radiates down the left buttock for years. She had an accident while at work many years ago and has since had many different low back problems. The current pain is slightly different from past pains in that it is over the entire low back as well as well [sic] down the left posterior thigh. ...The original injury was from sitting on a bench and it gave way landing her on her buttock and left side. She states that she has been to many other doctors and physical therapists and has had no relief from the pain."

PX2 at 22-24. Petitioner continued to see Dr. Foley for chiropractic treatment as well as Dr. Kirincic. PX2; PX6. Petitioner was diagnosed with an opioid dependency, but complied with the drug screens ordered by Dr. Kirincic. PX6.

Section 12 Examination – Dr. Lami

On December 3, 2012, Petitioner submitted to a medical evaluation with Babak Lami, M.D. ("Dr. Lami") at Respondent's request. RX4 (Dep. Exh. 2). Petitioner testified that she did not recall seeing Dr. Lami at Respondent's request in December of 2012, but recalled the evaluation after Petitioner's counsel stipulated to her attendance. Tr. at 87.

Petitioner provided a history reporting "an injury to her lower back in August of 2010. The injury occurred when she was on her food break. She was trying to sit down on the chair when the chair and table gave way and she fell on the cement floor. RX4 (Dep. Exh. 2). Dr. Lami reviewed Petitioner's reports of injury in August 2010 and October 2011, treating medical records from Dr. Roland, Dr. Lim, and Dr. Mekhail, as well as physical therapy records and diagnostic reports including Petitioner's October 2010 MRI. *Id.*

Dr. Lami concluded that Petitioner's MRI report failed to show any significant finding other than degenerative changes. *Id.* He noted that Petitioner had been evaluated at that point by two orthopedic surgeons, Dr. Lim and Dr. Mekhail, who both recommended functional capacity evaluations. *Id.* Dr. Lami also noted Dr. Mekhail's recommendation that Petitioner come off her pain medications and increase her activities. *Id.*

Dr. Lami also stated that Petitioner's "subjective complaints and the amount of narcotic medication she is taking are out of proportion to objective physical findings. Irrespective of causation, there is no objective basis to support her significant amount of pain, disability, and need for the significant narcotic medications. I cannot support her current symptoms over two years after her fall, without any objective findings to be related to the fall of August 17, 2010 or subsequent aggravation by bending over to grab medication." *Id.* He opined that Petitioner was at maximum medical improvement and that she required no further treatment or medications as a result of her fall on August 17, 2010. *Id.*

Continued Medical Treatment and Return to Work

As of February 22, 2013, Dr. Kirincic noted that Petitioner was not allowed to return to work while on pain medications or with restrictions. PX6 at 151-156. Dr. Kirincic kept Petitioner off work or noted that her work would not accommodate light duty through November 14, 2014 when she was placed at maximum medical improvement. PX6.

Petitioner testified that she selected Dr. Foley through her husband's insurance card. Tr. at 82. She denied having acupuncture with him. *Id.* She testified that she had acupuncture once with Dr. Kirincic and she did not have that again because it made her pain increase from 0 to 10 in about 20 minutes. Tr. at 83; *see also* PX6 at 170-173 (November 16, 2012 office visit noting Petitioner's report of pain at a level of 10/10 after acupuncture).

Petitioner testified that she went back to full duty work in June of 2013. Tr. at 41-42; PX6 at 132-137 (Petitioner reported on May 31, 2013 to Dr. Kirincic that she would like to return to work the following week as she was worried about her social security benefits). Petitioner explained that she still had pain that fluctuated and took narcotic pain medications including Norco, Opana ER, Percocet and also non-narcotic medications, but she was able to do her job. Tr. at 42-43. Petitioner testified that she then worked almost a full year. Tr. at 42.

Babak Lami, M.D. – Deposition Testimony

Respondent called Dr. Lami as a witness and he gave testimony at an evidence deposition on February 24, 2014. RX4. Dr. Lami is a board-certified orthopedic surgeon specializing in spinal conditions. RX4 at 4-6; RX4 (Dep. Exh. 1).

Dr. Lami testified that he noted that Petitioner reported a second injury in his review of the medical records, but Petitioner did not report a second injury to him. RX4 at 9-10. He noted no abnormalities in terms of Petitioner's orthopedic neurological examination and he could not identify the cause of Petitioner's low back pain with left buttock pain noting that "[s]he had very mild degenerative changes on her MRI. They were not significant, unremarkable I would say. Her symptoms were subjective. … her diagnostics and examination did not point out to a particular source of pain." RX4 at 11-13. He testified that neither Dr. Lim nor Dr. Mekhail recommended surgery in the records that he reviewed. RX4 at 16.

Dr. Lami maintained that he could not identify any objective basis for Petitioner's pain complaints at the time of his evaluation, her need for prescription medications or further medical treatment, or work restrictions. RX4 at 13, 17. He opined consistent with his report that Petitioner's low back pain with left buttock pain noted two years after her reported fall and reported second injury (of 2011) could not be related to her employment or her fall at work on August 17, 2010. RX4 at 12, 16-17.

On cross examination, Dr. Lami acknowledged that Petitioner had no reported history of back pain prior to August 17, 2010. RX4 at 19. He testified that Petitioner could have pain from the reported fall of August 17, 2010. RX4 at 20. Dr. Lami also testified that he did not review medical records from Dr. Kirincic, a doctor that Petitioner reported to him was her primary care physician. RX4 at 30-31.

On re-direct examination, Dr. Lami testified that radiofrequency ablations are not generally reasonable or necessary to treat a back strain as was diagnosed by Dr. Lim shortly after Petitioner's first work accident. RX4 at 31.

May 12, 2014

Petitioner reviewed Petitioner's Exhibit 8, which is workers' compensation employee's notice of injury completed by Petitioner with notations by Dr. Kirincic. Tr. at 47. Petitioner's Exhibit 9 is a claim notification for occupational disability (a.k.a., "SRS") that Petitioner testified that she completed because her workers' compensation claim was denied. Tr. at 47-48. Petitioner testified that she did not get SRS benefits. Tr. at 48. Petitioner's Exhibit No. 10 is another request for temporary total disability benefits completed by Petitioner and Dr. Kirincic for the claimed date of accident of May 12, 2014. Tr. at 49.

Petitioner testified that on May 12, 2014 she was working the same 3:00 p.m. to 11:00 p.m. shift with a partner, Helen Ojei ("Ms. Ojei"), another nurse. Tr. at 44. She testified that she worked with Ms. Ojei for about two months in the infirmary every day. Tr. at 45. She described her relationship with Ms. Ojei to be that of a coworker and that she did not socialize with Ms. Ojei outside of work. Tr. at 45. Petitioner also testified that she did not ever discuss anything about her back with Ms. Ojei prior to this incident and that Ms. Ojei never discussed anything with her regarding her back or prior incidents at work. Tr. at 45-46.

Petitioner testified that she was working with Ms. Ojei caring for a "total care" inmate in the infirmary named Joe Jones ("Inmate Jones") at about 7 o'clock. Tr. at 49. Petitioner testified that total care patients cannot do

anything for themselves. *Id.* She explained that twice per shift she changes Inmate Jones' diapers, empties his Foley catheter, changes his wound dressings, lifts and rolls him in bed, and dresses him. Tr. at 49-50.

Petitioner explained that she and Ms. Ojei were in the room together taking care of Inmate Jones and had gotten to point where they had changed his Foley and diaper. Tr. at 51. She testified that they both lifted him up in bed, and when they did they always would say "let's lift on 3, 1, 2, 3" and then they would lift him up. *Id.* Petitioner testified that she said 1, 2, 3 and lifted up Inmate Jones, but did not think Ms. Ojei heard her and Ms. Ojei did not lift him up such that Petitioner got the brunt of the lift. *Id.* Petitioner testified that she and Ms. Ojei usually lifted the inmate after counting to three. Tr. at 88. They had done this previously more than 20 times. *Id.* Petitioner testified that she did not believe that Ms. Ojei ever heard her counting to three. *Id.* Petitioner estimated that Inmate Jones weighed approximately 200 pounds. Tr. at 51.

Petitioner described a trapezius mechanism as a free standing medical piece that hangs over the patient's bed with a triangle that he could use to pull himself up and down and maybe get some arm strength. Tr. at 52. She testified that she carried this mechanism into Inmate Jones' room the night before and he did not make any attempt to use the mechanism when she and Ms. Ojei were trying to move him the following day. *Id.* On cross examination, Petitioner testified that she brought the trapeze unit in for Inmate Jones to build his upper body strength. Tr. at 89.

Petitioner testified that when she lifted Inmate Jones, she immediately said to Ms. Ojei, "oh, I hurt my back." Tr. at 53, 89. She explained that she just felt everything on the left side crack. *Id.* Petitioner described this pain to be more severe than with her prior injuries and that the pain was in her low back, left thigh and her left buttocks. Tr. at 53-54. Petitioner testified that after she said that she hurt her back she left the room and went back to the nurse's station at almost exactly the same time her boss, Ms. Trevino came in, and she told her what had happened. Tr. at 54. Petitioner testified that she told Ms. Trevino that she had injured herself while lifting Inmate Jones, was in severe pain, and needed to go home and to go see the doctor. Tr. at 55.

Petitioner testified that she never had a conversation with Ms. Ojei regarding this incident, but she did tell her that she was in pain both after she lifted Inmate Jones when she said "oh, my back hurts" and when they went back again in the infirmary she told Ms. Ojei that she had injured herself so she had to go home. Tr. at 54-55. Petitioner testified that she went home about an hour after the incident, passed a couple of medications and finished her shift. Tr. at 55. Petitioner testified that she could not leave right away because there were three emergencies in the emergency room and Ms. Trevino told her to wait a few minutes. Tr. at 55-56. Petitioner did not recall what the emergencies were. Tr. at 56.

Petitioner testified that she knows a correctional officer, Erin Sheridan ("Officer Sheridan"). Tr. at 56. Petitioner testified that Officer Sheridan was there on the night of her claimed accident. *Id.* She understood Officer Sheridan's responsibilities to include those of a security officer, opening the cells and standing there while she takes care of the inmates. *Id.* Petitioner testified that Officer Sheridan was out in the hall while she was taking care of Inmate Jones. Tr. at 56-57. She testified that she did not have any conversations with Officer Sheridan about this incident. Tr. at 57.

On cross examination, Petitioner testified that only she, Ms. Ojei, Inmate Jones, and another total care patient were in the room at the time. Tr. at 86. Officer Sheridan was in the hallway. *Id.* At a certain point during that day Petitioner testified that she felt that she needed to go home early after she hurt her back. *Id.* Petitioner completed an incident report on May 13, 2014. Tr. at 86-87; PX8; RX6. She indicated that the left leg, thigh and buttock injury occurred as follows:

inmate was lying in bed – total care – lifted inmate without any assistance from him [and] while lifting a total care male patient my left thigh on up was pulled, sprained rendering me unable to continue shift

PX8; RX6. Petitioner wrote the name of Robin, which she explained referred to Robin Bumber ("Ms. Bumber") the workers' compensation counselor at Stateville, on this incident report. Tr. at 86-87; PX8; RX6.

On cross examination, Petitioner testified that she completed a form on May 15, 2014 claiming time off work under the FMLA. Tr. at 83-84; RX7. Petitioner reported that she had chronic and permanent back and buttock pain. Tr. at 84. She testified that the request was so that she only had to work one shift and did not have to work overtime. Tr. at 84. Petitioner previously testified that she did not do overtime often; she was only given overtime about four times per year before any of her accidents at work. Tr. at 61-62.

Petitioner also completed a claim notification form directed to the state retirement systems for occupational disability due to an accident on May 12, 2014. PX9. Petitioner stated that the injury occurred as follows:

> Inmate is a total lift and is a total dead weight lift. While lifting inmate this nurse injured [left] buttock + [left] thigh. I heard a cracking noise. Inmate has a portable trapeze but has minimal upper body strength. Tight after lifting inmate I told the other nurse Helen Ojei I hurt myself. She stated she does not want to be a witness.

PX9.

Medical Treatment

On May 16, 2014, Petitioner returned to Dr. Kirincic as scheduled at her March 21, 2014 visit. PX6 at 87-100 at 57. She saw Dr. Kirincic between May 16, 2014 and January 30, 2015. Tr. St 57; PX6. At the May 16, 2014 visit, Dr. Kirincic noted the following history:

> [Petitioner] returns to clinic for follow-up visit. Last seen in clinic 3/21/14. Request the medication stronger than Norco because it is not strong enough. Interested in cortisone injection. She has been treated for years for chronic lt. buttock pain. Tylenol-3 did not work. Would like to try Percocet. tid. She does not like having the trigger point injections. She would rather just have the injection at the one spot of her pain. Working as our and, no overtime. No longer seeing chiropractor occ brace for posture, slight worsening with workload in cold weather. No radiating pain, no bowel, bladder dysfunction, no nausea, vomiting, night sweats, fevers, no pain with Valsalva maneuvers.
>
> *Patient actually reports that she has now new (previous 2011) work-related injury on May 12, 2014, about 3 days ago when she was reportedly tricked by her coworker who said let's quickly lift this patient up and held only sheet when the patient lifted. The patient experienced a flare-up of severe left buttock pain similar to what she had before. She believes it will take her again several months to recover from this incident and will need stronger medication.* Also saw a foot doctor in March 2014 for orthotics and is determined to go back to her chiropractor who helped her in past. *Also would like stronger medications as the incident with a 200 pound patient, on May 12, 2014, created pain.* She has not been back at work. Requested several pages of 2 or 3 different paperworks for FMLA and work.

PX6 at 85-93 (*emphasis* added). Petitioner denied telling Dr. Kirincic that Ms. Ojei tricked her into lifting a patient by herself. Tr. at 88.

The medical records reflect that Dr. Kirincic asked Petitioner if she worried with a new injury whether she needed new imaging, but Petitioner declined the recommendation. *Id.* Dr. Kirincic administered a trigger point injection and noted that Petitioner had been 80% better at maximum medical improvement from her previous flareup with a return to work now being off work since May 12, 2014 after a lifting injury with flareup of her left lumbosacral pain. *Id.* She restricted Petitioner from lifting over 25 pounds. *Id.*

Dr. Kirincic also completed a physician's statement for authorization for disability leave and return to work on May 16, 2014 in which she diagnosed a lumbosacral strain, right lumbosacral myofascial, tenderness, and decreased range of motion. *Id.* She restricted Petitioner to light duty work with no lifting over 25 pounds and no standing, sitting or walking over 45 minutes. *Id.*

Sean Campbell – Deposition Testimony

Respondent called Sean Campbell, P.T., M.P.T., A.T.C. ("Mr. Campbell") as a witness and he gave testimony at an evidence deposition on July 10, 2014. RX3. Mr. Campbell is a physical therapist certified in administration of Matheson system functional capacity evaluations. RX3 at 4-7; RX3 (Dep. Exh. 1). Mr. Campbell is the physical therapist that administered Petitioner's functional capacity evaluation on January 10, 2012. RX3 (Dep. Exh. 2). He also previously treated her as her physical therapist from September 23, 2010 through October 12, 2010. RX3 at 8-9, 51.

Mr. Campbell explained some of the testing methods and observations that he made of Petitioner throughout her functional capacity evaluation. RX3. He explained that physical effort testing is performed throughout an examination as a way to gauge a patient's effort levels during tests to establish a clear picture of the effort given. RX3 at 17. He also explained that competitive test performance is a category of behaviors that he looks for throughout the testing day to determine if someone is giving their strongest performance in the testing. RX3 at 19. He testified that he observed Petitioner for signs of such performance, but they were absent during her testing day. *Id.* Mr. Campbell further described heart rate testing, grip strength testing, and rapid exchange grip testing which are used to measure effort related to various physical activities. RX3 at 17-20.

Mr. Campbell testified that Petitioner's physical effort was low during testing at her functional capacity evaluation and that she made subjective complaints that limited her performance. RX3 at 22-23. Among other findings, he noted that Petitioner's trunk mobility testing was significant in that her repeated trunk flexion exercise was 19 seconds with no pain, but when she reported pain at a level of 9/10 her time was 23 seconds, which was not significantly different. RX3 at 38-39. Mr. Campbell testified that he called Petitioner the day after the evaluation to follow up and she reported that "she took a Motrin and a Vicodin after her test, and she laid down after she got home; that she had no energy to do anything around the house after the test; that she did not eat dinner; that the next morning she was still having pain. Although, it was not as bad, although, and it was limiting. She said she had to wrap her ankle because she was having some ankle complaints." RX3 at 40-41.

Ultimately, Mr. Campbell concluded consistent with the findings in his report that Petitioner's subjective reports of pain and disability were unreliable based on all of the tests (physical, written, and observation-based tests) that were administered to Petitioner at her functional capacity evaluation. RX3 at 33-34. He also concluded that Petitioner's functional capacity evaluation results were invalid and not an accurate depiction of what her then-current functional abilities were. RX3 at 41-42. Mr. Campbell based these conclusions on Petitioner's physical effort and the reliability of her reports noting that Petitioner showed low effort and unreliable reports. RX3 at 42-43.

On cross examination, Mr. Campbell testified that he was the only person at his facility who could administer a functional capacity evaluation, but they offered Petitioner the opportunity to go to another one of their centers, specifically to Tinly Park, and Petitioner declined. RX3 at 54-57. He also acknowledged that a functional capacity evaluation involves subjective components from both the examiner and examinee. RX3 at 65-66.

Continued Medical Treatment

Petitioner continued to see Dr. Kirincic through January 30, 2015 during which time she was restricted to light duty work. PX6 at 28-94. Petitioner also saw Dr. Foley on seven occasions after May 12, 2014 for what she described as some type of therapy. Tr. at 57. The medical records reflect that Petitioner reported the following:

> ...while working her job as a nurse at a Statesville [sic] prison she was attempting to lift a patient with another worker when she felt a pain in her low back and buttock region. The patient states that the pain level in the buttock is at an 7/10 [sic] burning type of pain on the left side from hip to lowest portion of the buttock. The low back pain is a 8/10 burning type of pain with a pins and needles sensation that is greater on the left side of the body but that it does include to a lesser degree the right side of the body. ...."

PX2 at 113-115. Petitioner received further chiropractic care through June 24, 2014. PX2 at 116-127.

Petitioner also treated at Integrated Physical Medicine with another chiropractor, Joshua Eldrenkamp, D.C. ("Dr. Eldrenkamp"), for 16 visits between September 19, 2014 and November 18, 2014. PX4; Tr. at 58-59. Petitioner testified that she went there because she was denied workers' compensation benefits and Dr. Foley was getting too expensive for her. Tr. at 58. She testified that she was making some of the payments in cash to Dr. Foley and Integrated Physical Medicine herself. *Id.*

The medical records reflect that Petitioner went to Dr. Eldrenkamp for an initial visit on September 19, 2014 and completed a health questionnaire in which she reported that the reason for her visit was "Periformis from 2010 injury + back pain." PX4 at 12-22. She also completed a pain drawing noting aching and stiffness pains in the low back and aching pain in the left buttock as well as pain at a level of 9/10 "while walking without medication." *Id.* Dr. Eldrenkamp's history notes the following:

> ... The mechanism of injury described by the patient involved a lifting injury. The symptoms have been present since the date of injury on 5/12/2014. .... She presents with primary chief complaints of lower back pain and left glute pain that has been bothering her for a few years now but seems to have been getting worse over the last few weeks. She states that the original injury was in 2010 when she fell out of a chair and landed on her buttocks. She has had pain since then and seen a number of different doctors and physical therapists over the last four years. She states that she was getting better with physical therapy and was discharged from care. She states that May 12th, 2014 she was lifting something heavy when she felt increased pain in the lower back. She notes that her left piriformis seems to spasm and remains sore since this incident. She denies radiating pain more distal that the left glute and denies numbness or tingling to the lower extremities bilaterally. ... She is having her case co-managed by her MD who has been administering injections into the left piriformis."

PX4 at 16. Petitioner's straight leg raise, heel and toe walk tests were negative bilaterally. PX4 at 17.

Petitioner's request for light duty was denied on October 17, 2014 in a letter stating that it could not be accommodated. PX11.

Petitioner returned to Dr. Kirincic on October 31, 2014. PX6 at 46-54. Dr. Kirincic administered a trigger point injection, noted that Petitioner's drug screen was consistent, and placed Petitioner at maximum medical improvement with a full duty return to work effective November 14, 2014. *Id.*

Dr. Kirincic also completed another physician's statement for authorization for disability leave and return to work on October 31, 2014 in which she diagnosed a resolving lumbosacral strain and chronic myofascial pain. PX4 at 34-36. She released Petitioner to light duty work effective October 31, 2014 and full duty work effective November 14, 2014. *Id.* Petitioner continued to attend physical therapy sessions through November 18, 2014. PX4.

Petitioner returned to Dr. Eldrenkamp who also completed a physician's statement for authorization for disability leave and return to work on November 18, 2014 in which he noted Petitioner's treatment including chiropractic manipulation. PX4 at 31-32. Dr. Eldrenkamp indicated that she could return to light duty work effective November 14, 2014 and full duty work effective December 1, 2014. *Id.*; PX12-PX13.

Petitioner testified that she was provided with several off work notes, which she provided to Respondent. Tr. at 60. Petitioner was off work from May 13, 2014 through November 30, 2014. *Id.* She received no benefits during this time, but she was under Dr. Kirincic's care and on medications. Tr. at 61.

Petitioner returned to work on December 1, 2014 and has worked full duty since then. Tr. at 60-61. She explained that when she returned to work she was feeling terrible, but she needed the money. *Id.* On cross examination she also testified that she is still using a TENS unit as prescribed by Dr. Roland. Tr. at 89. She explained that the TENS unit helped her minimally and she received one refill of the stickers for TENS unit. Tr. at 59. Petitioner also purchased a refill of those stickers approximately six months ago and paid for that in cash. Tr. at 59-60.

From December 11, 2014 through March 8, 2015, Petitioner testified that she has been on the following medications: Neurontin (300 milligrams at bedtime), Opana ER (20 milligrams twice a day), Tizanidine (6 milligrams at bedtime), Norco four times a day, Naproxen, Motrin, Robaxin and compound cream. Tr. at 62-63. Petitioner explained that these medications were for back pain and symptoms, and that she rubs the compound cream on her back and feet because now they hurt because she walks funny to compensate for her back. Tr. at 64-66. She testified that she has never had problems or pain in her feet like she has now before any of her accidents at work.

Petitioner testified that she last saw Dr. Kirincic on January 30, 2015. Tr. at 70-71. She explained that she does plan on seeing Dr. Kirincic in the future and that she will likely continue to see her for the rest of her life. Tr. at 71.

On cross examination, Petitioner acknowledged that Dr. Kirincic diagnosed her with opiate dependency and that when she sees her, she undergoes toxicity screens. Tr. at 82. Petitioner testified that Dr. Kirincic has discussed this issue with her. *Id.* She also testified that she has been trying to go off her medications, but she has pain when she does that. Tr. at 90.

Erin Sheridan

Respondent called Officer Sheridan as a witness. Tr. at 94. She testified that she was employed by Respondent

on May 12, 2014 as a correctional officer. *Id.* Her duties included whatever was assigned on a given day, but she testified that she was posted to the infirmary, the health care unit, on May 12, 2014. Tr. at 94-95. On cross examination, Officer Sheridan testified that she was employed by Respondent for just under two years and she retired in June of 2014. Tr. at 97-98.

Officer Sheridan testified that she observed Petitioner on that day. Tr. at 95. She explained that Petitioner was a nurse in the infirmary with her, so she observed Petitioner throughout the day doing her duties. *Id.* At one point, Officer Sheridan testified that Petitioner was in a room with Ms. Ojei. Tr. at 95.

She testified that she was standing outside the door facing into the cell where Inmate Jones was located. Tr. at 95. Officer Sheridan observed the nurses turning Inmate Jones multiple times per day. *Id.* She testified that she did not remember that day specifically being different from any other day. Tr. at 96. Officer Sheridan testified that they would turn inmate Jones, change his bandages, rotate him in the bed, and then if they had to do something with the other inmate in the cell they would do that with the other inmate as well and leave the cell. Tr. at 96. Officer Sheridan would then close the door. *Id.*

Officer Sheridan further testified that on May 19, 2014 she completed a witness report, which is a true and accurate representation of what she observed in the cell on May 12, 2014. Tr. at 97; RX8. With regard to the report, Officer Sheridan testified on cross examination that she did not recall May 12, 2014 to be specifically different than any other day, but that Petitioner and Ms. Ojei turned Inmate Jones daily. Tr. at 97-98. The report reflects the following statement by Officer Sheridan:

> Every time I am assigned to the Stateville Infirmary with Michelle Christersen, she complains of back pain when turning inmate Jones in cell 158. Jones has to be turned multiple times daily. On the days that I work in the infirmary, I open the cell door for the nurses and stand in the doorway while they turn inmate Jones. I was assigned to the infirmary on Monday May 12th, 2014 with Nurse Christersen. I do not recall this day, or the turning of Mr. Jones, going any differently than any other day, other than Ms. Christersen saying she wanted to leave early because her back was hurting.

RX8.

Officer Sheridan acknowledged that if Petitioner or any employee had an accident at work, she was not the person to whom to report it. Tr. at 99. However, she recalled that Petitioner went home early that day, which she had not otherwise done, and complained of pain several times. Tr. at 99-101. Officer Sheridan also testified that Petitioner specifically told her that she had a back injury and back pain. Tr. at 100.

Respondent's Exhibit 8 reflects the following statement by Officer Sheridan: "I do not recall this day or the turning of Mr. Jones going differently than any other day other than Miss Christerson saying she wanted to leave early because her back was hurting." Tr. at 101; RX8.

Helen Salako-Ojei

Respondent called Helen Salako-Ojei ("Ms. Ojei") as a witness. Tr. at 102-103. She testified that she is employed by Respondent as a nurse and has been so employed for almost two years. Tr. at 103. Her duties are to perform nursing work including providing medications and care. *Id.* Ms. Ojei characterized her relationship with Petitioner to be a good working relationship although they do not work together all the time, but when they do they try to perform their tasks as assigned before the next shift comes in. Tr. at 105.

Ms. Ojei testified that she was working with Petitioner on May 12, 2014. Tr. at 104-105. She explained that on she finished the 5 o'clock medication and was waiting for Petitioner to complete the 9 o'clock medications so they could perform direct patient care. Tr. at 105. She testified that they went to cell number 158 together to pick up the urinal and empty Inmate Jones' drainage bag. *Id.*

Ms. Ojei explained that when she finished the other inmate's dressings, she went to Inmate Jones to change his dressings. Tr. at 105. Ms. Ojei explained that Inmate Jones had a Stage III sacral wound and that she could smell the odor from the wound. Tr. at 106. She removed Inmate Jones' diaper and found a large bowel movement. *Id.* She cleaned him up and then tried to change the dressing while Petitioner was trying to walk out. *Id.*

Ms. Ojei testified that she said to Petitioner "please, can she just hold the inmate for me because there's no way I can use one hand to remove the -- she know, to clean up and do the dressing." *Id.* Petitioner complied and held him up so he would not fall back when Ms. Ojei changed the dressing; Petitioner was not lifting Inmate Jones at this time. Tr. at 106-107. Ms. Ojei testified that she finished the dressing and put a new diaper on him at which point it was time for them to move him. Tr. at 107. She explained that these are activities that they do every day with the inmates and that they turned Inmate Jones to prevent another decub (i.e., a sacral wound). Tr. at 107.

Ms. Ojei testified that she finished and immediately said that they needed to reposition Inmate Jones. Tr. at 108. She testified that Petitioner asked her why they could not use the inmate that walks inside the infirmary to help? *Id.* Ms. Ojei responded that it would take them less than three seconds to move Inmate Jones like they do on a regular basis. *Id.*

She also described an overhead trapeze on Inmate Jones' bed onto which he would hold so that they only thing that she and Petitioner were moving was the lower extremities. *Id.* Ms. Ojei testified that she told Petitioner and Inmate Jones that she would count to three and then move him. Tr. at 108-109. Petitioner was on the left side of the bed and she was on the right side. *Id.* She testified that she counted, told Inmate Jones to hold onto the trapeze, and then she and Petitioner lifted him like they normally did. Tr. at 109-110.

Ms. Ojei testified that Petitioner then "just stepped out of the room. She didn't tell me where she was going. She did not say anything to me." Tr. at 110. She believed that Petitioner went to use the washroom and she remained in the cell. Tr. at 110-111. This was the only occasion on which she moved Inmate Jones with Petitioner that day. *Id.*

On cross examination, Ms. Ojei testified that Petitioner and an officer brought the trapeze in for Inmate Jones months before. Tr. at 111-112. She believed that Inmate Jones had had plenty of time to practice using the trapeze. Tr. at 112. She also testified that on cross examination that she did not recall seeing Petitioner express any type of pain symptoms or expressions on May 12, 2014. *Id.*

Ms. Ojei further testified that she had a conversation with Petitioner when she complained that "she really hurt her back" and said that she did it in Inmate Jones' cell. Tr. at 113. Ms. Ojei testified that Petitioner left early that day after completing her evening medications, which included pushing a cart around to 20 cells. *Id.*

Joe Jones

Petitioner called Joe Jones ("Inmate Jones") as a witness at an evidence deposition taken on November 26, 2014. PX15. Inmate Jones testified that he knew Petitioner as his nurse, but has not seen her since May 12, 2014. PX15 at 5-6. He also testified that he is familiar with Ms. Ojei, who is also his nurse and continues to care for him. PX15 at 7-8.

Inmate Jones testified that has cancer and is paralyzed from the waist down and requires care for all of his needs. PX15 at 3-4, 9-10,14. On or around May 12, 2014, he had a bed sore. PX15 at 10. Inmate Jones testified that the day before, Petitioner got him a device that he could hang onto. PX15 at 14-15.

Inmate Jones testified that Petitioner and Ms. Ojei turned him and he observed Petitioner with a frown on her face. PX15 at 11. He testified that "...it usually takes two nurses to turn me to the other side, and evidently I figured out somebody didn't pull their weight like they should have, and [Petitioner] frowned, flinched, like reflecting pain." *Id.*

Inmate Jones also testified that Ms. Ojei raised her voice at Petitioner and "she told her something about she should have positioned herself where she could have picked up more weight, something of that nature. I'm not quite sure." PX15 at 16. He believed that Ms. Ojei was referring to Petitioner and that Petitioner should have picked up more of his weight and he described Ms. Ojei's tone as harsh. PX15 at 16-17.

On cross examination, Inmate Jones testified that he was not aware of Petitioner having any back pain before May 12, 2014. PX15 at 21. He also testified that when they turned him, Ms. Ojei was on his right and Petitioner was on his left. PX15 at 21-22. He explained that he was placed on his side facing toward Ms. Ojei, but he testified that he could see both nurses. *Id.*

When asked on re-direct examination how he could see Petitioner's facial expression if he was facing Ms. Ojei, Inmate Jones clarified that he could not because he was not looking in that direction at the time, but "[a]fterwards like I have certain items on the other side of me, and [Petitioner] didn't have the cheerful expression that she usually have on her face." PX15 at 23. He testified that she looked like she was in pain. *Id.*

Marie Kirincic, M.D.

Petitioner called Marie Kirinicic, M.D. ("Dr. Kirinicic") as a witness at an evidence deposition taken on November 5, 2013. PX17. Dr. Kirinicic is a board-certified physician specializing in rehabilitation and pain management. PX17 at 4.

Dr. Kirinicic noted that Petitioner reported two accidents at work to her, one that was very remote occurring more than two years before she met Petitioner. PX17 at 9-10; 40-41. She understood that Petitioner's 2011 accident involved a bending mechanism of injury. PX17 at 42.

Dr. Kirinicic testified that Petitioner's buttock pain did not change throughout her treatment of Petitioner. PX17 at 12. She diagnosed Petitioner throughout her treatment to have a lumbosacral strain with some sacroiliac joint dysfunction, piriformis/gluteal/muscular soft tissue pain, chronic/myofascial pain, and an aggravation of a pelvic obliquity and curvature. PX17 at 30-31.

With regard to Petitioner's October 26, 2010 MRI, Dr. Kirinicic testified that Petitioner had "[v]ery minimal age

appropriate findings like 70 percent would have in that age group." PX17 at 14. She explained, however, that a patient could have these findings and be asymptomatic. *Id.* Dr. Kirinicic opined that Petitioner's August 17, 2010 accident at work probably caused an aggravation of Petitioner's pre-existing degenerative condition as shown in the October 26, 2010 MRI. PX17 at 15. She also opined that Petitioner's conditions, with the exception of a cervical spine condition, were causally related to her accidents at work. PX17 at 31-32.

Dr. Kirinicic also opined that Petitioner's October 3, 2011 accident may have aggravated Petitioner's pelvic obliquity and caused more like a biomechanical pain and soft piriformis type syndrome like myofacial, more spasms in the back area. PX17 at 15-16. She described Petitioner's symptoms to be more soft tissue in nature and did not believe that Petitioner was malingering. PX17 at 16. Dr. Kirinicic testified that she did not suspect that Petitioner was malingering, "but it was frustrating that nothing we were trying every month [including medications, anti-inflamatories, muscle relaxants, pain medications, acupuncture, TENS units, manipulations, chiropractic care, or traction] was making her better in any little way." PX17 at 22-23, 57.

Dr. Kirinicic testified that she kept Petitioner off work or on light duty, but understood that Respondent would not accommodate light duty restrictions at the prison. PX17 at 19-20, 49-50. She released Petitioner to full duty work as of June 5, 2013. PX17 at 21. Dr. Kirinicic opined that Petitioner's need to be off work was related to both her August 2010 and October 2011 accidents at work. PX17 at 21-22. Dr. Kirinicic also opined that Petitioner's medical treatment with her and the chiropractor, Dr. Foley, was needed relative to Petitioner's accidents at work. PX17 at 22-25, 29-30. However, on cross examination Dr. Kirinicic noted that Petitioner's chiropractic treatment was "a little more excessive than I usually see with that piriformis syndrome...." PX17 at 52. Dr. Kirinicic further opined that Petitioner's neck pain was not causally related to any accident at work. PX17 at 25-26.

On cross examination, Dr. Kirinicic acknowledged that she did not have all of Petitioner's treating medical records or physical therapy notes from before her first visit in June 2012. PX17 at 36, 45. She testified that she understood from Petitioner that she did not have much back pain before her accident in August 2010. PX17 at41. Dr. Kirinicic also testified that she did not see any functional capacity evaluation report for Petitioner. PX17 at 17, 46, 57.

Additional Information

Regarding her current condition of ill-being, Petitioner testified that she has daily pain in the back. Tr. at 66-67. Her pain level depends on what she does, but is somewhat controlled with the medication. Tr. at 67. Petitioner testified that she tried to go off the medication every couple of months, but experiences pain. *Id.* She has not lessened the medication that she takes. *Id.*

Petitioner localized her pain to the lower mid back and the worst is in the left buttocks and both feet. Tr. at 67-68. The buttock pain has been mainly since her May 12, 2014 accident. Tr. at 68. Petitioner also testified on cross examination that she believes that the pain in her feet is related to her accidents at work because she overcompensates. Tr. at 90. She testified that a foot doctor told her that, but she could not recall the doctor's name. *Id.* On re-direct examination, Petitioner recalled that it was Dr. Tara Sakevich. Tr. at 91.

Prior to August 17, 2010, Petitioner testified that she used to engage in various hobbies such as swimming, gardening, walking the dogs, and cooking. Tr. at 68. She testified that she no longer does these things, and she has walked her dog since her accident, but it is very difficult. Tr. at 68-69; *see also* PX16 at 4 (Dr. Avula October 24, 2012 note of Petitioner's report that she walks her dog daily). She explained that it is a large dog

weighing about 150 pounds. Tr. at 90. Petitioner testified that she walked her dog since this accident and had her right ankle casted after she fell when walking the dog on the street. Tr. at 69. She denied injuring her back in that incident. *Id.*

Petitioner testified that she does not do anything that she used to do because she is too tired from work and pain. Tr. at 70. On cross examination, Petitioner acknowledged that none of her doctors have recommended surgery and that she had not had any surgery. Tr. at 78-79.

With regard to her medications, Petitioner testified that she takes medication for depression, Celexa, which she has taken for 10 years. Tr. at 71. She also takes Ambien for sleep. Tr. at 72. Petitioner testified that she is not claiming reimbursement for these medications. Tr. at 71-73. She also testified that portions of her bills were paid through her husband's insurance with Aetna. Tr. at 13.

Petitioner testified that after the August 17, 2010 and October 3, 2011 incidents, her back pain never completely went away. Tr. at 91-92. She also testified that after the May 12, 2014 incident, she began experiencing buttock pain which has not gone away. *Id.*

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

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 (LEXIS 2011). The "in the course of employment" element refers to "[i]njuries 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...." *Metropolitan Water Reclamation District of Greater Chicago v. IWCC*, 407 Ill. App. 3d 1010, 1013-14 (1st Dist. 2011). The "'arising out of' component refers to the origin or cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Metropolitan Water Reclamation District*, 407 Ill. App. 3d at 1013-14 (*citing Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (Ill. Sup. Ct. 1989)). A claimant must prove both elements were present (i.e., that an injury arose out of and occurred in the course of her employment) to establish that her injury is compensable. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (1st Dist. 2006).

The Arbitrator finds that Petitioner failed to establish by a preponderance of credible evidence that she sustained a compensable accident at work on October 3, 2011 as claimed. In so concluding, the Arbitrator finds that Petitioner's testimony is not credible and repeatedly contradicted by other objective evidence.

Petitioner testified that on October 3, 2011 she had been back at work approximately one week performing her same job duties as a registered nurse. She testified that she was working alone and, while passing out medications, she pulled the bottom drawer of the old medication cart Respondent provided to her and the drawer fell on her. Petitioner's injury report of the same date reflects her statement that she was injured while "standing in the back of the ER packing medications my back was aggravated as I bent over and pulled out bottom drawer."

Petitioner saw Dr. Roland the following day, but conceded on cross-examination that she already had this visit scheduled. Moreover, Dr. Roland's notes contradict Petitioner's testimony about the mechanism of injury presumably occurring the evening before. He noted that "Patient says she went back to work without restrictions she says after lots of walking her back is killing her." Petitioner made no mention of an injury less than 24 hours before resulting from bending over or using a medication cart, regardless of its working condition. Dr. Roland ordered physical therapy and she returned to AthletiCo. Her physical therapist, Mr. Svoboda, made similar notations about Petitioner's observed abilities taken in comparison to her reported pain and inability to engage in many activities. At the time of her discharge from therapy on October 28, 2011, Mr. Svoboda noted that "Patient observed to ride her bicycle to and from clinic appointments. No ambulatory deviation noted on level surface. No facial grimaces during bending activities."

It was not until November 30, 2011 that Petitioner reported any injury at work on October 3, 2011 to Dr. Roland. On that date, he reiterated his prior order for a functional capacity evaluation which Petitioner underwent on January 10, 2012. The evaluating physical therapist, Mr. Campbell of AthletiCo, found the results to be invalid and an unreliable representation of Petitioner's physical capabilities. Mr. Campbell testified

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

Michelle Christerson,
Petitioner,

vs.

NO: 14WC 18924

Stateville Correctional Center,
Respondent,

16IWCC0026

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, prospective medical, permanent partial disability, penalties, fees and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 7, 2015, is hereby affirmed and adopted.

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

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

DATED: JAN 8 - 2016
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DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CHRISTERSON, MICHELLE
Employee/Petitioner

Case# **14WC018924**

10WC035206
11WC044608

STATEVILLE CORRECTIONAL CENTER
Employer/Respondent

16IWCC0026

On 5/7/2015, 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 0.07% 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:

0000 BRISKMAN BRISKMAN & GREENBERG
SUSAN FRANSEN
175 N CHICAGO AVE
JOLIET, IL 60432

5132 ASSISTANT ATTORNEY GENERAL
STACEY LASKIN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9208

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

MAY 7 - 2015

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

16IWCC0026

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

Michelle Christerson
Employee/Petitioner

v.

Stateville Correctional Center
Employer/Respondent

Case # **14** WC **18924**

Consolidated cases: **10** WC **35206**
11 WC **44608**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **New Lenox**, on **March 9, 2015**. After reviewing all of the evidence presented, the undersigned Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 12, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**58,812.00**; the average weekly wage was $**1,131.00**.

On the date of accident, Petitioner was **51** years of age, ***married*** with **2** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services as explained *infra*.

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

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**. *See* AX3.

Respondent is entitled to a credit **for all amounts previously paid directly to medical providers** under Section 8(j) of the Act. *See* AX3.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner failed to establish that she sustained a compensable accident at work on May 12, 2014 as claimed. By extension, all remaining issues are rendered moot and all requested benefits and compensation are denied. Petitioner's claim for penalties is specifically 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

May 5, 2015
Date

MAY 7 - 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Michelle Christerson
Employee/Petitioner

v.

Stateville Correctional Center
Employer/Respondent

Case # **14** WC **18924**

Consolidated cases: **10** WC **35206**
11 WC **44608**

FINDINGS OF FACT

A consolidated hearing was held in all three of Petitioner's above-captioned cases. Arbitrator's Exhibit[1] ("AX") 3; AX1; AX2. The issues in dispute in this case include causal connection, Respondent's liability for certain unpaid medical bills, Petitioner's entitlement to temporary total disability benefits from May 13, 2014 through November 30, 2014, the nature and extent of Petitioner's injury, and whether Respondent is subject to penalties and attorneys' fees pursuant to Sections 16, 19(k) and 19(l) of the Act. AX3.

With regard to Petitioner's claim for payment of medical bills, the parties stipulated that if Petitioner met her burden of proof with regard to accident, causal connection, and the reasonableness and necessity of the medical bills (as reflected in the request for hearing forms for each case), Respondent's liability for such bills will be pursuant to Sections 8(a) and 8.2 of the Act. Tr. at 114-115. The parties also stipulated that if Petitioner meets her burden of proof with regard to each of the cases and the penalties being claimed in each of the cases, the award for penalties based on any medical bills will be calculated pursuant Sections 8(a) and 8.2 of the Act. Tr. at 115. The parties have stipulated to all other issues in this case. AX3.

The issues in dispute related to Petitioner's accident on August 17, 2010 are addressed in the concurrent decision issued in Case No. 10 WC 35206. AX1. The issues in dispute related to Petitioner's claimed accident on October 3, 2011 are addressed in the concurrent decision issued in Case No. 11 WC 44608. AX2.

Background

Prior to August of 2010, Petitioner described her physical condition as good. Tr. at 14. She was not under a doctor's care for any reason, including depression, other than routine medical treatment. *Id.* She testified that she never sustained any type of injuries, accidents, at home incidents, or anything involving her hips, mid-back, or lower back. Tr. at 14-15.

Petitioner testified that she was employed by Respondent through Wexford, which is a contract company, for about a year and a half working at Stateville and was then hired as a state employee July 2009. Tr. at 15. Petitioner testified that she was employed as a correctional nurse, RN. Tr. at 16. She explained that she is a registered nurse and has been since 2001. *Id.* Petitioner testified that a registered nurse carries out doctor's orders and provides all realms of care for their patient. *Id.* She previously worked at private facilities from 2001 to 2007 at Christ Hospital in Oak Lawn, Silver Cross in Joliet, and the Will County Sheriff in Joliet. Tr. at 16-17. Petitioner testified that she also has a degree in paralegal studies, but she never worked as a paralegal.

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

Tr. at 74-75.

Petitioner explained her duties at Stateville while working through Wexford to include passing medications, seeing patients, taking blood pressures, wound cares, lifting, total care patients and doing anything a nurse would do. Tr. at 17. Her duties stayed the same when she was hired by Stateville. *Id.*

Petitioner described the Stateville facility itself. Tr. at 17. She explained that it sits on acres and the buildings are very, very old with very poor ventilation. *Id.* In the summer, Petitioner explained that it was hot as well as in the winter. Tr. at 17-18. There are no elevators and the stairs in the general population area were high and extended up five floors. Tr. at 18. In the "F" house, which is the round house, there are four floors with no elevators. *Id.*

Petitioner testified that there is an infirmary in Stateville which is like a mini hospital where the chronic patients go. *Id.* This designated area has about 25 rooms and cells with two inmates per cell, but sometimes one. *Id.* Between 2007 and August 17, 2010, Petitioner testified that it depended on her assignment how long she would be in the infirmary. Tr. at 18-19. Some days she was assigned to work passing medications on different floors. Tr. at 19. Sometimes she worked with another nurse and sometimes passing medications by herself. *Id.*

August 17, 2010

On August 17, 2010, Petitioner testified that she was working the 3:00 p.m. to 11:00 p.m. shift. Tr. at 19-20. She did not recall her assignment. Tr. at 20. Petitioner testified that she went in the dining room to go sit down on the dining room chair and the chair broke away from the table and fell back causing trauma to her back and then the table fell on top of her chest. Tr. at 22-23. She estimated the weight of the table to be about 75-100 pounds. *Id.* Petitioner also explained that at Stateville everything is bolted down because of the inmates and the table was a round steel table with about six stools welded to it. Tr. at 23. She explained that when she sat on the chair it broke its connection to the table. *Id.*

Petitioner submitted a Supervisor's Report of Injury or Illness dated August 17, 2010 into evidence. PX20. Petitioner wrote the following details of accident and cause of accident:

> Sat down on dining room chair + the entire set collapsed + fell on me while I fell to the floor banging head + back on kitchen floor.
>
> Dining room set – chair collapsed + entire kitchen set fell on ground – not secured or intact.

PX20. The incident was witnessed by correctional officer Foster, who corroborated Petitioner's report. *Id.*

Petitioner testified that she felt immediate pain to her lower back and reported the incident. Tr. at 24. She reviewed Petitioner's Exhibit 20, which she explained is her supervisor's report of the accident. Tr. at 20-21. She completed the entire first page with the exception of the signature and the details of the accident section. Tr. at 21. Her supervisor completed the second page. Tr. at 22. Petitioner testified that she was sent to get medical care at Advocate Medical Group with her doctor, Dr. Avula, and then Dr. Lim. Tr. at 24-25. Petitioner testified that she did not go to the emergency room immediately because it was late at night and she was able to get an appointment with her doctor the next day. Tr. at 25. On cross examination, Petitioner testified that when she fell, she initially complained of some headache pain. Tr. at 77. Petitioner did not recall seeing a physician at Stateville the same day. Tr. at 77-78.

Medical Treatment – Dr. Avula & Dr. Lim

The medical records reflect that Petitioner saw her primary care physician, Dr. Avula at Advocate Medical Group, on August 19, 2010. PX16 at 21-22. Dr. Avula noted Petitioner's report as follows:

> On 8/17/10: was going to sit down & chair & table set collapsed!! Pt landed on back, banged head, & hurt back and neck. c/o back & neck pain → neck pain on left side. was dizzy at time of injury but no loc.

Id. Petitioner called the following day asking for a referral and noted that the recommended tests were not going to be paid by her insurance. *Id.* When she returned to Dr. Avula for follow up on August 27, 2010, she was diagnosed with thoracic and lumbar paraspinal spasms status post fall. PX16 at 18-19. She reported that she was taking Naproxyn and that she had been to the Hedges Clinic. *Id.* Petitioner was referred to "chiropractic." *Id.* However, on cross examination Petitioner acknowledged that Dr. Lim recommended against a chiropractor. Tr. at 78.

On September 1, 2010, Petitioner reported worsening back pain with working last week and inability to stand for few hours so she had to be off work. PX16 at 16-17. Petitioner reported no radiating symptoms. *Id.* Dr. Avula diagnosed severe back pain, upper thoracic pain, and spasms status post fall. *Id.*

Petitioner testified that Dr. Avula referred her to Dr. Richard Lim ("Dr. Lim"). Tr. at 25. The medical records do not contain a referral to Dr. Lim; however, they show that Petitioner started treating with Dr. Lim on September 15, 2010. Tr. at 25; PX22 at 6-7. At that time, Petitioner reported the following:

> Michelle is a 47-year old female nurse with Stateville Correctional Center presenting with chief complaint of left sided neck and left sided lower back pain since 8/17/2010. On that day she was at work, she was sitting at lunch and apparently fell backwards landing on the hard floor and has had pain ever since in her left side of her neck and left side lower back. She denied any radiation of either pain. She denies numbness or tingling down the legs. She denies bowel or bladder incontinence. No prior history of similar complaints. She has not had any treatment to this point. She has been off work since her injury.

Id. Dr. Lim diagnosed Petitioner with a cervical strain and a lumbar strain. *Id.* He recommended physical therapy and he placed her off work. *Id.* Petitioner testified that she was initially taken off work and was provided various work notes. Tr. at 28.

On September 23, 2010, Petitioner had an initial physical therapy evaluation with Sean Campbell, PT, MPT, ATC ("Mr. Campbell") at AthletiCo as referred by Dr. Lim. PX22 at 14-15. Therapy was recommended twice a week for four-to-six weeks. *Id.* Mr. Campbell noted Petitioner's report of lumbar back pain and "some compensatory left ankle discomfort following poor gait mechanics...." *Id.* Petitioner stated that she was limited to walking two blocks and standing for only 10 minutes, but she did not demonstrate objective elicitation, worsening, or exacerbation of symptomatology with repeated mechanical motions of the lumbar and cervical spine. *Id.*

Mr. Campbell updated Dr. Lim on Petitioner's progress in a note dated October 12, 2010, after seven visits, in which he stated that Petitioner was not "appropriate for mechanical treatment for reduction of low back pain." PX22 at 12-13. He noted that "each approach is subjectively deemed unsuccessful in providing any longevity and sustained relief." *Id.* He further stated that her performance had been inconsistent throughout treatment and

that her complaints had a poor prognosis for resolution with physical therapy. *Id.*

On cross examination, Petitioner testified that she stopped going to physical therapy after two visits because it was hurting her and not helping her; they were not treating her right. Tr. at 78.

Dr. Lim sent MRI of lumbar spine on October 25, 2010. Tr. at 26; PX7. The interpreting radiologist noted mild spondylosis changes, spinal stenosis demonstrated at T10/11, minimal disc bulging at L2-L3, mild disc bulging at L3-L4 with borderline right and mild left neural foraminal stenosis, disc bulging and mild endplate osteophyte formation at L4-L5 with mild right and borderline left neural foraminal stenosis and no spinal stenosis, and minimal disc bulging with borderline bilateral neural foraminal stenosis and no spinal stenosis at L5-S1. PX7. After the MRI, Petitioner testified that she saw Dr. Donald Roland ("Dr. Roland") from January of 2011 through February 3, 2012. Tr. at 27.

Petitioner was placed off work on September 15, 2010, October 13, 2010, and November 19, 2010. PX22 at 16-18. She discontinued treatment with Dr. Lim after November 19, 2010. PX22. Petitioner testified that Dr. Lim did not help her. Tr. at 38-39. On cross examination, Petitioner acknowledged that Dr. Lim did not recommend surgery. Tr. at 78.

Continued Medical Treatment – Dr. Roland

The medical records reflect that Petitioner saw Dr. Roland on January 11, 2011. PX27 at 2-4. She reported a mechanism of injury at work when she went to sit and a seat collapsed landing her on the left side and episodes occurring over the prior seven months. *Id.* On physical examination, Dr. Roland noted a tender midline, mildly decreased range of motion, tenderness bilaterally, and negative straight leg raise tests bilaterally. *Id.* He diagnosed Petitioner with lumbar/lumbosacral disc degeneration, sacroiliitis, and lumbosacral spondylosis. *Id.* Dr. Roland ordered Lidoderm, Skalaxin 800 TID, and a TENS unit. *Id.*; Tr. at 59.

On February 23, 2011, Dr. Roland recommended bilateral L4-5 and L5-S1 facet joint injections. PX27 at 5-6. Petitioner underwent the recommended facet joint injections on March 2, 2011. PX27 at 7-8. She returned to Dr. Roland on March 23, 2011 reporting 50% improvement after the injections. PX27 at 9-10. He recommended bilateral radiofrequency ablations from L3-S1. *Id.* When Petitioner returned to Dr. Roland on March 29, 2011 she requested Cymbalta instead. PX27 at 13-14.

At her next visit on June 15, 2011, Petitioner reported new pain in both feet and "still having LBP as well she had a facet injection it did help I then wanted to do RF procedure but not oked by work comp. She presented with low back pain. It is located on both sides. It is radiating to bilateral calf, bilateral leg, the left foot and the right foot. It is described as constant. The symptom is ongoing. The complaint is 4/10. The frequency of episodes is daily and increasing." PX27 at 15-16. Dr. Roland diagnosed Petitioner with facet syndrome, sacroiliitis, lumbosacral spondylosis, and lumbar/lumbosacral degenerative disc disease. *Id.* He ordered Norco, Mobic, an EMG, and bilateral radiofrequency ablations from L3-S1. *Id.*

Petitioner acknowledged that she told Dr. Roland at this visit that her back pain was radiating to her leg and calf. Tr. at 79. On re-direct examination, Petitioner clarified that this radiating pain to her leg and calf in June of 2011 occurred prior to the second incident with the cart and that she was incorrect when she testified on cross examination that this was the first time she felt pain going into her leg. *Id.*

On June 16, 2011, Dr. Roland issued a narrative letter. PX25. Petitioner reported increased pain at that time

and he ordered an EMG/NCV. *Id.* Dr. Roland noted his expectation that Petitioner would return to work as of August 12, 2011, but she called his office complaining of extreme pain so he scheduled a radiofrequency ablation procedure. *Id.* He noted that Petitioner should be back at full duty work five days after her procedure, which was scheduled for August 30, 2011. *Id.* Petitioner underwent the recommended bilateral lower extremity EMG/NCV on June 23, 2011. PX27 at 17, 20. The results were borderline for the lower extremities showing consistent findings for lower lumbar radiculitis, although no frank lumbar radiculopathy was seen. *Id.*

Petitioner also saw Tara Sakevich, D.P.M. ("Dr. Sakevich") for bilateral heel and arch pain beginning September 8, 2011. PX38. Dr. Sakevich's records do not contain any report by Petitioner to an injury involving the ankles or feet at work. *Id.*

Petitioner underwent the recommended bilateral radiofrequency ablations on September 20, 2011. PX27 at 23-24; Tr. at 28. She was released to light duty work. PX27 at 25.

Petitioner also had an initial physical therapy evaluation at AthletiCo on September 22, 2011 with Brad Svoboda, PT, ATC ("Mr. Svoboda"). PX27 at 26-27. Mr. Svoboda noted the following:

> Patient present to therapy with significant concern for return to work knowing the amount of walking she has to do and not feeling she is in condition to perform that since she has been unable to exercise secondary to high pain level over the last year. She does demonstrate reduced measurement for muscular strength and has a positive lumbar quadrant test eliciting her pain. *Patient reports functionally she is limited a lot with bathing or dressing herself, walking around the room, getting in and out of a chair, getting in and out of bed and walking one block. However patient able to sit to stand in clinic 3 times without reports of pain and she rode her bike to the clinic for her session.* Patient to benefit from physical therapy to improve muscular endurance and strength.

Id. (*emphasis* added).

Petitioner testified that she did not go back to work until September 26, 2011 approximately six days after the radio frequency ablation. Tr. at 28-29. She testified that she was still in pain, which had gotten a little better, but she was able to work. Tr. at 29.

When Petitioner returned to Dr. Roland on September 28, 2011, she reported 60% improvement after the radiofrequency ablation with continued low back pain radiating to the bilateral hips. PX27 at 28-30. Dr. Roland released Petitioner to work without restrictions. *Id.*

October 3, 2011

Petitioner testified that on October 3, 2011 she had been back at work approximately one week performing the same job as a registered nurse on the 3:00 p.m. to 11:00 a.m. shift. Tr. at 30. She was working alone on this date in the Stateville emergency room. *Id.* Petitioner explained her duties to include passing out medications and handling emergencies. *Id.*

Petitioner testified that she was doing her medications and bent over an old metal medicine cart that was about 50 years old, 3' x 3', and weighed about 100 pounds. Tr. at 31-33. She explained that the three drawers stick and she had to push them back in. *Id.* She added that the bottom drawer got stuck a lot and was bent. *Id.* Petitioner testified that she pulled the bottom drawer and it fell on her. *Id.* Petitioner testified that she hurt her back. *Id.*

Petitioner reviewed Petitioner's Exhibit 19, which she explained is an injury report written by her boss, Dolores Trevino. Tr. at 34, 36. She completed the description on page two of that exhibit and signed it. *Id.* The form indicates that this incident report was filled out at 7:28 p.m. on October 3, 2011. *Id.* The report is titled Adult and Juvenile Divisions Incident Report and reflects Petitioner's statement of facts as follows:

> On above date and approx time [Petitioner] notified this RNS that she had severe back pain while standing and packing medications for units D+E. [Petitioner] requested to go to hospital emergency room for further evaluation and treatment via ambulance. Shift Commander Major Fredericks rejected above Assistant Warden Edwards called and refused above. As per [Petitioner] transport to St. Joseph Hospital emergency room via [illegible] vehicle requested and Shift Commander .... HCS D.O.N. Cindy Garcia... directed [Petitioner] to [illegible] worker cmp with questions she has regarding workers cmp procedures, notification, and follow up.
>
> ....
>
> While standing in the back of the ER packing medications my back was aggravated as I bent over and pulled out bottom drawer. Pain is a 10 – lower back – shooting down left leg.

PX19.

Petitioner testified that she pulled the drawer out of the medicine cart and felt pain in her back going down her left leg. Tr. at 35. Petitioner testified that she did not feel pain in her back going down her left leg prior to that day. *Id.* She explained that her previous pain was located in the middle-to-lower part of her back. Tr. at 35-36. Petitioner testified that this pain intensified in her back. Tr. at 36.

On cross examination, Petitioner testified that she filled this form out directly after the claimed accident on October 3, 2011. Tr. at 79-80. She acknowledged that it is not a workers' compensation report form like she filled out with her first accident; rather it is an incident report form from the prison. Tr. at 80. Petitioner also explained that she did not mention in the report that the medication cart was broken because the cart was just there; it was just the equipment they used. Tr. at 81. She testified that her back started hurting again while she was at work and had just returned about one week earlier. *Id.* Petitioner described that her back condition was "aggravated" in the report. *Id.*

Medical Treatment – Dr. Roland, Dr. Mekhail & Dr. Hung

Petitioner returned to Dr. Roland on October 4, 2011 reporting the following:

> Patient says she went back to work without restrictions she says after lots of walking her back is killing her. Her supervisor sent her home told her to go to her doctor. The patient had radiofrequency procedure I sent her for PT she had only one visit I will have her finish PT then go back to work.
>
> She presented with low back pain. Patient's pain is worst on the left side. She states pain increases when she is at work since she has to walk several miles and go up the stairs.It is located on both sides. It is radiating to bilateral leg. It is described as shooting, constant and throbbing. The symptom is ongoing. The complaint is 5-10/10. The frequency of episodes is on and off. The symptom is exacerbated by physical activity and standing or walking.

PX27 at 31-35; Tr. at 36-37. Dr. Roland ordered physical therapy and a functional capacity evaluation. *Id.* Notably, Petitioner did not report her claimed accident at work allegedly occurring the prior day.

Petitioner testified on cross examination that she already had this visit scheduled with Dr. Roland before her claimed accident on October 3, 2011. Tr. at 81.

On October 28, 2011, Petitioner was discharged from physical therapy at AthletiCo after eight visits. PX27 at 37-38. At this time, she did not report another injury at work occurring on October 3, 2011. *Id.* Petitioner reported that she felt looser, that the therapy was helping, and that she wished to return to work. *Id.* The physical therapist, Mr. Svoboda, noted the following in pertinent part:

> *Patient observed to ride her bicycle to and from clinic appointments. No ambulatory deviation noted on level surface. No facial grimaces during bending activities.*

Id. (*emphasis* added).

Petitioner returned to see Dr. Roland on November 30, 2011. PX27 at 39-40. She reported the following:

> Oct 3rd hurt at work saw me on the 4th I sent for PT ordered PT and FCE. She was to return to work but she could not because of persistent pain. She says she did not have an order for the FCE. She has been finished with PT for 3 weeks.She called the office and asked for form to bde completed to be off work she was instructed to come in today.
>
> She presented with low back pain. Patient would like to get her work forms filled out. She states physical therapy did not help much.It is located on the left. It is radiating to the left buttock. It is described as intermittent and throbbing. The symptom is ongoing. The complaint is 4/10. The frequency of episodes is unchanged.

Id. Dr. Roland again ordered a functional capacity evaluation. *Id.*; PX31 at 13.

On December 27, 2011, Dr. Roland completed a physician's statement for authorization for disability leave and return to work after her functional capacity evaluation was completed. PX27 at 43-44.

On January 10, 2012, Petitioner underwent the recommended functional capacity evaluation. PX24 at 11-36. The test results were invalid. *Id.* The evaluating physical therapist summarized the findings as follows:

> The results of Mrs. Christerson's FCE are considered INVALID as they do not present an accurate depiction of her current functional capabilities. Mrs. Christerson's subjective reporting of pain and disability is considered: UNRELIABLE, as McGill, Dallas and Oswestry pain questionnaires were all indicative of excessive pain reporting in relationship to objective behaviors and observations. Mrs. Christerson also completed Hand and Spinal Sorts, in which she perceived her current abilities as Sedentary and Less than Sedentary, although she demonstrated greater functional abilities during her testing. Mrs. Christerson demonstrated LOW EFFORT today, evidenced with heart rate analysis of strength testing, including, Isoinertial lifting, and bimanual push & pull. She did not demonstrate competitive test behaviors traditionally observed throughout her exam, and reported subjective pain as primary limiting factor throughout her day. Her subjective pain ratings did not correlate with observed and expected behaviors & movement patterns.
>
> Mrs. Christerson demonstrated the ability to function at a Light Demand Level (20lbs) at Occasional Frequencies (0-33% of workday) for waist level work, and Medium Demand Level (20-50lbs) for Occasional Demand Level work at shoulder level. She demonstrated no significant limitations with positional tolerances including standing, sitting, or walking. She does not meet work demands as

populated by the Dictionary of Occupational Titles to lift 50lbs to waist level at Occasional Frequency.

Id. The evaluating physical therapist noted specific inconsistencies between Petitioner's reported abilities as well as deficiencies in effort. *Id.*

On February 8, 2012, Petitioner reported low back pain to Dr. Roland and wanted to discuss her disability forms. PX27 at 41-42. Petitioner testified that she stopped treating with Dr. Roland because he was not helping her. Tr. at 37.

On March 5, 2012, Petitioner saw Anis Mekhail, M.D. ("Dr. Mekhail"), another orthopedic physician. Tr. at 37-38. The medical records reflect that she reported her fall off a stool at work in August of 2010 with pain continuing since that time and no relief from any treatment from Dr. Lim, physical therapy or facet blocks. PX24 at 2(a-b). Dr. Mekhail recommended light duty work, additional physical therapy and rehabilitation, and to try to advance her activities as tolerated. *Id.* He also advised her to "try to wean herself off of pain medication and seek help from pain management where she got the medication." *Id.* Petitioner testified that no light duty work was given to her. Tr. at 37.

Petitioner then saw another physician, Ming Hung, M.D. ("Dr. Hung") on March 22, 2012. PX30. Petitioner testified that she saw Dr. Hung at Midwest Rehabilitation Associates as referred by Dr. Mekhail. Tr. at 39. She reported the following:

> 49 yo female here for eval for low back and right foot pain. Fell off a stool at lunch when the stool gave way. Sustained injury to her back and feet. Pain worsened next day. Stabbing pain in lower back, left worse than right. Pain range from 0-9 depending on activity. Pain worsens with prolonged standing and walking. Right foot feels swollen with throbbing pain. Difficulty with descending stairs. No falls or give away leg weakness. Pain worse at end of day. No radiating pain to the extremities. No increase in pain with cough, sneeze, or bowel movement. Had therapy at AthletiCo with Sean Campbell but did not have lasting result and was stopped due to insurance. Back injection did not help. Traction treatment aggravated the pain. No bowel/bladder incontinence. Had MRI of back done in 2010 which showed bulging discs. Had EMG but unaware of any significant findings. Had tried Lyrica and Neurontin without benefit. Had also tried Robaxin, Skelaxin, Ultram, and Flexeril without benefit. Currently on Cymbalta and Zanaflex. Reports decreased sleep and weight gain of 50 pounds during this time period.

Id. Dr. Hung diagnosed low back pain, left sacroiliac joint dysfunction, left piriformis syndrome, and right ankle pain/pronation syndrome. *Id.* He ordered physical therapy, an SIJ belt, an injection with Dr. Sharma/Patel for the left glut/piriformis, and a Xanax trial. *Id.*; PX31 at 14.

Petitioner underwent another initial physical therapy evaluation at Provena St. Joseph Medical Center on April 18, 2012 as ordered by Marie Kirincic, M.D. ("Dr. Kirincic"). PX31 at 15-17. Petitioner attended physical therapy between April 18, 2012 and August 19, 2012 for approximately 32 visits. Tr. at 40; PX6 at 208-226; PX31. Petitioner testified that the physical therapy did not help her at all. *Id.*

Continued Medical Treatment – Dr. Kirincic & Dr. Foley

Petitioner explained that neither Dr. Roland nor Dr. Lim helped her so she saw Dr. Kirincic at Hinsdale Orthopedics on June 8, 2012 as referred by Dr. Mekhail. Tr. at 38-39; PX6 at 198-207. The medical records reflect that Petitioner saw Dr. Kirincic for her low back from June 8, 2012 through March 21, 2014. Tr. at 39. Petitioner testified that the steroid injections administered by Dr. Kirincic helped her condition. Tr. at 40.

Petitioner presented with complaints of low back pain after an accident at work on October 3, 2011. PX6 at 198-207. Dr. Kirincic noted the following history:

> A pleasant 49-year-old who complains about left lumbosacral pain and right foot pain. She has been in physical therapy under St. Joseph, improving, made progress in pain and functional level. Still unable to do stairs at times. Pain free. Has not been able to resume work and is unable to do lifting or repetitive movement secondary to pain complaints. She needs a new script. She has had pain treatment under Dr. Hung and Dr. Roland, and has been on Ambien, Norco 7.5, clonazepam from Dr. Lelio for anxiety. Reports she had an accident at work on August 2010. She had x-rays, spinal neurotomy, facet blocks, physical therapy, and pain is still up to 9/10 on the VAS scale. She usually has pain with treadmill, standing for prolonged times, and negotiating stairs. Stabbing pain. Stretching, certain exercise, and pain medication or helping. She has not been able to return as a correctional registered nurse to her work in Joliet. The patient is here with two children, and she has been suffering with right foot plantar fasciitis.

PX6 at 200. Dr. Kirincic reviewed Petitioner's October 26, 2010 lumbar spine MRI showing minimal disc bulging and facet arthropathy with left facet degeneration L4-L5, and borderline neural foraminal stenosis, L5-S1. *Id.* she diagnosed Petitioner with a lumbosacral strain initially work-related injury August 2010 with left sacroiliac joint, peer performance, gluteal myofascial pain, and difficulty with return to work, and chronic pain, muscle spasms, radicular symptoms, and lumbosacral segmental dysfunction. PX6 at 200-201. Dr. Kirincic administered a trigger point injection into the left gluteus/piriformis, discussed and obtained an opioid agreement from Petitioner, and placed her off work. *Id.* Notably, Petitioner did not report her claimed accident at work on October 3, 2011.

Petitioner also saw Michael Dorning, D.O. ("Dr. Dorning") beginning June 15, 2012 for a left foot and ankle injury sustained while walking her dog. PX34.

Petitioner testified that she then began treating with Dr. Nathan Foley ("Dr. Foley") because the physical therapy was not helping and they were not treating her right. Tr. at 41. Petitioner went to Foley Physical Medicine for chiropractic care and physical therapy from August 8, 2012 through March 15, 2013 for approximately 43 visits. PX2; Tr. at 41.

The medical records reflect that at her first visit on August 8, 2012, Petitioner reported low back pain and completed a pain chart in which she noted stabbing pain in the low back and left buttock, a burning pain in the low back, a stabbing pain in the left ankle, and pins and needles sensation in the right toes. PX2 at 2-4, 22-24. Petitioner reported the following:

> ... she has had chronic low back pain that radiates down the left buttock for years. She had an accident while at work many years ago and has since had many different low back problems. The current pain is slightly different from past pains in that it is over the entire low back as well as well [sic] down the left posterior thigh. ...The original injury was from sitting on a bench and it gave way landing her on her buttock and left side. She states that she has been to many other doctors and physical therapists and has had no relief from the pain."

PX2 at 22-24. Petitioner continued to see Dr. Foley for chiropractic treatment as well as Dr. Kirincic. PX2; PX6. Petitioner was diagnosed with an opioid dependency, but complied with the drug screens ordered by Dr. Kirincic. PX6.

Section 12 Examination – Dr. Lami

On December 3, 2012, Petitioner submitted to a medical evaluation with Babak Lami, M.D. ("Dr. Lami") at Respondent's request. RX4 (Dep. Exh. 2). Petitioner testified that she did not recall seeing Dr. Lami at Respondent's request in December of 2012, but recalled the evaluation after Petitioner's counsel stipulated to her attendance. Tr. at 87.

Petitioner provided a history reporting "an injury to her lower back in August of 2010. The injury occurred when she was on her food break. She was trying to sit down on the chair when the chair and table gave way and she fell on the cement floor. RX4 (Dep. Exh. 2). Dr. Lami reviewed Petitioner's reports of injury in August 2010 and October 2011, treating medical records from Dr. Roland, Dr. Lim, and Dr. Mekhail, as well as physical therapy records and diagnostic reports including Petitioner's October 2010 MRI. *Id.*

Dr. Lami concluded that Petitioner's MRI report failed to show any significant finding other than degenerative changes. *Id.* He noted that Petitioner had been evaluated at that point by two orthopedic surgeons, Dr. Lim and Dr. Mekhail, who both recommended functional capacity evaluations. *Id.* Dr. Lami also noted Dr. Mekhail's recommendation that Petitioner come off her pain medications and increase her activities. *Id.*

Dr. Lami also stated that Petitioner's "subjective complaints and the amount of narcotic medication she is taking are out of proportion to objective physical findings. Irrespective of causation, there is no objective basis to support her significant amount of pain, disability, and need for the significant narcotic medications. I cannot support her current symptoms over two years after her fall, without any objective findings to be related to the fall of August 17, 2010 or subsequent aggravation by bending over to grab medication." *Id.* He opined that Petitioner was at maximum medical improvement and that she required no further treatment or medications as a result of her fall on August 17, 2010. *Id.*

Continued Medical Treatment and Return to Work

As of February 22, 2013, Dr. Kirincic noted that Petitioner was not allowed to return to work while on pain medications or with restrictions. PX6 at 151-156. Dr. Kirincic kept Petitioner off work or noted that her work would not accommodate light duty through November 14, 2014 when she was placed at maximum medical improvement. PX6.

Petitioner testified that she selected Dr. Foley through her husband's insurance card. Tr. at 82. She denied having acupuncture with him. *Id.* She testified that she had acupuncture once with Dr. Kirincic and she did not have that again because it made her pain increase from 0 to 10 in about 20 minutes. Tr. at 83; *see also* PX6 at 170-173 (November 16, 2012 office visit noting Petitioner's report of pain at a level of 10/10 after acupuncture).

Petitioner testified that she went back to full duty work in June of 2013. Tr. at 41-42; PX6 at 132-137 (Petitioner reported on May 31, 2013 to Dr. Kirincic that she would like to return to work the following week as she was worried about her social security benefits). Petitioner explained that she still had pain that fluctuated and took narcotic pain medications including Norco, Opana ER, Percocet and also non-narcotic medications, but she was able to do her job. Tr. at 42-43. Petitioner testified that she then worked almost a full year. Tr. at 42.

Babak Lami, M.D. – Deposition Testimony

Respondent called Dr. Lami as a witness and he gave testimony at an evidence deposition on February 24, 2014. RX4. Dr. Lami is a board-certified orthopedic surgeon specializing in spinal conditions. RX4 at 4-6; RX4 (Dep. Exh. 1).

Dr. Lami testified that he noted that Petitioner reported a second injury in his review of the medical records, but Petitioner did not report a second injury to him. RX4 at 9-10. He noted no abnormalities in terms of Petitioner's orthopedic neurological examination and he could not identify the cause of Petitioner's low back pain with left buttock pain noting that "[s]he had very mild degenerative changes on her MRI. They were not significant, unremarkable I would say. Her symptoms were subjective. … her diagnostics and examination did not point out to a particular source of pain." RX4 at 11-13. He testified that neither Dr. Lim nor Dr. Mekhail recommended surgery in the records that he reviewed. RX4 at 16.

Dr. Lami maintained that he could not identify any objective basis for Petitioner's pain complaints at the time of his evaluation, her need for prescription medications or further medical treatment, or work restrictions. RX4 at 13, 17. He opined consistent with his report that Petitioner's low back pain with left buttock pain noted two years after her reported fall and reported second injury (of 2011) could not be related to her employment or her fall at work on August 17, 2010. RX4 at 12, 16-17.

On cross examination, Dr. Lami acknowledged that Petitioner had no reported history of back pain prior to August 17, 2010. RX4 at 19. He testified that Petitioner could have pain from the reported fall of August 17, 2010. RX4 at 20. Dr. Lami also testified that he did not review medical records from Dr. Kirincic, a doctor that Petitioner reported to him was her primary care physician. RX4 at 30-31.

On re-direct examination, Dr. Lami testified that radiofrequency ablations are not generally reasonable or necessary to treat a back strain as was diagnosed by Dr. Lim shortly after Petitioner's first work accident. RX4 at 31.

May 12, 2014

Petitioner reviewed Petitioner's Exhibit 8, which is workers' compensation employee's notice of injury completed by Petitioner with notations by Dr. Kirincic. Tr. at 47. Petitioner's Exhibit 9 is a claim notification for occupational disability (a.k.a., "SRS") that Petitioner testified that she completed because her workers' compensation claim was denied. Tr. at 47-48. Petitioner testified that she did not get SRS benefits. Tr. at 48. Petitioner's Exhibit No. 10 is another request for temporary total disability benefits completed by Petitioner and Dr. Kirincic for the claimed date of accident of May 12, 2014. Tr. at 49.

Petitioner testified that on May 12, 2014 she was working the same 3:00 p.m. to 11:00 p.m. shift with a partner, Helen Ojei ("Ms. Ojei"), another nurse. Tr. at 44. She testified that she worked with Ms. Ojei for about two months in the infirmary every day. Tr. at 45. She described her relationship with Ms. Ojei to be that of a coworker and that she did not socialize with Ms. Ojei outside of work. Tr. at 45. Petitioner also testified that she did not ever discuss anything about her back with Ms. Ojei prior to this incident and that Ms. Ojei never discussed anything with her regarding her back or prior incidents at work. Tr. at 45-46.

Petitioner testified that she was working with Ms. Ojei caring for a "total care" inmate in the infirmary named Joe Jones ("Inmate Jones") at about 7 o'clock. Tr. at 49. Petitioner testified that total care patients cannot do

anything for themselves. *Id.* She explained that twice per shift she changes Inmate Jones' diapers, empties his Foley catheter, changes his wound dressings, lifts and rolls him in bed, and dresses him. Tr. at 49-50.

Petitioner explained that she and Ms. Ojei were in the room together taking care of Inmate Jones and had gotten to point where they had changed his Foley and diaper. Tr. at 51. She testified that they both lifted him up in bed, and when they did they always would say "let's lift on 3, 1, 2, 3" and then they would lift him up. *Id.* Petitioner testified that she said 1, 2, 3 and lifted up Inmate Jones, but did not think Ms. Ojei heard her and Ms. Ojei did not lift him up such that Petitioner got the brunt of the lift. *Id.* Petitioner testified that she and Ms. Ojei usually lifted the inmate after counting to three. Tr. at 88. They had done this previously more than 20 times. *Id.* Petitioner testified that she did not believe that Ms. Ojei ever heard her counting to three. *Id.* Petitioner estimated that Inmate Jones weighed approximately 200 pounds. Tr. at 51.

Petitioner described a trapezius mechanism as a free standing medical piece that hangs over the patient's bed with a triangle that he could use to pull himself up and down and maybe get some arm strength. Tr. at 52. She testified that she carried this mechanism into Inmate Jones' room the night before and he did not make any attempt to use the mechanism when she and Ms. Ojei were trying to move him the following day. *Id.* On cross examination, Petitioner testified that she brought the trapeze unit in for Inmate Jones to build his upper body strength. Tr. at 89.

Petitioner testified that when she lifted Inmate Jones, she immediately said to Ms. Ojei, "oh, I hurt my back." Tr. at 53, 89. She explained that she just felt everything on the left side crack. *Id.* Petitioner described this pain to be more severe than with her prior injuries and that the pain was in her low back, left thigh and her left buttocks. Tr. at 53-54. Petitioner testified that after she said that she hurt her back she left the room and went back to the nurse's station at almost exactly the same time her boss, Ms. Trevino came in, and she told her what had happened. Tr. at 54. Petitioner testified that she told Ms. Trevino that she had injured herself while lifting Inmate Jones, was in severe pain, and needed to go home and to go see the doctor. Tr. at 55.

Petitioner testified that she never had a conversation with Ms. Ojei regarding this incident, but she did tell her that she was in pain both after she lifted Inmate Jones when she said "oh, my back hurts" and when they went back again in the infirmary she told Ms. Ojei that she had injured herself so she had to go home. Tr. at 54-55. Petitioner testified that she went home about an hour after the incident, passed a couple of medications and finished her shift. Tr. at 55. Petitioner testified that she could not leave right away because there were three emergencies in the emergency room and Ms. Trevino told her to wait a few minutes. Tr. at 55-56. Petitioner did not recall what the emergencies were. Tr. at 56.

Petitioner testified that she knows a correctional officer, Erin Sheridan ("Officer Sheridan"). Tr. at 56. Petitioner testified that Officer Sheridan was there on the night of her claimed accident. *Id.* She understood Officer Sheridan's responsibilities to include those of a security officer, opening the cells and standing there while she takes care of the inmates. *Id.* Petitioner testified that Officer Sheridan was out in the hall while she was taking care of Inmate Jones. Tr. at 56-57. She testified that she did not have any conversations with Officer Sheridan about this incident. Tr. at 57.

On cross examination, Petitioner testified that only she, Ms. Ojei, Inmate Jones, and another total care patient were in the room at the time. Tr. at 86. Officer Sheridan was in the hallway. *Id.* At a certain point during that day Petitioner testified that she felt that she needed to go home early after she hurt her back. *Id.* Petitioner completed an incident report on May 13, 2014. Tr. at 86-87; PX8; RX6. She indicated that the left leg, thigh and buttock injury occurred as follows:

> inmate was lying in bed – total care – lifted inmate without any assistance from him [and] while lifting a total care male patient my left thigh on up was pulled, sprained rendering me unable to continue shift

PX8; RX6. Petitioner wrote the name of Robin, which she explained referred to Robin Bumber ("Ms. Bumber") the workers' compensation counselor at Stateville, on this incident report. Tr. at 86-87; PX8; RX6.

On cross examination, Petitioner testified that she completed a form on May 15, 2014 claiming time off work under the FMLA. Tr. at 83-84; RX7. Petitioner reported that she had chronic and permanent back and buttock pain. Tr. at 84. She testified that the request was so that she only had to work one shift and did not have to work overtime. Tr. at 84. Petitioner previously testified that she did not do overtime often; she was only given overtime about four times per year before any of her accidents at work. Tr. at 61-62.

Petitioner also completed a claim notification form directed to the state retirement systems for occupational disability due to an accident on May 12, 2014. PX9. Petitioner stated that the injury occurred as follows:

> Inmate is a total lift and is a total dead weight lift. While lifting inmate this nurse injured [left] buttock + [left] thigh. I heard a cracking noise. Inmate has a portable trapeze but has minimal upper body strength. Tight after lifting inmate I told the other nurse Helen Ojei I hurt myself. She stated she does not want to be a witness.

PX9.

Medical Treatment

On May 16, 2014, Petitioner returned to Dr. Kirincic as scheduled at her March 21, 2014 visit. PX6 at 87-100 at 57. She saw Dr. Kirincic between May 16, 2014 and January 30, 2015. Tr. St 57; PX6. At the May 16, 2014 visit, Dr. Kirincic noted the following history:

> [Petitioner] returns to clinic for follow-up visit. Last seen in clinic 3/21/14. Request the medication stronger than Norco because it is not strong enough. Interested in cortisone injection. She has been treated for years for chronic lt. buttock pain. Tylenol-3 did not work. Would like to try Percocet. tid. She does not like having the trigger point injections. She would rather just have the injection at the one spot of her pain. Working as our and, no overtime. No longer seeing chiropractor occ brace for posture, slight worsening with workload in cold weather. No radiating pain, no bowel, bladder dysfunction, no nausea, vomiting, night sweats, fevers, no pain with Valsalva maneuvers.
>
> *Patient actually reports that she has now new (previous 2011) work-related injury on May 12, 2014, about 3 days ago when she was reportedly tricked by her coworker who said let's quickly lift this patient up and held only sheet when the patient lifted. The patient experienced a flare-up of severe left buttock pain similar to what she had before. She believes it will take her again several months to recover from this incident and will need stronger medication.* Also saw a foot doctor in March 2014 for orthotics and is determined to go back to her chiropractor who helped her in past. *Also would like stronger medications as the incident with a 200 pound patient, on May 12, 2014, created pain.* She has not been back at work. Requested several pages of 2 or 3 different paperworks for FMLA and work.

PX6 at 85-93 (*emphasis* added). Petitioner denied telling Dr. Kirincic that Ms. Ojei tricked her into lifting a patient by herself. Tr. at 88.

The medical records reflect that Dr. Kirincic asked Petitioner if she worried with a new injury whether she needed new imaging, but Petitioner declined the recommendation. *Id.* Dr. Kirincic administered a trigger point injection and noted that Petitioner had been 80% better at maximum medical improvement from her previous flareup with a return to work now being off work since May 12, 2014 after a lifting injury with flareup of her left lumbosacral pain. *Id.* She restricted Petitioner from lifting over 25 pounds. *Id.*

Dr. Kirincic also completed a physician's statement for authorization for disability leave and return to work on May 16, 2014 in which she diagnosed a lumbosacral strain, right lumbosacral myofascial, tenderness, and decreased range of motion. *Id.* She restricted Petitioner to light duty work with no lifting over 25 pounds and no standing, sitting or walking over 45 minutes. *Id.*

Sean Campbell – Deposition Testimony

Respondent called Sean Campbell, P.T., M.P.T., A.T.C. ("Mr. Campbell") as a witness and he gave testimony at an evidence deposition on July 10, 2014. RX3. Mr. Campbell is a physical therapist certified in administration of Matheson system functional capacity evaluations. RX3 at 4-7; RX3 (Dep. Exh. 1). Mr. Campbell is the physical therapist that administered Petitioner's functional capacity evaluation on January 10, 2012. RX3 (Dep. Exh. 2). He also previously treated her as her physical therapist from September 23, 2010 through October 12, 2010. RX3 at 8-9, 51.

Mr. Campbell explained some of the testing methods and observations that he made of Petitioner throughout her functional capacity evaluation. RX3. He explained that physical effort testing is performed throughout an examination as a way to gauge a patient's effort levels during tests to establish a clear picture of the effort given. RX3 at 17. He also explained that competitive test performance is a category of behaviors that he looks for throughout the testing day to determine if someone is giving their strongest performance in the testing. RX3 at 19. He testified that he observed Petitioner for signs of such performance, but they were absent during her testing day. *Id.* Mr. Campbell further described heart rate testing, grip strength testing, and rapid exchange grip testing which are used to measure effort related to various physical activities. RX3 at 17-20.

Mr. Campbell testified that Petitioner's physical effort was low during testing at her functional capacity evaluation and that she made subjective complaints that limited her performance. RX3 at 22-23. Among other findings, he noted that Petitioner's trunk mobility testing was significant in that her repeated trunk flexion exercise was 19 seconds with no pain, but when she reported pain at a level of 9/10 her time was 23 seconds, which was not significantly different. RX3 at 38-39. Mr. Campbell testified that he called Petitioner the day after the evaluation to follow up and she reported that "she took a Motrin and a Vicodin after her test, and she laid down after she got home; that she had no energy to do anything around the house after the test; that she did not eat dinner; that the next morning she was still having pain. Although, it was not as bad, although, and it was limiting. She said she had to wrap her ankle because she was having some ankle complaints." RX3 at 40-41.

Ultimately, Mr. Campbell concluded consistent with the findings in his report that Petitioner's subjective reports of pain and disability were unreliable based on all of the tests (physical, written, and observation-based tests) that were administered to Petitioner at her functional capacity evaluation. RX3 at 33-34. He also concluded that Petitioner's functional capacity evaluation results were invalid and not an accurate depiction of what her then-current functional abilities were. RX3 at 41-42. Mr. Campbell based these conclusions on Petitioner's physical effort and the reliability of her reports noting that Petitioner showed low effort and unreliable reports. RX3 at 42-43.

On cross examination, Mr. Campbell testified that he was the only person at his facility who could administer a functional capacity evaluation, but they offered Petitioner the opportunity to go to another one of their centers, specifically to Tinly Park, and Petitioner declined. RX3 at 54-57. He also acknowledged that a functional capacity evaluation involves subjective components from both the examiner and examinee. RX3 at 65-66.

Continued Medical Treatment

Petitioner continued to see Dr. Kirincic through January 30, 2015 during which time she was restricted to light duty work. PX6 at 28-94. Petitioner also saw Dr. Foley on seven occasions after May 12, 2014 for what she described as some type of therapy. Tr. at 57. The medical records reflect that Petitioner reported the following:

> ...while working her job as a nurse at a Statesville [sic] prison she was attempting to lift a patient with another worker when she felt a pain in her low back and buttock region. The patient states that the pain level in the buttock is at an 7/10 [sic] burning type of pain on the left side from hip to lowest portion of the buttock. The low back pain is a 8/10 burning type of pain with a pins and needles sensation that is greater on the left side of the body but that it does include to a lesser degree the right side of the body. ...."

PX2 at 113-115. Petitioner received further chiropractic care through June 24, 2014. PX2 at 116-127.

Petitioner also treated at Integrated Physical Medicine with another chiropractor, Joshua Eldrenkamp, D.C. ("Dr. Eldrenkamp"), for 16 visits between September 19, 2014 and November 18, 2014. PX4; Tr. at 58-59. Petitioner testified that she went there because she was denied workers' compensation benefits and Dr. Foley was getting too expensive for her. Tr. at 58. She testified that she was making some of the payments in cash to Dr. Foley and Integrated Physical Medicine herself. *Id.*

The medical records reflect that Petitioner went to Dr. Eldrenkamp for an initial visit on September 19, 2014 and completed a health questionnaire in which she reported that the reason for her visit was "Periformis from 2010 injury + back pain." PX4 at 12-22. She also completed a pain drawing noting aching and stiffness pains in the low back and aching pain in the left buttock as well as pain at a level of 9/10 "while walking without medication." *Id.* Dr. Eldrenkamp's history notes the following:

> ... The mechanism of injury described by the patient involved a lifting injury. The symptoms have been present since the date of injury on 5/12/2014. .... She presents with primary chief complaints of lower back pain and left glute pain that has been bothering her for a few years now but seems to have been getting worse over the last few weeks. She states that the original injury was in 2010 when she fell out of a chair and landed on her buttocks. She has had pain since then and seen a number of different doctors and physical therapists over the last four years. She states that she was getting better with physical therapy and was discharged from care. She states that May 12th, 2014 she was lifting something heavy when she felt increased pain in the lower back. She notes that her left piriformis seems to spasm and remains sore since this incident. She denies radiating pain more distal that the left glute and denies numbness or tingling to the lower extremities bilaterally. ... She is having her case co-managed by her MD who has been administering injections into the left piriformis."

PX4 at 16. Petitioner's straight leg raise, heel and toe walk tests were negative bilaterally. PX4 at 17.

Petitioner's request for light duty was denied on October 17, 2014 in a letter stating that it could not be accommodated. PX11.

Petitioner returned to Dr. Kirincic on October 31, 2014. PX6 at 46-54. Dr. Kirincic administered a trigger point injection, noted that Petitioner's drug screen was consistent, and placed Petitioner at maximum medical improvement with a full duty return to work effective November 14, 2014. *Id.*

Dr. Kirincic also completed another physician's statement for authorization for disability leave and return to work on October 31, 2014 in which she diagnosed a resolving lumbosacral strain and chronic myofascial pain. PX4 at 34-36. She released Petitioner to light duty work effective October 31, 2014 and full duty work effective November 14, 2014. *Id.* Petitioner continued to attend physical therapy sessions through November 18, 2014. PX4.

Petitioner returned to Dr. Eldrenkamp who also completed a physician's statement for authorization for disability leave and return to work on November 18, 2014 in which he noted Petitioner's treatment including chiropractic manipulation. PX4 at 31-32. Dr. Eldrenkamp indicated that she could return to light duty work effective November 14, 2014 and full duty work effective December 1, 2014. *Id.*; PX12-PX13.

Petitioner testified that she was provided with several off work notes, which she provided to Respondent. Tr. at 60. Petitioner was off work from May 13, 2014 through November 30, 2014. *Id.* She received no benefits during this time, but she was under Dr. Kirincic's care and on medications. Tr. at 61.

Petitioner returned to work on December 1, 2014 and has worked full duty since then. Tr. at 60-61. She explained that when she returned to work she was feeling terrible, but she needed the money. *Id.* On cross examination she also testified that she is still using a TENS unit as prescribed by Dr. Roland. Tr. at 89. She explained that the TENS unit helped her minimally and she received one refill of the stickers for TENS unit. Tr. at 59. Petitioner also purchased a refill of those stickers approximately six months ago and paid for that in cash. Tr. at 59-60.

From December 11, 2014 through March 8, 2015, Petitioner testified that she has been on the following medications: Neurontin (300 milligrams at bedtime), Opana ER (20 milligrams twice a day), Tizanidine (6 milligrams at bedtime), Norco four times a day, Naproxen, Motrin, Robaxin and compound cream. Tr. at 62-63. Petitioner explained that these medications were for back pain and symptoms, and that she rubs the compound cream on her back and feet because now they hurt because she walks funny to compensate for her back. Tr. at 64-66. She testified that she has never had problems or pain in her feet like she has now before any of her accidents at work.

Petitioner testified that she last saw Dr. Kirincic on January 30, 2015. Tr. at 70-71. She explained that she does plan on seeing Dr. Kirincic in the future and that she will likely continue to see her for the rest of her life. Tr. at 71.

On cross examination, Petitioner acknowledged that Dr. Kirincic diagnosed her with opiate dependency and that when she sees her, she undergoes toxicity screens. Tr. at 82. Petitioner testified that Dr. Kirincic has discussed this issue with her. *Id.* She also testified that she has been trying to go off her medications, but she has pain when she does that. Tr. at 90.

Erin Sheridan

Respondent called Officer Sheridan as a witness. Tr. at 94. She testified that she was employed by Respondent

on May 12, 2014 as a correctional officer. *Id.* Her duties included whatever was assigned on a given day, but she testified that she was posted to the infirmary, the health care unit, on May 12, 2014. Tr. at 94-95. On cross examination, Officer Sheridan testified that she was employed by Respondent for just under two years and she retired in June of 2014. Tr. at 97-98.

Officer Sheridan testified that she observed Petitioner on that day. Tr. at 95. She explained that Petitioner was a nurse in the infirmary with her, so she observed Petitioner throughout the day doing her duties. *Id.* At one point, Officer Sheridan testified that Petitioner was in a room with Ms. Ojei. Tr. at 95.

She testified that she was standing outside the door facing into the cell where Inmate Jones was located. Tr. at 95. Officer Sheridan observed the nurses turning Inmate Jones multiple times per day. *Id.* She testified that she did not remember that day specifically being different from any other day. Tr. at 96. Officer Sheridan testified that they would turn inmate Jones, change his bandages, rotate him in the bed, and then if they had to do something with the other inmate in the cell they would do that with the other inmate as well and leave the cell. Tr. at 96. Officer Sheridan would then close the door. *Id.*

Officer Sheridan further testified that on May 19, 2014 she completed a witness report, which is a true and accurate representation of what she observed in the cell on May 12, 2014. Tr. at 97; RX8. With regard to the report, Officer Sheridan testified on cross examination that she did not recall May 12, 2014 to be specifically different than any other day, but that Petitioner and Ms. Ojei turned Inmate Jones daily. Tr. at 97-98. The report reflects the following statement by Officer Sheridan:

> Every time I am assigned to the Stateville Infirmary with Michelle Christersen, she complains of back pain when turning inmate Jones in cell 158. Jones has to be turned multiple times daily. On the days that I work in the infirmary, I open the cell door for the nurses and stand in the doorway while they turn inmate Jones. I was assigned to the infirmary on Monday May 12th, 2014 with Nurse Christersen. I do not recall this day, or the turning of Mr. Jones, going any differently than any other day, other than Ms. Christersen saying she wanted to leave early because her back was hurting.

RX8.

Officer Sheridan acknowledged that if Petitioner or any employee had an accident at work, she was not the person to whom to report it. Tr. at 99. However, she recalled that Petitioner went home early that day, which she had not otherwise done, and complained of pain several times. Tr. at 99-101. Officer Sheridan also testified that Petitioner specifically told her that she had a back injury and back pain. Tr. at 100.

Respondent's Exhibit 8 reflects the following statement by Officer Sheridan: "I do not recall this day or the turning of Mr. Jones going differently than any other day other than Miss Christerson saying she wanted to leave early because her back was hurting." Tr. at 101; RX8.

Helen Salako-Ojei

Respondent called Helen Salako-Ojei ("Ms. Ojei") as a witness. Tr. at 102-103. She testified that she is employed by Respondent as a nurse and has been so employed for almost two years. Tr. at 103. Her duties are to perform nursing work including providing medications and care. *Id.* Ms. Ojei characterized her relationship with Petitioner to be a good working relationship although they do not work together all the time; but when they do they try to perform their tasks as assigned before the next shift comes in. Tr. at 105.

Ms. Ojei testified that she was working with Petitioner on May 12, 2014. Tr. at 104-105. She explained that on she finished the 5 o'clock medication and was waiting for Petitioner to complete the 9 o'clock medications so they could perform direct patient care. Tr. at 105. She testified that they went to cell number 158 together to pick up the urinal and empty Inmate Jones' drainage bag. *Id.*

Ms. Ojei explained that when she finished the other inmate's dressings, she went to Inmate Jones to change his dressings. Tr. at 105. Ms. Ojei explained that Inmate Jones had a Stage III sacral wound and that she could smell the odor from the wound. Tr. at 106. She removed Inmate Jones' diaper and found a large bowel movement. *Id.* She cleaned him up and then tried to change the dressing while Petitioner was trying to walk out. *Id.*

Ms. Ojei testified that she said to Petitioner "please, can she just hold the inmate for me because there's no way I can use one hand to remove the -- she know, to clean up and do the dressing." *Id.* Petitioner complied and held him up so he would not fall back when Ms. Ojei changed the dressing; Petitioner was not lifting Inmate Jones at this time. Tr. at 106-107. Ms. Ojei testified that she finished the dressing and put a new diaper on him at which point it was time for them to move him. Tr. at 107. She explained that these are activities that they do every day with the inmates and that they turned Inmate Jones to prevent another decub (i.e., a sacral wound). Tr. at 107.

Ms. Ojei testified that she finished and immediately said that they needed to reposition Inmate Jones. Tr. at 108. She testified that Petitioner asked her why they could not use the inmate that walks inside the infirmary to help? *Id.* Ms. Ojei responded that it would take them less than three seconds to move Inmate Jones like they do on a regular basis. *Id.*

She also described an overhead trapeze on Inmate Jones' bed onto which he would hold so that they only thing that she and Petitioner were moving was the lower extremities. *Id.* Ms. Ojei testified that she told Petitioner and Inmate Jones that she would count to three and then move him. Tr. at 108-109. Petitioner was on the left side of the bed and she was on the right side. *Id.* She testified that she counted, told Inmate Jones to hold onto the trapeze, and then she and Petitioner lifted him like they normally did. Tr. at 109-110.

Ms. Ojei testified that Petitioner then "just stepped out of the room. She didn't tell me where she was going. She did not say anything to me." Tr. at 110. She believed that Petitioner went to use the washroom and she remained in the cell. Tr. at 110-111. This was the only occasion on which she moved Inmate Jones with Petitioner that day. *Id.*

On cross examination, Ms. Ojei testified that Petitioner and an officer brought the trapeze in for Inmate Jones months before. Tr. at 111-112. She believed that Inmate Jones had had plenty of time to practice using the trapeze. Tr. at 112. She also testified that on cross examination that she did not recall seeing Petitioner express any type of pain symptoms or expressions on May 12, 2014. *Id.*

Ms. Ojei further testified that she had a conversation with Petitioner when she complained that "she really hurt her back" and said that she did it in Inmate Jones' cell. Tr. at 113. Ms. Ojei testified that Petitioner left early that day after completing her evening medications, which included pushing a cart around to 20 cells. *Id.*

Joe Jones

Petitioner called Joe Jones ("Inmate Jones") as a witness at an evidence deposition taken on November 26, 2014. PX15. Inmate Jones testified that he knew Petitioner as his nurse, but has not seen her since May 12, 2014. PX15 at 5-6. He also testified that he is familiar with Ms. Ojei, who is also his nurse and continues to care for him. PX15 at 7-8.

Inmate Jones testified that has cancer and is paralyzed from the waist down and requires care for all of his needs. PX15 at 3-4, 9-10,14. On or around May 12, 2014, he had a bed sore. PX15 at 10. Inmate Jones testified that the day before, Petitioner got him a device that he could hang onto. PX15 at 14-15.

Inmate Jones testified that Petitioner and Ms. Ojei turned him and he observed Petitioner with a frown on her face. PX15 at 11. He testified that "...it usually takes two nurses to turn me to the other side, and evidently I figured out somebody didn't pull their weight like they should have, and [Petitioner] frowned, flinched, like reflecting pain." *Id.*

Inmate Jones also testified that Ms. Ojei raised her voice at Petitioner and "she told her something about she should have positioned herself where she could have picked up more weight, something of that nature. I'm not quite sure." PX15 at 16. He believed that Ms. Ojei was referring to Petitioner and that Petitioner should have picked up more of his weight and he described Ms. Ojei's tone as harsh. PX15 at 16-17.

On cross examination, Inmate Jones testified that he was not aware of Petitioner having any back pain before May 12, 2014. PX15 at 21. He also testified that when they turned him, Ms. Ojei was on his right and Petitioner was on his left. PX15 at 21-22. He explained that he was placed on his side facing toward Ms. Ojei, but he testified that he could see both nurses. *Id.*

When asked on re-direct examination how he could see Petitioner's facial expression if he was facing Ms. Ojei, Inmate Jones clarified that he could not because he was not looking in that direction at the time, but "[a]fterwards like I have certain items on the other side of me, and [Petitioner] didn't have the cheerful expression that she usually have on her face." PX15 at 23. He testified that she looked like she was in pain. *Id.*

Marie Kirincic, M.D.

Petitioner called Marie Kirinicic, M.D. ("Dr. Kirinicic") as a witness at an evidence deposition taken on November 5, 2013. PX17. Dr. Kirinicic is a board-certified physician specializing in rehabilitation and pain management. PX17 at 4.

Dr. Kirinicic noted that Petitioner reported two accidents at work to her, one that was very remote occurring more than two years before she met Petitioner. PX17 at 9-10, 40-41. She understood that Petitioner's 2011 accident involved a bending mechanism of injury. PX17 at 42.

Dr. Kirinicic testified that Petitioner's buttock pain did not change throughout her treatment of Petitioner. PX17 at 12. She diagnosed Petitioner throughout her treatment to have a lumbosacral strain with some sacroiliac joint dysfunction, piriformis/gluteal/muscular soft tissue pain, chronic/myofascial pain, and an aggravation of a pelvic obliquity and curvature. PX17 at 30-31.

With regard to Petitioner's October 26, 2010 MRI, Dr. Kirinicic testified that Petitioner had "[v]ery minimal age

appropriate findings like 70 percent would have in that age group." PX17 at 14. She explained, however, that a patient could have these findings and be asymptomatic. *Id.* Dr. Kirinicic opined that Petitioner's August 17, 2010 accident at work probably caused an aggravation of Petitioner's pre-existing degenerative condition as shown in the October 26, 2010 MRI. PX17 at 15. She also opined that Petitioner's conditions, with the exception of a cervical spine condition, were causally related to her accidents at work. PX17 at 31-32.

Dr. Kirinicic also opined that Petitioner's October 3, 2011 accident may have aggravated Petitioner's pelvic obliquity and caused more like a biomechanical pain and soft piriformis type syndrome like myofacial, more spasms in the back area. PX17 at 15-16. She described Petitioner's symptoms to be more soft tissue in nature and did not believe that Petitioner was malingering. PX17 at 16. Dr. Kirinicic testified that she did not suspect that Petitioner was malingering, "but it was frustrating that nothing we were trying every month [including medications, anti-inflamatories, muscle relaxants, pain medications, acupuncture, TENS units, manipulations, chiropractic care, or traction] was making her better in any little way." PX17 at 22-23, 57.

Dr. Kirinicic testified that she kept Petitioner off work or on light duty, but understood that Respondent would not accommodate light duty restrictions at the prison. PX17 at 19-20, 49-50. She released Petitioner to full duty work as of June 5, 2013. PX17 at 21. Dr. Kirinicic opined that Petitioner's need to be off work was related to both her August 2010 and October 2011 accidents at work. PX17 at 21-22. Dr. Kirinicic also opined that Petitioner's medical treatment with her and the chiropractor, Dr. Foley, was needed relative to Petitioner's accidents at work. PX17 at 22-25, 29-30. However, on cross examination Dr. Kirinicic noted that Petitioner's chiropractic treatment was "a little more excessive than I usually see with that piriformis syndrome...." PX17 at 52. Dr. Kirinicic further opined that Petitioner's neck pain was not causally related to any accident at work. PX17 at 25-26.

On cross examination, Dr. Kirinicic acknowledged that she did not have all of Petitioner's treating medical records or physical therapy notes from before her first visit in June 2012. PX17 at 36, 45. She testified that she understood from Petitioner that she did not have much back pain before her accident in August 2010. PX17 at41. Dr. Kirinicic also testified that she did not see any functional capacity evaluation report for Petitioner. PX17 at 17, 46, 57.

Additional Information

Regarding her current condition of ill-being, Petitioner testified that she has daily pain in the back. Tr. at 66-67. Her pain level depends on what she does, but is somewhat controlled with the medication. Tr. at 67. Petitioner testified that she tried to go off the medication every couple of months, but experiences pain. *Id.* She has not lessened the medication that she takes. *Id.*

Petitioner localized her pain to the lower mid back and the worst is in the left buttocks and both feet. Tr. at 67-68. The buttock pain has been mainly since her May 12, 2014 accident. Tr. at 68. Petitioner also testified on cross examination that she believes that the pain in her feet is related to her accidents at work because she overcompensates. Tr. at 90. She testified that a foot doctor told her that, but she could not recall the doctor's name. *Id.* On re-direct examination, Petitioner recalled that it was Dr. Tara Sakevich. Tr. at 91.

Prior to August 17, 2010, Petitioner testified that she used to engage in various hobbies such as swimming, gardening, walking the dogs, and cooking. Tr. at 68. She testified that she no longer does these things, and she has walked her dog since her accident, but it is very difficult. Tr. at 68-69; *see also* PX16 at 4 (Dr. Avula October 24, 2012 note of Petitioner's report that she walks her dog daily). She explained that it is a large dog

weighing about 150 pounds. Tr. at 90. Petitioner testified that she walked her dog since this accident and had her right ankle casted after she fell when walking the dog on the street. Tr. at 69. She denied injuring her back in that incident. *Id.*

Petitioner testified that she does not do anything that she used to do because she is too tired from work and pain. Tr. at 70. On cross examination, Petitioner acknowledged that none of her doctors have recommended surgery and that she had not had any surgery. Tr. at 78-79.

With regard to her medications, Petitioner testified that she takes medication for depression, Celexa, which she has taken for 10 years. Tr. at 71. She also takes Ambien for sleep. Tr. at 72. Petitioner testified that she is not claiming reimbursement for these medications. Tr. at 71-73. She also testified that portions of her bills were paid through her husband's insurance with Aetna. Tr. at 13.

Petitioner testified that after the August 17, 2010 and October 3, 2011 incidents, her back pain never completely went away. Tr. at 91-92. She also testified that after the May 12, 2014 incident, she began experiencing buttock pain which has not gone away. *Id.*

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

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 (LEXIS 2011). The "in the course of employment" element refers to "[i]njuries 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...." *Metropolitan Water Reclamation District of Greater Chicago v. IWCC*, 407 Ill. App. 3d 1010, 1013-14 (1st Dist. 2011). The "'arising out of' component refers to the origin or cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Metropolitan Water Reclamation District*, 407 Ill. App. 3d at 1013-14 (*citing Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (Ill. Sup. Ct. 1989)). A claimant must prove both elements were present (i.e., that an injury arose out of and occurred in the course of her employment) to establish that her injury is compensable. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (1st Dist. 2006).

The Arbitrator finds that Petitioner failed to establish by a preponderance of credible evidence that she sustained a compensable accident at work on May 12, 2014 as claimed. In so concluding, the Arbitrator first addresses Petitioner's testimony and various written reports in light of the testimony and written statements of Ms. Ojei, Officer Sheridan, and Inmate Jones.

Petitioner testified that on May 12, 2014 she was working with another nurse, Ms. Ojei, caring for a "total care" patient, Inmate Jones. She explained that she and Ms. Ojei had gotten to point where they had changed Inmate Jones' Foley and diaper. She added that when they lifted such patients, they always would say "let's lift on 3, 1, 2, 3" and then they would lift him up. Petitioner testified that she said 1, 2, 3 and lifted up Inmate Jones, but did not think Ms. Ojei heard her. She testified that Ms. Ojei did not lift him up such that Petitioner got the brunt of the lift. She also testified that when she lifted Inmate Jones, she immediately said to Ms. Ojei, "oh, I hurt my back." The testimony and written statements of Ms. Ojei, Inmate Jones, and Officer Sheridan paint a different picture.

Ms. Ojei testified that she finished changing Inmate Jones' diaper and he told Petitioner that they needed to reposition him. According to Ms. Ojei, Petitioner responded by asking why they could not use the inmate that walks inside the infirmary to help? Ms. Ojei testified that she responded that it would take them less than three seconds. She also testified, contrary to Petitioner's testimony, that she told Petitioner that she would count to three and then they would move Inmate Jones. Ms. Ojei's testimony appears to be almost exactly the opposite of Petitioner's testimony. However, the Arbitrator finds Ms. Ojei's testimony to be more credible than Petitioner's testimony. Petitioner's complaints about moving Inmate Jones are corroborated by the written statement and testimony given by Officer Sheridan, a former employee of Respondent.

Officer Sheridan completed a witness report on May 19, 2014. Therein, she stated that "*[e]very time I am assigned to the Stateville Infirmary with [Petitioner], she complains of back pain when turning inmate Jones* in cell 158. *Jones has to be turned multiple times daily.* On the days that I work in the infirmary, I open the cell

door for the nurses and stand in the doorway while they turn inmate Jones. I was assigned to the infirmary on Monday May 12th, 2014 with [Petitioner]. *I do not recall this day, or the turning of Mr. Jones, going any differently than any other day, other than [Petitioner] saying she wanted to leave early because her back was hurting.*" Thus, Officer Sheridan confirmed that Petitioner reported back pain to her, but not as a result of a specific incident. While Officer Sheridan admitted that she was out in the hall at the time of the alleged accident, her testimony and written statement buttress Ms. Ojei's testimony; that is, Petitioner complained about engaging in the work activity of turning Inmate Jones. Officer Sheridan's testimony also reinforces a pattern evident from Petitioner's medical treatment of continuous subjective complaints of pain that were not rooted in objective evidence.

Petitioner asserts that her alleged accident is confirmed by the testimony of Inmate Jones, a terminally ill prisoner. However, his testimony does little to support Petitioner's claim. Inmate Jones testified about contentious exchanges between Ms. Ojei and Petitioner when caring for him on May 12, 2014. He testified that "evidently I figured out somebody didn't pull their weight like they should have, and [Petitioner] frowned, flinched, like reflecting pain." Unfortunately, when asked how he could see Petitioner's facial expression if he was facing Ms. Ojei as he described, Inmate Jones admitted that he could not because he was not looking in Petitioner's direction at the time. He clarified later that "[a]fterwards ... [Petitioner] didn't have the cheerful expression that she usually have on her face." This testimony, in light of the record as a whole, only confirms the suspicion that Petitioner and Ms. Ojei had a tenuous working relationship on May 12, 2014.

Petitioner completed several forms in which she described the alleged accident. In an incident report, Petitioner indicating that she lifted an inmate without any assistance from him and injured her left thigh on up which was pulled, sprained rendering her unable to continue her shift. She also completed a claim notification form claiming that she heard a cracking noise and was injured while lifting the inmate. Notably, Petitioner also stated that she told Ms. Ojei about the injury, but that Ms. Ojei refused to be a witness.

Three days later, Petitioner submitted a form dated May 15, 2014 claiming time off work under the FMLA in which she reported that she had chronic and permanent back and buttock pain. Petitioner did not refer to an acute injury occurring on May 12, 2014. In explaining this, Petitioner testified that the request was so that she only had to work one shift and no overtime, but she admitted that she was only given overtime about four times per year—before any of her accidents at work.

Based on the foregoing, the Arbitrator does not find Petitioner's testimony to be credible. Petitioner claims that she sustained an acute injury to her back resulting in severe pain, but the testimony and reports of Ms. Ojei and Officer Sheridan controvert her claim. Notwithstanding, Petitioner underwent additional medical care generating further documentation and opinions regarding the alleged acute injury on May 12, 2014. Thus, the Arbitrator next addresses the medical records and opinions of Dr. Kirinicic and Dr. Lami.

Just as with her claimed accident on October 3, 2011, Petitioner already had a doctor's visit scheduled shortly after the alleged accident. Petitioner saw Dr. Kirincic the day after she completed the FMLA form asserting chronic back and buttock pain. The medical records reflect that this visit of May 16, 2014 had been previously scheduled on March 21, 2014. Dr. Kirincic noted Petitioner's report that: "*...she has now new (previous 2011) work-related injury on May 12, 2014, about 3 days ago when she was reportedly tricked by her coworker who said let's quickly lift this patient up and held only sheet when the patient lifted. The patient experienced a flare-up of severe left buttock pain similar to what she had before. She believes it will take her again several months to recover from this incident and will need stronger medication. ... Also would like stronger medications as the*

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

Stanley Nelson Moore, Sr.,

Petitioner,

vs. NO: 14 WC 07650

Pace Suburban Bus Company,

16IWCC0027

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/8(a) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, causal connection, temporary total disability and whether Petitioner's current condition of ill-being is connected to the accident date of January 16, 2014, 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 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.

16IWCC0027

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 8 - 2016

MB/mam
o:11/12/15
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

MOORE SR, STANLEY NELSON
Employee/Petitioner

Case# **14WC007650**

14WC007649

PACE SUBURBAN BUS COMPANY
Employer/Respondent

16IWCC0027

On 5/20/2015, 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 0.08% 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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16IWCC0027

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Stanley Nelson Moore, Sr.
Employee/Petitioner

v.

Pace Suburban Bus Company
Employer/Respondent

Case # **14** WC **07650**

Consolidated cases: **14 WC 7649**

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 **5/14/2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0027

FINDINGS

On the date of accident, **1/18/2014**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**54,600.00**; the average weekly wage was $**1,050.00**.

On the date of accident, Petitioner was **59** years of age, ***married*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of **$2,159.00**, as provided in Sections 8(a) and 8.2 of the Act.

Petitioner's claim for temporary total disability and prospective medical care and treatment is denied. Petitioner failed to prove a causal connection between the accidental injuries of January 18, 2014 and his current condition of ill-being regarding his low back and left shoulder.

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

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

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

Signature of Arbitrator

May 19, 2015
Date

ICArbDec19(b)

MAY 20 2015

FINDINGS OF FACT

This case was tried in conjunction with a consolidated case, No. 14 WC 07649, which involved the same parties. The issues in dispute were: Causal Connection; Temporary Total Disability; and Incurred and Prospective Medical Expenses.

The Findings of Fact in Case No. 14 WC 07649 are adopted and incorporated herein.

Petitioner was employed by Respondent as a bus operator. The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on January 18, 2014. The bus that he was driving was struck by a speeding car that was attempting to pass. The impact was heavy. Petitioner was taken by ambulance to Roseland Hospital, where he was examined in the ER. X-rays of the lumbar and cervical spine revealed multi-level degenerative joint disease. The discharge diagnosis was lumbar and cervical strain/sprain.

Petitioner continued to work as a bus operator until February 19, 2014. He had treatment at South Holland Injury Care, Integrity Orthopedics and with his PCP, Dr. Cressa Perish. He had a lumbar and left shoulder MRI on March 5, 2014 at Ingalls Memorial Hospital. Dr. Joy has recommended left shoulder surgery.

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:

Petitioner has failed to prove a causal connection between the accidental injuries of January 18, 2014 and his current condition of ill-being. Petitioner injured his low back and left shoulder as a result of falls that occurred on January 16, 2014 (Case No. 14 WC 07649) and on February 19, 2014 (not work related). In this case, Petitioner was treated at the ER for a neck strain/sprain and a low back strain/sprain. There was no mention of the left shoulder in the Roseland records. He continued to work at full duty until February 19, 2014. A left shoulder MRI of March 5, 2014 showed extensive pathology and a lumbar MRI of the same date showed an acute T12 fracture. Nothing in the Record supports a finding of a causal connection between the accident of January 18, 2014 and Petitioner's current condition of ill-being .

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:

After the accident, Petitioner was transported to Roseland Hospital by City of Chicago EMS and he received treatment at the Roseland ER. The bills from those providers are found to be reasonable and necessary to cure or relieve the effects of the injury. Accordingly, the bills from Roseland Community Hospital ($1,108.00) and City of Chicago EMS ($1,051.00) are awarded pursuant to §8(a) and §8.2 of the Act.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner is not entitled to prospective medical care, as there is no causal connection between the injury of January 18, 2014 and Petitioner's current condition of ill-being with respect to his left shoulder and his low back.

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

Petitioner is not entitled to TTD benefits, as there is no causal connection between the injury of January 18, 2014 and Petitioner's current condition of ill-being with respect to his left shoulder and his low back.

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

Stanley Nelson Moore, Sr.,

Petitioner,

vs. NO: 14 WC 07649

Pace Suburban Bus Company,

Respondent,

16IWCC0028

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/8(a) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, causal connection, temporary total disability and whether Petitioner's current condition of ill-being is connected to the accident date of January 16, 2014, 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 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.

16IWCC0028

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $11,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 8 - 2016

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:11/12/15
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

MOORE SR, STANLEY NELSON
Employee/Petitioner

Case# **14WC007649**

14WC007650

PACE SUBURBAN BUS COMPANY
Employer/Respondent

16IWCC0028

On 5/20/2015, 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 0.08% 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:

0311 KOSIN LAW OFFICE LTD
DAVID X KOSIN
134 N LASALLE ST SUITE 1340
CHICAGO, IL 60602

1505 SLAVIN & SLAVIN
NICOLE NELSON ESQ
20 S CLARK ST SUITE 510
CHICAGO, IL 60603

16IWCC0028

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Stanley Nelson Moore, Sr.
Employee/Petitioner

v.

Pace Suburban Bus Company
Employer/Respondent

Case # **14** WC **07649**

Consolidated cases: **14 WC 07650**

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 **5/14/2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0028

FINDINGS

On the date of accident, **January 16, 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, in part,*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**54,600.00**; the average weekly wage was $**1,050.00**.

On the date of accident, Petitioner was **59** years of age, ***married*** with **0** dependent children.

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

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

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

ORDER

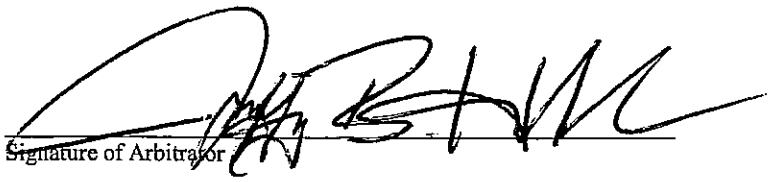
Respondent shall pay reasonable and necessary medical services of **$11,603.00**, as provided in Sections 8(a) and 8.2 of the Act.

Petitioner's claim for temporary total disability and for prospective medical care and treatment is denied. Petitioner failed to prove a causal connection between the accidental injuries of January 16, 2014 and his current condition of ill-being regarding his low back and left shoulder.

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

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

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



Signature of Arbitrator

May 19, 2015
Date

ICArbDec19(b)

MAY 20 2015

FINDINGS OF FACT

This case was tried in conjunction with a consolidated case, No.14 WC 07650, which involved the same parties. The issues in dispute in both cases were: Causal Connection; Temporary Total Disability; and Incurred and Prospective Medical Expenses.

Petitioner was employed by Respondent as a bus operator. He was hired in October of 2006. Before he was hired by Respondent, he worked as a dockworker and had some low back and left shoulder sprain/strain type injuries. After he began to work for Respondent, and before the accident date, his low back and left shoulder were in excellent condition. As a bus driver, Petitioner would turn the steering wheel, open and close the doors, engage the emergency brake, shift the gear box and operate controls with his left arm. Many of the controls are on the left side and he continuously used his left arm when operating the bus.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on January16, 2014. It was early in the morning and Petitioner slipped and fell on ice in Respondent's parking lot. He fell on his low back and left shoulder. His back hit first and then the shoulder. He noticed sharp pain on the top of the shoulder where the ball goes into the socket. He had sharp pain in his low back, midline above the beltline. The accident was reported. Petitioner continued to work the rest of his shift. He had discomfort and pain. He felt that the pain was worsening as his seat would move.

Petitioner did not seek medical treatment on the day of accident. He took some hydrocodone that he had from a 2011 right knee injury. The medication controlled the pain, but it did not go away. Petitioner did not go in to work the next morning, but did work the next evening of January17-January 18.

Petitioner was then involved in a motor vehicle accident (car vs. bus) on January 18, 2014. That accident is the subject of Case No. 14 WC 07650. Petitioner was driving his bus in the curb lane. His bus was struck by a passing vehicle at a high rate of speed. Petitioner was going 40 mph. The car that hit the bus was going 50-60 mph. Petitioner described the impact as "heavy". The impact rocked and shocked Petitioner. Petitioner had pain before this accident. He chased the car for a couple of blocks and then pulled over. Petitioner was taken by ambulance to Roseland Hospital.

Petitioner received treatment at the Roseland emergency room. According to Petitioner, he had complaints about his left shoulder, neck and low back in the ER. The records of Roseland Hospital show that there were no complaints or findings regarding the left shoulder. There was no history of the prior fall noted. The work up was for head, neck and back pain after a motor vehicle crash. X-rays were taken of the cervical and lumbar spine. The impression of the x-rays was multi-level DJD. The discharge diagnosis was lumbar and cervical sprain/strain. Petitioner was registered at 2:25 am and discharged at 7:10 am. A Chicago Fire Department form indicates that Petitioner had no complaints and refused treatment at first, but then asked to be checked out (LOC, CP, SOB-no trauma noted). He was taken from the bus by stairchair, rode on the bench in the ambulance and was transported from the ambulance to the ER by wheelchair. (PetEx. 1)

Petitioner was scheduled to work on January 20, 2014, but did not. He had to take a drug test and be cleared to return to work by Respondent. Petitioner returned to work on January 24, 2014 as a full time bus operator. He had continued pain in his left shoulder and low back. He had trouble moving his left arm, hand over hand, to make a right turn. He had pain using the controls. He felt that his pain was

increasing and his range of motion was worsening. Petitioner continued to work as a bus operator until February 19, 2014.

Petitioner next sought care from South Holland Injury Care and Dr. Cammarano. The first visit was on January 21, 2014. There is no chart note for the initial exam. The chart note of January 22, 2014 notes that the patient was being seen in follow-up. He fell on January 16, 2014 at his place of employment and hurt his lumbar spine and left shoulder. He also was involved in an accident while driving a Pace bus on January 18, 2014 which further injured his lumbar spine and left shoulder and cervical spine. Petitioner began a course of chiropractic care with Dr. Cammarano which lasted until April 15, 2014. Initially, Petitioner's pain complaints regarding his neck and back were 8/10 and the shoulder complaints were 9/10. The complaints were the same on February 18, February 19 and February 20, 2014. At the last visit, the neck complaints were 6/10, the back complaints were 8/10 and the shoulder complaints were 8/10. Petitioner was not taken off work by this provider. (PetEx. 2)

Petitioner testified that he tried to get treatment by his PCP, Dr. Cressa Perish, but was told that he could not be seen until February 19, 2014. Dr. Perish's records show that petitioner called on January 20, 2014, giving the history of the MVA on 1/18/14 and didn't think he should go back to work until he was feeling better "mentally/physically". Dr. Perish said that the patient must be seen in the office before any note can be considered. The patient was to bring the police report and any medical exams that occurred after the accident. (PetEx. 3)

On February 19, 2014, Petitioner slipped and fell on ice again and again injured his low back and left shoulder. He had the same pain and discomfort, although it was temporarily worsened by this fall. The accident happened at a gas station and he was taken by ambulance to St. James/Olympia Fields Hospital. Petitioner testified that he had left shoulder and low back pain and a headache when he was seen at the hospital. He saw Dr. Perish later that evening.

Dr. Perish's chart note of February 19, 2014 says that the reason for the visit was work injury/med refill. Petitioner's problem list from 1/8/2013 included low back problems. The HPI was: "pt states he slipped on some ice this morning at the gas station and his low back is in extreme pain and pt L arm is stiff and hard for him to life (lift?)". The patient could not abduct his arm beyond 40 degrees. The shoulder exam showed tenderness to palpation along the trapezius and supraspinatus and on active abduction to 40 degrees. It was non-tender along the AC joint and posterior capsule area and there was no bruising. The lumbar exam showed full range of motion with slight tenderness at L5 on flexion with tenderness noted at more than 90 degrees flexion and negative sitting SLR. Motor strength was 5/5 and sensation was normal in all extremities. The diagnosis was lumbar strain, acute and left shoulder strain. Petitioner was taken off work and was to follow up in one week. When Petitioner was seen on February 26, 2014 it was for follow-up on back pain. The patient said that his pain was still the same and he was still requesting MRI (not charted at the prior visit). The patient was very agitated with the staff of Dr. Perish and with that of Drs. Dilella/ Thometz, so that ORTHO office refused to see him. Dr. Perish was able to refer Petitioner to Integrity Orthopedics and they were to determine if an MRI of the shoulder was indicated. The MRI studies were performed on March 5, 2014. The lumbar study showed multi-level degenerative changes without evidence of disc protrusion or significant stenosis, along with an acute compression fracture of the superior endplate of T12 with moderate associated bone marrow edema. The left shoulder study had extensive findings: "Massive full-thickness cuff tear of supraspinatus and infraspinatus tendons. Full-thickness tear of the biceps tendon. Large full-thickness tear of the subscapularis tendon. Posterior superior labral tear with mild to moderate joint effusion with synovitis and loose bodies. A widening of the acromioclavicular joint might represent old trauma". (PetEx. 3)

The records of St. James/Olympia Fields show that Petitioner was treated in the ER on February 19, 2014 from 6:41-8:19 am for left shoulder and low back pain. He fell on ice at a gas station. He could not get up. He was taken to the ER via ambulance. Petitioner had 10/10 shoulder pain. Decreased range of motion and tenderness of the shoulder was noted. There was no swelling, deformity or effusion. Pain with flexion and abduction of the shoulder was noted. There was minimal back pain. Lumbar x-rays were compared to a film from 10/2/2006. The current shoulder and lumbar x-rays were limited due to movement and difficulty positioning the patient. Degenerative findings were noted and no acute defects were seen. The ER physician recommended follow-up with a specialist for the shoulder, given the history of a fall and decreased ROM. There was no history of the accidents of January 16, 2014 and January 18, 2014. (ResEx. 1)

Petitioner was seen at Integrity Orthopedics by Dr. James Krcik on February 27, 2014, with a chief complaint of left shoulder pain. Back and neck pain were noted on the physical exam. There was a history of a slip and fall on ice on 1/16/14 while at work and of another fall on 2/19/14. Both falls he landed on his back and tried to break his fall with his left arm. There was a history of RTC tear in the right arm. The pain in the left shoulder prevents the patient from pulling up his pants, reaching behind his back and there is pain when tying his shoes. The physical exam of the shoulder showed no defects, no tenderness and no effusion. Pain and limited range of motion was noted. Strength was limited and several tests were positive for impingement. An MRI was ordered and Petitioner was taken off work until the study was reviewed by Dr. Krcik. The diagnosis was: "Pain-Shoulder Condition: uncontrolled, acute exacerbation: Location: left". Petitioner was seen again by Dr. Krcik on March 13, 2014. Petitioner complained of shoulder pain. Dr. Krcik thought that Petitioner had a complex rotator cuff tear and biceps tendon tear which will need surgical repair. The patient was referred to Dr. Joy for surgery. Dr Krcik charted: "Due to no previous MRI unable to clearly state if new or old tear, patient asked if you can tell when this occurred and I cannot determine this and if it actually occurred at work or not." (PetEx. 2)

Petitioner had a consult with Dr. Edward Joy on March 14, 2014. The physical exam and impingement test results were consistent with that of Dr. Krcik. Dr. Joy thought that the MRI showed massive retracted tendon tears and moderate fatty degenerative changes, so successful surgical repair is not predictable, but the patient may benefit from limited debridement vs. partial repair. Dr. Joy recommended open rotator cuff repair with reinsertion of ruptured biceps/triceps tendon, w/wo tendon graft and arthroscopic repair of the slap lesion. Petitioner was released to modified/sedentary duty by Dr. Joy.

Petitioner received a release to return to work and he did so, on April 17, 2014. He has been working full duty as a bus driver since then.

Petitioner has never received TTD or an approval for the suggested surgery from Respondent. He has not received a written explanation for the denial of benefits.

Petitioner testified that his low back and left shoulder hurt. He has constant sharp pain that is constant. He has a hard time getting on and off the bus. It is hard for him to get in his seat. It is difficult for him to lie on his left side. He has the same pain, consistently, after the accident.

Petitioner's Bills Exhibit was Number 5.

CONCLUSIONS OF LAW

The Arbitrator adopts the Findings of Fact set forth above 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 has failed to prove a causal connection between the accidental injuries of January 16, 2014 and Petitioner's current condition of ill-being with respect to his left shoulder and his low back. The Arbitrator finds that as a result of the accident Petitioner suffered sprain/strain injuries to the low back and left shoulder. The current pathology shown in the MRI studies of March 5, 2014 is not related to the accident of January 16, 2014.

Petitioner did not seek medical care until after the MVA of January 18, 2014. There is no contemporaneous record of Petitioner's low back and left shoulder condition after the fall on January 16 and before the MVA.

The only causal connection opinion submitted is Dr. Krcik's chart note regarding the left shoulder where he could not state whether the tears were new or old, when they occurred and if it actually occurred at the patient's work or not.

There is no causal connection opinion in the records of Dr. Cammarano and the initial evaluation of the patient is not included in the submitted records. The first documented physical examination of the left shoulder is after the fall at the gas station (St. James/Olympia Fields and Dr. Perish). The MRI regarding the left shoulder reveals extensive pathology which cannot be related to the fall of January 16, 2014 without a competent expert medical opinion. Given the two subsequent injuries of January 18, 2014 and February 19, 2014 and the fact that Petitioner continued to work his regular duties as a bus operator until February 19, 2014, a finding of causal connection regarding the Petitioner's left shoulder condition would be entirely speculative.

The Petitioner did testify that he had continued complaints of pain and decreasing function in his left arm after the accident of January 16, 2014, but the Arbitrator will not speculate on causation regarding the left shoulder, given the evidence that has been adduced.

Regarding the Petitioner's low back condition, there is no causal connection opinion in the medical records. The St. James records show a prior lumbar x-ray took place in October of 2006. The x-rays from Roseland and St. James do not confirm the existence of the T12 fracture. Dr. Perish's records show that low back pain was on Petitioner's problem list from January of 2013. The work up at Roseland Hospital showed degenerative changes in Petitioner's lumbar spine and the diagnosis was lumbar and cervical sprain/strain. The records do not show any findings of tenderness in the T12 area which would be consistent with the compression fracture shown on the lumbar MRI. A finding of causal connection as to the T12 fracture and the accident of January 16, 2014 would be entirely speculative, given the evidence adduced.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner's Exhibit 5 was the bills exhibit. The bills from Roseland Community Hospital and City of Chicago-EMS directly relate to the accident of January 18, 2014 and are addressed in Case No. 14 WC 7650.

Respondent did not submit UR reports to challenge the treatment that underlies the claimed bills herein. While the Arbitrator has found that Petitioner's pathology shown on the MRI studies is not causally related, the Arbitrator also has found that Petitioner suffered a strain/sprain type injury to the left shoulder and low back as a result of the fall of January 16, 2014. Absent UR evidence or a persuasive medical opinion disputing the bills, the testimony of Petitioner and the medical records support a finding that the treatment and bills submitted are reasonable and necessary to cure or relieve the injuries of January 16, 2014.

Accordingly, the submitted bills from South Holland Injury Care ($6,185.00); Cressa Perish, MD ($115.00); Integrity Orthopedics ($605.00); and Ingalls Memorial Hospital ($5,303.00) are awarded, pursuant to §8(a) and §8.2 of the Act.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Based upon the Arbitrator's finding on the issue of causal connection, Petitioner is not entitled to any prospective medical care.

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

Based upon the Arbitrator's finding on the issue of causal connection, no award is made for TTD benefits.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin McAllister,
Petitioner,

vs. NO: 14 WC 28777

16IWCC0029

North Pond,
Respondent,

DECISION AND OPINION ON REVIEW

Respondent appeals the decision of Arbitrator Hegarty finding Petitioner sustained an accidental injury arising out of and in the course of his employment on August 7, 2014. As a result Petitioner was temporarily totally disabled from August 8, 2014 through September 14, 2012 for 5-3/7 weeks under Section 8(b) of the Illinois Workers' Compensation Act, is entitled to $10,454.25 in medical expenses under Section 8(a) of the Act and permanently lost 25% of the ~~use of his right leg/53.75 weeks minus a credit of 21.5 weeks from a prior award for a net award~~ of 32.25 weeks under Section 8(e) of the Act. Petitioner is entitled to additional compensation in the amount of $6,420.00 under Section 19(l), $6,584.27 under Section 19(k) and $3,407.60 in attorneys' fees under Section 16 of the Act. The Issues on Review are whether Petitioner sustained an accidental injury arising out of and in the course of his employment on August 7, 2014, whether a causal relationship exists between the alleged August 7, 2014 accident and Petitioner's present condition of ill-being and whether Petitioner is entitled to additional compensation and/or attorneys' fees under Sections 19(l), (k) and 16 of the Act. The Commission, after reviewing the entire record, reverses the Arbitrator and finds that Petitioner failed to prove he sustained an accidental injury arising out of and in the course of his employment on August 7, 2014, for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

16IWCC0029

1. Petitioner testified he is a 26 year old sous chef for a restaurant. His duties include checking orders, arranging the walk-in, making sauces, prepping and cooking.

2. On August 8, 2013, Petitioner said he injured his right knee and had to have to have surgery. Since his release he has been able to work full duty. He filed a workers' compensation claim and that case was settled. The settlement contract indicated Petitioner agreed to settle for a 10% loss of use of the right leg, which equaled 21.5 weeks of permanent partial disability benefits.

3. Petitioner testified that on August 7, 2014, one of the cooks had cooked a pan of carrots earlier in the day and he could not find them. The cook was busy doing other things. Petitioner said had some time so he looked for the cooked carrots. He looked for the carrots in the in the walk up because that is where the cook put them. Petitioner said he checked on all the shelves. Petitioner testified that sometimes things get knocked underneath the shelves and onto the floor. So, he knelt down on both knees to look for the carrots on the floor. They were not there. When he stood up his right knee popped and locked and he could not straighten his leg. When he stood up from kneeling on the ground he was not carrying or holding anything. He did not notice anything out of the ordinary such as the floor being covered with water or ice or that the floor was defective in any way. He hopped over to the table and then he hopped to the office, sat down and told Bruce Sherman, who is his boss and the chef, what had happened. He was then driven to the emergency room by the general manager.

4. Petitioner was seen at Presence Saint Joseph Hospital. As an aside, the Commission notes some of the records are dated August 7, 2014 while other records are dated August 9, 2014. While at Saint Joseph Hospital it was noted that Petitioner has had right knee pain since this morning. He was at work this morning when he stood up quickly, slightly twisting his knee and heard a pop. Petitioner reported he had a history of occasional right knee pain when standing up. He described it as a catching sensation. He also said the pain always quickly resolves. It was further noted there was no pertinent past surgical history given. In a second history, Petitioner complained of a sudden onset of right knee pain today when raising from kneeling to standing. He reported hearing a pop and feeling sudden pain. He said it felt like his prior meniscus tear that he had one year ago in same knee. His reported that his knee was repaired by Dr. Guelich. There were no past medical records on file. Petitioner was diagnosed with right knee pain and a possible ligamentous injury. Right knee x-rays were taken and he was told to follow up with an orthopedic doctor.

5. On August 11, 2014, Petitioner was seen by Dr. Garelick. The doctor noted that previously on August 26, 2013 he had performed a medial meniscus repair of Petitioner's right knee. The doctor noted that Petitioner was doing well until August 7, 2014 when he had been squatting down. Petitioner reports he next went to stand up and when he did so he heard a pop and felt a sharp sudden pain in his right knee. Dr. Garelick diagnosed Petitioner was a possible recurrent medial meniscus tear of right knee and he ordered a right knee MRI.

6. The August 13, 2014 right knee MRI showed a low-grade instar-substance injury of ACL without any complete disruption. There was also a bucket-handle tear of the medial meniscus. Small para-meniscal cysts contained debris were also noted as being possibly

present along with the posteromedial aspect of the knee joint. Lastly, there was moderate knee joint effusion.

7. In an August 13, 2014 follow up visit with Dr. Garelick, it was noted that Petitioner's most recent MRI showed a re-tear of medial meniscus consistent with a bucket-handle medial meniscus tear. As a result the doctor recommended surgery.

8. On August 15, 2014, Petitioner underwent right knee surgery. It was noted that approximately one year ago Petitioner underwent an all-inside medial meniscus repair. He did well up until a week ago when he was squatting at work; he had felt a pop and he was unable to straighten his knee; The post-surgical diagnosis was a bucket-handle medial meniscal tear of the right knee.

9. From August 29, 2014 through September 8, 2012 Petitioner underwent post-surgical physical therapy at Illinois Bone and Joint Institute. He reported to the physical therapist that he injuring his knee on August 7, 2014 while standing from a kneeling position while at work. He reported he heard a pop and experienced pain right away.

10. On September 10, 2014, Dr. Garelick indicated Petitioner could return to work on September 15, 2014. On September 22, 2014, Dr. Garelick saw Petitioner for a post-surgical follow up visit. At that time, he noted Petitioner has return to work on September 11, 2014 and is working full time. He does not report having any significant problems. On examination, there is some trace effusion of right lower extremity. During that visit, Dr. Garelick discharged Petitioner from care and instructed him to follow-up as-needed.

11. Petitioner testified he paid for the surgery and his medicine himself. He went to four post-surgical physical therapy sessions. He only went to four sessions because he was paying out of pocket and it was not worth paying for eight sessions when he had already done this last year and he knew he could do the exercises at home for the last four. He was off of work from the time of his accident through September 15, 2014. He was released from care by Dr. Garelick on September 22, 2014. He returned to work and has been working since. Currently, he works anywhere from less than 10 hours a day upwards of 15-16 hours a day. He stands all but an hour a day. Petitioner testified he has not been paid any workers' compensation or medical benefits since he was off of work. Currently his right knee feels sore, achy with occasional sharp pains while he is on his feet all day. He takes Ibuprofen or aspirin depending on how he is feeling. He would estimate he takes over-the counter medication three days a week, if not more. His leg feels sore and "used" when he comes home from work. Prior to the August 7, 2014 work accident, he used to bike and ski. He still bikes. He has not tried skiing and does not think he wants to try skiing again. He has not seen Dr. Garelick since he was released on September 22, 2014 and has not treated for his knee with anyone else since he was released.

The Commission notes that it is the employee's burden to establish all the elements of his claim by a preponderance of the credible evidence. Illinois Bell Telephone Company v. Industrial Commission, 265 Ill. App. 3d 681 (1994). The claimant has the burden of proving that his injury arose out of and in the course of his employment. County of Cook v. Industrial Commission, 68 Ill. 2d 24 (1977). Furthermore, merely being at the place of employment when the accident occurs is not sufficient to establish

compensability. Brady v. Industrial Commission, 143 Ill. 2d 542 (1991). Arising out of means that the origin or cause of the accident presupposes a causal connection between the employment and the accidental injury. Jones v. Industrial Commission, 78 Ill. 2d 284 (1980) . In order for an injury to arise out of one's employment the risk must be: 1) a risk to which the general public is generally not exposed but that is peculiar to the employee's work, or 2) a risk to which the general public is exposed but the employee is exposed to a greater degree. A peculiar risk is one that is peculiar to a line of work and not common to other kinds of work. Karastamatis v. Industrial Commission, 306 Ill. App. 3d 206 (1999); Orsini v. Industrial Commission, 117 Ill. 2d 38 (1987) Voluminous case law establishes that the act of standing and walking does not constitute a risk greater than that to which the general public is exposed. Caterpillar v. Industrial Commission, 129 Ill. 2d 52 (1989); Oldham v. Industrial Commission, 139 Ill. App. 3d 594 (1985); Elloitt v. Industrial Commission, 153 Ill. App. 3d 238 (1987); Prince v. Industrial Commission, 15 Ill. 2d 607 (1959). In the case at bar, there is no indication that Petitioner was exposed to a risk that was greater than that to which the general public is exposed when he reported a one-time instance of standing up from a kneeling position while in the course of his employment. As such the issue before the Commission is not whether the risk is a risk to which the general public is generally exposed but is a risk that is peculiar to the employee's work.

Keeping the Courts' rulings in mind and applying the same to the case at bar, the Commission finds that there is sufficient evidence to support Petitioner's claim that he was in the course of his employment on August 7, 2014. The Commission further finds that Petitioner was not exposed to a risk that was greater than that to which the general public is exposed. This, the primary question before the Commission is whether or not Petitioner's alleged accident on August 7, 2014 was a risk particular to his employment. In addressing this issue, the Commission heeds the recent ruling of the Appellate Court in Young v. Illinois Workers Compensation Commission, 13 N.E. 3d, 1252 (2014), in which the court found that it was unnecessary for the Commission to perform a neutral risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public when the claimant was injured due to an employment-related risk Id. However, in having done so, the Commission finds that the facts surrounding the case at bar are factually distinguishable from the facts contained within the Young v. Illinois Workers Compensation Commission, Id. Namely, the Appellate Court noted that the claimant in Young, Id. was reaching into a 36" deep box that was too narrow to fit both if his arms and shoulder into at the time he felt a pop in his left shoulder. The Appellate Court went on to say that although the act of "reaching" is one performed by the general public on a daily basis, the claimant action of reaching and stretching his arm into a deep, narrow box to retrieve a part for inspection was distinctly associated with his employment. In the case at bar, the Commission finds that Petitioner was not stretching and reaching into a deep and narrow container at the time of the incident. Rather, he was simply standing up after having kneeled one time. The Commission finds that the act of standing up after having kneeled on one occasion was not particular to Petitioner's employment and it just have easily could have occurred while Petitioner, similar to a member of the general public, was performing this task in any other area of his life whether it be looking under his car in the driveway or picking up an item that dropped underneath his bed. As such the Commission finds that Petitioner was subjected to a neutral risk which had no particular employment or personal characteristics. Springfield Urban League v. Illinois Workers' Compensation

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Commission, 990 N.E. 284 (2013). In finding so, the Commission holds Petitioner failed to prove he sustained an accidental injury arising from his employment on August 7, 2014 and his claim is not compensable.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove he sustained accidental injuries arising out of his employment on August 7, 2014 his claim for compensation 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: JAN 8 - 2016

Mario Basurto

MB/jm

O: 11/12/15

Stephen Mathis

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DISSENTING OPINION

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 COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ryan Maleckas,

Petitioner,

vs. NO: 12 WC 33222

16IWCC0030

Freeman Decorating,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of vocational rehabilition, maintenance benefits, penalties and attorneys' fees and being advised of the facts and law, corrects the clerical and computational errors 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 (1980).

The Commission notes that on the face sheet of the Decision, the Arbitrator found Petitioner entitled to vocational rehabilitation and awarded maintenance benefits from November 13, 2014 through March 24, 2015, the date of the arbitration hearing, and noted that period was 18-5/7 weeks. However, in the body of the Decision, the Arbitrator awarded maintenance benefits through April 22, 2015, the date of closing of proofs. The Commission corrects this clerical error to reflect the date of March 24, 2015 as when maintenance benefits were awarded through as this is the date that Petitioner testified. The Commission also corrects the computational error in the total number of weeks of maintenance benefits awarded. From

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November 13, 2014 through March 24, 2015 is 18-6/7 weeks. The Commission further corrects the computational error in the total number of weeks of temporary total disability benefits awarded. From November 19, 2011 through January 24, 2012 is 9-4/7 weeks and from June 11, 2013 through November 12, 2014 is 74-2/7 weeks. The total weeks of temporary total disability benefits is 83-6/7 weeks (9-4/7 weeks + 74-2/7 weeks). The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 15, 2015 is hereby affirmed and adopted with the above noted clerical and computational corrections.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $806.02 per week for a period of 83-6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $806.02 per week for a period of 18-6/7 weeks, that being the period of maintenance under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent prepare a written assessment of the course of medical care and, if appropriate, vocational rehabilitation to return Petitioner to employment pursuant to Commission Rule 7110.10(a).

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim for penalties under §19(k) and §19(l) and attorneys' fees under §16 is hereby denied.

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 paid $64,663.61 in TTD benefits.

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

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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 $18,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 13 2016
MB/maw
o12/03/15
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MALECKAS, RYAN
Employee/Petitioner

Case# **12WC033222**

16IWCC0030

FREEMAN DECORATING
Employer/Respondent

On 6/15/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

4128 RUBENS AND KRESS
FRANK KRESS
134 N LASALLE ST SUITE 444
CHICAGO, IL 60602

2623 McANDREWS & NORGLE LLC
MICHAEL LATZ
53 W JACKSON BLVD SUITE 315
CHICAGO, IL 60604

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STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Ryan Maleckas
Employee/Petitioner

v.

Freeman Decorating
Employer/Respondent

Case # 12 WC 33222

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Lynette Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on March 24, 2015 and April 22, 2015. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ 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 Vocational Rehabilitation

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FINDINGS

On **November 18, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 $**52,190.64 (43 1/7 week period)**; the average weekly wage was $**1,209.03**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **4** 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 $**64,663.61** 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

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $806.02/week for 83 3/7 weeks, commencing November 19, 2011 through January 24, 2012 and June 11, 2013 through November 12, 2014, as provided in Section 8(b) of the Act.

Maintenance
Respondent shall pay Petitioner maintenance benefits of $806.02/week for 18 5/7 weeks, commencing November 13, 2014 through March 24, 2015, as provided in Section 8(a) of the Act.

Vocational Rehabilitation
Pursuant to Commission Rule 7110.10 (a) the Respondent shall prepare a written assessment of the course of medical care, and, if appropriate, rehabilitation required to return the injured worker to employment.

Penalties
Penalties and attorney's fees are not awarded pursuant to the Act.

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

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

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Findings of Fact

The disputed issues in this matter are: 1) causal connection; 2) temporary total disability; 3) maintenance; 4) penalties; 5) attorneys fees; and whether the petitioner is entitled to vocational rehabilitation. *See,* AX1.

Petitioner's testimony

Ryan Maleckas ("Petitioner") testified that he worked as a union carpenter for Freeman Decorating, (the "Respondent"), at the time of this hearing. He further testified that he had been working as a union carpenter for twenty-two years and over twenty years strictly for the Respondent. The petitioner testified that he followed a procedure for getting work. He explained that someone from the Respondent's company would call and he would show up for a trade show at McCormick Place, Navy Pier, or a hotel in Chicago. If the Respondent did not have a show, the petitioner would show up and talk with the contractor and if they needed him, they would put him on, if not, he would go home. Petitioner also testified that his position does not have seniority. Tr. pp. 10-12.

On November 18, 2011, the petitioner was working when he was injured on the job. Petitioner testified that he was pulling carpet off the floor and rolling it up. There had been a machine show at McCormick Place prior to this particular workday; and double-faced tape was compressed into the carpet. The weight of the forklifts, semi-trailers and constant traffic, made the carpet adhere to the floor. To pull up the carpet, he had to bend down and stand forward and while doing so, he felt a pop and excruciating pain and fell to the floor. Tr. pp. 33-35.

During the trial, the petitioner testified that a case of double-faced tape weighs approximately twenty-five (25) pounds and the he would regularly lift a case to put it in a cart. He would have to load his cart with two cases of double-faced tape, three rolls of poly and his tools. The petitioner stated that poly was a plastic that protects carpet from forklift traffic and the rolls of poly weigh approximately thirty-two (32) pounds. The petitioner also explained that the he would sometimes have to load a roll of reinforced poly onto his cart, which weighed fifty (50) pounds. Tr. pp.13-15.

The petitioner testified that he would routinely have to throw the poly across the floor to cover an entire booth, as opposed to dropping it on the ground and rolling it out. The petitioner testified that one person would take the 50-pound poly and throw it out. The petitioner also explained that his bag of tools weighs approximately, thirty (30) to forty (40) pounds. Tr. pp. 15-17.

In addition to lifting and carrying tools, the petitioner described how he laid and moving carpet. The petitioner explained that he and his crew would show up to the job and the carpet was never dropped where it is supposed to be. He testified that trade shows are a mess, even when a crew moves in first. The carpenters have to pick up the carpet and place it where it is to be installed. Tr. pp. 18-29.

The petitioner testified that the smallest piece of carpet that he would have to move would be 9' by 10' and it could go up to 60' by 100'. The petitioner testified that he had the opportunity to weigh the carpet and that a 10' by 20' piece weighs sixty-eight (68) pounds. The petitioner testified that a one foot by one foot piece of carpeting weighs approximately three hundred seventy-three (373) pounds and that the heaviest that he would pick up and move around was a piece that was 10' by 30' in its dimensions, weighing approximately one hundred twelve (112) pounds. Specifically when asked if it was commonplace for a union carpenter working for the respondent to lift a 10' by 30' section of carpet, the petitioner testified that it was required. The petitioner explained that the heaviest carpet that he and fellow carpenters would have to move on the floor without padding, would be 10' by 125', weighing approximately four hundred sixty-six (466) pounds.

When specifically asked what items he was required to lift that exceeded forty (40) pounds, the petitioner stated "the carpet, the tool bags; and the platforms used to building stages". The petitioner explained that the platforms are large steel platforms with plywood on top and sometimes carpet, depending on whatever the occasion might be. The petitioner testified that the platforms exceed seventy-five (75) pounds and, in fact, could weigh up to two hundred (200) pounds. The petitioner further testified that he and one other carpenter would share the burden of lifting the larger skid because that it would be too cumbersome to try to lift with more than two men. Tr. pp. 104-105.

The petitioner explained that there is no seniority system in place for job assignments and that due to the lack of a seniority system, his work calls dropped considerably during the time that he was released to work, with restrictions; and his layoff on June 26, 2013. Tr. pp. 12-13, 44-45.

The petitioner has claimed an entitlement to vocational rehabilitation. There was no evidence presented that Respondent offered to assist the petitioner to find work, within his restrictions. The petitioner testified that he has done a self-directed job search that entitles him to maintenance as of the date that Dr. Butler released him on November 12, 2014. Tr. p. 55.

Petitioner testified that he worked, in a full duty capacity, until he was laid off on June 26, 2013. Additionally, Dr. Goldberg, Respondent's, Section 12 expert, noted that the petitioner could not return to work, in a full-duty capacity. The petitioner's testimony was credible that in order to perform the tasks of his job, he would need to lift excess of that which was exhibited in the May 30, 2014 FCE. The Arbitrator notes that according to the petitioner's testimony, the purported 40-pound lifting requirement is not expedient nor accurate.

Petitioner's treatment

On November 19, 2011, Petitioner went to the emergency room at Porter Regional Hospital. While the nurse's notes indicate that the petitioner injured himself getting out of his car, there is no dispute that he was injured while working for the respondent on November 18, 2011, and that he sought medical care as a result of that accident. PX1, p. 136.

Following his initial visit to the Porter Regional Hospital, the petitioner sought the care of Dr. Nikola Nenadovich of Lakeshore Bone and Joint. The petitioner testified that he went to Lakeshore Bone and Joint after the respondent's third party administrator provided him with a list of medical facilities to call. Dr. Nenadovich diagnosed the petitioner as having low back pain with a probable disc disorder. Dr. Nenadovich prescribed pain medication and recommended that the petitioner have sedentary work restrictions. Tr. p. 37; PX2, pp. 69-70.

On December 6, 2011, the petitioner returned to see Dr. Nenadovich and the doctor noted that the petitioner had no improvement in his symptoms and recommended that he begin physical therapy. Dr. Nenadovich increased the petitioner's pain medication and noted that if his symptoms persisted, he would recommend Percocet. PX2, p. 71-72.

Following several sessions of physical therapy, the petitioner returned to Lakeshore Bone and Joint on January 10, 2012 and Dr. Nenadovich noted significant improvement and recommended another two weeks of therapy, with a return visit to follow.

On January 24, 2012, the petitioner again presented to Dr. Nenadovich and it was noted that the petitioner had had significant improvement with physical therapy and was released to regular duty at work. Following another four sessions of physical therapy, the petitioner returned to see Dr. Nenadovich on February 14, 2012, complaining of increased pain after returning to work in a full duty capcity. Dr. Nenadovich recommended more physical therapy and pain medications, but still anticipated a release at maximum medical improvement ("MMI") at the petitioner's next visit. On April 24, 2012, Dr. Nenadovich released the petitioner at MMI, with an impairment rating of 2%. PX2, pp. 19, 73, 89-92.

Petitioner testified that due to ongoing pain and in contradiction to Dr. Nenadovich's release at MMI, he sought the care of Dr. Virgil DiBiase of Associates in Neurosurgery, on June 12, 2012. Dr. DiBiase noted that the petitioner had low back pain, radiating into the buttock, posterior thigh and behind the knee. Dr. DiBiase noted that S1 radiculopathy was the differential diagnosis therefore, he recommended an EMG and MRI. PX2, pp. 84-85.

In addition to being evaluated by Dr. DiBiase on June 12, 2012, the petitioner also sought care from Dr. Daniel Cha of Centers for Pain Control, the following day. Dr. Cha noted that despite Dr. Nenadovich's release, the petitioner was progressively getting worse. Dr. Cha diagnosed the petitioner with lumbago and recommended an EMG and MRI. On June 14, 2012, the petitioner underwent an MRI at Northwestern Medical Imaging that revealed disc bulges at L1-2, L2-L3, L3-L4, with a fissure and a disc protrusion at L5-S1. The following day, the petitioner underwent an EMG at the offices of Associates in Neurosurgery, which was read to show no abnormalities. PX4, pp. 6-9; PX5, pp. 4-6; PX6, p. 6.

On July 2, 2012, the petitioner followed-up with Dr. Cha after diagnostic testing. Dr. Cha read the MRI and noted that there was a focal disc protrusion at L5-S1, abutting the left S1 nerve root and mildly displacing it. Dr. Cha diagnosed the petitioner with lumbosacral spondylosis, without myelopathy. Dr. Cha recommended that the petitioner proceed with a diagnostic transforaminal injection, at the left side of the L5-S1 and S1 dorsal foramen. PX5, pp. 8-9.

On July 10, 2012, the petitioner underwent the diagnostic injection and returned to see Dr. Cha on July 23, 2012, who noted that the petitioner reported almost complete resolution of his pain for four to six (4-6) hours after the injection. Also noted was an increase in functional capacity, constituting short-term improvement. Based upon the fact that the petitioner received relief from the injection, Dr. Cha concluded that the primary etiology of the petitioner's pain was discogenic/radicular in nature. Based upon this result, Dr. Cha recommended a course of epidural steroid injections to treat the petitioner's condition, which on August 1, 2012 and August 15, 2012, he underwent. PX5, pp. 10-20.

Following the steroid injections, the petitioner returned to see Dr. Cha on September 12, 2012, who noted that the petitioner had done well with his injections; but that he had a worsening of symptoms in the previous week, due to an increased level of work and activity. Dr. Cha recommended that the petitioner undergo a diagnostic, lumbar, medial branch block to identify whether or not he had pain mediated by the facet joint. PX5, pp. 22-24.

On October 3, 2012, the petitioner underwent the medial branch block and returned to see Dr. Cha on October 8, 2012. Dr. Cha noted that the petitioner continued to have ongoing pain on the left side of his lower back; and that the therapeutic injections helped, but did not completely resolve his pain. Dr. Cha recommended a surgical consultation. PX5, pp. 28-29.

On January 18, 2013, Dr. Jesse Butler, of Spine Consultants, examined the petitioner to provide a surgical consultation. Dr. Butler noted the petitioner's history of a work-related accident and recommended a discogram and CT scan, to determine the specific levels of pain. PX7, pp. 42.

On May 1, 2013, Dr. Goldberg evaluated the petitioner at the request of the Respondent, pursuant to Section 12 of the Illinois Workers' Compensation Act (the "Act"). Dr. Goldberg opined that the petitioner's work accident could have accelerated or aggravated his low back condition and agreed with Dr. Butler that a discogram would be appropriate to ascertain whether the petitioner would be a surgical candidate. PX13.

On July 10, 2013, the petitioner underwent the recommended discogram at the Centers for Pain Control. The petitioner returned to see Dr. Butler on August 28, 2013, who reviewed the results of the discogram and lumbar CT scan; and recommended that Petitioner undergo a posterior, lumbar fusion at L5-S1, laminectomy and left-sided diskectomy. On October 18, 2013, Dr. Butler performed the surgery at Lutheran General Hospital. PX5, pp. 42-43; PX7, pp. 36-37, 116-118.

On October 31, 2013, Petitioner returned to see Dr. Butler, who noted that the petitioner had an improvement in his pre-operative symptoms, with a resolution of radiculopathy, numbness and tingling. Dr. Butler recommended that the petitioner remain off work, that he follow up with Dr. Cha for pain management; and that he modify his activity to accommodate his symptoms. PX7, pp. 3-32.

The petitioner returned to see Dr. Butler on November 21, 2013, who noted that the petitioner's symptoms had been improving and that he had been walking about 1 ½ miles per day. Dr. Butler continued to restrict the petitioner from work, but he did recommend that the petitioner begin a regimen of physical therapy three times per week for six weeks. The petitioner began his physical therapy at the Centers for Pain Control on December 5, 2013. PX7, pp. 27-29.

When the petitioner again saw Dr. Butler on December 27, 2013, Dr. Butler noted that the petitioner was doing well and that he should continue aerobic exercises for two weeks, with a progression to range of motion and core strengthening exercises thereafter.

Following several weeks of physical therapy, the petitioner returned to see Dr. Butler on February 27, 2014, who noted that the petitioner had been doing well in physical therapy. Dr. Butler also noted that the petitioner had occasional radicular pain to his bilateral thighs that was most impressive in the mornings or with prolonged sitting or standing. Dr. Butler recommended continued lumbar and core strengthening exercises with a follow-up visit in six weeks. PX7, pp. 23-24.

During his re-evaluation of the petitioner on April 10, 2014, Dr. Butler noted that the petitioner had been suffering from lower back pain that radiated down his left leg. Dr. Butler further noted that the petitioner initially suffered pain after his physical therapy sessions, but that he felt better about thirty minutes after a session. Dr. Butler indicated that he was hesitant to start work-conditioning until the petitioner's narcotic medication was decreased. Dr. Butler advised the petitioner to follow-up with Dr. Cha for a recommendation for proceeding with work-conditioning and obtaining a functional capacity evaluation ("FCE"). PX7, pp. 20-21.

On April 21, 2014, the petitioner saw Dr. Cha to discuss his pain medications and their potential impact on an FCE and it is noted that the petitioner was in the process of being weaned off morphine and other pain medications. Dr. Cha acknowledged that Dr. Butler wanted the petitioner to decrease his pain medications prior to undergoing an FCE and Dr. Cha believed that the petitioner could be weaned from Percocet to Hydrocodone. PX5, p. 88.
Dr. Cha recommended reducing the petitioner's Percocet to Norco and advised him to reduce his opioid medications as much as possible, to allow him to undergo the FCE. Dr. Cha opined that a "fairly accurate" FCE could be obtained if the petitioner was taking Norco, in lieu of the more potent Percocet. On April 24, 2014, the petitioner saw Dr. Butler, who ordered the FCE based upon Dr. Cha's recommendations. PX5, p. 89; PX7, p. 18.

On May 30, 2014, the petitioner performed an FCE at Accelerated Rehabilitation, a facility chosen by the Respondent's nurse case manager. The FCE revealed that the petitioner did not meet the lifting job demands of a carpenter, as he was limited to lifting sixty (60) pounds. The test was determined to be valid. Tr. 48-49; PX7, p. 57.

On June 25, 2014, Dr. Butler examined the petitioner and noted that the FCE revealed 60-pound lifting restrictions that prevented his return to work as a union carpenter. Dr. Butler recommended a return to work within the parameters of the FCE and placed the petitioner at MMI. PX7, pp. 15-16.

On November 12, 2014, the petitioner returned to see Dr Butler for a final time following a second IME performed by Dr. Goldberg. Dr. Butler wrote that the petitioner had a great outcome from a complicated surgery with pain management issues. Additionally, Dr. Butler specifically noted that he did not agree with a recommendation for work-conditioning, as he did not expect the results to be consistent with the petitioner obtaining a full-duty release. Dr. Butler further noted that he did not wish to see potential, additional injury, with the work-conditioning program and reiterated that the petitioner had reached MMI. PX7, p. 12.

Dr. Edward Goldberg's Independent Medical Examination, May 1, 2013

Dr. Goldberg reviewed Petitioner's medical records starting November 11, 2011 through April 6, 2011 and concluded that: 1) "lifting the carpet could aggravate prior disc degeneration at L3-4 through L5-S1"; 2) "this lifting injury could result in the petitioner's symptomology and that the herniation at L5-S1 was not initially discussed in the MRI from 2007"; 3) the subject "accident could have accelerated or aggravated the pre-existing degenerative disease at L3-4 through L5-S1 and or caused the herniation at L5-S1" 4) "treatment, today has been appropriate however the petitioner was fearful and wanted to wean off narcotic medication"; 5) "he cannot return to work as a carpenter position [sic]. He is capable of working with a 10-pound lifting restriction. Regarding additional treatment, I do believe discography to be reasonable to ascertain whether he would be a surgical candidate in any capacity. If the discography indicates that none of his symptoms can be reproduces then I would recommend an FCE and return to work within the parameters of FCE." Attachment to PX13.

Testimony of Respondent's first witness, Drew Massa

Mr. Massa testified that he has worked for the respondent for twenty-seven (27) years and is the director of risk management. He was shown Respondent's exhibit 1, which is an analysis of the job title of "outside carpenter" utilized by the Respondent. This witness testified that an outside carpenter is only required to lift forty (40) pounds.

When initially asked if a union carpenter could return to work with lifting restrictions, Mr. Massa testified that the Respondent would not accept him back. Upon re-direct examination, Mr. Massa attempted to qualify his response by stating that if a union carpenter had a lifting restriction of 10 or 20 pounds, then Respondent would not take him back according to the job analysis. He went on to

testify that if the person could lift and do his job within the job analysis, then according to Mr. Massa, the respondent would take him back. The Arbitrator notes that this testimony is ambiguous and is in direct contradiction to the petitioner's testimony as to what his daily duties are. Tr. pp. 87-88.

Testimony of Respondent's second witness, Michael Benson

Mr. Benson testified that he is the director of show site operations for McCormick Place; and also deals with safety and risk management. He knows the petitioner and was on site the day of the accident. He also was shown Respondent's exhibit 1 and testified that the lifting weight limit of forty (40) pounds, for a carpenter, was true and accurate and that safety meetings were held every morning wherein the lifting restrictions were reiterated. He further testified that he told the carpenters not to lift more than forty (40) pounds. The Arbitrator notes that the petitioner testified that the Respondent is able to choose which carpenters to call to work and that his calls to work diminished after his accident.

Conclusions of Law

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

Causation, in a workers' compensation case, may be established by a chain of events showing prior good health, an accident and a subsequent injury. *Gano Electric Contracting v. Industrial Comm'n,* 260 Ill. App. 3d 92, 96-97, 631 N.E.2d 724 (1994); *see also, Darling v. Industrial Comm'n,* 176 Ill. App. 3d 186, 193, 530 N.E.2d 1135 (1988).

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

The Respondent has disputed that the petitioner's current state of ill-being is causally related to his work accident of November 18, 2011. Given Dr. Goldberg's opinions and those of Drs. Cha and Butler, the Arbitrator finds that the petitioner's current state of ill-being is causally related to his work accident of November 18, 2011.

K. What temporary total disability benefits are in dispute?

TTD and Maintenance

For the purposes of this matter, it was stipulated that the respondent paid temporary total disability benefits through October 23, 2014, in the amount of $64,663.61. The petitioner is seeking additional temporary total disability benefits through November 12, 2014, the date that Dr. Butler placed the petitioner at MMI, following the second Section 12 examination by Dr. Goldberg. Petitioner is also claiming an entitlement to maintenance benefits from November 12, 2014 through the date of the

hearing in this matter, i.e., April 22, 2015. The Arbitrator notes that neither party entered the second IME into evidence.

It is the petitioner's position that a fundamental issue in this matter is whether the petitioner can return to work, in the full capacity of his employment as a union carpenter, in that he exhibited the ability to lift only sixty (60) pounds, in his FCE of May 30, 2014.

Also, the petitioner has testified that a union carpenter must lift, drag, and carry weights in excess of the limitations of his FCE; while both Respondent's witnesses have testified that a union carpenter is only required to lift forty (40) pounds to perform the full duties of the job.

The Arbitrator concludes that the petitioner's testimony regarding the weights of the tools and the materials that he works with, i.e., carpet, poly and his loaded cart is credible. The notion that the petitioner would only be required to lift forty (40) pounds to perform the tasks as described by him, strains credibility.

In addition, Dr. Butler specifically noted that he did not expect the work-conditioning program to be consistent with a full-duty release and that he did not wish to see any additional injury to Petitioner. The Arbitrator concludes that there are valid reasons to agree with the opinion of Dr. Butler; that the petitioner reached MMI as of November 12, 2014, with permanent restrictions that prevent him from returning to full-duty work, as a union carpenter.

For the reasons above, the Arbitrator finds that the petitioner is entitled to temporary total disability benefits from October 24, 2014 through November 12, 2014, and maintenance benefits from November 13, 2014 through April 22, 2015. In support of the award of maintenance, the Arbitrator notes that the petitioner testified that he was actively looking for work within his restrictions since Dr. Butler released him from his care and produced evidence of that search.

M. Should penalties and fees be imposed upon Respondent?

Illinois courts have refused to assess penalties under sections 19(k) and (l) of the Act where the evidence indicates that the employer reasonably could have believed that the employee was not entitled to the compensation withheld. *See, Board of Education v. Industrial Commission*, 93 Ill.2d 1, 442 N.E.2d 861 (1982); *See also, Avon Products, Inc. v. Industrial Commission,* 82 Ill. 2d 297 (1980) and *Brinkmann v. Industrial Commission*, 82 Ill. 2d 462 (1980). "Where a delay has occurred in payment of workmen's compensation benefits, the employer bears the burden of justifying the delay, and the standard we hold him to is one of objective reasonableness in his belief." *Id. See also, City of Chicago v. Industrial Commission*, 63 Ill. 2d 99 (1976).

The petitioner has filed for penalties to be assessed against the Respondent citing Dr. Goldberg's May 1, 2013, report on behalf of the Respondent, that recommended a discography to further diagnose the

petitioner's condition and Dr. Goldberg prescribing a ten-pound lifting restrictions that prohibited the petitioner's return to work, without restrictions. As, the respondent did not file a response to the Petition for Penalties, the Arbitrator must rely on the actions of Respondent to determine if penalties and attorneys' fees are warranted.

Petitioner argues that because Dr. Goldberg's opinion was not immediately disclosed to the petitioner, the petitioner continued to work, in a full-duty capacity, in violation of restrictions, until he was laid off on June 26, 2013. Additionally, from June 26, 2013 through the date of the filing of the penalty petition, the respondent only issued an advance toward the temporary total disability, but failed to pay the petitioner regular temporary total disability benefits despite the unequivocal opinion of Dr. Goldberg that he could not work as a carpenter.

The Arbitrator finds the Respondent paid TTD in the amount of $64,663.61 and provided a nurse case manager, medical care and guidance. The Arbitrator concludes that Respondent has not acted in a vexatious and unreasonable manner and therefore, no attorney's fees or penalties will be awarded, pursuant to the Act.

O. Is Petitioner entitled to vocational rehabilitation?

The Commission has been clear regarding a respondent's duty to provide vocational rehabilitation to injured workers. In the matter of *Mary Katheryn Pate v. United Airlines*, No: 10WC 16528, 12 IWCC 357; 2012 Ill. Wrk. Comp. LEXIS 349, P. 31, the Commission wrote that Section 7110.10(a) of the Rules Governing Practice Before the Illinois Workers' Compensation Commission 50 Ill. Admin. Code, states in pertinent part:

> The employer or his representative, in consultation with the injured employee and, if represented, with his or her representative, shall prepare a written assessment of the course of medical care, and, if appropriate, rehabilitation required to return the injured worker to employment when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which engaged at the time of injury, or when the period of total incapacity for work exceeds 120 continuous days, whichever first occurs.

In *Pate,* the Commission found that Respondent did not offer Petitioner a vocational rehabilitation assessment as required. The Commission, therefore, awarded Petitioner a vocational assessment pursuant to Section 7110.10(a). The Commission cited the appellate court case of *Roper v Industrial Commission*, 349 Ill.App.3d 500, 812 N.E.2d 65, Ill. Dec. 476 (5th Dist. 2004)in support of its award. Specifically, it stated that the petitioner has requested that she be awarded maintenance benefits from June 19, 2008, through December 22, 2010 (the date of the arbitration hearing). Id. In, *Roper,* the appellate court stated:

> [§8(a)] requires an employer to pay for an employee's necessary physical, mental and vocational rehabilitation, including the costs and expenses of maintenance. 820 ILCS 305/8(a) (West 2002). Simply read, section 8(a) sets forth the fiscal obligations of an employer under the Act, including an employer's duty to provide maintenance benefits to an employee undergoing vocational rehabilitation. Id.

In the subject matter, the Respondent has a duty to provide vocational rehabilitation to this Petitioner. Rule 7110.10 (a) states that the Respondent shall prepare a written assessment of rehabilitation required to return an injured worker when it can be reasonably determined that the injured worker will, as a result of the injury, is unable to resume the regular duties in which he was engaged at the time of injury; *or* when the period of total incapacity for work exceeds 120 continuous days. In this matter, both Drs. Butler and Dr. Goldberg were of the opinion that the petitioner cannot return to unrestricted work.

Additionally, the 120th day of disability was October 9, 2013. At that time, had Respondent followed Commission rules, it would have prepared a vocational assessment. The Arbitrator finds that the Respondent shall provide the petitioner with a vocational rehabilitation assessment as required by Commission rules.

16IWCC0030

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
12WC33222
SIGNATURE PAGE

Signature of Arbitrator

June 15, 2015
Date of Decision

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

Michael Crawford,
Petitioner,

vs.

NO: 11 WC 13198

State of Illinois/Menard Correctional Center,
Respondent,

16IWCC0031

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical, prospective 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 July 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.

No bond or summons for State of Illinois cases.

DATED: JAN 13 2016

MB/mam
o:1/7/16
43

Maria Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CRAWFORD, MICHAEL
Employee/Petitioner

Case# **11WC013198**

16IWCC0031

STATE OF ILLINOIS/MENARD CORR CTR
Employer/Respondent

On 7/6/2015, 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 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

JUL 6 - 2015

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

16IWCC0031

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

Michael Crawford
Employee/Petitioner

v.

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

Case # **11** WC **13198**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Herrin**, on **January 13, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0031

FINDINGS

On **March 12, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$57,258.00**; the average weekly wage was **$1,101.12**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of **$1,887.71** for TTD, $- for TPD, $- for maintenance, and **5 service connected days** for other benefits, for a total credit of **$1,887.71 and 5 s/c days.**

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $734.08/week for 13 weeks, for Petitioner's periods of temporary total disability from 3/13/11 through 4/13/11, 4/23/11 through 4/25/11, and 6/16/11 through 8/10/11, as provided in §8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $42,011.25, as outlined herein below, pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent shall have credit for any benefits which have been paid by its group health carrier and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in § 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $660.67/week for 21.5 weeks, because the injuries sustained caused the 10% loss of the left leg, as provided in § 8(e) of the Act.

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

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

Signature of Arbitrator

6/26/15
Date

JUL 6 - 2015

FINDINGS OF FACT

Petitioner is a Correctional Food Service Supervisor II. Petitioner testified that on March 12, 2011, he was escorting two inmates on a "trash run" when he stepped out of the kitchen door, walked across broken concrete, twisted his ankle, and fell on his left knee. (T.12, 13, 21, 22) Petitioner had no prior injuries to his left knee and had not required any treatment or diagnostic studies for his left knee prior to March 12, 2011. (T.13)

When asked to describe the grounds where the injury occurred on Respondent's premises, Petitioner testified that "the concrete was damaged all through that area." (T.22) Petitioner testified that at the time he encountered the defect, he was distracted because an inmate behind him started to speak to him and he turned to look at him. (T.23, 24) Petitioner testified without rebuttal that the general public is not permitted to traverse the prison grounds where he fell. (T.31)

Petitioner presented to Memorial Hospital of Carbondale for emergency care with right ankle, left knee and left groin pain. (PX3, 3/12/11) Swelling, tenderness and an abrasion to his left knee were noted on examination. *Id.* The CT of Petitioner's pelvis was negative. *Id.* Petitioner sought follow-up care for the same complaints two days later with Dr. Mark Austin of Southern Illinois Healthcare, who examined Petitioner and assessed a left knee contusion, abrasion and a "large tender popliteal (Baker's) cyst;" a grade II right ankle inversion sprain, and a lumbar strain. (PX4) Petitioner was placed on restrictions of no more than occasional lifting, pushing or pulling in excess of 20 pounds and instructed to avoid climbing stairs or ladders and kneeling or squatting. *Id.* Petitioner was further instructed not to participate in running, jumping or restraining inmates. *Id.* Dr. Austin prescribed braces, recommended over-the-counter anti-inflammatory medications, ordered x-rays of Petitioner's right ankle and knee, and an MRI of Petitioner's left knee. *Id.*

The radiographs of Petitioner's right ankle noted soft tissue swelling adjacent to the lateral malleolus attributable with a diagnosis of contusion or ligamentous injury. *Id.* The x-ray of Petitioner's knee was negative. *Id.* Dr. Austin noted, however, that Petitioner's left knee exhibited pain, posterior cystic swelling and tenderness in the popliteal area. *Id.* He indicated that Petitioner would require an orthopedic referral and an MRI. *Id.*

Petitioner testified that he intended to seek care with Dr. Paletta; however, since Dr. Paletta was not in the office, his staff referred him to Dr. Bayes for evaluation of his left knee injury. (T.26) Dr. Bayes noted that Petitioner had not yet received the recommended MRI, but during physical examination noted obvious boggy palpable effusion, palpable popliteal cyst in the posterior knee, significant medial knee joint tenderness, palpable end point to ACL testing with anterior drawer and Lachman test and guarding with pivot shift test. (PX5, 3/28/11) Dr. Bayes assessed acute onset of left knee pain causally related to the work fall on March 12, 2011. Petitioner was given a compression knee sleeve, prescribed Naproxen, and remained under work restrictions. *Id.*

Petitioner underwent the recommended left knee MRI on March 28, 2011, and it confirmed and measured Petitioner's cyst as a 3 x 5 centimeter medial popliteal fossa cyst. (PX6) Dr. Bayes reviewed the MRI and noted that it also showed significant bone contusion to the patella. (PX5, 3/31/11) He assessed Petitioner suffered from a patellar bone contusion with secondary popliteal cyst. *Id.* He performed aspiration of Petitioner's cyst under ultrasound guidance without subsequent injection and recommended physical therapy. *Id.* Petitioner returned on April 5, 2011, and reported that his cyst returned within 24 hours following the aspiration

with more pain in the posterior aspect of his knee. (PX5, 4/5/11) Dr. Bayes performed another aspiration, followed this time by an injection, and prescribed Medrol Dosepak. *Id.* Petitioner remained on restricted duty. *Id.*

When Petitioner returned to Dr. Bayes on April 21, 2011, his condition continued to deteriorate. (PX5, 4/21/11) Despite the previous two left knee aspirations and an injection, Petitioner's painful cyst returned. *Id.* Petitioner reported that is pain was worsened with prolonged weight-bearing. *Id.* Although Petitioner attended several visits of physical therapy, which helped with his range of motion and strength, it did not improve his swelling or pain. *Id.* Dr. Bayes offered Petitioner treatment choices of aspiration with prolotherapy, aspiration with injection, and surgical evaluation. Petitioner elected to proceed with prolotherapy and aspiration. *Id.* Dr. Bayes discontinued Petitioner's physical therapy and briefly restricted Petitioner further to seated work only to improve his odds of successful treatment. *Id.* However, Petitioner again failed conservative care and his cyst returned within 24 hours with persistent posterior pain. (PX5, 5/12/11) Dr. Bayes noted that Petitioner's left knee was aspirated multiple times and that Petitioner failed to improve despite injection in the left anterior knee joint itself, injection within the popliteal cyst with steroids, and with prolotherapy. *Id.* He recommended that Petitioner be evaluated by Dr. Paletta with diagnostic arthroscopy. *Id.*

Dr. Paletta saw Petitioner on May 25, 2011, took a consistent history of Petitioner's accident, and noted Petitioner's history of failed conservative care. (PX7, 5/25/11) Petitioner continued to report left knee pain as well as posterior tightness, discomfort and a sense of instability. *Id.* Dr. Paletta's impression was persistently symptomatic Baker's cyst from the setting of probable posttraumatic patellofemoral pain of the left knee. *Id.* Dr. Paletta also recommended arthroscopy of the knee with excision of the Baker's cyst. *Id.* He also agreed with the work restrictions of Dr. Bayes and continued them. *Id.*

On June 16, 2011, Dr. Paletta performed a left knee diagnostic arthroscopy, arthroscopic partial synovectomy, and arthroscopic excision and decompression of the Baker's cyst to address Petitioner's left knee synovitis and Baker's cyst. (PX8, 6/16/11) Petitioner followed up with Dr. Paletta on July 11, 2011, and advised that he felt like his cyst recurred. (PX7, 7/11/11) Although Dr. Paletta hoped it would resolve as the surgical cite for the cyst scarred, Petitioner returned with the same complaints on August 15, 2011. (PX7, 8/15/11) Petitioner reported that the cyst tends to bulge out when he stands for a prolonged period, and that he has difficulty with squatting and kneeling. *Id.* Dr. Paletta recommended a new MRI of Petitioner's left knee, which demonstrated a small-to-moderate residual Baker's cyst that appeared only slightly smaller than the cyst in his pre-operative MRI scan. (PX7, 8/15/11, 10/3/11) Dr. instructed Petitioner to avoid squatting and kneeling as much as possible. He was placed at maximum medical improvement and released to full duty. *Id.*

Petitioner testified that despite the improvement resulting from surgery, he continues to suffer some effects of his injury. (T.16) He continues to wear a compression brace on his left knee to reduce swelling. (T.16, 17) He testified that he did not wear any type of brace or assistive device for his left knee prior to the accident. (T.16) Petitioner testified that he is on his feet for nearly his entire 8-hour work day. (T.17, 18) He testified that his knee is considerably swollen at the end of his shift. (T.18) His hobbies of gardening and wood cutting and his ability to recreate with his minor children have been adversely affected. (T.19) Petitioner takes over-the-counter Naproxen for his swelling and pain. (T.18).

Respondent had Petitioner evaluated under § 12 by Dr. Timothy Farley on July 26, 2011, after arthroscopic surgery had already been performed. (RX1, p.6, 7) Dr. Farley testified that cysts generally appear in the knees of individuals that have pathology; however, 19% to 20% of Baker's cysts develop in normal knees of asymptomatic individuals. *Id.* at 11. Dr. Farley did not identify any cartilage or meniscus problems from Petitioner's MRI or the arthroscopic examination of Dr. Paletta. *Id.* at 11, 12. He testified that he did not believe that Petitioner's cyst was related to his work fall of March 12, 2011, because Petitioner did not demonstrate any specific intraarticular pathology outside of the cyst. *Id.* at 12, 13. He attributed Petitioner's development of the cyst to "a one-out-of-five chance of simply having a popliteal cyst." *Id.* at 13. He believed that the only injury Petitioner sustained as a result of his work injury was a deep anterior contusion from which he should have recovered in three to four months. *Id.* at 14, 15.

On cross-examination, Dr. Farley acknowledged that Petitioner sustained a direct blow to his left knee and acknowledged that Baker's cysts can result from trauma to the knee. *Id.* at 20, 21. He also acknowledged that Petitioner's medical records indicate that the cyst developed within 48 hours of his work accident. *Id.* at 21-23. Nevertheless, he testified that he believed that Petitioner's deep bone contusion to his knee had nothing to do with the creation of the cyst, and further testified that he did not believe that the incident made the cyst symptomatic despite the lack of any prior complaints, treatment or any indication of its existence. *Id.* at 28-31, 33.

Dr. Paletta also testified by way of deposition. (PX9) Dr. Paletta explained that his diagnosis of "persistently symptomatic Baker's cyst in the setting of post-traumatic patellofemoral pain" meant that Petitioner was experiencing pain related to his kneecap from a direct blow of his fall as well as symptoms related to his Baker's cyst despite nonsurgical treatment. (PX9, p.10) Dr. Paletta noted that Petitioner's left knee was entirely asymptomatic prior to his accident, but was persistently symptomatic afterward. *Id.* at 11. Dr. Paletta testified that this led him to the conclusion that Petitioner's work accident was as least an aggravating factor in his left knee condition. *Id.* at 11.

Dr. Paletta testified that due to the high recurrence rate of Baker's cysts, surgery is performed as a method of last resort; however, Petitioner underwent extensive nonoperative management with no lasting relief. *Id.* at 8, 9, 15. Dr. Paletta performed surgery and removed the cyst; however, the cyst recurred in a smaller form with multiple loculations. *Id.* at 16, 17. With respect to causation Dr. Paletta stated "I can't state that the fall caused the cyst, but this gentleman was asymptomatic prior to that and then had symptoms that were typical of a symptomatic Baker's cyst. So in my opinion, the fall resulted in patellofemoral pain, swelling of the knee, and symptoms related to the Baker's cyst." *Id.* at 18.

CONCLUSIONS OF LAW

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

Petitioner testified without rebuttal that while he was distracted by conversation with an inmate, he stepped on broken concrete, twisted his right ankle and fell on his left knee. (T.12, 13, 22-24). The medical records consistently document that Petitioner's accident occurred as a result of a hazard on Respondent's premises.

Petitioner must establish that his injury arose out of and in the course of his employment with Respondent. Since it is clear from the evidence in the record that Petitioner was in the course of his employment performing tasks required of him by Respondent at the time his injury occurred, the dispute centers on whether Petitioner's injury arose out of his employment with Respondent.

Liability is imposed where an injury occurs as a direct result of a hazardous condition on the employer's premises. *USF Holland, Inc. v. Industrial Commission*, 357 Ill.App.3d 798, 829 N.E.2d 810 (1st Dist., 2005) citing *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill.2d 52, 541 N.E.2d 665 (Ill. 1989); *see also See Archer Daniels Midland Co. v. Indus. Comm'n*, 91 Ill.2d 210, 437 N.E.2d 609, 610 (Ill. 1982); and *Material Service Corp., Division of General Dynamics v. Industrial Commission*, 53 Ill.2d 429, 292 N.E.2d 367 (Ill. 1973) (when conditions of the parking lot were a contributing cause to employee's death, employer was liable even though employee was not engaged in any work activity). When injury to an employee takes place in an area that is a part of the employer's premises that is attendant with a special risk or hazard, **the hazard becomes part of the employment** and satisfies the "arising out of" requirement of the Act. *Springfield Urban League v. Illinois Workers' Comp. Comm'n*, 2013 IL App (4th) 120219WC, 990 N.E.2d 284, 291 citing *Litchfield Healthcare Center v. Industrial Comm'n*, 349 Ill.App.3d 486, 812 N.E.2d 401, 406 (5th Dist. 2004).

The facts show that Petitioner was injured as a direct result of a hazardous defective condition rather than a neutral risk on Respondent's premises, namely broken concrete. The Arbitrator notes that the injury took place on prison grounds, where the general public is not permitted (T.31); and while Petitioner was distracted by an inmate.

Based upon the foregoing, the Arbitrator finds that Petitioner sustained an accidental injury which arose out of and in the course of his employment with Respondent.

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

"[A] preexisting condition does not prevent recovery under the Act if that condition was aggravated or accelerated by the claimant's employment." *Absolute Cleaning/SVMBL v. Illinois Workers' Comp. Comm'n*, 409 Ill. App. 3d 463, 470, 949 N.E.2d 1158, 1165 (4th Dist. 2011) citing *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill.2d 30, 36, 440 N.E.2d 861 (Ill. 1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 797 N.E.2d 665, 672 (Ill. 2003).

Causal connection between work duties and injured condition may be established by chain of events including workers' compensation claimant's ability to perform duties before date of accident and inability to perform same duties following date of accident. *Darling v. Indus. Comm'n of Illinois*, 176 Ill. App. 3d 186, 530 N.E.2d 1135 (1st Dist. 1988). Circumstantial evidence, especially when entirely in favor of the Petitioner, is also sufficient to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (4th Dist. 1994); *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (Ill. 1982).

Prior to the accident, Petitioner required no care or treatment for his left knee. After the accident, however, Petitioner consistently complained of left knee pain. Within 48 hours of his accident, the first medical

documentation of a "large tender popliteal (Baker's) cyst" surfaced. (PX3, 3/12/11) Dr. Paletta noted that if Petitioner's cyst did exist prior to the accident, it was entirely asymptomatic. (PX9, p.11) Dr. Paletta therefore opined that Petitioner's accident was *at least* an aggravating factor in Petitioner's condition of ill-being and his need for treatment. *Id*

Dr. Farley acknowledged that Petitioner sustained a direct blow to his left knee and that Baker's cysts can result from trauma to the knee (RX1, p.20, 21); and that the first complaints ever recorded regarding any cyst developed within 48 hours of his work accident; (RX1, p.21-23) but yet testified that he believed that Petitioner's deep bone contusion to his knee neither played part in the creation of the cyst nor made any pre-existing cyst symptomatic. (RX1, p.28-31, 33). Instead, he believed Petitioner's cyst was "idiopathic" or simply appeared without cause.

The Arbitrator finds Dr. Paletta's opinion more persuasive and supported by the evidence. The Arbitrator does not believe that Petitioner's development of a symptomatic cyst within two days of the traumatic accident is a mere coincidence. Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner met his burden of proof in establishing that his current condition of ill-being is causally related to his accident.

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

The parties stipulated on the record that some of the physicians who provided treatment for Petitioner's knee had also provided treatment for unrelated upper extremity conditions. They further stipulated that none of the charges relative to upper extremity treatment were to be considered in this decision.

Petitioner underwent extensive conservative treatment in the effort to relieve the effects of his injury. Petitioner had his knee aspirated 3 times, received 2 different types of injections, used a compression sleeve and underwent physical therapy; however, these failed to improve his condition. (PX5) Only after the failure of conservative treatment did Dr. Bayes recommend evaluation by Dr. Paletta, who recommended and performed surgery. Petitioner's surgery met with only limited success; he was able to return to work, but his cyst recurred. (PX7; PX8) Nevertheless, Petitioner exhausted all options and every method of treatment utilized was employed in the quest to relieve and/or cure the effects of his injury.

Therefore, the Arbitrator finds that the medical treatment rendered to Petitioner relative to his left knee has been reasonable and necessary and Respondent is liable for same. The difficulty in this case is determining which bills are related to the knee, which are related to the upper extremities, and which are related to both. The deposition testimony of Dr. Paletta was helpful in this regard as he explained the codes pertaining to the knee surgery and those pertaining to the upper extremity treatment. Petitioner submitted bills totaling $58,482.06. (PX1) Of these bills Petitioner met his burden of establishing the following bills are reasonable and necessary to treat his left knee condition:

Memorial Hospital of Carbondale	3/12/11	$ 5,469.00
	4/19/11	$ 513.00

Dr. Mark Austin	3/14/11	$ 674.25
Cape Radiology Group	3/14/11	$ 69.00
Dr. Mathew Bayes	3/28/11- 5/12/11	$ 7,348.00
MRI Partners of Chesterfield	3/28/11 & 10/3/11	$ 4,000.00
The Ortho. Center of STL	6/16/11	$ 3,835.00
	6/16/11	$ 2,444.00
Dr. George Paletta	6/16/11	$ 11,130.00
	10/3/11	$ 170.00
	10/6/11	$ 69.00
St. Louis Surgery Center	6/16/11	$ 6,290.00
		$ 42,011.25

The remainder of the submitted charges are either related to the upper extremity treatment or so intertwined with that unrelated treatment that Petitioner cannot be said to have met his burden of establishing that the treatment corresponding to the bills was necessary due to his knee condition.

Respondent shall pay the above stated charges totaling $42,011.25 pursuant to the fee schedule and shall have a credit for any medical expenses paid through its group carrier, but shall indemnify Petitioner from any claims made by any providers arising out of the amounts for which it claims credit, pursuant to §8(j) of the Act.

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

Petitioner claims he was temporarily and totally disabled for 20 2/7 weeks from 3/13/11 through 4/13/11, 4/23/11 through 4/25/11, and 6/16/11 through 10/3/11. Respondent disputed liability for Petitioner's period of temporary disability based on its dispute of accident and causal connection. Having previously found that Petitioner met his burden of establishing accident and causal connection the Arbitrator finds Petitioner established his entitlement to benefits for the periods of 3/13/11 through 4/13/11 and 4/23/11 through 4/25/11. The question of Petitioner's entitlement to benefits for the period of 6/16/11 through 10/3/11 is more complicated. On 6/16/11 Petitioner underwent surgery for both his knee injury and an unrelated upper extremity condition. He then subsequently underwent surgery on his other upper extremity. Dr. Paletta testified that in terms of his knee condition, Petitioner would have been able to return to work without restriction by August 10, 2011. (PX9, p. 49)

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner is entitled to benefits for the period of 3/13/11 through 4/13/11, 4/23/11 through 4/25/11, and 6/16/11 through 8/10/11 for a total of 13weeks. Respondent shall therefore pay temporary total disability benefits in the amount of $734.08 per week for a period of 13 weeks, as provided in §8(b) of the Act. Respondent shall have credit for the 5 service connected days and $1,887.71 in temporary total disability benefits paid to Petitioner pursuant to § 8(j) of the Act.

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

Petitioner testified that despite some improvement resulting from surgery, he continues to suffer some effects of his injury. (T.16) He continues to wear a compression brace on his left knee to reduce swelling. (T.16, 17) He testified that he did not wear any type of brace or assistive device for his left knee prior to the accident. (T.16) Petitioner testified that he is on his feet for nearly his entire 8-hour work day. (T.17, 18) He testified that his knee is considerably swollen at the end of his shift. (T.18) His hobbies of gardening and wood cutting and his ability to recreate with his minor children have been adversely affected. (T.19) Petitioner takes over-the-counter Naproxen for his swelling and pain. (T.18).

Petitioner's complaints are substantiated by the evidence in the medical records. Dr. Paletta testified that Petitioner's cyst recurred following surgery in a smaller form with multiple loculations. (PX9, p.16, 17). During Petitioner's final visit, Dr. Paletta instructed Petitioner to avoid squatting and kneeling as much as possible. (PX7, 10/3/11) Based upon the foregoing, the Arbitrator finds that Petitioner sustained 10% loss of his left leg.

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STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Deborah Madden, Surviving Spouse
of Thomas Madden, Deceased,

Petitioner,

vs. NO: 09WC 38543

Lorig Construction Company,

16IWCC0033

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, permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 9, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay death benefits commencing, July 31, 2009, of $1,013.33 per week to the surviving spouse, Deborah Madden, on her own behalf and on behalf of the minor children, Ashley Madden, born January 16, 1993, and Tom Madden, born June 1, 1988, until $500,000.00 has been paid or 25 years of benefits, whichever is greater, have been paid, because the injury caused the death of employee, Thomas Madden, as provided in Section 7(f) of the Act.

IT IS FURTHER ORDERED if the surviving spouse dies before the maximum benefit has been reached, and the children herein named still survive, Respondent shall continue to pay benefits until the youngest child reaches 18 years of age; however, if such child is enrolled as a full time student in an accredited educational institution, payments shall continue until the child

16IWCC0033

reaches **25** years of age. If any child is physically or mentally incapacitated, payments shall continue for the duration of the incapacity. If no children named herein are alive upon the death of the surviving spouse, payments shall cease. If the surviving spouse remarries, and no children remain eligible, Respondent shall pay the surviving spouse a lump sum equal to **two** years of compensation benefits; all further rights of the surviving spouse shall be extinguished. Respondent shall make payments for not less than **six** years to any eligible child under **18** years of age at the time of death.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner reasonable and necessary medical services of $588,024.83, as provided in Section 8(a) of the Act, subject to and pursuant to the medical fee schedule, as provided in Section 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July15th after the entry of this award, the petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 14 2016
o121715
DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
FATAL

MADDEN, DEBORAH SURVIVING SPOUSE OF MADDEN, THOMAS DECEASED
Employee/Petitioner

Case# 09WC038543

16IWCC0033

LORIG CONSTRUCTION COMPANY
Employer/Respondent

On 2/9/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0152 LINN, CAMPE & RIZZO LTD
JOHN J RIZZO
215 N MARTIN L KIND AVE
WAUKEGAN, IL 60085

2097 GRANT & FANNING
DANIEL SWANSON
300 S RIVERSIDE PLZ SUITE 2050
CHICAGO, IL 60606

16IWCC0033

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
FATAL

DEBORAH MADDEN, Surviving Spouse of THOMAS MADDEN, Deceased,
Employee/Petitioner

v.

LORIG CONSTRUCTION COMPANY,
Employer/Respondent

Case # 09 WC 38543

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Waukegan**, on **September 24, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Decedent's earnings?

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

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

J. ☒ Who was dependent on Decedent at the time of death?

K. ☒ Were the medical services that were provided to Decedent reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

L. ☒ What compensation for temporary total disability, if any, is due?

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

N. ☐ Is Respondent due any credit?

O. ☒ Other: Is Respondent liable for Burial Expenses?

FINDINGS

On the date of accident, **July 15, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Decedent's death *is* causally related to the accident.

In the year preceding the injury, Decedent earned $79,040.00; the average weekly wage was $1,520.00.

On the date of accident, Decedent was **51** years of age, *married* with *two* dependent children.

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

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

Respondent shall be given a credit of $ **0.00** for burial and funeral expenses.

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

The Arbitrator finds that Decedent died on **July 31, 2009**, leaving *three* survivor(s), as provided in Section 7(a) of the Act, including **Deborah Madden,** his wife, and his two minor children**, Ashley Madden** and **Tom Madden.**

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,013.33/week for 2-2/7 weeks, commencing **July 16, 2009** through **July 31, 2009,** as provided in Section 8(b) of the Act.

Respondent shall pay death benefits, commencing **July 31, 2009,** of $1,013.33/week to the surviving spouse, **Deborah Madden,** on her own behalf and on behalf of the minor children, **Ashley Madden,** born **January 16, 1993,** and **Tom Madden,** born **June 1, 1988,** until $500,000.00 has been paid or 25 years, whichever is greater, have been paid, because the injury caused the death of employee, **Thomas Madden,** as provided in Section 7(f) of the Act.

If the surviving spouse dies before the maximum benefit has been reached, and the children herein named still survive, Respondent shall continue to pay benefits until the youngest child reaches 18 years of age; however, if such child is enrolled as a full time student in an accredited educational institution, payments shall continue until the child reaches 25 years of age. If any child is physically or mentally incapacitated, payments shall continue for the duration of the incapacity. If no children named herein are alive upon the death of the surviving spouse, payments shall cease.

If the surviving spouse remarries, and no children remain eligible, Respondent shall pay the surviving spouse a lump sum equal to two years of compensation benefits; all further rights of the surviving spouse shall be extinguished.

Respondent shall make payments for not less than **six** years to any eligible child under 18 years of age at the time of death.

Respondent shall pay $ **0.00** in burial expenses to the surviving spouse or the person(s) incurring the burial expenses, as provided in Section 7(f) of the Act.

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

Respondent shall pay to Petitioner reasonable and necessary medical services of $**588,024.83,** as provided in Section 8(a) of the Act, subject to and pursuant to the medical fee schedule, as provided in Section 8.2 of the Act.

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

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

Signature of Arbitrator JOANN M. FRATIANNI

February 3, 2015
Date

FEB 9 - 2015

FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE ARBITRATOR

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

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

On July 15, 2009, Decedent worked for Respondent stripping a bridge deck form. On that date, he suffered a heart attack while working on a bridge over the Des Plaines River on I-94 in Gurnee, Illinois.

Testimony of Brian Russell

Mr. Brian Russell, a co-employee, and friend of Decedent, testified that he picked up and drove the Decedent to work at 5:30 or 5:45 a.m. on that day. The two carpenters then started working on the bridge at 7:00 a.m. Brian Russell testified that he was assigned to strip the bridge deck and that Decedent volunteered to switch work assignments with him. As a result of this, Decedent performed the task of removing wooden forms from the underside of the bridge.

Mr. Russell testified that he preferred this task that he called "the bottom man." Mr. Russell testified that the stripping of the wooden forms off a bridge deck, which Decedent was performing on July 15, 2009, was miserable work. Mr. Russell testified it was strenuous and confining as there was little room to work in that position. Mr. Russell testified he preferred working as "a bottom man" cleaning plywood that was stripped off the bridge as it came down. Mr. Russell further testified his job was not as confining as the job Decedent was performing of actually stripping the bridge on that date.

Mr. Russell testified that Decedent could not perform his job standing, but only while kneeling. He would have to move plywood materials with his toes and feet as he was in an awkward position. Mr. Russell further testified that the concrete where Decedent worked gives off extra heat, especially during July.

Mr. Russell testified that Decedent had been his partner and friend for five years, and he saw him several times outside of the workplace. Mr. Russell testified that Decedent was a smoker who drank coffee daily, and occasionally would drink a beer. Mr. Russell testified that he and Decedent had been at work for Respondent on this particular job for approximately three months, working on different bridges on the I-94 Tri-State Highway.

Mr. Russell testified that Decedent was performing his job stripping the bridge for an hour and a half or an hour and 45 minutes on July 15, 2009, when he climbed down a ladder at 8:30 a.m. and told Mr. Russell that he was not feeling well. Decedent then walked to his truck to take some aspirin, and then took a break and sat down. His condition worsened and an ambulance was called.

Decedent was transported by ambulance to Condell Medical Center. While he was being transported, Decedent went into cardiac arrest. (Px1)

Testimony of Deborah Madden

Mrs. Deborah Madden testified that she met Decedent in 1979 and they were married in 1986. They had two children from this marriage, Thomas Madden, born June 1, 1988, and Ashley Madden, born January 16, 1993. Mrs. Madden testified that Decedent voiced no complaints the night before he suffered his myocardial infarction or when he left for work around 5:30 a.m. on July 15, 2009. Mrs. Madden testified further that she received a phone call from Mr. Russell at 8:45 a.m. who informed her Decedent had suffered a heart attack.

On July 31, 2009, on the advise of physicians, Mrs. Madden made the decision to remove Decedent from life support and he passed away on that date.

Mrs. Madden testified that Decedent was an avid outdoorsman who enjoyed hiking, cooking and eating meat from his smoker. Mrs. Madden further testified that Decedent just prior to July 15, 2009 was in good heath and followed the advice of his physicians, including the taking of certain prescription medications.

Testimony of Joseph Moyer

Mr. Joseph Moyer testified on behalf of Respondent. Mr. Moyer worked for Respondent as a project engineer for 9 years, building and reconstructing bridges and highways. On July 15, 2009, he was overseeing multiple projects but was near the I-94 bridge over the Des Plaines River in Gurnee, Illinois. Mr. Moyer testified he drove straight to that location after being informed that Decedent required an ambulance.

Mr. Moyer testified his basic duties and tasks as a project engineer for Respondent involved ordering material, preparing daily schedules, contacting administration, managing timecards and dealing with consultants.

Mr. Moyer testified that Decedent was performing typical carpenter work and specifically was stripping a bridge on July 15, 2009. Mr. Moyer testified that stripping forms off a bridge after concrete is poured is a normal work task for a carpenter on highway and bridge construction/reconstruction, and it requires ordinary exertion for carpenter. Mr. Moyer further testified that the work being performed by Decedent on July 15, 2009 did not involve a greater stress than any other typical carpentry duty. Mr. Moyer testified he would expect all of his carpenters to be able to perform the work involved with stripping a bridge as it was normal and typical work for them.

Mr. Moyer testified the carpenter work cycle on a bridge construction project is to build forms, watch concrete pours while building new forms along the bridge, and then stripping or removing the wood forms. Mr. Moyer testified that he was not aware of any prior problems during the three months that Decedent worked for Respondent on bridges on I-94. Mr. Moyer testified he was quite familiar with the labor performed in forming, pouring and stripping bridges with carpenters.

Mr. Moyer did admit during cross-examination that he was not a union carpenter, had not performed the jobs of Decedent and Mr. Russell, and did admit there were easier activities throughout the process than those performed by Decedent. Mr. Moyer specially admitted he has never performed the job of stripping a bridge deck and only observed the carpenters while they performed such tasks.

Treatment Records of Condell Medical Center

These records in evidence reflect that Decedent presented with chest pain on July 15, 2009 in the emergency room, and underwent cardiac arrest and was resuscitated. Decedent had evidence of cardiogenic shock and received stents to his left descending and right coronary arteries along with a balloon pump.

Petitioner was then transferred to Aurora St. Luke's Medical Center, in Milwaukee, Wisconsin, for more advanced care to include possible mechanical cardiac support after suffering a second heart attack on July 23, 2009. The discharge notes of Condell Medical Center at that time reveal Decedent suffered an acute myocardial infarction, cardiogenic shock, multiple cardiac arrests, renal failure and hepatic failure prior to his transfer to St. Luke's. Petitioner was transferred on July 24, 2009 via flight for life.

While at Condell, Petitioner underwent emergency cardiac catheterization. Prior medical history reflected knee surgery in 2008, a diagnosis of high cholesterol, high blood pressure for which he had refused to take medication that was prescribed to him by Dr. Sekharan. Petitioner was also a diagnosed diabetic and a smoker who smoked two to two and a half packs daily, suffered from alcohol abuse, and from diabetes and chronic obstructive pulmonary disease.

Treatment Records of St. Luke's Medical Center

Petitioner was admitted to this hospital on July 24, 2009, and died there on July 31, 2009 after removal of life support. His admission diagnosis was respiratory failure due to cardiogenic shock, liver shock, anemia, renal failure, and history of tobacco abuse. On July 31, 2009, due to the severity and gravity of his condition, Decedent's family decided that all life support would be discontinued and comfort and care provided to him until he passed away. The cause of death according to the Wisconsin Death Certificate was myocardial infarction and coronary artery disease.

Testimony of Dr. Jason Robin and Dr. Daniel Fintel

Dr. Robin testified on behalf of Petitioner that Decedent was performing carpenter work on a bridge when he suffered an acute coronary syndrome and plaque rupture causing a loss of blood flow to his heart. Dr. Robin testified that he did not disagree with any of Dr. Daniel Fintel's medical conclusions in this case. Dr. Fintel examined the treatment records on behalf of Respondent in this matter.

Dr. Robin and Dr. Fintel only disagreed as to whether Decedent's death was directly related to his work activities on July 15, 2009. Both felt that plaque can rupture spontaneously. Dr. Robin testified that he had a very close relationship with Dr. Fintel and considered him a mentor. (Px15) Dr. Fintel concluded that Decedent's condition had progressed to such an advanced stage based on angiographic information dated July 15, 2009, that any activity could have been equally likely to have been associated with the plaque rupture and cataclysmic result.

Dr. Robin on the other hand, concluded that Decedent had significant premature atherosclerotic coronary disease due to a combination of genetics, tobacco use, uncontrolled hypertension and cholesterol. Dr. Robin felt these longstanding variables were due to personal lifestyle choices and genetics, and as a result, he felt the premature atherosclerosis was not related to Decedent's work activities. Dr. Robin did conclude the plaque ruptured while Decedent was performing manual labor underneath the bridge based on the pattern of cardiac enzyme levels in his blood. Dr. Robin concluded that since the rupture occurred at work while performing manual labor, the work contributed to the onset of Decedent's heart attack. Dr. Robin further asserted the weather on July 15, 2009 was in the mid-80's and assumed there was little breeze. Dr. Robin testified the heart attack was massive in light of the cardiogenic shock and Decedent lost too much heart muscle to survive the event and died two weeks later due to complications from the heart attack, such as from liver failure, renal failure and ventricular arrhythmias.

Dr. Robin concluded that Decedent was a 51 year old male with significant risk factors for premature atherosclerotic cardiovascular disease including uncontrolled hypertension, hyperlipidemia, and active smoking, who suffered an acute myocardial infarction during his work activities and subsequently died from complications of his acute myocardial infarction.

Dr. Robin did also testify that Decedent was engaged in very strenuous activities on the day of his heart attack. Dr. Robin felt that the intense anaerobic workout decedent was enduring while underneath the bridge in warm weather led to the plaque rupture and acute thrombosis within the left anterior descending artery. Dr. Robin felt that the work activity of July 15, 2009 aggravated Decedent's coronary artery disease and precipitated his plaque rupture and acute myocardial infarction.

Dr. Fintel concluded, based on the totality of facts and circumstances that Decedent was a heart attack waiting to happen. Decedent had significant preexisting coronary heart disease with risk factors for acute plaque rupture, including heavy smoking. Furthermore, Dr. Fintel felt Decedent's ultimate death from this condition appears to be more related to his risk factors than his work activities on that day. Dr. Fintel's opinion that Decedent's condition was likely severe enough that any significant exertion or possibly non-exertional situation would have led to the same outcome, and therefore, Dr. Fintel testified he does not believe that Decedent's work activities on July 15, 2009 are responsible for his death.

Conclusion and Findings of Arbitrator

Based upon the above, the Arbitrator adopts the findings and opinions of Dr. Robin along with the testimony of Mr. Russell, and concludes that on July 15, 2009, Decedent suffered an acute myocardial infarction and plaque rupture and that infarction arose out of and in the course of his employment by Respondent, and which ultimately resulted in his death. The Arbitrator further finds that the bridgework performed by Petitioner on that date was strenuous and the condition was caused by the extreme exertion performed on July 15, 2009, and not from any ordinary motion or mishap in life.

J. Who was dependent on Decedent at the time of death?

Mrs. Deborah Madden testified that she met Decedent in 1979 and they were married in 1986. They had two children from this marriage, Thomas Madden, born June 1, 1988, and Ashley Madden, born January 16, 1993.

No other testimony or evidence exists as to any other children or marriages.

K. Were the medical services that were provided to Decedent reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Petitioner introduced into evidence the following medical charges which were incurred after this accidental injury, and which remain unpaid:

Village of Gurnee (Ambulance)	$ 1,000.00 (Px1)
Advocate Condell Medical Center	$343,235.85 (Px2)

Healthcare Cardiovascular Specialists (Dr. Alikakos)	$ 27,355.33 (Px3)
Heart Care cardiovascular Specialists (Dr. Stamatis)	$ 12,827.14 (Px4)
Dr. Mathangi Sekharan	$ 5,670.00 (Px5)
Aurora Health Care	$171,087.51 (Px6)
Midwest Heart Surgery Institute	$ 17,111.00 (Px7)
Pulmonary Medicine Consultants	$ 1,096.00 (Px8)
St. Luke's Medical Center (Dr. Saxena)	$ 1,070.00 (Px9)
Milwaukee Radiologists, Ltd.	$ 158.00 (Px10)
Aurora Advanced Healthcare	$ 5,245.00 (Px11)
Great Lakes Pathologists	$ 2,169.00 (Px12)

These charges total $588,024.83.

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, the Arbitrator further finds Respondent to be liable to Petitioner for all of the above charges, as they represent reasonable and necessary medical services that were incurred as a result of this accidental injury. This award of medical expenses remains subject to the provisions of the medical fee schedule as created in Section 8.2 of the Act.

L. What compensation for temporary total disability, if any, is due?

The medical evidence before this Arbitrator establishes that Decedent was temporarily and totally unable to perform any gainful employment, and was hospitalized for the period of July 15, 2009 through July 31, 2009, the date of his death.

Based upon the above, the Arbitrator finds that Petitioner is entitled to receive temporary total disability benefits from Respondent commencing July 16, 2009 through July 31, 2009.

O. Is Respondent liable for burial expenses?

No evidence of burial expenses were introduced at the hearing.

Based upon the above, all claims made for such burial expenses by Petitioner in this matter are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sherri Sullivan,

Petitioner,

vs.

NO: 11WC000231
13WC007376

Jewel Food Stores,

16IWCC0034

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 total disability, causation, 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 8, 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.

16IWCC0034

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 $4,903.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 15 2016
MJB/bm
o-1/12/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

SULLIVAN, SHERRI
Employee/Petitioner

Case# **11WC000231**

13WC007376

JEWEL FOOD STORES
Employer/Respondent

16IWCC0034

On 7/8/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

0293 KATZ FRIEDMAN EAGLE ET AL
DAVID BARISH
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

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

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

SHERRI SULLIVAN,
Employee/Petitioner

v.

JEWEL FOOD STORES,
Employer/Respondent

Case # **11** WC **231**

Consolidated cases: **13 WC 7376**

16IWCC0034

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 **3/26/15, 4/24/15 and 6/23/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **9/29/08**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**28,817.88**; the average weekly wage was $**554.19**.

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

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

Respondent shall be given a credit of $**4,642.10** for TTD, $**0** for TPD, $**0** for maintenance, and $**10,586.48** for other benefits.

Respondent is entitled to a credit of $**308.22** for medical care and **$10,586.48** for disability pay under Section 8(j) of the Act.

ORDER

Medical benefits

Respondent shall reimburse Petitioner for the two $40.00 payments she made to Dr. Rawal (Elmhurst Orthopedics) in connection with the office visits of September 8, 2010 and December 30, 2010. Respondent shall also pay Dr. Rawal's (Elmhurst Orthopedic's) balance of $135.00, subject to the fee schedule.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $369.46/week from October 14, 2008 through October 21, 2008 and from May 27, 2010 through August 17, 2010, a total of 13 weeks, as provided in Section 8(b) of the Act, with Respondent receiving credit for the $4,642.10 in temporary total disability benefits it paid prior to trial.

Prospective Medical Care

Respondent shall authorize and pay for prospective care in the form of a return visit to Dr. Rawal and a left total knee replacement, if in fact the doctor still recommends that 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 — 7/8/15

Signature of Arbitrator — Date

ICArbDec19(b)

JUL 8 - 2015

Sherri Sullivan v. Jewel Foods
11 WC 231 and 13 WC 7376

Arbitrator's Findings of Fact Relative to Both Cases

James Noland, Respondent's transportation operations superintendent, testified out of order, before Petitioner, due to his upcoming retirement. Noland testified he has worked for Respondent for 47 years. T. 3/26/15, p. 22. He works in Respondent's transportation facility in Melrose Park. He oversees the delivery of various products to Respondent's stores. T. 3/26/15, p. 14.

Noland testified he is familiar with Petitioner and her job duties. He supervises Petitioner, although not directly. There are four or five people between him and Petitioner along the chain of command. Petitioner is a post-trip auditor. Her duties include keying in data obtained from driver trip sheets, answering telephones and assisting managers. T. 3/26/15, p. 15. Her duties do not require her to walk throughout the workday or go out to the dock area. T. 3/26/15, pp. 15-16. He typically sees Petitioner four days per week. On those occasions, Petitioner is working in the dispatch office. T. 3/26/15, p. 16.

Noland testified that Petitioner has been off work for extended periods during the last three years, but not since mid-2014. He is not certain whether Petitioner requested time off due to her knee within the last year. At the present, Petitioner typically sits at her desk, performing data entry. She moves around the office occasionally but gets assistance with filing because she is restricted from stooping or standing for extended periods. T. 3/26/15, pp. 18-19. The managers and supervisors help Petitioner out. T. 3/26/15. p. 19.

Noland testified that the photographs in Respondent Group Exhibit 1 show the hallway inside Respondent's general entrance. The door on the left side of the photographs leads to the dispatch office where Petitioner works. T. 3/26/15, pp. 19-20. Security cameras captured these photographs. To his knowledge, these particular cameras are in a fixed position and are always active. The photographs were not modified or altered in any way. They bear date and time stamps. They accurately depict the condition of the hallway and the activities performed therein on the dates and at the times reflected.

Noland testified he did not receive any compensation other than his regular salary for testifying. He is scheduled to retire in three weeks. T. 3/26/15, p. 22.

Under cross-examination, Noland acknowledged he was not in the hallway when the photographs were taken. He cannot recall where he was on the day and at the time reflected on the photographs. Security personnel are responsible for the cameras that captured the photographs. T. 3/26/15, p. 23. Petitioner performs most of her assigned duties while sitting at her desk. T. 3/26/15 p. 23. When he sees Petitioner at work, she is seated at her desk "most of the time but not always." T. 3/26/15, p. 24.

On redirect, Noland testified he has known Petitioner since she started working for Respondent, more than ten years ago. Based on his knowledge of Petitioner, he believes the person shown in the photographs is Petitioner.

By agreement of the parties, the case was continued to April 24, 2015. Petitioner testified on that date, as did a second Respondent witness, Frank Mikec.

Petitioner testified she has worked for Respondent for almost twenty-one years. T. 4/24/15, p. 8. She has always worked as a post-trip auditor. She works in an office, monitoring drivers' activities and answering telephones. T. 4/24/15, pp. 8-9.

Petitioner acknowledged injuring her left knee while working for Respondent many years ago. She underwent a left knee arthroscopy following this injury. She could not recall the year of the injury. She pursued a workers' compensation claim for the injury. T. 4/24/15, pp. 9-10. She denied undergoing any additional left knee treatment between the time she returned to work, following the arthroscopy, and her work accident of September 29, 2008. T. 4/24/15, pp. 9-10.

The parties agree Petitioner sustained an accident while working for Respondent on September 29, 2008. Arb Exh 1. Petitioner testified she struck her left knee against a file cabinet that day. Immediately before this accident, she was seated at her desk. She swung her desk chair around in order to get up to assist a driver and banged her left knee against a sharp piece that was sticking up from the file cabinet. T. 4/24/15, p. 11.

Petitioner testified she noticed swelling and bruising of her left knee after the accident. An on-site medical employee came to her work area, looked at her knee and told her to apply ice and keep her leg elevated. T. 4/24/15, p. 11.

Petitioner testified she eventually sought treatment from Dr. Prodromos. She believed someone at work referred her to this doctor. T. 4/24/15, p. 12.

Petitioner initially saw Dr. Prodromos on October 13, 2008. A handwritten form reflects that Petitioner reported undergoing a knee operation in 1998. PX 1. The doctor's typed note sets forth a history of the September 29, 2008 work accident. The note also reflects that Petitioner denied having any left knee problems before this accident. On left knee examination, the doctor noted marked medial joint line tenderness, a trace effusion and negative Lachman testing. He obtained X-rays and interpreted them as showing "roughly 80% diminution of the medial clear space with some medial spurring, but no bone on bone changes." He diagnosed a possible medial meniscal tear as well as degenerative joint disease. He took Petitioner off work and recommended a left knee MRI. PX 1. The MRI, performed on October 16, 2008, demonstrated medial degenerative joint disease. Petitioner returned to Dr. Prodromos on October 20, 2008, with the doctor recommending partial weight bearing, while using crutches. At the next and final visit, on November 3, 2008, the doctor noted "only a little improvement." He recommended physical therapy and directed Petitioner to follow up in

three weeks. In an addendum, Dr. Prodromos indicated he contacted the radiologist who performed the MRI. He described the exchange as follows: "I talked to Dr. Murphy who explained that he did not see a definite tear but did see that the meniscal material was all translated medially from its usual location within the joint to a point medial to the joint." PX 1.

On November 11, 2008, Petitioner consulted a different physician, Dr. Rawal, who had earlier treated her for a work-related carpal tunnel condition. Dr. Rawal recommended therapy and imposed work restrictions. PX 2. On December 19, 2008, the doctor noted limited improvement secondary to therapy. He prescribed a repeat left knee MRI and continued the previous work restrictions. He subsequently interpreted the repeat MRI as showing "cartilage irregularity in the medial compartment with a small, full-thickness 1-centimeter defect anterior femoral condyle." He described these findings as degenerative in nature. He also noted the "partial absence of the meniscus." He indicated this "would be consistent with a previous meniscectomy." He did not see any need for surgery and instead recommended continued therapy. PX 2.

At Respondent's request, Petitioner underwent a Section 12 examination by Dr. Verma on March 4, 2009. The doctor's report of that date sets forth a history of the September 29, 2008 work accident and the previous left knee arthroscopy. The doctor indicated that Petitioner denied having any left knee problems or treatment during the interval between the arthroscopy and the work accident.

Dr. Verma indicated that Petitioner was continuing to perform her regular duties but complained of left knee pain and popping, along with difficulty with stairs.

Dr. Verma described Petitioner's gait as antalgic. On left knee examination, he noted a range of motion from full extension to about 100 degrees of flexion, with significant pain at end range of motion, positive patellar crepitance, pain with palpation over both the medial and lateral joint line and no instability.

Dr. Verma indicated he reviewed various records but did not have access to the MRI scans. Based on Petitioner's history of a remote left knee arthroscopy and her denial of interval symptoms, along with the available records, he opined that the work accident aggravated an underlying left knee degenerative condition. He recommended cortisone and Synvisc injections, along with an unloader brace, but advised against additional therapy. He indicated that Petitioner's "final option" would be arthroplasty, if she failed to respond to the injections. He also indicated that Petitioner could continue to perform her regular work duties.

Petitioner returned to Dr. Rawal on March 17, 2009. The doctor noted that Petitioner reported some improvement secondary to therapy and use of an unloader brace. He continued the previous work restrictions and directed Petitioner to return in four weeks. PX 2.

On March 27, 2009, LaTanya Gaines, a claims consultant affiliated with Specialty Risk Services, sent Dr. Verma's report to Dr. Rawal, via facsimile, and indicated that Respondent was authorizing a series to Synvisc injections to the left knee. PX 2.

On April 14, 2009, Dr. Rawal described Petitioner as "stable in the brace." He noted that Petitioner wanted to defer Synvisc injections and continue therapy and bracing. He directed Petitioner to return in six weeks. PX 2.

On May 26, 2009, Dr. Rawal evaluated both the left knee and the right carpal tunnel syndrome. With respect to the knee, he recommended Synvisc injections. With respect to the carpal tunnel, he discussed the option of a revision release.

Petitioner underwent a right carpal tunnel release on June 5, 2009. She testified she lost some time from work following that surgery. During that interval, she also underwent treatment for her left knee. She lost no time from work due to her knee during that interval but she was experiencing knee swelling and difficulty walking. T. 4/24/15, pp. 14-15.

On June 23, 2009, Dr. Rawal removed the surgical sutures from Petitioner's right wrist and recommended therapy for both the wrist and left knee. He continued to keep Petitioner off work. PX 2.

On July 21, 2009, Dr. Rawal noted complaints relative to the left knee. He described Petitioner as having "maximized physical therapy." He recommended a repeat arthroscopy at such point that the carpal tunnel symptoms had resolved. At the next visit, on August 18, 2009, he noted that the recommended left knee arthroscopy had been approved but that Petitioner should wait another month, due to her carpal tunnel condition, before undergoing the surgery, since she would have to use crutches thereafter. PX 2.

Dr. Rawal continued to keep Petitioner off work thereafter, secondary to the wrist, noting that Petitioner was making a "very slow recovery" from the revision release and that she might have a component of complex regional pain syndrome. On December 11, 2009, he released Petitioner to light duty with no significant lifting or repetitive motion with the right hand and other restrictions relative to the left knee. He administered a left knee injection the same day. PX 2. On January 11, 2010, Dr. Rawal noted that Petitioner reported her job had not allowed her to return to work within the restrictions he imposed. He also noted that Petitioner was still experiencing left knee pain but wanted to defer surgery due to ongoing right hand complaints. He further noted that Petitioner seemed depressed. He recommended she consult her primary care physician and a psychiatrist this physician had referred her to. On February 12, 2010, Dr. Rawal noted that Petitioner reported some left knee improvement and that surgery was again deferred due to ongoing right hand complaints. PX 2.

Petitioner testified that Dr. Rawal recommended a total knee replacement after she underwent injections and therapy. She has not undergone the knee replacement because she lost her health coverage during a period when she was off work. T. 4/24/15, p. 15.

At Respondent's request, Dr. Verma re-examined Petitioner on February 17, 2010. The doctor noted that Petitioner was currently off work due to her carpal tunnel syndrome. He recommended a left total knee replacement.

On April 14, 2010, Petitioner returned to Dr. Rawal due to some mild left knee pain and swelling. The doctor described the left knee range of motion as "dramatically improved" since Petitioner's first visit. On left knee examination, he noted a minimal effusion, full extension and flexion, mild medial joint line tenderness and stability to varus and valgus stress testing. He administered an injection and noted that Petitioner "still has squatting and bending restrictions regarding that knee." PX 2.

On May 12, 2010, Petitioner saw Dr. Rawal again and reported partial relief from the earlier left knee injection. On left knee examination, the doctor noted some mild effusion, tenderness over the medial joint line and a range of motion of 0 to 120 degrees. At Petitioner's request, he wrote out a note releasing Petitioner to work with no standing, walking or climbing. He noted that Petitioner also had restrictions relative to her right wrist. He directed Petitioner to return in one month. PX 2.

At the next visit, on June 10, 2010, Petitioner complained of mild left knee pain and swelling. On examination, Dr. Rawal noted a mild amount of effusion, medial joint line tenderness and a range of motion of 0 to 100 degrees. He obtained new X-rays, which demonstrated some mild spurring and "no specific change in joint space narrowing." He discussed various treatment options, including arthroplasty, noting that Petitioner preferred to continue conservative care. He prescribed viscosupplementation and therapy and directed Petitioner to return in one month. PX 2.

Petitioner began a course of left knee therapy at Physico on June 16, 2010. PX 2.

Dr. Rawal administered Synvisc injections on June 23, June 30 and July 7, 2010. On August 4, 2010, Dr. Rawal noted that Petitioner reported mild improvement secondary to therapy and was "considering an arthroscopy and a revision medial meniscectomy." He continued the previous work restrictions and directed Petitioner to return in one month. PX 2.

On August 2, 2010, Petitioner's physical therapist reported some gains in function and strength. She recommended continued therapy. PX 2.

On September 8, 2010, Petitioner returned to Dr. Rawal and again complained of left knee pain. The doctor noted that, according to Petitioner, the recommended left knee surgery had been denied and Respondent had allowed her to resume light duty "for the past week." On left knee examination, he noted tenderness over the medial joint line and mild pain and clicking with McMurray's testing.

Dr. Rawal noted that, "at this time, [Petitioner] would not like to proceed with any other further treatment until her arbitration has concluded." He recommended conservative care and continued the work restrictions. He released Petitioner on a PRN basis. PX 2.

Petitioner returned to Dr. Rawal on December 30, 2010. The doctor noted that she reported worsening left knee symptoms over the last two weeks, "due to her repeatedly getting up and down at work." He also noted that Petitioner was limping and complained of significant pain. On examination, he noted a mild effusion, a range of motion from 0 to 100 degrees with some mild medial joint line tenderness and mild patellofemoral symptoms. He discussed various treatment options. He indicated Petitioner might require a total knee replacement at some point. He administered a cortisone injection and directed Petitioner to follow up in three weeks. PX 2.

Respondent offered into evidence several images captured by its internal security cameras at 7:58 AM in February of 2011. The images bear two different dates: February 7 and February 11, 2011. RX 1, A-E. The images show a dark-haired woman (from the back) carrying a purse and a box in a hallway. The woman appears to be wearing heeled shoes. None of the images show the woman's face.

Based on Dr. Rawal's testimony (summarized below), it appears the doctor treated Petitioner's left knee in June and October 2011. However, the notes concerning these office visits are not in evidence.

Petitioner testified that she fell while going into work on January 29, 2013. The weather conditions that day were rainy and icy. Before she fell, she parked her car in a lot that was reserved for Respondent employees. T. 4/24/15 at 19-20. She exited her car and was walking toward the entrance when she slipped and fell. She does not know exactly what she slipped on. [Accident is not in dispute. Arb Exh 2.] She landed on her left side, injuring her left thumb as well as her left ankle, knee and hip. After she fell, she had to bend her left thumb back into proper position. T. 4/24/15, pp. 20-21.

Petitioner returned to Dr. Rawal on February 6, 2013, with the doctor noting she had fallen at work, injuring her left ankle, left knee, left hip and left thumb. The doctor indicated that Petitioner complained of left thumb "locking" and pain in the left hip, knee and ankle.

On left arm examination, Dr. Rawal noted a trigger thumb and a palpable nodule along the flexor tendon. On left hip examination, the doctor noted minimal pain with range of motion. On left knee examination, the doctor noted a mild varus deformity and effusion, with painful range of motion. On left ankle examination, the doctor noted diffuse tenderness but indicated Petitioner was able to plantar flex and dorsiflex with minimal discomfort.

Dr. Rawal obtained X-rays of the left thumb, left hip, left knee and left ankle. He indicated the thumb, hip and ankle X-rays were negative for fracture or dislocation. He described the left knee X-ray as showing tricompartmental degenerative joint disease.

Dr. Rawal diagnosed a left trigger thumb, a left hip contusion, a left ankle sprain and aggravation of left knee degenerative joint disease. He injected the left knee with cortisone and provided Petitioner with a left thumb spica splint. He instructed Petitioner to return to him in three to four weeks and provided a note taking her off work for one week. PX 2.

Petitioner continued seeing Dr. Rawal thereafter through September 5, 2013. In his note of that date, Dr. Rawal recommended both a left total knee replacement and a left trigger thumb release but indicated Petitioner "would like to first begin to try to release to work." He released her to restricted duty and directed her to continue home therapy. PX 2.

At Respondent's request, Petitioner underwent a Section 12 examination by Dr. Mash, an orthopedic surgeon, on June 20, 2013. In his report of the same date, Dr. Mash noted a history of the January 29, 2013 work fall. He also noted that Petitioner had previously undergone left knee treatment with Dr. Rawal and that Petitioner was currently off work. He indicated that Petitioner complained of left thumb triggering, low back/hip pain and pain and weakness in her left knee. He indicated that Petitioner reported relying on a walker or wheelchair to get around.

Dr. Mash described Petitioner's low back examination as "quite abnormal." On hip examination, he noted tenderness to palpation about the greater trochanter and a limited range of motion. On left thumb examination, he noted "repetitious triggering." On bilateral knee examination, he noted a 0 to 150 degree range of motion, with crepitation throughout, a 1+ effusion in the left knee only, 5/5 strength, positive medial joint line tenderness bilaterally and negative McMurray, Lachman and stress testing bilaterally. He also noted a 5 degree genu varum deformity.

Dr. Mash obtained X-rays of Petitioner's lumbar spine, pelvis and knees. He described the lumbar spine and pelvis X-rays as showing some arthritic changes. He described the knee X-rays as showing "significant collapse and bone-on-bone deformity of the medial aspect of the joint."

Dr. Mash's impression was: 1) osteoarthritic change, left knee; 2) trochanteric bursitis, left hip; and 3) trigger thumb. He did not relate any of these conditions to the January 29, 2013 work fall. He described all of the conditions as pre-existing. He described the treatment to date as reasonable and necessary but unrelated to the work fall. He indicated Petitioner might be a candidate for left thumb trigger release surgery and a left total knee replacement. He found Petitioner capable only of "inside sit down work."

Near the end of his report, Dr. Mash indicated that the work fall might have only temporarily aggravated Petitioner's various underlying conditions "for at best a few days." Mash Dep Exh 2.

Dr. Rawal testified by way of evidence deposition on March 19, 2014. Dr. Rawal testified he is board certified in orthopedic surgery and holds a certificate of added qualifications in sports medicine. PX 3 at 5. Rawal Dep Exh 1.

Dr. Rawal testified he has treated Petitioner for various conditions for a period of years. He first treated Petitioner's left knee on November 11, 2008. PX 3 at 6. On that date, he obtained a history of the September 29, 2008 work accident and recommended a left knee MRI. The MRI revealed evidence of Petitioner's previous meniscectomy as well as chondromalacia in the medial compartment, with osteophyte formation and a joint effusion. PX 3 at 7. He initially prescribed physical therapy. After Petitioner failed to improve, he ordered a repeat MRI, which showed similar findings but also a "suspicion for a possible further tear of the meniscus." PX 3 at 8. After the repeat MRI, he initially recommended additional therapy and injections and later recommended a left knee arthroscopy. PX 3 at 9. He has never operated on Petitioner's left knee. As Petitioner's left knee condition worsened, over time, he began considering arthroplasty versus arthroscopy. PX 3 at 9-10. He released Petitioner on a PRN basis on September 8, 2010 because, on that date, Petitioner told him she wanted to await the results of arbitration before proceeding with additional care. PX 3 at 10-11.

Dr. Rawal testified that, when he next saw Petitioner, on December 30, 2010, her left knee symptoms had worsened, prompting him to discuss a total knee arthroplasty with her. PX 3 at 11. At that point, he felt that "arthroscopy would not give [Petitioner] appropriate relief." PX 3 at 11.

Dr. Rawal testified he completed FMLA paperwork for Petitioner on July 25, 2011. As of that point, he was continuing to restrict Petitioner from walking, climbing, stooping and bending. PX 3 at 12.

Dr. Rawal testified he continued to see Petitioner intermittently thereafter through September 5, 2013. On February 6, 2013, Petitioner reported having fallen onto her left side at work, injuring her left thumb, left hip, left knee and left ankle. When he examined Petitioner on that date, he noted triggering of the left thumb, mild pain with left hip range of motion, an effusion of the left knee, with pain with range of motion and a varus deformity, and left ankle tenderness. He took Petitioner off work and discussed various treatment options. PX 3 at 13-14. Over the next few months, he treated Petitioner conservatively and kept her off work. As of June 17, 2013, Petitioner's hips were giving her the most trouble but she was still experiencing left knee pain and left thumb triggering. PX 3 at 16. Throughout this time, his recommendation of a left knee arthroplasty did not change. PX 3 at 17. When he last saw Petitioner, on September 5, 2013, her hip pain was "slightly resolving" but she was still experiencing locking of the left thumb and significant left knee problems. PX 3 at 18. On September 5, 2013, Petitioner asked to be allowed to return to work the following Monday. PX 3 at 19. He released Petitioner to a sedentary desk job. PX 3 at 21.

Dr. Rawal opined that the work accidents of September 29, 2008 and January 29, 2013 resulted in worsening of Petitioner's left knee pain. PX 3 at 20. He continues to hold this opinion despite the passage of time. PX 3 at 20-21.

Dr. Rawal also opined that Petitioner's left thumb and left hip conditions could have been caused or aggravated by her fall of January 29, 2013. PX 3 at 21. He continues to recommend a left total knee arthroplasty and a left open trigger thumb release. PX 3 at 22. He is not recommending any care relative to the left hip. PX 3 at 22.

Under cross-examination, Dr. Rawal acknowledged he did not review Dr. Prodromos' records. PX 3 at 24. The first left knee MRI was "negative for any ligamentous injury or fracture." PX 3 at 24. The radiologist who read the repeat left knee MRI made three findings. He attributed the second finding, i.e., loss of meniscus, to the prior surgery but "also indicated a possible tear at the post-surgical site." PX 3 at 26. Petitioner did not provide any history of prior left knee problems other than the previous meniscectomy. PX 3 at 26. Petitioner exhibited a slight varus alignment in both knees, meaning she had a "slight bow-legged deformity." PX 3 at 26. In January of 2009, he told Petitioner her left knee condition was degenerative and that he saw no need for surgery. PX 3 at 27-28. Petitioner reported some left knee improvement at subsequent visits. PX 3 at 30. Prior to May 2009, he recommended that Petitioner undergo viscosupplementation, or Synvisc injections. PX 3 at 30. As of June 2009, he recommended a left knee arthroscopy. His report of August 18, 2009 reveals he obtained authorization to perform this procedure but the procedure was deferred due to Petitioner's unrelated right carpal tunnel release and the associated concern about her ability to use crutches. PX 3 at 32. As of April 2010, Petitioner had worsened and was limping due to left knee pain. PX 3 at 33. In June 2010, he again recommended Synvisc injections. He administered three injections thereafter. In September 2010, Petitioner told him she wanted to defer surgery until after she had concluded arbitration. PX 3 at 35-36. He could not recall whether he told Petitioner she needed the surgery and could have it done via group coverage. PX 3 at 36. Petitioner's left knee condition could worsen due to her decision to postpone surgery. PX 3 at 36. He never noticed Petitioner's footwear. PX 3 at 37. He recommended a left total knee replacement on December 30, 2010 and June 30, 2011. PX 3 at 37-38. He is not aware of Petitioner having seen Dr. Flood for foot problems. Severe bilateral foot pain could cause an antalgic gait. PX 3 at 40. He never noted any foot problems when he examined Petitioner. PX 3 at 40. He did not see Petitioner between October 2011 and April 3, 2012, when he authored a letter to Petitioner's counsel. PX 3 at 41. He has not seen Petitioner since September 5, 2013. PX 3 at 44. He performs knee replacements and would be the surgeon performing Petitioner's knee replacement. PX 3 at 44.

Dr. Mash testified by way of evidence deposition on April 10, 2014. Dr. Mash testified he obtained board certification in orthopedic surgery in 1979. RX 4 at 5. Mash Dep Exh 1.

Dr. Mash acknowledged he had no independent recollection of examining Petitioner on June 18, 2013. He relied on his report while testifying. RX 4 at 7. His testimony concerning his examination findings is consistent with his report, which is summarized above. He attributed

Petitioner's left knee effusion to her underlying arthritis. RX 4 at 12. The low back, pelvic and knee X-ray results support the conclusion that Petitioner "suffers systemic osteoarthritis in many areas of her body." RX 4 at 13. Osteoarthritis worsens over time at variable rates. RX 4 at 13-14. No one can predict how quickly or slowly any given patient's osteoarthritis will progress. RX 4 at 14.

Dr. Mash opined that none of the diagnoses he reached relate to the work injury of January 29, 2013. When that injury took place, Petitioner was already a candidate for a left total knee replacement. RX 4 at 17-18.

Dr. Mash opined that the work accident of January 29, 2013 caused pain and temporarily aggravated Petitioner's already bad osteoarthritis but did not permanently change or accelerate Petitioner's condition. RX 4 at 18-19. The work accident brought about the need for Dr. Rawal's initial evaluation and several subsequent visits but any treatment rendered thereafter was not related to the accident. RX 4 at 19. Petitioner needs a left total knee replacement but not due to the January 29, 2013 accident. RX 4 at 19-20. In his view, Petitioner is capable of inside, sit down work only. RX 4 at 20. He believes Petitioner was at maximum medical improvement (relative to the work accident) when he examined her. RX 4 at 20. The work accident did not result in any permanent impairment. RX 4 at 21. The bilateral knee X-ray report of November 12, 2004 supports his opinion that Petitioner had pre-existing, progressive osteoarthritis. RX 4 at 22-23. Petitioner's left knee osteoarthritis is "end stage" whereas her right knee osteoarthritis is "not quite as bad." RX 4 at 23.

Dr. Mash testified he devotes about 8 to 10% of his practice to forensic medicine, largely consisting of independent medical examinations and record reviews. He devotes the remaining approximate 90% to direct patient care. RX 4 at 24. About 70 to 75% of the forensic work he performs is for defendants or respondents. RX 4 at 24.

Under cross-examination, Dr. Mash testified that Petitioner walked with a limping gait as of his examination. RX 4 at 25. Petitioner's bow-legged deformity is a result of her osteoarthritis. RX 4 at 26. It is possible but not probable that an external event could affect the progress of osteoarthritis. RX 4 at 27. The 2004 knee X-ray results, standing alone, do not provide a basis for determining whether Petitioner was a surgical candidate. RX 4 at 28. However, those results allow you to conclude that Petitioner's disease process was likely to progress. RX 4 at 29. He agrees Petitioner needs a left thumb trigger release. RX 4 at 30. He reviewed pre-2013 records but cannot recall whether those records contained any mention of the left thumb. RX 4 at 31. He has no awareness of Dr. Rawal's opinions concerning causation. RX 4 at 31. He was not asked to consider the causative effect of any accident other than the accident of January 29, 2013. RX 4 at 31. He no longer performs knee replacements. RX 4 at 31. He cannot recall whether there were any gaps in Dr. Rawal's care. RX 4 at 33.

On redirect, Dr. Mash testified that collapsed arches and significant foot problems could cause an altered gait. RX 4 at 34. The 2004 knee X-rays document the presence of osteoarthritis. RX 4 at 34. He believes Petitioner's left thumb triggering predated the work

accident. Trigger finger develops over time and is common in diabetic patients such as Petitioner. RX 4 at 35. It can be caused by trauma but "it usually takes quite some time after the trauma for the problem to occur." RX 4 at 35.

Dr. Verma testified by way of evidence deposition on July 30, 2014. Dr. Verma testified he is board certified in orthopedic surgery. He devotes about 40 to 50% of his practice to knee problems. RX 2 at 5. He examined Petitioner but does not independently recall the examinations. RX 2 at 6. When he first examined Petitioner, he opined that the 2008 work accident aggravated Petitioner's left knee condition "based on [Petitioner's] history that she was asymptomatic prior to the injury and had onset of symptoms associated with the injury." RX 2 at 10. It was his understanding Petitioner had no left knee problems before the 2008 accident. RX 2 at 10. He recommended an injection and therapy. He also indicated Petitioner might require knee replacement surgery. RX 2 at 11. When he re-examined Petitioner, on February 17, 2010, he recommended a knee replacement, noting that Petitioner had derived only temporary relief from conservative measures. RX 2 at 12-13.

Dr. Verma testified he altered his causation opinion after he reviewed additional pre-accident records in 2010. RX 2 at 14-15. Those records prompted him to conclude that the history Petitioner provided was faulty and that Petitioner indeed had lower extremity problems before the 2008 accident. RX 2 at 15. He still believed Petitioner required a knee replacement but he now attributed this need to a pre-existing degenerative condition, not the accident. RX 2 at 15-16. It is now his opinion that the 2008 work accident resulted in a "contusion or exacerbation of knee symptoms." The exacerbation was temporary, not permanent. RX 2 at 16. He does not believe Petitioner requires a knee arthroscopy. RX 2 at 18-19. He believes Petitioner requires work restrictions but not due to the 2008 accident. RX 2 at 19. He has not examined Petitioner since 2010. RX 2 at 19. He devotes about 5% of his practice to medico-legal issues. RX 2 at 19. Of that 5%, about 80% comes from carriers. RX 2 at 20.

Under cross-examination, Dr. Verma conceded that it is "unknown" whether the pre-accident records he reviewed relate specifically to the knee. However, he believes Petitioner's pre-accident leg symptoms were consistent with arthritis. RX 2 at 24. The records mention fibromyalgia but that condition is not typically isolated to the legs. RX 2 at 24. The "burning" leg pain Petitioner complained of before 2008 could be indicative of a lumbar condition. RX 2 at 24-25. Only the records of November 2004 specifically mention the knees but other records contain multiple references to the legs. RX 2 at 27.

On redirect, Dr. Verma testified he noted no objective evidence of an acute left knee trauma when he examined Petitioner on March 4, 2009. RX 2 at 28. The degenerative knee condition documented by X-ray in November 2004 progressed, based on his 2009 evaluation. RX 2 at 29.

Petitioner testified that, following her January 29, 2013 fall, she was off work through September 8, 2013. She received short-term disability through Respondent during this time. She underwent care with Dr. Rawal for her left ankle, left knee, hip and left thumb. Her

husband's group carrier paid for much of this care but there are some unpaid balances. T. 27. Dr. Rawal recommended a left knee replacement and left thumb surgery. She has not undergone either of these procedures. She has not returned to Dr. Rawal. She performs home exercises recommended by her physical therapist. She continues to work for Respondent in an office setting. T. 24. Her co-workers help her with such tasks as retrieving files because she needs to limit her walking. T. 25. She wants to have the surgeries that Dr. Rawal recommended if they will result in improvement. T. 24. She experiences swelling in her left ankle and left knee, especially with increased activity. She also experiences hip problems with increased activity. She constantly has to pop her left thumb back in place. T. 25-26. She used to wear a splint on her thumb but discontinued this at her doctor's recommendation. T. 26. She did not have any of these problems before September 29, 2008. Before her second accident of January 29, 2013, she did not have any problems with her left ankle, left hip or left thumb. T. 27.

Petitioner testified she has reviewed the images in Respondent Group Exhibit 1. The images show her workplace, including a door in the office area. The images also show a woman but the woman's face cannot be seen. She is not sure whether she is the woman. Respondent employs two African-American women in addition to her. One works the afternoon shift and the other works in the back office in communications. T. 28-29.

Under cross-examination, Petitioner testified she continues to hold the same job at Respondent that she held prior to both of her work accidents. T. 29. She last saw Dr. Rawal for her knee and thumb on September 5, 2013. Since that date, no other doctor has taken her off work due to her knee. Her family physician is Dr. Wendy Foster. She has seen Dr. Foster since 2002. T. 30. Dr. Foster has referred her to other physicians over the years. T. 31. She does not recall Dr. Foster referring her to a rheumatologist in March 2014. T. 31. When she saw Dr. Prodromos in 2008, she told him she underwent a knee "scope" years earlier. T. 31. She is not sure whether Respondent sent her to Dr. Prodromos. Respondent's union employees are typically sent to Concentra. T. 32. Her Blue Cross coverage through Respondent ended in November 2009 because she paid a premium late. T. 34-35. She received disability benefits from Respondent in 2008 and 2013. T. 35.

Frank Mikec testified on behalf of Respondent. Mikec testified he currently works for Respondent as the transportation superintendent for operations. He was recently promoted to this job. He previously worked as the day shift senior supervisor for Respondent's transportation department. That job involved communicating with the stores, scheduling drivers and working with supervisors and clerical staff. T. 39.

Mikec testified he knows Petitioner. He was and still is Petitioner's supervisor. T. 39. Petitioner's job primarily involves monitoring drivers and performing data entry. He typically sees Petitioner three days per week. Petitioner typically works from 7 AM to 3:30 PM. T. 40. On Mondays, Tuesdays and Fridays he sees Petitioner frequently throughout each day. T. 40.

Mikec testified that the images in Respondent Group Exhibit 1 were captured by a security camera mounted on the ceiling. The images show the hallway in front of the dispatch office in the transportation department. T. 41. Both he and Petitioner use the entrance shown in the hallway on a frequent basis. The woman shown in the images is Petitioner. He did not know Petitioner in 2011, when the images were captured, but he is able to recognize her based on seeing her regularly over the last year and three months. T. 42. When the images were captured, in 2011, he worked in a different building. He reviewed a video that contained additional surveillance footage taken during the exact same time period as reflected on the still images. The video footage showed Petitioner from the front as well as from behind. He was able to recognize Petitioner's face in the video. T. 43. He is not being paid anything other than his regular salary while testifying. T. 44.

Under cross-examination, Mikec testified that the woman shown in the still images is wearing fancier clothes than would typically be seen at the workplace. T. 44.

Arbitrator's Credibility Assessment

All three witnesses were calm, articulate and believable.

Petitioner's lengthy tenure with Respondent weighs in her favor, credibility-wise.

Respondent maintains Petitioner was less than forthright with Drs. Prodromos and Verma with respect to her medical history. Dr. Prodromos' initial typed office note does not mention Petitioner's previous left knee arthroscopy but an accompanying history form reveals that Petitioner reported undergoing a knee "scope" in 1998. Dr. Verma's initial examination report reflects that Petitioner denied having any left knee problems during the interval between the left knee arthroscopy and the work accident of September 29, 2008. The Arbitrator, having reviewed the records (RX 3) relating to the treatment Petitioner underwent during this interval, does not view this denial as adversely affecting Petitioner's credibility. For the most part, the records document diffuse symptoms (such as burning pain) relative to both legs as well as the back. Petitioner did undergo bilateral knee X-rays in November 2004, secondary to a complaint of pain, with the X-rays showing mild degenerative changes in the left knee, but there is no evidence any physician recommended specific left knee care thereafter. In June of 2005 and June of 2006, Petitioner complained of left lower leg swelling, among other symptoms, but no physician documented any abnormal examination findings relative to the left knee. On June 7, 2006, Dr. Reed recommended leg elevation, a topical cream and a Doppler study, but did not restrict Petitioner's work or recommend treatment relative to the left knee.

The photographic images submitted by Respondent show a woman carrying a purse and box while making her way down a hallway at 7:58 AM on either February 7 or February 14, 2011. The woman appears to be wearing heeled shoes. Her face cannot be seen. Based on the images alone, it is not possible to determine the weight of the two objects the woman is carrying. Petitioner was unsure whether she is shown in the images. Frank Mikec testified he is

sure the woman in the photos is Petitioner, based on his review of contemporaneous video footage that is not in evidence. Mikec testified the video shows the woman's face.

The treatment note that is closest in time to the images is Dr. Rawal's note of December 30, 2010. In that note, Dr. Rawal indicated Petitioner exhibited a significant limp and complained of worsening left knee pain over the preceding two weeks. The doctor administered a cortisone injection and directed Petitioner to return in three weeks.

Even if the Arbitrator relies solely on Mikec (who, in turn, relied on a video that is not in evidence) and assumes it is Petitioner who is shown in the images, the activity shown in the images is relatively innocuous and not inconsistent with a person who had undergone a left knee injection about six weeks earlier.

Overall, the Arbitrator found Petitioner credible.

Arbitrator's Conclusions of Law Relative to 11 WC 231 (D/A 9/29/08)

Did Petitioner establish a causal connection between the undisputed work accident of September 29, 2008 and her current left knee condition of ill-being?

The Arbitrator finds that Petitioner established a causal connection between her undisputed work accident of September 29, 2008 and her current left knee condition of ill-being. The Arbitrator further finds that the September 29, 2008 accident contributed to the need for the left total knee replacement recommended by Drs. Rawal, Verma and Mash. In so finding, the Arbitrator relies on the following: 1) Petitioner's credible account of the mechanism of injury; 2) the fact that none of the pre-accident treatment records reflect treatment recommendations (other than the recommendation for bilateral knee X-rays in 2004) specific to the left knee; 3) Dr. Prodromos' initial history and examination findings; 4) Dr. Prodromos' addendum of November 3, 2008, concerning his consultation with the radiologist who interpreted the initial left knee MRI; 5) Dr. Rawal's causation-related opinions; 6) Dr. Verma's initial causation-related opinions and treatment recommendations; and 7) Dr. Verma's concession, during cross-examination, that it is "unknown" whether Petitioner's diffuse pre-2008 leg complaints related to a specific left knee condition. The Arbitrator views the need for the left total knee replacement as multi-factorial. Under Illinois law, a claimant need only show that a work accident was a cause of a condition of ill-being. He or she need not exclude other contributing causes such as, in the instant case, an underlying degenerative condition. See, e.g., Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003).

Overall, the Arbitrator finds the opinions of Dr. Rawal more persuasive than those voiced by Respondent's Section 12 examiners. Dr. Rawal treated Petitioner over an extended period while Dr. Verma saw Petitioner twice and Dr. Mash only once.

The Arbitrator also notes that, while Respondent's overall theory seems to be that Petitioner had significant left knee problems before the 2008 work accident, Respondent's now

retired transportation superintendent, James Noland, who worked with Petitioner for at least ten years, did not testify to observing any such problems.

Is Petitioner entitled to temporary total disability benefits in 11 WC 231?

In 11 WC 231, Petitioner claims various intervals of temporary total disability benefits, including an interval (January 31, 2013 through September 8, 2013) following her second accident of January 29, 2013. Arb Exh 1.

In 11 WC 231, Respondent stipulated to two periods of temporary total disability: October 18 – 21, 2008 and May 27, 2010 through August 17, 2010. Arb Exh 1.

Petitioner testified that, following the accident of September 29, 2008, she sought care on October 13, 2008, when she saw Dr. Prodromos. On that date, Dr. Prodromos recommended a left knee MRI and took Petitioner off work. PX 1. At the next visit, on October 20, 2008, Dr. Prodromos indicated Petitioner could progress to partial weight bearing with the use of crutches. He did not specifically comment on work status. Petitioner did not claim that Dr. Prodromos continued her off work. Nor did she claim that Respondent declined to accept her partial weight bearing restriction. The Arbitrator finds that Petitioner was initially temporarily totally disabled from October 14, 2008 through October 21, 2008, noting Respondent's stipulation. This is a period of 1 1/7 weeks.

The Arbitrator further finds that Petitioner was temporarily totally disabled from May 27, 2010 through August 17, 2010, based on the parties' stipulation. This is a period of 11 6/7 weeks. Arb Exh 1.

The Arbitrator declines to find that Petitioner was temporarily totally disabled on October 4 and 5, 2010, November 28, 2010, December 28 and 29, 2010 and January 18 through January 22, 2011, as claimed. Petitioner testified to missing work on these dates (T. 4/24/15 at 16-17) but the treatment records do not reflect that any physician kept Petitioner off work on the dates in question. As of September 8, 2010, Dr. Rawal had Petitioner on restricted duty. The next treatment note in evidence is dated December 30, 2010. Dr. Rawal did not comment on Petitioner's work status on that date. It appears Petitioner next saw Dr. Rawal in June 2011, although that treatment note is not in evidence.

The Arbitrator addresses the last claimed interval, January 31 through September 8, 2013, in the decision in the companion case, 13 WC 7376.

Is Petitioner entitled to medical expenses in 11 WC 231?

In 11 WC 231, Petitioner claims a $135.00 balance from Elmhurst Orthopedics (Dr. Rawal) and reimbursement of payments she made to Dr. Rawal ($80.00) and Internal Medicine Center of Oak Park ($90.00). PX 4.

The lengthy bill from Elmhurst Orthopedics includes multiple charges relating to right carpal tunnel and medial epicondylitis, conditions that are not at issue here. Petitioner's counsel provided a summary which purports to separate out the charges relating to the left knee.

The Arbitrator, having attempted to correlate the summary with the accompanying voluminous bills, and based on the foregoing causation finding, awards Petitioner reimbursement of the two $40.00 payments she made to Dr. Rawal in connection with her left knee visits of September 8, 2010 and December 30, 2010. The Arbitrator also awards the claimed $135.00 balance, subject to the fee schedule.

The Arbitrator declines to award Petitioner reimbursement of the $90.00 payments she claims to have made to Internal Medicine Center, for several reasons: 1) Petitioner did not testify to any such payments; 2) the itemized Internal Medicine Center bill in PX 4 includes charges for various health conditions unrelated to the left knee; and 3) Petitioner did not offer the accompanying medical records into evidence, so as to allow the Arbitrator to determine whether any payments Petitioner made to her internist relate to the claimed left knee injury.

Is Petitioner entitled to prospective care in 11 WC 231?

The Arbitrator finds that Petitioner is entitled to prospective care in the form of a return visit to Dr. Rawal, whom she has not seen since September 2013, and a left total knee replacement if in fact the doctor still recommends that procedure. Also see the decision in the companion case, 13 WC 7376.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Larnell Foster,

Petitioner,

16IWCC0035

vs. NO: 04 WC 43233

Illinois State Tollway Authority,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of liability for medical expenses and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Arbitrator denied all medical expenses incurred after June 7, 2012, including treatment with Dr. Piska and Dr. Harvey, as not causally related to the July 23, 2004 accident. On June 7, 2012 Dr. Piska noted Petitioner was doing well following the implantation of a spinal cord stimulator, until Petitioner sustained a fall attributed to a lacunar stroke. Petitioner experienced increased pain and the spinal cord stimulator began to malfunction. The spinal cord stimulator required reprogramming and adjustment, and Petitioner was ultimately referred to Dr. Harvey for a revision of the leads and generator which was performed on December 5, 2012.

After considering all of the evidence, we find that after June 7, 2012 Petitioner required additional treatment necessary to maintain the spinal cord stimulator, and that this treatment was causally related to the July 23, 2004 accident. The spinal cord stimulator, which had only recently been implanted in April of 2012, was treatment previously ordered by the Commission. We modify the Decision of the Arbitrator to award per the fee schedule all expenses for treatment by Dr. Piska and Dr. Harvey, including hospital and ancillary charges for revision of the permanent spinal cord stimulator. Any other medical care rendered to Petitioner is either unrelated to the work injury or unnecessary and duplicative and therefore not Respondent's

16IWCC0035

liability. The evidence shows that both before and after the revision surgery Petitioner remained noncompliant with narcotic usage, and sought additional unauthorized treatment with Dr. Wilkin and Dr. Gruft. Petitioner testified that he ultimately stopped using the spinal cord stimulator because he did not believe the device worked. The remainder of the Arbitrator's decision is affirmed and adopted; no medical expenses incurred prior to January 5, 2012 are awarded. January 5, 2012 is the date on which Petitioner saw Dr. Jalaja Piska on referral from Dr. Nepromuceno.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $469.87 per week for a period of 523 weeks commencing July 24, 2004 through August 3, 2014, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $469.97 per week for life, commencing August 4, 2014, as the incident of July 23, 2004 resulted in permanent total disability pursuant to §8(f) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable for the lesser of the negotiated rates or fee schedule amounts due for charges incurred with Dr. Piska and Dr. Harvey, including any hospital and ancillary charges incurred for implantation of the trial and permanent spinal cord stimulators and for the revision and replacement procedure and maintenance of the permanent spinal cord stimulator. Any other type of medical care rendered to or on behalf of Petitioner was unnecessary or not related to the work injury of July 23, 2004 and is therefore not Respondent's liability under §8(a) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for payments made by its group health insurance to or on behalf of Petitioner on account of said accidental injury, if any such payments were made, as provided in §8(j) of the Act. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit. Respondent is not entitled to credit for any payments made by the U. S. Postal Service.

DATED: JAN 15 2016
RWW/plv
o-12/15/15
46

Ruth W. White

Michael J. Brennan

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0035

FOSTER, LARNELL
Employee/Petitioner

Case# 04WC043233

ILLINOIS STATE TOLL HIGHWAY AUTHORITY
Employer/Respondent

On 11/24/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0059 BAUM RUFFOLO & MARZAL LTD
ANDREW MARZEL
33 N LASALLE ST SUITE 1710
CHICAGO, IL 60602

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

0210 GANAN & SHAPIRO PC
ELAINE T NEWQUIST
210 W ILLINOIS ST
CHICAGO, IL 60654

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

1024 IL STATE TOLL HIGHWAY AUTHY
ATTN: PAULA ELEM
2700 OGDEN AVENUE
DOWNERS GROVE, IL 60515

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

NOV 24 2014

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

16IWCC0035

FINDINGS

On **7/23/2004,** 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 $**36,649.60**; the average weekly wage was $**704.80**.

On the date of accident, Petitioner was **53** years of age, ***married*** with **4** 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 $**245,736.77** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**245,736.77**.

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

ORDER

RESPONDENT IS LIABLE FOR THE LESSER OF THE NEGOTIATED RATES OR FEE SCHEDULE AMOUNTS DUE FOR CHARGES INCURRED WITH DR. PISKA BETWEEN JANUARY 5 AND JUNE 7, 2012, INCLUDING ANY HOSPITAL AND ANCILLARY CHARGES INCURRED FOR IMPLANTATION OF THE TRIAL AND PERMANENT SPINAL CORD STIMULATORS, DURING THAT PERIOD ONLY. ANY OTHER TYPES OF MEDICAL CARE RENDERED TO/ON BEHALF OF PETITIONER DURING THIS PERIOD WAS UNNECESSARY AND/OR NOT RELATED TO THE WORK INJURY OF JULY 23, 2004, AND IS THEREFORE NOT RESPONDENT'S LIABILITY. ANY OTHER MEDICAL CARE RENDERED TO/ON BEHALF OF PETITIONER BEFORE JANUARY 5, 2012 OR AFTER JUNE 7, 2012 IS EITHER UNRELATED TO THE WORK INJURY AND/OR UNNECESSARY AND DUPLICATIVE, AND IS THEREFORE NOT RESPONDENT'S LIABILITY.

THE PETITIONER IS ENTITLED TO THE SUM OF $469.87 FOR A PERIOD OF 523 WEEKS, AS HE WAS TEMPORARILY TOTALLY DISABLED FOR A PERIOD BETWEEN JULY 24, 2004 AND AUGUST 3, 2014.

PETITIONER IS ENTITLED TO THE SUM OF $469.97 PER WEEK FOR LIFE, COMMENCING AUGUST 4, 2014, AS THE INCIDENT OF JULY 23, 2004 RESULTED IN PERMANENT TOTAL DISABILITY PURSUANT TO SECTION 8(F) OF THE ACT.

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

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

Signature of Arbitrator

11.21.14
Date

NOV 2 4 2014

16IWCC0035

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Larnell Foster
Employee/Petitioner

v.

Illinois State Toll Highway Authority
Employer/Respondent

Case # **04WC 43233** _____

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **August 4, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

Procedural History: Petitioner had three prior workers' compensation injuries involving his cervical and lumbar spine, sustained on April 18, 2000, March 28, 2002 and August 15, 2003. These resulted in treatment including a cervical fusion. Those cases (00 WC 38074, 02 WC 43195 and 03 WC 46452) were settled for a total of 24% of a person, with contracts approved by Arbitrator Cronin on June 12, 2008.

On July 23, 2004 Petitioner sustained a new injury to his low back when he fell while bending to retrieve money he dropped from a money tray. At the time of the injury, Petitioner was still under active medical care for chronic low back, cervical and left shoulder pain. Dr. Wilkin had been Petitioner's treating physician since July, 2002 and had him on a course of narcotic medications including Norco and Oxycodone, along with Botox injections every three months. Dr. Wilkin had not wished Petitioner to return to work, had advised against his returning to work, and testified "returning to work full time was not a good idea. That even returning to work part time would probably result in exacerbation of his condition and he should consider disability." At the time of the July 23, 2004 incident, Petitioner had been back to work for about six months.

The claim for the July 23, 2004 injury originally proceeded to trial before Arbitrator Cronin on February 10, 2009 on the issues of accident, causal connection, liability for medical treatment and temporary total disability. Arbitrator Cronin's decision of May 11, 2009 found that as a result of a fall at work on July 23, 2004 Petitioner sustained an accidental injury to his sacroiliac joint along with a temporary aggravation of his pre existing lumbar condition. Arbitrator Cronin specifically found Petitioner did not herniate the L4-5 lumbar disc as a result of the work incident, and therefore denied Respondent's liability for the lumbar surgery performed October 5, 2004. The Arbitrator also adopted the findings and conclusions of Dr. Candido with respect to appropriate further medical care. Dr. Candido had found Petitioner demonstrated pain behaviors. He noted the sacroiliac joint symptoms did not follow a dermatomal pattern. He concluded Petitioner either had pain or opiod induced hyperalgesia, which would take "weeks and months of examination and evaluation" to definitively diagnose. He recommended Petitioner wean off of narcotic medication.

Arbitrator Cronin noted the ever increasing high dosages of narcotic usage to try to control Petitioner's reported level of pain and specifically ordered that Respondent provide Petitioner the "treatment modalities that Dr. Candido has recommended for the sacroiliac joint." These included radio frequency ablation techniques of the SI joints or the lumbosacral medial branches, trial of a spinal cord stimulator and installation of a morphine pump, along with weaning off narcotic medication.

Cross reviews were filed by both parties. In its decision of December 1, 2009 the Commission reversed Arbitrator Cronin's denial of the L4-5 surgery, finding causal connection between the work incident and the need for that procedure, and affirmed in all other respects.

This matter has now proceeded to trial on all issues including permanency, before Arbitrator Carlson on August 4, 2014.

Statement of Facts: Petitioner testified he was aware of the prior decisions of the arbitrator and Commission, that certain types of treatment would be authorized by Respondent and care with physicians like Dr. Wilkin would not be. On cross examination Petitioner admitted he knew the Commission-ordered care included reducing narcotic medication, pursuing a spinal cord stimulator, radiofrequency ablations, a morphine pump, weight reduction, activity and exercise. However, Petitioner admitted he instead chose to continue treating with Dr. Wilkin, receiving Botox injections and narcotic medications. Dr. Wilkin's records reflect care for not only the low back but also the cervical spine, with prescriptions for Dilaudid, Botox, Lyrica, Flexeril, Percocet, Oxycontin, Norco and Oxycodone. Petitioner testified the pain did not get better with any of these. Dr. Wilkin's records reflect he would see Petitioner monthly to refill these prescriptions, and that he also administered Botox injections monthly. The Arbitrator notes Dr. Wilkin's care after December 1, 2009, the date of the Commission decision and order, remained exactly the same as before, and indeed, exactly the same as the treatment Dr. Wilkin had been administering to Petitioner since July, 2002.

Separately, Petitioner began treating with Dr. Glaser March 22, 2010, providing him a history of neck pain since an injury at work in 2000 and low back pain since 2002. Dr. Glaser prescribed Voltaren along with Oxycontin, Roxicodone, and Norco. He did discuss a spinal cord stimulator with Petitioner on two occasions in April, 2010, and again in July, as did his associate Dr. Broadnax in May and June of that year. Petitioner testified at trial he did not wish to undergo that procedure and therefore did not pursue that recommendation.

Petitioner continued receiving prescriptions for narcotic medications from both doctors, frequently seeing both within days of each other. On August 4, 2010 Petitioner was admitted to St. James Hospital for lower gastrointestinal bleeding. A past medical history of substance abuse with a stint in drug rehabilitation nine to ten years earlier was noted. Nevertheless, Drs. Wilkin and Glaser continued the same course of care.

On December 27, 2010 Dr. Wilkin appears to have first become aware Petitioner was obtaining narcotic medications from another medical provider. He made Petitioner sign a new pain contract which prohibited such conduct. On January 13, 2011 Dr. Glaser appears to have made the same discovery; he discharged Petitioner from his care at that time. Petitioner continued treating with Dr. Wilkin and receiving narcotic prescriptions for low back as well as cervical and left shoulder pain through the remainder of 2011. Dr. Wilkin did note Petitioner was still obtaining narcotic medications from some other source, against his pain program mandate, and made Petitioner sign a new pain agreement prohibiting such conduct June 9, 2011.

Petitioner was examined by Dr. Candido at the request of Respondent on August 16, 2011. He noted Petitioner was currently taking Metaxolone, Oxycodone and Norco "at the same quantities

as when last seen three years ago." He expressed concerns about addiction. He noted his recommendations for other treatment modalities had been ignored, that Petitioner at that point had undergone 19 injections and was seeing Dr. Wilkin monthly for narcotic refills, and stated "conduct involving opoids needs to be dealt with firmly and without compromise." He noted Petitioner was no better and no worse than in 2008, and that he was "content to remain off work, using potent opiod medications without consequences or future." He advocated the same treatment modalities as previously ordered by the Commission, and also recommended random urine testing to assess if Petitioner was actually taking all of the narcotics as claimed.

Petitioner admitted to concurrent care for cardiac issues, with admission to St. James in March, 2011, and a second hospitalization for chest pain and a fall while getting out of bed in January, 2012.

In January, 2012 Petitioner testified he sought care with Dr. Piska on referral from his family physician, Dr. Nepomuceno. Dr. Piska's note of January 5, 2012 reflects worsening low back and neck pain with use of narcotics and injections, all without relief. She recommended a trial spinal cord stimulator.

Petitioner was examined by Dr. Lubenow on referral from his attorney on February 8, 2012. Dr. Lubenow likewise noted no improvement with any prior care, and recommended a spinal cord stimulator. Dr. Piska implanted a trial spinal cord stimulator on March 26, 2012. Petitioner testified at trial it worked "pretty good." Dr. Piska's note of March 26, 2012 reflects Petitioner was reporting 80% pain relief, "loves the results" and had improvement in his daily living. He was directed to discontinue Oxycontin, however had to call for a new prescription April 3, 2012 as he had been "self medicating" and ran out of medication. A permanent stimulator was implanted on April 18, 2012. Petitioner testified the permanent stimulator did not work as well, his legs were giving out and he was falling. He also claimed shock like sensations in his belly. He related all of this to the stimulator. He also told Dr. Piska he thought he had suffered some kind of complication during the second implantation of the spinal cord stimulator in April, 2012. However, the records from that admission at Provena St. Mary's fail to reveal any suspicion of stroke or other surgical-related complication. Petitioner did report the same chronic leg numbness he had reported before.

Dr. Nepomuceno's records reflect that on April 30, 2012 Petitioner was seen with a history of incidious onset of head numbness and headaches. CT's of the head and brain were recommended. Dr. Piska documented Petitioner was experiencing numbness and shocking pains in his head causing him to lose his balance, as of May 7, 2012. Dr. Wilkin noted numbness in the head with constant tingling and headaches May 11, 2012. Petitioner was suspected to have suffered a stroke, although brain testing was negative.

On June 7, 2012 Dr. Piska documented that Petitioner had been "doing very well with the spinal cord stimulator until he had a fall," after which the stimulator covered his legs but not his low

back. Dr. Wilkin treated Petitioner for worsening low back pain, neck and left shoulder pain June 14, 2012, and again prescribed Botox, Skelaxin, Percocet, Oxycontin, Norco, Oxycodone, Flexeril, Lyrica, Dilaudid, a Medrol dosepak, Duragesic patches, and Gabapentin. He provided SI joint and Botox injections.

Dr. Piska again noted Petitioner had been doing very well until he fell, as of August 12, 2012. She reprogrammed the stimulator. She noted the stimulator leads had moved when Petitioner fell and recommended they be surgically replanted. She also noted Petitioner was "attempting to take care of himself using medications."

Petitioner saw Dr. Harvey for removal and revision of the spinal cord stimulator leads, performed December 5, 2012. Petitioner provided him a history of multiple falls. Dr. Harvey recommended Petitioner follow up with the stimulator manufacturer for adjustments, as needed, and to continue with Dr. Piska for pain management.

Petitioner continued treating with Dr. Wilkin, receiving narcotic prescriptions and injections. Dr. Piska prescribed Oxycodone and Soma July 11, 2013, and specifically told Petitioner to take this and nothing else. Petitioner continued receiving narcotic prescriptions from Dr. Wilkin. Dr. Piska repeatedly directed Petitioner to follow up with the stimulator manufacturer for adjustments, and specifically noted both that Petitioner was failing to do so and that he was taking more medications than prescribed. On December 26, 2013 she now noted Petitioner was taking his wife's medications, as well. She referred Petitioner to physical therapy, but he did not follow through with that recommendation.

Petitioner stopped treating with Dr. Piska, and on January 30, 2014 sought care from Dr. Gruft. He told the doctor neither the trial nor the permanent implantation of the spinal cord stimulator had worked, and he had turned them both off. Dr. Gruft prescribed narcotic medication and therapy. Dr. Gruft has continued Petitioner on narcotic medications, to date. These include Oxycodone, Norco and Percocet.

On May 27, 2014 P was examined by Dr. Kale at the request of his attorney. He advised the doctor he had turned off the spinal cord stimulator about four months earlier as it was not working.

He testified he is currently very limited in his activities and mostly stays home. He testified he has had absolutely no improvement in his condition since 2009.

Regarding F) is Petitioner's current condition causally related to the injury, the Arbitrator finds the following:

The Arbitrator notes that in Arbitrator Cronin's original decision in this matter, he had found Petitioner's lumbar condition to be a "temporary aggravation" of his pre existing lumbar

condition, and that the Commission expressly made no change in that language in its order. It is undisputed that Petitioner both had prior low back injuries and had been under active medical care for those injuries before the new incident of July 23, 2004. The Commission decision had found and related a "new" herniated disc at L4-5 for which surgery had been performed, and at the time of its decision it had found Petitioner still temporarily totally disabled and in need of medical care. However, the Commission also ordered specific care that would cure or relieve Petitioner of the ill effects of this new work injury.

Petitioner had since at least July, 2002, some two years before this new work injury, been under the active medical care of Dr. Wilkin, with ongoing prescriptions of narcotic medications along with Botox injections. Following the work injury of July 23, 2004, and through the time of hearing before Arbitrator Cronin February 10, 2009, Petitioner had continued treating with Dr. Wilkin and receiving that same exact treatment, although by his own admission he was not getting any better. Arbitrator Cronin and the Commission therefore ordered that Petitioner receive the type of care advocated by pain management specialist Dr. Candido, and specifically that he was to wean off of the narcotic medication he had, at that point, been taking for seven years. Petitioner admitted knowing exactly what the arbitrator and Commission had ordered for him, however, he expressly disregarded that order and continued not only receiving the same care from Dr. Wilkin, but duplicative care and narcotic medications from Dr. Glaser.

It was not until January, 2012 that Petitioner finally sought the medical treatment ordered by the Commission with Dr. Piska, undergoing implantation of a trial spinal cord stimulator which he reported to his doctor effectuated "80% relief," "improved daily living," and that he "loves the results." The permanent spinal cord stimulator was implanted and per Dr. Piska, once again Petitioner was doing "very well" with coverage into both the low back and both legs until, unfortunately, Petitioner had a fall, allegedly related to a stroke. That fall resulted in dislodging of some of the spinal cord leads, requiring surgical re-implantation, and it is not clear whether that procedure would or could have impacted Petitioner's professed pain, as he refused to meet with the manufacturer to have the spinal cord stimulator re-set. The Arbitrator also notes Petitioner reported to Drs. Kale and Gruft he simply turned the trial and permanently implanted stimulators off shortly after implantation of each.

He was on high dosages of narcotic medication from two different doctors, has been noted to take his wife's medications and/or to take his own improperly, so whether any change in his underlying medical condition could have been effectuated is not known.

The Arbitrator finds causal connection between the July 23, 2004 incident and Petitioner's subsequent and current condition of ill being. There is no direct evidence of any break in that

16IWCC0035

causation. Petitioner has reported consistent low back and leg pain. Respondent is not liable for any cervical complaints or other conditions of ill being alleged by Petitioner.

Regarding J) were the medical services provided to Petitioner reasonable and necessary, the Arbitrator finds the following:

The Commission ordered specific types of treatment for Petitioner. Ongoing treatment with Dr. Wilkin, duplicative treatment with Dr. Glaser, and more recent treatment with Dr. Gruft do not meet that mandate and are therefore denied as excessive and unnecessary.

Treatment with Dr. Piska commencing in January 2012, did meet the Commission mandate. The Arbitrator therefore finds the care with Dr. Piska commencing January 5, 2012 and through June 7, 2012, including hospital and ancillary charges for implantation of the trial and permanent spinal cord stimulator, to be Respondent's liability. Respondent shall be liable for the lesser of the negotiated rates or fee schedule amounts due for that care, pursuant to Section 8 of the Act.

Any medical charges incurred with Dr. Piska, any other doctor or facility after June 7, 2012 are not causally connected to the July 23, 2004 incident and are not Respondent's liability. By June 7, 2012 Dr. Piska was documenting non work related symptoms of a stroke including multiple falls, that as a result of one such fall Petitioner had disrupted the spinal cord stimulator leads, for which he would require surgical re-implantation under Dr. Harvey's care. Subsequent to that, Petitioner testified he shut the stimulator off and he no longer uses it. He has resumed narcotic usage, in direct contravention of the Commission order. The Arbitrator therefore finds all care after June 7, 2012 to be unrelated to the work incident of July 23, 2004 and not Respondent's liablity.

Regarding K) what temporary total disability benefits are in dispute, the Arbitrator finds the following:

Petitioner is entitled to the sum of $469.87 per week for a total period of 523 weeks from July 24, 2004 through August 3, 2014.

Regarding L) what is the nature and extent of the injury, the Arbitrator finds the following:

The Arbitrator finds Petitioner permanently and totally disabled as of the date of hearing of August 4, 2014. Petitioner shall be entitled to the sum of $469.87 per week from August 4, 2014 forward, for life, pursuant to Section 8(f) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kimberly DiClemente,

Petitioner,

16IWCC0036

vs.

NO: 14 WC 30129

Rush University,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective treatment, temporary disability benefits and penalties and fees and being advised of the facts and law, reverses the Arbitrator's award of penalties and fees and modifies the Decision of the Arbitrator as stated below to strike several portions of the Arbitrator's findings. We otherwise affirm and adopt 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 compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner, a 27-year-old nurse employed by Respondent hospital, tripped and fell over an IV pole while performing her duties on May 5, 2014. She sustained injuries to her right ankle and accident was accepted by Respondent. For conservative treatment, she participated in extensive physical therapy and wore a brace or boot. After being referred from corporate health services to Dr. Garras at Midwest Orthopedics at Rush, she underwent one right ankle injection for diagnostic and therapeutic purposes and he ultimately recommended surgery to repair a full thickness tear of the anterior tibiofibular ligament (ATFL). Petitioner sought a second opinion from another orthopedic surgeon at Midwest Orthopedics, Dr. Holmes. After obtaining an ultrasound and CT scan of Petitioner's right ankle, he suggested Petitioner try to live with her condition rather than undergo invasive treatment. However, he opined that if surgery was elected, an arthroscopic evaluation and possible Brostrom ligament repair was the appropriate treatment for Petitioner's work-related injury. Respondent sent Petitioner for a §12

examination with a podiatrist, Dr. Vinci. Dr. Vinci believed that Petitioner sustained no more than an ankle strain and reached maximum medical improvement from the accident on February 5, 2014. On September 9, 2014 Dr. Garras performed a right ankle arthroscopy and debridement, right Brostrom-Gould lateral ligament reconstruction, peroneus brevis and longus debridement, peroneus brevis repair, posterior ankle debridement with partial resection of the talus, and an amniotic membrane application.

Pursuant to Dr. Vinci's §12 examination opinion, Respondent disputed causal connection between the May 5, 2014 injury and the need for further treatment including surgery and denied authorization under workers' compensation. Respondent relied on Dr. Vinci's opinion that Petitioner had reached maximum medical improvement and could work full duty and terminated Petitioner's temporary disability benefits. Respondent's workers' compensation coordinator, Ms. Olson, testified that after the denial of claim decision was issued by Respondent's workers' compensation insurance she no longer received medical reports corresponding to Petitioner's claim. The insurance claim adjustor's denial letters to Petitioner are in evidence although the adjustor did not testify at hearing.

The Arbitrator adopted the opinions and findings of Dr. Holmes and Dr. Garras, and found that their opinions outweigh the opinion of Dr. Vinci. We agree and we affirm the Arbitrator's finding of causal connection and award of temporary disability benefits, medical expenses, and prospective treatment in the form of the current course of post-operative care recommended by Dr. Garras. However we reverse the Arbitrator's finding that Petitioner proved she is entitled to penalties and attorney's fees. We do not find that Respondent acted in bad faith or for unreasonable and vexatious purposes. We note that per the medical records Petitioner's treatment appeared to plateau over the course of her treatment and that according to her own physician, Dr. Garras, her clinical examination and diagnostic imaging failed to indicate a clear etiology of her ongoing symptoms. Furthermore Petitioner had a history of at least one prior right ankle sprain with years of strenuous athletic activity as a young adult. After a thorough consultation as a second opinion, Dr. Holmes even recommended avoiding surgery if possible. No depositions were taken prior to the §19(b) hearing. We find that reasonable physicians in this case differ in their opinions and there is no evidence that any opinion lacks credibility. Necessary workers' compensation denial letters were provided to Petitioner, and Petitioner's challenge to Respondent's denial of benefits was appropriately brought for hearing before the Arbitrator.

We must further disagree with the Arbitrator's characterization that Respondent chose to "bury it's[sic] head in the sand like an ostrich" in light of the opinion of Dr. Holmes, instead of following its "obligation" to reconsider its denial. We do not adopt these statements and we hereby modify the Decision of the Arbitrator to strike the first paragraph of page fourteen of the Arbitrator's findings. Furthermore, because we do not find that Midwest Orthopedics at Rush is an *agent* of Respondent we also strike the second paragraph of page fourteen and the third sentence in the second full paragraph of page eight of the Arbitrator's findings. The doctors at Midwest Orthopedics are affiliated with Respondent hospital but are not agents of Respondent. The evidence further fails to show that Petitioner was compelled to treat at Midwest Orthopedics or that Respondent would not have authorized treatment with a different provider.

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IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 13, 2015 is hereby modified as stated above and otherwise affirmed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $666.72 per week for a period of 12 1/7 weeks, commencing February 6, 2014 through March 16, 2014, August 7, 2014 and for the final period of September 23, 2014 through the §19(b) hearing date of November 6, 2014, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical expenses pursuant to the Illinois Medical Fee Schedule and reimburse the group carrier and the Petitioner for out-of-pocket expenses. In addition, Respondent shall authorize and pay the reasonable and necessary medical expenses incurred in connection with the prospective medical treatment prescribed by Dr. Garras pursuant to §8(a) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $47,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 15 2016
RWW/plv
o-12/15/15
46

Ruth W. White

Joshua D. Luskin

Charles J. DeVriendt

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

16IWCC0036

DICLEMENTE, KIMBERLY MARIE Case# **14WC030129**

Employee/Petitioner

RUSH UNIVERSITY MEDICAL CENTER

Employer/Respondent

On 1/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0154 KROL BONGIORNO & GIVEN LTD
KENNETH R GIVEN
120 N LASALLE ST SUITE 1150
CHICAGO, IL 60602-3506

2965 KEEFE CAMPBELL BIERY & ASSOC
MATTHEW IGNOFFO
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

16IWCC0036

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)

KIMBERLY MARIE DICLEMENTE
Employee/Petitioner

v.

RUSH UNIVERSITY MEDICAL CENTER
Employer/Respondent

Case # **14** WC **30129**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **November 6, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

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

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS 16IWCC0036

On the date of accident, **February 5, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 39-3/7 weeks preceding the injury, Petitioner earned **$39,460.11**; the average weekly wage was **$1,000.08**.

On the date of accident, Petitioner was **27** 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 **$3,840.65** for TTD, **$1,879.40** for TPD, **$0** for maintenance, and **$ 0** for other benefits, for a total credit of **$ 5,720.05**.

Respondent is entitled to a credit of **$4,359.07** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $666.72 per week for 12-1/7 weeks, commencing February 6, 2014 through March 16, 2014, August 7, 2014 and for the final period of September 23, 2014 through the 19(b) hearing date of November 6, 2014, as provided in Section 8(b) of the Act.

Respondent shall pay the reasonable and necessary medical expenses incurred in connection with the medical treatment received through the 19(b) hearing date as itemized on the Request for Hearing stipulation sheet in the amount of $49,653.54 pursuant to Section 8(a) of the Act.

Respondent shall pay the medical expenses pursuant to the Illinois Medical Fee Schedule and reimburse the group carrier and the Petitioner for out-of-pocket expenses. In addition, Respondent shall authorize and pay the reasonable and necessary medical expenses incurred in connection with the prospective medical treatment prescribed by Dr. Garras pursuant to Section 8(a) of the Act.

Respondent shall pay penalties pursuant to Section 19(l) of the Act of $1,350.00.

Respondent shall pay penalties under Section 19(k) of the Act in the amount of $26,969.80.

Respondent shall pay additional attorneys' fees under Section 16 of the Act in the amount of $10,787.92.

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

01-15-15
Date

ICArbDec19(b)

JAN 13 2015

16IWCC0036

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KIMBERLY MARIE DICLEMENTE,)
)
)
vs.) No. 14WC 30129
)
)
RUSH UNIVERSITY MEDICAL CENTER,)

In support of the Arbitrator's decision relating to (F), is the Petitioner's present condition of ill-being causally related to the injury, the Arbitrator finds the following facts:

Petitioner is a 27 year-old female registered nurse working for Respondent since May 6, 2013. Petitioner sustained a work injury on February 5, 2014, when she was in a patient's room and tripped and fell over an IV pole sustaining injuries to her right ankle. She immediately reported the accident to her supervisor and was transported by wheelchair to the Employee and Corporate Health Service. Later that day, she was directed to the emergency room at Rush where she had x-rays of her right ankle and lower right leg and was prescribed an air cast and crutches (Px.1). She returned to Employee and Corporate Health Service.

It was there where she met with her supervisor who called Beth Olson (the workers' compensation coordinator) by speaker telephone, who is the Workers' Compensation Coordinator for Rush. Petitioner and Ms. Olson discussed the names of specialists at Midwest Orthopaedics at Rush who could provide further treatment. The options included Dr. Simon, Dr. Lee and Dr. David Garras (Px.14). Beth Olson contacted Midwest Orthopaedics and made an appointment for the

Petitioner with Dr. Garras on February 13, who later prescribed an MRI and an ASO brace (Px.2).

The MRI indicated a full thickness tear of the anterior tibiofibular ligament (ATFL) with possible other tears of the ATFL and tenosynovitis of the tendons and extensive edema (Px.1,2).

In follow up appointments, Dr. Garras prescribed physical therapy and continued use of the brace. The parties stipulated Petitioner was off of work from February 6, 2014 through March 16, 2014. While it is true Dr. Garras released Petitioner to return to full duty work on March 17, the Petitioner continued to wear the brace and to perform physical therapy (Px.2).

On April 24, Dr. Garras prescribed bilateral arch supports with medial heel wedges and continued physical therapy (Px.2). The Petitioner was prescribed a restricted work schedule of two-twelve hour shifts per week in contrast to her regularly scheduled three-twelve hour shifts. The parties stipulated TPD benefits were paid from May 12, 2014 through June 26, 2014.

On June 26, 2014, the Petitioner had a second MRI which was prescribed by Dr. Garras. Once again, it confirmed the disruption of the ATFL and fibulocalcaneal ligament. The welling had decreased. Therefore, Dr. Garras performed an injection into her os tirgonum and FHL region. More physical therapy was prescribed and the restricted work schedule continued onward (Px.2).

On July 17, Dr. Garras prescribed surgery consisting of a posterior process talus resection and FHL debridement, but indicated to the Petitioner she might want a second opinion before proceeding with the surgery, which Petitioner requested (Px.2).

On June 26, Dr. Garras referred Petitioner to a rheumatologist.

On July 18, 2014 the Petitioner was examined by the rheumatologist at Rush (Px.2). At rial,

the Petitioner clarified the purpose of this appointment, stating that she had blisters and swelling of the right ankle with abrasions from her brace and the doctor wanted to rule out a systemic process.

Respondent arranged for an IME with M&M Orthopaedics where Petitioner was seen on July 22, 2014 by Dr. Samuel Vinci, a podiatrist, who later wrote that the Petitioner was at MMI, could return to work with no restrictions and the medical care provided by the rheumatologist was unwarranted. As a result, Respondent told the Petitioner to return to work and to bill her group insurance for any additional treatment (Rx.5,6).

As an aside, it should be noted that Petitioner received TPD benefits from July 7 through August 2, 2014, as she was still on restricted duty.

On August 7, Dr. Garras met with the Petitioner and discussed right ankle surgery. At that time, Petitioner still had swelling, crepitus and continued pain on flexion (Px.2).

On September 2, 2014, the Petitioner sought a second opinion with Dr. George Holmes. Dr. Holmes noted Petitioner had pain with palpation and discomfort with plantar flexion and eversion against resistance with a reproducible click or thump or clump with maximal plantar flexion of the ankle and slight jog of inversion and abduction. He noted he was able to produce an audible and palpable click and the patient grimaced with discomfort. Dr. Holmes noted the lateral weight bearing x-ray did suggest two small densities in the posterior aspect of the ankle with the MRI consistent with a possible compression fracture at the edge of the posterior tibia. Dr. Holmes prescribed a dynamic ultrasound stating that he noted, "crunching... with plantar flexion 40 degrees with adduction foot and inversion heel." Dr. Holmes also recommended a CT scan of the ankle (Px.2).

The CT scan was performed on September 2 and indicated a small cortical excrescence from the lateral aspect of the calcaneus. The ultrasound from Northwestern Memorial Hospital on September 3 showed focal thickening on the fibular attachment of the superior peroneal retinaculum, with a ruptured ATFL and soft tissue thickening in the anterolateral gutter (Px.2).

On September 10, 2014 the Petitioner was again seen by Dr. Holmes who suggested the Petitioner try and "tough it out," but if she wanted surgery, he would recommend an arthroscopic evaluation and possible Brostrom ligament repair. Dr. Holmes' record reflects he had spoken with Dr. Garras (Px.2). Later that day, the Petitioner was seen by Dr. Garras who recommended surgery which was ultimately performed on September 23, 2014 at Rush University Medical Center (Px.1, 2).

Petitioner testified she had attempted to work her regular duties as a registered nurse prior to surgery, which required her to be on her feet throughout her twelve hour shift, noticing significant pain, swelling, and discomfort, even though she continued to wear the brace.

Dr. Garras performed a right ankle arthroscopy and debridement, right Brostrom-Gould lateral ligament reconstruction, peroneus brevis and longus debridement, peroneus brevis repair, posterior ankle debridement with partial resection of the talus, and an amniotic membrane application. The surgery required both the amniox amniotic membrane and two Biomet JuggerKnot anchors. The post-operative diagnosis was right ankle instability, right ankle pain, peroneal tendinosis and tear with posterior ankle impingement.

The operative procedure confirmed both the tear of the ATFL and the tear of the peroneus brevis tendon.

The surgical report indicates the indication for the procedure was the fact the Petitioner had "attempted non-operative management for an extended period of time. The patient had two MRIs, which showed lateral ligament instability and tearing as well as peroneal tenosynovitis with a possible tear and posterior ankle fluid collection about the FHL related to a Stieda process. The patient failed a trial of non-operative management. After reviewing the appropriate imaging and laboratory studies, the above-named procedure was recommended." (Px.1,2).

On October 6, 2014, Dr. Garras removed the sutures and provided a non-weight bearing Cam boot and a compression wrap. He also recommended exercises, a knee scooter. And removed the Petitioner from work for a month. At the follow up office visit, the Petitioner was told to remain in the non-weight bearing Cam boot for two weeks, prescribed a TED hose stocking and additional medication. Finally, the doctor prescribed a water circulation cold pad with a pump (Px.2).

Petitioner testified she was scheduled to see Dr. Garras on November 6, 2014, after the 19(b) and 8(a) hearing.

No workers' compensation benefits were paid after the original Section 12 exam performed by Dr. Vinci (DPM). Nevertheless, Dr. Vinci authored a follow up report dated July 22, 2014 which indicated that the Petitioner had a healing irritation from a brace and positive tenderness on palpation around the peroneal tendons from their insertion. Moreover, Dr. Vinci found no crepitus, which is inconsistent with the findings of Dr. Holmes. While it is true that Dr. Vinci noted sensitivity with palpation, and reviewed the MRIs, he still thought the Petitioner had an ankle sprain, needed no further treatment and could return to work. (Rx.5).

Petitioner testified she tried to return to work as instructed by Dr. Vinci, yet noticed right

ankle pain, swelling and discomfort, since her job required her to be on her feet for twelve hours. Petitioner testified she felt she had tried conservative management for nearly eight months.

Workers' Compensation Coordinator, Beth Olson, testified pursuant to a subpoena from Petitioner's attorney and admitted she had reviewed various orthopedic specialists at Midwest Orthopaedics at Rush with both the coordinator and the Petitioner and specifically scheduled an exam with Dr. David Garras at Midwest Orthopaedics. She testified she was not aware of subsequent medical care after the IME, although she was aware the Petitioner had surgery. She was not aware the Petitioner had an ultrasound or CT scan and was recently was aware the Petitioner had seen Dr. Holmes and had discussed both the opinions of the doctors at Midwest Orthopaedics at Rush and the surgical procedure with her defense attorney. She admitted she did not reconsider her position regarding the termination of benefits and medical care.

Petitioner offered into evidence an article authored by the defense attorney on their firm website where the attorney stated "Rush's orthopedic program is entirely staffed by physicians from Midwest Orthopaedics at Rush, also the team physicians for the Chicago Bulls and Chicago White Sox." The article was referring to the rankings from U.S. News and World Report which had released its 2014 rankings for the best hospitals in the nation and the report had reviewed 1,646 hospital orthopedic programs nationwide. Out of all of the programs, Rush's orthopedics program was ranked #6 nationwide, making it the highest ranked orthopedic program in Illinois (Px.13). Nevertheless, Respondent chose to rely on their podiatrist to deny any further workers' compensation benefits.

Respondent cross-examined Petitioner regarding her physical activities from junior high through the present. Petitioner admitted she had been ranked the top female athlete in her high

school and had engaged in lacrosse, field hockey, volleyball and soccer while in high school and had continued playing lacrosse on a club team at Michigan State University during her college years. Since college, she testified she had run in various fundraising marathons and had run obstacle courses for fundraisers which involved great physical exertion. Respondent offered a series of pages from Petitioner's Facebook regarding her fundraising activities. The testimony confirms the Petitioner was able to perform heavy physical activities involving running and sports with no difficulties until her accident of February 5, 2014. The above testimony established that the Petitioner is not a deconditioned, middle-aged, office worker who is unaccustomed to mental and physical challenges.

F. Is the Petitioner's current condition causally related to the injury?

The Arbitrator notes that accident, notice and causal connection for a right ankle sprain are not disputed in this matter.

Arbitrator adopts the opinions and findings of both Dr. Holmes and Dr. Garras. Dr. Holmes documented his physical objective findings which lead him to prescribe both an ultrasound and a CT scan. He indicated if the Petitioner could not handle any additional conservative management that surgery was appropriate and he discussed his findings and the proposed surgery with Dr. Garras.

Dr. Garras provided a lengthy explanation in his operative report as to the indications for the need for the surgery. Both Dr. Holmes and Dr. Garras found instability of the ankle, consistent with the MRIs and inconsistent with the opinion of Dr. Vinci. Both Dr. Garras and Dr. Holmes have impeccable reputations as being experts in the treatment of ankle injuries, and their opinions far

outweigh the opinion of Dr. Vinci (DPM).

Dr. Vinci's opinion is less persuasive for the following reasons. First, he did not review the CT scan, the ultrasound nor the subsequent reports of Dr. Holmes and Dr. Garras from September. He did not review the operative report from September 23, 2014. Petitioner offered into evidence the medical records of Midwest Orthopaedics at Rush pursuant to Nollau Nurseries, Inc. v. Industrial Commission, 32 Ill.2d 190, 204 N.E.2d 745 (1965), and Fencl-Tufo Chevrolet, Inc. v. Industrial Commission of Illinois, 169 Ill.App.3d 510, 120 Ill.Dec 15, 523 N.E. 2d 926 (1988).

Additionally, it bear repeating that the Petitioner was directed by the employer to Midwest Orthopaedics at Rush for treatment. Dr. Garras was selected by Beth Olson, the Workers' Compensation Coordinator. Therefore, Dr. Garras and Dr. Holmes are agents of the Respondent. Dr. Garras specifically stated in his report of September 10, 2014 "I did explain to her that all of these injuries are still related to her initial injury that occurred in February while she was at work and I do believe that she would benefit from surgical intervention, given the fact that it has been seven months since the injury without any improvement despite our best efforts to avoid any surgical intervention with therapy immobilization and nonoperative modalities." (Px.2). Therefore, this Arbitrator finds a causal relationship between the condition of ill-being and the original accident of February 5, 2014.

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

The Respondent provided medical treatment through August 2014. The medial care was terminated under the Workers' Compensation Act based on the IME physician, Dr. Vinci. All treatment up to that point was stipulated by the parties to be reasonable and necessary. Based on the above causal connection findings, the subsequent medical care had been appropriate, reasonable and necessary.

The itemization of the medical bills was contained on the Request for Hearing stipulation sheet. Dr. Garras referred the claimant to a rheumatologist at Rush University due to the abrasions and blisters the Petitioner had from wearing her brace. Dr. Vinci also noted the abrasions at the time of his exam. Although Dr. Vinci did not feel the exam with the rheumatologist was related, this is inconsistent with both his objective findings and the reports of Dr. Garras. Dr. Garras specifically stated he was referring the claimant to the rheumatologist to rule out a systemic disease, and the referral and treatment was reasonable and related (Px.2). Therefore, the bill of the rheumatologist at Rush University Medical Center in the amount of $1,036.75 is related and awarded.

Petitioner submitted the operative bill in the amount of $42,266.07 from Rush University Medical Center. Both Dr. Holmes and Dr. Garras were of the opinion that the surgery was reasonable and necessary as a result, it is compensable under the Act. (Px.1,2).

The bill of Midwest Orthopaedics at Rush in the amount of $1,481.00 relates to the medical care from September 2, 2014 through October 23, 2014 with Dr. Garras and Dr. Holmes. They are

compensable under the Act. (Px.1,2).

Dr. Holmes referred the Petitioner to Northwestern Memorial Hospital for an ultrasound ($1,850.00) & ($164.00).

Dr. Holmes referred the claimant for a CT scan ($2,518.50) and ($258.00). Finally, prescription receipts ($79.22) are awarded (Px.1,2).

The Respondent is given a credit for the medical bills paid pursuant to Section 8(j) of the Act which is stipulated to be $4,359.07.

However, the Respondent is obligated to pay the bills pursuant to the Fee Schedule in the event they are outstanding.

Petitioner's group health care provider, Cigna, is to reimbursed directly. Petitioner is be held harmless for any outstanding medical bills incurred for this injury to the date of the hearing.

Finally, Petitioner is to be reimbursed for her out-of-pocket expenses for in the amount of $222.72.

The total of the medical bills which are awarded are itemized on the Request for Hearing stipulation sheet as listed which total $49,653.54.

In support of the Arbitrator's decision relating to (K), is Petitioner entitled to any prospective medical care, the Arbitrator finds the following facts:

Petitioner testified she is still under the care of Dr. Garras who performed surgery on September 23, 2014. The Petitioner continues to utilize the crutches, TED hose stocking, medication, water circulating cold pad with pump and scooter which were also prescribed by Dr. Garras subsequent to the surgery. Dr. Garras has prescribed an exercise program and his notes indicate he is considering prescribing physical therapy at the next scheduled office visit. Since Petitioner just had the extensive surgery of September 23, 2014 documented in the operative report, the continuing and prospective medical care is reasonable and necessary to assist her in her recovery from her accident. The prospective medical care of both Dr. Garras of Midwest Orthopaedics at Rush and Rush University Medical Center is reasonable and necessary (Px.1,2).

In support of the Arbitrator's decision relating to (L), what temporary benefits are in dispute (TTD), the Arbitrator finds the following facts:

The parties have stipulated the Petitioner was temporarily totally disabled from February 6, 2014 through March 16, 2014 and August 7, 2014 for a total of 5-5/7 weeks. The Respondent paid the appropriate TTD and was given a credit in the amount of $3,840.65 for TTD paid.

The parties further stipulated the Petitioner was entitled to TPD benefits for the periods from May 12, 2014 through June 26, 2014 and July 7, 2014 through August 2, 2014. Respondent was also given a credit for those TPD payments in the amount of $1,879.40.

The only dispute as of the hearing date was for the continued TTD benefits claimed for September 23, 2014 through November 6, 2014. The claimed additional period of temporary total disability is 6-3/7 weeks.

The original period of temporary total disability stipulated as paid by the Respondent was 5-5/7 weeks and the additional claimed period of 6-3/7 weeks covers from the surgical date of September 23, 2014 through the 19(b) hearing date of November 6, 2014. Therefore, total temporary total disability benefits of 12-1/7 weeks is awarded at the TTD rate of $666.72. Dr. Garras has provided the Petitioner with disability statements according to her testimony and the record of Dr. Garras since the date of her surgery (Px.2). There is no doubt the Petitioner is incapable of performing her job duties as a registered nurse which does require her standing and walking throughout a twelve hour shift.

In support of the Arbitrator's decision relating to (M), should penalties or fees be imposed upon Respondent, the Arbitrator finds the following facts:

Petitioner filed a Petition for Penalties and Attorneys' Fees (Px.3). The Respondent originally relied upon the opinion of Dr. Vinci (DPM) in terminating medical care and any additional claimed TTD benefits. Petitioner has cited the case of Consolidated Freightways, Inc. v. Industrial Commission of Illinois, 136 Ill.App.3d 630, 91 Ill.Dec. 306, 483 N.E. 2d 652 (1985) in support of the request for penalties and fees. While the Respondent relied upon the opinion of their podiatrist, Dr. Vinci, in terminating the benefits and medical care, the Respondent had an obligation to reconsider their position after additional testing and treatment.

Dr. Garras provided multiple opinions after the IME documenting Petitioner's continued objective findings and subjective complaints which supported his prescription for surgery. Dr. Vinci stated in his report the radiologist had interpreted the MRI as showing the claimant had a disruption of the ATFL and FCL ligaments. He incorrectly stated the ankle was stable and the Petitioner did not require further treatment (Px.1,2; Rx.5).

The Respondent had an obligation to reconsider their position regarding medical care and disability in light of the new findings from both Dr. Garras and Dr. Holmes. The Respondent had an obligation to consider the results of the CT scan, the ultrasound and the operative findings from September 23, 2014.

The operative report describes in detail the procedure performed by Dr. Garras. In addition, Dr. Garras provided an explanation as to the objective findings and why he considered the surgery. The operative findings confirmed the diagnosis and objective findings of both Dr. Garras and Dr. Holmes. The Petitioner had torn ligaments and tendons, and the surgery was necessary to relieve her of the symptoms she had been suffering since February 5, 2014 (Px.1, 2).

The Respondent is Rush University Medical Center, a leading medical institution in the Chicagoland area. The Workers' Compensation Coordinator and the third party administrator, Sedgwick Claims, had an obligation to reconsider their initial denial of continuing treatment and disability based on an opinion from a podiatrist, Dr. Vinci, from July. Instead, Respondent seemed to "bury it's head in the sand like an ostrich," and ignore all of the subsequent exams, testing and treatment subsequent to its IME.

It is no less important to note that Midwest Orthopaedics at Rush is an agent of the Respondent-Employer. Both Dr. Garras and especially Dr. Holmes have reputations as two of the leading orthopedic surgeons in the treatment of ankle and foot injuries. Beth Olson admitted she was aware of the U.S. News and World Report findings showing Midwest Orthopaedics to be a leading orthopedic group, who are the only physicians allowed to work at Rush University Medical Center.

As a result of the above, Respondent's behavior in denying this claim can only be characterized as unreasonable and vexatious. The Petitioner is entitled to Section 19(l) penalties of $30.00 per day for the additional 45 days Petitioner has been disabled covering from September 23 through November 6, 2014, (45 days at $30.00 per day is $1,350.00). Therefore, penalties are assessed under Section 19(l) of $1,350.00.

Petitioner is awarded TTD benefits of September 23, 2014 through November 6, 2014, or 6-3/7 weeks at a TTD rate of $666.72. Additional TTD benefits are awarded of $4,286.06 pursuant to Section 8(b).

Petitioner has submitted medical bills which are itemized and total $49,653.54. Petitioner is entitled to penalties under Section 19(k) of 50% of the compensation. The TTD benefits total $4,286.06, the medical bills total $49,653.54, for a total of $53,939.60. 19(k) penalties are awarded of 50% of the total compensation or $26,969.80.

In addition, Petitioner is entitled to additional attorneys' fees under Section 16 of 20% of the total compensation of $53,939.60 which comes out to $10,787.92.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christine Osinga,

Petitioner,

16IWCC0037

vs.

NO: 14 WC 21610

Elks Lodge #572,

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 and prospective medical treatment and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner failed to prove she sustained an accidental injury arising out of and in the course of her employment by Respondent on June 3, 2014 and that her current condition of ill-being is causally related to her employment by Respondent. Petitioner filed a §19(b) petition seeking benefits under the Act including prospective surgery recommended by Dr. Gornet, a two-level cervical disc replacement. A §19(b) hearing was held on March 16, 2015 and the Arbitrator's Decision was issued on May 20, 2015.

Petitioner filed an Application for Adjustment of Claim on June 24, 2015 alleging injury to her neck from "moving a full keg" on June 3, 2014. Petitioner worked as a manager at the Elks Lodge #572; her employment commenced on October 26, 2013, eight months prior to the date of the alleged accident. There are no employment records in evidence, but Petitioner testified that she worked sixty to seventy hours per week and she described her job duties as very broad – inclusive of everything from payroll to washing dishes and tending bar. She denied any pre-existing physical conditions that interfered with her work duties. On further questioning she admitted that she was involved in a motor vehicle accident with resultant whiplash-type injury in 2001, and that she had prior neck pain treatment and a condition of chronic low back pain managed with pain medication prescribed by her primary care doctor.

Petitioner testified that while attempting to move a keg on June 3, 2014 she felt and heard a pop in her neck and experienced an immediate onset of excruciating pain radiating to her head and both arms. The incident was unwitnessed and Petitioner testified that she subsequently tried to continue her regular work duties. When she felt that she "could not take it anymore" she sat down next to Ms. Sauer, a board member of the Lodge, and testified that "[Ms. Sauer] was like what's wrong with your neck because I kept grabbing it. [I] explained what happened to her and I said, I got to go home, I'm hurting, I got to go home and lay down, so I did." (T. 23)

Petitioner testified that she tried calling Mr. Schemonia, another board member of the Lodge, on June 3rd but did not speak with him. When he came in to the Lodge she reported the incident to him before she left work. (T. 24) Petitioner testified that she was in such severe pain immediately following the incident that she could hardly move her arms, and because the pain did not get better she primarily just sat for the rest of the day, "grabbing" her neck.

Petitioner testified that the following day, the 4th of June, she had "no choice" but to bartend at the Lodge, even though she was in severe pain. She testified that she made phone calls to "every bartender we had" trying unsuccessfully to find a replacement. (T. 25) She testified that she arrived at work late, and that there was a board meeting at the Lodge that night. After the meeting the board members sat around the bar and Petitioner testified that "another conversation was had between Debbie [Sauer], Steve [Schemonia] and myself about my neck because, you know, it was obvious to everyone – I mean, I couldn't move my head at that time, it was completely locked and, you know, couldn't really reach for things either." (T. 25)

Petitioner was scheduled to be off of work on June 5, 2014 and she testified that she rested at home. The following day she awoke with a feeling of numbness in her face. She testified that she called her primary care doctor and explained that she had been injured at work. Petitioner alleged she was told she would need to obtain a claim number for treatment under workers' compensation. She went to St. Joseph's Hospital emergency room on June 6, 2014 and complained of neck and back pain and numbness in her extremities. She reported sustaining an injury at work less than one week earlier and having gradually worsening pain in her back and neck. The examining physician noted tenderness to palpation at Petitioner's neck and back and decreased range of motion due to pain. Her medications notably included Cymbalta, Norflex, Valium, Lortab and Percocet. The results of a CT scan of the head were unremarkable. A CT scan of the cervical spine showed mild anterolisthesis of C4 on C5, C5 on C6, and C6 on C7 that was noted to appear degenerative. There was mild central canal stenosis at C5-6 and C6-7 and multilevel neural foramen stenosis. A CT scan of the lumbar spine showed multilevel annular bulges. Petitioner was discharged with a diagnosis of neck pain and back pain and referred to her primary care doctor.

Petitioner testified that she contacted Mr. Schemonia on at least two occasions on the 6th of June for the purpose of obtaining workers' compensation policy information for her primary care doctor. She testified that she had conversations with Mr. Schemonia, but that he did not provide the information to her until the 9th and therefore she was not able to see her doctor until June 10, 2014. According to Petitioner's testimony, she spoke with Mr. Schemonia specifically regarding the injury allegedly sustained at work on June 3, 2014 on each of the following days:

June 3rd, 4th, 6th, 9th, and 10th. She also testified that she exchanged phone calls and text messages with Ms. Sauer and Mr. Paul (another officer of the Lodge) about the alleged accident.

We note that Petitioner never filled out an incident report and she gave vague testimony as to whether she asked to make a report of injury. On cross-examination she admitted that she did not directly ask for a report, but she claimed that she asked "if there was anything I needed to fill out or what did I need to do." Petitioner did not specify whom she spoke with, and she denied that she would have had access on her own to the incident reporting forms kept by the secretary, even though she was the manager of the Lodge. (T. 53)

Mr. Schemonia testified for the Respondent. Mr. Schemonia is an officer of the board and the current "Exalted Ruler" of the Elks Lodge #572. He testified that on June 3, 2014 Ms. Sauer was the "Exalted Ruler" and he was a member of the board. Mr. Schemonia's testimony completely contradicts Petitioner's claim that she reported an accident to him and had discussions with him about her work related injury on June 3rd, 4th, 6th, 9th, and 10th. Mr. Schemonia testified that he observed Petitioner working on June 3rd and June 4th but he denied that she ever reported an injury, ever made complaints of pain, or ever appeared to perform her job duties differently. He did not recall Petitioner leaving early on June 3rd or coming in late on June 4th. Mr. Schemonia testified that he first became aware that Petitioner had alleged a work injury when he was contacted by a medical provider requesting insurance information.

Mr. Schemonia testified that he saw Petitioner on June 5, 2014, her day off. Petitioner came to the Lodge to unlock a cabinet where she had left the business checks. Mr. Schemonia denied that Petitioner reported any injury or complained of any pain on June 5, 2014. The next morning, Petitioner called Mr. Schemonia and told him that she was having numbness in her jaw and arm and was going to the doctor. Mr. Schemonia testified that to date Petitioner has never directly told him that she sustained an accidental injury at work on June 3, 2014 and he testified that he never spoke with Petitioner on the phone again after June 6, 2014.

The issue of timely notice under the Act was not disputed by Respondent. Mr. Schemonia admitted that he was notified that Petitioner was claiming a workers' compensation injury when he was contacted by a medical provider seeking insurance information. While he did not recall the exact date he received the call it was well within the statutory period. Furthermore, Petitioner filed her Application for Adjustment of Claim twenty days after the alleged accident. We are not persuaded, however, by Petitioner's uncorroborated testimony that she reported the injury to Mr. Schemonia and Ms. Sauer on June 3, 2014 and June 4, 2014. We find that Petitioner failed to prove she sustained an accident arising out of and in the course of employment. Petitioner failed to produce any witness to corroborate her testimony where accident was disputed and several potential witnesses were clearly identified. We see no reason why Petitioner would not subpoena Ms. Sauer, Mr. Paul, or another individual to testify at hearing. Furthermore, we find it doubtful that as a manager for the Lodge Petitioner did not have access to incident reports, and we find her testimony to be self-serving and unreliable on this issue.

During her rebuttal testimony Petitioner produced her cell phone, where a record of her phone calls and text messages throughout the days following the alleged accident was purportedly saved. (T. 97) The record is unclear as to whether Petitioner also produced printed

materials not offered into evidence, or merely referred to her actual cell phone during testimony. Petitioner's attorney asked Petitioner to explain the substance of the phone calls she made or received on certain dates and times, and we find this testimony patently unreliable.

We disagree with the Arbitrator's conclusion that Respondent failed to support its accident dispute. Mr. Schemonia denied that Petitioner reported any accidental injury or physical complaints on June 3rd, 4th, 5th, or 6th or that there was anything noticeably different about Petitioner's performance of her job duties on June 3rd or June 4th. We find that Mr. Schemonia's testimony lacks any indication of bias against Petitioner and we judge his testimony credible. Petitioner testified that she was in the presence of many others at the Lodge following her alleged accident and also the next day. As stated, we place no evidentiary weight on the testimony Petitioner gave while referring to the call record on her cell phone. The burden was on Petitioner to prove each element of her claim by a preponderance of the evidence, and we find that Petitioner failed to meet that burden.

We further find that Petitioner minimized her condition of ill-being prior to the date of accident, and her testimony is not consistent with the medical records of prior treatment offered into evidence by Respondent. The records show that Petitioner frequently reported symptoms of bilateral arm pain, numbness and tingling, and severe headaches, and we do not find that Petitioner's complaints after June 3, 2014 were objectively new or different. We disagree with the Arbitrator that the Petitioner's history of neck pain could be defined as merely "sporadic." We find that treatment for Petitioner's neck in 2012 and 2013 was significant. Petitioner underwent an MRI and CT and was examined by a neurosurgeon in the months prior to her employment by Respondent. Furthermore, she received injections into her cervical spine less than two weeks before she began working at the Lodge. Petitioner's treating physician, Dr. Gornet, opined that the accident aggravated Petitioner's pre-existing condition based on Petitioner's history.

Petitioner was examined by Dr. DeGrange at the request of Respondent and pursuant to §16 of the Act. Neither doctor DeGrange nor Dr. Gornet was deposed in advance of the §19(b) hearing. Dr. DeGrange opined in his report of December 19, 2014 that Petitioner's condition was not causally related to any work-related injury. We find the opinion of Dr. DeGrange to be more persuasive than the opinion of Dr. Gornet. Dr. DeGrange compared Petitioner's most recent cervical spine MRI to pre-accident studies and he concluded that Petitioner's objective condition was essentially unchanged. He believed that Petitioner's presentation and subjective pain was out of proportion to the objective findings and the alleged mechanism of injury. He noted a significant degree of symptom magnification and somatization and Petitioner's longstanding history of chronic neck and low back pain. He noted Petitioner's "dramatic" presentation; he observed her using both hands to support her head during the examination. Furthermore, Dr. DeGrange identified pre-accident records wherein Petitioner complained of the same severe symptoms she claimed were caused by the accident of June 3, 2014. Dr. DeGrange found an August 15, 2013 neurosurgical examination by Dr. Fleming particularly significant. Dr. Fleming noted that Petitioner complained of severe and worsening neck pain for several years, with headaches and numbness and tingling in both arms. Dr. Fleming found no medical explanation for Petitioner's symptoms and he noted signs of "non-organic reactions" in Petitioner's behavior. Dr. Fleming concluded that he would not recommend surgery or any invasive treatment for

Petitioner. 16IWCC0037

In conclusion, after reviewing the record we find that the Decision of the Arbitrator is not supported by the preponderance of the evidence. Therefore we reverse the Arbitrator's Decision on the issues of accident and causal connection as stated above and we deny Petitioner's claim for benefits under §19(b).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 20, 2015 is hereby reversed and no benefits are awarded.

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

DATED: JAN 15 2016
RWW/plv
o-12/1/15
46

Ruth W. White

Joshua D. Luskin

Charles J. DeVriendt

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

James Belford,

Petitioner,

vs. No. 11 WC 45948

State of Illinois/Pinckneyville Correctional Center,

16IWCC0038

Respondent.

DECISION AND OPINION ON REVIEW UNDER SECTIONS 19(h) AND 8(a)

Timely Petition for Review under sections 19(h) and 8(a) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of further permanent disability and further medical benefits, and being advised of the facts and law, denies the 19(h) petition and grants the 8(a) petition for the reasons set forth below.

On February 13, 2013, the Arbitrator filed a decision awarding medical expenses in the sum of $3,533.00 pursuant to sections 8(a) and 8.2 of the Act and permanent disability benefits corresponding to 4 percent disability to the person as a whole. Neither party appealed the Arbitrator's decision.

On February 3, 2015, Petitioner timely filed a petition for review under sections 19(h) and 8(a) asking the Commission to "review the prior award and enter an order for prospective medical benefits and payment of the award related to Petitioner's work injury of November 7, 2011." In his brief on review, Petitioner asks the Commission to award additional chiropractic bills and permanent partial disability benefits corresponding to 2 percent further disability to the person as a whole. Respondent, in its response brief, agrees that it is liable for the reasonable and necessary medical bills in Petitioner's Exhibit 3 pursuant to sections 8(a) and 8.2 of the Act. However, Respondent does not agree that Petitioner's permanent disability has materially increased.

At the 19(h)/8(a) hearing on August 6, 2015, Petitioner testified that after the arbitration hearing on January 15, 2013, he continued to perform the regular job duties of correctional officer. At some point, he was promoted to correctional sergeant. He has been able to perform the job duties of correctional sergeant. However, Petitioner has sought additional medical care for pain in the low back and right leg, as well as some stiffness. Petitioner feels being on his feet all day aggravates his condition. At the end of the shift, he feels stiffness and occasional pain. Outside of work, Petitioner keeps physically active and performs calisthenics exercises regularly. The exercises and chiropractic treatment help alleviate the symptoms. Petitioner feels he would require surgery if he did not have chiropractic treatment. He would like to avoid surgery.

On cross-examination, Petitioner testified that his promotion came with a pay raise. Petitioner admitted that no doctor has recommended surgery for his back condition. Petitioner further admitted that during the arbitration hearing he testified he had some low back pain with pain radiating to the right leg and occasionally the left leg. Riding in a car for long periods of time bothered him. The pain also affected his sleep. Petitioner admitted that he has substantially the same symptoms when his condition flares up now. His condition returns to baseline after a period of chiropractic treatment.

Petitioner introduced into evidence medical records and bills from McGuire Chiropractic Clinic. The records start on September 24, 2014, noting: "[The patient] started having pain in his low back and right hip 3 days ago for no reason. The pain has progressively gotten worse with no relief. The past day, the pain has started into his right thigh." Petitioner underwent regular chiropractic treatment through November 10, 2014, reporting progressive improvement. Petitioner suffered another flare-up in late June of 2015, after driving a long distance. He received regular chiropractic treatment from July 6, 2015, through July 31, 2015, once again reporting progressive improvement until experiencing another flare-up in late July of 2015.

As noted, Respondent agrees that it is liable for the reasonable and necessary medical bills in Petitioner's Exhibit 3 pursuant to sections 8(a) and 8.2 of the Act.

With regard to the 19(h) petition, the Commission finds that Petitioner failed to prove a material increase in his permanent disability. On cross-examination, Petitioner admitted that no doctor has recommended surgery for his back condition. Petitioner further admitted his symptoms are substantially the same as they were at the time of the arbitration hearing. The symptoms wax and wane. After a flare-up, his condition returns to baseline with chiropractic treatment.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's petition under §19(h) is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical bills in Petitioner's Exhibit 3 pursuant to §§8(a) and 8.2 of the Act.

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

16IWCC0038

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.

Pursuant to §19(f)(1) of the Act, there shall be no right of appeal as the State of Illinois is Respondent in this matter.

DATED: JAN 19 2016
o-12/10/2015
SM/sk
44

Stephen Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BELFORD, JAMES
Employee/Petitioner

Case# **11WC045948**

SOI/PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

16IWCC0038

On 2/13/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

0558 ASSISTANT ATTORNEY GENERAL
MOLLY WILSON DEARING
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

FEB 13 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

16IWCC0038

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
NATURE AND EXTENT ONLY

James Belford
Employee/Petitioner

v.

State of Illinois / Pinckneyville Correctional Center
Employer/Respondent

Case # 11 WC 45948

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joshua Luskin**, Arbitrator of the Commission, in the city of **Herrin**, on **1/15/13**. By stipulation, the parties agree:

On the date of accident, **11/7/11**, 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 $**57,921.00**, and the average weekly wage was $**1,113.87**.

At the time of injury, Petitioner was **40** years of age, ***married*** with **1** dependent child.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

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

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$668.32**/week for a further period of **20** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **permanent partial disability to the petitioner's whole body as a whole in the amount of 4%.**

Respondent shall pay Petitioner compensation that has accrued from **12/29/12** through **the present**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services of **$3,533.00**, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

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

Signature of Arbitrator

February 4, 2013
Date

FEB 13 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES BELFORD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 11 WC 45948
	)	
STATE OF ILLINOIS/PINKNEYVILLE C.C.,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

STATEMENT OF FACTS

The petitioner, a Correctional Officer, was injured in an altercation with an inmate on November 7, 2011. On November 10, he saw his family physician, Dr. Nanni, complaining of low back pain radiating to the right leg. Dr. Nanni recommended medication, heat and rest. See generally PX3. On November 15, Dr. Nanni noted that "[s]ymptoms related to the injury have improved." The petitioner was released to work without restrictions at that time.

On November 17, 2011, the petitioner presented to Dr. Nanni complaining of scrotal pain over the past day. Dr. Nanni noted the injury the week before and prescribed a support strap. No history of scrotal trauma was noted, but he noted the initial injury did include a groin strain. The petitioner did not follow up with Dr. Nanni thereafter. PX3.

On April 2, 2012, the petitioner saw Dr. Gornet complaining of persistent pain. He had been working full duty during this period. The petitioner related a prior history of low back pain for which he had sought chiropractic care in 2009. Dr. Gornet prescribed an MRI scan. See PX4.

The MRI was performed on May 21 and demonstrated degenerative disk disease with an annular tear at L5-S1 with a herniation at that level. The radiologist observed a disk bulge at L4-5, but no herniation at that level. PX5. Dr. Gornet reviewed the films that day and opined the L4-5 level was herniated. However, Dr. Gornet noted the claimant was tolerating his symptoms and recommended observation only without further treatment at that time. PX4. Follow-up visits with Dr. Gornet in September and November 2012 noted only intermittent symptoms without substantial problems. On November 29, Dr. Gornet assessed the petitioner at maximum medical improvement.

On July 6, 2012, the petitioner was examined by Dr. Timothy VanFleet pursuant to Section 12 of the Act. See PX6. Dr. VanFleet reviewed the MRI and assessed the

petitioner with degenerative disk disease with improving back pain secondary to a back strain. He opined the symptoms were related to the work incident although the degeneration predated the incident. He recommended home exercise.

The petitioner testified he has returned to the same position he held prior to the accident, and is able to perform all job duties. He complains of residual back pain for which he takes over the counter medication.

OPINION AND ORDER

The respondent is directed to pay the medical bills identified in PX1 within the limits of Section 8.2 of the Act, as these appear reasonably targeted at relieving the petitioner's complaints pursuant to Section 8(a) of the Act. While the appointment on November 17, 2011 indicates a one day history of groin pain, it is close in both temporal relationship to the accident and the location of the injury in the body to conclude that it was a related condition. Respondent shall receive credit for any and all amounts previously paid but shall hold the petitioner harmless, pursuant to 8(j) of the Act, for any group health carrier reimbursement requests for such payments.

Nature and Extent of the Injury

Pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

Applying this standard to this claim, the Arbitrator first notes that no AMA rating was submitted by the parties. The Arbitrator therefore relies on the other factors in arriving at a conclusion relative to this matter. The petitioner was 40 years old at the time of the incident. He is a Corrections Officer and missed only about one week from work. He has continued to work in his pre-injury capacity and no evidence of earnings impairment is apparent or likely. The petitioner does continue to describe some residual symptoms, but treated conservatively throughout and no physician recommended any invasive care. The petitioner's work-related accident resulted in a back strain superimposed on pre-existing degeneration; while he apparently never had previous invasive care, it is also notable that he did have prior back symptoms, as evidenced by his prior chiropractic treatment. The petitioner having reached maximum medical improvement, respondent shall pay the petitioner the sum of $668.32/week for a further period of 20 weeks, as provided in Section 8(d)2 of the Act, as the injuries sustained caused permanent loss of use to the petitioner's whole body to the extent of 4% thereof.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Frank Kush,

Petitioner,

vs. No. 12 WC 15411

Chicago Heights Fire Department,

16IWCC0039

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the parties herein and proper notice given, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, temporary disability, penalties and attorney fees, and being advised of the facts and law, corrects, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Commission finds, based on the stipulation of the parties regarding Petitioner's average weekly wage, that the weekly temporary total disability rate is $1,256.41. The Commission corrects the temporary total disability award to span the time period from November 20, 2012, through the date of the arbitration hearing on April 9, 2015. The Commission does not adopt the part of the caption on page 1 of the Arbitrator's decision stating "RESPONDENT'S PROPOSED."

16IWCC0039

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 6, 2015, is hereby corrected as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $1,256.41 per week for a period of 124 3/7 weeks, from November 20, 2012, through April 9, 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, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the medical bills for the arthroplasty surgery performed December 8, 2014, pursuant to §§8(a) and 8.2 of the Act. Respondent shall be given a credit for the medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit, as provided in §8(j) of the Act.

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

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

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

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

DATED: JAN 19 2016
o-12/17/2015
SM/sk
44

Stephen Mathis

Mario Basurto

David L. Gore

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

KUSH, FRANK
Employee/Petitioner

Case# **12WC015411**

CITY OF CHICAGO HEIGHTS
Employer/Respondent

16IWCC0039

On 7/6/2015, 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 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2675 COVEN LAW GROUP
LARRY J COVEN
180 N LASALLE ST SUITE 3650
CHICAGO, IL 60601

4217 DELGALDO LAW GROUP LLC
GEORGE S SPATARO ESQ
1441 S HARLEM AVE
BERWYN, IL 60402

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

RESPONDENT'S PROPOSED
ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0039

Frank Kush
Employee/Petitioner

Case # **12** WC **015411**

v.

Consolidated cases: _____

City of Chicago Heights
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 **K. Steffen**, Arbitrator of the Commission, in the city of **Chicago**, on **April 9, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

C. ☐ 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

16IWCC0039

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

N. ☒ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On the date of accident, **April 17, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**98,000.00**; the average weekly wage was $**1,884.62**.

On the date of accident, Petitioner was **60** 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 is entitled to an 8 J credit for all amounts paid by its group health plan for Petitioner's medical expenses.

Respondent paid Petitioner full pay while off work from April 17, 2012 through November 20, 2012. Respondent is entitled to a credit for the difference between full pay and Petitioner's TTD rate.

ORDER

Respondent shall pay temporary total disability from November 20, 2012 to the present and continuing while Petitioner continues to undergo post-surgical treatment for his knee.
Respondent shall pay for the arthroplasty surgery performed on December 8, 2014.
The Arbitrator denies Petitioner's request for penalties and/or sanctions.

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 permanent disability, if any.

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

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

Ketki Shroff Steffen July 6, 2015

Signature of Arbitrator Ketki Shroff Steffen Date

ICArbDec19(b)

Factual History

Petitioner testified that he was employed as a fire fighter for Respondent for twenty-nine years and ten months. Petitioner testified that for the entire twenty-nine plus years that he worked for Respondent, he had never had any injuries or pain in his left knee, had never missed any time from his job because of his left knee, and had never taken any medication or seen any doctors because of his left knee. Petitioner testified that his job as a fire fighter was a heavy labor job because of the heavy packs and gear weighing approximately 80-100 pounds they had to wear while climbing, crawling, and squatting to fight fires and answering emergency calls. At the time of the accident Petitioner was 61 years old. Petitioner did have a meniscal surgery performed when he was 14 years old, some 47 years before this accident. There was no further treatment or issues with his left knee for over 47 years. Petitioner testified that prior to this accident; he led a very active life style including golfing and cardiovascular workouts of about eight miles a day five days a week at the St. James Wellness Center.

On April 17, 2012 Petitioner responded on an emergency call relating to his duties as a fireman. He was walking with his gear and emergency pack on his back across a vacant lot in the dark when he stepped into a hole that was about 16-18 inches deep with his left foot. The hole was not visible as it was filled in with grass. Petitioner testified that as his left foot went down into the hole his left knee twisted, heard an audible pop, and he bruised his right knee. Petitioner experienced immediate significant pain in his left knee. Petitioner was helped up and back to the truck by Officer Warner Biedenharn of the Chicago Heights Police Department and another fire fighter. Petitioner went back to the station and reported the accident. Petitioner also completed a police report that evening with Officer Biedenharn.

With the pain getting worse and the knee swelling up, the next morning (4/18/12) the Petitioner was sent by Respondent to the St. James Occupational Clinic. Petitioner reported the fall on the emergency call to the Occupational physician. Petitioner's was seen by Dr. E. Philip who fielded his complaints, examined him, had him x-rayed, and in regard to the left knee reported no fracture or dislocation, small amount of joint effusion, mild swelling, full range-of-motion and negative Drawer's sign. Dr. Philip diagnosed left knee sprain. Petitioner was found able to return to restricted duty work with minimal walking, sitting, and wearing a knee brace. (PXA) The clinic restricted Petitioner to sedentary work, which was not accommodated, and immediately ordered an MRI of the left knee.

An MRI of the left knee was performed on April 25, 2012 which revealed a macerated degenerative appearance of the medial meniscus without discrete tear. Following the MRI, Dr. White of the occupational clinic referred the Petitioner to David Mehl, M.D., an orthopedic surgeon at the Well Group.

Dr. Mehl saw the Petitioner on April 30, 2012. Dr. Mehl reviewed the MRI films and diagnosed left knee medial meniscus tear and pre-existing left knee moderate degenerative disease which was asymptomatic. Dr. Mehl recommended arthroscopic surgery consisting of a meniscectomy and chondroplasty.

Petitioner decided to seek a second opinion from his own doctor. On May 1, 2012 the Petitioner was seen by Mark Nikkel, M.D., a board certified knee specialist at Bone & Joint Physicians. Petitioner reported the same history of accident to Dr. Nikkel and following an exam and an ultrasound Dr. Nikkel confirmed the tear, Dr. Nikkel recommended arthroscopic surgery.

On June 12, 2012 pre-op testing revealed an abnormal EKG, with increased cardiovascular disease, a right bundle branch block, and a left anterior fascicular block (new since March 6, 2009). Petitioner was required to do a stress test before being cleared for surgery.

Surgery was approved by Respondent and Dr. Nikkel performed the procedure on June 15, 2012. He performed arthroscopy, partial medial and lateral meniscectomy, and an chondroplasty.

Petitioner started physical therapy shortly after surgery and saw Dr. Nikkel for follow-up on June 26, 2012. Therapy was to continue and Petitioner returned to see Dr. Nikkel on August 21, 2012. At that time Petitioner was having complaints of pain and swelling. Dr. Nikkel diagnosed degenerative joint disease in the knee and recommended supartz injections. Respondent approved the supartz injections and Dr. Nikkel administered them on September 27, 2012, October 4, 2012, October 11, 2012, October 18, 2012 and October 25, 2012. Petitioner achieved minimal relief from the injections and returned to see Dr. Nikkel on November 20, 2012.

On November 20, 2012 Dr. Nikkel released Petitioner to return to work with permanent restrictions of no stooping, bending, crawling, climbing, or lifting greater than 20 pounds. Dr. Nikkel scheduled Petitioner for a three month follow-up. All medical and full wages were paid by Respondent up until November 20, 2012.

Petitioner emailed the permanent restriction note to his commander on November 20, 2012. Commander James Agnell responded that the City of Chicago Heights would not accommodate the restrictions. When Respondent refused to accommodate the restrictions, Petitioner retired from employment. Respondent stopped paying benefits. Petitioner testified that he did not wish to retire at this time but felt forced to do so. Petitioner testified that he had

planned to max out his pension and continue to work until he made 35 years with the department. The City of Chicago Heights failure to accommodate him curtailed his professional plans. Petitioner testified that he attempted to move on with his life and live with his left knee discomfort. Petitioner testified that for the next 13 months he continued to walk with a significant limp, struggled walking up and down stairs, struggled standing up from a chair, and would frequently take Advil for left knee pain. The pain continued to increase over this period. The Petitioner testified that he could not handle the pain anymore and on February 5, 2014 the Petitioner returned to see Dr. Nikkel. At that time Dr. Nikkel made it clear that Petitioner was there with left knee pain that started following a work injury in 2012 resulting in meniscal tearing and aggravation acceleration of degenerative disease. Petitioner reported that he has difficulty with activities of daily living, difficulty sleeping and complains of clicking, popping, buckling, instability, and locking in the left knee. Dr. Nikkel stated in his note:

> The patient's injury occurred in April 2012 did not cause his arthritic disease but it definitely accelerated and aggravated an ongoing condition. As a result he is having significant pain that has debilitated him in his retirement and prevented him from returning to work as a fire fighter.

Dr. Nikkel administered an injection for pain but stated that a knee arthroplasty was inevitable. Petitioner scheduled the surgery for Dr. Nikkel's first opening in November 2012. Petitioner hoped to get workers' compensation approval. At this point the planning process for the surgery began including approval from workers' compensation.

Petitioner returned to Dr. Nikkel on April 29, 2014 regarding the ongoing pain and arthroplasty surgery. Petitioner again reported that he has difficulty with activities of daily living, difficulty sleeping and complains of clicking, popping, buckling, instability, and locking in the left knee. Surgery was scheduled for November 3, 2014. Petitioner returned to Dr. Nikkel

on October 13, 2014 for a pre-operative planning. Surgery did not proceed on November 3, 2014 because Respondent would not approve it. Petitioner again returned to Dr. Nikkel on November 4, 2014 for pre-operative planning. Because of a cancellation on Dr. Nikkel's schedule, surgery was reset for December 8, 2014 to be done under group health while the issue was litigated. Petitioner did undergo a total knee arthroplasty on December 8, 2014 at Ingalls Memorial Hospital and has been in post-operative therapy since shortly thereafter. The Petitioner is not doing well post-surgery and recently underwent a third left knee surgery. In fact, on March 16, 2015, the Petitioner underwent a third left knee surgery in the form of a manipulation under anesthesia at Ingall's Hospital. The Petitioner was last seen by Dr. Nikkel on April 8, 2015, the day before trial, wherein a cortisone injection was administered. Petitioner is currently ambulating with the assistance of a walker.

Respondent scheduled an IME with Dr. Brian Forsythe at Rush on October 9, 2014. Dr. Forsythe opines that the Petitioner's current complaints are related to pre-existing degenerative arthritis and that his osteoarthritis is not related to the work injury of April 17, 2012. His notes indicate that Petitioner's April 25, 2012 MRI of left knee revealed a macerated degenerative appearance of the medial meniscus and lateral meniscus without discrete tear. Petitioner had a history of open arthrotomy for medial meniscus removal in high school. He opined that Petitioner's current complaints are related to pre-existing degenerative which is likely the long term sequela of the open subtotal menisctomy he underwent as a teenager. He confirmed that any further treatment is related to natural progression of pre-existing underlying osteoarthritis and NOT the April 17, 2012 incident and that Petitioner had reached MMI in regard to the April 17, 2012 alleged injury.

Petitioner scheduled an IME with Dr. Matthew Jimenez at Illinois Bone & Joint. Dr. Jimenez was provided all records and examined the Petitioner on November 11, 2014. Dr. Jimenez stated that the Petitioner's history was very clear, in that, prior to his work-related event, which occurred on April 17, 2012, the Petitioner was working full-duty no restrictions as a firefighter and carrying up to 30 pounds on his back and 60-70 of gear at work, with no complaints regarding his knee, passing his physical examinations without any issues regarding his knee as well as exercising 8 miles of cardio five days a week without any problems with his left knee. After the event, and since the event, Petitioner has been severely disabled, and therefore causation is clear. Dr. Jimenez goes on the state that there is evidence of mild degeneration from the surgery when Petitioner was 14, but the Petitioner was functioning very well and was asymptomatic for 47 years. However, Dr. Jimenez states that since the accident Petitioner has had tremendous disability and rapid degeneration of the knee cartilage leading to the need for knee replacement.

Based on this opinion, further TTD and medical benefits were denied by the Respondent. Petitioner has filed a penalty petition seeking penalties under section 19(k), 19(I) and is seeking attorney's fees. Respondent has filed an answer to this request.

Findings/Analysis

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

The essential and relevant facts of this matter are largely uncontested. Petitioner is a 61 year old fire fighter who was injured when responding to an emergency work call at the location of the alleged fire on April 17, 2012. He was walking with his heavy gear and emergency pack on his back across a vacant lot in the dark when he stepped into a hole that was about 16-18 inches deep with his left foot. The building had been abandoned and the hole was not visible as

it was filled in with grass. Petitioner testified that as his left foot went down into the hole his left knee twisted, heard an audible pop, and he bruised his right knee. Petitioner experienced immediate significant pain in his left knee. His fellow fire fighters were at the scene with him and either witnessed the accident or arrived there almost immediately to help him. Officer Warner Biedenharn of the Chicago Heights Police Department and another fire fighter helped the Petitioner get up and get back to the truck. Petitioner went back to the station and reported the accident and filled out a police report that evening with Officer Biedenharn. He also sought immediate and emergency medical attention and there is no controversy that this fire fighter was injured in the line of duty.

There are no discrepancies in the reporting of the accident and the accompanying facts. Most importantly, there is absolutely no disagreement that Petitioner, Frank Kush, is a man that was in great physical and mental shape prior to his accident. Much has been made of the prior football injury when he was 15 years of age where there was an open arthrotomy for medial meniscus removal. This procedure was successfully performed; Petitioner was treated and fully recovered. This caused no long term problems in his athletic, academic or professional career. Petitioner testified that prior to April 17, 2012 he had not had any problems ever with his left knee for 47 years, had never sought any medical treatment for his left knee for 47 years, had never taken any medication for his left knee for 47 years, and had never missed anytime from his job as a Captain for the Chicago Heights Fire Department because of his left knee. Petitioner was 100% asymptomatic with regards to his left knee prior to this work related accident for 47 years.

All medical evidence is quite clear that the accident on April 17, 2012 was the start of Petitioner's on-going pain and surgeries. It is stating the obvious, however, Petitioner was able to

pass the physical exams and perform well as a fire fighter for 27 years after this high school incident. In the Arbitrator's estimation, the prior injury must be truly examined in this context of time and nature. To do otherwise is a great disservice to the facts of this case which are clear. In addition to the above factors, Petitioner testified that he led an extremely fit lifestyle. Work as a fireman itself requires endurance and top physical form. To supplement his work activities, Petitioner Kush golfed and did cardiovascular workouts of eight miles a day five days a week at the St. James Wellness Center. In court, it is Arbitrator's observation that Petitioner's physical health and fitness was noteworthy in the disparity between his upper body and his knee. He appeared in court to be in very good upper physical shape and his looked to be physically fit with almost no excess body fat. In comparison, his knee and ability to walk and ambulate was truly and seriously compromised. The Arbitrator's decision in this matter is mindful of these courtroom observations along with the testimony, medical evidence and Illinois law governing the facts of this case.

To note, Petitioner's initial treatment and surgery are not contested and the Respondent has paid for the same. Respondent proposes, per the finding of the IME, Dr. Brian Forsythe, that Petitioner reached MMI on or about November 20, 2012 after the first surgery and follow-up treatment. The causation issue in this matter relates to care, treatment and benefits after this date. The Arbitrator finds that the Petitioner's current condition is causally connected to his work accident.

Under Illinois law, to obtain compensation under the Workers Compensation Act, a Petitioner must show by a preponderance of the evidence that he suffered a disability arising out of in the course of his employment. 820 ILCS 305/2. The 'Arising Out Of' component under the Workers' Compensation Act addresses the causal connection between a work related injury and

the Petitioners condition if ill-being. 820 ILCS 305/2. To satisfy this requirement for obtaining workers' compensation, it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the injury. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665 (Ill.Sup.Ct. 2003). A workers compensation claimant need prove only that some act or phase of the employment was a causative factor in the ensuing injury. A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of the workers compensation claimant's ill-being. *Brian Vogel v. Industrial Commission*, 821 N.E.2d 807 (Ill.App.2 Dist. 2005). A work activity is a sufficient cause of the aggravation of a pre-existing condition if the work activity presented risks greater than those to which the general public is exposed. *Twice Over Clean, Inc. v. The Industrial Commission*, 809 N.E.2d 778 (Ill.App.3 Dist. 2004). The evidence clearly shows that Petitioner sustained a meniscal tear that is directly connected to his fall while attending a false alarm call on April 17, 2012. Petitioner had not had any pain in his left knee for 47 years prior to the accident of April 17, 2012. Petitioner reported the injury to the Respondent immediately and went to the Occupational Clinic the next morning. Respondent authorized the first left knee surgery but then refused to accommodate the permanent restrictions. Both Dr. Nikkel (treater) and Dr. Jimenez make it very clear that this injury is related to the need for knee arthroplasty because it aggravated a pre-existing asymptomatic condition. There can be no dispute that Petitioner sustained a torn medical meniscus (See operative report) that pre-existing asymptomatic condition. On the other hand, IME Dr. Forsythe stated the need for arthroplasty was not related and never discussed the issue of aggravation. In the Arbitrator's humble opinion, this absence of comment or explanation regarding how an asymptomatic knee deteriorated so rapidly following the work accident is

glaring. Given Petitioner's excellent prior physical shape and the rapid and continuous decline of the knee following the accident the Arbitrator reaches the logical and legal conclusion that the accident has caused the need for knee replacement surgery and that it is also the cause of Petitioner current state of ill-being. There is no break, or return to unrestricted duty or long period of good health where one can definitively say that the knee had healed and returned to its pre-accident level. Dr. Forsythe lack of explanation of why this is not an aggravation and why or when there is a sufficient recovery to return Petitioner back to his base line, makes his opinion less convincing then the opinion of Dr. Mehl and Dr. Jimenez. Accordingly, the Arbitrator finds causation and finds that the Petitioner's current complains and the need for arthroplasty and the ongoing disability to be related.

(H): What Amount Is Due for Temporary Total Disability

Petitioner was released to work with permanent restrictions on November 20, 2012. At this point the Respondent stopped paying benefits. These restrictions would not allow the Petitioner to return to work as a fire fighter in his full duty capacity. The Respondent refused to accommodate these permanent restrictions. The failure to accommodate forced the Petitioner into retirement. The Petitioner testified that he never intended to retire at that point and hoped to maximize his pension and make 35 years with the department. Section 19(b) of the workers' compensation act provides for TTD benefits if Respondent cannot accommodate the restrictions. Furthermore, because Respondent was forced into retirement, the fact that he retired does not affect his right to temporary total disability benefits. *Land and Lakes Company v. The Industrial Commission*, 834 N.E.2d 583 (Ill. App. Ct, 2nd Dist. 2005). In *Land and Lakes Company*, the Petitioner retired because restrictions were not being accommodated and he needed income. The same fact pattern exists in the case at bar. Respondent has not accommodated the restrictions

following the 11/20/12 release with permanent restrictions forcing the Petitioner into retirement. TTD benefits were not paid and Petitioner retired and he was unable to return back to work. Arbitrator finds that Petitioner retired involuntarily due to these factors, is still treating and is not at maximum medical improvement as a result of his injuries. Based on these facts, temporary total disability is due from 11/20/12 to the present.

(J): Should penalties or fees be imposed upon the respondent?

Section 19(l) of the Act states that "[i]n cases where there has been any unreasonable or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award." Section 19(k) of the Act states that "[i]f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer of his or her insurance carrier shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or Commission shall allow the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld of refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay."

Section 16 of the Act states that "[w]henever the Commission shall find that the employer, or his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such

employee within the purview of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier.

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

The Supreme Court has established a test of ' objective reasonableness to determine whether 19(k) penalties should be awarded. 820 ILCS 305/19(k) states in part:

> (k). In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have to be instituted or carried on by one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the commission may award compensation additional to that otherwise payable under the act equal to 50% of the amount payable at the time of such award.

> The Supreme Court has established a test of ydelayu to determine whether 19(k) penalties should be awarded. 820 ILCS 305/19(l) states in part:

> If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d). In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have

been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

In applying the law to the facts of this case, the Arbitrator notes that the Petitioner's accident was uncontested and medical and TTD benefits were paid by the Respondent through 11/20/12. Petitioner was released to restricted duty by his treating physician and Dr. Forsythe, the IME, found Petitioner's subsequent complains to be related to the pre-existing condition. The Arbitrator has found that causation and given more weight to the testimony of Dr. Jimenez and has found the opinion of Dr. Forsythe to be lacking. The Arbitrator finds that after considering the parties' motion and response that the Respondent had a reasonable dispute as to whether Petitioner's injuries subsequent to 11/20/12 were causally connected to the work accident. The Arbitrator also finds that Petitioner's retirement may have given the Respondent pause regarding their continued obligation for benefits. Lastly, Respondent reliance upon the Section 12 was misplaced but not unreasonable in light of the Petitioner's release to restricted duty by his own physician and in light of the pre-existing arthritic condition of his left knee. Thus, Petitioner's claim for penalties and fees under Sections 19(k), 19(l) or Section 16 of the Act is denied.

Ketki Shroff Steffen — July 6, 2015

Signature of Arbitrator Ketki Shroff Steffen — Date

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Belinda Daniels,
Petitioner,
vs.

NO: 14 WC 9136

16IWCC0040

Bloomington Public School District #87,
Respondent.

DECISION AND OPINION ON REVIEW

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that since Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment on January 20, 2012, her claim for compensation is hereby denied.

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

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

DATED: JAN 20 2016

MB/jm

O: 12/10/15

43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DANIELS, BELINDA
Employee/Petitioner

Case# **12WC013949**
14WC009136

BLOOMINGTON PUBLIC SCHOOL DISTRICT #87
Employer/Respondent

16IWCC0040

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:

0564 WILLIAMS & SWEE LTD
JEAN SWEE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

0264 HEYL ROYSTER VOELKER & ALLEN
CRAIG S YOUNG
PO BOX 6199
PEORIA, IL 61601-6199

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

16IWCC0040

☐ 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

Belinda Daniels
Employee/Petitioner

v.

Bloomington Public School District #87
Employer/Respondent

Case # **12** WC **013949**

Consolidated cases: **14 WC 009136**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Bloomington, Illinois**, on **February 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. ☒ 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

16IWCC0040

On **11-2-11**, 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 $**11,980.20**; the average weekly wage was $**305.28**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**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 $**50,889.55** under Section 8(j) of the Act. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $305.28/week for 7 weeks, commencing 8-13-12 through 10-1-12, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $2804 to Dr. Pegg, $1654.49 to Orthopedic and Sports Enhancement, $2654.75 to Advocate BroMenn, and $1225.20 to Millennium Pain Center, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall further reimburse Petitioner in the amount of $310.00 for out of pocket expenses paid to her medical providers.

Respondent shall pay Petitioner permanent partial disability benefits of $305.28/week for 100 weeks, because the injuries sustained caused the 25% 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

4/11/15
Date

ICArbDec p. 2

APR 14 2015

FINDINGS OF FACT:

Petitioner was a 41 year old cafeteria food service worker at Bloomington High School. Petitioner had worked for Respondent in the dish room performing cafeteria clean up duties since March of 2009. Petitioner testified that on November 2, 2011, while cleaning the cafeteria, she lifted some rolled up rubber floor mats and threw them into the cafeteria dishwasher. While in the process of doing so, she felt a sharp pain and was unable to use of right arm effectively. Petitioner said that the floor mats were approximately one inch thick, 3 x 6 foot long, and weighed between thirty (30) to fifty (50) pounds. Petitioner stated that she continued to work while favoring her right arm. Petitioner provided that she noticed right elbow pain which began radiating towards her right hand initially then into her right shoulder over a period of time.

Petitioner testified that she reported the injury to Karen Hendrichs, one of the managers of the kitchen (on cross examination, Petitioner said that another name for Ms. Hendrichs may have been Collins). Petitioner indicated she was instructed to switch to the other side of the dishwasher which meant she went from loading to unloading only. Petitioner indicated she performed the duties with her right arm cuffed next to her body.

Petitioner testified that on November 9, 2011 she spoke by phone to Delores Anson, Respondent's off premises benefits coordinator. Evidence submitted show Ms. Anson filed an Illinois Form 45: Employers First Report of Injury. In the section of the report titled "What was the employee doing when the accident occurred?" Ms. Anson entered "Ongoing issue of pain when loading and loading dish machine." In the area titled "How did the accident occur," the entry states, "Just using the dish machine." Under "What was the injury..." the entry indicates "Right elbow, some pain in hand." Under "What object or substance, if any, directly harmed the employee" the entry states, "Repetitive gripping and lifting of dishes and pans into and out of the dish machine." The Report of Injury states Petitioner reported that the accident occurred on November 2, 2011. (RX 1)

Petitioner testified that she continued to work after the incident through January 26, 2012 when she treated with Dr. Dustman. Petitioner testified that she did not seek treatment sooner because she had some time off during the Thanksgiving and Christmas breaks and was hopeful that her symptoms would improve while she was off work. Petitioner testified that her symptoms did not improve. In addition to her pain, she noticed right biceps tingling which spread to her fingers.

Petitioner testified that upon returning to work after the Christmas break, she noticed immediate pain and increased tingling. Petitioner testified that her work activities caused increased discomfort and pain.

Petitioner testified that she reported her symptoms to the school district again on January 11, 2012. A second Form 45 Report of Injury was prepared by Nancy Nale, the claims adjuster. The form indicates Petitioner reported a "Date and time of accident" as November 2, 2011. In the section of the report titled "What was the employee doing when the accident occurred?" Ms. Nale entered "Ongoing issue of pain when loading and loading dish machine." In the area titled "How did the accident occur," the entry states, "Strain or injury by – Repetitive motion." Under "What was the injury..." the entry indicates "Multiple body parts – Multiple body parts – Specific injury – sprain/strain." (PX 2)

On January 26, 2012, Petitioner presented to Dr. J. Anthony Dustman, an orthopedic surgeon. Records submitted show Petitioner filled out a patient information record stating her complaints were right arm "numb spots and pain in forearm." Petitioner wrote that she first noticed her problem on November 2, 2011 at work; that gripping and twisting makes it worse, and that the pain is constant. (PX 3) Dr. Dustman's January 26, 2012,

record states that Petitioner had pain in her elbow and forearm which radiated to the dorsal aspect of her thumb. Dr. Dustman stated that the pain followed a radicular component very specific for C6 and that it had been there for about two months. Dr. Dustman stated that Petitioner worked at District 87 in the lunchroom carrying heavy pans at the high school. Dr. Dustman ordered x-rays of Petitioner's right elbow which he stated were normal. The doctor felt Petitioner probably had brachial plexopthy. He prescribed a Medrol pack, and referred Petitioner to Dr. Pegg. (PX 5, RX 3)

On February 24, 2012, Petitioner presented to Dr. Edward W. Pegg, a neurologist. Petitioner filled out a form on that date marking a box that her visit was work related. Dr. Pegg took a history that Petitioner had an area of numbness in her right upper arm, thumb and first finger which had been present for approximately two months. Dr. Pegg stated that there was no history of trauma and that she was a dishwasher and did much dishwashing and lifting, but that she did not recall any type of pull or injury. After obtaining the history and performing an examination, Dr. Pegg wrote that he was perplexed as to what was occurring with Petitioner. Dr. Pegg wrote that he inquired as to whether she was ever aware of the numbness in the past for which she replied her symptoms were new and that they were not present in the past. Dr. Pegg ordered an EMG. (PX 6, RX 4)

On February 28, 2012, Dr. Pegg performed an EMG which he indicated revealed a right C6 radiculopathy. Thereafter, the doctor ordered a MRI of the C-spine.(RX 4)

On March 9, 2012, Petitioner underwent an MRI of her cervical spine. The radiologist, Dr. Manness, stated that Petitioner had a disc herniation with severe stenosis and mild cord compression at C5-6. In a preliminary report to Dr. Pegg, Dr. Manness stated that there was cord compression with vague edema. (PX 7) Dr. Pegg referred Petitioner to Dr. Jeffrey K. Wingate, an orthopedic surgeon.

Petitioner saw Dr. Wingate the same day, or March 9, 2012. Dr. Wingate's recorded that Petitioner was employed at Bloomington High School in the kitchen area and/or dish room. Dr. Wingate stated that Petitioner was responsible for cleaning not only the pots, pans, dishes and utensils, but also the very large floor mats that were used to decrease slippage in the kitchen. Dr. Wingate recorded that about two months ago, Petitioner was lifting some of the heavy plastic mats and throwing them to be cleaned, when she felt a pop and began experiencing pain, numbness and heaviness into her lateral forearm region. Dr. Wingate stated that over the last two months, the symptoms intensified. Dr. Wingate stated that Petitioner had a very large extruded disc at C5-6 which was compressing the spinal cord with myelopathic signal change in the cord compressing around the right exiting C6 nerve root. Dr. Wingate diagnosed a C6 herniated disc with spinal cord and exiting nerve root compression/possible nerve root injury. Dr. Wingate took Petitioner off work and recommended an anterior cervical discectomy and fusion. (PX 4)

Petitioner testified that when she sought clearance for the surgery with her family doctor, Dr. Swanson, he diagnosed a separate medical issue (HBP) and she underwent emergency gallbladder surgery on April 6, 2012 (see Dr. Swanson's records, PX 10). While Petitioner treated for her gallbladder, she also underwent pain management for her C6 disc herniation with Dr. Ricardo Vallejo at Millennium Pain Center. On April 11, 2012, Petitioner filled out a general history form stating that her pain began on November 2, 2011. Dr. Vallejo's handwritten notes record a history that Petitioner's right arm began to hurt while lifting dishes at work at a high school cafeteria when she felt a pop. Dr. Vallejo performed epidural injections. (PX 12)

On August 13, 2012, Dr. Wingate performed a discectomy and fusion at C4-5 and C5-6 with BAK cervical interbody fusion cage device. (PX 8, RX 3) Post surgery, Petitioner underwent physical therapy through October 24, 2012. Dr. Wingate released Petitioner from his care on January 22, 2013. At that time, Dr. Wingate recorded that Petitioner was back at work with no real limitations. Petitioner informed the doctor that she took 1 to 1 ½ Norcos a day for her pain, and that "I am really not having any problems." Petitioner indicated

she had no shoulder blade, arm or hand symptoms. Dr. Wingate stated that Petitioner should continue with isometric strengthening exercises and that she had a 3% risk per year of adjacent segment disease. (PX 9)

Dr. Wingate moved to Michigan. Petitioner testified that she has not treated with any medical doctors for her cervical area since Dr. Wingate moved.

Petitioner testified that before November 2, 2011, she had not experienced any numbness or pain in her right arm, elbow, or forearm. She also stated that she had never treated medically or chiropractically for cervical or right arm pain prior to said date.

Petitioner testified that when she first treated with Dr. Dustman, she thought that her problem was in her arm and not her neck. Petitioner said that after November 2, 2011, she experienced numbness and pain in her right arm which increased with ongoing work activities. Petitioner said she did not do anything outside of work to aggravate the right arm pain.

Petitioner testified that Respondent's high school cafeteria serviced between 1200 and 1300 students each lunch hour. Petitioner said that approximately 400 students came for lunch every half hour for a total of three lunch periods per day. Petitioner said that during this time, she ran Respondent's dishwasher non-stop to wash the cafeteria trays. Petitioner said that she loaded 10 of the cafeteria trays in each washing and that she was continuously loading and unloading. Petitioner said that on and before November 2, 2011 and January 26, 2012, (case caption, 14 WC 009136), she used the dishwasher to wash the trays, she scrubbed pots and pans and then loaded them into the dishwasher for cleaning, and she loaded the 10 floor mats daily to clean them in the dishwasher. Petitioner said that she reviewed Respondent's job description and agreed that her job duties included lifting and carrying 50 pounds. (PX 11, RX 5)

Respondent introduced a video analysis taken May 9, 2014. The video analysis shows a worker cleaning baking pans in an industrial sink with 3 dividers; using a nozzle sprayer hanging from the ceiling to clean smaller pans; loading trays into an automatic feeder that runs through the dishwasher and brings the trays out to a conveyer belt; unloading the trays from the other side of the dishwasher after they had been presumably cleaned; carrying dishes to other parts of the cafeteria to unload; unloading the larger cafeteria trays, 4 to 5 trays at a time, from the dishwasher; loading the cafeteria trays into the dishwasher 1 or 2 at a time; rolling up black floor mats approximately 3 to 6 foot long and placing them on 2 trays to put into the dishwasher; unloading the mats after it goes through the dishwasher; hand scrubbing the stainless steel countertops and sink; and using a squeegee. (RX 6)

Petitioner testified that she reviewed Respondent's video and stated that the dishwashing machine that she used on and before November 2, 2011 was not the same as that depicted in the video. Petitioner said that the Respondent replaced the dishwashing machine sometime after she was taken off work on March 9, 2012. Petitioner said that the machine that she used at the time of her injury was at least 15 years old and that the drive belt was broken. Petitioner said that this required that she use more force to push the loaded trays into the machine as well as unload them from the other side. Petitioner said that she experienced increasing right arm pain after November 2, 2011 while she was unloading and loading the cafeteria trays.

Petitioner testified that she was right hand dominant. Petitioner said that since her accident, if she overuses her arms, she notices increased pain and that she gets a bump on her right shoulder. Petitioner said that she has less endurance since her accident and that she still takes Norco for pain three times a day. Petitioner said that, when Respondent is short-staffed and she has to work harder, she gets increased pain. Petitioner said that when she works on "taco" or "nacho" day, her pain level increases because there is more work to be done. Petitioner said that, after Dr. Wingate released her, she returned to work at Oakland Elementary School. Petitioner said that Oakland has fewer students and that this work is physically easier than

the high school. Petitioner said that she has decreased loss of range of motion in her neck and that she has difficulty looking up and down as well as turning her head to the left. Petitioner said she has less strength in her right arm.

Petitioner testified that she works for a school district and that, since she began working for Respondent, she has days and weeks off duringThanksgiving and Christmas seasons. She is also off work during the summer as the school is closed.

Respondent's witness, Marc Dietz, testified that he has been the cafeteria manager at Bloomington High School since August 2, 2011. Mr. Dietz testified that he supervises 21 people. Mr. Dietz testified that he did not know of Petitioner's injury and that he did not learn of her accident until 2014 when Petitioner was expected to go to arbitration. Mr. Dietz testified that after he became aware Petitioner was claiming she injured herself lifting the floor mats, he weighed them and they weighed sixteen (16) pounds.

Respondent's witness, Delores Anson, Respondent's benefit coordinator, testified that she spoke to Petitioner on November 9, 2011 and filled out a Form 45, Report of Injury. Ms. Anson said that she does not work with Petitioner at the same facility and that she filled the form out after speaking to Petitioner on the phone. Ms. Anson stated that Petitioner gave her a specific date of accident on November 2, 2011, but did not state that the injury occurred from throwing a rug. Ms. Anson stated that Petitioner did not review the report.

Respondent's witness, Laura Kletz, testified that she had been an assistant manager for Respondent's cafeteria since August of 2010. Ms. Kletz testified that Respondent has 26 employees in the cafeteria and that three of the employees worked in the dish room. Ms. Kletz testified that she did not know of Petitioner's work accident until a few years after the accident. Ms. Kletz testified that Petitioner wore an arm brace on her right elbow before her November 2, 2011 accident.

Respondent's witness, Julie McCoy, testified that she was employed as the food service director for Respondent. Ms. McCoy testified that just prior to arbitration, she reviewed Respondent's payroll records. Ms. McCoy testified that she could not find an employee named Karen Hendrichs, but she found one named Karen Collins. Ms. McCoy testified that Karen Collins' last paycheck, according to the payroll records, was through July of 2011 and that Ms. Collins had resigned in June of 2011. Respondent admitted a June 24, 2011 e-mail from "Karen Collins" resigning as BHS cafeteria manager (RX 9) and an employee history on Karen Collins with wages through July, 2011. (RX 8)

On rebuttal testimony, Petitioner testified that she did not wear an arm brace prior to November 2, 2011. Petitioner stated that she purchased the arm brace at Wal-Mart after November 2, 2011 but before she sought treatment in January 2012.

Dr. Wingate, Petitioner's treating physician, testified via deposition on July 29, 2014. Dr. Wingate testified that he was board certified in orthopedic surgery and has a specialty in spinal reconstructive surgery (PX 1, p. 5). Dr. Wingate testified that he first treated Petitioner on March 9, 2012. (PX 1, p.p. 7, 8) Dr. Wingate stated that the MRI and EMG findings showed that Petitioner had a very large disc herniation and that she would require surgical management to unpinch the affected nerves. (PX 1, p.p. 12, 13) Dr. Wingate stated that the MRI showed myelopathic signal changes at C5-6 and compression of the exiting nerves right C6 nerve root and that this indicated that there was a bad level of inflammation within the spinal cord. Dr. Wingate stated that the findings on the MRI explained Petitioner's right C6 radiculopathy. (PX 1, p.p. 14-16)

Dr. Wingate provided that he took a history that Petitioner was employed at Bloomington High School and that she worked in the kitchen area or dish room. Dr. Wingate stated that Petitioner was responsible for cleaning the pots, pans, dishes, and utensils as well as very large floor mats that were used to decrease slippage

in the kitchen area. Dr. Wingate stated that Petitioner informed him that, while lifting several of the heavy plastic mats and throwing them out the back door to be cleaned, she felt a pop and began experiencing pain and numbness with heaviness into her brachial radial lateral forearm region. She indicated that her symptoms over the prior two months had intensified. (PX 1, p.p. 16, 17) Dr. Wingate stated that the findings of the EMG with weakness on the C5 and C6 nerve root was consistent with the history of lifting the heavy mats and the time frame for which the symptoms developed. (PX 1, p.p. 20, 21)

Dr. Wingate testified that it was his opinion that Petitioner's work activities lifting the heavy mats likely caused her ruptured cervical disc. (PX 1, p. 21) Dr. Wingate testified that the moving of the mats and the lifting injury described could reasonably have caused the herniated discs at C4-5 and C5-6 that precipitated the need for surgical management. (PX 1, p.p. 31, 32) Dr. Wingate said that Petitioner experienced a popping sensation when she lifted the mat and that she began to experience a downturn in what she could do afterwards. Dr. Wingate testified that performing dishwashing activities could cause a tear in the outer covering of the disc and could put forces across the torn edge of the disc so that some of the disc material could actually herniate, or be pushed out, of the tear or opening. (PX 1, p.p. 33, 34) Dr. Wingate opined that Petitioner's work activities washing dishes, cleaning pots and pans, and doing heavy lifting at work could contribute to, or cause, the disc pathology he appreciated during surgery. (PX 1; p.p. 31, 32)

Dr. Wingate testified that the two level cervical fusion can cause stress above and below the fusion levels and that Petitioner has a 3% risk per year of developing adjacent disease and that there is a 30% chance within the next 10 years that one of the adjacent segments will go bad. (PX 1, p. 30) Dr. Wingate opined that because Petitioner is a younger patient, she stands more than a 50% chance that she will require additional surgical management within the next 20 years. (PX 1, p. 35) Dr. Wingate stated that the two level fusion Petitioner underwent removed approximately 20 degrees of potential motion from Petitioner's neck and that it would affect all six planes of her cervical motion. (PX 1, p.p. 36, 37)

On cross examination, Dr. Wingate stated that the MRI showed a disc herniation at C5-6 which was compressing against the spinal cord and was inducing some level of myelopathic signal change. Dr. Wingate stated that he agreed with the radiologist that there was an endplate osteophyte at C4-5. Dr. Wingate stated that an osteophyte is the body's inflammatory response to a torn or herniated disc. Dr. Wingate stated that a CT scan can show bone growing as early as 6 or 8 weeks after the inflammation begins. (PX 1, p.p. 45, 46) Dr. Wingate stated that if a person feels a pop and acutely herniates a disc, it will likely cause a fair amount of pain. Dr. Wingate stated that it was not unusual for a person to wait two months to treat for this type of pain.

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Ryon Hennessy, a board certified orthopedic surgeon, on August 29, 2014. Dr. Hennessy also testified via deposition on January 7, 2015. Dr. Hennessy testified that he obtained a history from Petitioner that her job activities included cleaning floor mats that had to be rolled up and put into a pot scrubber machine to clean them and that she lifted heavy pans for cooking. Dr. Hennessy reviewed Petitioner's job description with her at the time of the evaluation and stated that Petitioner agreed with said job description. (RX 7, p.p. 6, 7)

Dr. Hennessy testified that Petitioner described an accident on November 2, 2011 where she was rolling up mats to put them in the washer when she felt a pop in her right arm with pain shooting into her neck. Dr. Hennessy said that Petitioner reported this injury to her boss, Ms. Hendrichs, who was no longer with the district. (RX 7, p. 7) Dr. Hennessy stated that after her Christmas break in January, 2012, Petitioner called Dr. Dustman's office to make an appointment for what she believed was an elbow condition. Dr. Hennessy reviewed the medical records from Dr. Dustman, Dr. Pegg and Dr. Wingate and stated that he agreed that Petitioner had a herniated disc at C5-C6. (RX 7, p.p. 9-14) Dr. Hennessy opined that the C6 radiculopathy was fairly profound and new. Dr. Hennessy testified that the MRI showed some edema. Dr. Hennessy testified that it was his opinion that Petitioner suffered an acute cervical injury around the time she sought treatment from Dr.

Dustman, but not in November. (RX 7, p.p. 15, 16) Dr. Hennessy stated that a disc herniation causing a spinal cord edema is a fairly acute event and that he likened it to a broken ankle. Dr. Hennessy stated that a person with a broken ankle or an acute disc herniation that caused spinal cord edema would seek immediate care and that even her primary care physician, Dr. Dustman, recognized this and made an appropriate referral. Dr. Hennessy reiterated his opinion that he believed Petitioner's herniation started in January 2012. (RX 7, p. 23)

Dr. Hennessy testified that, on exam, Petitioner was pleasant and cooperative. Petitioner demonstrated a slight decrease in flexion and extension of her cervical area with rotation left and right being within normal limits. (RX 7, p. 19) Dr. Hennessy stated that Petitioner took a half a tablet of Norco one (1) to three (3) times a day for mild neck pain and that she had occasional radicular symptoms to the right deltoid stopping at the mid upper arm. Dr. Hennessy stated that Petitioner informed him her life was back to normal, but she was more sedentary at home. (RX 7, p. 20) Dr. Hennessy opined that Dr. Wingate's decision to perform surgery was reasonable given the EMG findings and the C5-6 disc herniation. (RX 7, p. 21)

Dr. Hennessy testified that he asked Petitioner whether or not her injury was a chronic wear and tear issue or a discreet event. Dr. Hennessy testified that Petitioner answered that it was a discreet event that occurred on November 2, 2011. Dr. Hennessy stated that it was his opinion that wear and tear injuries can cause cervical disc herniations, however; Petitioner's incident was not a repetitive trauma, it was an acute event (RX 7, p.p. 24, 25).

Dr. Hennessy testified that he was not able to declare that Petitioner was at maximum medical improvement as same would be determined pending radiographic documentation that the fusion did take. However, he noted Petitioner was back to full duty work and that while Petitioner had minor aches and pains, her life is essentially back to normal. Dr. Hennessy agreed with Dr. Wingate's assessment that a person with a fusion has a 30% chance of breaking down at the adjacent disc level over a period of 10 years. (RX 7, p.p. 27, 28)

On cross examination, Dr. Hennessy stated that Petitioner's job activities were medium and approached being heavy. (RX 7, p. 30) Dr. Hennessy stated that a person can have cord edema and continue working. (RX 7, p. 34) During cross examination, an inquiry was made of the doctor regarding his opinion on page 12 of his report wherein he opined that Petitioner had no permanency as a result of her November 2, 2011 accident. When asked, "Is that because the records that you reviewed did not reflect [a] November 2, 2011 accident?", The doctor replied, "Correct. Or at least an accident that caused a right C6 radiculaopathy which would come from a disk – acute disk herniation." When shown a handwritten note, dated January 26, 2012, from Dr. Dustman that indicates Petitioner's problem first began on November 2, 2011 at work when she began noticing numbness and right arm pain, Dr. Hennessy indicated that he did not have said note as part of the records he reviewed. Dr. Hennessy stated that said arm pain could be consistent with a disk herniation at C5/C6. (RX 7, p.p. 35-7) Dr. Hennessy also stated that Petitioner would likely require some type of medication in the future for her symptoms (RX 7, p. 37) Dr. Hennessy stated that rolling up a large floor mat and putting it into the dishwasher could cause a C5-6 disc herniation as could brushing your teeth or watching a tennis match. (RX 7, p. 38). Dr. Hennessy stated that lifting and carrying up to 15 pounds, reaching overhead and putting cafeteria trays into a dishwasher could contribute to a disc herniation at C5-6. (RX 7, p.p. 39, 40)

On redirect examination, Dr. Hennessy testified that his opinion regarding causal relation did not change despite reviewing the form mentioned above. Dr. Hennessy indicated that if it was such a discreet event, Dr. Dustman didn't mention it in his medical narrative. The doctor also refereed to Dr. Pegg's records wherein the doctor provided that Petitioner denied any traumatic events or discreet event. (RX 7, p.p. 42-43)

With respect to issue (C.) Did an Accident Occur That Arose Out of and In the Course of Petitioner's Employment by Respondent, the Arbitrator finds as follows:

Petitioner worked for Respondent in the dish room performing cafeteria clean up duties. Respondent's high school cafeteria serviced between 1200 and 1300 students each lunch hour which equated to approximately 400 students coming for lunch every half hour for a total of three lunch periods per day. According to Petitioner, she ran Respondent's dishwasher non-stop to wash the cafeteria trays. Petitioner loaded 10 cafeteria trays in each washing which required continuous loading and unloading. Also as part of her duties, she was required to clean floor mats. That process required that she load and unload 10 floor mats in the dishwasher on a daily basis. The individual floor mats were approximately one inch thick, 3 x 6 foot long, and weighed, according to Respondent's witness Mr. Marc Dietz, sixteen (16) pounds. Petitioner credible testimony demonstrates that on November 2, 2011, she used the dishwasher to wash trays, she scrubbed pots and pans and then loaded them into the dishwasher for cleaning. That day she also lifted rolled up rubber floor mats and threw them into the cafeteria dishwasher. While doing so, she felt a sharp pain and was unable to use of right arm effectively. She noticed right elbow pain which began radiating towards her right hand initially then into her right shoulder over a period of time.

On November 9, 2011, Respondent's off premises benefits coordinator, Delores Anson, filed an Illinois Form 45: Employers First Report of Injury. The Report of Injury states Petitioner reported that the accident occurred on November 2, 2011. The Form 45 indicates, in response to a question entitled "What was the employee doing when the accident occurred," Ms Anson wrote, "ongoing issue of pain when unloading and loading dish machine." In response to the question entitled "How did the accident occur?" – the form states "just using the dish machine." In response to a question "What was the injury or illness? List the part of the body affected and explain how it was affected." – the form states "right elbow, some pain in hand." In response to a question entitled "What object or substance, if any, directly harmed the employee?" – the form states "repetitive gripping and lifting of dishes and pans into and out of dish machine."

Petitioner continued to work after the incident through January 26, 2012 when she saw Dr. Dustman. Petitioner testified that she did not seek treatment sooner because she had some time off during the Thanksgiving and Christmas breaks and was hopeful that her symptoms would improve while she was off work. Petitioner testified that her symptoms did not improve. When she returned to work after the Christmas break, she noticed that her work activities caused increased discomfort and pain.

Petitioner reported her symptoms to the school district again on January 11, 2012. A second Form 45 Report of Injury was prepared. The form indicates Petitioner reported a "Date and time of accident" as November 2, 2011. In the section of the report titled "What was the employee doing when the accident occurred?" the entry states – "ongoing issue of pain when loading and loading dish machine." In the area titled "How did the accident occur," the entry states, "Strain or injury by – Repetitive motion." Under "What was the injury…" the entry indicates "Multiple body parts – Multiple body parts – Specific injury – sprain/strain."

On January 26, 2012, Petitioner presented to Dr. Dustman. Records submitted show Petitioner completed a patient information record stating her complaints were right arm "numb spots and pain in forearm." Petitioner wrote that she first noticed her problem on November 2, 2011 at work; that gripping and twisting makes it worse, and that the pain is constant. Dr. Dustman's January 26, 2012, record states that Petitioner had pain in her elbow and forearm which radiated to the dorsal aspect of her thumb. Dr. Dustman stated that the pain followed a radicular component very specific for C6 and that it had been there for about two months.

On February 24, 2012, Petitioner presented to Dr. Edward W. Pegg, a neurologist. Petitioner filled out a form on that date marking a box that her visit was work related. Dr. Pegg took a history that Petitioner had an area of numbness in her right upper arm, thumb and first finger which had been present for approximately two months. Dr. Pegg stated that there was no history of trauma and that she was a dishwasher and did much dishwashing and lifting, but that she did not recall any type of pull or injury.

After undergoing diagnostic tests, Petitioner was referred to Dr. Jeffrey K. Wingate. Petitioner saw Dr. Wingate on March 9, 2012. Dr. Wingate's recorded that Petitioner was employed at Bloomington High School in the kitchen area and/or dish room. Dr. Wingate stated that Petitioner was responsible for cleaning not only the pots, pans, dishes and utensils, but also the very large floor mats that were used to decrease slippage in the kitchen. Dr. Wingate recorded that about two months ago, Petitioner was lifting some of the heavy plastic mats and throwing them to be cleaned, when she felt a pop and began experiencing pain, numbness and heaviness into her lateral forearm region. Dr. Wingate stated that over the last two months, the symptoms intensified.

Petitioner reported her accident to Respondent on November 9, 2011and January 11, 2012 indicating that the right arm pain began on November 2, 2011. Petitioner reported a November 2, 2011 date of accident to Dr. Dustman on January 26, 2012 and to Dr. Wingate on March 9, 2012. Also, though not as compelling, when Petitioner saw Dr. Pegg on February 24, 2012, she recorded that her visit to the doctor was due to a work related incident. Even though Dr. Pegg took a history that that there was no history of trauma, he noted that she was a dishwasher and did much and lifting. The doctor recorded that Petitioner had an area of numbness in her right upper arm, thumb and first finger which had been present for approximately two months. That period coincides with the time-frame Petitioner declares she injured herself.

The Arbitrator notes that, although Dr. Wingate's record of March 9, 2012, is the first record that noted a specific history of Petitioner hearing a popping sensation near her right elbow while throwing a rug into the dishwasher, it is consistent with her testimony. Her ongoing right arm symptoms increased and progressed while she performed her industrial dishwashing duties for Respondent after November 2, 2011.

The Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of her employment with Respondent on November 2, 2011. The Arbitrator relies on Petitioner's testimony credible, the Form 45s prepared, as well as the medical records submitted.

With respect to issue (F.) Is Petitioner's Current Condition of Ill-Being Causally Related to the Injury, the Arbitrator finds as follows:

The Arbitrator finds that a causal relationship exists between Petitioner's cervical condition of ill-being and the accident sustained on November 2, 2011.

Credible evidence submitted show that prior to November 2, 2011, Petitioner did not suffer from any cervical or right arm pain. Nor had she treated medically for same. The evidence supports that on November 2, 2011, Petitioner sustained an accident causing right arm pain which began progressively radiating shortly after the accident. Petitioner's right arm pain was ultimately diagnosed as radiculopathy from a C5-6 disc herniation.

Petitioner's treating physician, Dr. Wingate, opined that Petitioner's work activity of lifting the floor mats likely caused her ruptured disc precipitating the need for surgical management. The Arbitrator relies on Dr. Wingate's opinions that Petitioner's work as a dishwasher could put forces across the torn edge of the disc causing the disc herniation to increase and that this caused increased symptoms of right arm radiculopathy.

Respondent's Section 12 examiner, Dr. Hennessy, agreed that Petitioner had a herniated disc at C5-C6. Dr. Hennessy opined that the C6 radiculopathy was fairly profound and new. Dr. Hennessy noted that the MRI showed some edema and opined that Petitioner suffered an acute cervical injury around the time she sought treatment from Dr. Dustman, but not in November. Dr. Hennessy reasoned that a disc herniation causing a spinal cord edema is a fairly acute event liking it to a broken ankle. Dr. Hennessy stated that a person with a broken ankle or an acute disc herniation that caused spinal cord edema would seek immediate care. However, the doctor also indicated that a person can have cord edema and continue working. During depositional

testimony, an inquiry was made of the doctor regarding his opinion on page 12 of his report wherein he opined that Petitioner had no permanency as a result of her November 2, 2011 accident. When asked, "Is that because the records that you reviewed did not reflect [a] November 2, 2011 accident," The doctor replied, "Correct. Or at least an accident that caused a right C6 radiculaopathy which would come from a disk – acute disk herniation." When shown a handwritten note, dated January 26, 2012, from Dr. Dustman indicating that Petitioner's problem first began on November 2, 2011 at work when she began noticing numbness and right arm pain, Dr. Hennessy indicated that he did not have said note as part of the records he reviewed. Dr. Hennessy stated that said arm pain could be consistent with a disk herniation at C5/C6 and that rolling up a large floor mat and putting it into the dishwasher could cause a C5-6 disc herniation.

The Arbitrator is more persuaded by the opinions of Dr. Wingate's than those opined by Dr. Hennessy.

Having found Petitioner credible and relying on the opinion of Dr. Wingate, the Arbitrator finds that a causal relationship exists between Petitioner's cervical condition of ill-being and the accident sustained on November 2, 2011.

With respect to issue (G.) What Were Petitioner's Earnings, the Arbitrator finds as follows:

Respondent produced a wage statement listing 26 two week pay periods for the year pre-dating Petitioner's November, 2011 accident. (PX 15, RX 2)

Petitioner testified that she missed whole days and weeks of work near Christmas and during the summers. After deducting the pay period prior to January 11, 2011 (Christmas break) and for June 4, 2011, June 18, 2011, July 2, 2011, July 16, 2011, July 30, 2011 and August 13, 2011(summer break, pay periods 15, 16, 17, 18, 19, and 20), Petitioner's earned income for the 38 weeks worked is $11,600.53 and the average weekly wage is $305.28.

With respect to issue (J.)Were the Medical Services that were Provided for Petitioner Reasonable and Necessary? Has Respondent Paid All Appropriate Charges for all Reasonable and Necessary Medical Services, the Arbitrator finds as follows:

For reasons stated in (F) Causal Connection, the Arbitrator orders Respondent to pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $2,804 to Dr. Pegg, $1,654.49 to Orthopedic and Sports Enhancement, $2,654.75 to Advocate BroMenn, and $1,225.20 to Millennium Pain Center. (PX 13) The Arbitrator orders that Respondent shall be given a credit of $50,889.55 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. Additionally, Respondent is ordered to reimburse Petitioner in the amount of $310 for medical expenses she had paid out of pocket. (PX 13)

With respect to (K.) What Temporary Benefits (TTD) are In Dispute, the Arbitrator finds as follows:

Petitioner underwent cervical surgery on August 13, 2012. Petitioner testified that she returned to restricted work on October 1, 2012.

The Arbitrator therefore awards temporary total disability benefits for 7 weeks, commencing August 13, 2012 through October 1, 2012.

With respect to issue (L.) What is the Nature and Extent of the Injury, the Arbitrator finds as follows:

Pursuant to Section 8.1(b) of the Act, the Arbitrator, in determining the level of permanent partial disability, must use the following factors:

16IWCC0040

i. The reported level of impairment;
ii. The occupation of the injured employee;
iii. The age of the employee at the time of the injury;
iv. The employee's future earning capacity; and
v. Evidence of disability corroborated by the medical records.

With regard to (i), of Section 8.1(b) of the Act:

Neither party submitted an AMA impairment rating. As such, no weight is given to this factor.

With regard to (ii) of Section 8.1(b) of the Act:

Petitioner's occupation has been as a cafeteria food service worker for Respondent, a school district, for 6 years. Petitioner's work is very physical. Petitioner was released to full duties by Dr. Wingate and she has returned to work at an elementary school where there are fewer students. Petitioner said that although the work is physically easier than the work she performed prior to November 2, 2011, she gets increased pain and symptoms in her right arm when Respondent is short staffed or on "taco" or "nacho" day.

With regard to (iii), the age of the employee at the time of the injury:

Petitioner was 41 years old at the date of the loss and had over 20 years to work before retirement age.

With regard to (iv) of Section 8.1(b) of the Act:

Petitioner's future earning capacity, at the present time, appears to be undiminished as a result of the injuries.

With regard to (v) of Section 8.1(b) of the Act:

Petitioner has credibly testified that she experiences increased pain in her right arm and right shoulder if she uses her arm too much. Petitioner's testimony that she has difficulty looking up and down as well as turning her head to the left is consistent with Dr. Wingate's opinion that a two level fusion would cause approximately 20 degrees of potential loss of range of motion and that it would affect all six planes of her cervical motion. According to Petitioner's treating physician and Respondent's Section 12 examiner, Petitioner has an increased risk of developing adjacent disc disease because of the two level fusion. Both Dr. Wingate and Dr. Hennessy agree that Petitioner has a 3% risk per year of developing adjacent disc disease. Dr. Wingate opined that because Petitioner is a younger patient, she stands more than a 50% chance that she will require additional surgical management within the next 20 years.

Based on all five (5) factors noted above, the Arbitrator finds that as a result of an accidental injury sustained on November 2, 2011, Petitioner is permanently disabled to the extent of 25% as provided in Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Belinda Daniels,
Petitioner,

vs. NO: 12 WC 13949

16IWCC0041

Bloomington Public School District #87,
Respondent.

DECISION AND OPINION ON REVIEW

Petitioner and Respondent appeal the decision of Arbitrator Dollison finding Petitioner sustained accidental injuries arising out of and in the course of her employment on November 2, 2011. As a result Petitioner was temporarily totally disabled from August 13, 2012 through October 1, 2012 for 7 weeks under Section 8(b) of the Illinois Workers' Compensation Act, is entitled to $8,338.44 in medical expenses and $310.00 in out of pocket expenses under Section 8(a) of the Act and is permanently partially disabled to the extent of 25% man as a whole under Section 8(d)2 of the Act. The Issues on Review are whether Petitioner sustained an accidental injury arising out of and in the course of her employment on November 2, 2011, whether a causal relationship exists between the alleged November 2, 2011 work accident and Petitioner's present condition of ill-being, and if so, the amount of Petitioner's average weekly wage, the extent of Petitioner's temporary total disability, the nature and extent of Petitioner's permanent disability and the amount of reasonable and necessary medical expenses. The Commission, after reviewing the entire record, reverses the Arbitrator's decision and finds that Petitioner failed to prove she sustained an accidental injury arising out of and in the course of her employment on November 2, 2011 and failed to prove a causal relationship exists between the alleged November 2, 2011 work accident and Petitioner's present condition of ill-being, for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

16IWCC0041

THE COMMISSION FINDS:

1. Petitioner, a 41 year old right-handed cafeteria food service worker, testified she works in the dish room of the high school cafeteria. She agreed she lifts and carries up to 50 pounds, bends and reaches about her shoulder as a part of her regular job. Petitioner was asked to watch RX6, a video of her job. Petitioner testified that the video does not match her job in that the footage depicted a different/new machine and not the 12-15 year old broken machine she worked on. Petitioner said the old machine required her to push the trays into the machine instead of rolling them into the machine. Petitioner testified that the drive on the machine was broken and she had to use more force to do everything. Also, the new machine has curtains so the water did not splash back. She testified that the amount of things she did and the speed in which she did them was greater than the amount and speed that the person did on the video. She lastly testified that the dishes that came out of the old machine were never as clean as the dishes that came out of the machine in the video and as a result, there was a lot more scrubbing that was involved to get the debris out of the pans.

2. On November 2, 2011, Petitioner testified she was doing cleanup work. She rolled up 3'x 6'to 3'x 8' rubber floor mats that weighed between 30-50 pounds and put them into the pot scrubber. When she was doing this her right elbow popped. It was a sharp pain that started in her right arm and that radiated all the way up her neck. She was unable to use her right arm effectively for quite a while. She started favoring her right arm and she adjusted her location from one end of the dish machine to the other so she could use her left arm more. On cross examination, Petitioner testified that someone else had rolled up the mats that she picked up. The mats were leaning on the wall waiting for her to run them through the machine. She also testified that she did not weigh the mat and it was strictly an estimate she made that the mat weighed 50 pounds.

3. Petitioner testified that after the November 2, 2011 incident she spoke to Karen Hendricks, her manager, who told her to go back to work. She told her not to the work on the side that caused her more pain and to switch to the other side to give her right arm a rest. Petitioner testified that after that conversation she switched sides and switched the job from loading the machine to unloading the machine. When Petitioner was told on cross-examination that the district never had an employee named Karen Hendricks and they had someone named Karen Collins who may previously been known as Karen Hendricks, Petitioner agreed that they were one and the same person. Respondent's attorney subsequently submitted into evidence a June 24, 2011 resignation letter from Karen Collins that showed she resigned from her position prior to the alleged November 2, 2011 work accident.

4. Julie McCoy testified she is the food service director. There was an employee by the name of Karen Collins who last worked for Respondent in July of 2011. RX9 is the June 24, 2011 resignation letter from Karen Collins. Karen Collins was not an employee of

Respondent on November 2, 2011. There is not an employee in the food service department by the name of Karen Hendricks. She learned today it might have possibly been Karen Collins' maiden name. Karen was their prior manager.

5. Petitioner reported she continued to work after November 2, 2011 but she worked at a slower pace. On November 9, 2011, Petitioner completed a work accident report in which she listed the date of accident as November 2, 2011 and stated she was experiencing ongoing pain when loading/unloading the dish machine. She also said she injured her right elbow and she was experiencing some pain in her right hand. She reported that she was harmed by repetitively gripping and lifting dishes and pans into/out of the dish machine.

6. Delores Anson testified she is a benefits coordinator for Respondent. On November 9, 2011 she received a verbal report of injury from Petitioner. RX1, the report of injury was completed using the information provided by Petitioner. The Petitioner reported at the time of the accident she was loading/unloading dishes, using the dish machine and injured her right elbow. She also reported that it was due to repetitive gripping and lifting of dishes/pans into/out of the dish machine. While Petitioner was specifically asked about the incident which allegedly occurring on November 2, 2011, the Petitioner did not speak about loading floor mats or any other specific incident occurring on November 2, 2011. She also did not review the form before it went in.

7. Petitioner testified that she thought the symptoms would subside over the Thanksgiving and Christmas breaks. During the break, she noticed she had a numb spot in her right bicep and right forearm. Also, her right thumb and first two fingers were beginning to tingle on a constant basis. Upon returning from Christmas break, she was still experiencing extreme pain and aggravation upon performing repetitive tasks.

8. On January 11, 2012, Nancy Nale, the claim representative completed PX2, a report of accident. In the report, she noted that Petitioner claims that her accident was caused by ongoing pain which resulted from unloading and loading. She said her sprain/strain injuries were the result of repetitive motion that she experienced performing her job and that she had injured multiple parts of her body.

9. Marc Dietz testified he is the cafeteria manager for Respondent. Petitioner never reported an injury to him. He only recently became aware of the fact that she sustained an injury. He is a working supervisor; he was around her on a daily basis and he did not notice her having any problems with her arm, neck or any other functions of performing her job. He currently supervises 21 people and he used to supervise 25 back in November of 2011. In all, they serve 1,200 people a day. Petitioner worked part-time. The busiest time in the cafeteria is from 11:00-12:30. The first time he became aware of Petitioner's claim was last year leading up to the proceedings. Karen was the manager before he arrived here. Her last day was in June or July of 2011. The standard protocol for someone who has an

accident is to alert the manager who then directs them to Delores Anson who handles it from there. He became aware of the fact that Petitioner claims she was lifting mats. He weighed the mats and they weigh 16 pounds. He agreed that the mats were put in the dishwasher to be cleaned.

10. Laura Kletz testified she is the assistant manager of the cafeteria. She did not receive a report of accident from the Petitioner. She did not know the Petitioner was claiming an injury until a few years after the fact. She did not notice Petitioner having any difficulty with her body as she went along with her daily activities. Petitioner used to wear braces on her wrist and elbow about 90% of the time. She wore the brace even before November 2, 2011.

11. Petitioner first saw Dr. Dustman, an orthopedic surgeon, on January 26, 2012. Upon seeing Dr. Dustman, she completed PX3, which is a patient information record for the Orthopedics and Sports Enhancement Center. In PX3, Petitioner said she was there today because she was experiencing a right arm pain and she had a numb spot. She rated her pain as being 5 out of 10 on a 10 point scale and said she first noticed pain on November 2, 2011 while at work. She lastly said her pain was made worse with gripping and twisting. On January 26, 2012, Dr. Dustman noted that Petitioner presents with pain in the elbow and forearm area which radiates down to the dorsal aspect of the thumb. She also has some pain in the shoulder area but does not really have much pain in the neck. He noted her pain complaints do not follow a radicular component very specifically for C6. Petitioner reported that the pain started about two months ago when she was working in the lunch room at District 87 and she was carrying heavy pans. On physical examination, he noted that Petitioner had numbness and tingling follows the C6 nerve distribution on her right side, but the Tinel's sign at her elbow was negative as was the Spurling's maneuver. He noted that forward flexion and compression of the neck do not cause her any pain. However, there is some tenderness though in the mid portion of the clavicle and it is aggravated by abduction. Yet, external rotation makes it better most of the time. He noted that Petitioner's elbow x-rays were normal. He opined that Petitioner probably has brachial plexopathy and he referred her to Dr. Pegg as well as prescribing a Medrol Dosepak.

12. On February 24, 2012, Petitioner saw Dr. Pegg, a neurologist. The doctor noted that Petitioner reports she has been having an area of numbness in the right upper arm and a sense of numbness in her thumb and first finger. Petitioner reports that this has been present for approximately two months and it seemed to have come on slowly. She reports no history of any trauma. She is a dishwasher and she does much dishwashing and lifting but she does not recall any type of pull or injury. She has not done anything with the arm above her head and she does not do any sports or throwing as a hobby. In conclusion, the doctor notes that he is somewhat perplexed as to what may be occurring in Petitioner's case. Although a brachial plexopathy injury could explain the constellation of symptoms, the Petitioner reported she has no history of trauma and there is nothing unusual on exam

to explain the cause. In addition, there has been no associated pain as one might see in an idiopathic brachial plexitis. Petitioner's February 28, 2012 EMG showed findings indicating right C6 radiculopathy. It was noted that this fits with the patient's complaints of numbness in the thumb and first finger and also goes along with the new findings of an absent right brachioradialis reflex. Dr. Pegg ordered an MRI on March 9, 2012 and referred her to Dr. Wingate, and orthopedic spine specialists. The March 9, 2012 cervical MRI showed a disc herniation with severe stenosis and mild cord compression at C5-6. The radiologist noted that the vague signal changes in the cord could indicate early edema.

13. On March 9, 2012, Petitioner saw Dr. Wingate who notes that Petitioner was seen by Dr. Desmond (sic Dustman) last week with a history of a right upper extremity injury. She works in the kitchen area/dish room of a high school. She is responsible for cleaning pots, pans, dishes, utensils and floor mats. Petitioner reports about two months ago she was lifting several of the heavy plastic mats and throwing them out of the back door to be cleaned, when she felt a pop and began experiencing pain, numbness and heaviness into her brachioradialis lateral forearm region. Over the last two months, her symptoms intensified. Dr. Desmond (sic Dustman) felt she had injury to the brachial plexus. The MRI shows a very large extruded disc at C5-C6 that is compressing both the spinal cord with myelopathic signal change in the cord in compression around the right existing C6 nerve root. At C4-5, she has a smaller disc that protrudes laterally into the right neural foramen compression against the C5 nerve root. The C5 nerve is involved. Neurologically she had sharply decreased right brachioradialis reflex. She also has a mildly decreased biceps reflex on the right side. On examination, the biceps is ½ grade weaker on the right than the left. She is right hand dominant. The brachioradialis is 4-/5 on the right upper extremity. Key pinch strength is significantly diminished on the right when compared to the left. The extensor pollicis strength on the right is significantly weaker than the left upper extremity. Dr. Wingate diagnosed Petitioner as having a C4-C6 herniated disc with spinal cord and exiting nerve room compression and a possible nerve root injury. He recommended that she consider undergoing an anterior cervical discectomy and fusion.

14. On April 11, 2012 Petitioner was seen at Millennium Pain Center. Under the personal Information column, Petitioner reported that in November she thought she had suddenly gotten tennis elbow while at work. When she had her elbow examined, she was told about the numbness and tingling. Petitioner said her arm began to hurt and she experienced numbness and tingling while lifting a (cut off) of dishes at work in the high school cafeteria.

15. On August 13, 2012 Petitioner underwent surgery consisting of a radial discectomy and decompression of spinal canal with an interbody fusion at C5-6.

16. On August 17, 2012, Dr. Wingate gave Petitioner an off work slip and indicated that Petitioner should be off of work for the next six to eight weeks due to undergoing surgery. From September 20, 2012 through October 2, 2012, Petitioner underwent physical therapy.

17. On January 22, 2013, Petitioner followed up with Dr. Wingate who noted that Petitioner is now five months post-surgery. She is doing great and she is back at work with no real limitations. On most days she takes 1 to 1-1/2 Norco. She said, "I am not really having any problem." Dr. Wingate instructed Petitioner to continue with her strengthening exercises and to re-check with him in three months.

18. Petitioner testified she last saw Dr. Wingate on January 22, 2013 when he moved to Michigan. She has not followed up with a doctor in regard to her cervical or right arm pain since seeing Dr. Wingate. When she came back to work she started working at a grade school which had a slower pace than the high school. Currently, her right arm and cervical area feel better. If she overworks, which is about once a week, she experiences a knot in her shoulder that causes some pain down her arm. This usually happens during a very labor intensive lunch such as when there is extra scooping for Taco or Nacho day. Her range of motion is decreased on the left side. She uses Norco three times a day which is prescribed by Dr. Swanson, her primary care physician. When she returned to work after her surgery she went to work at the grade school instead of returning to the high school. Petitioner testified that she purchased the right arm brace after the November 2, 2011 accident and before she sought treatment.

19. Dr. Wingate, a board certified orthopedic surgeon, was deposed on July 29, 2014. His subspecialty is spinal reconstructive surgery. He read both the histories of Dr. Pegg and Dr. Desmond (sic Dustman) and their evaluations. He testified that often the pain that manifests from a brachial plexus is perceived in the elbow. He noted that Petitioner had a positive EMG involving her C5 and C6 nerve roots. The MRI explained the right arm pain and the C6 radiculopathy. With spine patients there oftentimes is a discrete history that lends itself well to understanding what's going on with the patient's spinal problem. Dr. Wingate said he worked his way through medical school working in restaurants and is very familiar with the heavy, black mats. They are heavy and over the course of 8-24 hours they develop a layer of water beneath them that creates a suction seal. So the action of pulling up the mats and throwing them out the back door painted a very graphic picture for him and that was what Petitioner felt when she popped her neck. Generally, it takes a while to get that type of history. His causation opinion is based on a history of Petitioner lifting the heavy mats and symptoms having developed over the following two months. He believed that Petitioner's injuries were most probably derived from her lifting heavy mats than it was from her throwing them out the back door for cleaning. The lifting injury Petitioner described to me could have reasonably caused the herniated discs at C4-5 and C5-6 that ultimately precipitated her need for surgical management. Petitioner's work activities of washing dishes, cleaning pots and pans and doing heavy lifting at work could

have contribute to her disc pathology. He also opined that since she was successfully able to do this type of work without any discomfort until the time frame where she lifted the heavy mat and felt the pop and sudden change the timing also supports his causation opinion. Dr. Wingate stated that the dishwashing activities she described to Drs. Desmond (sic Dustman) and Pegg is the type of activity that can cause a tear in the outer covering of the disc and can put enough force across the torn edge of the disc so that some disc material can actually herniate or be pushed out through the tear/the opening. Dr. Wingate testified that Petitioner has a very good prognosis, but she does stand a significantly greater than 50% chance that she will require additional surgery within the next 20 years. As a result of the surgery, Petitioner lost 20 degree of potential motion in her neck and the surgery definitely affected all six planes of motion. He would not anticipate that Petitioner would need long term use of pain medication. With a young patient who had a two level fusion, we are looking at a 30% chance within the next ten years that one of the adjacent segments will go bad. In his opinion, Petitioner's herniations were acute in nature. He agreed that Dr. Desmond's (sic Dustman) January 26, 2012 note stated Petitioner complaint of radicular pain down her right arm and on examination her forward flexion and compression of the neck were negative. He stated that the physical examination findings are not hard and fast findings. He agreed that Dr. Pegg's records indicate that there was not any history of trauma and Dr. Desmond's (sic Dustman) did not record any report of Petitioner that she felt a pop. He disagreed with the radiologist's opinion that Petitioner had congenital stenosis in the mid-cervical spine which is superimposed on the top of the congenital narrowing/degenerative changes. He said that the radiologist job is not necessarily to describe and determine if something is degenerative or acute. Specifically, he refers to any type of tear of an annulus fibrosus, any type of bulge or herniation of disc material as a degenerative change. He said that the radiologist is really in this case referring to the acuity, subacuity or long-term nature of the underlying process when he uses the term degenerative. He agreed that it most probably takes months for an osteophyte to develop. He does not recall specifically seeing any significant osteophytes. Rather, it is a generalized description of the operation that is performed. He does not know why Petitioner did not report a history of a pop to the first two doctors. He said that the only difference is that he pays more acute attention than some other surgeons do who are not involved litigiously. He agreed that seeking treatment two months after the initial pop is not a usual time frame. He agreed that Petitioner did not describe the size of the mats, but he knows from his own past experience that the mats are 30-40 pounds dry and 3-4 feet long. These measurements are fairly consistent throughout the food preparation industry. He agreed that Petitioner's day to day activities of washing dishes could have played some role in the development of the disc herniation as well. He stated that there is no way to know what caused her herniation and he agreed that non-occupational factors could have caused the disk to tear. He agreed that she was released to full-time, unrestricted work and that at her last exam she reported that her arm and shoulder pain had been completely alleviated. Dr. Wingate testified that he would not find her to be at maximum medical improvement until twelve months after her surgery. He agreed that a patient's history is probably the single most important

ingredient in medical decision-making in an instance like this. He agreed that one of the things he based his opinion on was the temporal relationship between the onset of the pain and Petitioner's history. He agreed that it would be speculative to say whether she will need additional surgery. While he said she would have restriction in motion, at her last visit she did not demonstrate any such restriction.

20. Dr. Hennessy, a board certified orthopedic surgeon, was deposed on January 7, 2015. His practice consist of 30% spine work with a fair number of knee and hip replacements, knee arthroscopies, fracture care, shoulder arthroscopies, rotator cuff repairs, decompressions and kyphoplaties as well as cervical and lumbar fusions. He evaluated Petitioner on August 29, 2014. During the evaluation Petitioner reported that she was cleaning plastic floor mats that were rolled up and put into a pot scrubber machine. From there, the mats would be taken out and placed in an area to dry indoors. She also described lifting heavy pans for cooking. Her job description indicated a 50 pound lifting necessity and the ability to bend, stoop, reach and climb ladders, stairs and ramps. On November 2, 2011, Petitioner said she was rolling mats up to put them into the washer when she felt a pop in her right arm and pain shooting up her neck. When asked, she described a specific trauma and denied any wear and tear event. She reported she notified Ms. Hendricks, her boss, who is no longer in the district. She kept working and tried to take it easy at work. She thought she would be better after the Christmas break, which was two months later. She cannot recall if she told anyone specifically about her complaints of numbness and tingling. She stated she developed trouble with gripping. Her husband reported that she had dropped many glasses in the house. After Christmas, she made an appointment with Dr. Dustman's office and was seen on January 26, 2012 for her elbow condition. He reviewed Petitioner's treating records, the MRI films and Dr. Dustman's records. While Dr. Dustman opined that she may have a brachial plexopathy, he, notably, made no mention of a traumatic event. He mentioned that she carried heavy pans but made no mention of a "discrete" accident. Dr. Pegg who saw Petitioner one month later on February 24, 2012 also did not note that she had any history of trauma. By his notes, Petitioner stated she did a lot of dishwashing and lifting, but she did not recall any type of pull or injury. Dr. Hennessy noted that this was in direct contraindication of Petitioner's recollection of events and the fact that she told all of the doctors she had a "discrete" event on November 2, 2011. Dr. Pegg also repeated that while a brachial plexopathy was possible, there was no associated history of trauma and nothing unusual in her examination to explain a cause of brachial plexopathy. He thought she might have a rare case of idiopathic brachial plexitis or even a residual complication of the axillary infection she had had in prior years. Several times in his report, he stated specifically there was no associated history of trauma with regard to her symptoms. He reviewed both the report and the actual MRI. His reading pretty much agreed with the radiologist's reading and Dr. Wingate's diagnosis. In his opinion there was no central stenosis at C4/5 but he did find some right foraminal stenosis at C4/5. At C5/6 there was a herniation and significant central stenosis. The MRI coupled with the clinical picture and the fact that she saw Dr. Dustman who immediately recognized a C6 radiculopathy told him that it

was fairly profound and new condition. Dr. Hennessy stated that this was confirmed by Dr. Pegg's finding and Petitioner's EMG. On examination she has some slight degree of flexion. The extension was limited to 20 degrees and rotation to the left and right was approximately 70 degrees, which is normal. It was essentially a normal exam except for some very slight decrease in her cervical motion. She was using anywhere from 5-15 milligrams of Norco a day. She reported she would occasionally have radicular symptoms to the right deltoid stopping at the mid upper arm but nothing ever went past the elbow or to her hand or fingers. She denied numbness and tingling. She reported some decrease in flexion, extension, but felt her side-to-side rotation was okay. She said that for the most part her life was back to normal. Dr. Hennessy opined that the events she described in November of 2011 did not cause or contribute to her cervical spine condition. To support that opinion, one has to understand the type of disc herniation she had. She had a disc herniation that caused spinal cord edema, which is fairly profound. She saw Dr. Dustman 2-1/2 to 3 month after the alleged discrete event and Dr. Pegg 3-1/2 to 4 months after the alleged event. Additionally, during the time between the alleged November 2, 2011 accident and when she sought treatment, she was working a relatively heavy job. A disc herniation causing spinal cord edema is a fairly acute event. This is the type of injury where you would seek care right away. So in his opinion the C5-6 disc herniation started in January of 2012 and not on November 2, 2011. She did not report any specific injuries in January of 2012 to him or Drs. Dustman or Pegg. In Dr. Pegg's case, she specifically denied any traumatic injuries one month later. The contemporaneous medical records did not support the history that Dr. Wingate based his causation opinions upon. He asked Petitioner if this was a chronic wear-and-tear issue or discrete event and she answered it was a discrete event that occurred on November 2, 2011. It is possible that doing dishwashing could cause a disc herniation, but so could brushing one's teeth. It is a movement of the neck which we do every day whether we are at home, work, shopping or driving a car. He testified that Petitioner is back to work full-duty and while she has some minor aches and pains overall, her life is essentially back to normal. A radiographic image would be needed to say she had reached maximum medical improvement. He agreed that there is a 30% possibility that the adjacent disc levels with have disc disease over the next ten years. He believes that Petitioner has a very good prognosis. On cross-examination, Dr. Hennessy testified that he is sayings Petitioner had no accident because the records he reviewed did not reflect a November 2, 2011 accident or at least an accident that caused a right C6 radiculopathy which would be from an acute disc herniation. He agrees that he was not given a form from Dr. Dustman that states the problem first began on November 2, 2011 at work. It appears she will likely require some type of medication. Petitioner seems to have some mild symptomatology which she dealt with and she is continuing her normal life. There is always a possibility, which he would quantify as 30% over 10 years, that she will have a transitional zone problem. He agreed that the possibility of lifting up to 50 pounds, reaching overhead repetitively over time could contribute to a disk herniation at C5-6 but that's not what was claimed here by Petitioner. The same would hold for loading and unloading cafeteria trays into a dishwasher but he does not think this was the case here.

In this particular case the records show that Petitioner not only has severe stenosis but cord edema. Dr. Hennessy stated that this is a pretty profound finding and when you have this finding you are experiencing immediate pain and are seeking care right away. In this case, Petitioner did not seek care until January. This is not the type of situation where you say I'll try a little Tiger Balm and maybe some Advil for two months while continuing to work a heavy job before you seek treatment. When you get a disc herniation that's so large and is causing that much stenosis and cord edema you stop because your symptoms are coming on rapidly and you seek urgent care. On redirect examination, Dr. Hennessy testified that Dr. Dustman's form does not change his causation opinion for two reasons. One, if it was such a discrete event as she alleged, Dr. Dustman certainly did not mention it in his medical narrative. More specifically, one month later Dr. Pegg by his medical narrative sounds like he asked several time and several times she specifically denied any traumatic event or "discrete" event.

The Commission finds that Petitioner failed to prove she sustained an accidental injury on November 2, 2011 and that the alleged November 2, 2011 accident is causally connected to her present condition of ill-being. The Commission notes a number of discrepancies within Petitioner's testimony and in relationship to the medical histories. First, the Commission notes that there are variances in the mechanism of injury reported on both direct and cross examination. Namely, on direct examination Petitioner testified that she was rolling up the rubber floor mats at the time of the injury but on cross-examination she states someone else had rolled up the mats. On direct examination, Petitioner stated she reported the injury to Karen Hendricks, her manager, but on cross examination when she was told that there was no employee by the name of Karen Hendricks she agreed that it was Karen Collins. Based on RX9 and Marc Dietz's testimony, Karen Collins resigned from employer's employment in June of 2011, which would place her resignation some five months prior to the alleged November 2, 2011 date of accident. Stated simply Petitioner could not have notified a person of a work accident when said person was not working there at the time. Further, Petitioner testified that she experienced a sharp pain that radiated all the way up her neck, but her cross-examination testimony and her contemporaneous medical reports do not indicate there was any radiation up to or pain in her neck. In fact, Dr. Dustman's records showed that on examination that there was no pain in the neck. While Delores Anson testified that she received a verbal report of injury from the Petitioner on November 9, 2011 and a Form 45 report was completed by Nancy Nales, the claims adjuster, both Ms. Anson and the Form 45 report indicate that Petitioner was loading/unloading dishes and/or using the dish machine at the time of the alleged accident and there was no mention made of loading mats into the pot scrubber. Nor was there mention made of an injury to her right elbow or neck. As such it appears that a different mechanism of injury was given and a different body part was identified by the Petitioner shortly after the alleged date of accident than there was at the time Petitioner testified at arbitration. Both Marc Dietz and Laura Kletz, Petitioner's managers, testified that they were unaware of Petitioner claiming an injury until a few years after the fact and both indicated that while they saw

her on a daily basis, they did not notice her having problems with her arm, neck or otherwise being unable to perform her job duties. While not a significant detail, Marc Dietz also testified that the mats in question weigh 16 pounds a piece and not the 50 pounds a piece as the Petitioner claimed. Laura Kletz testified that she saw Petitioner wearing wrist and elbow braces even prior to the alleged November 2, 2011 date of accident while Petitioner claimed on rebuttal she purchased the same after the accident. Petitioner completed two Form 45's. In the first one dated November 9, 2011, Petitioner stated that she was loading/unloading the dish machine when she injured her right elbow. There was no mention of lifting/loading a mat or injuring her neck. The second Form 45 is dated some 2 months later, January 11, 2012, and it addresses ongoing issues of pain due to repetitive motion while loading and unloading. Again, there is no mention of lifting/loading a mat or injuring her neck. The Commission further notes that with the exception of the Thanksgiving/Christmas breaks, the Petitioner continued to work her normal heavy job after the alleged November 2, 2011 work accident and prior to her seeking treatment some two months later. During her first medical treatment with Dr. Dustman, Petitioner does indicate that she first noticed pain on November 2, 2011 while at work. However, Petitioner provided no specific trauma history to Dr. Dustman. At most, Dr. Dustman notes that Petitioner carries heavy pans and he notes there is not really much pain in the neck. A month later, Petitioner treats with Dr. Pegg where she reported her pain came on slowly and she denies any history of any trauma. It is not until four months later that Petitioner provides a specific history of lifting mats to Dr. Wingate. At that time, she indicates that she was throwing the mats out the back door to be cleaned and not into the pot scrubber. It appears that Dr. Wingate in his deposition attempts to explain away the earlier lack of histories given to the two prior doctors by indicating he dug deeper into inquiring how the accident happened than possibly the other doctors did. There is no basis in the record for which to support this statement. Furthermore, Dr. Wingate appears to interject his own experience of having worked in a kitchen and the fact that these rubber mats stick to the floor and weigh more when they are wet which all goes over and beyond what the mechanism of injury is that Petitioner testified to. Least the Commission not forget, in addition to Dr. Wingate saying that there is no way to know what caused the herniation and agreeing that it could have a non-occupational cause, it was Dr. Wingate who said that the patient's history is probably the single most ingredient in a medical decision making process such as this. Having said that, the Commission has compared/contrasted the histories Petitioner gave to her doctors to that given at arbitration and note the differences that arise therefrom. Of the two doctors, the Commission finds that Dr. Hennessy's testimony is most compelling. Namely, that by virtue of the extent of the injury itself, he testified that Petitioner would not have been able to work a heavy job and been able to wait some two months prior to treating for this type of injury. He states that it is more realistic given the turn of events that the injury took place in January of 2012 and not two months earlier with the additional understanding that there was no specific injury reported in January. Given all of the above, the Commission reverses the Arbitrator and finds Petitioner failed to prove she

16IWCC0041

sustained an accidental injury on November 2, 2011 and that the alleged November 2, 2011 accident is causally connected to her present condition of ill-being.

IT IS THEREFORE OREDERED BY THE COMMISSION that since Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment on November 2, 2011 and she further failed to prove a causal relationship exists between the alleged November 2, 2011 work accident and her present condition of ill-being, her claim for compensation 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: JAN 20 2016

MB/jm

O: 12/10/15

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Mario Basurto

David L. Gore

Stephen Mathis

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria Salazar,

Petitioner,

vs. NO: 13 WC 22337

City Colleges of Chicago,

16IWCC0042

Respondent.

DECISION AND OPINION ON REVIEW

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

The Petitioner testified that she slipped and fell from the third stair of a stairwell in Respondent's facility and slid down fifteen steps on her buttocks to the bottom of the stairs. Petitioner's Exhibit 5(a) of the record includes a photograph of the purported stairwell that Petitioner fell down. The photograph shows that there is a landing in the middle of the stairwell. Petitioner never mentioned the landing during her testimony or in her description of the accident in the Worker's Compensation Initial Medical Report that the Petitioner wrote herself. Petitioner's version of her accident is incredulous given that there is a landing in the stairwell: If the Petitioner slid down fifteen stairs on her buttocks then her momentum would have changed once she hit the landing section of the stairwell, and she would not have continued to keep sliding down the stairwell on her buttocks. Due to the Petitioner's lack of credibility on this issue, the Commission therefore agrees with the Arbitrator's denial of benefits to the Petitioner.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 19, 2014 is hereby affirmed and adopted.

16IWCC0042

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

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

DATED: JAN 2 0 2016

TJT/ gaf
O: 11/23/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SALAZAR, MARIA
Employee/Petitioner

Case# **13WC022337**

CITY COLLEGES OF CHICAGO
Employer/Respondent

16IWCC0042

On 11/19/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

3098 MICHAEL L NICHOLSON
7111 W HIGGINS AVE
SUITE 2165
CHICAGO, IL 60656

NYHAN BAMBRICK KINZIE & LOWRY PC
ADAM J COX
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

MARIA SALAZAR
Employee/Petitioner

Case #13 WC 22337

v.

16IWCC0042

CITY COLLEGES OF CHICAGO
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on August 24 and October 29, 2014. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☒ What were the petitioner's earnings?

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

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

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

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

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

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

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On May 6, 2013, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- Timely notice of this accident was given to the respondent.
- At the time of injury, the petitioner was 57 years of age, single with no children under 18.

ORDER:

- The petitioner's request for benefits is denied and the claim is dismissed.

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

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

Robert E. Williams

Signature of Arbitrator

November 19, 2014

Date

NOV 19 2014

FINDINGS OF FACTS:

On May 6, 2013, the petitioner received emergency care at Advocate Trinity Hospital for left foot and ankle pain. X-rays revealed a non-displaced fracture through the base of the distal phalanx of her left first toe and the posterior distal aspect of the fibula. She was splinted, given a mold cast and crutches, prescribed medications and discharged. The petitioner saw Dr. Srivastava on May 13th for tailbone pain. A CT scan of her sacrum and coccyx on May 15th revealed a sclerotic area in the last sacral segment. The petitioner reported low back and left knee pain to Dr. Srivastava on July 10th. The petitioner was restricted from work from May 6, 2013, through November 20, 2013, and thereafter, returned to her regular job duties. Dr. Srivastava opined on October 29, 2013, that a lumbar CT scan was negative for fractures but revealed multilevel degenerative changes. On October 2, 2014, the petitioner reported to the University of Illinois that she fell on March 3, 2014, and sprained her left toe and ankle. Also, she reported that her left toe fracture on May 6, 2013, had healed but that her back pain persisted.

FINDING REGARDING WHETHER THERE WAS AN EMPLOYER/EMPLOYEE RELATIONSHIP BETWEEN THE PARTIES:

An employer/employee relationship existed between the petitioner and the respondent on May 6, 2013. The petitioner's testimony that she worked part-time for the respondent was not rebutted.

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

Based upon the testimony and the evidence submitted, the petitioner failed to prove that she sustained an accident on May 6, 2013, arising out of and in the course of her employment with the respondent. The petitioner testified that she was carrying two

sheets of paper in a manila folder in her left hand while descending stairs from the second to the first floor when she slipped and fell about fifteen steps on her buttocks to the bottom of the stairs. She did not know why she fell and did not see any wetness on the stairs. The petitioner testified that after falling, she noticed her hand and the middle side of her left leg was wet.

Although it is felt that there is some intrinsic risk with traversing stairs, the petitioner failed to establish that she was subject to an increased risk due to her work duties, a defect in the stairwell or a special hazard. The petitioner's request for benefits is denied and the claim is dismissed.

FINDING REGARDING THE AMOUNT OF WAGES:

The petitioner's testimony that she averaged 25 hours per week with the respondent was not rebutted; however, there was no evidence of her hourly wage rate.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Franciszek Filipkowski,

Petitioner,

vs. NO: 11 WC 32009

16IWCC0043

True Vue,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 15, 2014, is hereby affirmed and adopted.

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

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

16IWCC0043

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

DATED: JAN 2 0 2016
TJT:yl
o: 1/12/16
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FILIPKOWSKI, FRANCISZEK
Employee/Petitioner

Case# **11WC032009**

TRUE VUE
Employer/Respondent

16IWCC0043

On 9/15/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

MARIYA ZAYATS
6300 N SHERIDAN RD
APT 109
CHICAGO, IL 60660

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

16IWCC0043

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

FRANCISZEK FILIPKOWSKI
Employee/Petitioner

v.

TRU VUE
Employer/Respondent

Case # 11 WC 32009

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **August 12, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 21, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**9,066.40**; the average weekly wage was $**456.27**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**19,805.33** for other benefits, for a total credit of $**19,805.33**.

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

ORDER

No benefits awarded.

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

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

Signature of Arbitrator

09-15-14
Date

SEP 15 2014

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

16IWCC0043

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FRANCISZEK FILIPKOWSKI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 11 WC 32009
	)	
TRU VUE,	)	
	)	
Respondent.	)	

ARBITRATOR'S DECISION

STATEMENT OF FACTS

The petitioner testified that he is currently 62 years old and had completed grammar school. He has worked as a laborer and a welder and other jobs. The petitioner testified that he was with the respondent for eight years until he had been laid off. He denied that there was much overtime and said that his position was that of an employee, which included sometimes packing glass with the weight dependent on the size of the glass. He testified that pieces could be quite small, but also could be 48 inches by 48 inches, but he did not know their weight. The petitioner testified that he was pushing glass into a boat of glass when he felt a strong pain in his back. He testified that this took place about 10 minutes before the end of the shift when he had pushed an empty boat one meter forward and felt a strong pain on his back that was more to the left. Petitioner used a translator during the trial but responded in English to that question. He admitted on cross examination that he spoke English at work and was part of the Union negotiating team and the negotiations took place in English.

The petitioner testified that no one was around to report the incident and he thought it would get better the next day. He did testify that it really hurt and it was almost unbearable at the time, but admitted that he left work without advising anyone on the date of the alleged event. The petitioner went to the doctor the following day and saw his family doctor, Dr. Stec. He admits having treated with Dr. Stec before and testified that the doctor was a general practitioner. He testified that he was examined and was given pain medications, an off work slip, and x-rays were ordered.

He testified that his daughter took the off work slip to his employer on that Monday and he has never returned to work since that time. He also testified that he had no improvement in his condition since that day. He testified that Dr. Stec said the only solution was surgery and he went to physical therapy for three to four months but that it was not helpful. The petitioner denied that he had any prior back problems. He said that Dr. Stec sent him to the hospital because his veins were clogged and they had to be opened up, but he denied he underwent surgery for the heart, indicating instead that they put a catheter up from his inside thigh up into his heart. He testified that the doctors recommended a pacemaker, but that he refused that surgery. He also testified that Dr. Stec recommended back surgery on three different times, but he would not agree to the surgery because he was afraid due to his heart problems. He later testified that he was afraid that he would wind up in a wheelchair and offered that he did not think that physical therapy would help, as it hadn't helped previously.

When asked about his job duties, the petitioner simply testified that he would go where his supervisor sent him. He denied again any prior injuries and admitted that he had a car accident, but denied any pain in his back. He also testified that he did not miss any work as a result of any prior injuries. He testified that he currently takes pain medication when he is

hurting and that he can only stand or walk for a half an hour at a time, and that his left leg was totally numb. He testified that he felt he couldn't work because he couldn't sustain an eight-hour work day.

On cross-examination the petitioner admitted that he had worked for TruVue for eight years and that he had been laid off in March of 2008 and re-hired in March of 2009. He further admitted that he had gone through many safety programs and was advised that he was to immediately report all injuries, no matter how minor. He admitted that he knew Mr. Robert Kozak and that if a work injury was alleged, an employee would speak to Mr. Kozak about the work injury. He admitted that he did not speak to Mr. Kozak about the back injury that he is now alleging. He further testified that despite his testimony on direct that he was in almost unbearable pain, he admitted that he did not report that to his supervisor because he didn't see him around. He denied that he did not tell Dr. Stec about the incident on the 21st of August.

The petitioner did admit that he had other problems including cervical problems, wheezing, and abnormal heart beat and some knee problems, but could not remember any abdominal pain, emphysema or originally any left elbow or shoulder issues. He later testified on cross-examination that he felt that the left elbow and shoulder issues were caused because of the low back problem. He felt that the low back problem was affecting his entire left side. The petitioner denied any treatment to his low back in 2005 at Union Health Services or that he saw Dr. Stec in 2007 as a result of the automobile accident of December of 2006 for treatment to his low back.

Further, the petitioner admitted that he did not see a spine specialist and when asked if he was referred to one, he simply indicated that he went and had an MRI at the hospital. He admitted that he refused injections, despite having pain so severe that he didn't believe he could

work. The petitioner also admitted that he had been approved for Social Security Disability at the beginning of 2011. The medical records admitted of Dr. Stec note that the last visit to Dr. Stec was on December 30, 2010, just before the petitioner was approved for disability. No medical records were submitted to support any care once the petitioner had been approved for Social Security Disability. On re-direct the petitioner testified that he had never been sent back to work by Dr. Stec and that he requires regular medical care. He indicated he would do surgery only if it was the last straw.

Respondent submitted the testimony of Robert Kozak. Mr. Kozak is the Safety Manager at TruVue and his responsibilities include safety and handling workers' compensation injuries. He testified regarding the petitioner's job duties and requirements and identified the job descriptions and requirements which were admitted into evidence. Mr. Kozak testified that a boxer stacker would take pieces of glass called lites coming off the line and place them into a box that was on a stacking table. The stacking table was adjustable so that the height was comfortable for each boxer or stacker as they set it themselves. This prevented the need for the employees to bend to move the lite from the conveyor belt to the box. Mr. Kozak testified that the weights would vary from as little as a pound to up to the maximum of 12 pounds.

Mr. Kozak also provided testimony that workers were all advised in various orientations, as well as monthly safety meetings, of the need to immediately report any incidents, regardless of how minor. He testified that the petitioner would have had a re-orientation when he was called back from the layoff in March of 2008 as if he was a new employee. Part of that training included reporting of injuries, regardless of how minor. Additionally, the supervisor would hold a daily safety briefing before each shift, which would go over any incidents. He testified that Mr. Filipkowski never advised him of any work injury and that he first learned that Mr.

Filipkowski was claiming a work injury when he was notified from a medical provider that they were requesting authorization for a work-related injury some time near the end of January of 2010. At that time he investigated the claim and reported it to his insurance carrier, as his requirements through his parent company were that those be reported within 24 hours. Mr. Kozak testified that the incident claimed by Mr. Filipkowski was not called to the insurance company in August of 2009 because Mr. Filipkowski had not claimed his back problems were due to a work injury.

Mr. Kozak also testified regarding the attendance of the petitioner and identified the punch list which showed which days and the times worked by the petitioner. He further identified the wage history of the petitioner from the time of layoff through the time of payment of short-term disability.

Mr. Kozak testified on cross-examination that to date there were approximately 11 first aid incidents where someone would have needed the first aid facility to bandage a finger cut or something to that degree. He testified that a safety program can help prevent the degree of the accidents. He further testified that a supervisor would have to be in the building any time other employees would be there. He testified that the building was approximately two-and-a-half acres but was one big open room. He further testified that the employees were all given an emergency page number and also instructed on how to use the pager system. He noted that the training had taken place in English and pictorials and that he would always communicate with the petitioner in English. He testified that a forklift would be used to move any racks and that if an individual boxer or stacker would need to move a pallet, then they would have to use a pallet jack to do so. An employee would not be moving these pallets manually and he noted that a forklift operator

was assigned to the etch department and that the employee would be able to page a forklift driver. Mr. Kozak testified that he had heard the petitioner using the system on occasion.

The respondent also submitted the testimony of Alonzo Fairchild. Mr. Fairchild testified that he is a supervisor at TruVue and has been with the company for 42 years. He testified that he knew Frank Filipkowski and had been his supervisor since 2006. He testified that the petitioner was a boxer and stacker and described that the petitioner would move glass along an air lift conveyor belt and would snap the glass where scored and place it into a box. He testified that the boxer and stacker would never have to move a box and they would not move any pallets. He testified that pallets were moved by the forklift operator and that the boxer and stacker would call for a forklift operator when the pallet was full. He testified that if a forklift driver did not respond, the boxer stacker could call the supervisor to have the full pallet removed. He testified that he is not aware of any employees having any need to move a pallet.

Mr. Fairchild testified that the petitioner was aware that he was going to be laid off prior to August 21, 2009 when he alleged his injury. He denied that Mr. Filipkowski ever approached him about any work injury that he had or any low back complaints he had that he related to his job.

On rebuttal the petitioner testified that he rarely used the pager, but admitted that he knew how and would use it to call the jeep driver to get the material. He testified that he didn't see anyone around at the time he alleged his injury and thought he would go home and it would pass. He testified that if he knew how bad it was, he would have called his supervisor. Upon questioning from the arbitrator, the petitioner testified that he wasn't sure if he was going to be laid off. He testified he did not receive a written notice prior to his alleged injury and wasn't sure of when his last day would have been under the layoff.

The respondent also submitted the evidence deposition testimony of Dr. Jerry Bauer. Dr. Bauer is a board certified neurosurgeon that specializes in spinal treatment. 100% of Dr. Bauer's cases are spinal cases. He also testified that he was honored by Chicago Magazine as one of the top doctors in Chicago since 2002 for neurosurgery (RE 8, pg 5-6). Dr. Bauer testified that he reviewed records from various sources, as well as the job descriptions for the UV line stacker and boxer responsibilities. He also reviewed radiographic films in conjunction with the case (RE 8, pg 8). He testified that the medical records showed that the petitioner had a history of degenerative changes in his lumbar spine without any evidence of an acute injury occurring on August 21, 2009 based upon his imaging studies. He noted that Dr. Stec's records failed to report any acute injury to the lumbar spine and it was not until April 23, 2010 that a physical therapy note indicated that the petitioner's back pain began on August 1, 2009 after pushing a big boat. Dr. Bauer noted the two prior significant auto accidents on December 4, 2003 and December 28, 2006 which allowed identification of the degenerative changes in his spine. He further noted that the petitioner was a tobacco smoker, which leads to premature degeneration of discs, both in the cervical and lumbar spine (RE 8, pg 9).

Dr. Bauer testified that the MRI that was taken on September 25, 2009 showed degenerative changes and bilateral pars defects which are fractures generally that occur in teenage years, but are not the result of any adult type injury and not related to an acute injury of the spine. He felt that Mr. Filipkowski had degenerative changes, including spondylolisthesis related to the pars defect with no evidence of an acute injury as a result of an episode on August 21, 2009 (RE 8, pg 10).

Dr. Bauer also testified that he reviewed the boxer and stacker job descriptions with photographs depicting how the petitioner's job was performed. He testified that it did not seem

that any job would require any significant lifting or bending to stress one's spine. He felt that Mr. Filipkowski had degenerative changes in his lumbar spine with degenerative disc disease at L4-5 and facet degenerative changes, but all the changes were degenerative in nature that were also identified on the x-rays taken on September 1, 2009. He further noted that x-rays of the cervical spine from December of 2006 showed instability and degenerative changes which were also demonstrated on the CT scan of December 27, 2006, but no acute injury to a cervical spine (RE 8, pg 12). Dr. Bauer felt that the records from 2004, 2005 and 2006 with respect to his spine showed the petitioner had degenerative changes which he felt would continue to go forward and probably get worse over time. He felt that those degenerative changes were consistent with the MRI from September of 2009, but that the condition was not in any way caused or aggravated by the work activity that the petitioner performed (RE 8, pg 13). Dr. Bauer testified that there was no evidence of any nerve root entrapment ever identified on any of the imaging studies, so he was unable to explain the physical finding of a positive straight leg raise which is generally related to nerve root entrapment in a herniated disc. He further noted that the examination right at the time of the event showed decreased muscle bulk in the left thigh and leg and moderate weakness of the leg, but that no cause was explained. He noted that Dr. Stec made a diagnosis of cervicalgia of unknown etiology and didn't specify the cause. He agreed with Dr. Stec that there was no explanation for the sciatic pain that was being reported, which is a subjective complaint (RE 8, pg 14-15). Dr. Bauer testified that it would be a little bit peculiar for a neurologist not to insist on a patient seeing a spine specialist when the pain continues over a period of a couple years (RE 8, pg 16) or that he would not prescribe injections (RE 8, pg 17). Dr. Bauer further testified that it is his opinion, regardless of the treatment that was rendered, that the back condition had nothing to do with the petitioner's work or that he needed any additional care as a

result of any event of August 21, 2009 or any repetitive trauma arising out of the work (RE 8, pg 19). He further did not feel that there was any need to consider any work restrictions, that the petitioner was as capable of working after August 21st as he was before August 21st (RE 8, pg 20).

On cross-examination the doctor testified that his review of the job descriptions would place it in the light to medium level work and it would not be considered heavy work. We believe that the heaviest glass would not be more than 10 to 20 pounds maximum (RE 8, pg 21). Dr. Bauer testified that the two most important factors that cause a degenerative spine are genetics and smoking (RE 8, pg 23-25). Further on cross, Dr. Bauer testified that the largest number of patients that he sees with degenerative spondylitic spondylolisthesis are female, which is more common than in men. Dr. Bauer testified that the degenerative changes in the lumbar spine related to the degenerative disc disease and the bilateral pars defects at L5 could explain this chronic back pain (RE 8, pg 22). Prior x-rays showing degenerative changes in the thoracic spine would be consistent with Mr. Filipkowski's diffuse degenerative changes in the cervical, thoracic and lumbar areas (RE 8, pg 30). The doctor further discussed the reference he saw in April of 2010. The petitioner was moving a big boat on August 1st when he first felt back pain. He testified that that was one issue, but also that the imaging studies failed to show any acute injury occurring on August 21, 2009 (RE 8, pg 33-34). Dr. Bauer felt that Dr. Stec's diagnoses were more Mr. Filipkowski's subjective complaints, such as low back pain and neck pain of unknown etiology. He also noted the conclusion of sciatica of unknown etiology by Dr. Stec, but did not necessarily agree with that diagnosis. Dr. Bauer further described spondylolisthesis as a stress fracture through the pars which almost always occurs in teenage years (RE 8, pg 38).

Dr. Bauer felt that the treating doctor, Dr. Stec, had improperly diagnosed degenerative spondylolisthesis which was not evident from Mr. Filipkowski. Instead he had spondylitic spondylolisthesis and there was no evidence for a disc herniation. There was facet joint degenerative osteoarthritis, but not severe, and he wasn't sure to what Dr. Stec was referring when he diagnosed mechanical abnormalities (RE 8, pg. 41). It was not possible that the slip at the L5 area was related to anything that happened on August 21st. Dr. Bauer testified that there was less than a grade 1 slip, so it was very minimal, and with the underlying pars fractures which could not have happened on August 21st, people can and do have slips. When questioned about whether or not heavy duty work would have an impact on the petitioner's condition, Dr. Bauer testified that work may have an effect, but to what extent he could not determine (RE 8, pg 45). The evidence shows that the petitioner only had to lift up to 12 pounds in this case and would not be considered a heavy job.

Dr. Bauer testified that there could be several levels of treatment other than surgery, including physical therapy, which was tried and failed, possible epidural injections and possible facet injections and then possibly surgery. Because there were too many steps not taken in this case, it is impossible to determine if there should be a recommendation for surgery (RE 8, pg 49). Dr. Bauer testified that the injections were basically safe and some are therapeutic and some are diagnostic (RE 8, pg 51).

The petitioner submitted the medical records of Dr. Augustyn Stec. The submitted medical records began on August 22, 2009 and indicated that the petitioner gave a history of doing heavy lifting and other activities on the job involving strains of the cervical and lumbar spine. He reported noting an increase in his low back pain after work and also recently nagging and aching in the cervical spine, radiating to both of his shoulders and his low back pain

radiating to both extremities, especially on the left. It indicated that for the last week the patient could barely work and by today he could barely walk because of low back pain. Already at that time the examination showed that the muscle bulk on the left thigh and leg had decreased. He had moderate weakness in his left lower extremity. The diagnosis was cervicalgia with etiology to be determined and low back pain syndrome with sciatica, etiology to be determined. There was no mention in the record of any specific work event and in fact, the medical records are inconsistent with a reported event of the day before (PE 1).

When the petitioner next saw Dr. Stec on September 8, 2009, Dr. Stec noted specifically "no history of recent low back injury." He further indicated that the low back pain was getting worse gradually and became very severe, interfering with ambulation and living daily activities. Dr. Stec noted multiple problems that the petitioner had and noted that the lumbar spine x-rays showed sacralization of the L5 vertebrae and degenerative changes of the discs and bones and an MRI was requested. An addendum on September 18th to that note further noted left shoulder and elbow pain and both left and right knee problems that compromised his walking and functional capacity. When he saw the patient on September 22, 2009, Dr. Stec noted diffuse arthritis and multiple joint pain. He noted that there was "not herniated acute disc which could be treated surgically" with respect to his low back. He noted that there was a complex etiology for the low back pain, including mechanical low back pain of multiple factors, degenerative disc disease and lumbar spine spondylosis with foraminal narrowing. The petitioner continued to follow up for multiple problems with Dr. Stec, including his low back, and on November 20, 2009, Dr. Stec noted that the petitioner could be evaluated by a low back surgeon if he would consider low back surgery, but the patient would not consider such an option.

When Dr. Stec saw the petitioner on December 10, 2009, the petitioner reported an increase in his low back pain without any apparent precipitating factor and was reporting unremitting low back pain. Now Dr. Stec was diagnosing spondylolisthesis, disc herniation, facet joint degenerative osteoarthritis and other mechanical abnormalities of the spine. He felt the petitioner was unable to do any labor type job and he was likely to go on a disability pension. When he was seen on December 28, 2009, the petitioner reported increased pain when turning at home. Dr. Stec felt the petitioner needed low back surgery for the lumbar spondylolisthesis and disc problems, but the petitioner was against surgery. When seen on January 12, 2010, the petitioner reported to Dr. Stec that he was against any surgical treatment or epidural steroid injections despite reporting pain most of the time. Dr. Stec felt the petitioner was incapacitated to work and the prognosis was poor. He specifically noted that the petitioner wouldn't even go for treatment at the pain clinic and so his chances for improvement were nil. The petitioner reported being afraid of surgery, epidural steroid injections or other pain clinic procedures for pain treatment.

The petitioner continued to treat with Dr. Stec throughout 2010. On August 26, 2010 the assessment from Dr. Stec was that the petitioner continued to have frequent low back exacerbations though he was not working. It noted that the petitioner was on a disability pension at the time and was still afraid of low back surgery. When he saw Dr. Stec on October 12th, Dr. Stec noted the petitioner continued to smoke and that was not good for the intervertebral discs. He was advised to quit smoking and prescribed Chantix. Dr. Stec saw the patient on November 12th and the assessment was chronic low back pain due to mechanical abnormalities, including slippage of one vertebrae in relation to another, causing spine joint stretching and nerve root stretching and pinching of nerve roots in the spine in the areas of the intervertebral foramina. He

noted that surgery would be extensive to stabilize the spine but could not guarantee freedom from pain and the patient has decided to not undergo surgery.

The records reflect that Dr. Stec last saw the patient on December 30, 2010 with increased pain with the cold weather. At this time the doctor indicated that the petitioner had chronic low back syndrome caused by his injury on the job, but does not indicate what that injury was. It was the first mention in any of Dr. Stec's medical records that the low back pain was related to a job injury.

The petitioner also submitted the records of St. Mary of Nazareth Hospital with the x-ray and MRI reports. The MRI was read to reveal a sacralization of L5 and bilateral pars defects at the L5 level with mild retrolisthesis of L4 on L5 with disc bulging and spurring and bilateral facet degenerative changes (PE 2). The petitioner also submitted the physical therapy records at Novacare (PE 3), the St. John Heart Clinic (PE 4) and Resurrection Healthcare (PE 5).

The respondent submitted the physical requirements and work instructions for the boxer stacker position and cut down boxer stacker positions, noting the physical requirements of the job (RE 1-4). The attendance records of the petitioner were also submitted which showed the petitioner was re-called on March 9, 2009 and worked from three to five days a week through August 21, 2009. Many weeks the petitioner did not work a full 40 hours and some weeks he did not work at all.

The respondent further submitted the medical records of Accelerated Rehab. It noted that the petitioner had a motor vehicle accident one month prior to the initial evaluation of December 4, 2003. He reported hurting his back which had increased pain with sitting and the pain was on the left. The petitioner was seen four times and was still reporting pain at 8 out of 10 in his back and both legs, but the records indicate no further care after December 16, 2003 (RE 9).

Respondent further submitted the medical records of Northwestern Memorial Hospital which noted that petitioner was involved in a motor vehicle accident with heavy front end damage and he was unrestrained with an unknown loss of consciousness on December 26, 2006. CT scans of the head, chest, abdomen and pelvis were requested and he was admitted for observation. The CT scans were negative and the petitioner was discharged the following day (RE 11). The admitted, subpoenaed medical records of State Farm Insurance Company for the automobile accident of December 26, 2006 noted that the petitioner saw Dr. Stec seven times during 2007 for cervical and low back pain arising out of the December 26, 2006 accident (RE 12, pg. 103-109).

The medical records of Union Health Services submitted by the respondent show that the petitioner had treated for low back pain and osteoarthritis on August 18, 2005, April 11, 2006 and August 15, 2006 (RE 10). The submitted medical records of Resurrection Healthcare note that petitioner did undergo surgery for his heart, including a right and left catheterization on November 25, 2009 (RE 13).

Conclusions

With respect to Issue D - Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the arbitrator finds as follows:

The arbitrator finds persuasive the contemporaneous medical records from Dr. Stec that there was no work injury on August 21, 2009. Dr. Stec's note of August 22 refers to increasing pain over a week and failed to mention any specific event. Although the petitioner reported heavy lifting at work to Dr. Stec, the only evidence of what was required was that he had to lift up to 12 pounds. Dr. Bauer classified the petitioner's work as light to medium and no evidence

was submitted that Dr. Stec knew what job the petitioner performed. On September 9, Dr. Stec specifically indicates that there was "no history of recent low back injury."

Although the petitioner testified he was pushing a "boat" on August 21 and had unbearable pain, he did not report that to any one at work or to Dr. Stec. He admitted he had been trained to report any injury no matter how minor on numerous occasions. He claimed the injury was near the end of the day and the supervisor wasn't around and that is why he didn't report it. Evidence showed, however, the petitioner knew how to use the pager system and had been trained on it. His testimony that he rarely used it is not credible given his own admission he would use it to call the "jeep" to come get the material when his pallets were full. Given the petitioner's testimony that the pain was unbearable, it is not credible that he would ignore work rules regarding reporting of the injury and fail to report the injury to anyone including his own doctor. Mr. Kozak and Mr. Fairchild both agreed that the petitioner never said anything to them about his back condition being related to work.

The arbitrator further finds that the evidence shows the petitioner's work was light. The most he had to lift was 12 pounds. The unrebutted testimony is that a boxer stacker would have no reason to try to move a pallet. The petitioner admitted he would call a forklift operator on the pager system when the pallet had to be switched out because it was full. The arbitrator finds persuasive the unrebutted testimony of Mr. Fairchild that the boxer stackers would not be moving pallets. The lift tables were adjustable so little bending was required of the boxer stacker. The petitioner's description to Dr. Stec of heavy lifting at work over the prior week is not supported by the evidence of what the work required.

The arbitrator also notes the evidence supports a finding that the petitioner knew he was to be laid off prior to him seeing his doctor about a back problem. Although the petitioner

testified he wasn't sure if he knew it or not, the testimony of both Mr. Kozak and Mr. Fairchild was clear that the employees were aware that they were being laid off prior to the petitioner last working there.

The arbitrator finds persuasive the testimony of Dr. Bauer who had the opportunity to review the job descriptions and work instructions of the petitioner's job. Dr. Bauer is a Board Certified Neurosurgeon who specializes only in back treatment. Dr. Bauer noted the petitioner had a degenerative condition that was not aggravated or accelerated by work. There was no disk herniation nor compressive pathology to indicate an acute injury. The petitioner provided no causal opinion from any doctor that his degenerative condition was caused or aggravated by work. The petitioner's only medical evidence that work had anything to do with his back condition was the last office note of Dr. Stec more than a year after the alleged event that said the petitioner's back problem was related to his work injury. Dr. Stec did not say what that work injury was and this statement is inconsistent with Dr. Stec's earlier notes specifically stating that there was no history of recent back injury.

Based on all the evidence, the arbitrator finds that the petitioner failed to meet his burden to show any accident happened or work or that his condition was caused or aggravated by any work activity.

With respect to Issue F - Is Petitioner's current condition of ill-being causally related to the injury, the arbitrator finds the following:

The arbitrator herby incorporates his findings with respect to Issue D above. The arbitrator finds that the petitioner failed to meet his burden of proof to show that his current condition of ill-being and disability are causally connected to his employment. The contemporaneous medical records specifically deny any recent event. Dr. Stec diagnosed a

degenerative condition and when he reviewed the MRI admitted that there was no herniation found. He stated that the low back pain and sciatica was of unknown etiology. The petitioner had a number of other health problems including both knees, his left shoulder and elbow and cervical spine as well as medical problems such as cardiac issues and abdominal issues. Dr. Stec specifically diagnosed arthritis in multiple joints. He never provided a causation opinion that the petitioner's degenerative condition was caused or aggravated by his work or that Dr. Stec even knew what type of work the petitioner performed other than the petitioner stating he does a lot of heavy lifting. As noted previously, the evidence does not support that statement. The petitioner's belief that his back problems were related to work are suspect when considered with petitioner's belief also that his left elbow and shoulder problem were related to his low back condition.

Although the petitioner denied any prior back problems, the submitted medical evidence does not support that testimony. The records from Accelerated show the petitioner treated there for lumbar pain in 2003 following a car accident. The petitioner was still reporting pain at the level of 8 out of 10 when he stopped treating. The Union Health Services records show the petitioner had back complaints in August of 2005 and April and August of 2006 and was diagnosed with osteoarthritis. The medical records of Northwestern Hospital show the petitioner was treated following a car accident in December of 2006 and the vehicle was noted to have extensive front end damage. The petitioner's denial that that involved any low back issues was inconsistent with the treatment of Dr. Stec in 2007 found within the subpoena response from State Farm for the claim arising out of that 2006 car accident. The petitioner's testimony concerning his lack of prior back problems is not credible. The records show a consistent history of low back problems for 6 years prior to the alleged event at work which is consistent with a developing degenerative condition as Dr. Bauer noted.

The arbitrator again finds persuasive the medical opinions of Dr. Bauer. Dr. Bauer was the only medical professional that knew the petitioner's work requirements and had the opportunity to see in detail what was required of the petitioner with review of the work instructions provided as part of the Section 12 exam. Dr. Bauer agreed with Dr. Stec's initial diagnosis that there was no evidence of disc herniation. Dr. Bauer further explained the petitioner's degenerative condition was progressive and this is consistent with the petitioner's report that his condition continued to have flare ups and did not improve long after the petitioner stopped working as reflected in Dr. Stec's treatment notes.

The arbitrator further notes that the petitioner's refusal of basically all forms of medical care offered to him other than a short course of physical therapy is inconsistent with his testimony that his back pain is unbearable and prevents him from returning to his prior occupation. Although the petitioner is not required to undergo specific medical care, his refusal of such care is relevant to the extent of the symptoms actually experienced by the petitioner. In this case, the petitioner testified he was afraid of surgery but he also refused to be even seen by a spine specialist. He refused injections that both the treating doctor and examining doctor felt could provide relief and he even refused a referral to a pain specialist, all while reporting he is in severe pain and unable to work. The arbitrator further finds it significant that the petitioner was approved for Social Security disability in early 2011 and the submitted medical evidence shows the last appointment with Dr. Stec was just before that, in December of 2010. The petitioner offered no medical evidence of any care for the last almost four years.

Based on the evidence, the petitioner failed to show that his condition of ill-being was causally related to his work.

With respect to Issue J - Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services? – the arbitrator finds the following:

The arbitrator hereby incorporates his findings with respect to Issues C and F above as if more fully set out herein. The arbitrator notes that the petitioner's medical bills were paid by his group health insurance and the parties agree that there are no outstanding balances and no medical to be awarded.

With respect to Issue K - What temporary benefits are in dispute – the arbitrator finds as follows:

The arbitrator hereby incorporates his findings with respect to Issues C, F and J above as if more fully set out herein. The arbitrator notes the petitioner has failed to show an accident has occurred. The petitioner further failed to show his current condition of ill-being is causally connected to his work. As such, the arbitrator finds the petitioner is not entitled to any temporary benefits.

With respect to Issue L - What is the nature and extent of the injury – the arbitrator finds as follows:

The arbitrator hereby incorporates his findings with respect to Issues C, F, J and K above as if more fully set out herein. The arbitrator notes the petitioner has failed to show an accident has occurred. The petitioner further failed to show his current condition of ill-being is causally connected to his work. As such, the arbitrator finds the petitioner is not entitled to any permanent disability.

Arbitrator Kurt Carlson

09-15-14
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brian Hicks,

Petitioner,

vs.

NO: 14WC 06996

16IWCC0044

Heath's Incorporated,

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 27, 2015, is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court

DATED:
O010716 JAN 20 2016
DLG/mw
45

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

HICKS, BRIAN
Employee/Petitioner

Case# **14WC006996**

16IWCC0044

HEATH'S INCORPORATED
Employer/Respondent

On 4/27/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0668 LAW OFFICES OF PAUL E SELIN
100 E CHESTNUT ST
SUITE 200
CHAMPAIGN, IL 61820

0238 WOLFE & JACOBSON LTD
PETER W JACOBSON
25 E WASHINGTON ST SUITE 700
CHICAGO, IL 60602

FINDINGS

On the date of accident, February 8, 2013, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Petitioner's current condition of ill-being is not causally related to the accident.

In the year preceding the injury, Petitioner earned $n/a; the average weekly wage was $n/a.

On the date of accident, Petitioner was 30 years of age, married with 3 dependent child(ren).

Respondent has paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Based upon the Arbitrator's Conclusions of Law attached hereto, Petitioner's Petition for prospective medical treatment is denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator
ICArbDec19(b)

April 21, 2015
Date

APR 27 2015

At the direction of Respondent, Petitioner was examined by Dr. Kern Singh, an orthopedic surgeon, on November 25, 2013. In connection with his examination of Petitioner, Dr. Singh reviewed medical records provided to him by Respondent as well as the MRI scan of November 5, 2013. Dr. Singh recommended Petitioner have additional physical therapy, then transition to work conditioning; however, he opined that Petitioner was a "nonoperative patient." (Petitioner's Exhibit 3).

Subsequent to his examination by Dr. Singh, Petitioner received physical therapy at Decatur Memorial Hospital in January, 2014. In the physical therapist's record of January 28, 2014, it was noted that Petitioner exhibited what appeared to be self limiting activity because of his subjective complaints of pain (Respondent's Exhibit 3).

Petitioner was subsequently seen by Dr. Steven Sparenberg (whose medical records were not tendered into evidence) who referred him to Dr. Hyunchui Jung, who saw Petitioner on April 21, 2014. At that time, Petitioner continued to complain of low back and bilateral leg pain. Dr. Jung opined that Petitioner's pain was coming from the L5-S1 disc and he recommended Petitioner undergo epidural steroid injections at that level. Dr. Jung gave Petitioner epidural steroid injections at L5-S1 on July 3, and July 17, 2014, but they did not give Petitioner any relief from his symptoms (Petitioner's Exhibit 1).

At the direction of Respondent, Petitioner was examined by Dr. Alexander Ghanayem, an orthopedic surgeon, on May 8, 2014. In connection with his examination of Petitioner, Dr. Ghanayem reviewed medical records provided to him by Respondent as well as the MRI scans of March and November, 2013. Dr. Ghanayem's findings on clinical examination were benign and he noted that the post-operative MRI of November, 2013, did not reveal any evidence of ongoing/recurrent disc herniations or neurologic compression. He further noted that Petitioner had non-organic physical findings consistent with symptom magnification. He opined that Petitioner was at MMI, could return to work without restrictions and that no further medical treatment was indicated (Respondent's Exhibit 2).

On June 10, 2014, Petitioner had another MRI performed (ordered by Dr. Jesse Butler) which revealed degenerative disc disease in the lower lumbar spine at L3-L4 through the L5-S1 level. The radiologist also noted an improved appearance and/or resolution of the disc bulge/protrusion at L3-L4 and L4-L5 when compared to the MRI of March 12, 2013. The June 10, 2014, scan also revealed an annular tear of L4-L5 and a disc bulge at L5-S1 without central spinal or neural foraminal stenosis (Petitioner's Exhibit 1).

Dr. Jung subsequently referred Petitioner to Dr. Huan Wang, a neurosurgeon, who examined Petitioner on August 19, 2014. At that time, Petitioner complained of low back pain with radiation into both legs that extended to the bottom of the feet. Dr. Wang suggested various modes of treatment including a decompression and fusion from L4 to S1. Dr. Wang's record of that date did not indicate that he had reviewed any of the MRI scans (Petitioner's Exhibit 1).

Dr. Wang again saw Petitioner on October 2, 2014, and the decision was made to proceed with the L4 to S1 lumbar decompression and fusion. This surgery was tentatively scheduled for sometime in November but was not performed because of Respondent's refusal to authorize.

The Arbitrator concludes Petitioner is not entitled to prospective medical treatment, in particular, a decompression and fusion surgery.

In support of this conclusion the Arbitrator notes the following:

Both of Respondent's Section 12 examiner's, Dr. Singh and Dr. Ghanayem, opined that Petitioner did not require surgery.

Dr. Ghanayem's findings on clinical examination of Petitioner, which included nonorganic findings indicative of symptom magnification, and his review of the MRI scans support his opinion that Petitioner does not require further medical treatment.

The Arbitrator is not persuaded by the opinion of Dr. Wang. Dr. Wang's records did not contain any reference to the MRI scans. Even though Dr. Wang testified that he reviewed them, he did not have any independent recollection of having done so. Further, Dr. Wang's opinion that the MRI technology is limited because of the patient lying in a horizontal position when the MRI is performed is questionable.

The Arbitrator finds the opinion of Dr. Ghanayem to be more persuasive than that of Dr. Wang.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stephen Jones,

Petitioner,

vs. NO: 14WC 18567

State Of Illinois/Shawnee C.C., **16IWCC0045**

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent of permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 25, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury

DATED: JAN 2 0 2016
o172016
DLG/mw
45

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JONES, STEPHEN
Employee/Petitioner

Case# **14WC018567**

16IWCC0045

STATE OF ILLINOIS/SHAWNEE C C
Employer/Respondent

On 6/25/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0969 THOMAS C RICH PC
6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
FARRAH L HAGAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SYSTEMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JUN 25 2015

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0045

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

STEPHEN JONES
Employee/Petitioner

v.

State of Illinois/Shawnee C.C.
Employer/Respondent

Case # 14 WC 018567

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **May 13, 2015**. By stipulation, the parties agree:

On the date of accident, **April 16, 2014**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

On this date, Petitioner sustained an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned **$55,247.00**, and the average weekly wage was **$1,062.45**.

At the time of injury, Petitioner was **30** years of age, ***single*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been (or will be) provided by Respondent.

Respondent shall be given a credit of $- for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $-.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$637.47**/week for a further period of **15** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **3% loss of the body as a whole**.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

6/19/15
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

STEPHEN JONES
Employee/Petitioner

v. Case # 14 018567

STATE OF ILLINOIS/SHAWNEE C.C.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FACTS

Petitioner is a 30 year old Correctional Officer who works at Respondent's Shawnee Correctional Center. (RX3). He has been employed in that capacity for 5 years. (RX3). The Parties stipulated that Petitioner sustained compensable nasal, right eye, and lip injuries that arose out of and in the course of his employment as a Correctional Officer for Respondent on 4/16/14. (T 11; AX1). Petitioner testified that he responded to a sergeant's radio call for assistance in handling an inmate. (T. 11). The verbal conflict between inmate and sergeant escalated to physical contact, and the inmate rushed the sergeant, and Petitioner was required to place the inmate against the wall. (T.11). The inmate then swung around and struck the Petitioner in the face twice. (T. 11). Petitioner took the inmate to the ground where he sustained more blows to the face and chest. (T. 11).

Following the accident, Petitioner saw his family physician, Dr. Mark Smith at Logan Primary Clinic, for a swollen right eye, swollen bridge of the nose, and trouble breathing. (T. 11, 12). Dr. Smith recommended that he follow up at the hospital. (T. 12; PX3). However, upon Petitioner arriving at Logan Primary, Logan Primary called Respondent, Shawnee Correctional Center "to confirm that the incident had happened." (T. 12). At this point, "Shawnee Correctional Center denied that it had happened." (T. 12).

Petitioner was concerned that he was not going to be treated so he left. (T. 12). Petitioner stated, "I was so afraid that it wasn't going to be taken care of, so I drove home." (T. 12). Following the accident Petitioner continued to notice pain around the top of his eyebrows and noted trouble breathing, especially through his nose. (T. 12, 13). Petitioner reported not experiencing such pain before the incident at 4/16/14. (T. 13).

On 6/16/14, Petitioner came under the care of a board certified orthopedic specialist, Dr. David Raskas, who performed a physical examination. (T. 14; PX4). While Dr. Raskas did not believe that Petitioner's neck condition required additional treatment, he strongly recommended follow up treatment with Dr. Nayak or another otolaryngologist for what was likely a nasal fracture (T.

14; PX4). Petitioner testified that despite calling the 800 number for Respondent's reporting, he had not yet received care. (T.14).

Petitioner testified to continued symptoms. He still has pain around the arches of his eyebrows, along with difficulty breathing, which hinders his regular activities of running, biking, rock climbing, and outdoor sports in general. (T. 15). Petitioner states that he gets more allergy infection due to breathing primarily through his mouth. (T. 15). Petitioner states that he gets occasional headaches. (T. 16). For the headaches and for the difficulty breathing, Petitioner occasionally uses saline solutions and takes Ibuprofen. (T. 16).

CONCLUSION

With regard to subsection (i) of § 8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of § 8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner continues to be employed by Respondent, State of Illinois Shawnee Correctional Center, and is able to work the same position at which he was formerly employed. Petitioner is able to perform his work, however he has difficulty breathing and occasional headaches for which he uses saline solutions and Ibuprofen. The Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of § 8.1b(b), the Arbitrator notes that Petitioner was 30 years old at the time of the accident. Because Petitioner has a number of working years ahead of him during which he must cope with his disability, the Arbitrator gives greater weight to this factor.

With regard to subsection (iv) of § 8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that there is no evidence of reduced earning capacity in the record. The Arbitrator notes that Petitioner's earnings have not been affected and the Arbitrator gives lesser weight to this factor.

With regard to subsection (v) of § 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's testimony is credible and entirely consistent with the findings in his medical records. Dr. Raskas, a board certified orthopedic specialist, noted the Petitioner's main difficulty was with breathing and recommended a referral to an otolaryngologist. Petitioner has not seen one and continues to live with a significant breathing problem as well as headaches, for which he takes Ibuprofen and uses saline spray.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability equivalent to the 3% loss of his body as a whole.

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICKY STEVENS,

Petitioner,

vs. NO: 13 WC 21942

CERRO FLOW,

Respondent,

16IWCC0046

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, medical expenses, temporary total disability, and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the permanency award and reduces it to 10% loss of use of each hand. Although we agree with the Arbitrator's analysis of the first four factors under Section 8.1b(b), we find that Petitioner's complaints of pain are not fully corroborated by the medical records.

Petitioner testified that most of the numbness and tingling in his hands went away after the surgeries but he still has some soreness. However, he also testified that he was told by the doctor that it could take up to a year for the soreness to go away. Therefore, it isn't clear whether this soreness is actually a permanent condition. Petitioner also testified that he doesn't think that his grip strength has returned completely but that he returned to work because he knew he was going to retire. We note that the most recent medical record on April 24, 2014, does not mention anything about soreness or diminished grip strength. Petitioner's surgeon, Dr. Beatty, testified that Petitioner had good results from the surgeries, was returned to work full duty on April 28, 2014, and that the hand therapist felt that Petitioner had recovered to resume full duty.

In addition, Petitioner has been diagnosed with bilateral osteoarthritis of the hands so it isn't clear what portion of his current complaints are related to that versus his work-related

carpal tunnel syndrome. On November 12, 2009, Dr. Byler diagnosed Petitioner with widespread degenerative arthritis in the hands and wrists. On January 4, 2010, Dr. Howard diagnosed osteoarthritis of the interphalangeal joints of both hands. Petitioner's Dr. Beatty testified that he was aware of this diagnosis and that Petitioner's work did not cause the osteoarthritis but did cause the carpal tunnel syndrome. Respondent's Section 12 examiner, Dr. Strecker, testified that, in his opinion, Petitioner may have had mild carpal tunnel syndrome but his major complaint was based on his rheumatoid arthritis, which is a progressive disease over time and was not related to Petitioner's work duties.

Although we affirm the finding that Petitioner's carpal tunnel syndrome is work-related, there is no evidence that the osteoarthritis is. As such, it is more likely than not that his current symptoms of soreness and reduced grip strength are also related to his progressive arthritic condition and not due to the carpal tunnel syndrome. Therefore, we find that Petitioner has proven that his work injury has resulted in the loss of use of 10% of each hand.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $447.95 per week for a period of 12-6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $403.15 per week for a period of 38 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 10% of the right hand and 10% of the left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $8,873.34 for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 1 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 12/2/15
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

STEVENS, RICKY
Employee/Petitioner

Case# **13WC021942**

CERRO FLOW
Employer/Respondent

16IWCC0046

On 2/9/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1312 BEMENT & STUBBLEFIELD
GARY BEMENT
PO BOX 23926
BELLEVILLE, IL 62223

0507 RUSIN MACIOROWSKI LTD
THEODORE J POWERS
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

16IWCC0046

STATE OF ILLINOIS)
)SS.
COUNTY OF St. Clair)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Ricky Stevens
Employee/Petitioner

v.

Cerro Flow
Employer/Respondent

Case # **13** WC **021942**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Belleville**, on **11/25/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Statute of Limitations**

16IWCC0046

FINDINGS

On **4/19/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**32,252.37**; the average weekly wage was $**671.92**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $447.95/week for 12 6/7 weeks, commencing 1/28/14 through 4/27/14, as provided in Section 8(b) of the Act. Respondent shall be given a credit for any amounts that have been paid for Short Term Disability.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $3,131.34 to Southwestern Illinois Plastic & Hand Surgery, $4,762.00 to Apex Physical Therapy, and $980.00 to Dr. Khan, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner permanent partial disability benefits of $403.15/week for 53.2 weeks, because the injuries sustained caused the 14 % loss of the right hand and 14 % loss of the left hand, as provided in Section 8(e) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

1/28/15
Date

FEB 9- 2015

FINDINGS OF FACT

The Petitioner was a 62 years of age on the date of hearing. He worked for the Respondent for 29 years, primarily on a set of machines known as Schumag machines. In general, these machines turned rolls of copper pipe into straight lengths of pipe. The Respondent provided two DVD's showing the operation of Schumag machines 2 & 3.(RX 2, 3) The Petitioner agreed that the DVD's accurately show a portion of the job duties, but not all. The operators turn a basket containing copper coils that weighs about 2000 pounds in order to achieve the proper alignment. He then must grab onto a coil of copper and pull it, hammer the end and place a plug in it. He then has to shove the tube into the machine, which requires force to accomplish. If all runs smoothly, the operator will send the copper through the machine with a series of buttons, and the copper pipe exits the machine and rolls into a tray. The operator must guide the coils and straighten them by hand. This is the operation shown in the DVD and in the ergonometric analysis provided by the Respondent.

The Petitioner testified that in reality there are many additional tasks required of the operator which are not included in either the DVDs or the ergonomic evaluation. Most days, the machine does not operate smoothly and the tubing gets jammed. He then must use a hacksaw to cut the tubing out. Some days he will use a hacksaw most of the day, but he always uses one at least 15-20 times a day. He also uses a hammer throughout the day. The hammer is a large brass hammer that weighs 2-3 pounds. This must be used multiple times per hour. He also is required to replace the sheer blade on both machines multiple times a day. This requires him to use wrenches, Allen wrenches, and ratchets to loosen the bolts to remove the old blade and the reverse to install the new one. The use of these tools requires pressure and torque of the hands. The Petitioner was also required to make most repairs on the machines, which required frequent use of hand tools, including wrenches, pliers, and hammers. Part of the job required measuring the tubing with a micrometer, which required him to handle the copper tubes with his hands many times per day. The Petitioner described the job as very difficult and very hand intensive.

In 2009 the Petitioner first complained of pain in his wrists and reported to the company physician. (RX 1,2) He was referred to Dr. Howard, an orthopedic surgeon in January, 2010. Dr. Howard reported that the Petitioner had multi-joint osteoarthritis of his hands, but did not have carpal tunnel syndrome. He reported that the employment was not a cause of the Petitioner's symptoms. (RX 4)

The Petitioner testified that he continued to work full duty, but his hand condition deteriorated. In addition to pain, he developed numbness and tingling in both hands. By April of 2013 the symptoms had gotten bad enough that he sought treatment from his family doctor, Dr. Reid, and was referred to Dr. Khan, who performed a nerve conduction study on 4/15/13 and diagnosed the Petitioner with carpal tunnel syndrome. (PX 2) Petitioner became aware of the diagnosis and that it was related to his employment on 4/19/13. He reported this to his employer at that time.

The Petitioner sought treatment from Dr. Beatty, a hand surgeon from Edwardsville, Illinois. Dr. Beatty confirmed the diagnosis of bilateral carpal tunnel syndrome and recommended surgery. Dr. Beatty released the right carpal tunnel on 1/28/14 and the left on 2/18/14. After post-operative physical therapy, the Petitioner was released to full duty on 4/28/14. (PX 5, p. 12; PX 4, p. 7) He testified that he was able to tolerate the discomfort in his hands while working until his retirement in August of 2014. He testified that he continues to have some slight numbness in his hands, although it is much better that before surgery. He notices a loss of grip strength bilaterally and has pain in both hands. The Arbitrator found Petitioner to be a sincere and credible witness.

Dr. Beatty testified that the Petitioner's job activity would be the cause and the basis for the development of bilateral carpal tunnel syndrome or worsening of preexisting carpal tunnel syndrome. (PX 5, p. 10) Dr. Beatty

had not reviewed the DVD's or job analysis, but relied on the Petitioner's job description. The job described in the form attached to Dr. Beatty's deposition is consistent with Petitioner's description of his job duties at the time of Arbitration. Dr. Beatty also considered it significant that the Petitioner's job activities caused his condition to intensify.

The Petitioner testified that he is diabetic and that in the past he has had difficulty in maintaining the correct blood sugar. It is now under control, however and has been for some time. Dr. Beatty did not believe that the compression neuropathy shown on the NCS/EMG was caused by diabetes, nor was it relevant to his opinion regarding causation. (PX 5, p.18)

The Petitioner was examined by Dr. William Strecker on 5/14/11, pursuant to § 12. He examined the Petitioner and reviewed some prior medical records. His diagnosis was osteoarthritis. He was uncertain whether the Petitioner had carpal tunnel syndrome. (RX 7, p.14) He had reviewed the DVDs and the ergonomic analysis performed by Apex. His opinion was that the Petitioner's job was not a factor in the development of the Petitioner's hand complaints. (RX 7, p. 18) He testified that the Petitioner's BMI and his age were more likely causes of his condition. Dr. Strecker did not review the NCS performed by Dr. Khan. He had not reviewed Dr. Beatty's records. He further did not know that the Petitioner used a hacksaw or hand tools while at work. (RX7, p. 24-25)

The ergonometric analysis was prepared by Apex Physical Therapy. It appears to have been made in conjunction with the DVD recording. The worker was required to push ½" tubing into the machine which required 25 lbs of pushing force and 50 lbs of grip force for 5 repetitions. On the other machine the 7/8" tubing required 45-50 lbs of pushing force and 50-60 lbs of grip force for 5 repetitions. (RX 10) The frequency of the repetitions is unclear. The report measures multiple factors, but it does not represent a complete picture of Petitioner's duties. It does not, for example include using a hack saw, 2-3 pound hammer, and hand tools on a repeated basis.

CONCLUSIONS OF LAW

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

An injury is accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Commission*, 128 N.E.2d 718, 720 (Ill. 1955); *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (Ill. 1982). In a repetitive trauma case, the issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,* 99 I.I.C. 0961 (1999). Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003) (emphasis added). As in establishing accident, to show causal connection Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury. *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3rd Dist. 2000).

In *Edward Hines Precision Components v. Indus. Comm'n,* 825 N.E.2d 773, (2nd Dist. 2005). the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. Similarly, the Commission recently noted in *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant

must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (2nd Dist. 1991) and *Edward Hines supra.*

In this case, the evidence shows that Petitioner worked in the Respondent's factory for 29 years, primarily performing the same job duties. The job, as Petitioner described it at the Hearing, is quite hand intensive. He testified that he must pull copper coils off a spool and use a 2-3 lb hammer to strike the end. He must the shove it into the machine, which takes force. Petitioner's testimony in this regard is consistent with the DVDs Respondent offered into evidence. (RX 12, 13) The Petitioner also testified that he was frequently required to use a hack saw to cut pieces of tubing in order to extricate them from the machine when it would jam. Sometimes he would use the hack saw most of the day, other days it would be less, but always at least 15-20 times per day. He also testified that he was required to use wrenches, Allen wrenches, pliers and other tools multiple times throughout the day. His testimony about the frequency of use of these tools was credible and unrefuted.

The Respondent admitted DVDs of the Petitioner's job as well as an ergonometric study. Petitioner agreed that the videos show the machine running. He indicated, however they do not show the operator using the tools as described above. He testified that during the short time of the video the machine was running smoothly, but that was the exception to the norm. The Petitioner was credible in his description of the job activities and his testimony as a whole. The Arbitrator finds the DVDs and ergonomic study do not completely and accurately represent the Petitioner's job duties and therefore give them little weight.

Petitioner's treating doctor, Michael Beatty, testified that he reviewed the detailed job description prepared by the Petitioner which is consistent with the Petitioner's testimony at the hearing. Dr. Beatty had the opportunity to review all of the prior medical records. His clinical examination showed the Petitioner to have bilateral carpal tunnel syndrome. This diagnosis was confirmed by the NCS. Dr. Beatty testified that the job duties as described, taken as a whole with all of the other factors was a cause or at least an aggravating cause of the carpal tunnel syndrome. (PX5 p. 10)

The Section 12 examiner, Dr. Strecker's testified he watched the videos and looked at the ergonomic study. He was unaware, however, that the Petitioner used a hacksaw or any hand tools on the job. He was not even certain that the Petitioner actually had carpal tunnel syndrome, but felt that his problems were caused by underlying osteoarthritis. He had not reviewed the nerve conduction study or Dr. Beatty's reports before his deposition. His testimony that many other issues could be causes of carpal tunnel syndrome, i.e. BMI, age, normal daily life, diabetes; but working 29 years in an industrial setting as described by the Petitioner could not have been a contributing factor is not persuasive. The Arbitrator finds the testimony and opinions of Dr. Beatty much more persuasive.

Based on the above, and the record taken as a whole, the Arbitrator concludes that the Petitioner's condition of ill-being did arise out of and in the course of his employment and is causally related thereto.

Issue (D): What was the date of the accident?
Issue (E): Was timely notice of the accident given to Respondent?
Issue (O): Was the application for adjustment of claim filed within the applicable Statute of limitation?

The Petitioner first made complaints of hand pain to his employer in 2009. In 2010 he was referred to Dr. Howard who reported that the Petitioner did not have carpal tunnel syndrome, but did have osteoarthritis in his hands which was not related to his work. From 2010 through 2013, the Petitioner continued to work full duty. He testified that his hands gradually got worse during that time and he started to develop more numbness in his hands. His hands were much worse in April 2013, so he sought treatment on his own. He had diagnostic testing on his upper extremities on 4/15/13 which revealed bi-lateral carpal tunnel syndrome. He was informed of his diagnosis on 4/19/13. He immediately reported this to his supervisor. Petitioner's testimony in this regard was credible and supported by the records in evidence. It was not refuted.

Petitioner was justified in relying on the opinion of Dr. Howard in 2010. The Arbitrator finds that Petitioner's condition manifested itself on 4/19/13 which is the date he was advised of his diagnosis and its relationship to his employment. He immediately informed Respondent, and filed his application for adjustment of claim on 7/8/13. Appropriate notice was given to Respondent and the claim was filed well within the Statute of Limitation.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Respondent did not dispute the reasonableness and necessity of the medical bills. The dispute was based upon the issues of causal connection and accident. Based upon the foregoing findings of the Arbitrator, Respondent shall pay the following medical bills pursuant to the fee schedule:

Southwest Illinois Plastic and Hand Surgery	$3,131.34
Apex Physical Therapy	$4,762.00
Dr. Khan	$ 980.00

Respondent shall be given a credit for any medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Issue (K): What temporary benefits are in dispute?

The only dispute regarding TTD was Respondent's liability there for based upon the issues of causal connection and accident. Petitioner worked up until the date of his first surgery on 1/28/14. He was released to return to work following his second surgery as of 4/28/14. The Arbitrator notes that the parties indicated on the Request for Hearing form that the period of disability ended on 4/14/14. It is clear from the records, however that Dr. Beatty did not release Petitioner to return to work until 4/28/14. (PX 5, p. 12; PX 4, p. 7) The Arbitrator finds Petitioner is entitled to TTD benefits in the amount of $448.17 per week for a period of 12 6/7 weeks for the period of 1/28/14 through 4/27/14. Respondent shall be given credit for any payments made for short term disability.

Issue (L): What is the nature and extent of the injury?

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was able to return to work full duty following his surgeries and subsequently retired in August of 2014. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 60 years old at the time of the accident. The Arbitrator gives *lesser* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner has retired. The Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was a credible witness. Because the medical records and testimony of his treating surgeon corroborate the Petitioner's complaints of pain, weakness and loss of function in his hands, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 14% loss of use of each hand pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CRAIG ROBERTS,

Petitioner,

vs.

NO: 12 WC 16990
13 WC 36532

PEORIA ROOFING,

Respondent,

16IWCC0047

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, employer-employee relationship, notice, causal connection, medical expenses, benefit/wage rates, temporary total disability, nature and extent, and statute of limitations, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes a clarification as outlined below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission clarifies that the manifestation date for Petitioner's right carpal and cubital tunnel injuries is January 31, 2011. For the left carpal and cubital tunnel, the manifestation date is December 12, 2011. We specifically affirm that Petitioner has proven that his hand-intensive work duties for Respondent from 2003 to 2011 are still a contributing factor in the development of his bilateral hand and arm conditions despite the fact that he worked for other employers prior to the manifestation date of December 12, 2011.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 4, 2015, is hereby affirmed and adopted with the clarifications noted above.

16IWCC0047

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 1 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 12/1/15
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION
REMANDED

ROBERTS, CRAIG
Employee/Petitioner

Case# **12WC016990**

13WC036532

PEORIA ROOFING
Employer/Respondent

16IWCC0047

On 3/4/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0225 GOLDFINE & BOWLES PC
MICHAEL MARINCIC
124 S W ADAMS ST SUITE 200
PEORIA, IL 61602

2965 KEEFE CAMPBELL BIERY & ASSOC
NATHAN S BERNARD
118 N CLINTON ST SUITE300
CHICAGO, IL 60661

16IWCC0047

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
REMANDED ARBITRATION DECISION
19(b)

CRAIG ROBERTS
Employee/Petitioner

v.

PEORIA ROOFING
Employer/Respondent

Case # 12 WC 16990

Consolidated cases: 13 WC 36532

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable STEPHEN MATHIS, Arbitrator of the Commission, in the city of PEORIA, IL, on 12/23/2013. After reviewing all of the evidence presented and the transcript of the testimony at trial, the Honorable Lynette Thompson-Smith, hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☒ What was the date of the accident?

E. ☒ Was timely notice of the accident given to Respondent?

F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?

G. ☒ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On the date of accident, January 31, 2011 & December 12, 2011, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $64,979.20 and his average weekly wage was **$1,249.60**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **3** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and 0.00 for other benefits, for a total credit of $0.00.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Petitioner's average weekly wage is $1,249.60.

Respondent shall pay Petitioner for medical treatment, in the amount of $4,052.06, as indicated in the medical bills attached as Petitioner's Exhibit 6, pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall pay for prospective medical treatment as recommended by Dr. Garst and any reasonable and necessary rehabilitative treatment, as needed, pursuant to Sections 8(a) and 8.2 of the Act

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

The disputes issues in this matter are: 1) employee-employer relationship; 2) accident; 3) causal connection, 4) notice; 5) earnings and average weekly wage; 6) reasonableness, necessity and liability of medical bills; and 7) prospective medical treatment. *See,* AX1.

Petitioner's testimony, 12 WC 16990

Petitioner testified that he began his career as a union sheet metal worker on or about August 2003. He further testified that he worked his first month as a union apprentice in Bloomington and then was as hired by Respondent in 2003; and worked steadily for Respondent until 2011. He finished his apprenticeship while working for Respondent then continued to work for them as a journeyman.

He testified that his job duties did not change however; he had more responsibilities after he became a journeyman. Petitioner indicated that his sheet metal work required him to use a variety of hand tools on a regular basis; and the type of sheet metal work that he did at Peoria Sheet Metal was called architectural work, i.e. custom work.

Petitioner explained that some shops do mostly duct work and a sheet metal worker is able to use machines in the shop while custom architectural work requires high maintenance. Petitioner testified that his job duties would vary depending on the day however, he would have to use hand tools, such as caulking gun, seamer, rivet gun, and snips every day, and that these tools required forceful gripping.

As an example, Petitioner testified that he might use a seamer over a 200-foot section of roof, which he would have to go over, inch by inch with hand tools; to seal the metal so that it formed a tight seal. He testified that many times the metal would be 22 or 24 gauge; and he would have to go over that long seam twice, to ensure that it was sealed appropriately. This action required forceful gripping and squeezing.

When doing certain applications outdoor, he would use rivet guns to construct gutters and gutter heads. Petitioner also used tin snips on a daily basis and testified he used these snips so frequently; he wore out four pairs per year.

Petitioner's Exhibit 5 was a printout from Beverly Niswonger, the secretary at the sheet metal union hall. Petitioner reviewed this document, which contained his working hours from January 31, 2006 to July 31, 2013; and also indicated that he worked at Respondent from January 31, 2006 until January 31, 2011, with two (2) intermittent work periods in April and May 2011. Petitioner testified that he worked for Respondent from 2003 until January 14, 2011, when he was laid off.

Petitioner testified that he had no hobbies, such as playing a guitar that required him to have frequent hand movements

On January 31, 2011, Petitioner presented to Dr. Garst with complaints of "paresthesias on the ring and little fingers...numbness and tingling". Petitioner testified that he had been having pain and numbness in both hands and arms prior to this day, however, this was the first time that it went all the way up to his shoulder and it scared him. On that date, Dr. Garst diagnosed him with probable right cubital tunnel and possible right carpal tunnel syndrome. Petitioner testified that he continued to work through the pain and discomfort but it continued to get worse. He went back to see Dr. Garst on February 12, 2011. At this point, he was making complaints of pain in both hands and elbows. Dr. Garst diagnosed him with possible bilateral carpal and cubital tunnel syndrome and had an EMG/NCV test performed on February 8, 2012, by Dr. Troung. The test was read as the petitioner having moderate to severe bilateral carpal tunnel syndrome, more pronounced on the left; and bilateral ulnar cubital tunnel syndrome, more severe on the left. .

On August 28, 2013, Dr. Garst testified that he initially recommended conservative care for Petitioner and after a course of physical therapy and splinting; Petitioner had not improved. Dr. Garst recommended that Petitioner undergo bilateral cubital and carpal tunnel surgeries. He stated he would like to do the left arm first, and Petitioner would be off work for about 4 to 6 weeks then Dr. Garst would do the right side; and Petitioner would be off work for another 4 to 6 weeks. He indicated that if light duty was available, Petitioner might only be off work for two (2) weeks after each surgery.

The petitioner was seen by Dr. Michael Bryan Neal, at the request of Respondent, for an independent medical examination ("IME"). Dr. Neal, an orthopedic surgeon, wrote a report regarding this matter stating that Petitioner did not have carpal tunnel syndrome; which contradicted of both Drs. Garst and Truong; and the EMG/NCV test results. Dr. Neal did believe Petitioner had bilateral cubital tunnel syndrome.

Dr. Neal was asked if the medical documentation supported a causal relationship between the accident and the injury. He opined that Petitioner does not have carpal tunnel and that his cubital tunnel symptoms were not caused by work. Further, Dr. Neal believed that the petitioner only worked for Respondent from October 30, 2010 through May 7, 2011.

When queried as to what types of activities can cause carpal tunnel syndrome, Dr. Neal stated that forceful, repetitive gripping and grasping, in extreme positions of flexion and extension; as well as activities where there is significant vibration exposure, would be the activities that were accepted by the majority of the medical world, as having an occupational causal relationship. In this particular instance, he opined that Petitioner did not have carpal tunnel and that the cubital tunnel symptoms he had were idiopathic.

Dr. Neal came to his conclusions even though Petitioner told him that when he did a lot of heavy cutting and grasping that would hurt and make his hands numb. The opinions of this doctor were

also based on information that the petitioner only worked for Respondent for six (6) months, i.e., October 30, 2010 through March 7, 2011. RX4, pgs.20-29.

Dr. Neal also testified that he believed that Petitioner's cubital tunnel was idiopathic. When he was asked on page 34 of his deposition, "where you do you think Petitioner's cubital tunnel come from (how to do you think he got it)", Dr. Neal indicated that Petitioner said he drank alcohol daily and that was the risk factor. In reviewing the record, Petitioner did indicate he drank one (1) beer per day. The doctor was asked several times during his deposition, whether Petitioner's drinking one beer per day caused Petitioner's cubital tunnel syndrome. Dr. Neal did not answer the question and only said that any alcohol can lead to peripheral neuropathies. Later, Dr. Neal admitted that carpal tunnel could be caused by sheet metal work. RX4, pgs.34-41.

Dr. Garst is Petitioner's treating orthopedic surgeon, who specializes in surgery of the hand and upper extremity. In his opinion, Petitioner's work activities with Respondent, caused the bilateral carpal and cubital tunnel syndromes that he diagnosed Petitioner as having. Dr. Garst was asked if Petitioner's primary job as a sheet metal worker, frequently using hand tools such as tin snips, pattering tools and riveters, would cause of the conditions of bilateral carpal and cubital tunnel syndrome that he diagnosed. Dr. Garst responded that within a reasonable degree of medical certainty Petitioner's conditions were work related. On cross-examination, Dr. Garst was asked a variety of questions about scientific studies, which he indicated could go either way, regarding the causes of carpal and cubital tunnel. However, he stated, "most of my opinion is based on the fact that I live in an area and practice in an area that's heavy with metal workers and my feeling is the frequency among them for compressive neuropathies is higher than the general population". Dr. Garst was unaware of any hobbies or activities that Petitioner had, which would require repetitive use of the hands. Further, both Drs. Garst and Neal agreed that repetitive, forceful use of hand tools could cause the petitioner's conditions. PX3; Dr. Garst Deposition, pgs.13-14; PX4, pgs.13-14, 29.

Respondent's witness' testimony

Mike Boyle, Branch Manager for Respondent Peoria Roofing, testified Petitioner last worked the week ending January 15, 2011, after a lay of a few weeks of work in April and May 2011. Mr. Boyle also testified that the petitioner has worked for Respondent since 2008, as a metalworker. He further testified that those working in the field would use hand tools such as riveters however, those working in the shop would use automated equipment, i.e., auto shears and brakes to cut and bend the metal.

Mr. Boyle further testified that he received a letter alleging a work injury for petitioner however, he did not remember when he received it and that the petitioner was not working for Respondent at the time of the subject injury. Mr. Boyle testified he was aware of the unrelated right long finger extensor tendon laceration repair that Petitioner had in late 2010, but was never provided notice of any other

claims as Petitioner was not employed with Peoria Roofing, at the time of the claims were alleged or filed. Mr. Boyle testified that as branch manager, he would be the appropriate party to be given notice of any alleged work related claim. He further testified that Marty Craig was the petitioner's supervisor and that Marty "takes care of the sheet metal shop"; and if someone reports an accident to Marty then Marty is supposed to notify him. He also testified that he could have pressed a button and printed the petitioner's earnings for the fifty-two (52) weeks prior to the accident date but he thought that they just wanted what the petitioner's earning were in 2011. He agreed that sheet metal workers make $32.15 per hour and that the petitioner did work with the type of tools to which he testified. Tr. pgs. 40-52.

12 WC 16990, date of accident January 31, 2011

Petitioner had previously sought medical treatment for a right, long finger, extensor tendon laceration repair. Treatment ended on January 18, 2011; when Dr. Jeffrey Garst recommended s full duty work release. Medical records during late 2010 and prior to January 31, 2011 reflected discomfort of the hand and fingers due to the casting involved in the unrelated right long finger extensor tendon laceration repair. Petitioner testified to right hand pain and numbness prior to January 31, 2011 but medical records, prior to January 31, 2011, make no mention of complaints of bilateral hand or elbow pain. The Arbitrator notes that the petitioner was relegated to one-armed or one-handed duty in November and December 2010. PX1.

The amended application 12 WC 16990 alleges a right upper extremity claim on January 31, 2011. The medical records document the first complaints of hand pain and numbness were when Petitioner returned to Dr. Garst January 31, 2011 and complained of right hand pain and numbness. Petitioner testified to ongoing pain complaints and Dr. Garst recommended an EMG January 31, 2011. Petitioner failed to appear for any scheduled appointments until almost a year later on December 12, 2011. The Arbitrator notes that the petitioner was apparently negligent in pursuing treatment for his hand complaints however, there is evidence that he was suffering from these afflictions since on or about 2010.

13 WC 36532, date of accident December 12, 2011

Application 13 WC 36532 alleges a bilateral, upper extremity claim from alleged repetitive trauma on a date of accident of December 12, 2011. Petitioner's medical records, of that date, state that he presented to Dr. Garst with "right hand pain and numbness with some left hand pain and numbness" that the petitioner "had been getting ulnar paresthesias and he had reported that previously". Dr. Garst reordered EMG/NCV testing. PX1.

Petitioner testified that on January 31, 2011, he had complaints related only to the right hand. Petitioner further testified to pain worsening in the right upper extremity; and additional symptoms

in the left upper extremity, after January 31, 2011. This was his reason for filling an additional claim for alleged bilateral upper extremity complaints.

In a letter to Petitioner's counsel, dated November 5, 2012, Dr. Garst stated he had a rather vague understanding of the type of work Petitioner performed and that his knowledge of the Petitioner's work history was limited. Concerning work duties, Dr. Garst stated that he had not addressed that issue with Petitioner. He stated that he noted that Petitioner was a sheet metal worker and that they do have repetitive jobs that are strenuous on their hands; and if this was the case with the petitioner, then the doctor opined that the compression neuropathies of carpal tunnel and cubital tunnel syndrome were related to his work. Dr. Garst also pointed out he had not physically examined Petitioner since July 3, 2012, in that Petitioner had cancelled his October 2012 appointment; therefore he was not recommending surgery, at that time however, if Petitioner's symptoms persisted, he thought surgery would be contemplated; and that if Petitioner continued to work, his compressive neuropathies would worsen over time. PX2.

At deposition, Dr. Garst indicated because of the ongoing nature of complaints, surgery may repair the various impingements but again he agreed that he did not have more than a very vague understanding of Petitioner's job duties, when he wrote the narrative report with his causation opinion. With more questioning on cross examination, Dr. Garst kept referring back to the duties as described during the hypothetical on direct examination as being a foundation for his opinion. However, Dr. Garst acknowledged he had not known of the specific job duties when he offered the opinion on causation, as memorialized in the November 5, 2012 narrative letter to Petitioner's counsel. Dr. Garst also stated that recent medical studies have not proven that carpal tunnel is caused by repeated hand movements while working. PX3.

After review of Petitioner's job description, in an IME report dated March 25, 2013 and addendum dated August 28 2013, Dr. Neal opined that Petitioner's work duties did not cause, contribute to or permanently aggravate Petitioner's conditions. Dr. Neal stated that Petitioner did not clinically express bilateral carpal tunnel regardless of EMG abnormalities. Dr. Neal also noted there was no bilateral finger triggering or complaints.

Dr. Neal further opined that if the petitioner had cubital or carpal tunnel syndrome, it was not related to his employment activities because Petitioner did not seek medical treatment or complain of any symptoms during employment with Respondent Peoria Roofing. RX2 & 3; PX2.

Petitioner testified to right, upper extremity pain, which worsened after January 31, 2011; and that he later developed left, upper extremity pain on or about December 12, 2011. However, Petitioner later testified all alleged symptoms occurred relatively at the same time, or within months of each other. Petitioner also provided a history at the IME, that all symptoms occurred at once, or within months,

and Dr. Neal opined this suggested an intrinsic biological origin as opposed to an occupational relationship. RX2 & 3.

Dr. Neal noted Petitioner was working without restrictions and opined that he could continue to do so. He did not recommended surgery although he thought that conservative care, such as wrist splinting and elbow pads, may be beneficial. He reiterated that Petitioner's conditions were not related to work and further opined that Petitioner's consumption of one beer per day may have caused his cubital tunnel syndrome, as daily alcohol use contributes to cubital tunnel syndrome. PX2; Rx. 4.

CONCLUSIONS OF LAW

B. Was there an employee-employer relationship?

The Arbitrator concludes that the petitioner was an employer of Respondent. The Arbitrator relies on the testimonies of the petitioner and Mike Boyle; and the fact that the respondent agreed, on the Request for Hearing, that Petitioner and Respondent were operating under the Illinois Workers' Compensation Act and their relationship was one of employee and employer.

C. Did an accident occur that arose out of and in the course of the Petitioner's employment by the Respondent?

A claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. It is the function of the Commission to judge the credibility of the witnesses and resolve conflicts in medical evidence. *See, O'Dette v. Industrial Comm'n*, 79 Ill. 2d. 249, 253, 403 N.E.2d 221, 223 (1980). In deciding questions of fact, it is the function of the Commission to resolve conflicting medical evidence, judge the credibility of the witnesses and assign weight to the witnesses' testimony. *See, R & D Thiel*, 398 Ill. App.3d at 868; *See also, Hosteny v. Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009).

For an employee's workplace injury to be compensable to be compensable under the Workers' Compensation Act, he must establish the fact that the injury is due to a cause connected with the employment such that it arose out of said employment. *See, Hansel & Gretel Day Care Center v. Industrial Comm'n*, 215 Ill. App.3d. 284, 574 N.E.2d 1244 (1991). It is not enough that Petitioner is working when accident injuries are realized; Petitioner must show that the injury was due to some cause connected with employment. *See, Board of Trustees of the University of Illinois v. Industrial Comm'n*, 44 Ill.2d 207 at 214, 254 N.E.2d 522 (1969).

Based on the above, the Arbitrator concludes that an accident did occur that arose out of and in the course of the petitioner's employment with the respondent. The petitioner worked for the respondent from 2003 until 2011, in the capacity as a union sheet metal worker. During this time, he was required to do forceful and repetitive gripping and grasping. Petitioner testified that his arms and hands began to hurt a couple of years before he went to the doctor. The event that led him to go to the doctor was when he felt pain go all the way up his right arm into his shoulder. With this in mind, the Arbitrator concludes that an accident did arise out of and in the course of the petitioner's employment.

E. Was timely notice of the accident given to Respondent?

The petitioner testified that he gave his supervisor, Marty Craig, notice of these accidents. As Mr. Craig was not called as a witness to rebut Petitioner's testimony, the Arbitrator concludes that timely notice was given, pursuant to the Act.

F. Is Petitioner's current condition of ill-being causally related to the injury?

It is within the province of the Commission to determine the factual issues, to decide the weight to be given to the evidence and the reasonable inferences to be drawn there from; and to assess the credibility of witnesses. *See, Marathon Oil Co. v. Industrial Comm'n*, 203 Ill. App. 3d 809, 815-16 (1990). And it is the province of the Commission to decide questions of fact and causation; to judge the credibility of witnesses and to resolve conflicting medical evidence. *See, Steve Foley Cadillac v. Industrial Comm'n*, 283 Ill. App. 3d 607, 610 (1998).

It is established law that at hearing, it is the employee's burden to establish the elements of his claim by a preponderance of credible evidence. *See, Illinois Bell Tel. Co. v. Industrial Comm'n.*, 265 Ill. App. 3d 681; 638 N.E. 2d 307 (1st Dist. 1994). This includes the issue of whether Petitioner's current state of ill-being is causally related to the alleged work accident. *Id.* A claimant must prove causal connection by evidence from which inferences can be fairly and reasonably drawn. *See, Caterpillar Tractor Co. v. Industrial Comm'n.*, 83 Ill. 2d 213; 414 N.E. 2d 740 (1980). In addition, causal connection can be inferred. Proof of an employee's state of good health prior to the time of injury and the change immediately following the injury is competent as tending to establish that the impaired condition was the cause by the injury.

The petitioner worked for the respondent from 2003 until 2011, in the capacity as a union sheet metal worker. During this time, he was required to do forceful and repetitive gripping and grasping. Petitioner testified that his arms and hands began to hurt a couple of years before he went to the doctor. The event that led him to go to the doctor was when he felt pain go all the way up his right arm into his shoulder. The Arbitrator concludes that the petitioner's present condition of ill-being is

causally related to his work. The Arbitrator finds the opinions of Dr. Garst to be more persuasive than those of Dr. Neal.

G. What were Petitioner's earnings?

Petitioner testified, on an uncontested and unrebutted basis, that he had worked for Respondent from 2003, when he started as an apprentice, until 2011, when he was laid off. He stated that his rate of pay was $32.15 per hour. He also testified that his average weekly wage was $1,249.60. Petitioner called Mike Boyle, a manager for Respondent, to testify. Mr. Boyle testified that he was a roofer who became a manager and worked for Respondent. He was never a sheet metal worker. He read and agreed that the job duties that were provided in Respondent's Exhibit 1 corresponded with the Petitioner's testimony regarding his job duties. Mr. Boyle testified that he was never notified of the subject accidents, however, he did testify that Marty was Petitioner's supervisor; and that if there was an accident, that is something that Marty was supposed to tell him. In regards to the wage statement, Mr. Boyle agreed that a person in Petitioner's position would make $32.15 per hour. Mr. Boyle bought a wage statement, which only consisted of Petitioner's last twelve (12) weeks of pay when he could have brought a wage statement showing the fifty-two (52) weeks of Petitioner's wages, prior to the accident date. The Arbitrator finds that Petitioner's testimony regarding his average weekly wage being $1,249.60, is credible.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Having found in favor of Petitioner concerning accident and causal connection, the Arbitrator now finds that the medical bills itemized in Petitioner's Exhibit 6, are reasonable and necessary; and represent office visits with Dr. Garst at Great Plains Orthopedics; and the EMG testing for Petitioner performed by Dr. Troung. The Arbitrator concludes that these bills were reasonable and necessary and Respondent shall pay to Petitioner the amount of these bills, pursuant to the medical fee schedule or the negotiated rate, whichever is less.

K. Is Petitioner entitled to any prospective medical care?

This Arbitrator finds Dr. Garst's opinions to be more persuasive than those of Dr. Neal; and that Dr. Garst's prospective medical treatment plan is reasonable and necessary. Therefore, the Arbitrator concludes that the petitioner is entitled to prospective medical care, as recommended by Dr. Garst; and any reasonable and necessary rehabilitative care, needed thereafter.

The petitioner has indicated, on the Request for Hearing, that TTD, TPD, maintenance; and the nature and extent of Petitioner's injuries is not at issue, therefore these issues will not be addressed.

16IWCC0047

ILLINOIS WORKERS' COMPENSATION COMMISSION
REMANDED ARBITRATION DECISION
12WC16990 & 13 WC 36532
SIGNATURE PAGE

L Thompson

Signature of Arbitrator

March 4, 2015
Date of Decision

MAR 4 - 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PHILLIP COX,

Petitioner,

vs. NO: 11 WC 9956

FORD MOTOR COMPANY,

16IWCC0048

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, and "vocational rehabilitation," and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms the finding that prospective medical treatment including implantation of a permanent spinal cord stimulator is reasonable, necessary, and causally related to Petitioner's work injury. However, since Petitioner has not reached maximum medical improvement, the issue of vocational rehabilitation is premature. Therefore, the award for vocational rehabilitation is vacated at this time.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $909.62 per week for a period of 61-1/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

16IWCC0048

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $37,324.52 for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the prospective medical treatment recommended by Dr. Kondamuri and Dr. Levin including the implantation of a permanent spinal cord stimulator under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $60,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 1 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 12/15/15
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

COX, PHILLIP
Employee/Petitioner

Case# **11WC009956**

FORD MOTOR COMPANY
Employer/Respondent

16IWCC0048

On 10/30/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0293 KATZ FRIEDMAN EAGLE ET AL
JASON CARROLL
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0075 POWER & CRONIN LTD
BRIAN RUDD
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

PHILLIP COX
Employee/Petitioner

v.

FORD MOTOR COMPANY
Employer/Respondent

Case # 11 WC 9956

Consolidated cases: _____

16IWCC0048

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **August 14, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ 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, **February 19, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**70,950.36**; the average weekly wage was $**1,364.43**.

On the date of accident, Petitioner was **53** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**29,887.54** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**29,887.54**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

- Respondent shall pay Petitioner temporary total disability benefits of $909.62/week for 61 1/7 weeks, commencing February 25, 2011 through December 14, 2011 and commencing April 3, 2014 through August 14, 2014, as provided in Section 8(b) of the Act.

- The Respondent shall authorize the treatment that has been recommended by Drs. Kondamuri and Levin, which includes implantation of a permanent spinal cord stimulator.

- Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $32.494.62 to Porter Memorial Hospital, $212.00 to St. Mary Medical Center, $200.00 to Pain Management Specialists, and $4,417.90 to Injured Workers' Pharmacy, as provided in Sections 8(a) and 8.2 of the Act.

- Respondent shall authorize vocational rehabilitation services as recommended by Julie Bose.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

10.30.14
Date

ICArbDec19(b)

OCT 30 2014

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PHILLIP COX,	)	
	)	
Petitioner,	)	
	)	
v.	)	11 WC 9956
	)	
FORD MOTOR COMPANY,	)	
	)	16IWCC0048
Respondent.	)	
	)	

ADDENDUM TO ARBITRATOR'S DECISION

FINDINGS OF FACT

Petitioner, Phillip Cox, testified he began working for Respondent, Ford Motor Company, on January 6, 1995. He testified he worked at Respondent's plant in St. Louis, Missouri until he was transferred to their Chicago plant in approximately July of 2008. Petitioner testified he was working for Respondent in February of 2011 and that his position was that of "market manager." As a market manager, he explained his job duties were to drive a fork lift and stock parts throughout the plant. He testified his shift normally began at 6:00 p.m. and would end the following day at approximately 4:30 a.m.

The parties stipulated that on February 19, 2011, Petitioner sustained an accident that arose out of and in the scope of his employment by Respondent and that Respondent was given proper notice of the accident within the time limits stated in the Act. (See Arb. Ex.1). Petitioner was injured when a pallet fell onto his right leg causing a scrape on his right lower leg. Petitioner did not immediately seek medical treatment as he did not believe the injury was serious. However, he testified that over the next several days, the area around his wound became puffy and red.

At approximately 8:54 p.m. on February 23, 2011, Petitioner presented himself to Respondent's plant medical seeking treatment for his right leg injury. (PX1, p. 137 of 171). Kesha Love, RN, BSN, examined Petitioner at his initial visit. (Id.). Nurse Love's clinical observation included lower leg with redness and mild swelling. (Id. at p. 138 of 171). Petitioner complained of shooting pain from below his knee into his ankle and foot. (Id.). Nurse Love instructed Petitioner to ice the abrasion for

twenty minutes, return to work, and return to plant medical to see the doctor at the end of Petitioner's shift. (Id.).

As instructed, Petitioner testified he returned to plant medical when his shift ended at 4:30 a.m. on February 24, 2011. He testified he waited approximately one hour to see a doctor, which is corroborated by the plant medical records that indicate he was seen at 5:22 a.m. by Dr. Winston Khin. (PX1 p. 139 of 171). Dr. Khin noted that the abrasion was infected and cellulitis had formed. (Id. at 140 of 171). Dr. Khim provided Petitioner with Augmentin 500 mg, advised him to return to work, and stated that no revisit was required. (Id.).

Emergency Treatment at Porter Memorial Hospital

On February 25, 2011, Petitioner testified he presented to the emergency room at Porter Memorial Hospital due to increased swelling, redness, and pain around his wound. He was discharged by Porter Memorial Hospital that same day with a diagnosis of right leg cellulitis and abscess and was advised to follow-up with his private physician within two days. (PX2).

Petitioner testified he went to the emergency room again at Porter Memorial Hospital the following day, February 26, 2011, because his wound had worsened. Petitioner was admitted to the hospital at this second visit. (PX2). His February 19, 2011 work accident was noted, and he was diagnosed with right leg abscess, cellulitis, and a MRSA infection. (Id.). While in the hospital, he came under the care of Dr. Adam Conn, who performed a surgical debridement of his right leg wound on February 28, 2011. (Id.). He was discharged from the hospital after several days on March 3, 2011.

Medical Treatment Following Petitioner's Hospital Discharge

Following his discharge, Petitioner testified he was provided with a home health care nurse who came to his home to assist with his wound care. Petitioner treated with Dr. Erika Young of Infectious Disease Specialists in Valparaiso, Indiana. (See PX8). By his March 30, 2011 and April 13, 2011 dates of services it was noted that his right leg wound was healing well. (Id.).

During this same time period, Petitioner testified he continued treating with Dr. Conn of Associates in Surgery, whom had performed his surgery while in the hospital. At a follow up visit on March 28, 2011, Dr. Conn noted Petitioner was complaining of neuropathic type pain while riding in a car or any time he

increased mobility over his anterior compartment. (PX9). Dr. Conn referred Petitioner to Dr. Richard Silberman, a neurologist, for an examination. (Id.).

Section 12 Examination by Jeffrey Coe, M.D., Ph.D.

Following his March 28, 2011 appointment with Dr. Conn, Petitioner was evaluated at the request of Respondent pursuant to Section 12 of the Act by Dr. Jeffrey Coe on April 12, 2011. (PX1). Dr. Coe examined Petitioner and noted he walked with difficulty using two crutches avoiding any right foot weight bearing or contact. (Id.). Dr. Coe concluded that Petitioner's right leg wound was healing but he had developed post-traumatic and post-operative nerve pain. (Id.). He recommended ongoing treatment that included evaluation by a pain management specialist or neurologist. (Id.).

Medical Treatment with Dr. Richard H. Silberman

Following his Section 12 examination with Dr. Coe, Petitioner returned to Dr. Conn's office on April 18, 2011. (PX9). At that visit. Dr. Conn reiterated his recommendation to see Dr. Silberman. (Id.). On April 22, 2011, Petitioner had his initial visit with Dr. Silberman of Neurology Associates of Northwest Indiana. (PX4). Dr. Silberman noted Petitioner's work accident of February 19, 2011 and subsequent complications and treatment. (Id.). After his examination, Dr. Silberman noted that Petitioner had suffered a traumatic injury to the distal aspect of his right leg complicated by a MRSA infection and right foot pain and swelling. (Id.). He indicated the possibility of complex regional pain syndrome or compartment syndrome had to be considered. (Id.). He recommended Petitioner undergo an MRI scan of the right leg from the knee through the foot, an EMG of the right foot, a trial of Neurontin 300 mg, and to remain off work. (Id.).

On May 2, 2011, Petitioner had another follow up visit with Dr. Conn. (PX9). Dr. Conn noted that the wound looked better and released Petitioner back to work in terms of the wound. (Id.). He released Petitioner to return as needed and noted Petitioner had now started treating with Dr. Silberman due to nerve impingement. (Id.).

Over Petitioner's foundation objection, Respondent entered eight photographs purporting to be of the Petitioner at a barbeque on or about May 2, 2011 that appear to be taken from the Facebook page of Gloria Cox-Harris, who was not identified by either party at trial. (RX4). Respondent did not identify where these photographs were taken nor was Petitioner asked. Petitioner testified he attended a barbecue on or about May 2, 2011 but did not testify that the eight photographs

were from that barbeque. In the photographs marked "a" and "e," which appear to be the same photograph with "e" being slightly zoomed in on, Petitioner is standing next to a tree. (PX4). In photograph "b," Petitioner is standing next to some poles with his arms crossed. (Id.). In photograph "c," Petitioner is sitting in a chair next to a woman who is sitting in another chair. (Id.). In photograph "d," Petitioner appears to be walking while carrying a foldable chair, which he indicated weighed approximately two pounds. (Id.). In photograph "f," Petitioner is standing and talking to another male individual. (Id.). In photograph "g," Petitioner is standing next to a pole talking to another male individual. (Id.). In photograph "h," Petitioner is standing and talking to another male individual. (Id.).

Although Petitioner testified he has used crutches since March of 2011, the Arbitrator notes he is not using crutches in any of these photographs that purport to have been taken three years and three months before the date of hearing. However, the Arbitrator also notes that as of the date of hearing, Petitioner had calluses on his bilateral wrists due to chronic use of his crutches, which were viewed by the Arbitrator, and he also testified to additional calluses under his arms due to the chronic use of crutches.

Pursuant to the recommendations made by Dr. Silberman, Petitioner underwent MRI scans of his right foot and right tibia/fibula on May 24, 2011. (PX10). He underwent a three phase bone scan on June 13, 2011. (Id.). Dr. Silberman provided Petitioner with a referral to Dr. Shanu Kondamuri at the Pain Center of St. Mary Medical Center on June 8, 2011. (Id.).

Section 12 Examination by Dr. Simon Lee

At the request of the Respondent, Petitioner was examined pursuant to Section 12 of the Act by Dr. Simon Lee of Midwest Orthpaedics at Rush on August 16, 2011. (PX4). Dr. Lee noted Petitioner had undergone reasonable treatment up to date that included MRIs, a bone scan, and an EMG/NCV, which was positive for tarsal tunnel syndrome. (Id.). He noted that the MRIs and bone scan were all essentially normal. (Id.). He indicated Petitioner was not using any assistive devices at that visit but was unable to completely place his right heel on the ground, mainly walking on the right forefoot. (Id.).

Dr. Lee concluded that medical treatment to date had been reasonable and necessary and related to the work accident of February 19, 2011. (PX4). He diagnosed Petitioner with post right tibial contusion with subsequent abscess and

neuritis with posttraumatic tarsal tunnel syndrome. (Id.). He stated Petitioner could work in a sedentary position but would be unable to drive himself. (Id.).

At the request of Respondent, Dr. Lee drafted an addendum report dated August 31, 2011. (PX4). He was provided with and reviewed additional medical records. (Id.). He concluded that the additional medical records supported and confirmed the contusion, abscess, and infection as well as the subsequent development of a tarsal tunnel syndrome in the right foot. (Id.). He noted that a formal tarsal tunnel release may be needed if physical therapy and medication management did not alleviate the condition. (Id.).

Medical Treatment with Dr. Shanu Kondamuri

Following his examination by Dr. Lee and pursuant to the referral of Dr. Silberman, Petitioner testified he first treated with Dr. Shanu Kondamuri on November 1, 2011. (PX15 Dep. Ex.2). Dr. Kondamuri noted Petitioner's work accident of February 19, 2011 wherein a pallet shifted and fell down his right leg onto his shin. (Id.). After taking Petitioner's history and a physical examination, Dr. Kondamuri noted it was likely that Petitioner had developed complex regional pain syndrome ("CRPS") in his right leg as well as tarsal tunnel syndrome. (Id.). He further indicated that this diagnosis was secondary to cellulitis due to the work-related injury. (Id.). He indicated Petitioner had a "...reddish-blue discoloration of the right foot, heel, sole of the foot, and distal lower leg." (Id.). He also noted evidence of allydonia, hyperalgesia, and increased local temperature change, which he indicated all strongly suggested CRPS. (Id.).

Dr. Kondamuri advised Petitioner to being a physical therapy program and that he would likely need to undergo multiple lumbar sympathetic block injections. (PX15 Dep. Ex.2). He advised Petitioner if this treatment was not successful, he may need to be considered for spinal cord stimulation. (Id.). At this visit, Dr. Kondamuri provided Petitioner with his first sympathetic block injection. (Id.). He concluded that Petitioner was unable to work his regular job but may work in a modified position with no standing and no driving more than ten minutes due to his difficulties with weight bearing. (Id.).

Petitioner returned to Dr. Kondamuri for his first follow-up visit on November 15, 2011. (PX15 Dep. Ex.2). He advised Petitioner that the likelihood of successfully treating his CRPS was minimized based on the fact that his disease had been present for roughly six to ninth months. (Id.). Petitioner continued to follow-up with Dr. Kondamuri and underwent additional lumbar sympathetic block

injections on November 29, 2011; December 13, 2011; January 10, 2012; January 24, 2012; and February 7, 2012. (Id.).

Petitioner's Return to Light Duty Work for Respondent

During the time period in which he was undergoing a series of sympathetic block injections, Petitioner testified that he returned to work in a light duty capacity for the Respondent on December 15, 2011. Because he was still unable to drive due to the work-related CRPS in his right leg, Petitioner was provided a taxi cab by the Respondent to take him from home to work and back each day. While performing this light duty job, Petitioner was living at his home in Wheatfield, Indiana. Petitioner explained that each day upon arriving to Respondent, he performed his light duty job in a small room with no windows.

On occasion, he was instructed to sort bolts. If there were no bolts to sort, he sat in the room with no other work to perform. He testified he performed this job for Respondent from December 15, 2011 through April 3, 2014 when he was advised that no light work was available. During this period of two years, three months, and nineteen days, Respondent provided a taxi cab to transport Petitioner.

Dr. Kondamuri and Spinal Cord Stimulator Recommendation

Petitioner testified that he continued to treat with Dr. Kondamuri after he returned to work in a light duty capacity. On February 21, 2012, he followed up with Dr. Kondamuri after completing the series of six lumbar sympathetic block injections. (PX15 Dep. Ex.2). Dr. Kondamuri noted Petitioner only attained about a twenty-percent reduction in his pain compared to when he was first treated three months earlier. (Id.). He stated, "At this point, the only treatment option that I have for him that has a high likelihood of success in controlling his pain and returning him back to his premorbid state would be to provide him with a trial of spinal cord stimulation." (Id.). He stated that the trial would be performed for several days and if he had greater than fifty-percent relief of pain, he may be considered for a permanent stimulator. (Id.).

First Section 12 Examination by Dr. Richard Noren

On April 12, 2012, at the request of the Respondent, Petitioner was evaluated by Dr. Richard Noren of Pain Care Consultants pursuant to Section 12 of the Act. (RX1 Dep. Ex.1). Dr. Noren noted Petitioner was using crutches constantly at that time and he was unable to place weight on his foot. (Id.). He stated Petitioner

uses his right shoe as a slipper with the heel portion of the sneaker rolled up, keeping his heel off the ground. (Id.). Petitioner had a seat in his shower for bathing purposes. (Id.).

Dr. Noren physically examined Petitioner as well. (RX1 Dep. Ex.1). He noted the right foot was cool to the touch compared to the left. (Id.). There were hair changes in the right foot with absent hair and slight hair pattern on the left. (Id.). He noted a red/purple discoloration of the right foot as well as a shiny discoloration to the skin. (Id.).

Dr. Noren agreed that a trial spinal cord stimulator was reasonable. (RX1 Dep. Ex.1). He opined that the trial should be at least five to seven days and that one of the goals would be to allow Petitioner to ambulate with placement of his right foot and heel on the ground. (Id.). He further concluded that Petitioner was not capable of driving at that time. (Id.).

Implantation of the Trial Spinal Cord Stimulator

Following his examination by Dr. Noren, Petitioner returned to Dr. Kondamuri on May 1, 2012. (PX15 Dep. Ex.2). Dr. Kondamuri noted they were still awaiting a decision from Respondent regarding authorization to proceed with the trial stimulator. (Id.).

During the cross examination of Petitioner, Respondent produced a speeding ticket dated May 28, 2012 given at 6:15 p.m. (RX3). Respondent's Exhibit 3 also included a guilty plea dated June 1, 2012 and signed by "Phillip Cox." Petitioner confirmed that the 2008 black Lincoln and driver's license number listed on the speeding ticket belonged to him. The ticket indicated the driver was going 83 miles per hour in a 65 mile per hour zone in Macon County, Illinois. (RX3).

Petitioner testified that he was not the person driving his car with his driver's license on May 28, 2012 when an individual received this speeding ticket. He testified that the signature appearing on the June 1, 2012 guilty plea was not his signature. He testified that when signing legal documents, he always uses his middle initial, which is J. The Arbitrator notes that Petitioner's Exhibit 10 includes a copy of his driver's license that expired on August 9, 2012 and his signature includes the middle initial J Petitioner's exhibit 19, a copy of the attorney representation agreement he signed for this claim, also includes his signature with the middle initial J. Petitioner's exhibit 20, a copy of his current driver's license, also includes his signature with the middle initial J. Petitioner testified that the two driver's license signatures and the attorney representation

agreement contained his actual signature. The Arbitrator notes that the signature on the guilty plea appears similar to the confirmed signatures of the Petitioner but no handwriting opinion was entered by either party to confirm or deny the authenticity of the signature in question.

Petitioner admitted that he had given his brother his driver's license to use as well as his black Lincoln. He testified that his brother did not have a valid license due to having been arrested for driving under the influence. He testified he allowed his brother to do this in exchange for periodic rides back to his home in Godfrey, Illinois, where his wife continued to live while he worked for Respondent in Chicago. Petitioner believes that his brother was the driver ticketed for speeding on May 28, 2012. He indicated he had gotten tickets using his identity previously and had to hire an attorney to clear up some legal matters caused by his brother's actions. Petitioner moved for a bifurcation of the trial in order to subpoena Petitioner's brother to testify but the Arbitrator denied this motion. Petitioner testified he has not been able to and has not driven a vehicle since approximately the date of his work accident.

The day after the speeding ticket was given to an individual using Petitioner's vehicle and driver's license, Petitioner had a follow-up visit with Dr. Kondamuri. (PX15 Dep. Ex.2). Dr. Kondamuri noted that Petitioner complained of aching, sharp, throbbing, tingling, numbness, and burning pain to the right leg from the knee down. (Id.). Petitioner stated his average pain since his last visit was eight on a scale of one to ten. (Id.). Dr. Kondamuri noted Petitioner would be scheduled for implantation of the trial spinal cord stimulator as soon as they received approval. (Id.).

Petitioner followed up again with Dr. Kondamuri's office on June 26, 2012 and July 17, 2012 while they continued to wait for approval from Respondent to proceed with the trial stimulator. (PX15 Dep. Ex.2). At the July 17 visit, Mary Malick, N.P. noted, "He will be evaluated by a psychiatrist per workmen's compensation request." (Id.). On July 30, 2012, Daniel L. Schultz, PhD, HSPP, evaluated Petitioner and concluded Petitioner was emotionally stable enough to undergo the trial stimulator and recommended that he be allowed to have the planned surgery. (Id.). At his August 7, 2012 visit, Dr. Kondamuri noted they had obtained approval to proceed with the trial stimulator. (Id.). The trial stimulator was surgically implanted by Dr. Kondamuri on August 21, 2012. (Id.).

Two days later on August 23, 2012, Petitioner returned to Dr. Kondamuri and the stimulator was removed. (PX15 Dep. Ex.2). Petitioner testified that he normally goes to bed each night at 9:00 p.m. He testified that it takes him around twenty

to thirty minutes to fall asleep and that he is in a lot of pain while he tries to sleep. He explained that his leg and back is in significant pain while attempting to sleep. He testified that for the two days that he had the spinal cord stimulator implanted, he was able to fall asleep in about five or ten minutes. He testified he was more relaxed, did not feel stressed, and had significantly less pain. Currently, Petitioner testified he wakes up at least three to four times per night due to his pain. He testified that while he had the trial stimulator, he may have woken up one time and had much less pain. At his August 23, 2012 visit, Petitioner stated he was able to sleep for the first time in greater than six months and attributed that to the spinal cord stimulator. (PX15 Dep. Ex.2).

Petitioner testified that while he had the trial stimulator implanted, he had significant reductions in his pain. He testified he was able to put some weight on his right foot while walking with his crutches. He testified that his pain was reduced more when he turned the machine up but this also caused an electric like shocking charge from his back down into his right leg. At his August 23, 2012 visit, Petitioner advised Dr. Kondamuri that his pain was sixty to seventy-percent improved while using the stimulator. (PX15 Dep. Ex.2). Dr. Kondamuri noted Petitioner was able to walk more efficiently with less use of his crutches when the stimulator was functioning. (Id.). Dr. Kondamuri concluded Petitioner was an, "...excellent candidate for spinal cord stimulation..." (Id.). He did, however, recommend an MRI scan of Petitioner's thoracic spine due to some difficulty they had in placing the leads in the lower thoracic spine. (Id.). Dr. Kondamuri further indicated this could be due to a narrowed spinal canal and they may need to consider implantation of surgical paddle leads in the percutaneous stimulators. (Id.).

Second Section 12 Examination by Dr. Richard Noren

Following the spinal cord stimulator trial, Respondent requested and obtained an addendum report from Dr. Noren dated November 8, 2012. (RX1 Dep. Ex.5). After reviewing the operative report dated August 21, 2012, Dr. Noren questioned why two of the stimulator electrodes were placed at the cervical level. (RX1 Dep. Ex.5). He noted in his addendum report that this would not have been indicated, warranted, or necessary medical care. (Id. at 1.). He concluded that the two day stimulator trial was inadequate, that the cervical leads were placed incorrectly, and that surgical implantation of a permanent spinal cord stimulator was not indicated. (Id. at 2.). Following receipt of this second report, Respondent obtained a second Section 12 examination of Petitioner performed by Dr. Noren on January 10, 2013. (RX1 Dep. Ex.7).

After having the opportunity to examine Petitioner a second time, Dr. Noren reached some additional conclusions regarding the permanent stimulator. (RX1 Dep. Ex.7). First, he was provided and reviewed an amended surgical report dated December 17, 2012 noting placement of the leads at the approximate level overlying the T8 and T9 vertebral bodies rather than at the cervical level. (Id. at 3.). He indicated that this would have been the correct level for stimulation of the right lower extremity. (Id.).

Dr. Noren noted that Petitioner advised him that placement of the trial stimulator made his pain "tolerable." (RX1 Dep. Ex.7 p. 2.). He also noted that the electrodes would cause shocking pain and severe shocking sensation with ambulation, which the arbitrator notes is similar as to what Petitioner testified to during the hearing. (Id. at 2.). Dr. Noren indicated that Petitioner had "no relief of pain with walking, sitting, or standing." (Id.).

Dr. Noren also indicated he reviewed the initial follow up notes of Dr. Kondamuri dated September 18, 2012 but stated there was no recording of any success or failure of the trial. (RX1 Dep. Ex.7). He noted there was no review of the specific side effects within that report and that the history of present illness recorded in each of the office notes dated September 18, October 9, and December 18, 2012 were all identical. (Id. at 3-4.). The Arbitrator notes that Dr. Noren did not review the actual initial office notes following the stimulator trial dated August 23, 2012 prior to drafting his January 10, 2013 report. Dr. Noren concluded that the trial stimulator did not provide an effective improvement in Petitioner's pain and that the potential success or failure in proceeding with a permanent stimulator could not be determined due to an inadequate trial. (RX1 Dep. Ex.7 p. 4). Instead, he recommended additional adjuvant medications or alternative medications. (Id.). He noted Petitioner had not reached maximum medical improvement and physical and desensitization therapy may be helpful in reducing his pain. (Id. at 4-5). Lastly, he concluded that Petitioner does have complex regional pain syndrome and his complaints are causally connected to his work accident of February 19, 2011. (Id.).

Testimony of Dr. Richard Noren

In addition to drafting his three reports, Dr. Noren was also called as a witness on behalf of Respondent and testified by way of evidence deposition on July 30, 2013. (RX1). Dr. Noren testified regarding his initial evaluation of Petitioner on April 12, 2012. (Id.). He summarized the findings contained with his report of the same date. (Id.). He testified there is not a minimum amount of time that a trial spinal cord stimulator should be used to determine whether to proceed with

permanent implantation but most believe it should last between three and ten days. (Id. at 14). He testified, "...there becomes a balance between appropriate length of time and risk of infection because it's going through the skin." (Id.).

Dr. Noren testified that when deciding whether to proceed with permanent implantation of a stimulator after a trial, he reviews a patient's functional improvements in his or her previous pain symptomatology. (RX1 p. 15). He testified a successful trial stimulator should produce at least fifty-percent relief. (Id. at 16). He testified that a two day trial would only be valid if the patient reported 100 percent of pain being gone during those two days. (Id.). During his deposition, Dr. Noren was provided with the August 23, 2012 office notes of Dr. Kondamuri for the first time. (Id. at 22). He noted that this office note indicated Petitioner had advised Dr. Kondamuri that he had sixty to seventy percent improvement with the trial stimulator, that he was sleeping better, and that he was able to walk more efficiently with less use of crutches. (Id.). Respondent's counsel asked Dr. Noren if reading these office notes changed his opinion regarding implantation of the permanent spinal cord stimulator. (Id. at 23). In response, Dr. Noren stated, "Based on this report that I'm reading from Dr. Kondamuri, he's reporting 60 to 70 percent improvement in function in a patient with CRPS with a trial. So yes, that would change my opinion." (Id. at 23-24). He further indicated that when he personally examined him on January 10, 2013, Petitioner stated he got fifty to seventy-five percent relief with the trial stimulator and that he had two nights of good sleep. (Id. at 27). He testified that Petitioner advised him that the electrodes were causing a shocking sensation when he stood up. (Id.). He agreed that Mr. Cox's reported relief was consistent with what was contained with Dr. Kondamuri's office notes of August 23, 2012. (Id. at 27-28).

Dr. Noren testified Petitioner stated he was unable to walk with the trial stimulator on because he would receive a painful shocking sensation in his spine. (Id. at 28.). He testified Petitioner told him he was only able to turn the stimulator on when he laid in bed because of a shocking sensation in his leg. (Id. at 28-29). Dr. Noren testified these complaints were significant in assessing the effectiveness of the stimulator. (Id. at 29.). He testified this told him the stimulator was not only not helping but it was probably causing some painful problems as well. (Id.). Dr. Noren stated he would have had a patient with these same complaints come in to reprogram the stimulator before deciding to proceed with permanent implantation. (Id. at 30). He testified that the August 23, 2012 office notes of Dr. Kondamuri did not mention any issues Petitioner had with ambulation while using the trial stimulator. (Id.). He concluded that these office notes, which he reviewed for the first time during his testimony, did not change

his opinion regarding whether to proceed with the permanent stimulator. (Id. at 34.).

On cross examination, Dr. Noren agreed that Petitioner's fifty to seventy-five percent pain relief with the trial stimulator met the criteria for pain relief he uses within his own practice when determining whether to proceed with a permanent stimulator. (RX1 p. 45.). Dr. Noren was asked the following hypothetical:

> *Hypothetically, Doctor, if Mr. Cox reported that he was able to walk more efficiently due to reduction in his pain with the stimulator on, that he was able to sleep for two nights for the first time in six months with the stimulator on, that he had pain relief while standing, sitting, and lying down with the stimulator on, and that he had only had shooting pain form his back to his leg when he leaned forward, would these facts in any way change your opinion that Mr. Cox was a candidate for a permanent spinal cord stimulator?*

In response, Dr. Noren testified that these facts would suggest that the trial may have been effective but attempts to reprogram the stimulator may have also been effective in helping clarify whether the trial was effective or not. (Id. at 54-55.).

Dr. Noren testified that ninety-five percent of independent medical examinations he performs are for workers' compensation cases. (RX1 p. 57.). He testified that one-hundred percent of the examinations he does in workers' compensation cases are for the respondents or insurance companies. (Id. at 57-58.). He testified he is board certified in anesthesia with a subspecialty in pain management. (Id. at 5.). He did one research trial related to spinal cord stimulators, which occurred in 2000. (Id. at 60.). He indicated this trial was for people with back pain who were implanted with a stimulator. (Id.).

Testimony of Dr. Shanu Kondamuri

Dr. Kondamuri was called as a witness at the request of Petitioner and testified by way of evidence deposition on June 7, 2013. (PX15). He testified he is board certified in internal medicine, anesthesiology, and pain medicine with a specialty certification in pain medicine from the American Board of Anesthesiology. (Id. at 7.). He testified regarding several publications he has had written, including "Impedance Variations in Spinal Cord Stimulation During Posture Change" in 2012; "Maintaining Spinal Cord Stimulation Therapy with Modern Programming Technology" in 2011; as well as five additional publications dated 2008 through 2010. (Id. at 10 and PX15 Dep. Ex.1 p. 3-4.). He further explained that he won

"Best Abstract Award" for his 2008 publication, "2-D Electronically Generated Lead (EGL) Scan: A Feasibility Study," which is an award given to the publication considered the best based on scientific merit. (Id. at 11.). He also explained several presentations he has recently given in 2011, 2012, and 2013 regarding spinal cord stimulators. (PX15 p. 12 and PX15 Dep. Ex.1 p. 5).

Dr. Kondamuri testified regarding his treatment of Petitioner dating back to November 1, 2011. (PX15 p. 14-15). He summarized his treatment of Petitioner since that time. (See PX15). He explained what a trial spinal cord stimulator is, how it works, and why they are used before determining whether to proceed with a permanent implant. (Id. at 27-28.). He testified that the standard protocol is a minimum fifty percent subjective pain relief with use of the trial stimulator. (Id. at 30.). He testified additional factors he uses to determine whether to proceed with a permanent implantation include a patient feeling "fabulously better," getting even higher than fifty percent pain relief, improved function, decreased medication usage, and an ability to walk. (Id. at 31.).

Dr. Kondamuri testified he implanted the trial stimulator into Petitioner on August 21, 2012 and he explained in detail exactly how this procedure was performed. (PX15 p. 32-38.). He testified that two days later, Petitioner returned to his office. (Id. at 38.). He testified Petitioner advised him of sixty to seventy percent relief of his right lower extremity pain, which he noted was clearly due to stimulation that he was receiving. (Id.). Petitioner advised him he was able to walk much more than he was prior to the stimulator. (Id. at 38-39.). He testified that one really important result was Petitioner was able to sleep those two nights whereas the last year prior he had not been able to sleep a full night because of his severe pain. (Id. at 39.). Dr. Kondamuri testified Petitioner was a good candidate for implantation of a permanent spinal cord stimulator based on this two day test. (Id. at 40.). However, he did indicate there was some difficulty inserting the stimulator in his spinal canal because the thoracic spine may have been somewhat narrowed. (Id.). He recommended an MRI of Petitioner's thoracic spine before doing a permanent implant to evaluate the diameter of his spine. (Id.).

Following the trial stimulator, Dr. Kondamuri testified he referred Petitioner to Dr. Levin, a neurosurgeon, to implant the permanent stimulator. (PX15 p. 42-43.). He testified he decided that paddle leads would be better for Petitioner than percutaneous stimulators, but he does not implant the paddle leads in his own practice. (Id. at 43.). He also testified that he reviewed the Section 12 report of Dr. Noren dated January 10, 2013. (Id. at 46.). He responded to this report in his own office notes dated March 26, 2013. (Id. at 47.). Dr. Kondamuri testified, "For

some reason Dr. Noren completely ignored those statements (of the Petitioner at his August 23, 2012 office visit) and incorrectly concluded – I quote from his IME report, that there was an absence of any recorded findings within his medical record, meaning my medical record, suggesting that the stimulator provided benefit. Clearly that's a wrong statement." (Id. at 51.). He further disagreed with Dr. Noren's conclusion that the two day trial was inadequate. (Id. at 52-53.). He explained, "Some spinal cord stimulator trials are performed literally on the table. The trial is basically the patient during the operating room phase. He may have stimulation for half of an hour and that may be enough to say, well, this patient is going to have a permanent implant. In other cases we may go seven days for the trial." (Id. at 53.). He continued, "...there is no clear cut criteria or protocol that must be followed by a physician like myself when they're performing a trial." (Id.). He testified that most physicians prefer to perform shorter trials to reduce the risk of infection and to reduce the amount of scar tissue formation. (Id. at 54-55.).

Petitioner's Medical Treatment Following the Trial Stimulator

Following the completion of the trial spinal cord stimulator, Dr. Kondamuri referred Petitioner to Dr. Marc Levin, a neurosurgeon, to perform the permanent spinal cord stimulator implantation. (PX15 Dep. Ex.2). At his first appointment on October 22, 2012, Dr. Levin noted Petitioner had undergone a stimulator trial and had done, "...quite well stating that he did get 50% improvement from the trial and he was especially able to sleep which is something he has not been able to do since the injury." (PX12). Dr. Levin recommended proceeding with the implantation of the permanent stimulator on November 30, 2012 with placement of the paddle leads in the T8 and T9 areas, "...because of the patient's successful trial." (Id.). The Arbitrator notes that Dr. Levin incorrectly noted Petitioner's injury was to his left ankle at this initial visit as well as at his follow up visit on December 6, 2012. (Id.). At that first follow visit, Dr. Levin indicated they did not proceed as they were waiting on authorization. (Id.). At the next visit on January 31, 2013, Dr. Levin correctly noted the injury was to Petitioner's right leg. (Id.). He continued to recommend implantation of the permanent spinal cord stimulator but they continued to wait for authorization. (Id.).

Petitioner testified that he agreed to undergo a therapy program at the Rehabilitation Institute of Chicago at Respondent's request, which was based upon the recommendations made by Respondent's Section 12 examiner, Dr. Noren. Petitioner testified that he completed this entire program. He testified that his pain had not changed compared to how he felt before beginning the program. During this same time period, Petitioner testified he continued to work

in the same light duty job at Respondent. He testified he was still using his crutches and received a ride back and forth to work each day by way of taxi cab. The parties stipulated that as of April 3, 2014, Petitioner was no longer offered light duty work and was entitled to temporary total disability benefits. (See Arb.Ex1). Petitioner testified that he has remained off work since April 3, 2014. He testified he has educated himself with the assistance of his wife as to the benefits and potential complications associated with the implantation of a permanent spinal cord stimulator and wants to proceed with this surgery.

Vocational Assessment by Susan Entenberg

At the request of his attorney, Petitioner underwent a vocational rehabilitation assessment with Susan Entenberg of Rehabilitation Services Associates on May 1, 2014. (See PX17). Ms. Entenberg drafted a four page report dated May 7, 2014. (Id.). She took a history from Petitioner and summarized her findings in her report. (Id.). At the time of her report, Petitioner was fifty-six years old. (Id. p. 1). Petitioner testified he completed school through the eighth grade but dropped out to work in ninth grade. (Id.). Petitioner testified he eventually obtained his GED in the 1980's.

Ms. Entenberg summarized medical records she was provided and noted that Petitioner's work restrictions are sedentary with use of crutches for all ambulation. (PX17 p. 3). She further noted Petitioner is unable to drive and was driven to Respondent by taxi cab while he was offered light duty work. (Id. at 2-3).

Ms. Entenberg concluded that Petitioner is not an appropriate candidate for vocational rehabilitation services and that he has no functional employability and access to a stable labor market. (PX17 p. 3). In reaching this conclusion, Ms. Entenberg further noted Petitioner's GED education, no computer skills, use of crutches, no transferable skills, limited physical tolerances, his need to lie down throughout the day, and that the activities given to him by Respondent for a light duty job was not gainful activity and cannot be considered gainful employment. (Id.). She further explained the basis for her conclusions by referring to the principles outlined in the Illinois Supreme Court case of *National Tea Co. v. Industrial Com.*, 73 Ill. Dec. 575 (Ill. 1983). (Id. at 3-4).

Vocational Assessment by Julie Bose

At the request of Respondent, Petitioner underwent another vocational rehabilitation assessment with Julie Bose of MedVoc Rehabilitation, Ltd. on May

23, 2014. (See RX2). Ms. Bose drafted a seven page report dated May 29, 2014. (Id.). She took a history from Petitioner and summarized her findings in her report. (Id.). The history contained in her report was similar to the findings contained within Ms. Entenberg's report as explained above.

After reviewing Petitioner's background and medical history, she concluded Petitioner is not medically able to return to his position with Respondent as a market manager. (PX2 p. 6). She further noted his sedentary work restrictions and that he has no transferrable skills from his work at Respondent allowing him to perform a sedentary position. (Id. at 6-7). She ultimately concluded Petitioner is capable of an entry-level sedentary unskilled position. (Id. at 7). She recommended proceeding with "...paper and pencil vocational testing..." (Id.).

Ms. Bose did not provide a labor market survey indicating what "entry-level sedentary unskilled" positions were currently available. She did not address his inability to drive to and from work and how that would affect his return to gainful employment. Petitioner testified that Ms. Bose also was retained by Respondent as a nurse case manager when he was originally injured and that she had attended his Section 12 examination with Dr. Simon Lee in August of 2011.

Petitioner's Ongoing Medical Treatment

Since he completed the therapy program at the Rehabilitation Institute of Chicago, Petitioner testified that he continues to treat with Dr. Kondamuri. He testified his most recent visits occurred on May 6 and July 29, 2014. He testified they are waiting to proceed with the permanent spinal cord stimulator. He noted that no other treatment, except medication management, is currently being recommended.

CONCLUSIONS OF LAW

F. WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL BEING IS CAUSALLY RELATED TO THE INJURY?

The Arbitrator finds that Petitioner's present condition of ill-being is causally related to his work accident of February 19, 2011 while working for Respondent.

The Petitioner testified credibly regarding his stipulated workplace accident of February 19, 2011. Although his credibility was minimally reduced on cross-examination when he admitted to providing a copy of his driver's license to his

brother to use, the Arbitrator does not find that this incident supplants the other overwhelming evidence that his condition is directly related to his accident. The history of accident is well documented within the treating medical records. Most importantly, every physician who either treated or examined Petitioner and provided an opinion agreed that his current condition of ill-being is causally related to his work accident, including but not limited to Drs. Lewis, Conn, Silberman, Kondamuri, Levin, Coe, Lee, and Noren.

For the foregoing reasons, the Arbitrator finds that Petitioner's current condition of ill-being, including complex regional pain syndrome, tarsal tunnel syndrome, as well as his associated hip, leg, and back pain, is causally related to his work-related accident of February 19, 2011.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

The Arbitrator finds that medical services provided to Petitioner have been reasonable and necessary. Respondent has not paid all appropriate charges.

Petitioner has undergone an aggressive treatment program aimed at slowing the effects of his complex regional pain syndrome. The treating physicians as well as the Respondent's experts have all agreed that treatment that has been provided has been both reasonable and necessary to address his condition. The only true dispute in this claim is the correct ongoing care.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $32.494.62 to Porter Memorial Hospital, $212.00 to St. Mary Medical Center, $200.00 to Pain Management Specialists, and $4,417.90 to Injured Workers' Pharmacy, as provided in Sections 8(a) and 8.2 of the Act.

K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

The Arbitrator finds that Respondent shall authorize the treatment that has been recommended by Drs. Kondamuri and Levin, which includes implantation of a permanent spinal cord stimulator.

The Arbitrator has already found that Petitioner's ongoing problems and symptoms are causally related to his injuries sustained on February 19, 2011. The main issue in this matter is the differing opinions of Respondent's Section 12 examiner, Dr. Noren, versus Petitioner's treating pain specialist, Dr. Kondamuri, and neurosurgeon, Dr. Levin.

Dr. Noren agreed that Petitioner was a candidate for the trial spinal cord stimulator but testified against a permanent implant due to the length and outcome of the trial. Using the same evidence gained during the trial, both Drs. Kondamuri and Levin recommended proceeding with the permanent implant. Both treating physicians noted Petitioner's fifty to seventy percent reduction in his pain complaints and ability to sleep for the two nights that he had the trial stimulator. Dr. Noren dismissed these results and pointed to Petitioner's inability to walk while using the stimulator and the electric like charges he felt while using the device. Dr. Kondamuri addressed these issues and the Arbitrator finds more credibility in the opinions of Dr. Kondamuri compared to Dr. Noren.

In essence, their differing opinions are seemingly based on differences in their own theories of practice rather than what is simply the correct procedure and what is not. The Arbitrator notes Dr. Kondamuri's significant experience in the area of spinal cord stimulators as evidenced by his testimony and C.V. Dr. Kondamuri explained that there is no protocol that must be followed when a physician is performing a trial stimulator. He indicated they can, in certain circumstances, last only an hour or less. Dr. Noren did not testify as to actual protocols but relied on his own theories used in his own practice.

Also not insignificant is that Petitioner agreed to and underwent the treatment suggested by Dr. Noren and it proved to be unsuccessful. The only other treatment being recommended, aside from medication, is the permanent spinal cord stimulator. Petitioner testified to, and it is also corroborated by the contemporaneous medical records, significant reductions in his pain and his ability to finally sleep at night while using the trial stimulator.

For these reasons, the Arbitrator finds that Respondent shall authorize the permanent spinal cord stimulator as recommended by Drs. Kondamuri and Nevin.

VOCATIONAL REHABILITATION SERVICES

Both Petitioner and Respondent entered into evidence vocational rehabilitation reports drafted by vocational rehabilitation counselors. Petitioner's counselor, Ms. Entenberg, concluded Petitioner is not a candidate for vocational rehabilitation services and that he has no functional employability or access to a stable labor market. She noted Petitioner's GED education, lack of computer skills, use of crutches, lack of transferable skills, limited physical tolerances, his need to lie down throughout the day, and that the activities given to him by Respondent for a light duty job were not gainful activity and cannot be considered gainful employment.

Ms. Bose confirmed Petitioner's sedentary work restrictions and that he has no transferrable skills from his work for Respondent. She, however, concluded Petitioner is capable of an entry-level sedentary unskilled position. She explained that with training, including but not limited to, basic classes and keyboarding skills, she may be able to assist him in finding a sedentary clerical position. Although not addressed in her report, the Arbitrator notes Petitioner is unable to drive using a traditional vehicle. Respondent would also need to provide transportation for Petitioner during the vocational rehabilitation process and if he ever secured a position.

For these reasons, the Arbitrator finds that Respondent shall provide Petitioner with vocational rehabilitation services as recommended by Julie Bose and as provided in Section 8(a) of the Act

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tommy Sauls,

Petitioner,

vs. NO: 13 WC 06961

16IWCC0049

Vision Logistics,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, prospective medical expenses, causal connection, temporary total disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent. One should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the Arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

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The Commission affirms and adopts the Arbitrator's decision in all respects, except with regard to the award of prospective medical treatment. For the reasons set forth below, the Commission modifies the Arbitrator's decision and denies the prospective medical treatment that was awarded by the Arbitrator, including the cognitive testing and lumbar surgery. The Commission orders that Petitioner undergo a functional capacity exam ("FCE"). The Commission further orders that this case be remanded for a determination of permanent partial disability and/ or further temporary total disability.

The Petitioner was injured while working as a truck driver on December 21, 2012 when he fell while climbing down from the cab of a truck. The Petitioner testified that he was unconscious for an unknown, but brief period of time. He went to the emergency room the next day and was diagnosed with a concussion, a cervical strain, and a lumbar strain. The Petitioner treated with approximately ten different physicians before undergoing two separate Section 12 examinations for his head injury and spinal issues, respectively. (Tr. 6-13, Px1-Px15, Rx3, Rx4).

Dr. Russell Glantz, a board certified neurologist, conducted the Section 12 examination on July 9, 2013 for the Petitioner's head injury. Dr. Glantz opined in his report that the Petitioner did not exhibit evidence of having a cognitive dysfunction, and that he does not need a neuropsychological exam because he does not have any objective residual cognitive or neurological abnormalities. He also noted that the Petitioner's facial drooping and hearing loss were not related to his fall. Dr. Glantz wrote that the Petitioner claimed that he did not experience facial drooping prior to his December 21, 2012 work accident; however, there is a medical record dated December 26, 2012 that indicates that the Petitioner had facial drooping prior to his work accident. Dr. Glantz testified that for the Petitioner to have experienced a traumatic hearing loss, there would have had to be an injury to the hearing nerve on one side that would be explained by a fracture or an injury in the ear canal. This injury would have been visible on a brain scan; but, the Petitioner's scan did not exhibit such an injury. (Rx4).

Dr. Glantz wrote in his report that there was no evidence from Petitioner's vestibular testing that the Petitioner had an inner ear abnormality. He also opined that Petitioner's post concussion syndrome injury would result in headaches for some weeks post accident, but his current complaints of headaches, dizziness, and trouble focusing would not be connected to the accident at the time of the Section 12 exam. Dr. Glantz wrote: "His symptoms may have been present for some weeks after the injury, but there is no physiological reason for them to be persisting. He never had any fracture of the skull, never had any bleeding in the brain. There was never any bleeding in the ear canals either." Dr. Glantz opined that the Petitioner does not require additional medical treatment for his brain symptomatology: "[Petitioner] does not have objective abnormality related to any injury to his brain that occurred as a result of the December 21, 2012 injury." (Id.)

Dr. Glantz also reviewed surveillance footage of the Petitioner. Dr. Glantz observed the footage from May 10, 2013 of the Petitioner moving approximately eighteen (18) pieces of wood without pausing. Dr. Glantz noted during his deposition that the Petitioner then proceeded to

walk normally to his house without exhibiting any pain behaviors after moving the wood. He also testified that the Petitioner had an appointment with Dr. Salehi later that day and reported his back pain to be eight out of ten on a ten-point scale and complained of limitation of back motion. Dr. Glantz opined that those complaints do not correspond to the Petitioner's behavior in the surveillance footage. Dr. Glantz wrote in his report that the surveillance footage of the Petitioner handling the wood is not consistent with the Petitioner exhibiting pain in his back during the Section 12 exam. According to Dr. Glantz, the footage also does not depict evidence of someone that claims instability and dizziness issues or that informs him that they do not do much around the house. He found Petitioner's veracity to be suspect with regard to claims of continued symptoms because of all of the inconsistencies noted above. (Id.).

Dr. Glantz testified via deposition that, from a neurological standpoint, the Petitioner is at maximum medical improvement ("MMI") for his brain condition and that the Petitioner was capable of returning to work as of the July 9, 2013 exam. (Id.).

Dr. Martin Herman, a board certified neurosurgeon, conducted the Section 12 examination on July 16, 2013 for the Petitioner's spinal issues. Dr. Herman testified via deposition that he believed that the Petitioner was malingering and capable of much more than what he demonstrated during his Section 12 exam based on the following: Dr. Herman's examination of the Petitioner and his demonstrated inconsistencies, the surveillance footage of what the Petitioner was capable of doing in comparison to the results from Dr. Salehi's examination of Petitioner, and the Waddell's signs that Dr. Herman observed. Dr. Herman noted in his Section 12 exam report that the Petitioner was observed bending, lifting, and walking outside of his home in the surveillance footage; however, the Petitioner's range of motion was very limited, he walked very slowly, and he had difficulty rising up from his chair when he was examined by physicians. (Rx3).

Dr. Herman also opined that the Petitioner was at MMI as to his lumbar spine as of the July 16, 2013 exam. Dr. Herman testified that the Petitioner did not need treatment for a condition caused by an injury, but instead needed treatment for his degenerative conditions in his cervical and lumbar spine. He disagreed with Dr. Salehi's recommendation that the Petitioner undergo a spinal fusion. Dr. Herman did not think that surgery was indicated and because the Petitioner is at a high level of function. (Id.)

Dr. Herman recommended that the Petitioner undergo an FCE because it would be useful to determine what restrictions, if any, will be necessary for the Petitioner since he believes that the Petitioner is capable of working. An FCE would also be helpful from a validity standpoint in this case, according to Dr. Herman, because an FCE examiner would have a better opportunity to evaluate a patient for a longer time period and with more tests. (Id.)

The Petitioner's lack of credibility is also a factor in the Commission's decision. The Commission reviewed the videotape evidence of the Petitioner, particularly when he was moving approximately twenty (20) boards off of a trailer in his driveway on May 10, 2013. The

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Commission concurs with Dr. Glantz's assessment that the Petitioner's actions do not correspond to Petitioner's complaints of chronic instability and dizziness issues, or his complaint of back pain at a level of eight out of ten (on a ten-point scale) when he saw his physician later that day. (Rx5a, Rx6a, Rx7, Rx7c).

The Petitioner testified at trial that he was not taking any prescribed pain medication and had not been taking any for awhile. He could not recall when he last took any. However, he also testified that his pain level was an eight out of ten (on a ten-point scale) the day of the hearing (a 'ten' necessitating a trip to the emergency room), and that his best pain level is between four and six. He further stated that he will take between two and six Tylenol as needed per day for pain, but that they do not alleviate his pain. The Commission further questions the Petitioner's veracity as it does not seem probable that the Petitioner could tolerate such a high level of pain for so long without seeking relief through prescribed medication. (Tr. 49-55).

Based upon the totality of the evidence and the factual findings above, the Commission finds that the Petitioner failed to prove entitlement to prospective medical treatment for his head injury or for surgery to his lumbar spine.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary total disability benefits of $715.06 per week for a period of 91 and 4/7 weeks, commencing December 22, 2012 through September 23, 2014, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner failed to prove entitlement to prospective medical treatment for his head injury or surgery for the lumbar spine.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner undergo a functional capacity exam ("FCE").

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

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Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $44,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 2 2016

TJT/ gaf
O: 11/9/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

SAULS, TOMMY
Employee/Petitioner

Case# **13WC006961**

VISION LOGISTICS
Employer/Respondent

16IWCC0049

On 11/5/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1315 DWORKIN & MACIARIELLO
ADRIAN CHERIKOS
134 N LASALLE ST SUITE 1515
CHICAGO, IL 60602

1886 LEAHY EISENBERG & FRAENKEL LTD
JAMES P TOOMEY
33 W MONROE ST SUITE 1100
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0049

TOMMY SAULS
Employee/Petitioner

v.

VISION LOGISTICS
Employer/Respondent

Case # 13 WC 6961

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **GERALD GRANADA**, Arbitrator of the Commission, in the city of **GENEVA**, on **9/23/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS 16IWCC0049

On the date of accident, **12/21/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**55774.68**; the average weekly wage was $**1072.59**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**21,451.80** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**21,451.80**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $715.06/week for 91-4/7 weeks, commencing 12/22/12 through 9/23/14, as provided in Section 8(b) of the Act.

Respondent shall pay all reasonable and necessary medical services, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. This includes the related prospective medical treatment recommended by Petitioner's medical providers.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator Granada — **10/30/14** Date

NOV 5 - 2014

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FINDINGS OF FACT

On December 21, 2012, Petitioner, Tommy Sauls, was a truck driver in the employ of Respondent, Vision Logistics. On said date, Petitioner testified that as he was climbing out of the cab to fix a frozen door latch, his right boot got stuck in a large hole in the step of the truck and while trying to remove his right foot from the step, his left foot slipped. After slipping, Petitioner fell backward, striking his back and the back of his head on the pavement. (Testimony of Petitioner, hereinafter "TX," at 9).

Following the accident, Petitioner testified that he "was unconscious for a short period of time," but did not know how long. (TX at 9). After he woke up, he pulled himself up, got back into the truck, noticed his head was bleeding, and regrouped, waiting to feel better. (TX at 10). Petitioner did not immediately report the accident, hoping that he would feel better. After he began to drive to his destination, Petitioner began to feel worse and reported the accident to a dispatcher, one of Vision Logistics four co-owners. He reported the accident and was encouraged by Respondent to complete his assignment, despite reporting that he was "getting dizzy and sick" during the drive. Petitioner testified that he got sick "three times" throughout the day. (TX at 12). Petitioner was ultimately unable to pick up the trailer in Iowa, due to weather, and drove back to pick up a trailer in Joliet before ending his ten hour day on the road. He also testified that he drove no more than 25-30 miles per hour due to the snowy conditions. In further testimony, Petitioner explained that he was "too tired and sick" to go to the doctor the evening of the accident. (TX at 13).

The next morning, December 22, 2012, Petitioner presented to Provena St. Mary's Hospital where he was diagnosed with a concussion, cervical strain, and lumbar strain. The intake sheet memorialized that Petitioner complains that his head was 'still swimming' and that he had pain radiating down his right leg. A CAT scan of the lumbar spine showed no fracture, but noted moderate degenerative changes at the L4-L5 and L5-S1 levels. A CAT scan of the cervical spine similarly revealed no fracture, but noted severe degenerative changes of the C6-C7 level with moderate bilateral neural foraminal stenosis. A final diagnostic, CAT scan of the head, was normal. Petitioner was also treated by Dr. Edwin Hinton of St. Mary's Occupational Health Center, who discharged him with a variety of instructions: prescriptions for Norco and Motrin, no driving for one week, no lifting over ten pounds, avoid working at heights, no bending, no stooping, no twisting, and to follow up with Dr. Panuska in one to two days in the Occupational Health Clinic. (PX 1).

Petitioner next followed up at St. Mary's Occupational Health Clinic, under the care of Dr. Panuska. At follow up visits on December 26, 2012 and December 31, 2012, Petitioner complained of lumbar pain radiating to his leg. Additionally, complaints of blurred vision, dizziness, nausea, and numbness to the right ear persisted; along with pain when rotating his neck. Petitioner was taken off of work on December 26, 2012 and prescribed ThermaCare for the neck and back, as well as Ultracet and brain rest, including no TV or computer work. At the December 31, 2012 follow up appointment, the concussion symptoms were still present, and the doctor indicated a ventral hernia that pre-dated the accident was larger. Petitioner was continued off of work, and a CT scan was ordered for the abdomen. (PX 1)

On January 4, 2013 Petitioner presented to St. Mary's Hospital with chest pain. A CT scan of the chest revealed a nondisplaced anterior left rib fracture. A CT scan of the abdomen yielded imaging of bilateral inguinal hernias and kidney cysts. Petitioner next followed up with Dr. Panuska in Occupational Health January 7, 2013 where he was continued off of work and referred to Dr. Orozco for an evaluation of a

right hand tremor that had developed. On follow up visits January 11 and 18, 2013, Petitioner's symptoms remained the same and he was kept off of work. At the January 11, 2013 appointment, Petitioner's wife noted personality changes characterized by emotional ups and downs. At the January 18, 2013 appointment, Petitioner reported a ringing in his ears was not helped by one of the medications he was taking. (PX 1).

Petitioner presented for a neurological evaluation with Dr. Daniel Orozco on January 21, 2013 at Riverside Neurology Specialists. After an evaluation for ringing in the ears, headaches, and dizzy episodes, Dr. Orozco prescribed Elavil and referred Petitioner to be seen at an ENT clinic. A follow up was planned after four weeks. (PX 2)

Petitioner followed up with Dr. Panuska January 25, 2013 with the same symptoms of back pain and vertigo with nausea. An MRI of the lumbar spine was ordered and Petitioner was kept off of work for an additional month. (PX 1)

On February 4, 2013, Petitioner presented to St. Mary's Hospital with headaches which persisted daily since the accident. Petitioner also complained of problems focusing and was told to follow up with Panuska. (PX 1).

On February 6, 2013, Petitioner presented to Dr. David Krause to evaluate Petitioner for vestibular dysfunction and hearing loss. Dr. Krause diagnosed post-concussion tinnitus, headaches, and intermittent vertigo. Petitioner was instructed to follow up with Panuska and a full battery hearing test was ordered. (PX 3).

On February 8, 2013, Petitioner presented to Accelerated Open MRI for an MRI of the Lumbar Spine. Degenerative changes were found at the L4-L5 and L5-S1 levels. There was an annular tear in the left foraminal aspect of the disc at L2-L3 level. At L3-L4 a 2.5 mm bulge was found. From L4-L5 and L5-S1, paracentral inferior herniations were indicated with 6 mm and 5 mm herniations, respectively. (PX 4).On February 14, 2013, Dr. Panuska added the diagnosis of situational anxiety. The doctor's note indicated a statement by Petitioner's wife indicating she noticed he was becoming more depressed and withdrawn. (PX 1).

On February 15, 2013, Petitioner had a follow up appointment with Dr. Orozco, still complaining of daily headaches. Dr. Orozco changed the treatment plan, instructing Petitioner to discontinue the Elavil and was instead prescribed Neurontin. That same day, Petitioner presented to Riverside ENT Hearing and Balance where he treated with Dr. Sadie Braun for his hearing trouble. Dr. Braun performed a Complete Audiologic Evaluation, after which she recommended binaural hearing aids to improve his hearing and reduce the tinnitus. (PX 2).

On February 27, 2013 Dr. Panuska ordered a STAT brain MRI to evaluate left facial drooping that had begun "several days ago." A history of facial drooping was first discussed with Panuska in a January appointment, but was not treated until the symptom developed late in February. At trial, Petitioner's ex-wife, Dala Sauls, testified that the Petitioner always "smiled crooked" but that Petitioner never received treatment for a facial droop prior to Petitioner's work accident. (Testimony of Dala Sauls at 71). Dala Sauls further testified that the facial droop was not merely more pronounced, compared to the "crooked smile." Rather, Petitioner's face "was different" and the "left side was lower than ever," "the left side

drooped." (Ibid. at 72). Petitioner remained off of work and the brain MRI revealed areas of T2 FLAIR abnormality. Petitioner followed up with Dr. Panuska on March 1, 2013, was told the results of the MRI were essentially within normal limits and was advised the newest diagnosis, left facial palsy, would likely resolve. Petitioner was continued off of work. (PX 1).
On March 18, 2013 Petitioner followed up with Dr. Orozco and reported that his headaches had improved. However, the dizziness, nausea, inability to concentrate, and memory loss were worse. Dr. Orozco increased the dosage of Neurontin at this point, to further improve the headaches and associated symptoms. (PX 2).

On March 21, 2013 Petitioner presented to Dr. Harvey at Neurosurgery Consultants for back pain. After reviewing the Petitioner's symptoms, Dr. Harvey recommended four to six weeks of physical therapy, opining that Petitioner would not require surgical intervention. On March 29, follow up with Dr. Panuska, Petitioner's March treatment history was reviewed, and he was continued off of work as symptoms had neither improved nor resolved. (PX 2).

On April 1, 2013 Petitioner sought out a second choice and presented to Beverly Park Medical Center to be seen by Dr. Michael Foreman. Dr. Foreman treated all symptoms, and referred him to a pain specialist for the lumbar pain and a neurologist for a second opinion on the facial paralysis. Physical therapy was ordered three days a week for four to six weeks. Only two visits were completed in April, at ATI Physical Therapy. Additional sessions were not completed due to Petitioner's inability to tolerate the sessions. (PX 7).

On April 17, 2013 Petitioner followed up with Dr. Orozco. By now, Petitioner had been treating with Dr. Foreman. Dr. Orozco for the first time diagnosed Meniere's disease. (PX 2).

Petitioner's final appointment with Dr. Panuska was April 22, 2013. At this visit, Petitioner reported an inability to complete physical therapy because he got dizzy and threw up. Dr. Panuska kept him off work pending approval for further treatment. (PX 1).

On April 29, 2013, Petitioner was re-evaluated by Dr. Foreman and reported his inability to tolerate physical therapy. Dr. Foreman kept Petitioner off of work until he was cleared by the specialists. (PX 7).

On May 10, 2013, Petitioner presented for an initial evaluation with Dr. Sean Salehi. Dr. Salehi prescribed a combination of physical therapy and injections. Specifically, one or two epidural steroid injections were prescribed at the L4-L5 level and bilateral facet injections were recommended from L4-S1. Dr. Salehi kept Petitioner off of work due to his inability to drive. (PX 10).

On May 28, 2013, Petitioner presented for his initial evaluation with Dr. Neil Allen at Consultants in Neurology. Dr. Allen noted that Petitioner sustained an obvious concussion with cognitive impairment. After reviewing Petitioner's symptoms and treatment history, Dr. Allen recommended neuropsychological testing and kept Petitioner off of work. (PX 5).

Throughout May 2013, Petitioner treated for renal stones, unrelated to the work injury.

On June 4, 2013, Petitioner presented to Accredited Ambulatory Care and received bilateral L4-L5 transforaminal epidural steroid injections and nerve root block. The injections gave minimum relief, as

Petitioner reported at a June 12, 2013 follow up with pain specialist, Dr. Axel Vargas. (PX 12). Petitioner also treated with Dr. Tian Xia on June 21, 2013, who performed additional injections to address Petitioner's headaches. Dr. Xia expressly disagreed with Dr. Vargas' treatment plan with regards to radio frequency ablation. Dr. Salehi agreed and Dr. Xia took over Petitioner's pain management. (PX 13).

At a follow up visit on June 25, 2013 with Dr. Allen, memory and concentration problems were reviewed and new glasses and neuropsychological testing was recommended. (PX 5).
Throughout June and July 2013, Petitioner completed ten physical therapy sessions at Accelerated Rehabilitation. (PX 9). Petitioner also followed up with Dr. Xia, on June 28, 2013 appointment, who performed additional sphenopalatine ganglion nerve blocks to address the headaches. Dr. Xia also confirmed the herniations in the lumbar spine and wanted to perform additional steroid injections which were never approved. (PX 13).

On July 9, 2013, Petitioner presented to Dr. Russel Glantz for a Section 12 examination. Dr. Glantz, a neurologist of Parkview Orthopaedic Group, examined Petitioner for the symptoms related to his head injury. In his report, Dr. Glantz's opinion was that Petitioner's current condition of ill-being was subjective. The doctor also reviewed video surveillance taken of Petitioner on May 10, 2013. Based on the history reviewed by Dr. Glantz and the video surveillance, the doctor believed the symptoms related to the work accident and post-concussion syndrome was resolved and there was no reason they should persist. Dr. Glantz reported that no further treatment was needed, that Petitioner was capable of working without restriction and at maximum medical improvement with regard to his brain condition.

On July 16, 2013, Petitioner presented to Dr. Martin Herman for a Section 12 examination. Dr. Herman, a neurosurgeon at the Center of Brain and Spine Surgery, examined Petitioner for his lumbar spine injury. Herman also reviewed the May 10, 2013 video surveillance. Dr. Herman's opinion, based on his exam and the video surveillance was that Petitioner's symptoms were related to degenerative disease and arthritis. In his report, Dr. Herman wrote that Petitioner did not need additional treatment for his lumbar spine, other than to treat his chronic degenerative spine condition. Dr. Herman also determined Petitioner was capable of working and recommended a Functional Capacity Evaluation to determine the level Petitioner is able to work at.

On follow up visits in July 2013, Dr. Salehi recommended another course of injections before considering a fusion surgery. In September 2013, after failure of conservative treatment, Dr. Salehi recommended the fusion. Petitioner testified at trial that he would like to proceed with the fusion if awarded. (TX at 35).

On an August 6, 2013 follow up visit, Dr. Allen recommended neuropsychological evaluation because of the possibility of loss of self-esteem, loss of self-worth, and posttraumatic stress disorder secondary to the injury. Approval for this treatment was denied throughout, although Petitioner continued to see Dr. Allen for follow up visits on October 29, 2013, February 27, 2014, and June 19, 2014. (PX 5).

The deposition of Respondent's Independent Medical Examiner, Dr. Russell Glantz, was taken on October 31, 2013. The doctor testified that Petitioner's complaints were subjective and could not find any objective evidence that was related to the accident on December 21, 2012. Dr. Glantz did, however, testify that Petitioner was subjectively complaining of a lot of back pain and "might have aggravated his underlying degenerative disease." Dr. Glantz further testified that Petitioner had reached Maximum

Medical Improvement "from the point of view of his brain condition" and did not need additional treatment for his brain condition. In Dr. Glantz's opinion, symptoms of post-concussive symptoms resolve after six months, and the IME was taken seven months after the accident. Of note, Dr. Glantz did not disagree with the reasonableness and necessity of the treatment from the date of accident until the IME. Rather, the doctor's opinions of current condition of ill-being were based in large part on surveillance video that the doctor reviewed prior to the deposition. This video was not reviewed at the time of the deposition and was not provided to Respondent until the date of trial. (RX 4).

The deposition of Petitioner's treating physician, Dr. Sean Salehi, was taken on November 12, 2013. Dr. Salehi testified that Petitioner had a disk herniation at L5-S1 and stenosis at the L4-L5 level. He testified that the herniation was causing radiculopathy. Dr. Salehi testified that Petitioner's symptoms were related to his work accident of December 21, 2014 and recommended a lumbar fusion surgery, as all conservative treatment options had been exhausted. Dr. Salehi testified that if Petitioner was lifting boards for approximately ten to twenty minutes, while taking pain medication, this would not change his opinion on the need for further treatment and surgery. (PX 11).

The deposition of Respondent's Independent Medical Examiner, Dr. Martin Herman, was taken on December 10, 2013. Dr. Herman testified that he performed a breakaway strength test based on a concern Petitioner was feigning weakness and when "coached," Petitioner was able to perform with normal strength. Additionally, the doctor testified at the deposition that he performed an axial loading test on Petitioner's head, which induced low back pain, however, Dr. Herman admitted that this finding was not included in his IME report that was published to both the Petitioner and Respondent. Dr. Herman testified that he saw surveillance video from May 10, 2013 of Petitioner "loading" wood into a trailer for "a period of three to four minutes." This video was not reviewed at the time of the deposition and was not shared with Petitioner until the day of trial. Dr. Herman testified that there was a bulge at the L4-L5 level, rather than a herniation. Dr. Herman further testified that Petitioner was at Maximum Medical Improvement, did not require further treatment, and was "essentially malingering." The doctor admitted that he based his opinions off of the Waddell test and the video surveillance. Herman opined that Petitioner would not be at MMI until a Functional Capacity Evaluation was performed to determine the level at which Petitioner might be able to work. On cross-examination, Dr. Herman testified that "it is possible" that the degenerative condition was aggravated by the work accident and that aggravation might be keeping him from returning to work full duty. (RX 3).

The evidence deposition of Petitioner's treating physician, Dr. Neil Allen, was taken on December 23, 2013. Dr. Allen testified that the myriad symptoms Petitioner presented with and had been treated for, prior to Dr. Allen's care, were consistent with a concussion. Dr. Allen testified that he performed the Montreal Cognitive test, which is designed specifically for patients with concussions. Dr. Allen testified that Dr. Glantz had not performed such a test. Dr. Allen testified that Petitioner had a mild level of impairment based on the results of the Montreal test. Dr. Allen recommended neuropsychological testing and that Petitioner was not able to perform his job duties as a truck driver with his level of impairment. Dr. Allen testified that if petitioner was on sufficient pain medication, he could perform work consistent with what was reported in Dr. Herman and Dr. Glantz' IME reports, as Dr. Allen did not view the surveillance video from May 10, 2013. Dr. Allen's further testified that Petitioner's current condition was related to the work accident of December 21, 2012. (PX 6).

Petitioner testified at trial that on May 10, 2013, his wife brought home a trailer with a few pieces of lumber in it. Petitioner was "feeling less of a man and pretty rotten" about himself. (TX at 21). Petitioner testified that he went outside to "move a few boards off that trailer and lay them down right next to it." To prepare for this activity, Petitioner testified that he took a "handful" of pain pills that morning, more than the recommended dosage. Petitioner further testified that he took the medicine early enough so that by the time he went to his doctor's appointment, the medicine had worn off, and he could accurately describe his pain for the doctor. (Id. at 22).

At trial, Petitioner testified that he never received treatment for pain to his back, neck or head prior to his work accident. He testified that he is receiving Social Security Disability benefits. Petitioner further testified that he has extreme anxiety, noise in his ears, back pain, and headaches. These symptoms have prevented him from enjoying the company of family and friends, as well as activities like boating, camping, gardening, and maintaining a swimming pool. Petitioner testified that he mows his lawn, although he does not do it as often, or as well as he should. Since his divorce, Petitioner testified that he does his own laundry and cooking because he is on his own. He may put off doing laundry, and gets confused while grocery shopping for himself. (TX at 66, 67)
Petitioner testified that his wife filed for divorce in early 2014. He testified that their marriage of thirty years ended because their quality of life suffered and Petitioner's mood swings and anxiety were intolerable.

At trial, Petitioner had one witness, his ex-wife, Dala Sauls. Dala testified that she accompanied Petitioner to nearly all of his doctor appointments after the work accident. Her undisputed testimony was that prior to the work accident, Petitioner had never been treated by a physician for the facial droop, and his facial features in relation to the droop were different after the accident, not merely more pronounced. Dala further testified that she had not contemplated divorcing Petitioner before the accident. However, her testimony was that after the accident Petitioner's demeanor changed. There were mood swings, loss of home, and loss of social life that led her end their 30 year marriage. She testified that Petitioner could not be in large groups of over 3 to 4 people, as the noise would aggravate Petitioner. She testified that Petitioner was unable to perform sexually after the work accident. (Testimony of Dala Sauls at 69, 70, 75, 76).
At trial, Respondents had three witnesses: Tim Dillow, Joe McKay, and Brian Lukasiewicz. All three were field investigators for Sedgwick Factual Photo who conducted surveillance of Petitioner.
Mr. Dillow conducted surveillance on August 21, 2014 and testified that on that date he recorded six minutes of Petitioner leaving his home on bicycle. Mr. Dillow testified that he remained at Petitioner's residence and thirty-five minutes late, Petitioner returned home on bicycle. On cross-examination, Mr. Dillow testified that he mailed in the raw video footage to an address on a pre-labeled Fed-Ex package and had never spoke with the team that handles the editing of the CD. Mr. Dillow testified he conducted surveillance for eight hours on August 21, 2014 and only had six full minutes of footage from those eight hours. (Testimony of Tim Dillow at 80, 91)

Mr. McKay conducted surveillance over four days in July 2013. He testified that he viewed Petitioner out in his yard, not wearing a brace and performing activities such as getting the mail and walking in his front yard. Mr. McKay testified that Petitioner bent at the waist once. Review of the surveillance footage reveals that over July 9, 10, and 11, 2013, Mr. McKay recorded roughly five minutes of activity over twenty-three hours of surveillance.

Mr. McKay also conducted surveillance on August 21, 2014. Mr. McKay testified that he was alerted to Petitioner's bicycle activity and "picked up the trail" from Mr. Dillow. On cross-examination, it was Mr. McKay's testimony that Petitioner biked 3 miles round-trip, with stops at the post office and grocery store in 38 minutes. (Testimony of Joe McKay at 131) Mr. McKay testified that the video was the complete amount of footage he shot, but could not remember how many segments he shot on August 21, 2014. On cross-examination, Mr. McKay further testified that he had no way of knowing that the correct number of video segments was returned on the disc viewed in court from the raw footage he sent in.

Mr. Lukasiewicz conducted surveillance in May 2013, including May 10, 2013. Mr. Lukasiewicz testified that he conducted surveillance over four days – May 2, 3, 10, and 11 – for a total of thirty-five hours. Over the course of the thirty-five hours, the footage was stopped and started every hour on the hour, unless Petitioner's activity was observed. Over the course of thirty-five hours, less than ten minutes of Petitioner's activity was recorded. The activities included Petitioner getting the mail, taking out the garbage, and driving. On May 10, 2013, he recorded four minutes of Petitioner removing wood from a trailer. It was not four concurrent minutes, but three segments of video totaling 4 minutes. Petitioner is seen taking repeated breaks after lifting wood. Mr. Lukasiewicz testified that on May 10, 2013 he observed Petitioner remove wood from the trailer, enter his garage, and use a power tool. All of this activity was over the course of approximately four minutes.

CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's credible testimony and the supporting medical evidence from his treating physicians. The Arbitrator acknowledges the video evidence depicting the Petitioner performing a number of physical activities, but notes that this evidence was not sufficient to show a break in the chain of causation between Petitioner's undisputed accident and his current condition of ill-being. In the video where Petitioner is picking up wood, he is only seen doing this for less than four minutes and the wood does not appear that heavy. As for the video of Petitioner riding his bicycle, the arbitrator notes that the Petitioner did not appear to be riding very fast and sat in an upright position while riding slowly through town. The Arbitrator also finds persuasive the opinions of Petitioner's treating physicians with regard to this issue. These records show that the Petitioner was diagnosed with a brain injury, a lumbar spine injury and the aggravation of a pre-existing hernia. Based on a review of the medical evidence and the Petitioner's uncontroverted testimony, the Arbitrator concludes that these conditions are related to the Petitioner's December 21, 2012 work accident.

2. Based on the Arbitrator's findings with regard to the issue of causation, the Arbitrator finds that the Petitioner is entitled to temporary total disability from the date of his initial medical appointment on December 22, 2012 through the date of the arbitration hearing. Accordingly, the Arbitrator awards the Petitioner TTD commencing December 22, 2012 through September 23, 2014, a period of 91-4/7 weeks, as provided in Section 8(b) of the Act. Respondent shall receive a credit for any TTD or disability benefits it has paid thus far.

3. Based on the Arbitrator's findings with regard to the issue of causation, the Arbitrator finds that the Petitioner's medical treatment thus far has been reasonable and necessary to address his conditions stemming from his work related injury. Accordingly, the Arbitrator award the Petitioner all related medical expenses as set forth in the arbitration exhibits and Respondent shall pay the same, subject to the fee schedule in accordance with Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for

any expenses that it has paid to date . Respondent shall also authorize the prospective medical care recommended by Petitioner's treating physicians, relating to the Petitioner's work injuries. This includes further cognitive testing and lumbar surgery.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MIREYA GARCIA,

Petitioner,

vs.

NO: 10 WC 09050

16IWCC0050

STAFF FORCE COMP U.S.A.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner Attorney Lulay herein and notice given to all parties, the Commission, after considering the issue of attorney fees, and being advised of the facts and law, affirms and adopts the Notice of Rejection of Settlement Contract and Order as stated below and provides further explanation for this affirmance, which is attached hereto and made a part hereof.

The Commission wishes to make clear the reasons why we believe that the Arbitrator's analysis and determinations regarding attorneys fees were very fair and just, and in accordance with law.

Attorney Scholl represented Petitioner from March, 2010 until December, 2012, when the Petitioner discharged Attorney Scholl in favor of Attorney Lulay.

In a review of the approved settlement contract in this case, which is part of the Commission file, the contract was initially executed by Respondent's Attorney Scarpelli on June 7, 2013. Attorney Scarpelli, on the record on February 21, 2014, indicated that he had sent Attorney Lulay the contracts on June 7, 2013. After some time, he then contacted Attorney Lulay to inquire about the status of the contracts. Attorney Scarpelli resent the contracts via email on

August 14, 2013. Thus, it appears that Attorney Lulay did not contact Attorney Scarpelli between June 7 and August 14, 2013 with regard to why he hadn't received the contracts. Attorney Scarpelli indicated that Attorney Lulay acknowledged receipt of the settlement contracts on August 14, 2013 via email. (2/21/14 Tr. 11-12).

The contracts themselves evidence that the Petitioner did not sign the contracts until December 6, 2013, approximately 16 weeks after they were received by Attorney Lulay. While it is possible that the Petitioner took some time to make certain that she wanted to settle her case, this appears to the Commission to be a significant delay, and Attorney Lulay has provided no information or evidence regarding the basis for this delay. The contracts indicate that Attorney Lulay then did not sign the contracts himself until 11 weeks later, on February 20, 2014.

Meanwhile, Attorney Lulay filed his own Motion to Adjudicate Attorney Fees on January 9, 2014. The case in chief, which had still not been presented for settlement, was above the "red line" at that point. Pursuant to Commission Rule 7020.60(b)(2)(C), the matter was set for hearing on February 21, 2014 (*50 Illinois Administrative Code, Chapter II, Section 7020.60(b)(2)(C)*), along with Attorney Lulay's Motion. There is no evidence that Attorney Lulay made written request for a continuance of the case for good cause, pursuant to the same Commission Rule.

As noted by the Arbitrator, Attorneys Scholl and Scarpelli appeared before the Arbitrator on February 21, 2014, but Attorney Lulay did not. According to Attorney Lulay's Motion to Augment Proofs (Lulay Exhibit F), he indicated he did not know the case was above the red line. Attorney Lulay's Exhibit F contains a letter to Attorney Scholl indicating the February 13, 2014 status date, that a "must appear" hearing would be scheduled, and that he planned to pick February 24, 2014 to proceed. This letter makes it clear that Attorney Lulay was well aware that the case was above the red line, and that he must appear at that time. Additionally, Attorney Scholl stated on the record that he had received facsimile confirmation of the February 21, 2014 hearing date from Attorney Lulay. (2/21/14 Tr. 7-8).

The Arbitrator asked Attorney Scholl to call Attorney Lulay to determine why he had not appeared. Attorney Scholl did so, reporting that Attorney Lulay indicated he was sitting at his desk at his office, that he had emailed Attorney Scholl the night prior indicating he would not appear, and that he was not planning to do so. (2/21/14 Tr. 14-15). Attorney Scholl stated that the email was sent to his firm's general email address, not to Scholl's personal email address. Attorney Scholl stated that the first time he had seen the email was when Attorney Scarpelli showed it to him on the morning of February 21, 2014. The email chain itself, which was submitted by Attorney Lulay as part of his Exhibit F, indicates on its face that it was reviewed by Attorney Scholl's colleague, Attorney Fohrman, at approximately 8 p.m. Attorney Scarpelli indicated that, while he had received the email with regard to the fee dispute issue, he nevertheless expected Attorney Lulay or someone from his office to appear based on the case being above the red line, and that he appeared "to make sure that I was protecting my client in that regard." (2/21/14 Tr. 8-14). Attorney Scholl reported that he told Attorney Lulay during the phone call that he planned to proceed on his Petition for Attorney Fees.

Attorney Lulay then stated that when he received a phone call from Attorney Scholl on February 21, 2014, which was at the Arbitrator's request based on Attorney Lulay's failure to appear, that Attorney Scholl essentially told him it was too bad that he hadn't appeared, that it was Attorney Lulay's problem, and that the case was going ahead without him. (3/12/14 Tr. 13A-14A). Despite this, the record reflects no attempt by Attorney Lulay to appear following this phone call. The Arbitrator, on the record on February 21, 2014, noted that she had received no email correspondence from Attorney Lulay indicating he would not be appearing, or providing a reason why he did not do so.

In the Commission's view, Attorney Lulay was aware that the Petitioner's case was above the red line and, in his own words, a "must appear", had filed a motion that was to be heard on the same date, failed to appear at that time and was given an opportunity to do so by the Arbitrator, and he instead chose to remain at his office. While there is evidence that Attorney Lulay contacted Attorney Scholl advising him not to appear via email, it is equally clear that this email was not sent until after business hours on February 20, 2014, the night before the hearing date. The Commission notes that both Attorney Scholl and Attorney Scarpelli indicated that the email was sent at 7:12 p.m. The email chain submitted by Attorney Lulay as Exhibit F indicates it was sent at 5:12 p.m. It is unclear which of these are accurate.

Even if we accepted the theory that Attorney Scholl did not need to appear on February 21, 2014, this in no way would have relieved Attorney Lulay of the obligation to appear on an above the red line case that had been set for hearing.

The February 20, 2014 email from Attorney Lulay to the firm of Attorney Scholl itself indicates that, because he had not received what he believed to be sufficient proof of work that would prove a split of attorney fees, that he had been waiting for same since August 2013, and that he would provide the "professional courtesy" that Attorney Scholl need not appear. He noted, however, that should he not receive such sufficient proof, he would simply motion the case up for hearing in March, 2014 and seek to dismiss Attorney Scholl's attorney fee petition for lack of sufficiency stated with detail. What is unclear to the Commission is what was stopping Attorney Lulay from doing so on February 21, 2014, being that the issue was scheduled to be heard at that time based on his own motion. Instead, it appears that Attorney Lulay decided he was not going to appear, and attempted to justify this failure to appear as "professional courtesy" to Attorney Scholl.

The Commission has discretion with regard to the awarding of attorney fees. In this case, we agree with the Arbitrator's determinations of the proper allocation of fees to Attorneys Scholl and Lulay.

The Commission notes that while the Arbitrator indicated that Petitioner and Attorney Lulay signed the Settlement Contract Lump Sum Petition and Order on February 20, 2014, a review of the contract indicates that the Petitioner actually signed the contract on December 6,

2013. Thus, it took Attorney Lulay two months after the Petitioner signed the contract to sign it himself. While an argument could be made that the contract was not signed by Attorney Lulay because he was first trying to resolve the attorney fee issue, this would only make sense if the contract were never signed by Attorney Lulay, as the attorney fee issue remained unresolved when he signed on February 20, 2014. Additionally, Attorney Lulay submitted the contracts to a different Arbitrator on May 30, 2014. It appears that Attorney Lulay simply delayed submitting the settlement contracts.

At one point at the March 12, 2014 hearing, Attorney Lulay stated: "So my qualm with proceeding, we have one experience and I have another, when I am going - - want to proceed on a particular day and my opponent has not returned any of my phone calls, has not submitted anything that indicates preparation for that day, my basic assumption is that they want to mess with me, they want me to show up –." (3/12/14 Tr. 7A-8A). He further stated as the reason for his failure to appear on February 21, 2014: ". . . for the several months leading to that date that I had made amicable efforts in writing and by making phone calls to solicit what amount (Attorney Scholl's) firm wanted and the basis for it by way of any time or detail or description went completely and utterly unanswered all the way up until I had to make my motion to adjudicate and/or dismiss off of the February call. . . And being that there was a question in my mind as to whether they would indeed appear on that date and then whether they would indeed be prepared to proceed that date, and it was my intention to call the client and pay for an interpreter that date. They had not returned any of my phone calls or returned any for the Petitioner or supplied the subsequent information we would need to proceed that date. I sent an email the evening before . . ." (3/12/14 Tr. 11A-12A).

Attorney Lulay's arguments and reasoning are unclear to the Commission. First, regardless of any motions being filed or not, the matter was a red line case, meaning that counsel for Petitioner was required to appear, with the potential consequence of a failure to do so being dismissal of the claim. Secondly, Attorney Lulay indicated that he filed a motion regarding the attorney fee issue precisely based on an allegation that Attorney Scholl was not responding to his attempts to make contact, and then indicated that he didn't appear on the motion based on Attorney Scholl's failure to respond. This makes no logical sense. If the reason for the motion by Attorney Lulay was due to Attorney Scholl's failure to respond, we cannot fathom a reason why Attorney Lulay would not appear to address the issue directly. We also fail to see how anyone was "messing" with Attorney Lulay, when it was his case that was above the red line, and his motion that was pending for the same date. Instead, it appears to the Commission that Attorney Lulay's convoluted explanations for his failure to appear support the Arbitrator's determination that it was proper to proceed on February 21, 2014 in Attorney Lulay's absence.

Attorney Lulay argued that Attorney Scholl was not entitled to a fee in this matter based on his conclusion that any ongoing TTD or medical benefits that were provided to the Petitioner during her representation by Mr. Scholl were not disputed. However, the issue in this matter involves attorney fees based on a final settlement of permanency and unpaid medical expenses. (3/12/14 Tr. 19A-20A).

A large part of Attorney Lulay's argument as to his failure to appear on February 21, 2014 was Attorney Scholl's failure to provide a substantive basis for his claim for attorney fees. Attorney Scholl produced a substantive basis for his claim at the February 21, 2014 hearing date. Had Attorney Lulay bothered to appear that day, he would have had the opportunity to review same. Petition's for attorney fees by a former attorney against a substituting attorney are routinely entered and continued to disposition of the case without the former attorney providing a "substantive basis" (see Attorney Lulay's "Motion to Vacate/Augment Proofs on Prior Attorney's Fee Claim" in Lulay Exhibit F) in advance of a hearing or agreement regarding the issue of fees upon disposition of the case. Again, we fail to see how Attorney Lulay unilaterally determined that because, in his estimation, he did not have the substantive basis for Attorney Scholl's request for fees, that he could just pick and choose when he wanted to appear. While he complains about being "messed" with, his failure to appear resulted in Attorney Scholl being required to spend over three hours at arbitration, incurring more of his attorney time.

In the same Motion to Vacate/Augment Proofs, Attorney Lulay requested that the Arbitrator either reset the fee dispute issue for a new hearing, or alternatively to set the matter "for further proofs to afford evidence to be submitted by Petitioner's current counsel in conjunction with whatever record (Attorney Scholl's) firm already made in support of his claim." The Arbitrator opted for the latter approach, after which Attorney Lulay failed to submit any evidence which would allow the Arbitrator to try to properly determine a fee split in this case.

Pursuant to *DeLapaz v. Selectbuild Construction*, 394 Ill.App.3d 969, 917 N.E.2d 93 (2009), the determination of attorney fees by a trial court is discretionary. As stated by the Court in that case:

> "A client may discharge his attorney with or without cause at any time, even in a contingency fee based agreement. *Thompson v. Hiter*, 356 Ill.App.3d 574, 580-81, 292 Ill.Dec. 362, 826 N.E.2d 503, 509 (2005). When the attorney is discharged, the contingent fee contract no longer exists and the contingency term is no longer operative. *Thompson*, 356 Ill. App.3d at 581, 292 Ill.Dec. 362, 826 N.E.2d at 509. A discharged attorney, however, is entitled to payment for the services rendered prior to discharge on a *quantum meruit* basis. *Thompson*, 356 Ill.App.3d at 580, 292 Ill.Dec. 362, 826 N.E.2d at 509. The term *"quantum meruit"* literally means "'as much as he deserves.'" *Much Shelist Freed Denenberg & Ament, P.C. v. Lison*, 297 Ill.App.3d 375, 379, 231 Ill.Dec. 625, 696 N.E.2d 1196, 1199 (1998), quoting *First National Bank of Springfield v. Malpractice Research, Inc.*, 179 Ill.2d 353, 97*97 365, 228 Ill.Dec. 202, 688 N.E.2d 1179 (1997). Several factors are considered in determining the *quantum meruit* amount for services rendered, which include "the time and labor required, the attorney's skill and standing, the nature of the cause, the novelty and difficulty of the subject matter, the attorney's degree of responsibility in managing the case, the usual and customary charge for that type of work in the community, and the benefits resulting to the client." *Will v. Northwestern University*, 378 Ill.App.3d 280, 304, 317 Ill. Dec. 313, 881 N.E.2d 481, 504-05 (2007). If

16IWCC0050

an attorney performed much of the work on a case before discharge and a settlement immediately follows the discharge, the factors used to determine a reasonable fee "'would justify a finding that the entire contract fee is the reasonable value of services rendered.'" *Will*, 378 Ill.App.3d at 304, 317 Ill.Dec. 313, 881 N.E.2d at 505, quoting *Wegner v. Arnold*, 305 Ill.App.3d 689, 693, 238 Ill.Dec. 1001, 713 N.E.2d 247 (1999)."

Attorney Scholl presented evidence supporting his claim for quantum meruit fees, the Arbitrator, within her discretion, determined that this resulted in a finding that Attorney Scholl was entitled to 75% of the contractual fee in this case via quantum meruit, with the remaining 25% of the contractual fee going to Attorney Lulay.

IT IS THEREFORE ORDERED BY THE COMMISSION that the March 28, 2014 order of the Arbitrator is affirmed and adopted with regard to the issue of attorney fees of Attorneys Scholl and Lulay.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $3,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:
TJT: pvc
o 11/24/15
51

JAN 2 2 2016

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF REJECTION OF SETTLEMENT CONTRACT AND ORDER

Mireya Garcia
Employee/Petitioner

v.

Staff Force/Comp USA
Employer/Respondent

Case # 10 WC 9050

16IWCC0050

The attached settlement contract was submitted to the undersigned Arbitrator for review on March 12, 2014. Arbitrator's Exhibit 1. I am rejecting the contract in its current form, and have made findings and reached conclusions on the disputed attorney's fees and costs as explained *infra*.

Findings

In an unusual hearing on February 21, 2014 and March 12, 2014, Petitioner's current attorney of record, Mr. Lulay of Lulay Law Offices, and Petitioner's former attorney, Mr. Scholl of Donald W. Fohrman & Associates, Ltd., dispute whether the other is entitled to any portion of the $4,000.00 attorney's fees and costs deductions noted in the $20,000.00 settlement amount accepted by Petitioner and Mr. Lulay, in writing, on February 20, 2014.

Petitioner engaged Mr. Scholl as her attorney and eventually retained Mr. Lulay as counsel. On February 11, 2013, Mr. Scholl filed a Petition for Fees under Section 16a. At some point, Mr. Scholl signed a Stipulation to Substitute Attorneys, which was filed on February 13, 2013. Lulay Exh. C. Mr. Scholl's Petition for Fees under Section 16a was entered and continued to case resolution by Arbitrator Dollison on May 3, 2013. Due to Arbitrator rotations in the downstate calls, Petitioner's case was eventually assigned to the undersigned Arbitrator.

Petitioner's case was above the "red line" at the February 13, 2014 status call in Geneva. The case was set for final resolution by trial or presentation of executed settlement contracts during the February trial cycle on February 21, 2014 due to the age of the case.

Petitioner and Mr. Lulay signed the settlement contracts on February 20, 2014, the day before her case was set for final resolution on February 21, 2014. Neither Petitioner nor Mr. Lulay appeared in court on February 21, 2014. Petitioner's former counsel, Mr. Scholl, did appear on February 21, 2014 insisting on a hearing on his Petition for Fees given his understanding that the case was now settled. Respondent's counsel, Mr. Scarpelli, appeared also and indicated that Respondent had indeed made a settlement offer to Petitioner in the summer of 2013. The settlement contracts reflect Mr. Scarpelli's signature on Respondent's behalf during the prior year on June 7, 2013. Mr. Scarpelli requested that the case not be dismissed for want of prosecution, in particular because that would likely require his presence again for a hearing on a petition to reinstate the case which seemed a waste of the parties' and Arbitrator's time and resources under the circumstances. The Arbitrator agreed.

Both Mr. Scholl and Mr. Scarpelli attempted to reach Mr. Lulay at the Arbitrator's request on February 21, 2014 to determine why he was not present given the "red line" status of the case which was discussed on the record at the hearing that morning. Mr. Lulay had settlement contracts for many months and dismissal of the

case for want of prosecution would only cause further costs and delay to the Petitioner herself without necessity. Under these unusual circumstances, the Arbitrator allowed Mr. Scholl to present evidence in support of his petition for fees given Mr. Lulay's unexplained absence.

In essence, on February 21, 2014 Mr. Scholl proffered evidence including an itemization of his time and efforts on Petitioner's behalf in support of a *quantum meruit* argument for $4,800.00 in attorney's fees. *See* February 21, 2014 Hearing Transcript. Mr. Scholl and Mr. Scarpelli also made representations on the record regarding their telephone and email communications with Mr. Lulay prior to February 21, 2014 and on that date, which essentially resulted in his unexplained refusal to appear either to adjudicate the attorney's fees issue or explain why his client's case should not be dismissed for want of prosecution.

Mr. Lulay eventually took some action and provided a courtesy copy of a motion entitled "Motion to Vacate/Agument [sic] Proofs on Prior Attorney's Fee Claim" to the Arbitrator, Mr. Scholl and Mr. Scarpelli via email on February 25, 2014. This motion was not file-stamped, but Mr. Lulay later represented that he was waiting for it to be returned from the Commission with a file-stamp. In response to the courtesy copy of his motion, the Arbitrator indicated to Mr. Lulay the expectation that he and Petitioner would be present on whatever date was assigned at the following status call. After the attorneys determined their availability, a Notice of Motion and Order of a "Motion to Adjudicate Petition for Attorney's Fees" was presented at the next status call setting in New Lenox on March 4, 2014. Notably, no such motion was attached to the notice. Given the parties availability, Petitioner's case and the attorney's fees issue was set for a hearing on March 12, 2014.

Mr. Lulay, Mr. Scholl, and Mr. Scarpelli appeared on the assigned date to resolve Petitioner's case and any attorney's fees issues. Mr. Lulay submitted contracts for approval—which, again, had been signed by him and by Petitioner on February 20, 2014—and his request to augment proofs regarding attorney's fees was granted. A hearing was held. *See* March 12, 2014 Hearing Transcript. Notwithstanding the Arbitrator's previous indication to Mr. Lulay that Petitioner should be present at the hearing, she was not present.

At the hearing, despite repeated requests by the Arbitrator that Mr. Lulay refrain from speculation and argument, he failed to provide evidence of his claimed entitlement to the entire $4,000.00 in requested attorney's fees as claimed. Mr. Lulay argued extensively that Mr. Scholl is not entitled to any fees because according to him Petitioner's case was undisputed while Mr. Scholl represented Petitioner and the only time any issues came into dispute occurred while he represented Petitioner. Mr. Lulay provided no evidence of these assertions, but argued them repeatedly.

The only basis on which the Arbitrator finds Mr. Lulay to have established his entitlement to receive any attorney's fees is the agreement of all three attorneys that the first and only settlement offer made by Respondent to Petitioner occurred while she was represented by Mr. Lulay as reflected in the settlement contracts signed by Mr. Scarpelli on June 7, 2013. Mr. Lulay did not offer any itemization of his time expended on Petitioner's behalf. He did not provide any evidence that the $245.00 in costs identified in the settlement contracts were actually expended by his office on Petitioner's behalf. Nor did Mr. Lulay offer any evidence that the largest deduction for payment of disputed medical bills totaling $6,648.53 were resolved by him in complete satisfaction of Petitioner's debts.

The lack of evidence to support Mr. Lulay's contention that he is entitled to the entire $4,000.00 requested in attorney's fees or that the claimed deductions have been properly resolved by him is brought into further

question by a serious misrepresentation. Mr. Lulay attested and signed the settlement contracts on February 20, 2014 indicating that "*any fee petitions on file with the IWCC have been resolved. Based on the information reasonably available to me, I recommend this settlement contract be approved.*" AX1 (*emphasis* added). As reflected in the hearing record, Mr. Lulay made extensive statements and provided correspondence with Mr. Scholl establishing the exact opposite.

Conclusions

After careful consideration of the record, the Arbitrator rejects the contracts as submitted, declines to award the entire $4,000.00 in attorney's fees or deduct $6,893.53 ($6,648.53 + $245.00) in costs as claimed by Mr. Lulay, and orders as follows:

(1) The settlement contracts shall be amended to reflect that

(a) The $4,000.00 (20% of the total settlement offer of $20,000.00) attorneys' fees portion is divided between Mr. Scholl's firm and Mr. Lulay's firm totaling $3,000.00 (75% of $4,000.00) to Mr. Scholl's firm and $1,000.00 to Mr. Lulay's firm on the basis of *quantum meruit*.

(b) The $245.00 in costs deducted from the total amount to be paid to Petitioner shall be removed and this amount will be added to the amount payable to Petitioner.

(c) The $6,648.53 deducted from the total amount to be paid to Petitioner for medical bills shall be removed and these amounts shall be paid directly to the indicated providers only on production of an affidavit from Petitioner that these amounts resolve any disputed medical bills related to her claim in full, as well as an affidavit from a translator that these matters were explained to her in Spanish, and Mr. Lulay attaches written confirmation of the agreements reached by his office and these providers that the indicated amounts have or will resolve the disputed medical bills in full.

(d) The total amount payable to Petitioner shall be re-calculated to include the foregoing amendments.

(2) The foregoing amendments shall be initialed and dated by Petitioner, Mr. Lulay, Mr. Scholl and Mr. Scarpelli on the settlement contracts.

The parties have ☐ have not ☒ been advised that, after assignment by the Review Unit, they may have the rejected contract reviewed by a commissioner, who may approve or reject the contract.

Barbara N. Flores, Arbitrator

March 28, 2014
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Barbara Thrush,
Petitioner,
vs.

16IWCC0051

NO: 14 WC 20713

Menards,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 24, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $22,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 22 2016
KWL/vf
O-1/12/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

CORRECTED **16IWCC0051**

THRUSH, BARBARA
Employee/Petitioner

Case# **14WC020713**

MENARDS
Employer/Respondent

On 4/24/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0154 KROL BONGIORNO & GIVEN LTD
CHARLES GIVEN
120 N LASALLE ST SUITE 1150
CHICAGO, IL 60602-3506

0445 RODDY LAW LTD
MICHAEL S POWALISZ
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

16IWCC0051

PMO 4/20/15

Barbara Thrush,
Employee/Petitioner

v.

Menards,
Employer/Respondent

Case # 14 WC 20713

Consolidated cases: none

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **New Lenox**, on **11/14/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **8/22/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being with respect to her right shoulder ***is*** causally related to the accident, but Petitioner's current condition of ill-being with respect to her cervical spine ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**30,460.19**; the average weekly wage was $**585.77**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **no** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services related to the right shoulder.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services relating to the right shoulder.

Respondent shall be given a credit of $**9,502.70** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**9,502.70**. (Arb.Ex.#2).

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $390.51 per week for 25 weeks, commencing 1/7/14 through 6/30/14, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from ~~8/23/14~~ 8/23/13 through 11/14/14, and shall pay the remainder of the award, if any, in weekly payments. PMO 4/24

Respondent shall be given a credit of $9,502.70 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of $351.46 per week for 62.5 weeks, because the injuries sustained caused the 12.5% loss of the person as a whole, as provided in §8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Peter O'Malley
Signature of Arbitrator

4/20/15 PMO 4/20/15
Date

APR 24 2015

16IWCC0051

STATEMENT OF FACTS:

At the time of her injury, Petitioner was a 49 year old General Laborer and Warehouse Employee who had worked for Respondent since April 1999. On August 22, 2013, Petitioner was painting while standing on a picker approximately 5 feet off the ground. She was wearing a harness that went over her bilateral shoulders, under the bilateral buttocks, and buckled over her chest. Her right foot slipped and fell through the floor board causing her entire leg, up to her right hip, to fall through the board. Her left leg was still on the picker's platform board when this happened causing the harness to catch her. Petitioner twisted back and to the right and felt immediate pain in her right shoulder. The harness caused bruising to her right arm, right shoulder, right shoulder blade and right thigh. Petitioner is left hand dominant.

Petitioner's initial medical treatment was on September 9, 2013 when she was examined by Dr. Charles Woodward at Provena Mercy Medical Center. Petitioner was referred to this clinic by the Respondent. Petitioner complained of right shoulder pain and was unable to raise her arm past 45 degrees. She was prescribed a MRI of the right shoulder and provided with light duty work restrictions of no lifting over 5 pounds with the right arm and no pushing or pulling over 10 pounds. Respondent was able to accommodate the restrictions. (PX1).

A MRI of the right shoulder was performed at Provena Mercy Medical Center on September 19, 2013. The MRI revealed: 1. Fluid signal intensity within the subacromial/subdeltoid bursa, 2. High signal intensity in the anterior distal most aspect of the supraspinatus tendon suggestive of at least degenerative changes and tendinopathy. Partial intrasubstance injury/tear extending to the bursal surface cannot be excluded. There is also probable tendinopathy involving the subscapular tendon distally, and 3.There is at least degenerative change and possibly a labral tear involving the anterior superior labrum. (PX1).

On examination with Dr. Woodward on September 20, 2013, Petitioner had a positive Neer test and a positive Hawkins sign. Dr. Woodward prescribed and performed a cortisone injection to the right shoulder. After the injection Petitioner had a decrease in the pain. Dr. Woodward prescribed a course of physical therapy. (PX1).

Petitioner's shoulder complaints did not improve with physical therapy and on October 29, 2013, Dr. Woodward referred Petitioner to Dr. John Pinello at Castle Orthopaedics for an orthopedic evaluation. (PX1).

Petitioner was examined by Dr. Pinello on November 4, 2013. The doctor prescribed and performed an injection into the subacromial space and provided the Petitioner with light duty work restrictions of no use of the right arm. Respondent was able to accommodate the restrictions. (PX2).

Dr. Pinello re-examined Petitioner on November 19, 2013. The injection did not provide lasting relief. Range of motion in the right shoulder was limited with pain. The doctor recommended conservative treatment with the continued use of Voltaren and recommended additional physical therapy. (PX2).

On December 16, 2013, Petitioner sought a second opinion with Dr. Jeffrey Grosskopf, an orthopedic surgeon with Grosskopf Orthopedics. Dr. Grosskopf prescribed a right shoulder surgery and allowed for light duty work through the date of the surgery. Respondent was able to accommodate the restrictions. (PX3).

On January 7, 2014, Petitioner underwent right shoulder surgery performed by Dr. Grosskopf at Valley Ambulatory Surgery Center. The procedures performed included arthroscopic superior labral repair, supraspinatus tendon debridement, and acromioplasty. Petitioner postoperative diagnoses included a superior

labral tear extending into the anterior upper edge of the labrum, a 10% undersurface supraspinatus tendon tear in the anterior third, and impingement syndrome. Petitioner was taken off of work. (PX3).

Petitioner began a course of physical therapy at West Physical Therapy on January 16, 2014. (PX6).

On March 3, 2014, Petitioner underwent an injection to the right glenohumeral joint performed by Dr. Grosskopf. She was having pain at 6/10 with constant pain in the posterior upper arm and anterolateral shoulder. (PX3).

On April 3, 2014, Dr. Grosskopf prescribed and performed an injection to the right subacromial space. After five minutes Petitioner had less shoulder pain with motion and less pain into the triceps and radial forearm. Petitioner was referred to Dr. Yuan Chen, a pain management doctor because Dr. Grosskopf thought a cervical spine issue may be contributing to the pain and symptoms. Petitioner was prescribed a cervical MRI. (PX3).

The cervical spine MRI was performed on April 10, 2014 and revealed mild anterior spurring at C3-C6 with no localized herniations. (PX3).

Dr. Grosskopf re-examined Petitioner on April 14, 2014. Petitioner had pain in the base of the neck but no radiation into the arm. Range of motion in the cervical spine was reduced 25%. Petitioner was referred to Dr. Chen and advised to continue physical therapy. (PX3).

At the request of the Respondent, Petitioner visited Dr. Sean Salehi for purposes of a Section 12 examination on May 15, 2014. On examination, Petitioner was unable to raise the right arm over the horizontal plane and she had tenderness over the right shoulder, right clavicle and right armpit. Dr. Salehi opined that "the mechanism of injury described is consistent with having resulted in what appears to be primary right shoulder pathology. There is nothing in the history or documentation to suggest cervical complaints… No treatment for the cervical spine is warranted, and instead all focus should be made on the shoulder pathology which falls beyond my area of expertise. Since I do not believe there is a work injury regarding the cervical spine I will not use the term MMI regarding this region of the body. There are no work restrictions as it relates to his cervical spine." (RX1).

Petitioner was re-examined by Dr. Grosskopf on May 29, 2014. Her greatest pain was in the axilla. She had stiffness on the right side and tightness that was slowly resolving. Dr. Grosskopf related the pain complaints to the stretch trauma suffered at the time of her original injury. Dr. Grosskopf ordered a referral to Dr. Chen for pain management evaluation. Petitioner was prescribed Ultram and advised to continue physical therapy. Petitioner was kept off of work. (PX3 & PX4).

Petitioner's last physical therapy appointment was at West Physical Therapy on June 2, 2014. Petitioner attended 56 therapy sessions and at the last examination she was having scapular impairment, right lower cervical closing restrictions and tenderness over the right subscapularis musculature. No additional therapy sessions were authorized by the insurance company. (PX6).

At the request of Respondent, Petitioner was examined by Lawrence Lieber on June 30, 2014 for purposes of a Section 12 examination. On examination of the right shoulder, flexion and range of motion were decreased at the extremes due to pain. She had positive AC tenderness, positive greater tuberosity, positive impingement, positive O'Brien, positive reverse O'Brien, positive apprehension and positive Speed test. Strength was affected by pain. Dr. Lieber opined, "There appears to be a direct causal relationship between the Petitioner's subjective complaints, subsequent right shoulder surgery, and that of the isolated August 22, 2013 work event." Petitioner

was found to be at maximum medical improvement for the right shoulder condition and found 5% permanent partial impairment of the right upper extremity that converts to 3% impairment for the individual as a whole. (RX2 & RX3).

Dr. Grosskopf re-examined Petitioner on July 3, 2014. Petitioner's greatest pain was in the axilla. Dr. Grosskopf reviewed the report of Dr. Salehi and expressed confusion that the IME doctor did not address the periscapular pain which was Petitioner's biggest pain issue. Dr. Grosskopf prescribed MethylPrednisolone and advised Petitioner to remain off of work. (PX4).

On July 31, 2014, Petitioner was examined by Dr. Grosskopf. In reviewing the §12 report, Dr. Grosskopf opined, "Ms. Thrush clearly describes her worst pain in her axilla and medical scapular border. In Lieber's report, this pain is not reported at all and the pain mentioned is not described accurately. He describes her motion as decreased due to pain, yet he does not record her motion as he does for her normal shoulder. He gives her a 5% impairment of her right upper extremity, he documents some weakness and unknown degree of lost motion AND then states in paragraph 7 of his plan, 'there is no objective evidence of any functional impairment of the right shoulder area which would restrict this individual from returning to full employment, with no restrictions.' This report contradicts itself and did not even mention or address her biggest pain complaint! Unfortunately, her work comp benefits have been stopped. She has no alternative other than to try light duty work as she has no income and no health benefits since the above occurred." Petitioner was prescribed Ultram and allowed a light duty work release effective August 4, 2014 with restrictions of no lifting over 10 pounds. (PX4).

Petitioner returned to work in a light duty capacity effective August 4, 2014. Petitioner has continued to work in a light duty capacity through the date of the hearing.

Petitioner was re-examined by Dr. Grosskopf on August 21, 2014. Petitioner had pain from the shoulder blade to the axilla. There was right sided neck ache and stiffness. Petitioner was once again referred to Dr. Chen for pain management evaluation. (PX4).

Petitioner was examined by Dr. Yuan Chen on September 30, 2014. Petitioner complained of pain in the neck, right shoulder, scapula and anterior chest wall area. The pain was without numbness or tingling sensations but was with significant weakness in the right upper extremity. On physical examination there was significant tenderness on palpation in the right cervical paraspinal area. Range of motion was limited for extension, lateral flexion and rotation due to the significant discomfort in the neck and right scapula. Petitioner was diagnosed with cervical facet dysfunction and prescribed a set of cervical medial branch nerve blocks for facet treatment. The doctor's goal with the injections was to allow the deposit of the anti-inflammatory medication precisely into the irritated area to offer the Petitioner adequate pain relief. (PX5).

Petitioner was re-examined by Dr. Grosskopf on October 2, 2014. On physical examination Petitioner had tenderness on palpation at the bicipital groove. There was active abduction to 150 degrees, active forward flexion to 155 degrees, active internal rotation and external rotation at 90 degrees of abduction was 80 degrees. No weakness in the right shoulder was observed. No pain was elicited during a Neer impingement test and Speed's test was negative. Her c-spine examination remained unchanged. She had slight motion restriction with pain into the right neck and right shoulder blade with extension and bending to the right. Petitioner was allowed to continue working light duty with no lifting over 10 pounds, no over the shoulder work and no working more than 40 hours per week. (PX4).

Petitioner was re-examined by Dr. Grosskopf on November 13, 2014. Dr. Grosskopf recommended to continue treatment on the cervical spine with Dr. Chen and continued the work restrictions no lifting over 10 pounds, no over the shoulder work and no working more than 40 hours per week. (PX8).

As of the hearing date, Petitioner had continued complaints of pain and discomfort in her right shoulder and cervical spine. She is unable to lift her right arm overhead or reach for items that are over her head. She experiences an increase in shoulder pain while walking her dogs and playing with her three year old grandson. She experiences headaches and has a constant pain in the neck that she rates as a 5/10. Sleeping is difficult and she has a hard time turning her neck while driving. For pain relief she takes Tramadol at night and Ibuprofen during the day. When her pain levels are high she uses ice for pain relief.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that she never had problems with her right shoulder before the accident on August 22, 2013. On the date of the accident, Petitioner was painting while standing on a picker approximately 5 feet off of the ground. She was wearing a harness at the time of the accident that went over her bilateral shoulders, under the bilateral buttocks, and buckled over her chest. Her right foot slipped and fell through the floor board causing her entire leg, up to her right hip, to fall through the board. Her left leg was still on the picker's platform board when this happened causing the harness to catch her. Petitioner twisted back and to the right and felt immediate pain in her right shoulder. The harness caused bruising to her right arm, right shoulder, right shoulder blade and right thigh.

At the request of Respondent, Petitioner visited Dr. Lawrence Lieber on June 30, 2014 for purposes of a §12 examination. Dr. Lieber opined that "[t]here appears to be a direct causal relationship between the Petitioner's subjective complaints, subsequent right shoulder surgery, and that of the isolated August 22, 2013 work event." (RX2).

Petitioner is also alleging that her current cervical condition is related to her work accident of August 22, 2013. However, the first mention of a cervical problem in the medical records is April 3, 2014. This is almost eight (8) months after the original accident. Petitioner underwent a cervical MRI that revealed mild anterior spurring at C3-C6. No localized herniations were revealed. Dr. Grosskopf referred Petitioner for pain management related to the cervical spine with Dr. Chen. (PX3 & PX4). Dr. Chen examined Petitioner on September 30, 2014 and diagnosed her with cervical facet dysfunction. She was prescribed a set of cervical medial branch nerve blocks for facet treatment. (PX5).

At the request of Respondent, Petitioner visited Dr. Sean Salehi on May 15, 2014 for purposes of a §12 examination. Dr. Salehi opined that "the mechanism of injury described is consistent with having resulted in what appears to be a primary right shoulder pathology. There is nothing in the history or documentation to suggest cervical complaints… No treatment for the cervical spine is warranted, and instead all focus should be made on the shoulder pathology which falls beyond my area of expertise. Since I do not believe there is a work injury regarding the cervical spine I will not use the term MMI regarding this region of the body. There are no work restrictions as it relates to his cervical spine." (RX1).

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner's current right shoulder condition is causally related to the work accident of August 22, 2013. However, the Arbitrator finds that Petitioner failed to prove by a preponderance of the credible evidence that her current condition of ill-being

with respect to her cervical condition and need for medical treatment for same is not causally related to the work accident of August 22, 2013.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner presented medical bills from TOP Pain Center, IWP, and Grosskopf Orthopaedics. (PX4, PX5 & PX7). All of the outstanding medical bills are related to treatment for the cervical spine and post-date the §12 examination with Dr. Salehi.

Therefore, based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Petitioner failed to prove her entitlement to medical expenses related to her cervical spine, including prospective medical treatment in the form of the cervical medial branch nerve blocks prescribed by Dr. Chen. As a result, Petitioner's claim for same is hereby denied.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner claims that she is entitled to TTD benefits for the period between January 7, 2014 and August 3, 2014, a period representing 29-6/7 weeks. Respondent claims the benefits should have been terminated on May 22, 2014. (Arb.Ex.#1).

The Arbitrator has reviewed the evidence and finds Petitioner is entitled to TTD benefits for 25 weeks, representing the period between January 7, 2014 through June 30, 2014. The Arbitrator notes that Petitioner was found MMI with respect to the right shoulder condition effective June 30, 3014, the date of the §12 examination and impairment rating by Dr. Lieber. (RX2 & RX3). Prior to June 30, 2014, no doctor had released Petitioner to return to work full duty with respect to the shoulder condition. Dr. Salehi released Petitioner on May 15, 2014 for the cervical condition but deferred any issues on the shoulder to a shoulder specialist. Petitioner was off of work and receiving medical treatment for the right shoulder condition through June 30, 2014 when Dr. Lieber found Petitioner to be at maximum medical improvement.

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Petitioner was temporarily totally disabled from January 7, 2014 through June 30, 2014, for a period of 25 weeks pursuant to §8(b) of the Act.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that even though this matter was tried pursuant to §19(b) of the Act, the parties agreed that if the Arbitrator determined that Petitioner's condition had reached maximum medical improvement, the Arbitrator could rule on the issue of nature and extent. Based on the Arbitrator's finding to the effect that Petitioner failed to prove that her current condition of ill-being with respect to her cervical spine was causally related to the accident (issue "F", supra), and that Petitioner's condition with respect to her right shoulder had reached MMI as of June 30, 2014 (issues "F" & "K", supra), the Arbitrator finds it appropriate to make a determination as to the nature and extent of the injury.

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors;

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating by Dr. Lieber of 5% of the right upper extremity, which the doctor indicated translated to 3% impairment of a whole person pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. (RX2). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a general laborer and warehouse employee at the time of the accident and that she returned to work in that capacity, and continues to do so as of the hearing date.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 49 years old at the time of the accident. (Arb.Ex.#1).

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that there is no evidence that Petitioner's future earnings capacity has been appreciably diminished as a result of the accident.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner underwent right shoulder surgery performed by Dr. Grosskopf at Valley Ambulatory Surgery Center on January 7, 2014. The procedures performed included arthroscopic superior labral repair, supraspinatus tendon debridement, and acromioplasty. Petitioner postoperative diagnoses included a superior labral tear extending into the anterior upper edge of the labrum, a 10% undersurface supraspinatus tendon tear in the anterior third, and impingement syndrome. (PX3). Petitioner completed a course of physical therapy at West Physical Therapy. (PX6).

Petitioner was examined by Dr. Lieber at the request of Respondent on June 30, 2014. On examination of the right shoulder, flexion and range of motion were decreased at the extremes due to pain. She had positive AC tenderness, positive greater tuberosity, positive impingement, positive O'Brien, positive reverse O'Brien, positive apprehension and positive Speed test. Strength was affected by shoulder pain. (RX2).

Petitioner was examined by Dr. Grosskopf on October 2, 2014. On physical examination Petitioner had tenderness on palpation at the bicipital groove. There was active abduction to 150 degrees, active forward flexion to 155 degrees, active internal rotation and external rotation at 90 degrees of abduction was 80 degrees. (PX4).

The determination of PPD is not simply a calculation, but an evaluation of all five factors as stated in the Act. In making this evaluation of PPD, consideration is not given to any single enumerated factor as the sole determinant. Therefore, after applying §8.1b of the Act and considering the relevance and weight of all these factors, including Dr. Lieber's AMA impairment rating, the Arbitrator finds that sustained permanent partial disability to the extent of 12.5% person-as-a-whole pursuant to §8(d)2 of the Act.

WITH RESPECT TO ISSUE (N), IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

The parties submitted into evidence an agreed stipulation to the effect that Respondent paid $9,502.70 in temporary total disability benefits in this claim. (Arb.Ex.#2). The Arbitrator notes that this amount supersedes the amount the parties had originally agreed to in the Request for Hearing form (Arb.Ex.#1).

Therefore, Respondent is entitled to a credit for TTD paid in the amount of $9,502.70.

STATE OF ILLINOIS)	☒ Affirm and adopt	☒ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
WINNEBAGO		☐ PTD/Fatal denied
	☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Charles Smith,

Petitioner,

16IWCC0052

vs. NO: 09 WC 48190

Lamplight Rockford Incorporated and the
Illinois State Treasurer, as Ex-Officio Custodian of the
Injured Workers Benefit Fund,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of permanent partial disability, vocational rehabillitation and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 24, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The Illinois State Treasurer as ex-officio custodian of the Injured Worker's Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and

16IWCC0052

allowed under section 4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 2 2016
KWL/vf
O-1/12/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

16IWCC0052

SMITH, CHARLES
Employee/Petitioner

Case# **09WC048190**

LAMPLIGHT ROCKFORD INCORPORATED AND THE ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 2/24/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

0529 GREG TUITE & ASSOC
RYAN M GAILEY
119 N CHURCH ST SUITE 407
ROCKFORD, IL 61101

0000 LAMPLIGHT ROCKFORD INC
1523 BROADWAY
ROCKFORD, IL 61104

4987 ASSISTANT ATTORNEY GENERAL
LAURA HARTIN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

6STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

☒ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

16IWCC0052

CHARLES SMITH,
Employee/Petitioner

v.

LAMPLIGHT ROCKFORD INCORPORATED And The ILLINOIS STATE TREASURER, as Ex-Officio Custodian of the Injured Workers Benefit Fund,
Employer/Respondent

Case # 09 WC 48190

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Rockford**, on **January 22, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other: Did Respondent receive timely and appropriate notice of the hearing in accordance with the Rules of Practice of the Commission? Insurance Compliance/Automatic Coverage?

FINDINGS

On **December 18, 2008**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$6,864.00**; the average weekly wage was **$132.00**.

On the date of accident, Petitioner was **60** years of age, ***single*** with **no** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **0.00** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **0.00**.

Respondents are entitled to a credit of $ **0.00** for payment of medical benefits under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$132.00**/week for **13-5/7** weeks, commencing **December 19, 2008** through **March 24, 2009**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$132.00**/week for **75.25** weeks, because the injuries sustained caused the **35%** loss of use of his **left leg**, as provided in Section 8(e) of the Act.

Respondent shall pay to Petitioner reasonable and necessary medical services in the amount of **$24,685.74**, subject to the provisions of the medical fee schedule as provided in Section 8(a) and 8.2 of the Act.

The Respondent shall pay the Petitioner compensation that has accrued from **December 18, 2008** through **January 22, 2015,** and shall pay the remainder of the award, if any, in weekly installments.

The Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of the Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of the Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator JOANN M. FRATIANNI

February 19, 2015
Date

FEB 24 2015

A. Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

Petitioner testified that on December 18, 2008 Respondent-Employer *Lamplight Rockford Incorporated,* operated as a bar or tavern serving alcoholic beverages to the general public. Paragraph 12, Section 3 of the Act provides for automatic insurance coverage under the Act for "establishments open to the general public wherein alcoholic beverages are sold to the general public for consumption on the premises."

Based upon the above, the Arbitrator finds that Respondent-Employer *Lamplight Rockford Incorporated,* were operating under and subject to the Illinois Workers' Compensation Act and specifically, the provisions of Sections 3(12) apply to this case.

B. Was there an employee-employer relationship?

Petitioner testified that on December 18, 2008, he was employed by Respondent-Employer *Lamplight Rockford, Incorporated* to clean the bar, and later became responsible for serving drinks. He worked from 11:00 a.m. to open the bar daily, clean in the morning, count the cash, and began serving drinks around noon. Petitioner identified the owner of Respondent-Employer as Verna Kail.

Based upon the above, the Arbitrator finds that on December 18, 2008, an employee-employer relationship existed between the Petitioner and Respondent-Employer *Lamplight Rockford Incorporated.*

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. What was the date of the accident?

Petitioner testified that on December 18, 2008, he was employed by Respondent-Employer *Lamplight Rockford Incorporated.* Petitioner testified his job duties included cleaning the facility and serving drinks to customers. Petitioner testified that on December 18, 2008, he was struck in the head and shot in the left thigh during a robbery of the tavern.

There is no indication in the evidence before this Arbitrator that Petitioner was the aggressor of this incident and the altercation was clearly related to his work for Respondent-Employer.

An evidence deposition of Rockford Police Officer Michael Booker (Px11) reflects that Respondent-Employer was located in a high crime area known as Patrol Zone 6, which had the highest overall crime activity for Rockford and the second highest reported number of aggravated assaults. (Px11)

Medical records of treatment introduced into evidence corroborate the injury that occurred on December 18, 2008.

Based upon the above, the Arbitrator finds that on December 18, 2008, Petitioner sustained an accidental injury that arose out of and in the course of his employment by Respondent-Employer. Based further upon said findings, the Arbitrator finds the date of accident was December 18, 2008.

E. Was timely notice of the accident given to Respondent?

See findings of this Arbitrator in "C" and "D" above. Petitioner testified that after receiving medical treatment at Swedish American Hospital on December 18, 2008, he telephoned Ms. Verna Kail, owner of Respondent-Employer, and told her of his injuries and the robbery. Petitioner further testified that Ms. Kail was aware of the incident and reported to him that she had dealt with the police.

Based upon the above, the Arbitrator finds that Petitioner gave Respondent-Employer timely notice of this accidental injury as defined by the Act.

F. Is Petitioner's current condition of ill-being causally related to the injury?

See findings of this Arbitrator in "C" and "D" above.

Petitioner first received medical treatment for this injury through the emergency room of Swedish American Hospital on December 18, 2008. He received treatment for multiple cuts and abrasions and received 5 staples to close his head wounds. Petitioner was also treated for a gunshot wound to his left leg. Petitioner was prescribed a CT scan to his head which was reported as being normal and multiple bullet fragments were seen in the proximal and distal thigh with evidence of soft tissue swelling. Petitioner also noticed a problem with his left foot. Petitioner was discharged from the hospital on December 22, 2008.

On December 29, 2008, Petitioner had the 5 staples removed at Crusader Clinic. Petitioner then returned to Crusader Clinic on February 13, 2009 with complaints of chronic headaches. He reported that since the shooting he was walking with a cane and complained of some numbness, swelling and tingling to his left leg. Petitioner was prescribed Neurontin and Celebrex along with physical therapy. On March 24, 2009, Petitioner returned to the clinic, having completed physical therapy and reported that he could walk without his cane. Petitioner complained his left leg swelling was worse at the end of the day but wanted to return to work with no restrictions. Petitioner was prescribed a T.E.D. hose for leg swelling.

Petitioner then returned to Crusader Clinic on October 6, 2009 and reported left extremity numbness, especially around the ankle. He reported that physical therapy had improved his ability to stand, but he could only do so for 20 minutes before his ankle felt like it would give way. Petitioner was prescribed more physical therapy and advised not to be standing at work. Petitioner testified he was not working at this time as Respondent-Employer had closed the business. On November 23, 2009, Petitioner underwent an EMG/NCV of the left lower extremity. This revealed some evidence of sensory motor polyneuropathy but no active denervation.

Petitioner then returned to Crusader Clinic on February 17, 2010 with reports of cramping, aching that worsened with exertion or standing on his left leg. He was diagnosed with chronic pain syndrome due to the gunshot wound trauma.

Petitioner then began regular visits to the V.A. Medical Center in April of 2010. His medical records reflect a history pre-dating 2008 of abnormal liver function tests, alcohol abuse, shoulder pain, sciatica and hyperlipidemia. He reported difficulty walking long distances and experiencing pain and numbness to his left foot. On June 15, 2012, he underwent a physical at the V.A. Medical Center. This revealed 20 pound occasional and 10 pound frequent lifting restrictions, standing and sitting restrictions for 2 hours of a 8 hour day, and changing positions every 30 minutes.

Based upon the above, the Arbitrator finds that the condition of ill-being as noted above is causally related to the accidental injury of December 18, 2008.

G. What were Petitioner's earnings?

Petitioner testified that he was paid $6.00 an hour and worked 20-30 hours a week. This would calculate to an average weekly wage of $120.00 to $180.00. Petitioner testified he also worked 4-5 hours each shift and worked daily. Petitioner claims $132.00 a week as an average weekly wage.

Based upon the above, the Arbitrator finds the average weekly wage to be $132.00 and the annual earnings to be $6,864.00.

H. What was Petitioner's age at the time of the accident?
I. What was Petitioner's marital status at the time of the accident?

Petitioner testified that he was 60 years old, which is corroborated by the medical records in evidence, on December 18, 2008. Petitioner testified that he was single with no dependents, as of December 18, 2008.

Based upon this finding, this Arbitrator finds that on December 18, 2008, Petitioner was 60 years of age, single with no dependent children under the age of 18.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Petitioner introduced into evidence the following charges that were incurred after this accidental injury:

Crusader Clinic	$ 360.00
Dr. Mohammed Afzal	$ 881.25
Infinity Health Care/Swedish American Hospital (ER)	$ 872.00
Northern Illinois Scanning	$ 2,687.00
Radiology Consultants of Rockford	$ 669.00
Rockford Surgical Service	$ 785.00
Swedish American Hospital	$17,693.58
Swedish American Infusion Services	$ 178.59
VA Rockford Medical Center	$ 503.39
Prescriptions and bandages	$ 55.93

These charges total $24,685.74.

Based upon the findings of this Arbitrator in "F" above, the Arbitrator further finds that the above charges represent reasonable and necessary medical care and treatment that was causally related to this accident, and further finds Respondent-Employer to be liable for same, subject to the provisions of the medical fee schedule.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "C," "D" and "F" above.

Petitioner testified that he does not recall when he returned to work for Respondent-Employer. Petitioner did not supply any off work slips at trial. Medical evidence before this Arbitrator establishes that Petitioner was not working and was treating for this injury from December 19, 2008 through March 24, 2009. On March 24, 2009, Petitioner expressed an interest to his doctor in returning to work.

Based upon the above, the Arbitrator finds that Petitioner is entitled to receive temporary total disability benefits from Respondent-Employer commencing December 19, 2008 through March 29, 2009.

L. What is the nature and extent of the injury?

See findings of this Arbitrator in "C," "D" and "F" above.

As a result of this accidental injury, Petitioner suffered a gunshot wound to his left leg causing a nerve injury. Petitioner has since been diagnosed with chronic pain syndrome, and testified to experiencing numbness, pain, tingling and left leg swelling. Petitioner also testified to left ankle and foot weakness and instability since the accident.

On October 24, 2012, Petitioner was examined by Dr. Jeffrey Coe. Dr. Coe examined him at his own request. Dr. Coe noted persistent left leg swelling and numbness with tingling, along with weakness and left leg fatigue. Petitioner was walking with a limp and using a cane. Dr. Coe noted left thigh atrophy, swelling to the left calf and ankle, and left foot and ankle dysestheas, which he related to the gunshot wound. Petitioner was noted to have post traumatic headaches.

On October 31, 2014, Petitioner underwent a rehabilitation conference via Skype with Susan Entenberg, a certified rehabilitation counselor. He reported living alone and not owning a computer or telephone. He has a GED education and receives $800.00 monthly in social security retirement benefits. He has no computer skills, no hobbies and has no drivers license for the past 20 years. He worked for Respondent for 2-3 years, working 3-4 hours daily. Ms. Entenberg described this work as being light to medium in exertion level, with lifting and constant standing and walking. The bartending aspect was deemed low to semi-skilled and the cleaning aspect unskilled.

Petitioner has a prior employment history as a meat wrapper and packer at a grocery store for 15 years, and operating a freight elevator for National Lock for 10 years. Ms. Entenberg concluded that Petitioner was not capable of returning to work as a cleaner/bartender. It is not clear if she was aware that Petitioner had returned to work for Respondent full duty, or finding another job with restrictions. She determined he was not an appropriate candidate for vocational rehabilitation and there was no stable job market for him, based on his limited work skills, physical limitations, lack of clerical and computer skills, lack of transferable skills, his advanced age and limited educational background.

Based upon the above, the Arbitrator finds that as a result of this injury, Petitioner has not become permanently totally disabled from work but is entitled to receive an award of compensation pursuant to Section 8(e) of the Act at 35% disability to the left leg.

M. Should penalties or fees be imposed upon Respondents?

Petitioner has failed to show or prove entitlement to any penalties or attorneys fees under the Act.

All claims for penalties and attorneys fees made by Petitioner in this matter are thus hereby denied.

N. Is Respondent due any credit?

Petitioner testified that he received no benefits from Respondent-Employer in this matter following this accidental injury. Respondent-Employer is not entitled to any credit against this award under these circumstances.

O. Did Respondent receive timely and appropriate notice of the hearing in accordance with the Rules of Practice of the Commission? Insurance Compliance/Automatic Coverage?

This action commenced pursuant to the Workers' Compensation Act by Petitioner seeking benefits from Respondent-Employer Lamplight Rockford Incorporated. On January 22, 2015, a hearing was held before this Arbitrator in Rockford, Illinois. Respondent-Employer did not appear for the hearing and was not represented by counsel. Respondent-Employer was notified of the hearing by mail. (Px1) Respondent-Employer prior to the hearing filed for Bankruptcy, then the owner subsequently passed away. (Px3) The Illinois Attorney General's office appeared on behalf of the Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund, and participated in the hearing, as the Respondent-Employer did not have Workers' Compensation Insurance.

Based upon the above, the Arbitrator finds that Respondent-Employer *Lamplight Rockford Incorporated* received timely notice of hearing in this matter.

Based further upon the above, *The Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund,* is also found to have been properly named as a Respondent and responsible for the payments awarded in this matter.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Susan Cerza,
Petitioner,
vs.

16IWCC0053

NO: 12 WC 3367

Evanston/Skokie School District 65,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of nature and extent of Petitioner's partial disabilityand being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 30, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:
KWL/vf
O-1/12/16
42

JAN 2 2 2016

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0053

CERZA, SUSAN
Employee/Petitioner

Case# **12WC003367**

EVANSTON/SKOKIE SCHOOL DISTRICT 65
Employer/Respondent

On 7/30/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4036 MILLON & PESKIN LTD
MITCHELL PESKIN
2100 MANCHESTER RD SUITE 1060
WHEATON, IL 60187

1120 BRADY CONNOLLY & MASUDA PC
JASON R STETZ
10 S LASALLE ST SUITE 900
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

16IWCC0053

Susan Cerza
Employee/Petitioner

v

Evanston/Skokie School District 65
Employer/Respondent

Case # 12 WC 03367

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **3/6/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

16IWCC0053

FINDINGS

On **11/15/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**50,177.82**; the average weekly wage was $**1,194.71**.

On the date of accident, Petitioner was **45** years of age, ***single*** with **3** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**2,573.47** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**2,573.47**. The Parties agreed that Petitioner was entitled to TTD benefits from 7/17/12-7/30/12; 8/24/12-8/30/12 and 10/29/13-11/3/13 (3-6/7 weeks) and all TTD benefits have been paid.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, of **$6,135.99 to Athletico Physical Therapy and $140.00 to Arlington Orthopedics**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$669.64/week** for **110.875 weeks,** because the injuries sustained caused the **17.5% loss of use of Petitioner's right leg/knee, 15% loss of use of Petitioner's left leg/knee, and 20% loss of use of Petitioner's right hand/wrist,** as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner the benefits that have accrued from 11/15/2010 to March 6, 2015 and shall pay the remainder of the award, if any, in weekly payments.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

July 30, 2015
Date

JUL 30 2015

FINDINGS OF FACT

The Petitioner began her employment with the Respondent in August 2010. She works as a childhood special education preschool teacher. Specifically, she works with children who have cognitive and/or physical disabilities.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of her employment by Respondent on November 15, 2010. Petitioner was leading one of the children off of the school playground. She was holding the child's left hand. The child threw himself to the ground causing the Petitioner to fall forward. Petitioner testified that she was able to avoid landing on the child. She landed on both of her knees and her right wrist. She testified that she immediately felt pain in her right wrist and both of her knees following the accident. She stopped working and sought treatment the same day with Dr. Bryan Neal, an orthopedic surgeon.

Dr. Neal's initial progress note indicated that Petitioner had resolving left knee pain, anteromedial right knee pain and right wrist pain. (PX1). X-rays of the right wrist were taken, which showed no fractures. (PX1). Dr. Neal released Petitioner to return to work and prescribed a Velcro thumb Spica splint. (PX1). On December 13, 2010, Dr. Neal noted that Petitioner was continuing to have bilateral knee pain with the right being more bothersome than the left. (PX1). He also noted that she continued to use the splint and was having localized pain over the first dorsal extensor compartment. (PX1). Petitioner underwent an MRI of her right wrist on January 8, 2010. The MRI showed some asymmetric fluid located along the volar aspect of the distal radius possibly representing reactive edema or a small ganglion cyst and intrinsic signal within the triangular fibrocartilage most likely representing partial tear and degeneration. (PX1). Petitioner also underwent an MRI of her right knee on January 8, 2010 which showed a tear of the posterior medial meniscus extending to the inferior surface. (PX1).

On February 21, 2011, Dr. Neal noted that Petitioner was having clicking in her knees and that her right wrist complaints were not improving. (PX1). He offered Petitioner a corticosteroid injection into the right wrist but the Petitioner refused. (PX1). She testified that she was not comfortable having injections. On May 12, 2011 Dr. Neal noted that Petitioner was reporting her knees were buckling and that she was continuing to have clicking. (PX1). Dr. Neal recommended proceeding with a right knee arthroscopy. (PX1). Petitioner had surgery with Dr. Neal for her right knee on July 17, 2012. (PX1). She underwent an arthroscopic partial medial meniscectomy of the posterior horn of the medial meniscus. (PX1). The post-operative diagnosis was right knee posterior horn medial meniscus tear. (PX1). Following her surgery, Petitioner underwent an MRI of her left knee, on July 30, 2012, which showed a small tear of the medial meniscus near junction of the posterior horn and body, extending to the posterior horn. (PX1). Thereafter, Dr. Neal performed a left knee arthroscopic partial medial meniscectomy on August 24, 1012. (PX1). On October 3, 2012, Dr. Neal noted that Petitioner reported significant improvement in each of her knees following her surgeries, but continued to have right wrist complaints with tenderness along the flexor carpi radialis tendon. (PX1). He prescribed occupational therapy and suggested that Petitioner have an independent evaluation for her right wrist. (PX1). Petitioner attended sixteen sessions of therapy at Athletico from October 9, 2012 through December 13, 2012 for her right wrist. (PX3).

At the request of the Respondent, Petitioner attended a §12 examination with Dr. Scott Sagerman on December 21, 2012. Dr. Sagerman noted that Petitioner has continued to have persistent right hand pain since her November 15, 2010 work accident. (RX1, Sagerman Dep. Ex. No. 2). He diagnosed Petitioner with chronic right radial wrist pain with arthritis. (RX1, Sagerman Dep. Ex. No. 2). Dr. Sagerman suggested consideration of anti-inflammatory medication, resting splint, local steroid injection and surgery on an elective basis. (RX1, Sagerman Dep. Ex. No. 2). He further stated that he would consider a diagnostic arthroscopy to inspect the articular surface and perform debridement. (RX1, Sagerman Dep. Ex. No. 2). He also thought that consideration could be given for a release of the flexor carpi radialis tendon to address symptoms suggesting tendinitis. (RX1, Sagerman Dep. Ex. No. 2). Dr. Sagerman noted that if Petitioner underwent surgery,

postoperatively, she should have supervised hand therapy, temporary activity and work restrictions. (RX1, Sagerman Dep. Ex. No. 2). Dr. Sagerman opined that the need for further treatment is causally connected to Petitioner's November 15, 2010 work injury and found no indication of any pre-existing condition affecting her right wrist before her work injury. (RX1, Sagerman Dep. Ex. No. 2).

Petitioner returned to see Dr. Neal on January 21, 2013. Dr. Neal indicated he had reviewed Dr. Sagerman's findings, but he was hesitant to recommend surgery and suggested a repeat MRI of the right wrist. (PX1). This was performed on February 20, 2013 and showed a 12 mm ganglion cyst between the flexor carpi radialis tendon and radial styloid process. (PX1). On March 4, 2013 after reviewing the MRI of the right wrist, Dr. Neal noted that he believed the ganglion cyst was the source of Petitioner's volar radial wrist pain. (PX1). Dr. Neal recommended a surgical excision of the ganglion cyst as a treatment option. (PX1). On October 14, 2013 Dr. Neal noted that he received approval for a flexor carpi radialis release. (PX1). Per Dr. Neal, the epicenter of Petitioner's wrist pain was over the flexor carpi radialis at the wrist crease. (PX1). In his October 28, 2013 report, Dr. Neal noted that he agreed a flexor carpi release needed to be done and indicated he would perform this procedure. (PX1). He also indicated that he would perform a ganglion cyst removal because he believed that was the painful root cause. (PX1). He agreed to only charge one procedure code for both procedures. (PX1).

Petitioner underwent right hand surgery by Dr. Neal on October 29, 2013 at Northwest Surgicare. (PX1). Specifically she underwent a resection of the right wrist occult volar radial carpal ganglion cyst and a flexor carpi radialis tenolysis. (PX1). Dr. Neal's operative report indicated he did identify a multi-loculated occult gangling cyst after dissecting the deep flexor carpi radialis tendon. (PX1). The post-operative diagnosis was occult ganglion cyst of the right wrist radial carpal joint with secondary flexor carpi radialis irritation. (PX1). On October 28, 2013 Dr. Neal had prescribed occupational therapy for Petitioner's right wrist ganglion cyst resection. (PX1).

Following surgery, Dr. Neal noted on November 4, 2013 that Petitioner was no longer feeling a "pressure" type of sensation. (PX1). On November 27, 2013 Dr. Neal noted that the therapy that Petitioner was having for her right wrist was helping and that she stated "she is getting better every time I go." (PX1). He also noted that the pain Petitioner had in her right wrist prior to surgery was absent and that every day her wrist was getting a little bit better. (PX1). On November 26, 2014, Dr. Neal noted that Petitioner's right wrist was continuing to get better and that Petitioner had stated to him that the therapy was helping. (PX1).

Petitioner attended physical therapy for her right wrist at Athletico from November 5, 2013 through March 27, 2014. (PX3). Consistent with Dr. Neal's medical records, the notes from Athletico reflected that Petitioner's right wrist condition continued to improve during her course of treatment. (PX3). Specifically, the records noted that at the completion of her therapy, her range of motion improved (since November 5, 2013) as follows: active extension (from 40 to 60 degrees), flexion (from 19 to 67 degrees), radial (from 10 to 20 degrees) and ulnar from 30 to 35 degrees). (PX3). In addition, Petitioner's strength in her right hand improved (since November 5, 2013) after completion of her therapy as follows: tip pinch (from 7 to 9 pounds), grip strength (from 32 to 50 pounds), lateral pinch from 8.5 to 17 pounds, and 3 jaw pinch (from 8.5 to 12 pounds). (PX3). As of March 27, 2014, Petitioner was reporting 75% to 80% of anticipated functioning, continued limitations of active wrist range of motion into simultaneous wrist extension and radial deviation, decreased right upper extremity strength compared to the left, significantly decreased right hand pain and the ability to self-manage her impairments. (PX3).

On May 7, 2014 Dr. Neal noted that Petitioner was having discomfort when writing on the blackboard at school. (PX1). She described the discomfort as some vague right volar forearm discomfort. (PX1). Petitioner last saw Dr. Neal on July 7, 2014. He noted that Petitioner had begun to feel "weird stuff" in her right knee but this resolved. (PX1). He noted that her right knee was painless without clicking, and without instability, but Petitioner could not squat or kneel on her knees as much or as well as before. (PX1). With regard to her right wrist, Dr. Neal noted that she was not reporting pain in the wrist, but did report stiffness and achiness. (PX1).

Petitioner testified that she is right handed. She had no right wrist or knee complaints prior to her November 15, 2010 work accident. She testified that her right wrist is sometimes achy and she has difficulty writing on the chalkboard. Petitioner testified that her right and left knees are good, although she experiences a crackling feeling in her right knee, notices her right knee does not flex smoothly and that it is difficult for her to kneel down on both of her knees.

On the issue of causation, Dr. Neal stated in his reports that Petitioner had an occult symptomatic ganglion cyst on the volar radial aspect of her right wrist. (PX1). Given Petitioner's persistent right wrist complaints since her accident and the findings of both MRI's, Dr. Neal opined that her right wrist pain was due to the volar radial wrist ganglion stemming from a traumatic ganglion cyst. (PX1). He opined that this condition was causally related to Petitioner's November 2010 fall. (PX1). While he agreed that Petitioner should have a flexor carpi radialis tenolysis resection of the right wrist, he more firmly believed that she needed a resection of the occult volar radial carpal ganglion cyst to address her wrist complaints. (PX1).

Like Dr. Neal, Dr. Sagerman opined that Petitioner's right wrist condition was causally related to her November 15, 2010 work injury. (RX1, Sagerman Dep. Ex. No. 2). However, Dr. Sagerman was not convinced that the Petitioner had a ganglion cyst and opined that the MRI findings may be consistent with other conditions of tendinitis and arthritis. (RX1; Pg. 12 & Sagerman Dep. Ex. No. 3). He stated that a true ganglion cyst would arise spontaneously and not typically be related to trauma. (RX1, Sagerman Dep. Ex. No. 3).

Dr. Sagerman believed that Petitioner had chronic right radial wrist pain with arthritis and possible flexor tendinitis. (RX1; Pg. 9). It was his opinion that theses diagnoses and Petitioner's complaints were causally related to her November 15, 2010 work injury. (RX1; Pg. 10). Although Dr. Sagerman suggested a release of the flexor carpi radialis tendon, he testified that if a visual inspection through the surgical procedure identified a ganglion cyst, it would be reasonable to remove it. (RX1, Pgs. 10, 24). Dr. Sagerman testified a ganglion cyst is a mass containing a gel-like fluid with a stalk arising from a joint. (RX1; Pg. 14). When asked to assume that Petitioner has both a ganglion cyst and flexor carpi radialis tendinitis, Dr. Sagerman acknowledged that it would be difficult to distinguish where the symptoms from each of the conditions would be emanating from. (RX1; Pg. 16). Dr. Sagerman testified that, postoperatively, Petitioner should undergo therapy for her right hand. (RX1; Pg. 10).

Although, Dr. Sagerman opined that ganglion cysts are not typically caused by trauma (RX1; Sagerman Dep. Ex. No. 3), he provided the following testimony:

Q. And you also indicated in that same report that you thought the MRI findings may not show a ganglion cyst but, rather, could be consistent with other conditions of tendinitis and arthritis?
A. Yes.
Q. What did you mean by that?
A. Well, fluid can be associated with tendinitis. Fluid can form as a manifestation of inflammation. And, **I suppose, you could term it a ganglion**. Ganglions also arise from tendon structures. So I wouldn't - - **I didn't call it a cyst, but I called it a - - or I referred to it as a finding consistent with tendinitis and arthritis**. Those are inflammatory conditions, which can cause fluid to arise as part of the inflammatory process, and that was my impression.
Q. And you also in that report expressed an opinion that you believe that that condition was related to Miss Cerza's injury, is that correct?
A. Yes. (RX1, Pg. 19).

CONCLUSIONS OF LAW

The Arbitrator adopts the Findings of Fact set forth above in support of the Conclusions of Law set forth below.

In support of the Arbitrator's decision relating to F. Whether Petitioner's Present Condition of Ill-being is Causally Related to the Injury and J. Whether the medical services that were provided to Petitioner were reasonable and necessary; the Arbitrator finds the following:

The Parties stipulated that there is no causation or reasonableness or necessity dispute concerning the flexor carpi radialis tenolysis procedure and the left and right knee surgeries that Petitioner underwent. The disputed issue stems from the radial carpal ganglion cyst procedure that was performed simultaneously with the carpi radialis procedure.

The Arbitrator notes both doctors have opined that Petitioner's right wrist condition is causally related to her injury. Dr. Neal is of opinion that Petitioner had an occult symptomatic ganglion cyst on the volar radial aspect of her right wrist as a result of her accident. Dr. Neal believed this was the source of her pain, although he did not disagree that Petitioner also had a flexor carpi radialis condition. Consistent with Dr. Neal's opinions are the findings on both MRI's, and the fact that he identified and removed a ganglion cyst during surgery.

Dr. Sagerman, essentially agreed with Dr. Neal. However, rather than calling the fluid identified on the February 20, 2013 MRI a ganglion cyst, Dr. Sagerman characterized the condition as arising from part of the inflammatory process, which he opined was casually related to Petitioner's injury. Dr. Sagerman acknowledged that it would be reasonable to remove a ganglion cyst if identified during the surgical procedure which is exactly what Dr. Neal did. Dr. Neal kept both procedures under one surgical charge. Regardless, as to whether Dr. Neal or Dr. Sagerman are correct in terms of diagnosing the underlying cause of Petitioner's wrist complaints, both agreed her complaints were related to her injury. No additional charges were incurred for the cyst removal, and Petitioner's condition improved following the surgical procedure.

Based upon Petitioner's testimony and the medical evidence, the Arbitrator concludes that Petitioner had both flexor carpi radialis and a ganglion cyst both of which were causally related to her November 15, 2010 accident. Further, based on the above, the Arbitrator finds the surgery that Petitioner underwent addressing both right wrist conditions, to be reasonable, necessary and causally related to her accident.

Petitioner submitted into evidence as Petitioner's Exhibit 6, the following unpaid medical bills:

Athletico Physical Therapy	$6,135.99 (11/5/13-3/27/14)
Arlington Orthopedic & Hand Surgery Specialists	$ 140.00 (7/7/14)

The Arbitrator notes that the above-referenced bills correspond to treatment that Petitioner had for her right wrist condition following her October 29, 2013 surgery. The July 7, 2014 bill corresponds to Petitioner's last office visit with Dr. Neal. The Althetlico bill corresponds to the post-operative physical therapy treatment that Dr. Neal had prescribed. Dr. Sagerman also opined that post-operative physical therapy was appropriate. Dr. Neal's medical records, the therapy notes from Athletico and Petitioner's testimony establish that her right wrist condition improved during her post-operative course of therapy.

Based upon the Arbitrator's findings on causal connection, the fact that both doctor's believed post-operative therapy was necessary and the fact that Petitioner's right wrist condition improved during her course of therapy, the Arbitrator finds the post-operative therapy treatment was reasonable and necessary to cure or relieve the effects of the injury. The Arbitrator also finds that Petitioner's last office visit with Dr. Neal on July 7, 2014 was reasonable and necessary.

Accordingly, Respondent shall pay the above bills from Dr. Neal and Athletico, pursuant to §8(a) and § 8.2 of the Act. The Parties agreed that Respondent was entitled to a credit for all bills that it paid.

In support of the Arbitrator's decision relating to L. The Nature and Extent of the Injury; the Arbitrator finds the following:

Petitioner underwent treatment for more than three and one-half years for her right wrist injury in the form of therapy and a resection of the right wrist occult volar radial carpal ganglion cyst and a flexor carpi radialis tenolysis. Although she improved, Petitioner's testimony established that she continues to have right wrist achiness and difficulty writing on chalkboards. Further, the therapy records indicated that Petitioner continued to have limitations of active wrist range of motion and decreased right upper extremity strength compared to the left.

Petitioner also underwent a partial medial meniscectomy of the posterior horn of the medial meniscus of right knee and a left knee arthroscopic partial medial meniscectomy. Her testimony established that she presently experiences a crackling feeling in her right knee and notices that it does not flex smoothly. She also has difficulty kneeling down on both of her knees.

The Arbitrator finds that Petitioner was forthright and credible. Her complaints are supported by the medical records. Based on the Petitioner's testimony and the medical records, the Arbitrator finds the injuries sustained caused 17.5% loss of use of Petitioner's right leg/knee, 15% loss of use of Petitioner's left leg/knee, and 20% loss of use of Petitioner's right hand/wrist, as provided in Section 8(e) of the Act and, accordingly, orders Respondent to pay Petitioner the sum $669.64/ week for a period of 110.875 weeks.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

16IWCC0054

BRIAN SCHNEIDER,

Petitioner,

vs. NO: 12 WC 10168

CHILDS CONSTRUCTION SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability and vocational rehabilitation and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Decision of the Arbitrator awarded Petitioner 21-1/7 weeks of maintenance benefits under Section 8(a) of the Act as well as vocational rehabilitation, also, under Section 8(a) of the Act. The bases for these awards was that Petitioner suffered a diminishment in earning capacity as result of the permanent disability that resulted from his compensable March 15, 2011, injury as well as his inability to return to his pre-injury occupation as a maintenance supervisor. The Commission finds these awards were not justified and modifies the Decision of the Arbitrator.

The Commission, contrary to the findings contained within the Decision of the Arbitrator, finds Petitioner to be capable of resuming his career as a maintenance supervisor, arriving at this conclusion based upon the findings of the functional capacity evaluation (FCE) that was performed on May 3, 2013, as well as the opinions expressed by Dr. William Vitello in his independent medical examination (IME) report dated June 5, 2013.

The FCE was prescribed by Petitioner's treating physician, Dr. Aaron Bare, and was performed by Noel Priest, a therapist for Orthopaedic Rehabilitation, on May 3, 2013. The FCE indicated, per the DOT, Petitioner's occupation was found be at a heavy physical demand level and called for the occasional lifting of weights between 51 and 100 pounds. The FCE noted Petitioner stated that his occupation was at a heavy physical demand level but required the occasional lifting between 80 and 100 pounds and the frequent lifting of between 30 and 60 pounds. The FCE reported Petitioner demonstrated the ability to work at a heavy to very heavy physical demand level and capable of occasionally lifting between 80 and 105 pounds and of frequently lifting between 40 and 60 pounds. The Commission notes the FCE findings exceeded the job requirements as set forth in the DOT and equaled or exceeded the job requirements Petitioner had advanced.

The Commission also notes the FCE revealed Petitioner engaged in inconsistent behavior during the evaluation. Petitioner reported a left arm lifting tolerance of 10 to 20 pounds and an 8-pound carrying tolerance but demonstrated the ability to lift and carry between and 80 and 105 pounds with both arms. Petitioner's effort during the 5-position Jamar grip strength testing failed to produce a bell curve. It was noted the lack of a bell curve suggested a submaximal test effort. Petitioner complained of a 9-10/10 level of pain intensity but failed to exhibit compensatory motions or pain behaviors. It was also noted there was no increase of Petitioner's heart rate despite his complaints of 9-10/10 level of pain intensity and his self-reported maximum exertion during lift testing. These inconsistencies lend credence to the finding that Petitioner was capable of working at a heavy to very heavy physical demand level.

Petitioner returned to Dr. Bare on May 10, 2013, and Dr. Bare's record of that visit indicates he reviewed the FCE and found it dipositive of Petitioner's physical condition. Dr. Bare found Petitioner capable of returning to work his usual work duties but, nevertheless, returned Petitioner to work with permanent restrictions because of the potential for overuse and aggravation of his left shoulder. Dr. Bare, in his evidence deposition testimony, testified, however, that he did not remember if Petitioner provided him with any idea as to what he did for a living. He was sure they discussed it, but he acknowledged that he did not document that discussion. The Commission finds the imposition of restrictions without knowledge of Petitioner's job activities, particularly given the findings of the FCE, to be unreasonable.

Dr. Bare's assessment of Petitioner's ability to resume working his usual work duties were mirrored by Dr. William Vitello, Respondent's examining physician. Dr. Vitello conducted an IME of Petitioner on June 5, 2013, and found the examination revealed forward flexion to 170°, abduction to 160°, internal and external rotation to 70° without crepitus, 5/5 rotator cuff strength as well as negative findings on the various tests performed. The Commission finds these results to be very similar to the examination results elicited by Dr. Bare on May 10, 2013. Unlike Dr. Bare, however, Dr. Vitello found no need to impose restrictions upon Petitioner's ability to return to work. Given the results of the FCE and the examinations conducted by Dr. Bare and Dr. Vitello, the Commission agrees.

Petitioner's medical records and the testimony of both Dr. Bare and Dr. Vitello lead the Commission to conclude Petitioner achieved maximum medical improvement as late as May 3, 2013, the date the FCE was performed. The subsequent examinations of Petitioner by Dr. Bare

16IWCC0054

and Dr. Vitello only reinforce the FCE findings. The Commission further concludes, on the bases of the results Petitioner's FCE and Dr. Vitello's IME findings, Petitioner is capable of resuming the normal work duties of a maintenance supervisor without restrictions and is not entitled to either maintenance or vocational rehabilitation. Accordingly, the Commission modifies the Decision of the Arbitrator to vacate these awards.

The Commission modifies the Decision of the Arbitrator further with respect to Petitioner's average weekly wage. The parties, during oral arguments, stipulated that Petitioner's average weekly wage to be $633.71.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator be modified to vacate the maintenance and vocational rehabilitation.

IT IS FURTHER ORDERED BY THE COMMISSION that Decision of the Arbitrator be modified to reflect that Petitioner's average weekly wage is $633.71.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for determination of compensation for permanent disability, if any, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 2 2016
KWL/mav
O: 11/24/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

16IWCC0054

SCHNEIDER, BRIAN
Employee/Petitioner

Case# 12WC010168

CHILD'S CONSTRUCTION SERVICES INC
Employer/Respondent

On 3/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2194 STROM & ASSOCIATES
JOSEPH MULVRY
180 N LASALLE ST SUITE 2510
CHICAGO, IL 60601

0507 RUSIN & MACIOROWSKI LTD
JENNIFER L RIZK
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0054

Brian Schneider
Employee/Petitioner

v.

Child's Construction Services, Inc.
Employer/Respondent

Case # 12 WC 10168

Consolidated cases: ___

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **August 11, 2014** and **October 1, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☐ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other: **Vocational rehabilitation**

16IWCC0054

FINDINGS

On the date of accident, **March 15, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$33,968.22**; the average weekly wage was **$653.24**.

On the date of accident, Petitioner was **34** years of age, *married* with **2** dependent children.

Respondent *has* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$27,194.55** for TTD, $ **0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$27,194.55**

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay maintenance benefits to Petitioner at a rate of **$435.39**/week for **21-1/7** weeks, from May 14, 2013 through August 23, 2013, from October 1, 2013 through October 2, 2013, and from June 2, 2014 through July 15, 2014.

Respondent shall provide vocational rehabilitation services for Petitioner.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

March 13, 2015
Date

ICArbDec19(b)

MAR 13 2015

State of Illinois)
) SS
County of Cook)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brian Schneider,

Petitioner,

v.

Child's Construction Services, Inc.,

Respondent.

16IWCC0054

Case Number: 12 WC 10168

ADDENDUM TO DECISION

I. FINDINGS OF FACT

Petitioner testified that he had been employed by Child's Construction for approximately three years when, on March 15, 2011, he injured himself while hanging drywall (TX., p. 8). At the time of his injury, Petitioner was a maintenance supervisor. Petitioner testified that his job duties included lifting posts from the ground to the roof of a van, lifting heavy sewer lids, moving 300 lb. barrels of salt, removing and installing drywall, and carrying and climbing ladders (TX., p. 26). Petitioner testified that in his role as a maintenance supervisor, and over a 52-week period, he had to work overtime 40 - 45 of those weeks (TX., p. 23). He explained that he was given work in the morning and told that he needed to stay until the work orders were done (TX., p. 23).

On the day of the accident, Petitioner and a co-worker were replacing drywall in a ceiling. Petitioner bent down to pick up his drill with his right hand when a drywall sheet fell from above and forced his left arm backwards. Petitioner testified that he heard a "pop" and felt his left arm go numb. Petitioner completed his assignment by screwing in the drywall (TX., pp. 11-12).

Upon returning to Respondent's office, Petitioner reported his injury and was told to seek medical care if necessary. Petitioner began a course of treatment that would culminate in two surgical repairs of his left shoulder.

Petitioner initially treated at Central DuPage Business Health and was referred to Kellen K. Choi, M.D., for an orthopedic evaluation. Petitioner's initial care consisted of a course of

physical therapy and a subacromial injection. The injection provided only mild, temporary pain relief.

On July 5, 2011, Dr. Choi performed an arthroscopic repair of Petitioner's left shoulder. Dr. Choi's post-operative diagnosis: (1) Posteroinferior labral tear from 3 o'clock to 4:30 with associated paralabral cyst (2) Anteriorsuperior labral tear form 9 o'clock to 11:30, bucket handle (3) Subacromial impingement and mild acromioclavicular joint arthritis (TX., p. 14, P. Ex. 3).

Post-operatively, Petitioner completed courses of physical therapy and work conditioning. Petitioner testified that his symptoms "disappeared" following the surgery, but that they returned toward the end of physical therapy. (T.15)

On November 4, 2011, Dr. Choi examined Petitioner and wrote, *inter alia*, the following:

> Mr. Schneider has symmetrical full active range of motion including internal rotation, which now reaches approximately T7. Excellent strength is noted throughout his rotator cuff muscle groups, which has been the case for the last several visits. There is no evidence of side-by-side detectible weakness at the infraspinatus, supraspinatus or subscapularis. Posterior load and shift is well tolerated with no complaint of pain. Hawkins test is negative and Speed's test is negative.
>
> *****
>
> His current work conditioning report demonstrated excellent gains in his ability to lift and carry 70 pounds including floor to chair lift of 90 pounds with no difficulty. This certainly meets the medium-to-heavy physical demand level from a functional standpoint, and therefore, I recommend a release to full duty at this point. He agrees and is confident that he should be able to return to work without any restrictions or concerns . . . I encouraged him to continue his home exercise program learned through formal therapy for rotator cuff strengthening and scapular stabilization in hopes of injury prevention in the future. (P. Ex. 4)

Petitioner returned to full-duty work and continued to perform such work through November 15, 2012.

Petitioner testified that pain in his left shoulder began to flare up in February 2012.

On May 11, 2012, Petitioner sought a second opinion for his left shoulder condition from Aaron A. Bare, M.D., an orthopedic surgeon. Petitioner told Dr. Bare that his shoulder is worse than it was before Dr. Choi's surgery on him. Petitioner reported to Dr. Bare that although he is able to do his job, he has pain with reaching and lifting as well as night pain. Dr. Bare ordered an MRI arthrogram of Petitioner's left shoulder. (P.Ex. 6)

On July 6, 2012, Petitioner followed up with Dr. Bare and complained of a sharp pain like "a knife stuck in [his] shoulder." He noted that these are the same complaints Petitioner had at the last visit. Petitioner reported that it bothers him with overhead activities. Dr. Bare opined that there was substantial structural pathology in his shoulder based on the MRI arthrogram and that Petitioner may, and probably will, require surgical intervention at some point in the future. The doctor gave Petitioner the option of continuing with conservative care or undergoing surgery. Dr. Bare then wrote: "In the meantime, I think it is something for him to consider, in the meantime, as well as he (sic) wants to try full duty." (P.Ex. 6)

After following up with Dr. Bare on October 26, 2012, Petitioner underwent left shoulder surgery on November 21, 2012. Dr. Bare performed an arthroscopic repair of the superior labrum and a mini open biceps tenodesis. Dr. Bare's post-operative diagnosis: (1) Left shoulder failed labral repair (2) Left shoulder biceps tendinitis. (P.Ex. 6)

Petitioner then participated in a course of physical therapy followed by a work hardening regimen. Subsequently, Petitioner underwent 3 Functional Capacity Evaluations ("FCEs") The dates of such FCEs: February 26, 2013, March 22, 2013 and May 3, 2013. Noel K. Priest, M.S., A.T.C., conducted all three FCEs. (R. Ex. 3)

Following the May 3, 2013 FCE, Ms. Priest found, based on the test results, that Petitioner is currently lifting at the heavy-to-very-heavy physical demand level. Therefore, she concluded, Petitioner's capabilities meet the job lifting requirements according to the verbal job description and Dictionary of Occupational Titles for floor to knuckle and shoulder to overhead lifts and push/pull. Ms. Priest noted that there were some inconsistencies with Petitioner's performance during validity testing that would indicate this may not be a completely accurate representation of his current maximum functional capabilities. In describing these findings, Ms. Priest wrote, she was by no means implying intent or denying his symptoms, but rather stating that Mr. Schneider appears to be able to do more at times than he commonly states or perceives. (R. Ex. 3)

In an addendum of May 6, 2013, Ms. Priest wrote:

Brian Schneider called stating that he experienced 9/10 intensity pain

in his entire left shoulder following the FCE on 5/3/13 but that it was

"no different" compared to what he usually feels. Therefore, it appears he is able to tolerate the functional activity levels as outlined in this report and the attached Work Capacity Summary without any adverse reactions. (R. Ex. 3)

Petitioner returned to see Dr. Bare on May 10, 2013. At that time, Dr. Bare discharged Petitioner from care and issued a work status report that indicated the employee may return to light-duty or alternate work if available, with the following restrictions: 50 lbs. to chest, 20 lbs. overhead. (R. Ex. 3) In his chart note of the same date, Dr. Bare noted that these are "permanent restrictions and thus will likely require repetitive actions." (P. Ex. 6)

On June 5, 2013, at the request of Respondent, and pursuant to Section 12 of the Act, Petitioner presented to orthopedic surgeon William A. Vitello, M.D., for an examination. Dr. Vitello took a history from Petitioner, and upon examination, found:

> No asymmetry or atrophy of the shoulder, forward flexion of 170 degrees, abduction of 160 degrees, internal and external rotation of 70 degrees in each direction without crepitus, 5/5 rotator cuff strength testing, negative Hawkins sign, negative impingement sign, negative Speed test, negative apprehension relocation test, negative O'Brien's test and negative Yergason's test. (R. Ex. 2, Dep. Ex. 2)

Dr. Vitello testified that the physical examination findings of the left shoulder were within 10 to 20 degrees of normal, which he considers to be within normal limits. He testified that Petitioner has a stable left shoulder. (R. Ex. 2, pp. 17-18) Dr. Vitello testified that Petitioner is capable of returning to work within the limitations and demonstrated capabilities of the May 3, 2013 FCE. (R. Ex. 2, p. 20)

Petitioner testified that Dr. Vitello spent approximately 15 minutes with him, and that the examination ended when Dr. Vitello moved his left shoulder, his shoulder stuck and popped, and Petitioner screamed. (TX., pp. 19-20)

At the request of Petitioner, Dr. Bare prepared a December 13, 2013 narrative report in which he explained the basis for imposing light-duty restrictions on Petitioner. Dr. Bare wrote that he has reviewed the opinions of Dr. William Vitello in his narrative report. Dr. Bare also wrote that when he last met with Petitioner in May, they discussed his job description and potential need to repetitively reach and lift to help other workers on job sites. Dr. Bare opined that although Petitioner is at MMI, he did not feel that Petitioner could return to "his full duty at

a heavy manual job." Dr. Bare acknowledged that Petitioner did reach his job requirements at the functional capacity evaluation. Dr. Bare then wrote:

> That being said, we need to consider his clinical picture. This is a young individual who has had 2 previous shoulder surgeries. I believe with a high degree of medical certainty that if he works his normal job doing heavy overhead reaching and lifting frequently, then he will probably aggravate his shoulder periodically resulting in further care followup and treatment to his shoulder. What I am recommending is he go forward with restrictions but still allow him to do most of his job as he is a maintenance supervisor. If indeed he does mostly supervisory work, this should not limit his ability to is (sic) to do his normal job. What I am suggesting is that if he does have to help coworkers, to refrain from doing a lot of overhead reaching and lifting. This is more for protection than anything else. He did demonstrate his ability to do heavy demand jobs at a functional capacity evaluation that allows and tests repetitions up to 15 to 20 times. What it is not able to do is to test repetitive lifting and reaching overhead multiple hours at a time. Common sense then would consider permanent light-duty restrictions for repetitive reaching and lifting.

Following his release from care, Petitioner attempted to return to work for Respondent by contacting his supervisor, Brian Stacy, and dropping off a copy of his restrictions (TX. p. 43). On July 10, 2013, Petitioner was contacted by Dave Childs, on behalf of Respondent, and was informed that he could not return to work with the permanent restrictions entered by Dr. Bare (TX. p. 44).

Petitioner testified that after his release to return to work, he and his family moved to Florida. Petitioner's wife received a job offer from a hospital in Florida that they could not pass up. Petitioner has not worked since he moved to Florida. Petitioner further testified that he has been looking for a job. He testified that he spends 3 to 4 hours a day searching online databases and submitting resumes or job applications. (TX., pp. 21-22)

Petitioner offered into evidence a job search log. (P. Ex. 8)

Petitioner testified that he has worked in various occupations over the years, but that all of his jobs have involved heavy lifting. (TX., pp. 24, 86) He further testified that had some college. (TX., p. 24) He further testified that he would like to go to school to be a motorcycle mechanic, and that he has looked into attending the Motorcycle Mechanics Institute. (TX. pp. 25, 91)

II. CONCLUSIONS OF LAW

With regard to issue (F):

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of March 15, 2011. The Arbitrator relies on Petitioner's testimony and on the opinions of his treating surgeon, Dr. Aaron Bare, in support of this decision.

There is no dispute that Petitioner was injured on March 15, 2011 and that his current condition is related to that injury. There is no dispute that Petitioner's treatment has been reasonable and necessary; Respondent has accepted responsibility for the accident and has paid all medical bills. The dispute is the precise state of Petitioner's current condition, specifically whether the restrictions entered by Dr. Bare are reasonable.

Dr. Bare testified that after Petitioner's second shoulder surgery, he had recurrent and ongoing pain in his shoulder. After reviewing the FCE, Dr. Bare, in consultation with Petitioner, concluded that the rigors of Petitioner's job were likely to be too severe to allow him to return to that position. Dr. Bare based his opinion on the nature of Petitioner's job and on his expertise as an orthopedic surgeon:

> I was basically trying to explain, you know, why I was placing him on permanent restrictions when the FCE commented that he met job levels, and it was based on the fact that this is an individual that had to do a lot of heavy overhead reaching/lifting and the repetitive nature of doing that could re-aggravate his injured shoulder and I didn't want to make him worse. So in lieu of the fact that he had to do that at work, I didn't think he was capable of doing his normal job. (P. Ex. 7, p. 17)

Dr. Bare further testified that an FCE is not the only thing that he considers when determining a patient's permanent restrictions. He also considers subjective complaints, objective findings, medical history, multiple surgeries and his clinical experience of having performed a procedure on the shoulder. (P. Ex. 7, p. 18)

Dr. Vitello, Petitioner's Section 12 examining physician, agreed that these factors should be considered when imposing permanent restrictions. (R. Ex. 2, pp. 36, 46)

Dr. Bare had the opportunity to treat and evaluate Petitioner on 10 separate occasions (P. Ex. 7, p. 26). In contrast to Dr. Bare's assessment, Dr. Vitello saw Petitioner on only one occasion for approximately fifteen minutes (TX. p. 19). Further, Dr. Vitello never reviewed a job

description and admitted that it was difficult to comment on job restrictions without more information (R. Ex. 7, p. 49).

Dr. Vitello deferred to Noel Priest's opinions that Petitioner was capable of returning to work without limitations. Notwithstanding, Dr. Vitello testified that Dr. Bare's opinion was "reasonable" that Petitioner should be placed on restricted work given the type of invasive surgery he underwent. Dr. Vitello agreed that medical minds can vary based on opinion from time to time. (R. Ex. 7, pp. 31-32)

The Arbitrator finds the opinions of Dr. Bare to be more persuasive than those of Dr. Vitello.

The Arbitrator finds Petitioner to be credible.

Based on the foregoing, the Arbitrator concludes that the permanent restrictions that Dr. Bare are reasonable and are causally related to the accident of March 15, 2011.

With regard to issue (G):

The Arbitrator concludes that Petitioner earned $33,968.22 in the 52 weeks immediately preceding the accident (sum of "gross pay this period" figures) and that his average weekly wage is $653.24. (P. Ex. 9) Of the 26 fortnightly earning statements, Petitioner performed overtime work in all but 5 of them. (P. Ex. 9) The documents indicate that Petitioner did not work a set number of overtime hours per two-week pay period. (P. Ex. 9) Petitioner testified that he performed overtime work in 40 - 45 weeks of the 52 weeks that he worked. (TX., p. 23) He explained that he was given work in the morning and told that he needed to stay until the work orders were done. (TX., p. 23) Respondent has offered no rebuttal on this issue. Therefore, the Arbitrator concludes that as such overtime hours were mandatory and consistent, Petitioner's average weekly wage is $653.24.

With regard to issues (O) and (L):

The Arbitrator concludes that Petitioner is entitled to maintenance benefits from May 14, 2013 through August 23, 2013, from October 1, 2013 through October 2, 2013, and from June 2, 2014 through July 15, 2014, for a total period of 21-1/7 weeks.

Petitioner testified that he never returned to work for the Respondent following his release from care. (TX., p. 21) He testified that he contacted his boss and dropped off his release form with restrictions. (TX., p. 43) He testified that the owner of the company called and left a voice mail message in which he stated: "Twenty pounds overhead will not work." (TX., p. 44)

Petitioner testified that he moved to Grand Island, Florida, on July 30, 2013, shortly after his release to return to work. (TX., pp. 21-22, 41) He testified that he has not worked since his family moved, but that he has been looking for a job. (TX., p. 22)

Petitioner testified that he spent 3 to 4 hours per day on the computer going through job searches, and that he submitted a resume or filled out an application when a job "comes up." (TX., p. 22) Petitioner testified that since May 3, 2013, he has kept a notebook in which he has recorded each of the jobs for which he has applied. Petitioner did not have this notebook at the time of trial, and testified that he never forwarded it to his attorney. (TX., p. 60) He further testified that he transferred the information from the notebook to the forms that his attorney sent him. (TX., pp. 45-46) The collection of forms constitutes the log. (P. Ex. 8)

Petitioner initially testified that he received a few "call backs" from prospective employers to whom he applied and "a few" e-mails from different companies advising that they had gone with a different candidate. (TX., p. 24) He later testified that he received only one e-mail message in response to his applications, which was from Lowe's and is attached to the job log. (TX., p. 71)

According to the log, Petitioner first applied for a job on May 3, 2013, which was before Dr. Bare imposed permanent work restrictions. (TX., p. 45, P. Ex. 8) Petitioner's notes indicate that he was offered a job as a maintenance supervisor at Nordstrom, but when they found out about his restrictions, they told him they could not hire him since he was too much of a liability for them. (P. Ex. 8)

Petitioner testified that he created this job log approximately one month prior to the trial date of August 11, 2014, and that he forwarded a portion of the log to his attorney two weeks prior to trial. (TX., p. 46) Respondent was not provided a copy of this job log prior to trial.

Petitioner testified that he is currently looking for jobs in construction and driving that are within his job restrictions of 50 pounds to chest and 20 pounds overhead. (TX., p. 25) Petitioner later testified that he did not attempt to specifically search for light-duty jobs within the databases he regularly uses. (T.93)

Petitioner testified that the list of jobs for which he applied is complete. (TX., p. 61) The job log includes a job description with the lifting requirements for each position. The vast majority of such jobs are outside of Dr. Bare's restrictions. (P. Ex. 8) Petitioner testified that the online job postings did not list lifting requirements, and that he referred to the employers' websites after he applied in order to determine the specific requirements. (TX., pp. 82-83) He testified that he only applied through online job search databases. (TX., pp. 83-84)

Petitioner testified that he is interested in undergoing job training to be a motorcycle mechanic. He testified that he used to be a service porter and helped mechanics when working at a Ford dealership. (TX., p. 84) He testified that the position of motorcycle mechanic did not require lifting above waist level, per his communication with the school. He testified that he would have to lift pneumatic tools, but was unaware of their weight. (TX., p. 91) Petitioner provided no information with regard to the cost of the motorcycle mechanic school, the likelihood he could get a job as a motorcycle mechanic upon completion of the program or the amount he could expect to earn as a motorcycle mechanic.

Petitioner offered into evidence a handwritten job log that includes 159 prospective employers to whom he sent applications and/or resumes. Petitioner testified that this is the complete list of all the positions for which he applied over a search period of approximately 15 months. In fact, Petitioner did not apply for any positions in September 2013, and did not apply

for any positions between October 2, 2013 and June 2, 2014. Therefore, the Arbitrator concludes that Petitioner did not conduct any job search whatsoever for a total of approximately 9 months.

The Arbitrator finds that Petitioner is not entitled to maintenance benefits during these two hiatuses.

The Arbitrator notes that after the second hiatus, Petitioner began making job entries on June 2, 2014, which was 4 days prior to his attorney filing a demand for vocational rehabilitation benefits.

It is true that the vast majority of jobs for which Petitioner applied were outside his restrictions. Yet, Respondent did not provide any vocational assistance for Petitioner.

It is clear to this Arbitrator that Petitioner needs help in finding a job or transitioning into a new line of work. Petitioner testified that when he applied for jobs online, he did not think to check the job requirements first because he just wanted to get his name out there. Petitioner testified that he applied for warehouse jobs and maintenance jobs because these were the types of jobs he performed in the past. Petitioner has not undergone a vocational assessment.

Petitioner's testimony establishes that he is not fully equipped to find new employment without outside assistance. The job search logs evince a willingness to put forth the effort necessary to find employment. However, Petitioner has used a relatively unsophisticated approach and his job search has been unsuccessful to date.

Therefore, the Arbitrator finds that Petitioner is entitled to vocational rehabilitation. The Arbitrator finds that Petitioner proved that he suffered a work-related injury and that the restrictions arising from such injury have impaired his earning power. As a result of the accident, Petitioner has been precluded from returning to his pre-injury occupation. Additionally, Petitioner testified that he has worked in various occupations over the years, but that all of his jobs have involved heavy lifting. Petitioner has suffered a loss of job security as a result of the accidental injury. He is a high school graduate with some college. There is no evidence that Petitioner possesses any specialized work skills. On the date of the trial, Petitioner was 37 years old, so he has a fairly long work-life expectancy. Petitioner appears to be motivated to pursue a new career. Therefore, as there are a sufficient number of factors in Petitioner's case that favor vocational rehabilitation, pursuant to National Tea Co. v. Indus. Comm'n, 97 Ill. 2d 424, 432, 454 N.E.2d 672, 73 Ill. Dec. 575 (1983), the Arbitrator finds that vocational rehabilitation is appropriate here and orders Respondent to provide such benefit.

With regard to issue (M):

The Respondent relied on the opinions of William A. Vitello, M.D., and Noel Priest, M.S., A.T.C., in disputing Petitioner's entitlement to maintenance and vocational rehabilitation. The Arbitrator finds that such reliance was not unreasonable. Therefore, the Arbitrator concludes that neither penalties nor attorneys' fees are warranted in this case.

Brian Cronin, Arbitrator

March 13, 2015
Date

MAR 13 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LORRAINE BLACK,

Petitioner,

16IWCC0055

vs. NO: 13 WC 025334

TRANSPORTATION JOINT AGREEMENT,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses and temporary total disabilty and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Decision of the Arbitrator found Petitioner's current complaints of low back pain and leg pain to be causally related to her October 16, 2012, accident. It was noted that "various physicians and physical therapists" diagnosed Petitioner's these pains as being work-related and that "the medical records reflect a consistent and unbroken course of medical treatment . . . ." The Commission views the history contained in Petitioner's medical records differently and, therefore, is unable to conclude that Petitioner's current complaints are related to her October 16, 2012, accident.

Petitioner's medical history reveals no continuous complaints of low back pain with radicular symptoms but a series of acute complaints of low back pain, twice with accompanying radicular symptoms, and is most notable for the abandonment of treatment. The pattern evidenced by the Petitioner's medical history gives rise to the conclusion that the pain and discomfort Petitioner experienced on October 16, 2012, was a temporary exacerbation of a preexisting condition.

Petitioner initially treated her injury at Centegra Occupational Health (Centegra) from the date of the accident, October 16, 2012, through February 7, 2013. Over the course of her treatment at Centegra, Petitioner regularly and repeatedly complained of low back pain and radicular pain into the right lower extremity. On October 19, 2012, while treating at Centegra, she provided a history of having been diagnosed with intravertebral disc disease two-and-a-half years earlier, an injury that resulted, per Petitioner, in daily, low grade back pain. Concurrent with her receiving medical treatment at Centegra, Petitioner underwent physical therapy at Centegra Physical Therapy and Sports Clinic from November 20, 2012, through January 23, 2013. Petitioner's medical treatment was subsequently transferred to Dr. Babak Lami, the physician with whom Petitioner had treated her earlier lumbar complaints with. Though Petitioner's physical therapy was to continue, January 23, 2013, is the last recorded date Petitioner underwent physical therapy.

Petitioner began treating with Dr. Lami on February 27, 2013, and complained of a recurrence of symptoms, namely radiating pain down her right leg in a L5 nerve distribution. Dr. Lami's found no motor deficit but noted Petitioner was made uncomfortable with motion of the lumbar spine and Petitioner's straight leg raise testing reproduced symptoms. Continued complaints of low back pain and the similar findings of no motor deficits were made on April 19, 2013, May 3, 2013, and June 5, 2013. On August 14, 2013, Petitioner again complained to Dr. Lami of low back discomfort but also complained ofnumbness in her feet and of generalized weakness. Concerned with Petitioner's complaint of weakness, Dr. Lami had Petitioner undergo an electromyogram and nerve conduction study of her lower extremities on August 29, 2013. The result of the study was the finding that all of Petitioner's tested muscles were normal. Petitioner returned to Dr. Lami on September 11, 2013. She continued to complain of low back pain but also complained of abdominal pain that radiated into her leg. Dr. Lami ordered thatPetitioner undergo a CT of her abdomen. One was performed on October 2, 2013, that suggested pelvic congestion syndrome. Over the course of treating with Dr. Lami, Petitioner was also seen by Dr. Lami's colleague, Dr. Neema Bayran, for pain management. She, however, did not return to Dr. Lami, or Dr. Bayran, after September 11, 2013. Petitioner offered no explanation as to why she stopped treating with Dr. Lami.

On December 5, 2013, Petitioner completed an intake form for Dr. Anthony LeBario and indicated, in a pain diagram, of experiencing right-sided pain from below her right shoulder blade down to her right foot and along the entire length of the back of her right arm. To Dr. LeBario, Petitioner provided a history of stabbing, shooting, unbearable and constant pain that, at that moment, rated 10/10 in intensity. The resultant physical exam found tenderness to palpation

along multiple areas in the lumbar spine but also pain with mid-line lumbar extension and with right lateral lumbar flexion. The examination elicited no muscle or neurological deficits. Petitioner returned to Dr. LeBario on December 18, 2013, with continued complaints of 8-9/10 pain, pain described as constant, throbbing and radiating into her right leg. The accompanying examination again revealed pain over multiple areas of Petitioner's lumbar spine and resulted in Dr. LeBario administering a lumbar transforaminal epidural steroid injection at L5-S1 as well as a trigger point injection into her right gluteal muscle. Petitioner, upon returning to Dr. LeBario on January 8, 2014, indicated that her symptoms improved a little but still complained of 8-9/10 pain that radiated down her right leg. The examination again elicited findings of diffuse lumbar pain and resulted in Dr. LeBario again administering a lumbar transforaminal epidural steroid injection at L5-S1 as well as a trigger point injection into her right gluteal muscle. Dr. LeBario also indicated that Petitioner should follow-up this appointment no sooner than one week for repeat injections. Petitioner never returned for those injections. Petitioner testified that she did not return to Dr. LeBario due to her insurance company's refusal to cover the recommended injections. Dr. LeBario testified that he was unaware as to why he hasn't seen Petitioner since January 8, 2014.

The above medical history contradicts the assertion contained in the Decision of the Arbitrator of Petitioner partaking in "consistent and unbroken medical care." Per the medical records Petitioner tendered into evidence, she suffered from a continuous low-grade back pain that dated back to her 2009 work injury. On October 16, 2012, she suffered low back pain while attempting to secure a child in a seat on the bus as was her job duty. She then treated with Centegra and, then, Dr. Lami, and his colleague Dr. Bayran, until September 11, 2013. Despite Petitioner's complaints of continued back pain with radiation and Dr. Lami's recommendation for continued treatment, she stopped treating with Dr. Lami. Petitioner did not resume treatment for her low back and radicular symptoms until December 5, 2013, and did so by presenting to Dr. LeBario. She saw Dr. LeBario on two more occasions. Petitioner did not indicate, nor do her medical records, that she sought regular treatment for her low back since she last saw Dr. LeBario on January 8, 2014, despite complaining of 8-9/10 pain with radicular symptoms when she last seen by Dr. LeBario. By the time Petitioner's arbitration hearing was held on December 5, 2014, Petitioner had gone more than eleven months without recorded medical treatment. Given this history, the Commission finds that the Arbitrator erroneously found Petitioner's medical care to have been consistent and unbroken.

The Commission also finds it difficult to reconcile some of Petitioner's as-testified-to claims either with her own testimony or with her medical records. Petitioner testified that she called Dr. Lami sometime after September 11, 2013, but never received a return phone call. No explanation was offered by Petitioner when she did not follow-up that phone call with others, particularly given her claimed level of pain. Petitioner, in explaining why she stopped attending physical therapy first indicated it was because Respondent wouldn't authorize it but then stated it was because Dr. Lami stopped it. Most significantly, Petitioner testified that she had not injured her back or had another injury to her back since the October 16, 2012, accident. On March 13, 2013, Petitioner presented to the emergency department of Sherman Hospital with complaints of

back pain. The history she provided the hospital staff was that she injured her back turning to reach for a television remote control. The history of the incident further states that the onset of her complained-of pain began three hours early. Petitioner, at that time, also provided a medical history that was noted to be "negative." Though she treated her low back pain with Dr. LeBario only two months earlier, Petitioner did not reference that treatment. She was examined and her musculoskeletal range of motion was found to be normal. She was found to exhibit no neurological deficits. Petitioner was discharged from the hospital with instructions to return if her condition worsened. As with her other treatment providers, Petitioner never returned.

It is the cyclical nature of Petitioner's complaints and treatment that lead the Commission to conclude that Petitioner's injury on October 16, 2012, resulted in the aggravation of her pre-existing lumbar condition, an aggravation that resolved as of September 11, 2013, the date Petitioner last treated with Dr. Lami. The Commission further concludes Petitioner failed to prove her claimed radicular symptoms were causally related to her compensable accident. The August 29, 2013, electromyogram and nerve conduction study was negative, and both Dr. Lami and Dr LeBario, and later the emergency room physician at Sherman Hospital, found Petitioner showed no neurological deficits. The inconsistencies noted in Petitioner's testimony gives the Commission pause to accept Petitioner's subjective claim of radicular symptoms. The Commission, therefore, finds Petitioner achieved maximum medical improvement from the October 16, 2012, accident as late as September 11, 2013. Accordingly, the Commission modifies the Decision of the Arbitrator to terminate temporary total disability and medical benefits effective September 11, 2013, and vacate the awarded prospective medical treatment.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is modified to terminate temporary total disability and medical benefits effective September 11, 2013, and vacate the awarded prospective medical treatment on the basis of Petitioner being found to be at maximum medical improvement on said date.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $259.22 per week for a period of 18-5/7 weeks, from May 4, 2013, through September 11, 2013, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $6,794.83 for medical expenses under §8(a) of the Act, that sum being the medical expenses incurred from October 16, 2013, through September 11, 2013.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $9,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 2 2016
KWL/mav
O: 11/23/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

16IWCC0055

BLACK, LORRAINE Case# **13WC025334**
Employee/Petitioner

TRANSPORTATION JOINT AGREEMENT
Employer/Respondent

On 1/9/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1767 FREEMAN TUTAJ LLC
JAMES P TUTAJ
170 CENTER ST SUITE 2
GRAYSLAKE, IL 60030

0210 GANAN & SHAPIRO PC
AMY TURNBAUGH
210 W ILLINOIS ST
CHICAGO, IL 60654

STATE OF ILLINOIS)
)SS.
COUNTY OF **McHenry**)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
XX None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0055

Lorraine Black
Employee/Petitioner

v.

Transportation Joint Agreement
Employer/Respondent

Case # **13** WC **25334**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Falcioni**, Arbitrator of the Commission, in the city of **Woodstock**, on **December 5, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **10-16-12**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**20,219.16**; the average weekly wage was $**388.83**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**2814.39** for TTD paid.

ORDER

Respondent shall pay reasonable and necessary medical services of $22,396.58, as provided in Sections 8(a) and 8.2 of the Act and receive credit for all sums previously paid hereunder.

Respondent shall pay Petitioner temporary total disability benefits of $259.22/week for 83.14 weeks, commencing 5-4-13 through 12-5-14, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 7-18-13 through 12-5-14, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $2814.39 for temporary total disability benefits that have been paid.

Respondent shall provide the medical care prescribed by Dr. Laborio as set forth more fully herein.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Robert E. Mahoney
Signature of Arbitrator

December 23, 2014
Date

ICArbDec19(b)

JAN 9 - 2015

Statement of Facts

On October 16, 2012 while assisting a disabled child into his bus seat, Petitioner injured her low back. Petitioner testified she felt a sharp stabbing pain into her low back.

Petitioner reported the occurrence to her supervisor and was sent by Respondent to its Occupational health Clinic, Centegra Occupational Health in Crystal Lake Illinois.

Petitioner's Exhibit 1 are the records from the Centegra Occupational Health Clinic in Crystal Lake Illinois. On October 16, 2012 Petitioner was seen for an initial triage and assessment. She presented with complaints of low back pain that radiated up the middle of her back and down her right leg to her foot. She also complained of slight bilateral leg tingling while sitting. Petitioner was diagnosed with lower back pain and sciatica, prescribed anti-inflammatories, muscle relaxants and Vicodin for severe pain. She was placed on light duty and instructed to return to the Clinic on October 19, 2012. Her work restrictions included no stooping, bending or twisting; minimal pushing, pulling, caring and squatting; and to avoid extensive kneeling.

Petitioner testified that her duties as a school bus attendant required consistent and extensive stooping, bending, twisting, pushing, pulling, carrying, squatting and occasional kneeling.

On October 19, 2012 Petitioner was seen for follow-up in the Occupational Clinic. An additional diagnosis of muscle spasm was added to the previous diagnosis of sciatica. Physical therapy was ordered, Petitioner was continued on light-duty and medications, and directed to follow-up in two weeks.

On November 2, 2012 the Clinic reported no significant improvement in Petitioner's condition. A Medrol dose pack was ordered and Petitioner is directed to follow-up after physical therapy.

On November 20, 2012 Petitioner is seen for her initial physical therapy evaluation. The physical therapist notes that she was referred for physical therapy on October 16, 2012 but only recently received insurance authorization to begin physical therapy.

Petitioner presented with complaints of back pain of 10/10 at worst; 7/10 at best. Her pain increased with driving, walking, stair climbing. Her pain was decreased with pain medications. She reported weakness in her right lower extremity and sitting and standing tolerance of only 15 minutes. Her physical examination revealed reduced range of motion in all planes, muscle spasms in her low back and moderate tightness in her hamstrings and piriformis muscles bilaterally. The therapists assessment was decreased truncal mobility, gate deviation, poor truncal stability affecting functional and positional tolerances. She recommended physical therapy 2 to 3 times a week for four weeks.

Between November 20, 2012 and January 23, 2013 Petitioner seen for a total of 11 physical therapy sessions. The February 3, 2013 physical therapy discharge summary

reflects a recommendation of continued physical therapy two times a week for four weeks.

Additional physical therapy was not ordered or approved.

On January 23, 2013 the Occupational Clinic ordered an MRI of the lumbar spine.

The report of the lumbar MRI obtained on February 5, 2013 reflects:

> At L3-L4, minor disk bulge indents the anterior thecal sac, resulting in slight inferior foraminal narrowing, greater on the left.
> At L4-L5, minor diffuse disk bulge indents the anterior thecal sac. There is edema in the central annulus. Slight inferior foraminal narrowing is noted.
> At L5-SI, a tiny shallow left paramedian disk protrusion with edema in the annulus questionably abuts the descending left S1 nerve root sleeve. The neural foramen and central spinal canal otherwise appear patent.

On February 7, 2013 the Occupational Clinic reported their diagnosis of vertebral disc tear with sciatica, extended Petitioner's light-duty restrictions, and discharged Petitioner with a referral to spine specialist Dr. Lami for further evaluation and care.

Petitioner is first seen by Dr. Lami on February 27, 2013. Petitioner's Group Exhibit 2. Dr. Lami's impression is low back pain with radiculitis. He ordered a trial of lumbar epidural injections.

On March 26, 2013 Petitioner was seen by Dr. Lami's partner, Dr. Bayran for evaluation and performance of an epidural steroid injection. Dr. Bayran's physical examination revealed reduced muscle strength of -5/5 on right hip and knee flexion, right knee extension, right foot dorsi and plantar flexion, and right inversion and eversion. Sensation to light touch was decreased over the medial and lateral aspect of her right thigh. Straight leg raising test was positive on the right side. Dr. Bayran performed a transforaminal epidural steroid injection at L4-L5 and L5 -S1.

On April 19, 2013 Dr. Lami reported Petitioner had two weeks of significant relief until the right leg symptoms returned. He reported Petitioner had difficulty walking and standing. His physical examination revealed limited range of motion and positive straight leg raising test on the right. Dr. Lami ordered a second lumbar MRI

The MRI was performed on May 3, 2013 at Centegra's facility in Crystal Lake Illinois. The radiologist's report reflects his impression of annular tearing at L4-L5 and L5-S1; Diffuse disc bulging at L4-L5 and L5 S1; facet joint arthropathy at L4-L5 and hypertrophy of the ligamentum flavum at L4-L5 and L5-S1.

On May 3, 2013 Dr. Lami ordeeds a second lumbar epidural steroid injection and plain x-rays of Petitioner's right hip. He also restricted Petitioner from all work.

The second epidural steroid injection was performed by Dr. Bayran on May 14, 2013 at L4-5 and L5-S1 and was returned to light duty work by Dr. Bayran at that time. (PX 2, RX 4) Petitioner admitted at trial she did not return to work despite the light duty release, but also testified that she never learned of the light duty release and that Respondent never offered her light duty work within the terms of the restrictions of Dr. Bayran.

On June 5, 2013 Dr. Lami reported the second epidural steroid injection provided only short-term relief. He refilled her pain medications and referred her for a second opinion.

Petitioner testified Dr. Lami gave her a list of three surgeons he recommended a second opinion with: Drs. Perlmutter, Yuk or Panchal. Petitioner testified that the second opinion recommended by Dr. Lami was not authorized. Rather Petitioner was sent for evaluation by Respondent's independent medical examiner Dr. Citow.

On July 5, 2013 Dr. Citow reported that Petitioner sustained a lumbar strain that should have resolved within six weeks of onset. He did not believe her current symptoms were related to the work injury, opined that she was at maximum medical improvement, that she did not require any further treatment and believed she could return to full duty work without restrictions.

Based upon Dr. Citow's report, Respondent terminated all TTD and medical benefits.

On July 25, 2013 Respondent's workers compensation carrier writes Dr. Lami seeking confirmation that Petitioner is at maximum medical improvement, capable of full duty work, that Petitioner's condition as of that date was not related to the occurrence of October 16, 2012 and that she was not in need of any further medical treatment.

On August 14, 2013 Dr. Lami reported his impression of persistent low back pain with numbness in her legs and weakness. He prescribed the neuropathic pain medication Lyrica and muscle relaxants, ordered an EMG and authorizeed Petitioner to remain off work until further notice.

On August 29, 2013 a nerve conduction study was performed by Dr. Dave' at Mercy Woodstock Medical Center in Woodstock Illinois. The report reflects that there was no electrical evidence of a neuromuscular disease. There is no reference to the presence or absence of a lumbar radiculopathy nor is there any indication that Petitioner was evaluated for the presence or absence of a lumbar radiculopathy.

On September 11, 2013 Dr. Lami ordered a CT of the abdomen and pelvis to rule out intra-abdominal pathology.

The CT scan of the abdomen ordered by Dr. Lami was performed on October 2, 2013 at Centegra's Crystal Lake facility. The report suggests findings consistent with pelvic congestion syndrome.

Petitioner testified that after Dr. Lami received the report of the CT scan he recommended evaluation by a gynecologist due to the suggestion of pelvic congestion syndrome.

On October 16, 2013 Petitioner was evaluated by Dr. Preeti Jhaveri of Barrington Healthcare for Women. Petitioner's Exhibit 3. Dr. Jhaveri's report of her evaluation reflects Petitioner's history of sustaining a work related injury on October 16, 2012 and a summary of the treatment received for her low back injury. After conducting a physical examination and reviewing the CT of the abdomen Dr. Jhaveri concluded:

> Patient's history and physical highly suggestive of neurologic sequelae, most likely resulting from previous back injury/trauma. Given that she has had three MRIs, CT, EMG, consultation with orthopedic surgeon, would strongly recommend urgent follow-up with a neurologist or neurosurgeon to avoid further injury.
>
> **Suspected dilated ovarian veins are a red herring**, as patient denies any specific, or consistent GYN complaints. Name, address, and numbers of local neurologists provided to patient and offered assistance in any capacity we can provide.

On December 5, 2013, Petitioner was seen by Dr. Lebario at the Illinois Pain Institute. Petitioner's Exhibit 4. Petitioner testified that Dr. Lebario was the first physician she treated with who was not chosen by her employer or a referral from a physician chosen by her employer.

After evaluating Petitioner, Dr. Lebario recommended performance of a right L5 and S1 lumbar transforaminal epidural steroid injection and trigger point injections into the right gluteal muscle. Dr. Lebario also authorized Petitioner to remain off work and stated she "will need reevaluation prior to return to work"

Dr. Lebario performed these injections on December 18, 2013 and again on January 8, 2014.

Petitioner testified a third series of injections were canceled due to non-authorization by her husband's group health plan. Petitioner testified that after initially authorizing the injections, both those performed on December 18 and January 8, and the additional injections recommended by Dr. Lebario, the health plan revoked the authorization contending that the treatment was due to a work related injury. Petitioner testified she has been unable to follow-up with Dr. Lebario or obtain any further treatment by him due to lack of insurance authorization. Petitioner testified it is her intention to obtain additional treatment and injections from Dr. Lebario if authorization can be obtained through workers compensation.

Dr. Lebario testified by means of an evidence deposition. Petitioner's Exhibit 5.

Dr. Lebario is a physical medicine and rehabilitation physician who sub-specializes in pain management. He is fellowship trained in interventional pain management.

Dr. Lebario first saw Petitioner on December 5, 2013. His physical exam revealed she had tenderness to palpation along multiple areas of the involved area, pain with midline lumbar extension, and pain with right lateral lumbar flexion. He testified his exam was consistent with her history of having predominantly right-sided symptoms

Dr. Lebario testified that Petitioner's pain upon extension was significant because extension of the spine causes loading upon the facet joints. When loading causes symptoms, it is consistent with some right facet joint pathology.

His assessment of Petitioner on December 5, 2013 was that her history and physical exam findings were consistent with a lumbar radiculopathy. He recommended a lumbar transforaminal epidural steroid injection, as well as injections for the myofacial pain and neuritis.

Dr. Lebario also reviewed the report of the May 3, 2013 lumbar MRI. Dr. Lebario testified the MRI findings correlated with Petitioner's history and his physical exam findings. Dr. Lebario noted that the changes reported by the radiologist on the lumbar MRI are the types of changes that can cause right-sided radiculopathy. Dr. Lebario explained that even though the MRI does not reveal true nerve root compression, patients can have a history and physical exam findings consistent with radiculopathy without noted compression on the nerve root. Chemical irritation of the nerve roots from the disc material itself can also cause radiculopathy

Dr. Lebario testified that Petitioner's complaints of pain with extended sitting and standing noted in his report of December 18, 2013 were also significant because it is consistent with a diagnosis of radicular and discogenic symptoms. He explained that when standing or sitting in a seated position, you have axial loading upon your disks. When you lay down or are in a recumbent position, the axial loading is relieved. Because MRI's generally are taken in a recumbent position without axial loading, you can have changes in the lumbar spine that are not picked up on an MRI because the patient is in a recumbent position.

Dr. Lebario opined that Petitioner's symptoms were related to the work incident of October 2012

Dr. Lebario testified that the injections he performed on December 18, 2013 and January 8, 2014 did not completely eliminate Petitioner's pain. They provided a reduction in her pain, but she still continued to have a considerable amount of pain. His treatment plan as of January 8, 2014 was to repeat the injections and go up or down a vertebral level for the next transforaminal epidural steroid injection. He was unable to go to that next step in his treatment plan because his treatment with Petitioner was interrupted.

Dr. Lebario testified that epidural injections are often part of the conservative treatment plan that is attempted before a surgical option is considered. When his patients exhaust conservative treatment measure, he refers his patients either to an orthopedic surgeon or spine surgeon for evaluation. Not every patient who he sends for surgical evaluation ends up having surgery because the surgeon often does not feel surgery is appropriates. He explained that although patients can have structural issues that are contributing to the patient's symptoms, some neurosurgeons or orthopedic spine surgeons will opt to delay surgery because surgeries can be rather limiting in terms of patient function and have prolonged recovery times. Also some surgeons feel that the pathology is not significant enough that they can guarantee the patient that they will provide some relief. Just because a spine surgeon declines to offer surgery as a treatment option does not mean the patient is not experiencing any pain. Some patients have chronic lumbar pain, but are not surgical candidates.

Dr. Lebario testified that as of the last date he saw Petitioner, he felt that she would benefit from additional treatment.

Dr. Lebario did not observe or elicit any Waddell signs or note any symptoms inconsistent with her history or MRI images during his treatment with Petitioner. He did not see any evidence of drug seeking behavior.

Dr. Lebario confirmed that Petitioner has not been released or discharged from his care. Lebario Exhibit 2 is his script restricting her from work until further evaluation. He testified this script was never changed or modified.

Petitioner's Exhibit 14 are records from a March 14, 2014 admission to emergency room at Sherman hospital. Petitioner was treated for an acute exacerbation of her chronic back pain after turning to reach for the television remote control. Petitioner was prescribed valium for muscle spasms, anti-inflammatories and tramadol for pain, and directed to follow up with her primary care provider

Petitioner testified that she continues to experience low back pain that radiates down her right leg to her foot. She also has numbness in her right leg and foot to the point her foot feels like it is a sleep. She remains limited in her ability to do perform her activities of daily living and household activities. She has not been released to return to work by Dr. Lami or Dr. Lebario.

Dr. Citow authored an addendum report August 22, 2014. Dr. Citow reviewed all of the updated records after the initial evaluation in July 2013. Dr. Citow opined in direct contradiction to Dr. Lebario that the epidural steroid injections Petitioner received on December 8, 2013 and January 8, 2014 were not medically necessary as she had no lumbar pathology that required an epidural steroid injection and there was no pressure on the neural elements at any level based upon the MRIs of Petitioner's spine. He stated Petitioner was at that point malingering and in need of no additional treatment. He

further disagreed with Dr. Lebario's opinions that Petitioner had lumbar radiculopathy at all as the MRI and EMG demonstrates a complete lack of cause or explanation for any radiculopathy Petitioner was complaining of. He disagreed with Dr. Lebario's recommendation for ongoing epidural steroid injections and stated that they should be used to treat pressure on nerves which is obviously not present here. He further opined there were no objective findings to warrant any work restrictions. He disagreed specifically with Dr. Lebario's testimony regarding the interpretation of the MRIs which, in his opinion, clearly demonstrated there is absolutely no lumbar nerve root involvement to warrant ongoing pain management treatment. (RX 4)

In support of issue F, is Petitioner's current condition of ill being causally related to the injury, the Arbitrator finds as follows:

Based upon the records of Centegra Occupational Health Clinic, Dr. Lami, Illinois Pain Institute, Dr. Lebario's testimony, and Petitioner's credible testimony, the Arbitrator finds that Petitioner's current condition of ill being is causally related to the accidental injuries sustained on October 16, 2012. Petitioner's complaints, history and physical examinations as documented by numerous different physicians and other medical providers from different practices and facilities, remain consistent throughout the entire course of treatment. The medical records reflect a consistent and unbroken course of medical treatment for Petitioner's complaints of low back and right leg pain from the time of injury forward. There is no record or evidence of an intervening accident, event or medical condition that breaks the causal relationship between Petitioner's current condition of ill being and the October 16, 2012 accident.

The records of the Occupational Health Clinic consistently and repeatedly reflect the conclusion that Petitioner's complaints of back and leg pain and the diagnosis of the various physicians and physical therapists who provided treatment to Petitioner, were "Work-Related". Likewise, Dr. Lami repeatedly attributes Petitioner's complaints of back pain to the October 16, 2012 occurrence. The Arbitrator notes the fact that Petitioner was directed to these providers by Respondent and that they were not chosen or selected by Petitioner. Moreover, Dr. Lami's records contain a copy of Dr. Citow's July 5, 2013 report of his independent medical examination and a July 25, 2013 letter from Respondent's workers compensation carrier soliciting his opinion that Petitioner was at maximum medical improvement, capable of full duty return to work and that Petitioner's condition as of that date was not related to the occurrence and therefore not in need of further medical treatment. Not only did Dr. Lami decline Respondent's invitation to break the causal connection, he continued to treat Petitioner, ordered additional diagnostic studies, and even extended his initial May 3, 2013 no work authorization by virtue of a work status report authored August 14, 2013. The Arbitrator declines to adopt the opinions of Dr. Citow, finding the opinions of Petitioner's treating physicians to be more credible and reliable. Dr. Citow saw Petitioner on one occasion and his opinion is contrary to the entire medical record. His opinion that Petitioner sustained a lumbar strain that should have resolved within six weeks of onset is refuted by the records of Respondent's own Occupational Clinic that clearly reflect Petitioner's condition of ill being extending well beyond six weeks from the date of the accident. Dr. Citow's opinion

is also contradicted by the findings and treatment provided by Dr. Lami and his partner Dr. Bayran.

It's In support of issue J, were the medical services that were provided to Petitioner reasonable and necessary and has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator incorporates by reference as if fully set forth herein, the Statement of Facts and his findings in regard to causal relationship.

The Arbitrator finds that the medical services provided to Petitioner from the date of accident through the emergency room visit on March 13, 2013 where necessary and reasonably required to cure or treat the effects of her accidental injuries. Petitioner's Exhibits six, seven, nine and ten are invoices for medical services provided by or at the request of Dr. Lami. The May 10, 2013 hip x-ray, the August 29, 2013 EMG and October 2, 2013 CT of the abdomen, were diagnostic studies ordered by Dr. Lami in an effort to confirm his diagnosis and rule out other potential causes for Petitioner's low back and right leg pain. Petitioner's Exhibit eight is an invoice from Illinois Pain Institute for services provided by Dr. Lebario in an effort to cure and treat the effects of Petitioner's low back injury. Petitioner's Exhibit 13 is for laboratory blood work, CBC and Sed rate ordered by Dr. Lebario on December 5, 2013. Petitioner's Exhibit 12 is an invoice for services provided at the emergency room of Sherman hospital on March 13, 2014 and is directly attributable to Respondent's refusal to authorize ongoing medical treatment subsequent to July 5, 2013. The Arbitrator finds that all the services were necessary and reasonably required to treat Petitioner's low back condition and therefore are properly the responsibility of Respondent and orders same to be paid by Respondent pursuant to the medical fee schedule, Respondent to receive credit for all sums previously paid hereunder.

In support of issue K, is Petitioner entitled to any prospective medical care, the Arbitrator finds as follows:

The Arbitrator incorporates by reference as if fully set forth herein the statement of facts and his findings in regard to issues F and J.

The Arbitrator finds that Petitioner is entitled to the prospective medical care as testified to by Dr. Lebario. Dr. Lebario testified that he had not finished his course of treatment with Petitioner and that additional injections would be of some benefit to Petitioner. He further testified that due to the interruption in his course of treatment, Petitioner would need to be re-evaluated before further treatment is initiated. Respondent shall authorize and pay for a re-evaluation by Dr. Lebario.

In support of issue L, what temporary benefits are in dispute, the Arbitrator finds as follows:

The Arbitrator incorporates by reference as if fully set forth herein statement the facts, and findings in regard to issue F.

The Arbitrator finds that Petitioner is entitled to temporary total disability benefits from May 4, 2013 through the date of hearing, December 5, 2014. Dr. Lami's records reflect that on May 4, 2013 he restricted Petitioner from all work. Dr. Lami never modified or rescinded this authorization and, in fact, continued Petitioner's no work status on August 14, 2013. The August 14, 2013 no work authorization was likewise never rescinded or modified by Dr. Lami. On December 5, 2013 Dr. Lebario again provided Petitioner with a no work authorization and stated Petitioner would need a re-evaluation prior to her return to work. Dr. Lebario testified that as of January 8, 2014 he felt Petitioner was in need of further treatment and that he had additional treatment options that he felt would benefit Petitioner and that his prior no work order had never expired and would require him to see Petitioner again in order to change her work status. None of Petitioner's treating physicians ever opined or found Petitioner to be at maximum medical improvement.

STATE OF ILLINOIS	)	☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	)	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
	SS.		
COUNTY OF WILL	)	☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Richard Glas,
Petitioner,

vs. NO: 11 WC 38157

Harrah's Casino,
Respondent.

16IWCC0056

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, permanent partial disability, medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 6, 2015 is hereby affirmed and adopted.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 2 2016

o-01/20/16
drd/wj
68

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GLAS, RICHARD
Employee/Petitioner

Case# **11WC038157**

16IWCC0058

HARRAH'S CASINO
Employer/Respondent

On 2/6/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

5511 DeCARLO LAW GROUP
ANITA DeCARLO
6525 W NORTH AVE SUITE 204
OAK PARK, IL 60302

1139 NOBLE & ASSOCIATES
LIS BARBIERI
387 SHUMAN BLVD SUITE 210-E
NAPERVILLE, IL 60563

STATE OF ILLINOIS)
)SS.
COUNTY OF **WILL**)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Richard Glas
Employee/Petitioner

v.

Harrah's Casino
Employer/Respondent

Case # **11** WC **38157**

Consolidated cases: _____

16IWCC0056

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **New Lenox**, on **January 16, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **July 18, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**35,770.80**; the average weekly wage was $**687.90**.

On the date of accident, Petitioner was **65** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Petitioner failed to meet his burden of proof regarding the issue of accident. Therefore, all benefits are denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

2/5/15
Date

FEB 6 - 2015

16IWCC0056

FINDINGS OF FACT

Petitioner testified on July 18, 2011 he was working as a Security Guard, checking hand stamps at the entry and exit way of the casino floor. Early in his shift, petitioner testified he pivoted his body to the right and noticed a sharp burning feeling onto his right knee.

On July 19, 2011, Petitioner reported the incident to his supervisor, Dickson Amoah. The incident was documented on the same date by Mr. Amoah. (RX-2). The Security Department incident report is dated on the date Petitioner testified he made the report to Mr. Amoah. The report indicates they incident took place at 1345 hours. (RX-1)

On July 20, 2011 Petitioner initially treated at Physicians Immediate Care for right knee pain that began two days prior. Petitioner stated that he went to pivot off his right foot but his right foot remained planted causing sharp pain in the medial aspect of his knee. On examination, Petitioner demonstrated good range of motion however with some pain at full flexion and more localized to the medial aspect of the right knee with aggravation upon lateral stress. The results of diagnostic testing of the right knee returned within normal limits. Petitioner was diagnosed with a right knee sprain/strain and given a knee sleeve, and allowed to return to work full duty without restrictions. (PX-1)

On July 29, 2011 Petitioner presented to Joliet Open MRI for an MRI of the right knee which revealed a strain or partial tear of the anterior cruciate ligament with an acute sprain of the tibial and fibular collateral ligaments. Degenerative changes of the posterior horn of the medial meniscus with chondromalacia of the medial joint space and patella along with patella tendinitis and tendinitis about the iliotibial band. (PX-1)

On August 18, 2011 Petitioner presented to Hinsdale Orthopaedics, and evaluated by Dr. Anuj Puppala, who administered a steroid injection to the right knee. Dr. Puppala recommended a right knee arthroscopy medial menisectomy and chondroplasty surgical procedure to repair Petitioner's right knee medial meniscal tear. (PX-2) Petitioner continued to treat at Hinsdale until August 31, 2012. (PX-2).

On September 7, 2011 Petitioner presented to M & M Orthopaedics for an Independent Medical Evaluation with Dr. Timothy C. Payne. (RX-2) Dr. Payne examined petitioner, reviewed the surveillance video (RX-3) and reviewed petitioner's medical treatment and care. Dr. Payne opined petitioner's ongoing pain complaints as consistent with a degenerative meniscal tear of the right knee. Dr. Payne opined Petitioner's condition is due to his degenerative condition that has developed over time and not from him standing and working the turnstile as security. (RX-2)

Petitioner corroborated the video surveillance provided by Respondent and shown during trial was of him working at his assigned location on the date of the alleged incident. Respondent's video surveillance was taken during the time listed on the incident report filed by Mr. Amoah. (RX-1) (RX-3). Petitioner testified he reported the alleged accident the day after it happened to his supervisor, Mr. Amoah. An incident report was drafted with the details of the accident, including when the accident was alleged to have taken place at approximately 1345 hours. (RX-1) Petitioner testified to all material aspects of the report including the exact wording used in the report to describe the accident. The only portion of the report that was refuted by Petitioner was the time of the accident. Petitioner testified he couldn't remember the time when the accident happened, only that it took place early in his shift prior to his dinner break around 5pm.

16IWCC0056

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner failed to meet his burden of proof. In support of this finding, the Arbitrator relies on the testimony at trial as well as the investigative material admitted into evidence. First, the Arbitrator notes that the Petitioner's description of his accident in which he was in the act of pivoting his body to the right, is not in and of itself an accident. Petitioner was at not at an increased risk any greater than that of the general public when he pivoted his body. There was no evidence of any defect in the floor or carpet when the accident allegedly occurred. There was no evidence of any trauma to the Petitioner's leg. There was no evidence that the Petitioner was running or walking, nor was the Petitioner carrying anything or wearing special clothing or gear that could have contributed to the incident. Basically, the Petitioner was standing in one position and moved his leg to the right when he claims to have sustained an injury. Secondly, the Petitioner testified he reported the alleged accident the day after it happened to his supervisor, Mr. Amoah. An incident report was drafted with the details of the accident, including when the accident was alleged to have taken place at approximately 1345 hours. (RX-1) Petitioner testified to all material aspects of the report including the exact wording used in the report to describe the accident. However, in reviewing the video surveillance of the Petitioner performing his duties on and around the time in question, there does not appear to be anything to even suggest that an accident occurred in the video. Petitioner's testimony at trial that he cannot remember at what time the accident occurred, but is able to recall the other details of his initial accident report ultimately belies the credibility of Petitioner's claim. As such, the Arbitrator concludes that the Petitioner failed to prove that he sustained an accident arising out of and in the course of his employment with Respondent on July 8, 2011.

2. Based on the Arbitrator's findings with regard to the issue of accident, all other issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCCLEAN)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin Byrd,

Petitioner,

vs. NO: 12 WC 24862

Bridgestone,

16IWCC0057

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, permanent partial disability, medical, notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 9, 2015 is hereby affirmed and adopted.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 5 2016

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:12/10/16
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BYRD, KEVIN
Employee/Petitioner

Case# **12WC024862**

16IWCC0057

BRIDGESTONE
Employer/Respondent

On 6/9/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0564 WILLIAMS & SWEE LTD
DIRK A MAY
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

2904 HENNESSY & ROACH PC
EMILIE A MILLER
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

16IWCC0057

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kevin Byrd
Employee/Petitioner

Case # **12** WC **24862**

v.

Bridgestone
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Bloomington**, on **April 21, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On **June 1, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this alleged accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the alleged accident.

In the year preceding the injury, Petitioner earned $**26,000.00**; the average weekly wage was $**500.00**.

On the date of accident, Petitioner was **24** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

ORDER

The Petitioner failed to prove that he sustained an accidental injury that arose out of and in the course of his employment by the Respondent. The Petitioner's claim for compensation is, therefore, denied.

No benefits are awarded herein.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

June 3, 2015
Date

JUN 9 - 2015

16IWCC0057

FACTS:

The Petitioner testified that he worked for Respondent as a Spadone Operator and that he started working for the Respondent at its Bloomington plant beginning in 2011. The Petitioner testified that on June 1, 2012 he slipped on oil residue on the stairs of the Spadone Machine after straightening material that had come off the roll. The Petitioner testified that when he slipped he fell down approximately 20 stairs and injured his back and left hip.

The Petitioner testified that after he fell he provided notice of his accident to his supervisor, Curtis Smith, and the plant nurse, Sheril Donahue. The Petitioner testified that he also completed an incident report. The Petitioner testified that when he reported his accident he was asked if he wanted to seek medical treatment, but he said no because he did not want to make a big deal out of it. The Petitioner testified that he did, however, eventually seek medical treatment approximately one week later. While Petitioner testified that he sought treatment about one week after his accident, the medical records admitted into evidence by Petitioner do not document treatment until June 14, 2012.

Petitioner testified that he first sought treatment at OSF Occupational Health upon referral from the plant nurse. However, the medical records admitted into evidence by Petitioner confirm that he actually first sought treatment at OSF St. Joseph Prompt Care on June 14, 2012. The Petitioner was not seen at OSF Occupational Health until June 21, 2012.

Upon presenting to OSF St. Joseph Prompt Care on June 14, 2012, the Petitioner reported a three week history of back pain after falling down steps three weeks ago. There is no indication in the record that the Petitioner reported that his fall occurred at work. It is noted that Petitioner also reported moving into an apartment three weeks ago. The Petitioner returned for treatment at OSF St. Joseph Prompt Care on June 18, 2012 and that time he did report his fall occurred at work, but did not confirm a date of accident.

The Petitioner testified that while serving National Guard duty the weekend of June 8th, 9th, and 10th of 2012, he was not required to do much because he "had a doctor's note". The Arbitrator notes, however, that no medical records were admitted into evidence by the Petitioner confirming that he had sought or obtained any medical treatment prior to June 14, 2012.

During his visits to OSF St. Joseph Prompt Care on June 14th, 18th and 21st, the Petitioner was diagnosed with back pain. The Petitioner was referred for physical therapy on June 21st by Dr. Dowden at OSF Occupational Health; however, Petitioner testified he elected to pursue chiropractic treatment at AlignLife instead. The Petitioner was first seen at AlignLife on July 31, 2012 and he was discharged on November 9, 2012.

On November 16, 2012, the Petitioner presented for evaluation at Orthopedics of Illinois. At that time, Petitioner was evaluated by David Kieser, a family nurse practitioner for Dr. Kolb. After examining the Petitioner, Mr. Keiser again diagnosed him with low back pain and recommended an MRI of his lumbar spine. It was noted that the Petitioner reported to

16IWCC0057

Mr. Keiser that he had not worked since June 14, 2012 and that he did not think he could work without restrictions. The Arbitrator notes, however, that the Petitioner testified that he began working a new job as a security guard in August of 2012 and that he remained so employed at the time of his testimony.

After November 16, 2012, the Petitioner did not treat again until February, 2013 when he returned to AlignLife. The Petitioner testified that the delay in his treatment was due to the fact that his first attorney had closed his case and that payment of his medical bills was coming out-of-his own pocket. The record of the Petitioner's treatment at AlignLife on February 7, 2013, demonstrate that he reported left-sided, sharp pain in his back and hips that began on January 25, 2013 after he flipped his truck on the way home from work and was thrown from his vehicle. While the Petitioner admitted that he was involved in a motor vehicle accident, he denied an injury other than to his left shoulder blade.

The Petitioner did return to Orthopedics of Illinois again on February 20, 2015 and was seen by Dr. Anderson. When asked why he returned to Orthopedics of Illinois in February of 2015 after not seeking treatment for almost two years, the Petitioner testified that he was told by his doctor at AlignLife that his efforts had been exhausted. The Arbitrator notes, however, that there is no record of treatment of the Petitioner at AlignLife since February 7, 2013. While the Petitioner testified that he returned to AlignLife in 2014, record of that treatment was not admitted into evidence. On February 20, 2015, Dr. Anderson again recommended an MRI of Petitioner's lumbar spine. The Petitioner underwent that MRI on February 23, 2015 and the MRI was reported to be normal.

Curtis Smith, the Petitioner's supervisor, testified that the Petitioner never reported a work accident to him on June 1, 2012. Mr. Smith testified that had the Petitioner reported a work accident on June 1, 2012, or any other day, he not only would have immediately prepared an accident report himself, but he would also have had the Petitioner complete a report. Mr. Smith testified that Respondent's policy requires that once notice of an accident is provided reports are prepared by the supervisor and employee and are scanned and submitted via email to the Safety Department, the department manager and the operations manager. Mr. Smith testified that upon conducting a review of the Respondent's records, no reports were located related to an alleged accident on June 1, 2012.

Mr. Smith testified that had Petitioner first reported to the plant nurse with report of a work related injury she would have inquired of him, as the Petitioner's supervisor, regarding the Petitioner's report, which she never did. Mr. Smith also testified that in that instance it would have triggered him to inquire with Petitioner and prepare a report.

Emily Nolan, the Respondent's Safety and Health Coordinator, also testified. Ms. Nolan testified that as the Safety and Health Coordinator she is in charge of all workers' compensation claims occurring at the Respondent's Bloomington plant. Ms. Nolan testified that the Respondent did not receive notice of the Petitioner's accident until a copy of his Application for Adjustment of Claim was received from the Commission, she thought at the end of July, 2012. Commission records show that Petitioner's Application was filed on July

20, 2012.

The Petitioner testified that he currently continues to experience constant pain in his low back that shoots down his left leg, sometimes all the way to his ankle. He also testified his left leg goes numb. The Petitioner testified his pain is irritated by standing, sitting, and lifting.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

It is axiomatic that the Petitioner bears the burden of proving all of the elements of his claim by a preponderance of the credible evidence. The Arbitrator finds that the Petitioner failed to meet that burden here. Specifically, the Arbitrator finds that the Petitioner failed to prove that he sustained an accidental injury that arose out of and in the course of his employment by the Respondent. In so finding, the Arbitrator questions the reliability and credibility of the Petitioner's testimony.

The Arbitrator notes that the Petitioner did not seek any medical treatment until June 14, 2012, two weeks after his alleged injury, and that, after allegedly falling down 20 stairs, he failed to report when first seeking treatment that his injury occurred at work. It was not until June 18, 2012 that the Petitioner first reported his injury occurred at work and, even then, he reported that he was unsure of the exact date of the incident. The Arbitrator finds it difficult to believe that had the injury occurred as the Petitioner testified and had the Petitioner in fact notified the Respondent of his accident as alleged on June 1, 2012, that he would have failed to mention his accident when seeking treatment on June 14, 2012. The Arbitrator also finds it difficult to believe that had the Petitioner reported falling down 20 stairs when he first sought medical treatment that such a detail would not have been included in the record of that treatment.

The Petitioner's testimony that he reported his injury to his supervisor is, similarly, unsupported by the record. Curtis Smith, the Petitioner's supervisor, testified that the Petitioner never reported a work accident to him on June 1, 2012. Mr. Smith testified that had the Petitioner reported a work accident he would have immediately prepared an accident report and would have had he Petitioner complete a report. Mr. Smith testified that Respondent's policy requires that once notice of an accident is provided reports are prepared by the supervisor and employee and are scanned and submitted via email to the Safety Department, the department manager and the operations manager. Mr. Smith testified that upon conducting a review of the Respondent's records; no reports were located related to an alleged accident on June 1, 2012. Emily Nolan, the Respondent's Safety and Health Coordinator, testified that the Respondent did not receive notice of the Petitioner's accident

until a copy of his Application for Adjustment of Claim was received from the Commission at the end of July, 2012.

The Arbitrator also notes that the Petitioner testified that he already had a "doctor's note" when he reported for National Guard duty the weekend of June 8th, 9th and 10th of 2012, after his accident, but before first seeking treatment on June 14, 2012. The Petitioner provided no explanation via testimony or evidence as to why he had a "doctor's note" before presenting for treatment of his alleged work injury. Similarly, although the Petitioner testified that he only injured his left shoulder blade in the motor vehicle accident of January 25, 2013, the record of the Petitioner's treatment at AlignLife on February 7, 2013, demonstrate that he reported left-sided, sharp pain in his back and hips that began after he flipped his truck on the way home from work and was thrown from his vehicle. These inconsistencies, together with the inconsistencies noted above, cause the Arbitrator to doubt the reliability and the credibility of the Petitioner's testimony.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner failed to prove that on June 1, 2012 he sustained an accidental injury that arose out of and in the course of his employment by the Respondent.

Having found that the Petitioner failed to prove that an accidental injury arising out of and in the course of his employment by the Respondent occurred, determination of the remaining disputed issues is moot. The Petitioner's claim for compensation is denied and no benefits are awarded herein.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tina Cederborg,

Petitioner,

vs. NO: 14 WC 16159

Caputo's New Farm Produce, Inc.,

Respondent,

16IWCC0058

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under §19(b) by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, accident and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 8, 2015 is hereby affirmed and adopted.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 5 2016

MB/mam
o:1/21/16
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

CEDERBERG, TINA
Employee/Petitioner

Case# **14WC016159**

16IWCC0058

CAPUTO'S NEW FARM PRODUCE INC
Employer/Respondent

On 6/8/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0891 STORTO FINN & ROSINSKI
LAWRENCE FINN
100 W GREEN ST
BENSENVILLE, IL 60106

4412 ACCIDENT FUND HOLDINGS INC
NICOLE B HANLON ESQ
200 W MADISON ST SUITE 3850
CHICAGO, IL 60606

16IWCC0058

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
X None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Tina Cederborg
Employee/Petitioner

v.

Caputo's New Farm Produce, Inc.
Employer/Respondent

Case # **14** WC **16159**

Consolidated cases: ___

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Wheaton** on **3/27/2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. X Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

F. X Is Petitioner's current condition of ill-being causally related to the injury?

G. ☐ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. X Is Petitioner entitled to any prospective medical care?

L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance x TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. Other: ___

FINDINGS

On the date of accident, **2/14/2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned an average weekly wage of $**398.62**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

As he finds that Petitioner failed to prove accident and causation, the Arbitrator hereby denies compensation.

All other issues are moot.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

June 8, 2015
Date

ICArbDec19(b)

JUN 8 - 2015

TINA CEDERBORG v. CAPUTO'S NEW FARM PRODUCE, INC.
CASE NUMBER: 14 WC 16159

FINDINGS OF FACT:

The above case was tried before Arbitrator Cronin in Wheaton on March 27, 2015. It was stipulated that the petitioner was employed by the respondent on February 14, 2014. Issues in dispute include whether the petitioner's accident arose out of and in the course of her employment, whether her condition of ill-being was causally related to her injury, payment of the outstanding medical bills, and the petitioner's prospective medical treatment.

The petitioner was the first and only witness to testify. The petitioner testified that she is 51 years of age and is right-hand dominant. The petitioner testified that she is employed by the respondent, Caputo's New Farm Produce, Inc. The petitioner testified that she began working for the respondent in August 2013. The petitioner testified that prior to her current employment, she was unemployed for approximately two years. Prior to being unemployed, she worked for a non-profit company, APPNA. For over 15 years there, she worked as a secretary and entered data, typed, filed, scheduled meetings and answered phones.

The petitioner testified that in August of 2013 she began working for the respondent in their Addison store location. The petitioner was assigned to the deli department. Her duties included cleaning, stocking, assisting customers, taking orders and slicing meats. The petitioner testified that she worked in that department for approximately two to three months and then she moved into the produce department in October or November of 2013. The petitioner testified that while in the produce department, she assisted with making guacamole, cutting fruit, vegetables and making vegetable trays. The petitioner testified that the difference between the produce department and the deli department was that she had to use her hands to cut fruits and vegetables. The petitioner testified that she would spend approximately 75-80% of her day holding a knife as she would have to cut fruits and vegetables.

The petitioner testified that when she was transferred from the Addison store to the Bloomingdale store in January 2014, she was put in charge of the produce department. She had the same duties that she had at the Addison store. The petitioner testified that she was the only person in that department and would

sometimes work 12-14 hours a day, 6 to 7 days a week. The petitioner testified that she would spend approximately 75-80% of her shift holding a knife. The petitioner testified that when she worked in the produce department, in addition to cutting fruit and vegetables, she would make guacamole. The petitioner testified that she would cut up the fruit and put the sliced pieces into 16 oz. containers. The petitioner testified that when she was working in the produce department, she noticed problems with her hands, including achiness, numbness and tingling.

Prior to working in the produce department, the petitioner testified, she never experienced any problems with her hands. The petitioner testified that while working in her prior employment as a secretary, she had no problems with her hands.

The petitioner testified that in February 2014, she saw Kimbrough Clark, D.C., because she was having issues with her hands. Prior to that date she had no symptomatology in her hands. The petitioner testified that she treated with Dr. Clark and that he later referred her to Jeffrey L. Visotsky, M.D. In addition, the petitioner underwent an EMG, which revealed that she had carpal tunnel syndrome. The petitioner testified that since the diagnosis of carpal tunnel syndrome, her job had been modified and she began working fewer hours. The petitioner first worked as a greeter and was subsequently moved to the meat department. The petitioner testified that as a greeter she welcomed customers and was in charge of loss prevention. The duties of her job in the meat department include wrapping and dating the meat, stocking shelves and cleaning.

On June 11, 2014, the petitioner saw Charles Carroll IV, M.D. for a Section 12 medical examination. Dr. Carroll confirmed that the petitioner had bilateral carpal tunnel syndrome.

The petitioner testified that her right hand bothered her more than her left hand. The petitioner testified that she does not have rheumatoid arthritis, gout, hypertension or diabetes.

The petitioner testified that she reviewed the job description/video. The petitioner testified that it was not accurate as it showed two people performing a job that she typically performed by herself. In addition, the job video did not show the petitioner making guacamole or pico de gallo, and did not show the volume of produce that she would cut up in a typical day. The petitioner testified that in regard to making

pico de gallo, she would have to dice onions. In regard to making guacamole, she would have to scoop out portions of avocados with a spoon and then use a potato masher.

The petitioner testified that her symptoms have not dissipated. When questioned as to whether her symptoms had changed since she left the produce department, she said no, they had actually gotten worse. The petitioner testified that she wore braces on her wrists when she worked at the guacamole stand; however, the braces did not help her symptoms. In addition, the petitioner underwent injections, which only helped for a day or two. The petitioner testified that she wants to proceed with the bilateral carpal tunnel surgery.

On cross-examination, the petitioner testified that the respondent hired her on or about August 17, 2013. The petitioner testified that she first began working at the Addison store. The petitioner testified that she thought she was originally hired for full-time, and not part-time, work. The petitioner testified that at the Bloomingdale store, when she would make fruit trays, she would make approximately four large trays and four small trays in a day. The petitioner testified that she made approximately 40 containers of guacamole. Such containers were either 8 oz. or 16 oz. containers.

The petitioner testified that when she worked in the produce department, she was the only person working in that department. However, if she needed assistance, she could find someone to help her. The petitioner testified that her typical hours at the Addison store were from 8 to 5 or 9 to 5. The petitioner testified that she was supposed to get two breaks plus a lunch break. The petitioner testified that when she worked in the produce department, she was cutting, filling and stirring.

The petitioner testified that she currently has pain in her hands. The petitioner further testified that when she worked as a greeter, she experienced pain in her hands.

Dr. Visotsky has recommended surgery for the petitioner. On August 1, 2014, Dr. Visotsky tentatively scheduled surgery that month that consisted of right carpal tunnel release and right small trigger finger release. (Px.2)

Dr. Carroll, the respondent's examining physician, reviewed medical records, viewed the job video and examined the petitioner. Dr. Carroll opined that the petitioner's job activities are not the cause of her

condition based upon the medical issues and his review. He further opined that any aggravation would be temporary in nature. (Rx.2)

The job video was not offered into evidence.

The respondent conducted an Ergonomic Work Station Assessment of the petitioner's job in the produce department of Caputo's. The Assessor, Bill Luebke, opined: "As a result, there appears to be Low exposure to an occurrence of bilateral carpal tunnel, based on the work risk factors evaluated." (Rx.4)

CONCLUSIONS OF LAW

IN SUPPORT OF THE ARBITRATOR'S DECISION WITH REGARD TO ISSUES (C) "DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?" AND (F) "IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?", THE ARBITRATOR FINDS THE FOLLOWING:

An employee who alleges an injury based upon repetitive trauma must meet the same standard of proof as other claimants alleging an accidental injury. Peoria County Bellwood Nursing Home v. Industrial Commission, 115 Ill.2d 524, 505 N.E.2d 1026 (1987). In addition, the claimant in a repetitive trauma case must show that the injury is work related and not the result of the normal degenerative aging process. Id.

There is no dispute as to the petitioner's condition of ill-being. The treating physician, Dr. Visotsky, and the respondent's examining physician, Dr. Carroll, agree that the petitioner has bilateral carpal tunnel syndrome and trigger fingers. The dispute lies in whether or not the petitioner's current condition of ill-being of bilateral carpal tunnel syndrome and trigger fingers is causally related to the work activities that the petitioner performed for the respondent.

In a report dated February 10, 2015, Dr. Visotsky wrote:

At this point in time, questions put forth in the narrative report:

1. **Whether her bilateral carpal tunnel syndrome and multiple trigger fingers are causally related to her job at Caputo's?**

At this point in time, based on her clinical examination, history obtained from the patient, physical examination and serial examination of the patient along with review of the EMG and NCV studies and job video, appears (sic) that her job is the cause or contributed to the production of carpal tunnel and trigger finger. She does not have any significant co-morbidities, prior history of disease. The temporal sequence point to (sic) work causing or contributing to the production of carpal tunnel syndrome and stenosing tenosynovitis.

2. **Whether her age, weight, general medical condition are likely causes of her diagnosis?**

At this point in time, the patient has no significant comorbidities. She is 5' 4", 170 pounds, right-hand dominant female. She has a family history of diabetes but is not diabetic herself. She currently takes Seroquel, Paxil, clonazepam and B6 vitamins. There are no known drug reactions for these interactions for these drugs. Her past surgical history includes a hysterectomy, cholecystectomy, C-section, and foot surgery. These surgeries have no relationship to hands and do not indicate any underlying orthopedic problems such as arthritis, rheumatoid arthritis, or inflammatory arthropathy. There are no comorbidities that contribute to the production of carpal tunnel syndrome or trigger finger. There are diseases such as endocrine abnormalities, collagen vascular diseases that make patients more prone to this, though she has never had symptoms of these diseases or through the physical examinations from her primary treating physician and treated positive for thyroid disorder, lupus, rheumatoid arthritis. If you have further questions, feel free to contact me.

At the request of the respondent, and pursuant to Section 12, the petitioner presented to Dr. Carroll for examination. Dr. Carroll issued three reports; the last two reports followed a review of the medical records, medical reports and job video.

On June 11, 2014, Dr. Carroll took a history from the petitioner and examined her. Dr. Carroll wrote: "She presents today with evidence of bilateral carpal tunnel syndrome and multiple trigger fingers." Dr. Carroll opined: "Her age, weight, and general medical condition although (sic) likely cause of her diagnosis." At that time, Dr. Carroll had not yet reviewed the medical records, the medical reports or the job video. (Rx.1)

On June 30, 2014, Dr. Carroll issued a second report. He reviewed medical records and reports and the job video. In this report he noted: "Alterations in my understanding or new facts could change my opinions in the future." Dr. Carroll also wrote:

> The job video was dated 4/17/14. It reviews work in the department cutting fruit for her employer. Various activities are noted. Postures are not awkward. Force is not significant. Making a vegetable container was noted. Knife was in right hand. Produce was placed in a container. Various produce was cut and handled. Smaller plastic containers were filled and weighed. Labels were applied. It was hand delivered in store. It was placed on a shelf. Cutting fruit was noted. Pineapples and other fruit were cut and packaged. Wrapping of partially cut produce was noted. Placement in plastic containers and placing in store was noted. I do not find these activities are the cause of her condition based upon the medical issues and this review. Any aggravation would be temporary in nature. The video was about 20 minutes long. (Rx.2)

The petitioner testified that the video was not accurate since it did not show the volume of fruit that she was required to cut up and it did not show the tasks she was required to do in making guacamole and pico de gallo.

On October 16, 2014, Dr. Carroll issued a third report. He reviewed his report of June 11, 2014 and the EMB/NCV studies of July 29, 2014. He advised the petitioner to undergo outpatient staged bilateral carpal tunnel releases followed by three months of physical therapy and a return to full use of each hand two to three months post-surgery. Dr. Carroll wrote: "I do not have any new opinions on causal relationship based upon these studies." (Rx.3)

The petitioner claims a manifestation date of February 14, 2014, which is the first time she treated with Dr. Clark. At that time, she presented to Dr. Clark with bilateral hand pain, numbness and weakness of approximately two months duration. (Px.1)

When Dr. Visotsky first saw the petitioner on April 29, 2014, he wrote: "She presents with extreme pain in her right hand, left hand, neck and shoulders. The pain started on 02/24/2004 when she began having gradual pain in her hands and arms." (Px.2)

When Dr. Carroll first examined the petitioner on June 11, 2014, he wrote: "She developed bilateral wrist and hand complaints that she dates to March 27, 2014." (Rx.1)

The Arbitrator finds, by a mere preponderance of the evidence, that the petitioner failed to prove accident and causation. The Arbitrator finds the opinions of Dr. Carroll to be more persuasive than those of Dr. Visotsky. Dr. Visotsky's causation opinion was based on the temporal sequence of events and the lack of comorbidities. However, Dr. Visotsky did not address the mechanism of injury, that is, the petitioner's hand/wrist positions and motions while working in the produce department that allegedly led to repetitive trauma. For example, Dr. Visotsky did not address the amount of force the petitioner applied with her hands when (1) cutting/dicing the produce, (2) holding the produce or (3) stirring the dips, he did not address the various activities she performed, and he did not address whether or not the petitioner's wrists were in a flexed, extended or neutral position when she performed these activities.

Moreover, the results of the Ergonomic Work Station Assessment of the petitioner's job in the produce department of Caputo's indicate that she had a low exposure to the occurrence of bilateral carpal syndrome based on the work risk factors evaluated.

Therefore, compensation is hereby denied. All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Kevin Easley,
Petitioner,

vs.

NO: 13WC 28020

Continental Tire North America Inc.,
Respondent,

16IWCC0059

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, prospective medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 9, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:
o010716
DLG/mw
45

JAN 2 5 2016

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

EASLEY, DAVID KEVIN
Employee/Petitioner

Case# 13WC028020

16IWCC0059

CONTINENTAL TIRE NORTH AMERICA INC
Employer/Respondent

On 7/9/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

3067 KIRKPARTICK LAW OFFICES
ERIC KIRKPATRICK
3 EXECUTIVE WOODS CT SUITE 10
BELLEVILLE, IL 62226

0299 KEEFE & DePAULI PC
JAMES K KEEFE SR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

16IWCC0059

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

David Kevin Easley
Employee/Petitioner

v.

Continental Tire North America, Inc.
Employer/Respondent

Case # 13 WC 28020

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **McCarthy**, Arbitrator of the Commission, in the city of **Herrin**, on **06/12/2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Statute of Limitations**

FINDINGS

On the date of accident, **January 16, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident N/A given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**42,536.78**; the average weekly wage was $**893.63**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **0** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Petitioner's claim for prospective medical treatment is hereby denied as he failed to prove an accidental injury arising out of his employment causally related to his current conditions of ill being.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

D. Dylan MacCarthy
Signature of Arbitrator

July 3, 2015
Date

ICArbDec19(b)

JUL 9 - 2015

THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Petitioner, 46 years of age, has been an employee of Respondent since 1999. Petitioner testified he built beads as an Apex operator from 1999 through approximately May 2010. The Apex job requirements were described as hand and arm intensive. Petitioner subsequently switched to the BAC machine and continues working there without any restrictions. The BAC job requirements are not considered hand or arm intensive.

Lead Supervisor Michael McGuire testified that Petitioner's purported work timeline was not accurate. He testified Petitioner switched to the BAC operator position no later than November 2008, and likely before. He explained the last BAC machine was installed in November 2008. Apex operators switched to the BAC machines in line with seniority. Petitioner had more seniority than 50% of the Apex operators. Mr. McGuire agreed that one Apex machine remains in operation, but to his knowledge, Petitioner does not operate the machine. During the transitions, extra employees were hired to handle the Apex machine.

Petitioner testified that he developed bilateral upper extremity symptoms and sought out treatment no later than 2005. Petitioner testified that he underwent EMG/NCS studies at the direction of Respondent. There was no medical documentation of the study. As early as 2004 or 2005, he believed there was a relationship between his work and his condition of ill-being because other Apex operators developed similar conditions. Petitioner testified that he notified his employer of the condition and need for treatment. There were no records or witnesses corroborating this allegation. He further testified that his symptoms gradually worsened until November 2, 2012, when he went for treatment at an occupational health facility recommended by his employer.

Mr. McGuire testified that he did not become aware of Petitioner's condition until November 2012. Mr. McGuire testified that he is made aware of all injuries in his department. Had Petitioner reported an injury prior to November 2012, Mr. McGuire would have known about it. Petitioner did not file an Application for Adjustment of Claim until August 26, 2013. Petitioner originally alleged a November 2, 2012 accident date that was amended at trial to January 16, 2013.

Records reflect that Petitioner presented to Midwest Occupational Medicine on November 19, 2012. He reported pain, numbness, and tingling to his bilateral elbows and wrists. Nurse Pauline Gregge recorded that Petitioner noticed symptoms to both elbows and wrists six months prior. Petitioner testified that the nurse miss-recorded his symptom onset.

Petitioner was referred to Dr. David Brown on January 16, 2013. Petitioner filled out a new patient questionnaire form stating he first noticed symptoms six to eight months prior to the visit. He acknowledged his handwriting was on the questionnaire. Dr. Brown also documented Petitioner had a six to eight month gradual onset of numbness and tingling in both hands involving all the digits, associated with medial elbow pain right worse than left. Petitioner testified that Dr. Brown miss-recorded his symptom onset. Petitioner was referred to Dr. Daniel Phillips for EMG/NCS studies. The studies confirmed electrodiagnostic evidence for bilateral carpal tunnel syndrome right worse than left as well as bilateral cubital tunnel syndrome. Dr. Phillips recorded Petitioner had an eight-month history of gradually progressive bilateral hand pain with intermittent global numbness. Petitioner testified that Dr. Phillips accurately recorded the history.

Dr. Brown recommended a comprehensive conservative treatment program. Petitioner was permitted to continue working without restriction. Petitioner acknowledged his BAC operating position did not cause him symptoms.

On February 25, 2013, Petitioner returned to Dr. Brown reporting no improvement. Dr. Brown administered a right elbow injection to treat medial epicondylitis. Dr. Brown recommended that Petitioner undergo bilateral carpal tunnel releases. With regards to Petitioner's bilateral cubital tunnel syndrome, he recommended continued conservative treatment. Petitioner received a second elbow injection on June 3, 2013. Petitioner continues to work without restriction to date. He regularly fishes in his free time. He reported fishing causes him wrist symptoms.

Dr. Brown's deposition was taken on January 26, 2015. On direct-examination, Dr. Brown testified that he was provided job videos and a demand analysis of the BAC operator position. Based on that information, Dr. Brown did not believe Petitioner's job activities would be a factor as a cause or even an aggravation in the development of carpal or cubital tunnel syndrome. (Brown deposition p. 12). Petitioner's attorney also provided Dr. Brown a short video of the Apex operator position. Counsel proposed that Petitioner worked in the Apex position from 1999 up to 2010. Dr. Brown opined that if Petitioner's onset of symptoms correlated with the period of time he was performing those activities, then he would consider the Apex position a potential aggravating factor for carpal and cubital tunnel syndrome. (Brown deposition p. 14). However, Dr. Brown also testified that his opinion was dependent on the proposition that the Petitioner's symptoms began when working on the old Apex machine and just never went away, which he said was not the history he received from the Petitioner. (Brown deposition p. 17).

On cross-examination, Dr. Brown confirmed Petitioner reported having a six to eight month gradual onset of numbness and tingling in both hands prior to the initial evaluation. This was also the history recorded in the patient questionnaire and Dr. Phillips' note. Dr. Brown testified that there were no other sources between 1999 and November 2012 that documented Petitioner having symptoms consistent with carpal or cubital tunnel. (Brown deposition p. 25). Dr. Brown agreed that a history taken closest to the time of onset is normally the most accurate. (Brown deposition p. 26).

Assuming the information and history Dr. Brown received was accurate, he did not believe Petitioner's condition of ill-being was related to his job activities at Continental Tire. He confirmed that bilateral carpal tunnel and cubital tunnel syndrome can be idiopathic. (Brown deposition p. 26).

Other than Petitioner's trial testimony, there is no evidence or medical documentation corroborating a symptom onset predating May 2012.

THEREFORE THE ARBITRATOR CONCLUDES:

(1) Accident / Medical Causation

Repetitive trauma claims are claims where a Petitioner does not sustain an accident from an identifiable single trauma but instead is injured from his or her work activities. The issues of accident and causation are considered together because the issue is whether the Petitioner's work activities were a

cause of his conditions of ill being, which in this case are bilateral carpal and cubital tunnel and medial epicondylitis.

Petitioner has the burden of proving this causal relationship. While the parties agree that the Petitioner's work activities while he worked full time as a bead builder using the Apex machine were hand and arm intensive, that fact does not satisfy the Petitioner's burden. He must also prove that the work was a causative factor in the conditions he began treating for in November of 2012 for which Dr. Brown has recommended further treatment. The evidence shows that the Petitioner has not met his burden on that point.

The case really boils down to the Petitioner's credibility concerning his testimony that once he began having symptoms in his hands and elbows while operating the Apex machine, they remained and got progressively worse. If that were the case, he would prevail on the issue of causation, as Dr. Brown testified to in his deposition. Unfortunately for the Petitioner, the histories which he provided to multiple medical providers at the time he began treatment do not corroborate his testimony.

Dr. Brown said that the Petitioner told him on January 16, 2013 that his hand and elbow numbness began six to eight months prior to that visit. The notes from Dr. Phillips, whom the Petitioner saw the same day, show the Petitioner claiming that his symptoms began eight months earlier. When he was initially seen at Midwest Occupational on November 2, 2012, the notes contain a history of symptom onset of six months. The Petitioner also wrote on a questionnaire for Dr. Brown that his symptoms were six to eight months old. (PX 3 at 25)

Based on the above evidence, the Arbitrator must conclude that the Petitioner became symptomatic with the conditions of ill being for which he now seeks care in mid 2012. At that time, even by his own testimony, the Petitioner had been using the non hand intensive BAC bead building machine regularly for at least two years. He also said that he still used the Apex machine when the BAC machine was inoperable, but was unable to estimate how often that occurred. Dr. Brown, the only physician to testify, was not asked whether that scenario would produce causation. Dr. Brown did testify, as referenced above, that working on the BAC machine would not be a causative factor in the development of any of the Petitioner's conditions.

Because the Petitioner has failed to meet his burden of proving that his work was a causative factor in his current conditions of ill being, his claim and request for prospective medical is denied.

All other issues therefore become moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Javier Delgado,

Petitioner,

vs. NO: 10 WC 46666

Ferrara Pan Candy Company, Inc.,

16IWCC0060

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of nature and extent of Petitioner's permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission herein, however, does correct clerical errors of the Arbitrator to reflect Petitioner's injury and award to his LEFT middle toe and LEFT foot.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- On the date of accident, September 14, 2010, Petitioner testified that the forklift ran over his foot (LEFT). Petitioner was taken via ambulance to Loyola University Medical Center emergency room and was admitted to the hospital through September 17, 2010. Petitioner continued to follow up with Dr. Francis Rottier from Loyola after discharge. During a follow up, Dr. Rottier recommended surgery to amputate Petitioner's 1st and 2nd toes of his left foot and that surgery was performed October 22, 2010. Petitioner viewed PX 6 and he identified it as photos of his left foot prior to surgery (also noted was the damage to the 3rd toe and top of his foot). Petitioner continued follow up with the doctor post-surgery and that included a regimen of physical therapy and work conditioning; at Industrial Rehab Allies. By April 22, 2011 Petitioner had completed therapy and work

conditioning. Petitioner returned to Dr. Rottier on May 23, 2011 and noted then that his left foot was in pain (at the top and side of his foot) and swollen. The doctor at that time prescribed medication and a special boot with a steel toe. Once Petitioner got the boot the doctor said he could return to work with restrictions. Petitioner testified that once he got the boot, Respondent initially was not able to accommodate the restrictions, but eventually did accommodate the restrictions. Petitioner underwent a functional capacity evaluation at Industrial Rehab Allies. Petitioner then followed up with Dr. Rottier on October 31, 2011 who then prescribed orthotics and pain medication and maintained petitioner on light duty work restrictions. Through the date of hearing, March 3, 2015, Respondent continued accommodate the light duty restrictions (Petitioner was doing inventory). Doing inventory involves working three hours per day on the computer; checking the system to see what is in inventory and then going on the floor to see if everything is the same. For an hour he walks doing the same, checking inventory, and for six hours he works on the forklift putting merchandise away. Petitioner no longer picks/gathers orders but he still does drive the same type of forklift as before. Petitioner testified that in his new position he gets in and out of the forklift less than his prior position; currently he gets in and out of the forklift only 25-35 times per day. Petitioner does wear special footwear (steel toes) while performing his job. In his inventory job, Petitioner works with Mark Morelli who did that job previously. Mr. Morelli did the job in the office, but did not drive a forklift.

- Petitioner had follow up visits with Dr. Rottier since October 31, 2011 with the most recent visit being September 4, 2014. Petitioner then had returned to the doctor as he was having pain and swelling in the left foot, and the doctor then prescribed medication for the pain. Petitioner indicated Dr. Rottier informed Petitioner to follow up when he has pain in his foot for the pain medication refills.

- Petitioner testified that through the current day Petitioner has continued to work for Respondent in the modified duty work that included getting in and out of the forklift. Petitioner testified that currently when performing job activities he used his left foot to get in and out of the forklift. Petitioner stated that he puts all his weight on his left foot and that is when he notices the pain at the top of his foot and the side. Petitioner testified the job also requires him to stand while he operates the forklift and when he stands on the forklift he had been getting pain in his 3rd toe, blisters in the middle of the toe and at the bottom of his foot as well as pain where he puts his weight at the bottom of his foot by the 3rd toe. Petitioner agreed his job currently requires him to walk the aisles to check the inventory. Petitioner indicated that while walking he gets pain on the side as all his weight is on his left foot. Petitioner testified that he can walk for about a block before he starts feeling the pain. Petitioner indicated to manage the pain he will sit down at the computer. When Petitioner gets home after his work shift he has the pain in the same areas previously noted, with the swelling on the side and top to the ankle. Petitioner testified when he gets home he takes off his steel toe boots and he takes the medication. He does use a topical cream at the end of the day and his girlfriend will rub his foot. Petitioner agreed that Dr. Rottier has prescribed special footwear as well as the orthotics throughout his treatment; Petitioner had a special orthotic and the steel toe boots. Throughout the course of treatment the doctor had tried various modifications to the

orthotics and had prescribed the pain medication for his foot. Petitioner testified that the treatment had not successfully eliminated the pain in his left foot.

- Petitioner testified that prior to the accident he enjoyed playing basketball about three times per week; he was on a league that played every Sunday. Petitioner testified that had been his primary form of exercise prior to the accident. Petitioner no longer plays basketball; he had tried playing but he would get the pain; he played for only a couple minutes before he got the pain. Petitioner currently does not exercise because of the pain. Prior to the accident he picked up his two children at school a block away and previously he walked that; he is able to walk that distance to get his children from school but on the way back he starts having the pain. Petitioner's highest education was high school. Prior to working for Respondent he had worked at another candy company as a forklift driver. Petitioner had no other outside training or specialized technical training. Petitioner testified that other than the inventory work he does at Respondent on the computer he is not familiar with computers.

- Petitioner removed both shoes/boots and socks for the Arbitrator to view his feet. Petitioner noted that he only wore the orthotics in his work boots. The Arbitrator noted some bone loss of the 3rd toe (tip being floppy). The Arbitrator noted the great toe and 2nd toe completely removed at the base. The Arbitrator noted some discoloration at the base at the amputations. The Arbitrator noted the whole left foot slightly swollen compared to the right (consistent with testimony), and the Arbitrator noted the left foot a little darker and veinier that the right. Petitioner indicated the doctor indicated the difference due to the nerves. The Arbitrator viewed the sole of his feet and noted a bad blister at the bottom of Petitioner's middle toe, and calluses at the forefoot with the callus at the distal area of the middle toe unusual. Petitioner indicated the pain medication he receives is a topical cream (Lidoderm) he applies to the top of the foot. He does not take any oral medication for the pain.

The Commission notes that the medical records are consistent with Petitioner's testimony and the description in testimony of the condition of Petitioner's LEFT foot/toes and with the two amputations. Petitioner remains working for Respondent in a modified position but he does not perform the order picking duties getting in and out of the forklift as frequently now in his inventory control position. Petitioner still does have to walk and operate a forklift in his current duties. Petitioner noted the problems with pain and swelling walking beyond a block and being on his feet; the daily post work problems and the records are consistent with that testimony. Petitioner currently earns more per hour due to a merit increase prior to hearing, so while he is working modified restricted work, his earning capacity has not diminished. The awards regarding the toes (statutory amputations previously paid and that credit should appropriately be applied to the award) and the foot are certainly supported in the evidence and testimony. The award regarding person as a whole, with all facts and evidence considered, are certainly supported in the evidence and testimony and within prior Commission decisions. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and herein, affirms and adopts the Arbitrator's finding as to Permanent partial disability, other than correcting the clerical error to reflect Petitioner's LEFT foot/toe injuries.

16IWCC0060

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 1, 2015 is hereby affirmed and adopted, with the exception of correcting clerical errors as noted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner is entitled to an award of 12.5% loss of use of Petitioner's person as a whole under §8(d)(2) of the Act (62.5 weeks) (less credit of $19,057.68 for statutory §8(e) losses for Petitioner's LEFT great toe and LEFT 2nd toe), 70% loss of use of Petitioner's **LEFT** middle toe (9.1 weeks), and 25% loss of use of Petitioner's **LEFT** foot (41.75 weeks) under §8(e)(7 & 11) of the Act, at $373.68 per week (113.35 total weeks) = (($42,356.63 total PPD less the credit for statutory amputations=Net PPD $23,298.95)).

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $42,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 25 2016
d-1/7/16
DLG/jsf

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DELGADO, JAVIER
Employee/Petitioner

Case# 10WC046666

16IWCC0060

FERRARA PAN CANDY CO INC
Employer/Respondent

On 6/1/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4788 HETHERINGTON KARPEL BOBBER
ANDREW B PIPPIN
120 N LASALLE SUITE 2810
CHICAGO, IL 60602

0532 HOLECEK & ASSOCIATES
GRANT ELLIS MILLER
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

14IWCC0181

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Javier Delgado
Employee/Petitioner

v.

Ferrara Pan Candy Co., Inc.
Employer/Respondent

Case # **10** WC **4666**

Consolidated cases: _____

16IWCC0060

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **March 3, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [ ] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **September 14, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**32,385.60**; the average weekly wage was $**622.80**.

On the date of accident, Petitioner was **33** years of age, ***single*** with **2** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**19,057.68** under Section 8(j) of the Act for statutory Section 8(e) losses of Petitioner's left great toe and left second toe.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $ 373.68 week for 62.5 weeks, less a Section 8(j) credit of $19,057.68, because the injuries sustained caused the 12.5 % loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $ 373.68 for 9.1 weeks, because the injuries sustained caused the 70% loss of use of the right middle toe.

Respondent shall pay Petitioner permanent partial disability benefits of $ 373.68 for 41.75 weeks, because the injuries sustained caused 25% loss of use of the right foot.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

05-01-15
Date

JUN 1 - 2015

Javier Delgado v. Ferrara Pan Candy Co., Inc.
10 WC 4666
Addendum to Arbitration Decision

I. Findings of Fact

On September 14, 2010, Mr. Javier Delgado ("Petitioner") was a 33 year old forklift operator for Ferrara Pan Candy Co., Inc. ("Respondent").

Petitioner testified that his duties as a forklift operator for Respondent required him to collect or "pick" orders with the help of a co-worker. To do this, he and his co-worker would drive separate forklifts to the specific location of an ordered product. Once there, Petitioner would use his forklift to lower the desired pallet of product from a stack. He and his co-worker would then exit their respective forklifts and gather the needed product, placing it into a pallet hauled by his co-workers' forklift. Thereafter, Petitioner would re-enter his forklift, return the pallet he previously lowered, and he and his partner would proceed to their next order. During the course of his average work day, Petitioner estimated that this picking activity required him to get in and out of his forklift two-hundred and fifty times. Petitioner further explained that the entrance to the forklift is approximately one foot off the ground and, due to its cramped design, he was required to step in and out of the forklift using his left foot first. Once inside the forklift, he would drive it by pressing an accelerator with his left foot. He was not required wear to any special type of footwear to do this job.

While performing his job as a forklift operator on September 14, 2010, Petitioner's left foot was run over by a forklift. After his accident, he was taken by ambulance to the emergency room at Loyola University Hospital, where he was admitted through September 17, 2010. Petitioner's Exhibit ("Px") 1; Px 2: 54. At the time of his admission, his left forefoot and the foot's first three toes were bruised, swollen, cold to the touch, and bloody. Px 2: 63-65. X-

rays ultimately revealed multiple fractures in the first two toes. Px 2: 65-6, 72. Upon his discharge he was given dressings and instructed to follow up with a physician at Loyola Hospital, Dr. Francis Rottier. Px 2: 54.

Petitioner continued to follow up with Dr. Rottier through October 19, 2010. Px 2: 35. At that visit, his third toe showed some improvement but his first two toes had become gangrenous. As a result, Dr. Rottier recommended surgery to amputate Petitioner's left great and second toes. Px 2: 35. This procedure was performed on October 22, 2010. Px 2: 42.

In following months, Dr. Rottier prescribed and Petitioner attended a regimen of physical therapy and work conditioning at Industrial Rehab Allies. Px 4. After completing this treatment, he returned to see Dr. Rottier on May 23, 2011, at which time Dr. Rottier prescribed a pair of custom steel toed boots for Petitioner to wear in advance of an attempt to return to work. Px 2: 22. These boots were provided by Scheck & Siress Prostethics, Inc. and included custom arch support and toe filler orthotics. Px 4: A2

After receiving this custom footwear, Petitioner followed up with Dr. Rottier on June 27, 2011. At that visit, Petitioner described difficulty with the custom footwear including painful rubbing from the toe-filler orthotic and difficulty with the width of the boot. Dr. Rottier ordered held Petitioner off work and ordered modifications to the footwear. Px 2: 21.

Petitioner again returned to see Dr. Rottier on August 5, 2011, when he again reported that the custom footwear continued to cause him discomfort. Again, the orthotic was modified. Px 2: 20. At this visit, Dr. Rottier allowed Petitioner to return to modified duty, which Petitioner began on August 8, 2011. *Id.*

On August 22, 2011, Petitioner saw Dr. Rottier following his attempt to return to work. Px 2: 19. At this visit, he described blistering on his third toe and pain in his left foot from walking, standing, and using the foot to enter, exit, and accelerate his forklift. Based on these increased complaints, Dr. Rottier again modified Petitioner's orthotic and recommended a functional capacity exam ("FCE") to determine appropriate permanent restrictions. *Id.*

On October 17 and 21, Petitioner underwent the prescribed FCE with Industrial Rehab Allies. The exam placed Petitioner at a medium physical demand level, with an ability to walk or stand limited to up to 45 minutes and a limited ability to enter and exit a forklift. Px 4: 64. The exam further established that Petitioner's left third toe was unstable, causing it to flex and rub within his custom boot, which produced painful blistering. Px 4: 58-59. Given his limitations, the examiner recommended that Petitioner not return to his prior position as a forklift operator performing picker duties – a position which demanded that he frequently enter and exit his forklift with his left foot, then stand for an extended period while using his left foot to accelerate the forklift, thereby aggravating and worsening his symptoms. Px 4: 59. Based on the results of the FCE, Dr. Rottier has continued to allow Petitioner to work for Respondent in a modified capacity, with a permanent and specific prohibition against operating a forklift to "pick" or gather orders. Px 2: 16-17; Px 3 (final page).

Since returning to work with permanent restrictions, Petitioner has continued to follow up with Dr. Rottier to manage the pain and swelling in his left foot. At his June 4, 2013 visit, Dr. Rottier prescribed Naprosyn and Lidoderm to manage Petitioner's persistent swelling and pain and recommended that he continue to follow up should his symptoms flare up or should he need new orthotics. Px 3 (June 4, 2013 Progress Note). Petitioner testified that

he most recently saw Dr. Rottier on September 4, 2014, due to pain and swelling in his left foot. At this visit, Dr. Rottier noted that Petitioner's left third toe remained unstable and "floppy." To treat Petitioner's persistent pain, he refilled Petitioner's medication and maintained his permanent work restrictions. Px 3 (September 4, 2014 Progress Note and Work Release).

Petitioner confirmed that Respondent has accommodated Dr. Rottier's restrictions since his return to work on August 8, 2011. Petitioner's current job duties deal with product inventory. In this new capacity, he works for approximately three hours per ten hour shift in front of a computer, checking the system to see what inventory is listed. Based on this review of the digital inventory, he spends approximately one hour per day walking the warehouse aisles, confirming that the inventory listed in the computer is accurate. The remaining six hours of his day are spent operating a forklift "putting stuff away." Petitioner confirmed that he is no longer picking or gathering orders and, as a result, he gets in and out of his forklift less often than was required by his prior position – approximately 25 to 35 times per day. While working, Petitioner wears his custom made steel toed boots and orthotics.

Petitioner testified that prior to his assuming this inventory position, the work he performs on the computer was done by Mark Merrali, who worked out of Respondent's offices and did not drive a forklift.

Despite receiving pain medication from Dr. Rottier as well as multiple orthotic devices, Petitioner continues to experience painful blistering on his third toe and the underside of his foot, pain on the top of his foot, pain at the amputation sites, pain on the left or outside

portion of the base of his left foot, and swelling on the left side and top of his foot, which extends up into his left ankle.

Specifically, while working, Petitioner testified that walking the aisles to check on inventory produces pain on the outside of his left foot. He explained that his left foot feels unbalanced and, as a result, he leans away from his amputated first two toes towards the outside of his foot. Petitioner estimated that he is able to walk about one block before feeling this pain. Moreover, while working, Petitioner is required to stand in his forklift and use his left foot to operate it. He testified that this causes painful blistering to his third toe and underside of his foot as well as pain to the top and outside of his left foot. Additionally, Petitioner continues to use the same type of forklift as he did when he was a forklift operator, which requires him to get in and out of the forklift using his left foot first. In so doing, Petitioner's entire body weight is put onto his injured left foot and, when doing this, he experiences pain throughout his left foot particularly on the top and outside of the foot. When he is in need of a break from this discomfort, Petitioner testified that he sits down and checks inventory on a computer.

After work, Petitioner continues to experience pain in his left foot. Moreover, Petitioner testified that after a full day of work, his left foot is particularly swollen on its outer side and on the top of his foot, running up into his ankle. To manage his symptoms, he takes off his custom made boots and orthotics, applies a topical pain medication and asks his girlfriend to rub his swollen foot.

Prior to the accident, Petitioner testified that he enjoyed playing basketball approximately three times per week, including playing in a league on Sundays. He stated that this was his primary form of exercise before the accident. Since the accident, Petitioner no longer

plays basketball or exercises as it causes his left foot to hurt within a couple of minutes. Petitioner testified that he also enjoyed picking his two children up from school prior to the accident. While he continues to walk the two blocks required to pick up his children, he explained that after approximately one block, his left foot becomes painful.

Petitioner's highest level of education is high school and after graduating, his only work experience had been driving a forklift for Respondent and another candy company. He has no technical training or expertise other than operating a forklift and he has no computer abilities other than those required to monitor inventory for Respondent.

At the conclusion of Petitioner's testimony, the Arbitrator viewed his feet. The Arbitrator noted that Petitioner was not wearing an orthotic device during the arbitration. Petitioner testified that he routinely wears the orthotic while working in his custom steel toed boots, but occasionally does not wear the orthotic outside of work as it rubs and irritates the underside of his third toe and the amputation sites. The Arbitrator's observation of Petitioner's foot was consistent with Petitioner's testimony: His left third toe appears to have bone loss and is floppy [*Indeed, the Arbitrator described the toe as "like a flaccid piece of meat"*], likely causing it to drag under his left foot producing a severe blister; the left great and second toes are completely removed at the base of the toe; his left foot is swollen up to his ankle; there is discoloration around the amputation sites; and the entire left foot appears darker and veinier than his right foot. Petitioner testified that Dr. Rotier advised the change in color was likely due to a nerve injury.

Respondent's first and only witness was Rudolpho Cornejo, an employee of Respondent's and Petitioner's supervisor. Mr. Cornejo, who started with Respondent approximately a year and a half before the date of arbitration, testified that Petitioner had once complained

to him about painful blisters on his foot, but that he has not complained since. Mr. Cornejo opined that Petitioner's position would be permanent, that he is doing an excellent job, and that Respondent is currently looking to hire a similar employee to work the second shift.

II. Conclusions of Law

The sole issue to be determined is the nature and extent of Petitioner's undisputed work accident.

(i) Nature and Extent

Petitioner contends that he has sustained a substantial impairment to his earning capacity as a result of the injury to his left foot. For this reason, he seeks recovery under Section 8(d)2 of the Illinois Workers' Compensation Act ("the Act") rather than a specific loss award under Section 8(e). Novak v. Leigh Press, 13 IWCC 1072 (Petitioner is precluded from receiving a permanent partial disability award under both Sections 8(d)2 and 8(e) for the same accidental injury to the same body part); *cf.* Mitchell v. Industrial Commission, 148 Ill. App. 3d 690; 499 N.E.2d 999 (1986) (permitting an 8(e) and 8(d)2 awards for multiple injuries to multiple body parts).

The remedy sought by Petitioner is warranted by law. The fundamental purpose underlying workers' compensation in Illinois is the replacement of lost earning capacity resulting from industrial accidents. Larson's Workers' Compensation Law, 80.05 ("the award of compensation is not for the disability as such, but for the impaired earning capacity which results from that disability"); E.R. Moore Co. v. Industrial Commission, 71 Ill.2d.353, 360, 376 N.E.2d 206, 209 (1978). As such, it is now well settled that an employee may seek an award under Section 8(d)2 of the Act despite the fact that the injury is scheduled under Section 8(e):

> Schedule allowances were originally exclusive. A strong trend, however, now views schedule allowances as nonexclusive. Instead of simple losses compensated strictly on the schedule value of the listed members, the loss of impairment could be compensated on the percentage disability of the body as a whole, or of a general disability. A claimant may have an option, therefore, which will result in an award more favorable than a schedule award. Lusietto v. Industrial Commission, 174 Ill. App. 3d 121, 129, 528 N.E.2d 18, 23 (1988) (citations omitted).

The Illinois Workers' Compensation Commission ("the Commission") has frequently rendered awards under Section 8(d)2 of the Act to claimants who, like Petitioner, have returned to work for their employers without a current reduction in wages following injuries that are otherwise compensable under Section 8(e). The factors having the greatest impact on the Commission's award in these cases are whether the claimant has permanent restrictions and the likelihood that he would suffer lost earnings if he was no longer employed at the same job. *See, e.g.,* Rankin v. Hoyne Industries, 84 IIC 196 (where the Commission affirmed the arbitrator's award of 40% permanent partial disability under Section 8(d)2 because the "(p)etitioner would be seriously...hindered in his efforts to find other work...in the event he were terminated...or decided...that he wished to try working in another field of endeavor or for a different employer...;" *See also,* Cook v. Mid-Illinois Companies, 06 IWCC 64; Winfrey v. Wagner Casings, 05 IWCC 726; Donato v. City of Chicago, 05 IWCC 462; Turney v. City of Waukegan, 04 IIC 17; Range v. City of Chicago, 03 IIC 891; Ott v. Highland Park Hospital, 02 IIC 970; Carlson v. Sessler Ford, 01 IIC 312; Funes v. Block Steel Corp., 00 IIC 866; and L.D. Glass v. Tremont Auto Park, 90 IIC 1959.

In Ryan McKinney v. Westmont Engineering, 02 IIC 361, Petitioner's right foot became wedged between a forklift and a bumper guard, causing a crushing injury to the foot and ultimately requiring amputation of his first and second toes. The petitioner was released with permanent restrictions, which the respondent was willing to accommodate. As the petitioner elected to return to school instead of accepting the light duty job offer, there was

no evidence of lost wages. In awarding a 40% loss of the person as a whole under Section 8(d)2, the Commission emphasized the petitioner's young age; the aching and pain near his amputation sites; his limited ability to be on his feet past 30 to 60 minutes; an inability to climb; a requirement to wear an orthotic device; an inability to play sports; and the potential need for future medical care. *See also* James McCarthy v. Material Handling Services, 08 IWCC 0377; Michael Novak v. Leigh Press, 13 IWCC 1072; Juan L. Luna v. Pactiv, 09 IWCC 0058; and The Jewel Food Companies v. Industrial Commission, 265 Ill. App. 3d 525, 630 N.E.2d 865 (1993) *[These cases are summarized in a chart attached hereto as Exhibit A].*

Similarly, the facts of this case justify an award under Section 8(d)2 of the Act. Petitioner is a young man, 37, who is now burdened with permanent physical restrictions that prevent him from returning to his prior position for Respondent as a forklift operator picking orders. Px 3 (final page). Furthermore, since his accident, his ability to drive a forklift in any manner has been significantly compromised by the ongoing symptoms in his left foot. These symptoms include difficulty and pain with walking, standing, getting in and out of the forklift, and using his left foot to accelerate the forklift.

After his work day has concluded, Petitioner continues to experience pain and swelling throughout his left foot, which prevent him from playing basketball or taking up other types of exercise, and make simple familial tasks like picking up his children from school painful and difficult. In an effort to seek relief from these symptoms, under the ongoing care of Dr. Rottier, Petitioner continues to apply topical pain medication to his foot at night.

Having viewed Petitioner's feet, the Arbitrator confirms that Petitioner's testimony regarding his left foot was accurate in that the Arbitrator observed swelling and

discoloration throughout the foot into his ankle and a weak or floppy third toe with a large blister on the underside.

Petitioner's highest level of education is high school. Since graduating, he has only worked as a forklift operator and has no other specialized training. He is unfamiliar with computers other than the inventory work he currently performs for Respondent in his modified position. In light of his permanent restrictions, his ongoing symptoms, and his educational and employment background, it is clear that if Petitioner is no longer able to work through the persistent symptoms his job duties aggravate or if Respondent is no longer willing to accommodate his permanent restrictions, he will suffer a significant loss of earnings.

Although Petitioner is currently employed by Respondent in an inventory capacity, it is uncertain whether he will be able to continue in that job. That is, the weight of the evidence suggests that the physical demands required of him in this capacity, particularly the operation of a forklift, continue to aggravate his injury, causing him pain and swelling in his left foot. The Arbitrator finds it notable that Petitioner has continued to follow up with Dr. Rotier for management of these symptoms and that he continues to require pain medication. It is, therefore, reasonable to conclude that over the course of his future working life, Petitioner may desire to seek employment that does not consistently cause him pain and discomfort.

It is also uncertain whether Respondent will continue to employ Petitioner in his current capacity. While Respondent has provided Petitioner with suitable work, his current position was not previously performed by a forklift operator. That is, Petitioner's uncontroverted testimony is that prior to him taking on computerized inventory duties, this task was

handled by another employee who worked solely in an office in front of a computer. The Arbitrator recognizes that Respondent's witness, Mr. Cornejo, opined that Petitioner's position would be permanent. However, he was not employed by Respondent at the time the position was created for Petitioner and it is reasonable to conclude that Respondent may in the future return to having an office worker – not a forklift operator – manage their inventory on a computer.

Therefore, in view of Petitioner's age, educational background, limited occupational experience, physical limitations, and the uncertainty of continued employment with Respondent, the Arbitrator finds that Petitioner has sustained permanent partial disability to the person as a whole to the extent of 12.5% thereof. The Arbitrator emphasizes that in the event Petitioner is unable for any reason to continue working for Respondent, he will have difficulty finding employment due to his disability and may not be able to find a job paying competitive wages. Additionally, the Petitioner is awarded 70% loss of use of the right middle toe and 25% loss of the right foot.

By stipulation of the parties, the Arbitrator finds that Respondent paid $19,057.68 in benefits for the statutory Section 8(e) losses of Petitioner's left great toe and left second toe. Arbitrator's Exhibit 1. Respondent is entitled to a credit in this amount. Guzman v. Edward Hines Precision Components, 8 IWCC 1004, citing Payetta v. Industrial Commission, 339 Ill. App. 3d 718m 791 N.E.2d 862 (2003).

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NANCY CARNEVALE,

Petitioner,

vs. NO: 12 WC 01551

EAGLEWOOD RESORT & SPA, **16IWCC0061**

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Findings of fact and conclusions of law

The Commission finds:

1. Petitioner was the Lead Esthetician for Respondent in 2011. She performed facials which included scalp, neck, hand and arm massages. The massaging required constant thumb rotation and pressure, and pushing and pulling of the limbs. She also engaged in constant pumping of bottles, twisting off caps and squeezing out sponges. When she was not working on a client she was washing bowls and utensils. Facials lasted for 30, 60 or 90 minutes, and some came with an additional 30 minute massage. She also used tweezers to remove hair from client's eyebrows. This required pinching of her thumb and forefinger. Petitioner also handwrote orders for supplies and performed data entry. She worked 8 hours a day.

2. Petitioner also performed lavender wraps while in Respondent's employ. This required dry brushing of the body with long smooth strokes and constant turning of the wrist while squeezing a brush. She applied thumb pressure to sweep away dead skin. These wraps took 45 minutes to complete, followed by a 15 minute lotion massage.

3. In July and August of 2011 Respondent was busy with business. During that time Petitioner began noticing soreness in her hands. In August she also developed swelling in her fingers and lumps on the tendon of every finger. The bottom portion of her fingers began turning blue-ish as well. By the end of the month, Petitioner felt pain shooting up her arm when she put her thumb and pointer fingers together on both hands.

4. Petitioner sought treatment from a Chiropractor, who diagnosed her with carpal tunnel syndrome and tenosynovitis.

5. Eventually Respondent hired another Esthetician, and Petitioner was able to use some vacation time. She subsequently began seeing improvement in her shoulder and elbow symptoms.

6. Petitioner's hand symptoms still persisted, and she sought medical care from her doctor.

7. After treating with a rheumatologist, Petitioner underwent cortisone injections with Dr. Tulipan, two in the right wrist and thumb and one in the left.

8. Dr. Tulipan believed the majority of Petitioner's discomfort stemmed from her osteoarthritis. However, he opined that heavy pinching and gripping activities and pressure on a repetitive basis could exacerbate a person's underlying arthritic condition.

9. On December 20, 2011 Petitioner informed Dr. Tulipan that most of her pain had gone away, with the exception of her shoulder and thumb pain. She was released from care in April 2012 and applied for unemployment.

10. Dr. Fernandez performed an Independent Medical Examination (IME) on Petitioner on November 6, 2012. Petitioner presented with complaints of intermittent and occasional numbness and tingling, mostly in her ring and small fingers on the right hand, pain radiating along her forearm muscles anteriorly around the elbow, and pain at the basilar joint of her thumbs, right greater than left, with associated stiffness and weakness.

11. Upon examination Dr. Fernandez noted that Petitioner's subjective complaints were supported by the objective findings. He found swelling at the base of her thumbs, significant pain on palpation of the thumbs, right greater than left, stiffness and crepitus. He diagnosed basilar joint arthritis in subluxation osteophytes and local sclerosis. He described it as a degenerative arthritis or osteoarthritis occurring at the base of the thumb, and that many cases are asymptomatic. He also stated that this condition occurs irrespective of employment.

12. Dr. Fernandez noted that, while Petitioner had previously been diagnosed with

DeQuervain's Tenosynovitis by her Chiropractor, he did not see evidence of this during his own exam.

13. Dr. Fernandez opined that Petitioner's job activities did not cause or aggravate her diagnosis.

14. Dr. Fernandez testified that the basis of his causal connection opinion was that no medical literature supported such a finding. He disagreed with the Mayo Clinic assertion that arthritis can cause severe hand pain, swelling and decreased strength and range of motion, which would make it difficult to perform simple household tasks such as turning door knobs and opening jars. He also disagreed with the Mayo Clinic assertion that placing high stress on the thumb joint is a risk factor for developing thumb arthritis. Dr. Fernandez disagreed with this assertion despite acknowledging that osteoarthritis is the most common arthritis to affect joints at the base of the thumb.

15. Currently Petitioner works for Nordstrom full time, after having been unemployed for over a year. The position she applied for was "Cosmetic Esthetician." She has held this position since February 2013. She performs mini facial massages 2-4 times monthly.

16. Petitioner also performs some of the same duties at Nordstrom as she did with Respondent, but with less frequency. She also does not perform any computer data entry work at Nordstrom.

17. Petitioner stated that her hands are affected by cold and rainy weather, and that increased use affects the osteoarthritis in her thumbs. Her ring and pinky fingers will fall asleep if she bends her arm to talk on the phone for an extended period of time. She has difficulty opening jars and even Ziploc bags at home.

The Commission affirms the Arbitrator's rulings on the issues of accident, causal connection, medical expenses and temporary total disability.

The Commission, however, modifies the Arbitrator's wage differential award down to an award for permanent partial disability. While the Commission finds Dr. Tulipan's causal connection finding persuasive, it also finds that Petitioner has returned to essentially the same career as she had pre-injury. The only difference being that she now performs her duties with less frequency than which she did for Respondent. Thus a wage differential is inappropriate.

Based on the evidence, the Commission finds that Petitioner's injuries necessitate a 10% loss of use of her right hand and a 7.5% loss of use of her left hand.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $555.00 per week for a period of 35.875 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused a 10% loss of use of Petitioner's right hand, and a 7.5% loss of use of her left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner

16IWCC0061

interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 25 2016
O: 11/19/15
DLG/wde
45

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CARNEVALE, NANCY
Employee/Petitioner

Case# 12WC001551

16IWCC0061

EAGLEWOOD RESORT & SPA
Employer/Respondent

On 1/5/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0975 RIFFNER BARBER ROWDEN & SCOTT
SCOTT BARBER
1834 WALDEN OFFICE SQ 5TH FL
SCHAUMBURG, IL 60173

1153 MARTIN, PATRICK W
203 N LASALLE ST
SUITE 2100
CHICAGO, IL 60601

16IWCC0061

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Nancy Carnevale
Employee/Petitioner

v.

Eaglewood Resort & Spa
Employer/Respondent

Case # **12** WC **1551**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **April 14, 2014 and June 12, 2014.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **8/30/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**48,100.00**; the average weekly wage was $**925.00**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent is entitled to a credit of $**12,933.93** under Section 8(j) of the Act as a result of short-term disability benefits paid by the Respondent and $**5,052.89,** also under Section 8(j), as a result of medical bills paid by the Respondent through its group medical plan.

ORDER

- Respondent shall pay Petitioner temporary total disability benefits of $**616.67**/week for **71-2/7** weeks, commencing **10/16/11** through **02/25/13**, as provided in Section 8(b) of the Act.

- Respondent shall pay the charges for the reasonable, necessary and related medical services of $**9,658.00** to Mary Luther, DC, $**984.00** to Elmhurst Clinic, $**1,414.00** to Elmhurst Memorial Hospital, $**559.00** to Quest Diagnostics, $**54.00** to Elmhurst Radiologists, and $**1,304.00** to LabCorp, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

- Respondent shall pay Petitioner wage differential benefits of **$161.97/week from February 26, 2013 through the date Petitioner reaches the age of 67 (12/27/2028), or 5 years from the date the award becomes final, whichever is later,** because the injuries Petitioner sustained caused her to become partially incapacitated from pursuing her usual and customary line of employment and also caused her to sustain an impairment of her earnings, as provided in Section 8(d)1 of the Act, as amended.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

January 2, 2015
Date

JAN 5 - 2015

In support of the Arbitrator's Decision, the Arbitrator makes the following findings of fact:

This matter came before the Commission for hearing on the Petitioner's Application for Adjustment of Claim alleging repetitive injuries to both of her hands arising out of and in the course of her employment with the Respondent. The parties were represented by counsel and executed a Request for Hearing form stipulating to some of the issues and placing others in dispute. The issues in dispute were whether the Petitioner suffered accidental injuries; whether those injuries arose out of and in the course of her employment; the causal connection between the employment and the Petitioner's injuries; whether the medical bills were reasonable and necessary; the amount of temporary total disability benefits due, if any, and the nature and extent of the Petitioner's injuries.

The Arbitrator closed proofs on April 14, 2014.

On May 28, 2014, the Petitioner mailed, with proper postage, a Motion to Amend Application for Adjustment of Claim, to opposing counsel and to the Arbitrator. The Petitioner set such motion on the Arbitrator's June 2, 2014 status call, at which time the Arbitrator set the matter for hearing on the agreed-upon date of June 12, 2014.

On June 12, 2014, the Petitioner moved to re-open proofs, amend the Application for Adjustment of Claim to a date of accident of August 30, 2011 and moved to amend the stipulation sheet (AX 1) to reflect a date of accident of August 30, 2011. The Arbitrator granted the Petitioner's motion, pursuant to McLean Trucking Company v. Indus. Comm'n, 449 N.E.2d 832, 70 Ill. Dec. 485 (1983) and Illinois Institute of Technology Research Institute v. Indus. Comm'n, 731 N.E.2d 795, 247 Ill. Dec. 22 (1st Dist. 2000). The Arbitrator then closed proofs.

The Petitioner testified that she was employed as Lead Esthetician with the Respondent. (TR 10) There were two estheticians while she was employed there. Using a menu of services

offered at the spa that Respondent offered as an RX 5, she testified about the services she provided, the length that each service took to perform and she demonstrated and described how the service was performed.

One of the services she provided was a facial. The menu has several different types of facials listed and she described the basic facial. She testified that the basic facial is 60 minutes long. An exfoliation is done first, and then a massage of the face, neck and décolleté is performed (TR 12). Then a second mask is applied and while that was on, a scalp and back of the neck massage is performed (TR 12-13). She testified that the customer lies in front of her and that she massages the customer's neck by using her thumb in a rotating motion to get up under the neck. (TR 15). The neck massage lasts between 10-15 minutes. (TR 20) Afterwards, she performs an arm and hand massage. She testified that she would push and pull her hands in a gliding motion up and down the arms and hands of her customers while she would push and rotate her thumbs in a circular motion. (TR 14.) She would also knead around the customer's palms and back of the hands. (TR 14). The hand massage lasts about seven minutes (TR 20). She testified that the facial also involved a facial and scalp massage. She testified that these actions involved a lot of use of the thumbs applying pressure and squeezing with the fingers (TR 16).

Performing the facial required her to open bottles, wring out and squeeze towels and pump bottles to get product out. She testified that she would wring out towels about twenty times during a facial because clean towels were needed to wipe off product. (TR 17). She testified that these actions were done quickly because the facial is only supposed to last one hour. She testified that while the customer is relaxing, she must wash things quickly, sanitize them and get on to the next step in the facial. Once the facial is done, she walks the client to a different

area of the spa and she then returns to change the sheets on the bed, sanitize everything and refill the steamer. (TR 19) She estimated the weight of the steamer to be about 40-50 pounds and she had to pull it across the carpeting. Since the steamer did not have a handle on it, she had to grab it with her thumb and fingers and pull it.

She testified that two types of facials lasted 90 minutes. One type, the lavender bliss facial, is the basic facial with more masking and extra massage (TR 24). The second type, a Reiki facial, involves "energy work" in which she tries to bring balance to the customer (TR 22).

She also testified that she performed waxing of the eyebrows, back, bikini and chin. She testified that waxing required dipping a stick into hot wax and then continually twirling it with the fingers and thumb so the wax does not drip on the customer. (TR 22-23) The wax is applied to the customer and then a strip is placed over the wax. (TR 23). Then with the thumb and fingers, the strip is pulled out in a flicking of the wrist motion. Afterwards, she pulls out any remaining hair with a tweezers by again using a flicking motion of the wrist using the thumb and forefinger to grip the tweezers. (TR 24).

She testified that when she was not performing spa services for customers, she ordered the professional supplies and tended to the retail store as well as to the guests at the fitness center and the spa. (TR 26). These activities involved writing orders, then entering them in to a computer using the keyboard. She also did the time card edits, helped with payroll, answered the phone and booked appointments. (TR 27).

In July and August 2011, the spa became very busy (TR 25). She noticed that her hands started hurting in July and became worse as time went on. In August, she noticed the bottom of her fingers swelling and she started to develop lumps "almost like on the tendons of every finger." (TR 25). In August, she reported her symptoms to the HR director after a manager's

meeting on the importance of filling out injury reports. (TR 25) She first sought medical attention at the end of August (TR 28) with a chiropractor named Mary Luther (TR 29). However, she received chiropractic care but continued to work as an esthetician; she would take two steps forward with her symptoms and then one step backward. (TR 29). In July, the Respondent hired another esthetician. The Petitioner was then able to use five weeks of vacation time and she noticed that her hands started feeling better during that rest period. (TR 30 – 31)

On September 13, 2011, Dr. Luther noted that the Petitioner had blood tests for bruise-like areas of her fingers. (PX 2)

Since she was getting limited benefit from the chiropractic care, Dr. Luther referred her to Elmhurst Clinic. She first saw a rheumatologist (31). The rheumatologist did blood work and then referred her to an orthopedic doctor named Tulipan. (TR 33). The Petitioner testified that Dr. Tulipan gave her three injections, one in the left hand and two in the right wrist and thumb (TR 33). She testified that Dr. Tulipan made recommendations. She stopped working for the Respondent. She testified that she had a hard time finding work because her qualifications were as an esthetician. Currently she works for Nordstrom (TR 34).

She testified that she collected unemployment for a little over a year and during that time, conducted a job search. Her job search log was introduced as Petitioner's Exhibit 8. She testified that in February 2013 she applied for and received a job at Nordstrom in the Woodfield Mall as a beauty advisor. (TR 36 – 37). Her job duties now consist of selling skin care at the retail level and performing a mini version of the facial that lasts about 40 minutes total (TR 37). She testified that there is very little massaging involved in this min facial because the client sits in a massage chair that mechanically kneads the whole body (TR 37).

On cross-examination, the Petitioner testified that she still maintains her esthetician license and renewed it as recently as September 2013. She testified that she is still licensed to perform the same type of work she performed for the Respondent. She explained that she kept her license current because she went through all of the schooling it took to earn the license and she finds that to be a licensed esthetician makes her more credible to her current clients when she recommends skin care products. Moreover, the cost of the license is only $50 every two years (TR 41).

Respondent's Counsel continued the cross-examination of the Petitioner by introducing Respondent's Exhibit 5, which includes the menu of spa services and a record of the spa services the Petitioner performed for the Respondent over the relevant period of time. Petitioner testified that there were errors in that Exhibit. She testified that there were services she performed that are missing from RX 5, specifically 24 hand treatment services (TR 43).

On August 20, 2011, the Petitioner performed four facials and a body wrap. She described the body wrap as involving dry brushing of the entire body with a brush. She squeezes the brush with one hand, followed by the other hand, and then she performs a massage. The Petitioner testified that she applies enough pressure during the facial to stimulate the muscles, and not just the skin. She described the pressure as a medium pressure (TR 47). On August 24, 2001, she performed seven services (TR 45).

She testified that on August 25, 2011, she spent 90 minutes giving a facial and performing a wrap. (TR 44) The Petitioner further testified that she went to doctor on August 25, 2011. She said that she had worked 12 days in a row prior to that date (TR 46).

The Petitioner was then cross-examined about the services she performed every day from April 1, 2011 through the Petitioner's original alleged accident date, August 25, 2011. Using her

own notes, she testified about the number of services she performed each day during that time period. She testified that she kept her own record of the services she performed. She produced such record by gathering copies of receipts for the services she performed for the Respondent, and then recording that information.

The Petitioner was handed Respondent's Exhibit 3, which was her application for her job with Nordstrom. The application stated "Cosmetics Esthetician – Woodfield." She testified that that is the position identified on the application, but the job was that of a cosmetic retail sales clerk. (TR 84) She testified that the number of facials she does per month at Nordstrom varies. There are months when she does no facials and other months when she does three or four facials.

She notices today that her hands are affected by cold and rainy weather and they become stiff and sore. She said sometimes the thumbs will lock in place and she has to use the other hands to move it and unlock it. She also testified that if her arm is bent, her last two fingers fall asleep all the way down the elbow and that this wakes her up at night (TR 92). She testified she has to lie on her stomach with her arms underneath her and keep them straight. During the night, if she bends her arms, she will wake up because her arms will fall asleep. She testified that she is able to perform the job at Nordstrom because there is no repetitive motion involved. She said that she can do one facial and her hands will not bother her. She testified that she has difficulty opening jars and closing and opening zip lock bags because it requires pinching of her thumb and finger together (TR 92-93).

The Petitioner first sought medical care on August 30, 2011 with Dr. Mary Luther, a chiropractor. She complained of neck pain, upper extremity pain and hand, arm and shoulder pain (PX 2, p. 24). The Petitioner treated with Dr. Luther through January 2012. During this time Dr. Luther's records indicate that the Petitioner was getting some intermittent relief,

particularly when she would rest from her work activities. Overall, the chiropractic adjustments and treatments provided little relief to the Petitioner.

The Petitioner was then examined by Dr. Costamire, a rheumatologist at Elmhurst Clinic, on October 21, 2011. She complained of small lumps from the MCP to the PIP joints on multiple fingers, of swelling in this area, and that her rings were too tight. She said that her fingers were very painful when she hits them on something. She had pain in both thumbs right greater than left, and the pain can go up to the lateral epicondyle, especially of the right arm. She noted that her grip strength had been weakened. On physical exam, the doctor noted that there may be some slight gray discoloration of the skin over the extensor fingers from the MCP to the PIP joints. He also thought he could feel some slight thickening over the extensor or medial or lateral fingers between the MCP and PIP joints. There was no swelling. He also noted that there was no synovitis across the MCP or PIP joints of her hands. He noted, diffuse myofascial discomfort to palpation from her neck down into her shoulders, across her upper and lower back, over the lateral epicondyles of her elbows. He also noted there was some tenderness to palpation around the base of the right thumb, especially, but that it was not obviously squared. He diagnosed her with the right tennis elbow and possible mild osteoarthritis of her hands with thumb base pain with increased use. He thought she might have a possible autoimmune disease and ordered a complete evaluation (PX 3, pp. 125 – 126). When she returned a week later, Dr. Costamire noted that her lab reports were normal. He thought she possibly had mild osteoarthritis in the thumbs (PX 3, p. 133). She was then referred to Dr. Tulipan at the Elmhurst Clinic.

Her first visit to Dr. Tulipan was on December 20, 2011. At that point she had been off of work since October 19, 2011. She complained that she had very limited range of motion in

her thumbs and the pain was aggravated with movement. She said the right is much worse than the left, but she denied any numbness and tingling in her hands. She described the pain as aching when she is not moving and sharp when she moves the thumbs. She said that she had some chiropractic treatment three times a week for several months and that most of her discomfort had gone away except for that in the shoulders and shoulder girdle. In particular, she complained of pain around the thumbs. This was the condition for which she was seeing Dr Tulipan. His examination of her revealed that pressure around the shoulder girdle/biceps was uncomfortable for the Petitioner. However, she had an excellent range of motion of those areas. She had a mildly positive flexion compression test on the wrist on the right and negative on the left and she had a positive Finkelstein's test bilaterally more so on the right than the left. She had a positive grind test more so on the right than the left. There was also some pain to resisted extension of the thumb bilaterally, but no significant pain to palpation over the first extensor compartment. Dr. Tulipan reviewed x-rays of the wrist that were previously obtained that showed basal joint views, revealing some early joint space irregularity and osteophyte formation consistent with early-stage 2 basal joint arthritis on the wrist. His impression at the time was bilateral upper extremity pain, possible myofascial pain syndrome with probable mild bilateral basal joint arthritis and deQuervain's syndrome. He offered an injection to her, which she received on January 24, 2012 (PX 3, pp. 133 – 137). She returned to him on February 14, 2012 and said she had absolutely no improvement from the steroid injection. She still complained of pain around the thenar eminence and basal joint on the right, but also on the left. He believed that a majority of her discomfort stemmed from her osteoarthritis. He recommended a stronger anti-inflammatory medication and so he prescribed a higher dose of Mobic to relieve her discomfort. If that did not work, he would try one more injection.

She returned to Dr. Tulipan on March 13, 2012. He gave her another injection and opined: "The etiology of this problem is always difficult to say. A great deal of arthritis is genetic in nature. Certainly heavy pinching/gripping type activities and pressure on a repetitive basis, opening bottles, given (sic) massage could on a regular basis exacerbate an underlying arthritic condition. Certainly it will make the symptoms more manifest." (PX 3, p. 141)

She returned for her final visit on April 17, 2012. At that point she denied any pain and stated she felt some aching along the thumb and through the fingers. Dr. Tulipan gave her an injection in the left hand that day. He told her that she should follow up with him on an as needed basis if the pain recurs. He recommended that she "avoid any type of activity that requires heavy pinching and gripping. This will more than likely be a lifelong restriction. Certainly, keyboard work, office work, light pinch and grip is (sic) all accessible to her" (PX 3, pp. 142-143).

Petitioner introduced, and the Arbitrator admitted into evidence, her wage statements from Nordstrom as Petitioner's Exhibit 1. Respondent raised no objection. Those records demonstrate that Petitioner received an hourly rate of $15.75, plus commission for product that she sells. Petitioner was paid semi-monthly. The hours Petitioner worked during a semi-monthly pay period varied, and the hours she worked each day was not broken out. The Arbitrator totaled the current gross wages for each of the 26 full pay period immediately prior to April 14, 2014, which was the first hearing date. Those semi-monthly amounts add up to $35,466.75. Then $35,466.75 divided by 52 weeks yields an average weekly wage of $682.05. (PX 1)

Petitioner also introduced, and the Arbitrator admitted into evidence, the medical records and bills of Mary Luther, DC as Petitioner's Exhibit 2; the medical records and bills of Elmhurst

Clinic as Petitioner's Exhibit 3; the medical records and bills of Elmhurst Hospital as Petitioner's Exhibit 4; the medical bill from Quest Diagnostic as Petitioner's Exhibit 5; the medical bill from Elmhurst Radiologists as Petitioner's Exhibit 6; the bill from Lab Corp as Petitioner's Exhibit 7.

The Respondent presented the Evidence Deposition of Dr. John Fernandez as its only witness. The Petitioner underwent an examination conducted by Dr. Fernandez pursuant to Section 12 of the Worker's Compensation Act. The Petitioner provided a history to Dr. Fernandez that she had been an esthetician for Eaglewood Resort & Spa for over 8 ½ years (RX 1, p. 14) Dr. Fernandez testified that the Petitioner provided him with a job description that was consistent with the medical records and the other sources he reviewed, both in terms of the intensity of her work and the use of her hands (RX 1, p.15). Dr. Fernandez testified that the Petitioner told him that her symptoms began in July 2011 and she attributed them to work activities because her symptoms would get worse with those activities and they would improve when away from those activities (PX 1, p. 16). He testified that when he saw her, she complained of intermittent and occasional numbness and tingling that mostly affected her ring and small fingers on the right hand. She complained of pain radiating along the forearm muscles anteriorly around the elbow. But the main focus of her pain was at the basilar joint of her thumbs, right greater than left, with associated stiffness and weakness (RX 1, p. 17).

When he examined Petitioner, he found that her symptoms subjectively correlated well with the objective findings and did not feel that there was any symptom magnification or pain behavior (RX 1, p. 18). His examination revealed that she had swelling and thickening at the base of the thumbs. She had significant pain palpation at the base of the thumb, right greater the left. She had crepitus, which is a noise that is generated by the joint with movement. She had stiffness, about 20% compared to normal, with pain at the ends (RX 1, p. 19). He had x-rays

taken that showed she had grade II to III out of IV degeneration of the basilar joints with subluxation osteophytes and local sclerosis. He came to a diagnosis of basilar joint arthritis in both thumbs right greater than left (RX 1, p. 21).

He described basilar joint arthritis as a type of degenerative arthritis or osteoarthritis that occurs at the base of the thumb (RX 1, p. 20). He said many cases of osteoarthritis are asymptomatic. He testified that the incidence of osteoarthritis is reported to be as high as 50% of people over the age of 50, but that not everyone has symptoms. He testified that this condition occurs irrespective of employment. There is a certain percentage of the people who have arthritis and develop symptoms. Dr. Fernandez noted the following:

> "There's (sic) anatomic differences, for example, between men and women. Specifically to basilar joint arthritis, for example, the incidence of arthritis is almost 10 times higher in women than in men. We think that has to do with the fact that women are slightly more lax, so they have more motion through that joint. The fact that there is an estrogen effect on the joint as well as on the ligaments which creates or contributes to the arthritis. So, what happens is, basically, the cartilage on the end of the bone wears away, just like the rubber on your tire, and eventually, it will start to cause problems."

Dr. Fernandez further testified, "We haven't been able to figure out why some people have symptoms and some people don't." (RX 1, p. 23). He further testified that from her records, she had been diagnosed with deQuervain's tenosynovitis, but that he didn't see any evidence of that on his exam. He testified that deQuervain's tenosynovitis is a tendinitis of the extensor tendon that occurs at the wrist and is unrelated to basilar joint arthritis.

Dr. Fernandez testified that his primary diagnosis was basilar joint arthritis (RX 1, p. 25). He rendered the opinion that her job activities did not cause or aggravate her diagnosis of basilar

joint arthritis (RX 1, p. 26). He testified that arthritis is a degenerative condition and that it occurs over time "irregardless" of what caused it or contributed to it (RX 1, p. 27). He did render an opinion that Petitioner's arthritis is symptomatic with any use of the hands. The more intense the use, the more likely that she is going to be symptomatic, with work activities or without work activities. He testified, "So my opinion on the record is that her work activities did not cause or aggravate the disease, but I will reasonably agree that her work activities will increase her symptoms. They will manifest her symptoms." (RX 1, p. 29). He further testified that her restrictions would be related to her comfort level. (RX 1, p. 29). He testified that from an objective basis, she has all the capabilities to return to work in any job, including an esthetician, but that she may not feel like she can do it. He opined that the capabilities of the patient are primarily determined by the patient themselves (sic), because they tell you how symptomatic they are. (RX 1, p. 32).

On cross-examination, Dr. Fernandez testified that any use of her thumb is going to increase the pain in the thumb. (RX 1, p. 42). He testified that the more physical the use of the thumb, the more likely it is going to cause symptoms (RX 1, p. 43).

Dr. Fernandez testified that the sole basis of his opinion that Petitioner's work activities did not aggravate or cause the basilar joint arthritis was because there was no medical literature to support that it does (RX 1, p. 43). However, he admitted that he did not know when he last did a medical literature search on basilar thumb arthritis prior to his Section 12 examination of the Petitioner (RX 1, p. 46). He further admitted that he was unaware that the Mayo Clinic issued a statement that one of the risk factors for osteoarthritis of the thumb is work activities that aggravate symptoms (RX 1, p. 46). He was also unaware of the article written in the *Annals of Internal Medicine*, Volume 133, 8, October 17 of 2000, on the issue of osteoarthritis in the

workplace. He was unaware that the article stated that jobs in which workers do repetitious tasks that overwork the joints and fatigue the muscles that protect the joints, increase the risk for osteoarthritis in those joints (RX 1, pp. 46-47). He was also unaware of the study done in a Virginia textile mill that found female workers whose jobs required repeated pinch and grasp motions (pinching the thumb and index or middle fingers together to hold something) had a much higher rate of osteoarthritis in the joints than did other female workers (RX 1, p. 47).

Dr. Fernandez opined that there was no medical literature to say that pinching and grasping did not cause basilar thumb arthritis. So it was his opinion there were no studies either way, i.e., there were no studies that either prove or disprove the relationship (RX 1, pp. 47-48).

Dr. Fernandez testified that he is a member of the American Association of Orthopedic Surgeons, but would not consider their articles authoritative (RX 1, pp. 43-44). He testified that he agreed with the statement made by the American Academy of Orthopedic Surgeons that arthritis is a condition that irritates or destroys a joint; that the one that most often affects the joint at the base of the thumbs is osteoarthritis; and that osteoarthritis is degenerative or wear-and-tear arthritis (RX 1, p. 44). He also testified that articles distributed by the Mayo Clinic would not be authoritative (RX 1, p. 45). He did agree with the statement made by the Mayo Clinic that arthritis can cause severe hand pain, swelling and decreased strength and range of motion, which would make it difficult to do simple household tasks such as turning doorknobs and opening jars. He disagreed with the Mayo Clinic that the risk factors for thumb arthritis would be performing certain activities on jobs that put high stress on the joint (RX 1, p. 40). He testified that her underlying condition could limit capabilities as an esthetician because those activities would produce pain and that pain would restrict her from repetitive tasks involving pinching, because that activity would increase the pain (RX 1, pp. 54-55).

The Respondent introduced and the Arbitrator admitted in to evidence, Dr. Fernandez's Section 12 report as Respondent's Exhibit 2; the Nordstrom job application as Respondent's Exhibit 3; and a copy of the Petitioner's esthetician license as Respondent's Exhibit 4.

Based on the forgoing findings of fact, the Arbitrator makes the following conclusions of law:

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

The Arbitrator finds that the Petitioner suffered an accident of a repetitive nature while in the employment of the Respondent. It was undisputed that the Petitioner was the Lead Esthetician for the Respondent, and that she developed pain and discoloration in her fingers that manifested in late August 2011. She testified that her date of accident was August 25, 2011 and that she had worked 12 days in a row performing several services each day up to that date.

The Petitioner filed a motion to amend the Application for Adjustment of Claim. The Arbitrator granted the Petitioner's motion to change the claimed date of accident to August 30. 2011, which is the first date that she sought medical care for her condition with Dr. Luther.

Petitioner's Exhibit #2 indicates that on August 30, 2011, the Petitioner first received treatment for her upper extremities with Mary Luther, D.C. The Petitioner subsequently sought treatment with Dr. Costamire and Dr. Tulipan.

Based on the type of hand and thumb movements that she performed, the Petitioner's testimony, the medical records and the opinions of Dr. Tulipan and Dr. Fernandez, the Arbitrator concludes that on August 30, 2011, the Petitioner sustained repetitive trauma injuries to her thumbs.

F. Is Petitioner's current condition of ill-being casually related to the injury?

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to her job duties with the Respondent. The Petitioner testified that she noticed that while she was performing her esthetician duties with the Respondent, her fingers started swelling, hurting and developed lumps. She testified that these conditions worsened while she was working and lessened while she was not. Dr. Tulipan noted: "Certainly heavy pinching/gripping type of activities and pressure on a repetitive basis, opening bottles, giving massage could on a regular basis exacerbate an underlying arthritic condition. Certainly it will make the symptoms more manifest."

Dr. Fernandez testified that while it was his opinion the work activities did not cause or aggravate the arthritis, her work activities would increase her symptoms. He testified that from an objective basis, she has all the capabilities to return to work in any job, including an esthetician, but that she may not feel like she can do it. He opined that the capabilities of the patient are primarily determined by the patient themselves (sic), because they tell you how symptomatic they are. He testified that the more physical the use of the thumb, the more likely it is going to cause symptoms.

When an employee with a pre-existing condition is injured in the course of his employment, serious questions are raised about the genesis of the injury and the resulting disability. The Commission must decide whether there was an accidental injury, which arose out of the employment, whether the accidental injury aggravated or accelerated the pre-existing condition or whether the pre-existing condition alone was the cause of the injury. Generally, these will be factual questions to be resolved by the Commission. However, the Commission's decision must be supported by the record and not based on mere speculation or conjecture. If

there is an adequate basis for finding that an occupational activity aggravated or accelerated a pre-existing condition, and thereby caused the disability, the Commission's award of compensation must be confirmed. Sisbro v. Indus. Comm'n, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003).

In cases relying on the repetitive trauma concept, the claimant generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability. City of Springfield v. Illinois Workers' Comp. Comm'n, 388 Ill. App. 297, 315 (4th Dist. 2009).

The sole basis of Dr. Fernandez' opinion that the Petitioner's work activities did not cause or aggravate her arthritis was that he found no medical literature to support such claim. However, on cross-examination, Dr. Fernandez admitted that he could not remember the last time he had performed a literature search on this issue and was unfamiliar with literature that indicated that repetitive motions of the fingers and thumbs can aggravate arthritis.

The Arbitrator finds the opinions of Dr. Tulipan to be more persuasive than those of Dr. Fernandez.

Since the Arbitrator finds that the Petitioner suffered repetitive trauma injuries from her work activities, the Arbitrator finds that the Petitioner's current condition of ill-being of her thumbs is causally related to the activities she performed for Respondent on or around August 30, 2011.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Since the Arbitrator finds that the Petitioner suffered repetitive trauma injuries from her work activities and that such injuries arose out of and in the course of her employment, the Arbitrator further finds that the Petitioner is entitled to the payment of medical bills she incurred for treatment of those injuries, pursuant to Section 8(a) and subject to Section 8.2 of the Act, specifically, the medical bills from Mary Luther, DC ($9,658.00); Elmhurst Clinic ($984.00); Elmhurst Memorial Hospital ($1,414.00); Quest Diagnostics ($559.00); Elmhurst Radiologists ($54.00); and LabCorp ($1,304.00).

K. What temporary total disability benefits are due to the Petitioner?

The Arbitrator finds that the Petitioner was temporarily totally disabled from her employment starting on October 16, 2011, pursuant to Dr. Tulipan's recommendations, and ending on February 25, 2013, the day before she began working for Nordstrom, for a period of 71- 2/7 weeks.

L. What is the nature and extent of the injury?

The Arbitrator finds that the Petitioner's job duties at the Respondent would increase the amount of pain she was in and would be a prohibitive factor in her continued employment with the Respondent.

Dr. Tulipan's records indicate that he restricted her from performing the type of activities required of a facialist/esthetician.

The Petitioner then underwent a self-directed job search where she found employment with Nordstrom. At Nordstrom, the Petitioner testified, she performs 0-4 facials per month. However, she described her job as being in retail sales. She earns 3% commission on the skin care products that she sells. She earns less than she earned with the Respondent.

The Arbitrator finds that her job search was reasonable and the employment with Nordstrom is suitable. The Arbitrator finds that the Petitioner is currently earning $682.05 per week. Since the Petitioner was earning $925.00 per week with the Respondent, she has suffered a wage loss in the amount of $242.95 per week. Two-thirds of $242.95 is $161.97.

The Respondent is hereby ordered to pay Petitioner permanent partial disability benefits of $161.97 per week commencing on February 26, 2013 through the date Petitioner reaches the age of 67 (12/27/2028), or 5 years from the date the award becomes final, whichever is later, because the injuries Petitioner sustained that caused her to be partially incapacitated from pursuing her usual and customary line of employment and also caused her to sustain an impairment of her earnings, as provided in Section 8(d)1 of the Act, as amended.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEGAGO

☒ 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

Jeanette Solis,
Petitioner,

16IWCC0062

vs.

NO: 11 WC 43825

City of Rockford, Illinois, a municipal Corporation, Head Start Program, CETA,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, permanent disability, temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 23, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 26 2016
o1/20/16
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

16IWCC0062

SOLIS, JEANETTE

Employee/Petitioner

Case# 11WC043825

CITY OF ROCKFORD ILLINOIS A MUNICIPAL CORPORATION HEAD START PROGRAM CETA

Employer/Respondent

On 3/23/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0529 GREG TUITE & ASSOC
GREGORY SZUL
119 N CHURCH ST SUITE 407
ROCKFORD, IL 61101

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
321 W STATE ST PO BOX 1288
ROCKFORD, IL 61105

16IWCC0062

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JEANETTE SOLIS
Employee/Petitioner

v.

CITY OF ROCKFORD, ILLINOIS, a municipal corporation, Head Start Program, CETA
Employer/Respondent

Case # **11** WC **43825**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **Woodstock**, on **3/06/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
   ☒ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **9/26/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

In the year preceding the injury, Petitioner earned $**29,217.24**; the average weekly wage was $**561.87**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **5** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Denial of Benefits

Petitioner failed to meet her burden of proof that her accident as alleged arose out of and in the course of her employment with Respondent. All other issues are moot.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

3-17-15
Date

16IWCC0062

ARBITRATION DECISION

ATTACHMENT

Jeanette Solis v. City of Rockford, Illinois, a municipal corporation, Head Start Program, CETA
Case No. 11 WC 43825

In support of the Arbitrator's findings with respect to (C), did an accident occur that arose out of and in the course of Petitioner's employment by Respondent;

The Petitioner is alleging accidental injuries to the left foot on 9/26/11. At arbitration, the Petitioner testified that she was walking kids to a bus when her left foot stepped into a hole. The Petitioner did not testify where this hole was located, and there was no evidence presented showing that this hole was on property either owned or maintained by the employer.

Furthermore, the Arbitrator notes the Petitioner did have a Section 12 evaluation at her own request with Dr. Jeffrey Coe on December 12, 2012. Dr. Coe's testimony was taken in an evidence deposition and was introduced into evidence as Petitioner's Exhibit No. 4. The Petitioner told Dr. Coe that she "misstepped onto a curb." (Petitioner's Exhibit No. 4.) Dr. Coe was unequivocal in his recitation of the history that Petitioner had given him insofar as how the accident alleged herein had occurred.

The Petitioner testified that she had been, before the alleged accident, having bilateral foot problems, including complaints with respect to her left foot. Petitioner happened to be scheduled for a physical therapy visit on the day of the alleged occurrence, 9/26/11. The Petitioner testified that this physical therapy appointment had been scheduled prior to 9/26/11.

Introduced as Petitioner's Exhibit No. 1 are the medical records of the SwedishAmerican Hospital Physical Therapy Department. There was a visit date of 9/26/11. For history of injury, the following is stated:

> Report that she's been receiving treatment for anemia, then slowly noticed some left foot problem. Since, she's been experiencing this for two years, on and off. Received Cortisone 3x since November of 2010, no plans of another injection.

(Petitioner's Exhibit No. 1.)

In another portion on the physical therapy note, it was noted that the Petitioner reported an increase in pain this morning since she "stepped on a curb." (Petitioner's Exhibit No. 1.) Similar to the history that she provided to her own examining physician, Dr. Jeffrey Coe, the Petitioner told the physical therapist that she injured her left foot while stepping on a curb. To the contrary, at arbitration the Petitioner unequivocally testified that she stepped into a hole.

The Arbitrator also notes that when the Petitioner was seen by Dr. Hoffman on 9/27/11, the Petitioner stated that she simply "stepped wrong" on her left foot. There was nothing in the 9/27/11 medical records stating that the Petitioner stepped in a hole or was injured while at work. (Petitioner's Exhibit No. 2.

Based on the record as a whole, the Arbitrator finds that the Petitioner has failed to meet her burden of proof in showing that her accident arose out of and in the course of her employment with Respondent. Due to the conflicting histories of accident given to medical providers and contained in the properly admitted medical records and the deposition testimony of Dr. Coe, Petitioner's examining doctor, it is impossible for the Arbitrator to determine exactly how the accident alleged herein took place. As late as December 12, 2012, over one year after her

accident, Petitioner was giving a history of accident to her examining doctor that was significantly different than that to which she testified but which was consistent with that recorded in the treating medical records immediately after the accident, and which, if correct, without further elucidation, make this case non compensable. Compensation is denied and all other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
KANKAKEE

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Kimberlin,

Petitioner,

vs. NO: 14WC 39268

Crown Cork & Seal,

Respondent,

16IWCC0063

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, incurred medical, prospective medical, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 13, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 7 2016
o012016
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

KIMBERLIN, JAMES
Employee/Petitioner

Case# **14WC039268**

CROWN CORK & SEAL
Employer/Respondent

16IWCC0063

On 3/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2208 CAPRON & AVERINOS PC
DANIEL F CAPRON
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

1120 BRADY CONNOLLY & MASUDA PC
MARK F VIZZA
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

16IWCC0063

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

James Kimberlin,
Employee/Petitioner

v.

Crown Cork & Seal,
Employer/Respondent

Case # **14** WC **39268**

Consolidated cases: **none**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Kankakee**, on **1/14/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

16IWCC0063

FINDINGS

On the date of accident, **7/23/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**42,871.40**; the average weekly wage was $**824.45**.

On the date of accident, Petitioner was **57** years of age, ***single*** with **no** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**1,479.81** for other benefits, for a total credit of $**1,479.81**. (Arb.Ex.#1).

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act. (Arb.Ex.#1).

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $549.63 per week for 6-1/7 weeks, commencing 12/3/14 through 1/14/15, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 7/24/14 through 1/14/15, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Petitioner is entitled to prospective medical treatment in the form of a right total knee arthroplasty as prescribed by Dr. Puri, and Respondent shall pay the reasonable and necessary medical expenses associated therewith pursuant to Sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

3/10/15
Date

ICArbDec19(b)

STATEMENT OF FACTS:

Petitioner is a forklift operator who has worked for the respondent since 1996. He testified that on July 23, 2014, while descending from his forklift from a height of more than three feet, he felt a "pop" and immediate pain in his right knee. At the time he felt the pain, his left foot was already on the ground and his right leg had swung over and was in the process of straightening out immediately before his right foot alighted on the ground. The petitioner testified that the pain in his knee was so severe that he thought he had fractured it. He was taken to the emergency room of Presence St. Mary's Hospital.

The emergency room records reflect that petitioner "was getting off of his forklift at work and as he landed on his left leg he felt and heard a pop." X-rays of petitioner's right knee showed no fractures or dislocations, but marked degenerative joint disease. The attending physician suspected an injury to the collateral ligament or meniscus, and she referred petitioner to Dr. Panuska at the occupational health clinic for further care. (PX1).

Petitioner testified that he had previously undergone surgery to his right knee in 1970, and a second surgery in 1974. He believed that these procedures were to repair his cartilage. (Although the treating medical records reference a third knee surgery, the petitioner clarified that this was directed at his left knee.) The petitioner testified that he had no symptoms and received no medical treatment to his right knee for the period from 1975 until his accident at work on July 23, 2014.

On July 24, 2014, Dr. Panuska at the St. Mary's Occupational Health Clinic noted that the petitioner's right knee was swollen and tender. He noted that x-rays of the knee revealed "pretty much bone on bone." He provided the petitioner with a Neoprene knee support and imposed light duty restrictions. (PX 2)

On July 28, 2014, Dr. Panuska noted that the petitioner's right knee was still swollen. The petitioner reported that it was getting worse. An MRI was prescribed. (PX 2) When the petitioner returned to Dr. Panuska on August 6, 2014, authorization for the MRI was still pending and the knee was still swollen. (PX 2)

Petitioner underwent an MRI of his right knee on August 22, 2014. It revealed moderate to severe osteoarthritic changes, a small tear of the medial meniscus, moderate joint effusion and diffuse soft tissue edema. (PX 2) Upon reviewing the MRI on August 26, 2014, Dr. Panuska referred the petitioner to Dr. Rajeev Puri for an orthopedic consult. On September 8, 2014, authorization for the petitioner's visit to Dr. Puri was still pending and Dr. Panuska noted that the right knee was still swollen. (PX 2)

On September 30, 2014, the petitioner was seen by Dr. Puri. The history reflected that the petitioner "has had sx on knee before, but had no sig problems with knee prior to accident on July 2014, stepped off and pop and fall." Dr. Puri diagnosed osteoarthritis, administered a cortisone injection and imposed a restriction of sitting work only. (PX 3)
On October 15, 2014, Dr. Puri prescribed a right total knee arthroplasty. On November 4, 2014, he noted that he was "awaiting final approval or IME." (PX 3)

Petitioner was examined at the request of the respondent pursuant to Section 12 of the Act on November 17, 2014 by Dr. Lawrence Lieber. Dr. Lieber felt that the petitioner's work accident had resulted in only a minor strain of the right knee. He felt that the principal diagnosis was degenerative arthritis and that the petitioner's accident was "not a substantial contributing factor" regarding this diagnosis. In addition, he felt that the petitioner's degenerative knee condition was "neither caused, related or accelerated" by the work accident. He felt that the petitioner had reached maximum medical improvement with regard to the minor strain of his right knee and that he was capable of returning to work without restriction.

Petitioner testified that the respondent had accommodated his light duty restrictions until December 2, 2014, but that as of December 3, 2014 they refused to do so on account of the fact that they considered the restrictions to be non-work related. The petitioner remains off work and desires to proceed with the surgery to his right knee.

WITH RESPECT TO ISSUES (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, AND (D), WHAT WAS THE DATE OF THE ACCIDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that on July 23, 2014 he was loading a truck and was getting off a forklift when he felt excruciating pain in his right knee. He indicated that the injury occurred while he was getting ready to swing his right leg over while still holding onto the forklift. He noted that he thought he had broken his knee and noticed that it was painful to walk. He testified that the step off the forklift was 3-1/2' to 4' off the ground and that it was awkward to step off in the first place.

Prior to the accident in question, Petitioner had undergone two (2) surgeries on his right knee, the first in 1970 to repair a torn cartilage following a football injury and the second in 1970 to repair several torn ligaments. Petitioner testified that it took six (6) weeks to recover from the more recent surgery, and that recovery was "a piece of cake." He noted that he was released thereafter without restrictions and that he did not have any problems or symptoms, or need to see a physician for his right knee from that date until the present date of accident, or a period of approximately 40 years.

While merely stepping down from a normal height, such as descending a set of stairs, is not typically considered an increased risk associated with one's employment, it appears that petitioner's injury involved more than simply stepping down off a normal step. Instead, petitioner testified that the distance from which he was required to step down in descending from his forklift was between three and a half and four feet. It was while straightening his leg in the midst of this descent that petitioner felt a pop in his right knee. His left foot was already on the ground, his right foot was nearly so. Based on this rather awkward position, and the distance off the ground, the Arbitrator finds that the activity in question did indeed expose petitioner to an increased risk of injury due to the nature of his job activities. Needless to say, members of the general public are not required to step down from a height of nearly four feet and to do so on a regular and continuous basis.

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner proved by a preponderance of the credible evidence that he sustained accidental injuries arising out of and in the course of his employment on July 23, 2014.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The respondent's examining physician, Dr. Lawrence Lieber, has opined that the petitioner's right knee condition was neither caused nor aggravated by his accident at work, and that the work accident consisted merely of a minor strain. This opinion is impossible to reconcile with the facts.

Although the petitioner had undergone two prior surgeries to his right knee, he testified that he has not seen a doctor for his right knee since 1975, a period of 40 years. In addition, he testified that his right knee was asymptomatic until his accident on July 23, 2014. There is no evidence to the contrary and, in fact, the treating medical records generally corroborate this testimony.

The records of St. Mary's Occupational Health and Dr. Puri further confirm what the petitioner testified to: that his right knee has been painful and swollen at all times since the accident on July 23, 2014. It is unclear how Dr. Lieber can characterize the petitioner's injury as a minor strain when the medical records confirm that the right knee has remained swollen and painful for several months since the accident.

Simply stated, prior to the accident the petitioner's right knee was asymptomatic; ever since the accident, his right knee has been painful and swollen. It is apparent that the degenerative joint disease reflected on the x-rays and MRI pre-existed the accident, but was rendered symptomatic by the accident to the point at which surgery is now required. The fact that Dr. Puri is seeking authorization from "workers' comp" to perform the total knee arthroplasty strongly suggests that he thinks so as well.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner's current condition of ill-being with respect to his right knee is causally related to the accident at work on July 23, 2014.

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that his job as a forklift driver required him to work 52 hours one week, followed by 41 hours the next week. During every two week block of time, therefore, the petitioner worked a total of 93 hours, or an average of 46.5 hours per week. He testified that any overtime hours in excess of 40 per week were mandatory and not optional. He also testified that his straight time hourly rate of pay was $17.73. No documentary evidence was introduced on the issue of the petitioner's wages.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner's average weekly wage as calculated pursuant to §10 of the Act was $824.45 ($17.73 x 46.5 hours/week), for an annual salary of $42,871.40 ($824.45 x 52 weeks).

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

While this was marked as an issue in dispute on the Request for Hearing form (Arb.Ex.#1), no medical bills were submitted into evidence. Thus, no medical expenses are awarded herein. The issue would appear to be more one of prospective medical treatment (issue "K", infra).

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner has moderate to severe osteoarthritis in his right knee for which his treating orthopedic surgeon, Dr. Puri, has prescribed a total knee arthroplasty. The respondent has refused to provide authorization for this procedure based on the disputes they have raised regarding the compensability of the accident and whether the underlying condition was caused or aggravated by the accident. Having determined that the petitioner's accident on July 23, 2014 did arise out of and in the course of his employment; and having further determined that the petitioner's current condition of ill-being in his right knee is causally connected to that accident; the Arbitrator further determines that the petitioner is entitled to undergo the surgery as prescribed by Dr. Puri.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner is entitled to prospective medical treatment in the form of a right total knee arthroplasty as prescribed by Dr. Puri, and Respondent shall pay the reasonable and necessary medical expenses associated therewith pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner has been subject to various work restrictions since he was injured on July 23, 2014. The respondent initially provided the petitioner with light duty work until they received the examining report of Dr. Lieber, at which time they informed the petitioner that they would no longer accommodate his restrictions. The petitioner last worked on December 2, 2014.

Petitioner has not yet reached maximum medical improvement. He remains under the care of Dr. Puri who is awaiting authorization for a right total knee arthroplasty.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner was temporarily totally disabled from December 3, 2014 through January 14, 2015, the date of hearing, for a period of 6-1/7 weeks.

STATE OF ILLINOIS	)	☒ 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

Khaled Karim,
Petitioner,

vs.

NO: 08WC 50887

H & M International,
Respondent,

16IWCC0064

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical, causal connection, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 9, 2014, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $17,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 27 2016
o012016
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KARIM, KHALED
Employee/Petitioner

Case# 08WC050887

H&M INTERNATIONAL
Employer/Respondent

16IWCC0064

On 12/9/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4218 KATZ FRIEDMAN ET AL
DAVID M BARISH
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

1872 SPIEGEL & CAHILL PC
CHRISTINA H BAWCUM
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Khaled Karim
Employee/Petitioner
v.
H&M International
Employer/Respondent

Case # **08** WC **50887**

16IWCC0064

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **September 22, 2014 and September 30, 2014.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **fee petition by prior attorney**

16 IWCC 0064

FINDINGS

On **February 19, 2007**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's hernia and right shoulder current condition of ill-being *are* causally related to the accident.

Petitioner's low back current condition of ill-being *is not* causally related to the accident.

In the year preceding the injury, Petitioner earned **$45,703.84**; the average weekly wage was **$878.92**.

On the date of accident, Petitioner was **57** years of age, *single* with **no** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent shall be given a credit of **$2,916.69** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$2,916.69**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$585.95**/week for **7** weeks, commencing **February 26, 2007** through **April 15, 2007**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$2,916.69** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary hernia and right shoulder medical services only, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$527.35**//week for **30**/ weeks, because the injuries sustained caused the **6**/% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Petitioner's attorneys' fees shall be divided pursuant to agreement, as detailed in this decision.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

December 9, 2014
Date

DEC 9 - 2014

FACTS

Petitioner worked as a truck mechanic for Respondent. On February 19, 2007, Petitioner was carrying an air compressor with two co-workers. He testified that the air compressor weighed between 400 and 500 pounds. Petitioner testified that as a result of this activity he began feeling pain in his back and abdomen. Petitioner testified that he continued to work for about one hour until the end of the day. Petitioner testified that he performed light duty work for about a week, when, while using a hammer at work he again felt pain in his abdomen and back.

On February 26, 2007, Petitioner presented to Concentra. He complained about shoulder pain and advised the doctor that it was injured on February 19, 2007. He stated that he was using a big hammer overhead to straighten a trailer piece and he felt pain in the right shoulder. That same day he felt pain at the left groin area. The pain began gradually. The assessment was shoulder strain and inguinal hernia. He was to undergo therapy three times per week for 1 to 2 weeks. He was given work restrictions of no lifting over ten pounds, no pushing/pulling over 20 pounds of force, and no reaching above shoulders. (RX 1, 26-28)

Petitioner returned to Concentra on March 1, 2007. He complained about his shoulder which was injured on February 19, 2007. The assessment was inguinal hernia and shoulder strain. He was to do a home exercise program and modified work duties were recommended. (RX 1, 29-30)

Petitioner returned to Concentra on March 8, 2007 for a re-check of his right shoulder and inguinal hernia. It was noted that he was to see a surgeon for his hernia. Petitioner informed the doctor that his shoulder was better. The assessment was (1) right shoulder strain (2) history of a left inguinal hernia. He was to return to the clinic in one week for re-check of his right shoulder. The same restrictions of no repetitive lifting over ten pounds and no pushing or pulling over 20 pounds were imposed. (RX 1, 31)

Petitioner returned to Concentra on March 15, 2007 and complained of shoulder pain. He reported that he was using a hammer to straighten out a trailer piece. The assessment was (1) shoulder strain improved and (2) left inguinal hernia. Petitioner was given restrictions of no lifting over ten pounds, no pushing/puling over 20 pounds of force. He was released from medical care, because he preferred to follow-up with a private physician. (RX 1, 33-34)

On March 13, 2007, Petitioner presented to Dr. Siavelis. He reported that he lifted something heavy at work called a compressor, and then felt left inguinal pain and started noticing that he had a bulge in the left inguinal area. (RX 2, 19, 24) On March 16, 2007, Dr. Siavelis performed a laparoscopic preperitoneal bilateral hernia repair with mesh and umbilical hernia repair. (RX 2, 22-23) Dr. Siavelis released Petitioner to return to work full duty as of April 16, 2007. (RX 6)

Petitioner testified that he was terminated by Respondent on October 18, 2007. That day, Petitioner returned to Dr. Siavelis. Petitioner reported to Dr. Siavelis that he was doing well, but then felt a sharp pain with lifting in the left periumbilical region that radiated down towards the groin. A detailed physical examination showed that the repairs were entirely intact. There was no evidence of herniation. Dr. Siavelis felt that Petitioner may have a small muscle strain. (RX 2, 17)

On September 26, 2008, Petitioner underwent a MRI of right shoulder pursuant to the recommendation of Dr. Karim, Petitioner's nephew. The impression was degenerative changes at the AC joint with soft tissue

hypertrophy and inferior spurring producing extrinsic impingement on the supraspinatus muscle; Mild tendinosis involving the distal supraspinatus tendon; There was no evidence of labral tear; Question biceps tendinosis at the level of the biceps anchor; There was normal appearance of the biceps tendon within the bicipital groove. (RX 2, 33-34)

On September 26, 2008, Petitioner underwent an MRI of the lumbar spine pursuant to the recommendation of Dr. Karim. The impression was transitional vertebral and 6 lumbar vertebral bodies. There were hypertrophic and degenerative change at the spine and decreased signal intensity of the intervertebral disc at the level of L4-L5 and L5-L6. There was mild stenosis at the level of L4-L5 and moderate spinal stenosis at the level of L5-L6. There was a moderate sized herniated and extruded disc at the level of L5-L6 on the left combined with small spinal canal. (RX 2, 36)

On November 20, 2008, Petitioner presented to Dr. Zillmer at M&M Orthopedics. He was referred by a family member for evaluation of his left shoulder. Petitioner informed the doctor that his left shoulder was painful occasionally but primarily he was suffering from weakness in the left arm. He stated that he was injured on the job back in February of 2007, when he had to lift, along with some others, a 400 pound compressor. Petitioner reported that this led to pain in his shoulder and also to development of a hernia which eventually required operative intervention. Some time later he then had to use a sledgehammer to straighten out something that was bent. He had to make multiple overhead blows with that hammer over several hours. By the time he was done with that particular day he had significant discomfort. Dr. Zillmer performed physical examinations on both the left and right shoulders. Dr. Zillmer review the MRI scan and read it as showing degenerative changes at the AC joint with some extrinsic impingement on the supraspinatus muscle, tendinosis of the distal supraspinatus tendon with no evidence of full thickness cuff tear of labral pathology or biceps tendon pathology. The doctor felt that Petitioner likely had a rotator cuff strain combined with some subacromial bursitis secondary to overuse. Dr. Zillmer recommended supervised physical therapy and that Petitioner return in one month. (RX 3, 3-5)

On January 8, 2009, Petitioner presented to Dr. Mather for evaluation of low back pain. He informed the doctor that he sustained an injury in January of 2007, when he lifted a compressor weighing approximately 500 pounds. He noted an onset of low back pain beginning June 2007. He complained of low back pain when getting up on the morning especially after doing some shoveling of snow or lifting. He had noted an increase in his pain in the morning starting in April or May of 2008, with no additional injury reported. He informed the doctor that he also experienced an onset of bilateral feet numbness, tingling and cold sensation since that time. Dr. Mather reviewed the MRI films from September 26, 2008, and found that they revealed a large extruded disc migrated caudally, left L5-L6 at the transitional level with mild degenerative disc disease noted at L5-L6. The impression was degenerative disc disease of the lumbar spine and history of herniated disc. He was instructed to do home exercises, and continue conservative care. (RX 3, 2-3)

Petitioner returned to Dr. Mather on April 26, 2010. Petitioner complained of back pain that radiated to both buttocks and both feet. A new MRI was ordered. (RX 2, 13)

Petitioner underwent a second MRI of the lumbar spine on June 18, 2010. The impression was spondylotic changes in the lumbar spine at L4-S1 and L4-L5 to a lesser degree. Findings at the L5-S1 improved from the prior examination and the findings at L4-L5 were overall stable. (RX 4)

On July 15, 2010, Petitioner reported to Dr. Mather that he continued to have complaints of lower back pain with radiation of symptoms down either leg. (RX 2, 11) The doctor reviewed the MRI and found that it

revealed a large left L4-L5 disc herniation. Dr. Mather noted that L5-S1 a transitional segment, so some radiologists may call this an L5-S1 disc herniation. Dr. Mather found that it was a relatively large disc herniation occupying the left half of the spinal canal. The impression was herniated disc. Dr. Mather felt that Petitioner needed surgery and recommended augmenting the discectomy with fusion. He opined that Petitioner was unable to work.

CAUSATION

Petitioner testified that when he presented to Concentra, he complained of back pain. However, the Concentra medical records do not show that Petitioner complained of back pain. When Petitioner presented to Dr. Siavellis for hernia and shoulder injuries, he did not complain of back pain. Petitioner's testimony that he complained of back pain is contradicted by the medical records.

Petitioner's accident was on February 17, 2007. However, it was not until September 26, 2008 that he underwent a lumbar spine MRI, which was pursuant to the recommendation of his nephew, Dr. Karim.

The medical records do corroborate hernia and right shoulder complaints.

Based upon the foregoing, the Arbitrator finds that Petitioner's current condition of ill being regarding his hernia and right shoulder, are causally related to the accident.

Based upon the foregoing, the Arbitrator finds that Petitioner's current condition of ill being regarding his low back is not causally related to the accident.

MEDICAL

Based upon the Arbitrator's findings regarding causation, the Arbitrator finds that Respondent shall pay medical bills for hernia treatment and for right shoulder treatment only.

The Arbitrator further finds that Respondent is not responsible for medical bills regarding the low back.

TEMPORARY TOTAL DISABILITY

Petitioner was given work restrictions on February 26, 2007, which were continued until Dr. Siavelis released him to return to work full duty on April 16, 2007.

Therefore, the Arbitrator finds that Petitioner is entitled to temporary total disability for that period.

NATURE AND EXTENT

Petitioner sustained a right shoulder strain for which he underwent conservative care. The Arbitrator awards 1% loss of the person as a whole for that injury.

Petitioner sustained hernia injuries for which he underwent surgical repair. The Arbitrator awards an additional 5% loss of use of a person as a whole for that injury.

ATTORNEYS' FEES

Petitioner's prior attorney, Isabella Wells, and Petitioner's current attorney, David Barish, have entered into an agreement regarding the division of attorney's fees. They have agreed that an award that is up to Respondent's existing offer shall result in 1/3 of the attorneys' fees to Petitioner's current attorney and 2/3 of the attorneys' fees to Petitioner's prior attorney. They have further agreed that an award that is above Respondent's existing offer shall result in 2/3 of the attorneys' fees to Petitioner's current attorney and 1/3 of the attorneys' fees to Petitioner's prior attorney.

The amount of the offer has not been disclosed. Respondent's attorney has voiced no objection.

The Arbitrator finds that the attorneys' agreement is reasonable and orders that the fees be divided, as agreed.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Moore,

Petitioner,

vs. NO: 11 WC 39031

16IWCC0065

Brookwood School District #167,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, and permanent disability benefits, hereby reverses the Arbitrator's Decision and finds that Petitioner sustained accidental injuries arising out of and the course of his employment on July 18. 2011, Respondent is liable for medical expenses incurred in the treatment of such accident, and that as a result of the accident Petitioner has suffered a 20% loss of use of the right leg under Section 8(e)12 of the Act.

After a complete review of the evidence, the Commission finds that Petitioner suffered a compensable work accident on July 18, 2011. The Commission finds the Arbitrator's finding that Petitioner exposed himself to a risk outside his reasonable duties by moving a cabinet he was instructed not to move, therefore removing himself from the sphere of his employment, unsupported by the evidence.

The Commission notes that Petitioner was not violating a safety rule or performing personal activities that took him out of the sphere of his employment. Petitioner was injured moving furniture in a classroom. The record clearly indicates that Petitioner had been tasked with moving the furniture in classrooms throughout the school so that the carpets could be cleaned. However, the Commission finds that even accepting that Petitioner had been told not to move any file cabinets, doing so was for Respondent's benefit, not Petitioner's.

The Commission notes that the Arbitrator relied on *Sekora v. Industrial Commission*, 198 Ill.App.3d 584 (1990), in which the claimant had been moving vehicles into a garage for Respondent when he crashed and suffered an injury. The court found that claimant's behavior fell under horseplay since he had taken the vehicle to a field next to the dealership instead of directly to the garage. Furthermore, the employer had told its employees to walk, not ride, the vehicles into the garage. Claimant, however, denied any knowledge of such an instruction.

The Commission finds the case at bar distinguishable from *Sekora*. In the case before us, Petitioner's behavior did not constitute horseplay. As previously noted, moving the cabinet was solely for Respondent's benefit and fell within his job duties, which was to move the furniture in the classroom. The Arbitrator also found the rule in *Saunders v. Industrial Commission,* 189 Ill.2d 623, 631 (2000), applicable in this case. In *Saunders*, the court denied claimant's claim, finding that while claimant's job "included the operation and use of forklifts" he was to use the forklift "by himself, to move machine parts from one part of the plant to another" and not for "hitching a ride to the break room" which was what he was doing when he was injured.

The Commission notes that, as in *Sekora*, the claimant in *Saunders* acted in a way that constitutes horseplay and that was for his benefit and not for the benefit of the employer. The claimants in *Sekora* and *Saunders* suffered injuries as a result of activity prohibited by their employers **and** conducted solely as a personal convenience. In the case at bar, Petitioner may have performed an activity which Respondent had not asked him to perform, but it is clear that his activity was for the sole benefit of Respondent and in no way for Petitioner's benefit or convenience, distinguishing it from *Sekora* and *Saunders*.

The Commission also notes that Anita Lee and Janice Washington, Petitioner's co-workers and fellow custodians, testified that the custodians had been instructed not to move any heavy furniture such as cabinets and bookshelves. (T.101-102,120) Yet, the Commission notes, a dolly was made available to the custodians for moving items. When questioned about the dolly, Charles Anderson, Petitioner's supervisor, testified that it was used to move items that could not be carried. (T.152-153) Considering, as previously noted, that Ms. Lee and Ms. Washington both testified that they had been told not move anything heavy, providing custodians a dolly to move items is suspect. Additionally, the Commission finds it compelling that both Ms. Lee and Ms. Washington were working in the same classroom as Petitioner and yet they did nothing to dissuade him from moving the cabinets. (T.104,125)

Petitioner's decision to move the cabinet did not remove him from the sphere of his employment. Therefore, based on the totality of the evidence, the Commission reverses the Arbitrator's Decision and finds that Petitioner's accident arose out of and in the course of his employment with Respondent on July 18, 2011. As such, the Commission awards medical expenses in the amount of $4,990.61, the outstanding balance of the medical treatment incurred by Petitioner in the treatment of his injuries from the July 18, 2011 accident, and $115.00 for medical payments made by Petitioner out-of-pocket.

Regarding permanent disability benefits, the Commission notes that Petitioner has returned to work, full duty. Petitioner testified that he performs the same duties he did before the

accident. (T.71-72) Petitioner further testified that he is able to perform his job duties as a custodian without difficulty and does not take any medicine, prescribed or over-the-counter, as a result of his leg injury. (T.69) At the arbitration hearing, Petitioner showed the scar to the Arbitrator and the parties agreed that the scar goes from Petitioner's right ankle to just under his calf. (T.65) The parties also agreed that the scar is about ¼ inch wide and that at the bottom of the scar there appeared to be some scaling and discoloration. (T.65-66) Petitioner also testified that "occasionally there is one part of the scar that will seep blood." (T.67) He explained that he feels "numb pain" in his right inner leg when the area is touched. (T.68) Petitioner further explained that he feels numbness in his right leg, but it is in the "background." (T.68) Petitioner testified that injured area has remained "darkish, mottled pigmentation that never was [there] before the accident." (T.70) Petitioner's description of the injured area and scar is supported by the photos in PX5. Therefore, based on the evidence presented, the Commission finds that Petitioner has suffered a 20% loss of use of the right leg under the Act.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. Furthermore, we have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent. Finally, one should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

IT IS THEREFORE ORDERED BY THE COMMISSION that that the Decision of the Arbitrator, filed on March 17, 2015, is reversed as stated above.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay the sum of $4,990.6 in medical expenses and $115.00 for out-of-pocket payments made by Petitioner pursuant to Sections 8(a) & 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $317.77 per week for a period of 43 weeks, as provided in Section 8(e)12 of the Act, for the reason that the injuries sustained caused the 20% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under Section 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

16IWCC0065

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 8 2016
MJB/ell
o-12/07/15
52

Michael J. Brennan

Thomas J. Tyrrell

Dissent

I respectfully dissent from the decision of the majority. Arbitrator Thompson-Smith's findings are both thorough and well reasoned. This decision is correct and should be affirmed

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MOORE, DAVID
Employee/Petitioner

Case# **11WC039031**

16IWCC0065

BROOKWOOD SCHOOL DISTRICT #167
Employer/Respondent

On 3/17/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

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STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

David Moore
Employee/Petitioner

Case # 11 WC 39031

v.
Brookwood School District # 167
Employer/Respondent

16IWCC0065

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Lynette Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on 2/26/15. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?

G. ☐ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. ☐ What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ☐ TTD

L. ☒ What is the nature and extent of the injury?

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☒ Should Respondent pay out-on-pocket expenses of $115.00 to Petitioner.

FINDINGS

On 07-18-11, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did not sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

In the year preceding the injury, Petitioner earned $27,539.72; the average weekly wage was $529.61.

On the date of accident, Petitioner was 57 years of age, married, with 1 child under 18.

Petitioner has received all reasonable and necessary medical services.

Respondent has not paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00.

Respondent is entitled to a credit of $8,371.64 under Section 8(j) of the Act.

ORDER

The Petitioner has not proven, by a preponderance of the evidence, that an accident occurred, which arose out of and in the course of his employment by Respondent, therefore no benefits are awarded, pursuant to the Act.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest of at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

The disputed issues in this matter are: 1) accident; 2) causal connection; 3) medical bills; 4) out-of pocket expenses; and 5) the nature and extent of Petitioner's injuries. *See*, AX1.

Mr. David Moore, ("Petitioner") testified that he started working with School District 167 ("Respondent"), in 2006 and became permanently, full-time in December 2006, as a day custodian at the Longwood Elementary School.

Petitioner's testimony and treatment

In general, his duties are to open the building and get it ready for classes. He performs various tasks depending on the time of the year, including but not limited to snow removal and grass cutting. He testified that he performs all necessary indoor and outside maintenance and cleaned lunchrooms, washrooms and other areas of the school. In the summer, he also cleans the building, including desks, chairs, windows and carpeting and waxed tiled floors.

He testified that in July 2011, he was working in the maintenance department with two of the night custodians, Ms. Anita Lee and Ms. Washington. His supervisor was Charles Anderson. He further testified that on July 18, 2011, he was injured while working. He stated that a meeting took place before the accident in June 2011, at the Longwood School. It included the two other custodians, Charles Anderson, Jeff Charleston, the business manager, and Dr. Pamela Hollich, who was the district superintendant at the time. The purpose of the meeting was to go over the work to be done as an outside service had been hired to clean the carpeting in the school, instead of using the custodians. He seemed to recall that Dr. Hollich essentially controlled the meeting.

Petitioner testified that the one instruction he recalled was that the custodians were to stay ahead of the carpet cleaners, i.e., clean a classroom and then move on to the next. The idea was to move the furniture, desks and other items to one side of the room so there was an carpet area open, which could be cleaned. After it was cleaned and dry, the furniture would be moved to the opposite side of the room, to open up the other half of the carpet.

Petitioner specifically denied being told not to move the file cabinets or heavy, weighted items. He estimated there were over 20 rooms in the school. Most of them were carpeted and he believed that all of the carpeting was to be cleaned. He testified that he was moving file cabinets having two or four drawers, before the accident occurred.

He testified the accident occurred in Room 106, while he was working with Ms. Lee and Ms. Washington, cleaning the classroom. He was attempting to move a four-drawer file cabinet with a dolly. In the process, the cabinet tipped and hit his right leg. He testified that he pulled his right leg away and the cabinet fell to the floor.

He noticed that his right leg started to hurt and he rested it on a desk. When he pulled up his pant leg he saw some redness, but it did not appear to be seriously injured. He did not see any bleeding or swelling. He did leave to go to the St. James Occupational Health Center and he testified that he notified his supervisor, Mr. Anderson

He drove to the St. James Clinic (the "clinic"), experiencing a great deal of pain. A doctor looked at his leg and it did not appear to show a great deal of damage. An x-ray was taken and there was no fracture.

He returned to the clinic on July 21, 2011, now noticing a bruise as well as blistering on his skin. He identified various photographs of his leg taken before he had surgery. PX5.

Petitioner testified that there was bruising, blistering and bleeding in the leg. When he would take a shower, it would appear that the skin would open. He had difficulty walking and was not able to work.

He eventually came under the care of Dr. Aribindi, who recommended surgery to debride the wound. Petitioner agreed that he had approximately thirteen (13) visits with Dr. Aribindi and surgery was performed on September 7, 2011. He testified he had no new injury to the leg between the date of the accident and the date of the operation. He thought the surgery was to open the leg wound and debride it.

Dr. Aribindi did perform a debridement procedure of the right leg with packing of the wound. The doctor's post-operative diagnosis was status post crush injury to right leg with infected right leg wound, with persistent drainage. Petitioner identified additional photographs of his leg taken after the surgery. PX1 & 5.

He returned to work in November 2011. He thought it was full-time and could not recall working part-time. He remembered being told to do what he could tolerate.

Petitioner identified his Exhibit 3, is a bill from St. James Hospital and Health Center showing a balance of $4,574.61 for services on July 18 and July 21, 2011. He also identified his Exhibit 4, which is a bill from Southland Orthopedics showing that he paid $115.00 out-of-pocket and has a balance of $416.00 for services from July 22, 2011 through January 17, 2012.

The Arbitrator then examined a scar on his leg, approximately ¼" wide and discolored, which extends from the calf to the ankle.

He testified that on occasion the scar tissue would seep blood and that there were no particular activities that caused this action. He described feeling a numb sensation and pain to light touch. The scar has no affect on his ability to walk or work and he is not taking any medication for pain. When the bleeding occurs, he applies a bandage. In addition, the pigmentation of his skin is dark in the area of the wound.

Upon cross-examination, Petitioner testified that he will be 62 years old in August of this year and that he continues working at Brookwood as a custodian, performing all of his regular duties. He could not recall the date he returned to work full-time, but agreed it was some time in November 2011. The actual date was November 23, 2011, according to Respondent's Exhibit 1. Petitioner testified that he was not under any restrictions from doctors because of the injury and that he is not taking any prescription medication. Also, he has no current doctor's appointment because of the condition of his leg.

Although he could not recall, Dr. Aribindi allowed him to return to work at a four-hour a day shift, on November 7, 2011. He agreed that once he returned to work as a custodian, he has continued work in a full duty capacity. RX1.

He could not recall Dr. Aribindi telling him that his injury was well healed at the final appointment, on January 7, 2012. He admitted that at that point he was performing his regular work duties and the doctor had discharged him from care, with no limit on activity. He agreed the doctor told him to come back, if necessary and he has not had the need to do so.

Finally, Petitioner testified that he recalled the meeting that was held before the work began in July 2011 but could no remember an instruction that file cabinets or heavy items were not to be moved.

Testimony of Respondent's first witness

The respondent called Ms. Anita Lee. She is employed with the School District and has worked there for eighteen (18) years as a night custodian. She briefly described the duties of a night custodian.

She testified that in the summer of 2011 she was working at the Longwood School along with Mr. Moore and Ms. Spearman-Washington.

She remembered the incident, but could not recall the date or the classroom. She was working with Mr. Moore and Ms. Spearman-Washington and Mr. Charles Anderson was their supervisor.

She testified that there was a meeting that took place before this work began, in which they were instructed as to how they were to perform the work. She did not think Ms. Pamela Hollich was there and Mr. Anderson was in charge of the meeting. They were instructed to move desks, tables, chairs and teacher's desks and things that were light. These items were to be moved to one side of the room, so the carpet cleaning company could clean half of the room. After the carpet was cleaned and dried, they would move the items to the other side of the room so the other half of the carpet could be cleaned. They were not supposed to move heavy furniture or any of the file cabinets.

Ms. Lee did not actually see the accident as she testified that Ms. Spearman-Washington motioned to her, while Mr. Moore was attempting to put the cabinet on the dolly. She testified that she went back to doing what she was doing, when she heard a loud noise and a scream; and realized that the file cabinet had fallen and struck Mr. Moore's leg.

She stated that Mr. Moore hopped on one foot, to an area and put his leg up. She testified that she gave him her cell phone after she dialed Mr. Anderson. Mr. Moore eventually left to go to the hospital and did not return to work that day. She testified that he had been off work for a period and then returned working as a custodian. She testified she has never spoken to him about this case.

On cross-examination, she testified that she could not recall which room they were in or whether it was on the east or west side of the building. She also did not remember the number of rooms they had cleaned on the day of the occurrence. She admitted that it was possible that Mr. Moore had worked in another classroom while she and Ms. Spearman-Washington were working in a separate room.

Testimony of Respondent's second witness

Respondent called Ms. Janice Spearman-Washington and she testified that she has worked as a night custodian for the school for nine years. She also gave a brief description of her job duties, stating that she also works, during the day, in the summer. She recalled working with Mr. Moore and Ms. Lee on the day Petitioner was hurt and testified that the work being done was moving items in the classrooms so that the carpets could be cleaned.

Mr. Anderson was also her supervisor and she recalled a meeting that took place in June to talk about the work that would be done in the Longwood school. Mr. Moore and Ms.

Lee attended and there were discussions on what was to be moved and what was not to be moved. She testified that they were told that file cabinets were not supposed to be moved.
At the time of the accident, she saw Mr. Moore attempting to move a file cabinet and she called Ms. Lee's attention to it. He was moving a dolly under the file cabinet and in the process, she saw the file cabinet fall and strike Mr. Moore's leg.

She could not remember if she found an ice pack for Mr. Moore but thinks she did and she agreed that he left the school and was off work for some time. She also testified that after he returned to work, she did not talked to him about the accident.

Upon cross-examination, Ms. Spearman-Washington testified she could not remember what classroom they were in but that Ms. Lee told Petitioner "David you are not supposed to be moving the file cabinets." She could not recall Mr. Moore's response. She also testified that there were no stickers placed on items that were not to be moved.

Testimony of Respondent's third witness
The respondent called Mr. Charles Anderson as a witness and he testified that he was the director of buildings and grounds for the Brookwood School District until December 2014, when he retired. He had worked for the district thirty-nine and one-half (39-1/2) years and he briefly described his duties, which included supervising the custodians.

He testified that he is familiar with Mr. Moore, Ms. Lee and Ms. Spearman-Washington. In the summer of 2011 after summer school ended, they needed to have the Longwood School building cleaned. That year, summer school went longer than usual and as a result, they contracted out the carpet cleaning. Ordinarily, the custodians would clean the carpet.
Prior to the work beginning, there was a meeting that took place at the school where they went over what needed to be done and how to go about doing it. Mr. Anderson testified that he instructed the custodians to move the furniture and items that were in the traffic area so that the carpet could be cleaned. Heavy items, such as the file cabinets, which were in corners, not in the traffic area, were not to be moved. He explained that this decision had been made because the carpet under the file cabinet was not being trafficked by people and the file cabinets were very heavy.

Mr. Anderson met with the custodians, as well as with the shampoo contractor, the day before the work was to begin and again instructed them on how to go about preparing the classroom carpets for cleaning. He instructed them on what to move and what not to move. They were to move the desks, chairs, tables and teachers' desks. They were not supposed to move heavy items or file cabinets.

Mr. Anderson testified that he did not witness the accident because he was in his office. He received a phone call from an employee at the school, but he could not recall from whom, learning of the accident. Later that day Mr. Moore called him and told him that he had gone to the hospital and would not be able to come back to work. He told Mr. Anderson he needed x-rays and Mr. Anderson asked him why he had moved the file cabinet. It is Mr. Anderson's testimony that the Petitioner then stated "that is how I do things". Mr. Moore did eventually return to work as a full-time custodian and Mr. Anderson testified that he has not had any discussions with Mr. Moore about the accident.

Upon cross-examination, Mr. Anderson could not remember if Dr. Hollich attended the meeting and admitted that the custodians did have free access to dollies while doing their work, for the purpose of moving items that cannot be easily carried. He agreed that no stickers were placed on items that were not to be moved and that Mr. Moore was a good employee.

Mr. Moore testified in rebuttal that he could not recall Ms. Lee telling him not to move the file cabinet, nor could he recall instructions that were given telling them not to move file cabinets. His recollection of the instructions was to stay ahead of the carpet cleaners.

CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?"

A decision by the Commission cannot be based upon speculation or conjecture. *Deere and Company v Industrial Commission*, 47 Ill.2d 144, 265 N.E. 2d 129 (1970). A petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d 236, 369 N.E.2d 853 (1977). Where a petitioner fails to prove by a preponderance of the evidence that there exists a casual connection between work and the alleged condition of ill-being, compensation is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v Industrial Commission*, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs.*

Industrial Commission, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).

It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); *see also, Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

The Arbitrator finds the petitioner's testimony with respect to the instructions that were given to the custodians was equivocal at best. He initially testified that at no time were the custodians instructed not to move heavy items or file cabinets. He later testified that he was unable to remember an instruction not to move the file cabinets.

Ms. Lee, Ms. Spearman-Washington and Mr. Anderson testified that the custodians were told that the heavy items and file cabinets were not to be moved. Mr. Anderson explained that there was no reason to move the file cabinets because they were not located in areas where there had been foot traffic; therefore, there was no reason to clean the carpeting underneath the file cabinets. In addition, he did not want the file cabinets moved because they were heavy. The Arbitrator finds the testimony of the respondent's witnesses to be credible.

The meeting conducted in June 2011, was for the purpose of informing the custodians how the work was to be done, in order for the cleaning to proceed in an efficient manner. Mr. Anderson instructed the custodians what they were to move and where to move the items. He wanted the areas where carpet had heavy traffic cleaned. Areas where the file cabinets were located did not need to be cleaned since they were not exposed to heavy traffic. Mr. Anderson testified that he repeated the instructions to the custodians the day the work started, which was the day before Mr. Moore's injury.

Based on these facts, the Arbitrator finds that the petitioner exposed himself to a risk outside of his reasonable duties. The Arbitrator relies on the decision in *Sekora v. Industrial Commission*, 198 Ill. App. 3d 584, 556 N.E.2d 285, 144 Ill. Dec. 818 (1990). If an employee voluntarily and in an unexpected manner, exposes himself to a risk outside any reasonable exercise of his duties, a resulting injury will not be within the

scope of his employment, unless the employer had knowledge of or acquiesced in such unreasonable conduct.

In *Sekora* the petitioner, a salesperson for a motor vehicle dealership, was injured while driving an all terrain vehicle. He and other employees were taking the display vehicles that were outside the dealership building, into the garage for the night. Forty or fifty vehicles had been brought in when the petitioner and another worker drove two of the all terrain cycles into a field next to the dealership building and crashed the vehicle. A week earlier, another employee had been injured driving such a vehicle. The petitioner denied any knowledge of instructions given, after the previous accident, that employees were no longer to ride the vehicles, but instead, walk them into the garage at the end of the night.

The employer presented evidence that because of mishaps, the policy concerning riding the vehicles was changed and instructions were given to the employees, to walk the vehicles into the garage. The respondent's service manager testified that the petitioner should not have been doing what he was doing, when he was injured.

The Commission found the employees were not working or trying to gain knowledge of the operation of the vehicles and benefits were denied. The Appellate Court found that any permission previously given did not encompass the activities, which resulted in the petitioner's injuries. The Court concluded the Commission's finding was not against the manifest weight of the evidence.

In the present case, the petitioner voluntarily took it upon himself to attempt to move the file cabinet. There is no evidence that Mr. Anderson was aware that the petitioner was going to engage in such activity and certainly none that demonstrates acquiescence. The petitioner's activity was not something he was required to do, in order to perform the work needed for the carpet vendor to clean.

The Arbitrator distinguishes the decision in *J. S. Masonry v. Industrial Commission,* 369 Ill. App. 3d 591, 861 N.E.2d 202, 308 Ill. Dec. 137 (2006). In that case, the petitioner was injured when he fell off a scaffold. His employer argued that his claim should be denied because he violated a safety rule, in that, he did not fasten the safety gate of the scaffold. The Commission found his case to be compensable.

The Appellate Court upheld the Commission's decision. The opinion analyzed decisions in *Saunders v. Industrial Commission,* 189 Ill. 2d 623, 727 N.E.2d 247, 244 Ill. Dec. 948 (2000) where compensation was denied to an employee was injured while riding as a double passenger in a forklift truck and *Chadwick v. industrial Commission,* 179 Ill.

App. 3d 715. 534 N.E.2d 1000, 128 Ill Dec. 555 (1989), where death benefits were awarded when a pipe fitter fell to death while working as a result of failing to tether himself to a scaffold lifeline.

The Court's opinion addressed the applicability of the rules of each decision. "The rule in *Saunders* is applicable in cases where the employee is acting outside the sphere of his employment when injured and the analysis in *Chadwick* is applicable when an injury is sustained while the employee is engaged in an authorized work activity." 861 N.E.2d at 207.

The Arbitrator finds that the preponderance of the evidence demonstrates that the rule in *Saunders* is applicable to this case. The petitioner had been specifically instructed not to move the file cabinets. His injury was the direct result of him doing so and by attempting to move the file cabinet; he removed himself from the sphere of his employment. He was not engaged in an authorized activity when he was injured.

Petitioner has not proven, by a preponderance of the evidence, that an accident occurred, which arose out of and in the course of his employment by Respondent, therefore, no benefits are awarded, pursuant to the Act.

Based on the finding that the petitioner has not proven an accident arising out of and in the course of his employment by the respondent; all other disputed issues are moot and will not be addressed.

16IWCC0065

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
11WC39031
SIGNATURE PAGE

Signature of Arbitrator

March 17, 2015
Date of Decision

MAR 17 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jacqueline Toney,

Petitioner,

16IWCC0066

vs.

NO: 13 WC 28646

Chicago Transit Authority,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of accident, and being advised of the facts and law, changes the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

As indicated above, this matter was arbitrated under §19(b) of the Act. The Arbitrator found that Petitioner failed to meet his burden of proving a compensable accident. The Commission affirms that finding. However, in the "ORDER" section of the decision, the Arbitrator included the language that "in no instance shall this award be a bar to subsequent hearing and determination of any additional amount of medical benefits or compensation for a temporary or permanent disability, if any." Because the claim was denied in its entirety, the matter will not be remanded for determination of any additional benefits and therefore the decision does bar subsequent awards. Therefore, the Commission strikes the above quoted language from the "ORDER" section of the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 15, 2015 is hereby affirmed and adopted with the changes noted above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:
o1/20/16
RWW/rm
46

JAN 2 8 2016

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

16IWCC0066

TONEY, JACQUELINE
Employee/Petitioner

Case# **13WC028646**

13WC030507

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

On 4/1/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0274 HORWITZ HORWITZ & ASSC
TYLER BERBERICH
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

0515 CHICAGO TRANSIT AUTHORITY
MICHELE D MORRIS
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

16IWCC0066

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jacqueline Toney
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # **13** WC **28646**

Consolidated cases: **13 WC 30507**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen Friedman**, Arbitrator of the Commission, in the city of **Chicago**, on **February 6, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

16IWCC0066

FINDINGS

On the date of accident, **August 8, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$64,001.00**; the average weekly wage was **$1,230.80**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **2** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$1,276.00** for other benefits, for a total credit of **$1,276.00**.

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

BECAUSE PETITIONER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT SHE SUSTAINED ACCIDENTAL INJURIES ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT ON AUGUST 8, 2013 AND FAILED TO PROVE THAT HER CONDITION OF ILL BEING WAS CAUSALLY CONNECTED TO ANY ALLEGED ACCIDENT ON AUGUST 8, 2013, PETITIONER'S CLAIM FOR COMPENSATION IS HEREBY DENIED.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

April 1, 2015
Date

ICArbDec19(b)

APR 1 - 2015

Statement of Facts

Petitioner Jacqueline Toney has filed three Applications for Adjustment of Claim against Respondent Chicago Transit Authority which were previously consolidated. Case number 13 WC 04880 alleging accidental injuries arising from an accident on November 15, 2012 was settled with contracts approved on March 3, 2015. Petitioner's remaining two Applications, 13 WC 28646 and 13 WC 30507, both allege accidental injuries with an accident date of August 8, 2013. These remaining two claims have been consolidated for hearing and decision on the Petition for Immediate Hearing under Section 19(b) of the Act.

The medical records admitted include treatment for the prior injury on November 15, 2012. Petitioner was seen at Concentra Occupational Health (Px 2). Their records document treatment beginning on November 15, 2012 for right arm symptoms. On that date, the primary complaints were to the right hand. In her visit with Dr. Munoz at WorkCare on November 16, 2012, she was complaining of pain in the right hand and wrist and also into the forearm and shoulder (Px 5). The examination of the right shoulder on that date records tenderness and limited range of motion with stiffness. She was diagnosed with a right shoulder rotator cuff strain. Petitioner continued with these complaints and findings through January 7, 2013. At that visit her shoulder symptoms had improved with increased range of motion and reduced pain. She still had stiffness. She was continued off work for the wrist condition. She advanced complaints of shoulder stiffness and soreness to the therapist on that date as well (Px 7). She continued to advance similar shoulder complaints on February 11, 2013 and was complaining of severe hand limitations. She was kept off of work (Px 5) Petitioner remained off work through an office visit with Dr. Munoz on May 10, 2013. She reported having an IME with Dr. Medina and being told by the adjuster that she was to lose her benefits. She reported to Dr. Munoz that he hand and arm were now "fine," and was released to return to regular work at MMI (Px 5).

Petitioner testified that on August 8, 2013, she was employed as a bus driver by the Respondent. The petitioner had been employed as a bus driver by the respondent since 2001. On August 8, 2013, Petitioner testified that she was driving a bus 6802. She was driving the route between the Howard Red Line station and the Skokie courthouse.

Petitioner testified that in order to put the bus into gear at the beginning of her shift, she needed to first press down the parking brake valve which sat on her left side, approximately six inches below her legs while seated in the bus driver's seat. She testified that when she pressed the brake valve that morning she found it to be very difficult to get down. She explained that after multiple attempts to press down the valve, she had to use her whole body weight to push it down. The valve, when properly functioning, moves up and down like a button. It does not maneuver more than a few inches in either direction.

Petitioner testified that she began noticing her shoulder toward the Skokie courthouse end of the route. She stopped at the Skokie Courthouse for a restroom break. Petitioner testified that when she stopped the bus, she had to pull the brake valve back up to put the bus into park. Petitioner again found the brake valve very difficult to move. Petitioner testified that while pulling on the valve with her left arm, she experienced a pull in the left shoulder. Petitioner continued her route and reached over to use her right arm to press the brake valve down to begin her route again. Petitioner testified that she continued her route to the Red Line to find a supervisor to report her injury but was unable to locate a supervisor. Petitioner testified she went back to the Skokie courthouse and called in to control to report that she had been injured. She testified that the brake was still hard.

Petitioner was taken by ambulance to Skokie Hospital on August 8, 2013. The ambulance record was admitted as Petitioner's Exhibit 3. The history recorded was that Petitioner was trying to release the parking brake when she felt pain in the left shoulder. The records of Northshore University Health System (Skokie Hospital) were admitted as Petitioner's Exhibit 3. The history recorded is of pain in the left shoulder after pulling a hand brake. Petitioner denied any history of previous shoulder injury. No complaints other than left shoulder pain and decreased range of motion are recorded. The diagnosis was left shoulder strain. Petitioner was also seen at Concentra Occupational Health on August 8, reporting that she applied the brake and felt a pull on her left shoulder. She claimed the pain began immediately (Px 2).

On August 12, 2013, Petitioner was seen by Dr. Luis Munoz at WorkCare Occupational Medicine Center. Dr. Munoz recorded Petitioner's history. The record states Petitioner was manipulated the bus airbrake, but found it very hard to move or release. She stated as she pushed with all her weight, she felt a sharp pain in her right and left shoulders in the attempt to move the airbrake handle. She presented complaining of right and left shoulder pain. Dr. Munoz diagnosed the petitioner with bilateral shoulder rotator cuff sprain injuries. He noted that the shoulder pain was consistent with the mechanism of injury. Petitioner was prescribed medication and physical therapy. She was taken off work (Px 5).

On August 14, 2013, the petitioner began physical therapy at Bucktown Rehab Center. The notes from Bucktown Rehab indicate a history of Petitioner injuring her right shoulder while performing her duties as a CTA bus operator with complaints of right shoulder pain and weakness (Px 7).

Petitioner followed up with Dr. Munoz complaining her right shoulder was very painful and the left shoulder is also painful and tight (Px 5).The physical therapy records confirm that the right shoulder had less strength and range of motion than the left (Px 7). On September 4, 2013, Dr. Munoz recommended that Petitioner undergo

MRI scans of both shoulders, continue therapy and stay off work (Px 5). Petitioner underwent MRI scans of each shoulder on October 18, 2013. The MRI of the right shoulder was read as showing a high-grade partial bursal surface tear involving the distal supraspinatus tendon, spurring of the acromioclavicular joint and subacromial/subdeltoid bursitis. The MRI of the left shoulder was read as showing bursal surface fraying or low-grade partial tear of the distal supraspinatus tendon, infraspinatus insertional tendinosis, mild inferior spurring of the acromioclavicular joint and subacromial/subdeltoid bursitis.

Petitioner followed up with Dr. Munoz on October 23, 2013, reporting a flare up on both shoulders the last few days. He reviewed the MRI scans and diagnosed bilateral rotator cuff sprains and partial tears of the supraspinatus tendon in each shoulder and a right forearm strain. Dr. Munoz kept Petitioner off work, advised that she continue physical therapy and referred her for an orthopedic consultation (Px 5).

On December 9, 2013, the petitioner was seen by Dr. Saul Haskell at Orthopedic Specialists of the North Shore complaining of both shoulders and both wrists. She denied any prior shoulder or wrist symptoms before August 8, 2013. Petitioner described her injury as pulling the lever with her left hand injuring her left shoulder and then using her right hand felt similar pain in the right shoulder. She complained of developing pain and swelling in both wrists. She also complained of problems with her jaw and questioned if this could be related. Dr. Haskell reviewed the MRI studies and referred the petitioner to Dr. Ronald Silver for evaluation of her shoulders. He recommended that she stay off work (Px 6).

On December 18, 2013, Petitioner was seen by Dr. Ronald Silver. Dr. Silver made note of Petitioner's shoulder injuries, which occurred while she was attempting to pull the airbrake on her bus. Petitioner again denied any previous treatment or symptoms. Dr. Silver performed an examination of Petitioner and administered a subacromial cortisone injection into her right shoulder. He kept Petitioner off work and told her to follow up in two weeks (Px 6).

On February 5, 2014, Petitioner followed up with Dr. Silver. She reported temporary relief from the injection. Dr. Silver recommended arthroscopic surgical repair for right rotator cuff partial thickness tear. Dr. Silver stated that at the same time he would administer an injection to the petitioner's left shoulder. Dr. Silver opined that the need for the petitioner's right shoulder surgery was causally related to her August 8, 2013 work injury. Lacking appropriate arthroscopic care, the petitioner would be permanently disabled (Px 6).

From February of 2014, through November 7, 2014, Petitioner followed up with Dr. Silver awaiting approval for the right shoulder surgery. Dr. Silver has prescribed medications to manage Petitioner's symptoms. However, Dr. Silver continues to recommend arthroscopic surgery to the right shoulder and has noted that without

surgical intervention, she will be permanently disabled (Px 6). Petitioner testified that she has seen Dr. Silver every two months though the week before the hearing with no change in his recommendations and that he continues her off work.

Petitioner testified concerning the current condition of her shoulders. She testified that it is hard to sleep due to pain in both of her shoulders. The pain wakes her up at night. She experiences throbbing pain in her shoulders when she attempts to pick up certain objects. The petitioner is currently taking Tramadol and Aleve every day for pain.

Jose Saucedo, testified for Respondent. Mr. Saucedo worked as a Bus servicer, out of Respondent's Forest Glen garage on August 8, 2013. His job duties at the time required him to perform inspections on buses with reported problems. On the date of Petitioner's alleged accident, Mr. Saucedo received a work order to inspect Bus 6802 (Rx 1). Mr. Saucedo testified that he specifically remembers performing the inspection on Bus 6802 because he found it odd that a person reported an injury while engaging the parking release valve. According to Mr. Saucedo, his inspection of Bus 6802 included a test drive, a safety inspection, and a full inspection of the brake release valve. He found no defects. His findings were documented in a Work Order Detail (Rx 1).

Mr. Saucedo testified that all reports from bus inspections and services are stored in a computer system for all servicers to access. Also stored in this system is the history of all inspections and repairs performed on a bus. A printout of the history from Bus 6802 from the August 8, 2013 through September 8, 2013, was viewed by Mr. Saucedo at hearing (Rx 2). Mr. Saucedo testified that no repairs to the brake release valve were performed during that time. Mr. Saucedo testified that the bus underwent multiple safety inspections that included an inspection of the bus' braking system. Although he did not have a copy with him at hearing, Mr. Saucedo stated the prior to hearing he reviewed the entire history of Bus 6802 and the brake release valve has never been reported to have a defect nor has it been replaced.

On cross-examination, Mr. Saucedo, explained how the brake release valve functions. He stated it is not a brake per se. Instead, it allows air to enter or leave a chamber. When air is in the chamber it prevents the bus' brakes from moving. In order to drive the bus, the air must be released. He stated that several systems on the bus operate with air chambers, but each mechanism uses its own air supply.

Mr. Saucedo testified that in his years of repairing buses for the Respondent that he has never seen a brake release valve malfunction in the manner in which Petitioner described. In addition, he stated that when he examined bus 6802, he found it working in the same manner of all buses he ever encountered.

Petitioner was recalled after Mr. Saucedo's testimony. She testified that there were often issues with portions of the bus that were controlled with air systems. Petitioner testified that the drivers' seat, which is air controlled, would be unable to move up or down at least once per week. She also experienced times where the seat would move itself up while driving down the road. She testified that she never saw a brake release valve malfunction in the way she described either before or after her alleged accident.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident, the Arbitrator finds as follows:

Petitioner is seeking compensation for an alleged accident on August 8, 2013 when she alleges an air brake valve lever malfunction causing injuries to her shoulders. After observing the Petitioner's testimony and reviewing the medical records and histories and the reviewing the testimony of Mr. Saucedo, the Arbitrator finds the Petitioner's testimony of accident not credible.

Petitioner's mechanism of injury varies from medical history to history. She alleges she was releasing the brake to the ambulance, but pulling the lever (which is engaging the brake) to the emergency room. She reported pushing the brake to Dr. Munoz and pulling the lever to Dr. Haskell. Petitioner's testimony was that, after initially releasing the brake by pushing on it with her whole body weight, she noticed the pain as she drove to the Skokie courthouse, but the histories include reports of immediate pain. The histories also vary in the description of when she used her right arm to assist. Contrary to her testimony, the history to Dr. Munoz states that she felt pain in both shoulders at the time of the initial effort to release the brake.

Petitioner only complained of left shoulder pain to the ambulance and emergency room. Her complaints to Dr. Munoz included both shoulders, and for the first time described the further use of the right arm. The records of Dr. Munoz, the MRI studies and Bucktown Rehab Center document that the right shoulder is actually the more serious condition. The therapy records do not even mention the left shoulder. When she is seen by Dr. Haskell she is complaining of both shoulders and both wrists. She also adds complaints in the jaw as a possibly related condition.

The Arbitrator finds significant that, despite specific complaints and treatment for the right hand, wrist, arm and shoulder from November, 2012 through May, 2013, that Petitioner denied any prior injuries, symptoms or treatment to the wrists and shoulders before the date of accident to Dr. Haskell. She tells Dr. Silver that her shoulders were normal without previous treatment or symptoms. Although Petitioner was released to return to full duty work and at MMI in May, 2013 from the prior injury, the Arbitrator notes that Petitioner was continuing

to advancing complaints weakness and an inability to open her hand until an IME was performed and she was advised she would lose her benefits and needed to return to work.

Petitioner testified that when operating properly, the brake does not take any significant force. She also testified that the brake mechanism barely moves. Given the description of the mechanism, and the credible testimony of Mr. Saucedo with respect to his personal inspection of bus 6802 and found no defect, the explanation of the workings of the parking brake valve and the lack of any similar occurrences, which are supported by the inspection records on bus 6820, the Arbitrator concludes that the Petitioner's claim of continued and repeated malfunction is simply not credible nor supported by the preponderance of the evidence submitted.

Petitioner has the burden of proving by a preponderance of the evidence that an accident arose out of and in the course of employment. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill.App.3d, 472, 477, 949 N.E.2d 1151, 1156 (4th Dist. 2011). After review of the record as a whole, having observed the witnesses and reviewed the exhibits submitted, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment on August 8, 2013.

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

Petitioner is seeking compensation and medical treatment for her bilateral shoulder condition. As more fully addressed in the Arbitrator's decision with respect to Accident, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent on August 8, 2013 based in large part upon the Arbitrator's finding that Petitioner's testimony as to the activities which she alleges resulted in her shoulder pain, in particular with respect to the onset of her symptoms in the right shoulder, are not credible.

The medical records submitted address causal connection. The opinion of an expert is only as valid as the basis of the opinion. Dr. Munoz statement that the Petitioner's pain is consistent with the mechanism of injury is premised upon the accident description being accurate. As discussed in the Arbitrator's decision with respect to accident, the Arbitrator finds that the greater weight of the credible evidence is to the contrary.

The causal connection opinion of Dr. Silver is based upon an greater inaccuracy, as the history which was provided also included the denial of prior symptoms in the right hand and arm despite the clear treatment following the November, 2012 injury with specific complaints, findings and treatment in the right shoulder. The

opinion of causation for the need for right shoulder surgery is based upon an incomplete and inaccurate history as is therefore not credible.

Based upon record as a whole, including the testimony and the Arbitrator's observation of the witnesses, the exhibits submitted, and in light of the Arbitrator's decision with respect to Accident, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the credible evidence that her condition of ill being is causally connected to the events of August 8, 2013, and particularly with respect to the condition of ill being of the right hand, arm and shoulder in light of the pre existing condition documented by the records submitted.

In support of the Arbitrator's decision with respect to (J) Medical, (K) Prospective Medical, and (L) Temporary Compensation, the Arbitrator finds as follows:

In light of the Arbitrator's decision with respect to Accident and Causal Connection, Petitioner's claim for medical, prospective medical and temporary compensation are moot. Claim for benefits is denied.

In support of the Arbitrator's decision with respect to (M) Penalties, the Arbitrator finds as follows:

Petitioner filed a petition seeking penalties under Sections 19(k), 19(l), and 16. Where there is a genuine controversy as to whether Petitioner sustained an accident that arose out of and in the course employment, it is not unreasonable for Respondent to require Petitioner to prove her case. As more fully discussed with respect to the Arbitrator's decisions with respect to Accident and Causal Connection, Respondent has presented a good faith defense as to whether Petitioner sustained an accident arising out of her employment and whether her condition of ill being is causally connected to her alleged accident. In light of the evidence submitted by Respondent on Accident and Causal Connection and the Arbitrator's decision with respect to Accident and Causal Connection, the Petition for Penalties is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Randy Bolen,
Petitioner,
vs.

NO: 14 WC 31814
16IWCC0067

D & L Drainage, LLC,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, notice, medical expenses, evidence and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 1, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 28 2016
KWL/vf
O-1/25/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF 19(b) ARBITRATOR DECISION

16IWCC0067

BOLEN, RANDY
Employee/Petitioner

Case# 14WC031814

D & L DRAINAGE LLC
Employer/Respondent

On 7/1/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4707 LAW OFFICE OF CHRIS DOSCOTCH
DAMON YOUNG
2708 N KNOXVILLE AVE
PEORIA, IL 61604

0264 HEYL ROYSTER VOELKER & ALLEN
DANA J HUGHES
300 HAMILTON BLVD PO BOX 6199
PEORIA, IL 61601-6199

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0067

Case # 14 WC 31814

Randy Bolen
Employee/Petitioner

v.

D & L Drainage, LLC.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Peoria**, on **May 20, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

16IWCC0067

FINDINGS

On the date of alleged accident, **January 5, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this alleged accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the alleged accident.

In the year preceding the alleged injury, Petitioner earned $**27,040.00**; the average weekly wage was $**520.00**.

On the date of alleged accident, Petitioner was **48** years of age, ***married*** with **0** dependent children.

ORDER

The Arbitrator has found that the Petitioner failed to prove that an accident occurred which arose out of and in the course of his employment with the Respondent and failed to prove any current condition of ill-being which is causally related to his employment by the Respondent. The Petitioner's claim for compensation is, therefore, denied.

No benefits are awarded herein.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

June 22, 2015
Date

14 WC 31814
ICArbDec19(b)

JUL 1 - 2015

16IWCC0067

FACTS:

On January 5, 2014 the Petitioner was employed by the Respondent as a laborer, having been so employed since July of 2013. The Petitioner testified that his job duties consisted primarily of digging ditches in farmer's fields. The Petitioner testified that January 5, 2014, which was a Sunday, was a cold day and that he worked that day digging ditches with "Doug", a co-worker. The Petitioner testified that his hand began to hurt him and that, while they were on their way home, he told "Doug", a co-worker, that his hand hurt. The Petitioner testified that he thought at the time that it could have been frostbite. The Petitioner testified that the next day, he went to work and told Bill Doubet, the Respondent's owner, that his fingers "were all messed up". The Petitioner testified that he continued to work his regular job with the Respondent "off and on" until May of 2014 when he quit and started another job at We Start Farms doing general carpentry work. The Petitioner testified that he continued to work and his hand continued to hurt and be swollen.

On August 7, 2014, the Petitioner sought medical treatment with Dr. Gross at OSF Medical Group. The Petitioner was noted to have complaints of arthritis with pain and stiffness in the fingers of both of his hands and some locking of the right ring finger. It was also noted that the Petitioner's arthritis was "a chronic problem" with the "current episode" starting one year ago and gradually worsening. The Petitioner was diagnosed as having osteoarthritis and a right ring trigger finger and he was prescribed medications. Referral to a hand surgeon was also considered.

On September 10, 2014, the Petitioner was referred to Hand Surgery at Midwest Orthopedics for his right ring trigger finger. The Petitioner testified that he did not see anyone at Midwest Orthopedics because he had no insurance and could not afford to pay for the visit. The Petitioner testified that the swelling in his hand was reduced but he continued to experience locking of the right ring finger.

The Petitioner next came under the care of Dr. Robert Seidl on February 12, 2015. Dr. Seidl noted the Petitioner's history of an injury to his right hand in January of 2014 while employed by the Respondent. Dr. Seidl noted that the Petitioner's work included digging ditches and holes and that "this was in cold weather when it occurred".Dr. Seidl also noted that "When he continued to work for several months at that job, his increased work activities would aggravate that injury causing more pain, swelling as well as active triggering." Dr. Seidl diagnosed the Petitioner as having a right 4th trigger finger and he opined that "given his activities in January and his symptoms that arose at that time, that his work at a minimum aggravated this condition causing and/or aggravating." Dr. Seidl prescribed a surgical release of the A-1 pulley for the Petitioner.

The Petitioner testified that he was refered to Dr. Seidl by a friend. The Petitioner also testified that he would like to avail himself of the surgery prescribed for him by Dr. Seidl.

One of the Respondent's co-owners, Bill Doubet, testified that none of the Respondent's employees were working on January 5, 2014, which was a Sunday. In

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rendering this testimony, Mr. Doubet relied on a written calendar that he prepares documenting his whereabouts each and every day. His calendar reflected that it was snow and blowing with a high of eight degrees on January 5, 2014. Mr. Doubet testified that he was sure, based on those weather conditions, that his employees were not working on January 5th of 2014. Mr. Doubet testified that, for the same reason, neither he nor any of his employees were working on Monday January 6th of 2014, which, according to his calendar, was an even colder day. Mr. Doubet testified the Petitioner did not report a work-related accident at all during the course of his employment with the Respondent and that he first became aware of the Petitioner's alleged accident when he received a letter from the Petitioner's attorney dated September 8, 2014, approximately eight months after the date of the Petitioner's alleged work accident.

Janet Doubet, the Respondent's other co-owner, also testified that, based upon the documentation she keeps in the normal course of the Respondent's business, the Petitioner was not working for the Respondent on January 5, 2014, nor was he working on January 6th of 2014, the day on which he alleged he told Bill Doubet about his alleged accident.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

It is axiomatic that the Petitioner bears the burden of proving all of the elements of his calim by a preponderance of the credible evidence. The Arbitrator finds that the Petitioner failed to meet that burden here. Specifically, the Arbitrator finds that the Petitioner failed to prove that on January 5, 2014 an accident occurred which arose out of and in the course of the Petitioner's employment by the Respondent.

In so finding, the Arbitrator notes that the Petitioner sought no medical treatment for his alleged injuries until he saw Dr. Gross on August 7, 2014, six months after his alleged injury. Dr. Gross' office note of that date contains absolutely no mention of a work injury or the Petitioner's work and, instead, indicates that the Petitioner's problem is a "chronic" one with the "current episode" starting one year ago. The Arbitrator also notes the credible and persuasive testimony of Bill and Janet Doubet, the Respondent's co-owners, that the Petitioner was not working on January 5, 2014, the date of the alleged accident, or on January 6, 2014, the date he allegedly told Bill Doubet about his accident. The Arbitrator further notes that the first mention of a work accident or injury in the Petitioner's medical records appears in in the February 12, 2015 office note of Dr. Seidl, more than one year after the Petitioner's alleged accident. Even then, there is no actual description of an alleged accident but merely a reference that an injury occurred while digging in cold weather.

Based upon the foregoing, and having considered the totality of the credible evidence

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adduced at hearing, the Arbitrator finds that the Petitioner failed to prove that an accident occurred which arose out of and in the course of the Petitioner's employment by the Respondent.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Arbitrator has found that the Petitioner failed to prove that an accident occurred which arose out of and in the course of the Petitioner's employment by the Respondent. Thus determination of the remaining disputed issues is moot. Assuming, arguendo, that an accident did occur which arose out of and in the course of the Petitioner's employment with the Respondent, the Arbitrator finds that the Petitioner failed to prove any condition of ill-being which is causally related to that alleged accident.

In so finding, the Arbitrator notes that the medical treatment records of Dr. Gross indicate that the Petitioner suffered from a chronic condition of osteoarthritis and that the Petitioner saw Dr. Gross on August 7, with complaints related to this longstanding arthritic condition. The medical treatment records contain no description of a work-related accident, or any acute incident whatsoever. While Dr. Gross did diagnose the Petitioner with a right fourth trigger finger and refer him for orthopedic evaluation and treatment of that condition, there is no indication that the condition is related to anything other than the Petitioner's arthritis, which was described as a constant and gradually worsening condition in the Petitioner's bilateral hands.

The Petitioner's own testimony lends further support for the Arbitrator's finding of no causal connection between the Petitioner's condition of ill-being with respect to his right fourth finger and his work duties for the Respondent on or about January 5, 2014. The Petitioner testified that following the alleged accident, he continued to work for the Respondent through May of 2014. The Petitioner sought no medical treatment for his right fourth finger condition during this time. In May of 2014, the Petitioner took a job working as a carpenter for We Start Farms. This job for We Start Farms required use of the Petitioner's right hand to perform carpentry duties. The Petitioner next sought medical treatment for his hands in August of 2014, approximately three months after he began working as a carpenter for We Start Farms. The Petitioner was able to continue to work as a laborer for the Respondent until he terminated that employment in May, and it was not until after he worked for three months as a carpenter for We Start Farms that he sought medical treatment for his right hand/right finger condition. These facts suggest that the Petitioner's work duties for the Respondent in January of 2014 did not cause the condition or contribute to the symptoms that lead the Petitioner to seek medical treatment for his right hand or right fourth finger in August of 2014.

While the Arbitrator notes the opinions of Dr. Seidl, the Arbitrator finds those opinions to be unpersuasive in the instant matter. The Arbitrator notes that the Petitioner did not see Dr. Seidl until February of 2015, nearly 13 months following the alleged work injury, and that there is no specific description of a work accident contained in Dr. Seidl's note of that visit. It is not

16IWCC0067

clear from Dr. Seidl's note that he understood the mechanism of injury and the basis of his opinion is not indicated.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner failed to prove that the condition of ill-being with respect to his right fourth finger is causally connected to his work duties with the Respondent on or about January 5th of 2014.

As the Arbitrator has found that the Petitioner failed to prove that an accident occurred which arose out of and in the course of the Petitioner's employment by the Respondent and failed to prove any condition of ill-being which is causally connected to his work duties with the Respondent on or about January 5th of 2014, determination of the remaining disputed issues is moot.

The Petitioner's claim for compensation is denied, and no benefits are awarded herein.

STATE OF ILLINOIS	)	☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF SANGAMON	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kenneth Osmoe,
Petitioner,

vs.

Freeman United Coal Mining Company,
Respondent.

16IWCC0068

NO: 09WC 26456

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petition herein and notice given to all parties, the Commission, after considering the issues of diease, permanent partial disability, legal issue, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 20, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 8 2016
KWL/vf
O-1/25/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0068

OSMOE, KENNETH
Employee/Petitioner

Case# 09WC026456

FREEMAN UNITED COAL MINING COMPANY
Employer/Respondent

16IWCC0068

On 7/20/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0755 CULLEY & WISSORE
KIRK CAPONI
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

16IWCC0068

Kenneth Osmoe
Employee/Petitioner

Case # 09 WC 26456

v.

Consolidated cases: n/a

Freeman United Coal Mining Company
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Springfield, on May 28, 2015. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other Sections 1(d)-(f) of the Occupational Diseases Act

FINDINGS

On August 28, 2007, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did not sustain an occupational disease that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is not causally related to the alleged occupational disease.

In the year preceding the injury, Petitioner earned $59,515.40; the average weekly wage was $1,144.53.

On the date of accident, Petitioner was 58 years of age, married with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

Respondent has paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Based upon the Arbitrator's Conclusions of Law attached hereto, claim for compensation is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator

July 14, 2015
Date

JUL 20 2015

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an occupational disease to his lungs and/or heart arising out of and in the course of his employment for Respondent. The Application alleged a date of last exposure of August 28, 2007, and that Petitioner sustained the occupational disease as a result of inhalation of coal mine dust including, but not limited to, coal dust, rock dust, fumes and vapors for a period in excess of 33 years.

At the time of trial Petitioner lived in Mt. Olive, Illinois, and was 66 years old. Petitioner graduated from high school and served in the Army with the 101st Airborne from 1967 to 1969. He worked in the coal mine for 32 years with the first 30 years being underground. In addition to coal dust he was regularly exposed to and breathed silica dust, roof bolting glue fumes, diesel fumes and trowel.

Petitioner last worked in the coal mine for Respondent at its Crown II mine on August 27, 2007, which is when the mine closed. Petitioner was 58 years old at that time and was working on the surface in the prep plant. Petitioner testified that he was exposed to coal dust on his last day of coal mine employment. Petitioner went to work for the Laborers' Union after the mine closed and worked there for about seven years and then retired.

Petitioner worked at Monterey Coal for about a year beginning in 1969. He worked at the face as a buggy runner. After he left Monterey he went to Washington State for about seven or eight years and worked for a paper recycling business. He came back to Illinois around 1980 and took a job with Respondent. He worked for Respondent for the remainder of his mining career. His job classifications at Respondent included buggy runner, roof bolter and continuous miner operator.

As a roof bolter he was exposed to roof bolting glues which had a strong odor. The continuous miner cuts the coal from the face. He testified that the dust at times was so bad that he could barely see. Petitioner testified that he thought the dust exposure was worse on the surface than at the face of the mine because there was no water to knock down the dust.

Petitioner first noticed breathing problems at work about 10 years into his coal mining career. He testified that he could not do what he used to be able to do without wheezing. When he would walk the silos and climb ladders it would cause him breathing problems including wheezing. Petitioner testified that he would have to stop about half way up. He testified that his breathing problems progressively got worse from the time he first noticed them until his last day of employment in the mine and that his breathing problems are about the same now as when he left the mine. Petitioner testified that he uses an inhaler when he starts to wheeze. He has to use it after he cuts the grass and when he is out walking. He testified that his breathing affects his ability to ride bikes and cut his grass with a push mower. He testified that he used to be into exercising, but now he starts wheezing.

Petitioner testified that Dr. Mathur is his family physician. He testified that he talked to Dr. Mathur about his breathing problems. Dr. Mathur sent him to another physician who gave him some shots and conducted an examination and testing and then gave him an inhaler. Petitioner testified that he has never smoked.

Petitioner testified that he was laid off by Respondent when the mine closed. He testified that but for the mine closing, he would have reported for his next shift. Petitioner testified that he received a full retirement pension. It was a normal pension, not a disability retirement. After he left work, he began working out of Local 338 in Wood River. Petitioner worked a lot for Widman at Conoco Refinery and eventually stayed with them throughout the year. Petitioner was a foreman at the dumpsite. He made sure that the bulldozer spread the dirt out and made room to dump other dirt. He testified that there was not much dust out there and when there was, he would go the other way. When the full time work with Widman ended in 2012, Petitioner took other jobs out of the union hall. He worked as a laborer on road construction in 2012. He testified that the jobs did not really require physical effort. He was a flagman most of the time. He had some problems when he had to carry the signs and walk up and down the highways.

Petitioner testified that he won a Strongman contest in Mt. Olive for his age group. He testified that the Strongman contest requires lifting rocks and flipping tires. The heaviest rock that he lifted was 300 plus pounds. In the competition he had to flip big tractor tires. Petitioner testified that the Strongman competition was 10 years ago or more. He testified that he did it just the one time.

Dr. Glennon Paul is the Medical Director of St. John's Respiratory Therapy and a Clinical Assistant Professor of Medicine at SIU Medical School. (Petitioner's Exhibit No. 1, p. 6). Dr. Paul is the senior physician at the Central Illinois Allergy and Respiratory Clinic. Those physicians specialize in allergy and pulmonary diseases. They take care of patients with respiratory diseases, critical care, allergic diseases and some internal medicine problems. Dr. Paul reads 15 to 20 chest x-rays per day. It may be a 100 a week or 5,000 a year. (Petitioner's Exhibit No. 1, pp. 7-8). He also interprets about the same number of pulmonary function tests per day. (Petitioner's Exhibit No. 1, p. 8). Dr. Paul's board certification is in allergy, immunology, and asthma. (Petitioner's Exhibit No. 1, p. 12). He has been board certified since 1971. (Petitioner's Exhibit No. 1, Deposition Exhibit No. 1). Dr. Paul testified that at the time he took his boards, he did not have the option to take the pulmonology boards. (Petitioner's Exhibit No. 1, p. 48).

Dr. Paul has provided care and treatment to Petitioner. He was asked by Petitioner's counsel to fill out a letter with 11 questions. (Petitioner's Exhibit No. 1, pp. 12-13). Dr. Paul testified that Petitioner had coal workers' pneumoconiosis caused by his work as a coal miner. He also testified that Petitioner has chronic bronchitis caused at least in part or aggravated and made worse by his exposure as a coal miner. Dr. Paul testified that in light of the diagnoses of coal workers' pneumoconiosis and chronic bronchitis, if Petitioner were to have further exposure to the environment of a coal mine, it would provide a risk to his health in the form of an increased

potential of a progression of those conditions. (Petitioner's Exhibit No. 1, pp. 13-14). Dr. Paul testified that based on his treatment of Petitioner, he concluded that he had asthma or reactive airways disease caused by his exposures as a coal miner. Dr. Paul testified that if Petitioner were to have further exposure to the environment of a coal mine, it would provide a risk to his health in the form of an increased potential of progression of his asthma or reactive airways disease. (Petitioner's Exhibit No. 1, pp. 14-15). Dr. Paul testified that in light of his diagnoses and medicines that he prescribed for Petitioner and based on his clinical presentation, Petitioner did not have the pulmonary capacity to work full time as a coal miner. (Petitioner's Exhibit No. 1, p. 15).

Dr. Paul testified that in order to have pneumoconiosis one must have, in addition to coal mine dust deposited in his lungs, a tissue reaction to it. The tissue reaction known as scarring or fibrosis cannot perform the function of normal healthy lung tissue. (Petitioner's Exhibit No. 1, p. 16). He testified that by definition, if one has coal workers' pneumoconiosis, it is true that he has some impairment in the function of the lung at the site of the scarring whether it can be measured by spirometry or not. (Petitioner's Exhibit No. 1, p. 17). Dr. Paul was not aware of any outside testing that was done on Petitioner. (Petitioner's Exhibit No. 1, p. 35). Dr. Paul testified that he reviewed a chest x-ray of Petitioner dated March 4, 2013. He read that there was pneumoconiosis on the film. He did not assign a profusion rating or put down an opacity type. Dr. Paul testified that he is not a radiologist or an A or B-reader. He testified that Petitioner just had an x-ray that looked like coal workers' pneumoconiosis, whether the opacities were round or fibular or what. (Petitioner's Exhibit No. 1, pp. 35-37).

Dr. Paul testified that the diagnosis of chronic bronchitis requires a history of cough, wheezing and shortness of breath. He testified that sputum is not required for the diagnosis of chronic bronchitis. Dr. Paul had no authority for that assertion other than his own experience. (Petitioner's Exhibit No. 1, pp. 37-38). Dr. Paul testified that Petitioner related wheezing and coughing and shortness of breath for approximately 10 years. He testified that it did not end after he left coal mining. To Dr. Paul's knowledge Petitioner had not worked since he left the mine. (Petitioner's Exhibit No. 1, pp. 38-39).

Dr. Paul testified that in the testing he performed on March 4, 2013, there was no evidence of obstruction until after Petitioner inhaled methacholine. He testified that Petitioner did not have a diffusion abnormality. Dr. Paul testified that he had a positive response to the inhalation of methacholine and then went back to normal after the inhalation of bronchodilators. (Petitioner's Exhibit No. 1, pp. 39-40). Dr. Paul testified that for the change in FEV1 to be significant, most people use 20% as a guideline to determine if the drop is significant, but that cannot be locked in. (Petitioner's Exhibit No. 1, pp. 40-41).

Dr. Henry K. Smith, a board certified radiologist and NIOSH B-reader, interpreted a chest x-ray dated March 29, 2009, as positive for pneumoconiosis, profusion 1/0 with P/S opacities in the bilateral middle and lower lung zones. Dr. Smith interpreted a chest x-ray of October 14, 2010, as positive for pneumoconiosis, profusion 1/1 with P/P opacities in all lung zones. Dr. Smith interpreted a chest x-ray of March 4, 2013, as positive for pneumoconiosis, category 1/0 with P/P

opacities in all lung zones. Dr. Smith also interpreted the chest CT dated October 14, 2010. He noted findings consistent with coal workers' pneumoconiosis with P/P opacities in the upper, mid and lower lung zones bilaterally with a profusion 1/1. (Petitioner's Exhibit No. 4).

Dr. Michael S. Alexander, a board certified radiologist and B-reader, interpreted a chest x-ray dated March 29, 2009, as positive for pneumoconiosis, profusion 1/0 with P/P opacities in all lung zones. Dr. Alexander made an identical interpretation of the chest x-ray dated October 14, 2010. (Petitioner's Exhibit No. 5).

Dr. Dani Tazbaz practices pulmonary medicine and provides critical care services in the hospital. (Petitioner's Exhibit No. 3, p. 4). Dr. Tazbaz is board certified in internal medicine, pulmonary disease and critical care medicine. He testified that five to ten percent of his patient census deals with the care and treatment of coal miners or former coal miners. (Petitioner's Exhibit No. 1, p. 5). Dr. Tazbaz had three years of training in pulmonary and critical care medicine under Dr. Robert Cohen at Stroger Hospital. Dr. Cohen is the medical director of the black lung clinics of the nation. In his work with Dr. Cohen, Dr. Tazbaz had an opportunity to take special training and gain specific experience in reading radiographic studies for occupational lung diseases and in performing pulmonary function testing on current and former coal mine employees. (Petitioner's Exhibit No. 3, pp. 5-6).

Dr. Tazbaz evaluated Petitioner on October 2, 2009. (Petitioner's Exhibit No. 3, pp. 6-7). Dr. Tazbaz saw Petitioner one time. He testified that he has seen 10 to 15 individuals at the request of Petitioner's counsel. (Petitioner's Exhibit No. 3, p. 24). Dr. Tazbaz testified that the diagnosis of coal workers' pneumoconiosis can generally be considered an x-ray reading diagnosis. (Petitioner's Exhibit No. 3, p. 8). He testified that in order to have pneumoconiosis, there must be a tissue reaction to the coal dust that is trapped in the lungs. This tissue reaction is called scarring or fibrosis. He testified that the scarring and/or fibrosis of coal workers' pneumoconiosis is permanent and cannot perform the function of normal healthy lung tissue. (Petitioner's Exhibit No. 3, pp. 8-9). Dr. Tazbaz testified that a person with coal workers' pneumoconiosis diagnosed by x-ray could still have normal pulmonary function tests, normal blood gases and normal physical exam of the chest. (Petitioner's Exhibit No. 3, p. 10).

Dr. Tazbaz testified that the physical examination of Petitioner's chest was clear. Petitioner reported that he gets short of breath. He reported that he could walk a mile, but he had to push himself. Dr. Tazbaz testified that obesity could also add to some of Petitioner's shortness of breath. Based on the symptoms Petitioner had, which included cough, and his chest x-ray, which looked positive when read by a B-reader, Dr. Tazbaz thought that Petitioner had coal workers' pneumoconiosis. He testified that the coal workers' pneumoconiosis was from exposure to coal mine dust. (Petitioner's Exhibit No. 3, pp. 19-20). Dr. Tazbaz noted on the history that Petitioner had been coughing on a regular basis for about a year although he had cough when he was in the mines. Dr. Tazbaz testified that such a history qualified for a diagnosis of chronic bronchitis because when he was in the coal mines, he was coughing up black secretions. Dr. Tazbaz testified that Petitioner's chronic bronchitis was caused by exposure to coal mine dust.

(Petitioner's Exhibit No. 3, p. 21). Dr. Tazbaz testified that based on the diagnosis of coal workers' pneumoconiosis and chronic bronchitis as well as his symptoms of cough and shortness of breath, Petitioner could have no further exposure to coal mine dust without endangering his health. (Petitioner's Exhibit No. 3, pp. 21-22).

Dr. Tazbaz testified that in the history Petitioner related to him, he did not relate sputum production with his cough on the day that Dr. Tazbaz saw him. The sputum production was a temporary condition for him existing only while he was in the mine. (Petitioner's Exhibit No. 3, p. 24). Dr. Tazbaz testified that one usually has sputum production with a diagnosis of chronic bronchitis. (Petitioner's Exhibit No. 3, p. 25). Petitioner did not relate a history of sputum production in the two years between when he left the coal mine and when he was examined by Dr. Tazbaz. He had a cough with sputum while at the mine, he retired from the coal mine and about a year after that he developed a cough again. (Petitioner's Exhibit No. 3, p. 26).

Dr. Tazbaz testified that shortness of breath is very subjective so it was hard to say if it was relevant or not for somebody like Petitioner. (Petitioner's Exhibit No. 3, p. 27). Dr. Tazbaz testified that Petitioner's review of systems was negative. His past medical history was negative including past history of pulmonary disease. Petitioner was not taking, and according to the history he provided to Dr. Tazbaz, had never taken breathing medication. Petitioner did not relate to Dr. Tazbaz that he left the mine at the time he did on the recommendation of a physician. He did not tell Dr. Tazbaz that he left mining at the time he did due to some respiratory problem or disease. Petitioner did not relate to Dr. Tazbaz any problem in performing the duties of his last job at the mine. Petitioner did not relate to Dr. Tazbaz any problems in performing his current job as a construction worker. On physical examination Petitioner's chest was clear to auscultation, and he had no wheezes or crackles. (Petitioner's Exhibit No. 3, pp. 29-30). Based on the simple spirometry that Dr. Tazbaz performed on Petitioner, he did not have an obstructive defect. Dr. Tazbaz could not rule out a restrictive defect. He testified that to rule out a restrictive abnormality, he would need to have lung volumes which were not performed on Petitioner. He testified that a restrictive defect, if present, would be associated with scarring or obesity or both. (Petitioner's Exhibit No. 3, pp. 30-32).

Dr. Tazbaz is not a B-reader. He did not know when the chest x-ray that he reviewed was performed. He did not document the quality of the film. He did not document what lung zones were involved. He testified that the opacities that were present were all nodular. (Petitioner's Exhibit No. 3, p. 33). Dr. Tazbaz testified that in his opinion coal workers' pneumoconiosis first involves the lower lung zones. Dr. Tazbaz testified that for those who develop coal workers' pneumoconiosis and cease their exposure, the disease is unlikely to progress. He testified that one can have simple pneumoconiosis and have further exposure, and the disease not progress. He testified that an individual can have radiographic evidence of simple pneumoconiosis and yet have no functional impairment. (Petitioner's Exhibit No. 3, p. 34).

Dr. Tazbaz did not review any treatment records regarding Petitioner. He testified that treatment records are of value when evaluating a patient for occupational lung disease to know about

interpretations of prior chest x-rays or the results of prior spirometry. Dr. Tazbaz agreed with the position taken by the American Thoracic Society that an older worker with mild pneumoconiosis may be at low risk from working in currently permissible exposure levels until he reaches retirement age. (Petitioner's Exhibit No. 3, p. 35).

Dr. Tazbaz's diagnosis for Petitioner was cough. He also listed coal dust exposure from working in the mine. Dr. Tazbaz's diagnosis of pneumoconiosis was based upon his positive reading of the chest x-ray and history of exposure to coal dust as well as the report that he saw on another chest x-ray reading. (Petitioner's Exhibit No. 3, pp. 38-39).

Dr. Manish Mathur is a family practice doctor with Staunton Clinic. Dr. Mathur is board certified in internal medicine. (Petitioner's Exhibit No. 2, pp. 4-5). In his practice Dr. Mathur has occasion to treat coal miners and former coal miners. He testified that he treats people for lung disease. (Petitioner's Exhibit No. 2, p. 5). Petitioner's counsel sent Dr. Mathur 10 questions regarding Petitioner's pulmonary status which Dr. Mathur answered. (Petitioner's Exhibit No. 2, p. 6).

Dr. Mathur testified that he had known for some time that Petitioner was a coal miner. (Petitioner's Exhibit No. 2, p. 7). Dr. Mathur testified that based on his knowledge of Petitioner, it was his opinion that Petitioner did not come to his office for treatment every time he had a productive cough. Dr. Mathur testified that Petitioner could or might have chronic bronchitis notwithstanding the number of entries of cough in his treatment records. Dr. Mathur testified that a lack of treatment for productive cough could not be used as a basis for ruling out the existence of chronic bronchitis in Petitioner. Dr. Mathur testified that he saw Petitioner for bronchitis soon after he left the coal mine, but not before. (Petitioner's Exhibit No. 3, pp. 7-8). Dr. Mathur testified that if, in fact, Petitioner had chronic bronchitis, his exposure as a coal miner for 32 years might have been a causative factor or an aggravating and worsening factor to some degree in that chronic bronchitis. He testified that if Petitioner has chronic bronchitis, further exposure to the environment of a coal mine would present a risk to his health in the form of increased potential for progression of chronic bronchitis. (Petitioner's Exhibit No. 3, pp. 8-9).

Dr. Mathur testified there was no x-ray evidence of coal workers' pneumoconiosis in Petitioner's treatment records. (Petitioner's Exhibit No. 2, p. 9). Dr. Mathur testified that he is not an expert in radiologic diagnosis of pneumoconiosis, but he would say that it is possible to have disease which is not detectable on x-ray but may be detectable on more sensitive ways of imaging such as CT scan. Dr. Mathur testified that pathology would really clinch the diagnosis of pneumoconiosis. He testified that there was no way that Petitioner's treatment records could be cited to rule out the existence of asthma or reactive airways disease. (Petitioner's Exhibit No. 2, p. 10). Dr. Mathur testified that if, in fact, Petitioner has asthma or reactive airways disease, his exposures as a coal miner would have been a causative factor in or aggravated such disease. He also testified that if such disease is present, further exposure to coal mine dust would provide a risk to Petitioner's health in the form an increased potential for progression of his asthma or reactive airways disease. Dr. Mathur testified that when a coal miner with 30 years of coal mining ends

his career, some coal dust remains in his lungs for the rest of his life. He will have continuing exposure to coal mine dust in the form of the dust that was trapped in his lungs. It is possible that continued exposure could cause worsening of conditions he may have had from coal mining or initiation of new conditions that had not shown up before. (Petitioner's Exhibit No. 2, pp. 11-12).

Dr. Mathur first saw Petitioner on July 24, 2007, for right shoulder pain. On that date physical examination of his chest was normal. Petitioner was next seen on December 19, 2007, complaining of runny nose and cough. He was diagnosed with upper respiratory infection with bronchitis. (Petitioner's Exhibit No. 2, pp. 13-14). On July 6, 2011, Petitioner was seen for diarrhea and abdominal cramping. (Petitioner's Exhibit No. 2, p. 14). Petitioner was seen again on August 7, 2012, for a sore tongue. Up until this date, Dr. Mathur had not diagnosed Petitioner with chronic bronchitis or asthma. (Petitioner's Exhibit No. 2, pp. 14-15). Petitioner was seen on February 15, 2013, complaining of wheeze and daily cough. Dr. Mathur testified that was the first time he had either of those complaints. Petitioner reported to Dr. Mathur that he was undergoing evaluation for black lung. Dr. Mathur testified that on that date Petitioner requested to see Dr. Paul from pulmonology in Springfield. Up until that date Dr. Mathur had never made a referral to anyone for anything, including respiratory, because he did not see a need for a referral. (Petitioner's Exhibit No. 2, pp. 15-17). Dr. Mathur conducted a physical examination on that date. Petitioner's chest exam was normal. (Petitioner's Exhibit No. 2, p. 17). Petitioner returned to Dr. Mathur on September 27, 2013, for follow up regarding his chronic cough and wheezing. (Petitioner's Exhibit No. 2, p. 20). When Petitioner saw Dr. Mathur on September 27, 2013, he told the doctor that he had recently won a Strongman contest in Mt. Olive. Dr. Mathur ordered a chest x-ray that day to evaluate the chronic cough. Same was performed on September 30, 2013, and interpreted by Dr. Gene W. Spector, a radiologist. Dr. Spector interpreted the film as negative chest. (Petitioner's Exhibit No. 2, pp. 21-22). Petitioner was seen on February 11, 2015, complaining of dyspnea with moderate exertion. Dr. Mathur testified this was the first time that Petitioner complained to him of shortness of breath. Dr. Mathur testified that Petitioner was not audibly wheezing. (Petitioner's Exhibit No. 2, pp. 22-23).

Dr. Mathur testified that he did not know if the testing performed by Dr. Paul was valid in terms of the American Thoracic Society Guidelines. He testified that the American Thoracic Society requires a change in FEV1 of 20% with the methacholine challenge testing to make the diagnosis of asthma. Dr. Mathur testified that he did not have any pathologic or diagnostic evidence in his file of pneumoconiosis. (Petitioner's Exhibit No. 2, pp. 25-26).

At the request of counsel for Respondent, Dr. Jerome F. Wiot reviewed a PA and lateral chest x-ray dated March 29, 2009. Dr. Wiot found the film to be quality 2 because it was done in relative expiration meaning Petitioner did not take a full and complete deep breath and hold it. (Respondent's Exhibit No. 1, p. 48). Dr. Wiot testified that as a result of the underinflation there was some crowding of the bases. He testified that when there is crowding of the bases, the vascular markings are crowded together so it looks like there are more of them. One has to be careful with such a film so as not to over interpret what one is seeing in the bases. (Respondent's

Exhibit No. 1, pp. 49-50). Dr. Wiot testified that there is no evidence of coal workers' pneumoconiosis on this film. (Respondent's Exhibit No. 1, p. 50).

Dr. Wiot was the past President of the American Board of Radiology and served as an examiner for the board. (Respondent's Exhibit No. 1, pp. 11-13). Dr. Wiot was also the past President of the American College of Radiology and as a member of the Task Force on Pneumoconiosis, he helped develop a weekend symposium which eventually became the modern day B-reader program. (Respondent's Exhibit No. 1, pp. 13-19). Dr. Wiot has been teaching the B-reading program since the first weekend course was held in 1970. (Respondent's Exhibit No. 1, p. 37). Dr. Wiot has been a B-reader since the program started. (Respondent's Exhibit No. 1, pp. 26-27).

Dr. Wiot testified that in reviewing a film for the presence of pneumoconiosis, the reader looks at the profusion or degree of involvement as well as the opacity type. (Respondent's Exhibit No. 1, p. 31). For a film to be considered to be positive for pneumoconiosis it must have a 1/0 profusion or higher. A 0/1 profusion is negative for pneumoconiosis. (Respondent's Exhibit No. 1, pp. 30-31). Dr. Wiot testified that with coal workers' pneumoconiosis, the vast majority of the opacities will be round with irregular opacities as a secondary type. (Respondent's Exhibit No. 1, pp. 31-32). Dr. Wiot testified that the reader also indicates what lung zones are involved. Coal workers' pneumoconiosis invariably begins in the upper lung fields. When it progresses, it will move to the mid and lower lung zones. He testified that it is almost invariably worse in the top lung zones than in the bottom. (Respondent's Exhibit No. 1, pp. 33-34). Dr. Wiot testified that the scarring of coal workers' pneumoconiosis is permanent. By definition if a person has coal workers' pneumoconiosis, theoretically he would have an impairment in the function of his lungs at the site of the scar tissue even though that impairment may not be able to be measured by pulmonary function testing. (Respondent's Exhibit No. 1, p. 66). Dr. Wiot testified that it is very important in reading chest x-rays to be able to understand what is normal and what is abnormal. He testified that one has to understand what is acceptable for normal before he can decide if the minor changes are significant. This understanding only comes with experience. (Respondent's Exhibit No. 1, pp. 38-39).

At the request of counsel for Respondent, Dr. Cristopher A. Meyer reviewed chest x-rays of Petitioner dated March 29, 2009, and October 14, 2010, as well as the chest CT scan dated October 14, 2010. Dr. Meyer rated both chest x-rays as quality 2 due to underinflation. He testified that underinflation results from the failure of the patient to take a full and complete breath and hold it. He testified that if the patient's lung volumes are low, it will cause the pulmonary arteries and veins to be crowded. He testified that this accentuates the pulmonary vasculature. (Respondent's Exhibit No. 3, pp. 40-41). Dr. Meyer testified that there were no radiographic findings of coal workers' pneumoconiosis on the chest x-rays. He testified that on the chest CT the lungs were clear. He described some calcified subcarinal lymph nodes and no findings of coal workers' pneumoconiosis. (Respondent's Exhibit No. 3, pp. 41-42). Dr. Meyer testified that the CT scan is more sensitive, ergo, more accurate than a chest x-ray for interstitial lung disease. (Respondent's Exhibit No. 3, p. 42).

Dr. Meyer has been board certified in radiology since 1992. (Respondent's Exhibit No. 3, p. 7). Dr. Meyer has been a B-reader since 1999. (Respondent's Exhibit No. 3, p. 19). Dr. Meyer was asked to take the B-reading exam by Dr. Jerome Wiot. (Respondent's Exhibit No. 3, pp. 19-20). Dr. Wiot was on the original committee that designed the training course which is called the B-reader program. (Respondent's Exhibit No. 3, p. 21). Dr. Meyer has recently been asked to have a more active academic role with the B-reader course. (Respondent's Exhibit No. 3, p. 32). Dr. Meyer testified that radiologists have a 10% higher pass rate on the B-reading exam than other specialties. In Dr. Meyer's opinion radiologists have a better sense of what the variation of normal is. (Respondent's Exhibit No. 3, pp. 34-35).

Dr. Meyer testified that the B-reader looks at the films of the lung to decide whether there are nodular opacities or any linear opacities and based on the size and appearance of those small opacities, they are given a letter score. (Respondent's Exhibit No. 3, p. 22). Dr. Meyer testified that specific occupational lung diseases are described by specific opacity types. Coal workers' pneumoconiosis is characteristically described by small round opacities. (Respondent's Exhibit No. 3, pp. 28-29). The distribution of opacities is also described because different pneumoconioses are seen in different regions of the lung. Coal workers' pneumoconiosis is typically an upper zone predominant process. (Respondent's Exhibit No. 3, pp. 22-23). The last component of the interpretation is the extent of the lung involvement or the so-called profusion. (Respondent's Exhibit No. 3, p. 23). Dr. Meyer testified that the profusion defines the density of the small opacities in the lung. (Respondent's Exhibit No. 3, p. 30).

Dr. Meyer reviewed a chest x-ray dated March 4, 2013. He testified that the film was quality 2 because of overexposure. Dr. Meyer testified that there were no findings of coal workers' pneumoconiosis on the film. He testified that if a film is overexposed it can make the abnormalities of coal workers' pneumoconiosis less apparent. (Respondent's Exhibit No. 6, pp. 3-4).

Dr. James Castle, who is board certified in internal medicine and pulmonary disease as well as being a B-reader, interpreted chest x-rays of Petitioner dated March 29, 2009, and March 4, 2013. Dr. Castle found the March 29, 2009, film to be quality 2 due to improper position. He found no abnormalities consistent with pneumoconiosis on the film. Dr. Castle also noted the March 4, 2013, chest x-ray was quality 2 due to overexposure. Dr. Castle found no abnormalities consistent with pneumoconiosis on that film. (Respondent's Exhibit No. 7).

Dr. Jeffrey Selby examined Petitioner at the request of Respondent's counsel on October 14, 2010. (Respondent's Exhibit No. 2, p. 8). Dr. Selby is board certified in internal medicine and pulmonology. He has been a B-reader since 1985. (Respondent's Exhibit No. 2, pp. 4-5). Dr. Selby has a general pulmonology practice that entails both inpatient and outpatient. He does all manner of consultation work as far as chest, lungs or breathing disorders. His practice also includes occupational lung disease including individuals with coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, pp. 5-7).

Dr. Selby's examination included a complete occupational history, physical examination and various laboratory testing. (Respondent's Exhibit No. 2, p. 8). Dr. Selby testified that Petitioner's chief complaint was wheezing and shortness of breath. Dr. Selby found no abnormality on his examination of Petitioner's chest. (Respondent's Exhibit No. 2, pp. 9-10). Dr. Selby also performed spirometry on Petitioner. He testified that there was no evidence of an obstruction based on the spirometry. He also measured Petitioner's lung volumes. Based on those measurements there was no evidence of restriction. Dr. Selby testified the total lung capacity and residual volume were normal. (Respondent's Exhibit No. 2, p. 10). Dr. Selby testified that Petitioner's diffusion capacity was super normal at 125% of predicted. Dr. Selby also put Petitioner through exercise testing. (Respondent's Exhibit No. 2, pp. 10-11). Dr. Selby testified that the exercise testing helps him to know if the patient has a normal exercise capacity and if not, why not. Dr. Selby testified that there is no better test to determine an individual's cardiopulmonary exercise capacity other than exercise testing. (Respondent's Exhibit No. 2, pp. 12-13). Dr. Selby testified that the exercise testing performed on Petitioner revealed no abnormality. It did not reveal any pulmonary limit to exercise and did not provide any basis to explain Petitioner's complaint of shortness of breath. (Respondent's Exhibit No. 2, pp. 17-18).

Dr. Selby also reviewed chest x-rays of Petitioner dated March 29, 2009, and October 14, 2010. Dr. Selby found the March 29, 2009, film to be quality 2 because of underinflation. He testified that it is important to know that underinflation exists in a film because it will cause a false positive reading due to increased lung markings that can look like scars which are not truly there. He testified that it accentuates the pulmonary vasculature, which is particularly true of the bases. (Respondent's Exhibit No. 2, pp. 18-19). Dr. Selby did not find any parenchymal or pleural abnormalities consistent with pneumoconiosis on the March 29, 2009, chest x-ray. He rated the October 14, 2010, chest x-ray as quality 2 for underinflation as well. His interpretation of that film was the same. (Respondent's Exhibit No. 2, pp. 19-20). Dr. Selby also ordered a high resolution CT scan of the chest to be performed on Petitioner. He testified that high resolution CT scans augment plain films of the chest in the diagnosis of coal workers' pneumoconiosis. He testified that high resolution CT scans are more sensitive in picking up the presence of emphysema than a plain film. The CT scan was interpreted by Dr. Anthony Perkins, a board certified radiologist, as showing no evidence of coal workers' pneumoconiosis. (Respondent's Exhibit No. 3, pp. 20-21).

Dr. Selby testified that Petitioner did not have any respiratory or pulmonary abnormality as a result of coal mine dust inhalation. Petitioner did not have coal workers' pneumoconiosis. He had the pulmonary or respiratory capacity to perform all previous coal mine employment duties including his last job in plant maintenance. Dr. Selby noted that Petitioner was very obese and deconditioned which was a major, if not the only, cause for any shortness of breath or wheezing. (Respondent's Exhibit No. 2, pp. 21-22). Dr. Selby noted that Dr. Tazbaz had testified that Petitioner related to him a history of cough with sputum production that ended at the time he left the mine and that after he was out of the mine for about a year he developed a cough again. Dr. Selby testified that assuming those facts are true, the cough that Petitioner developed a year after his last employment at the coal mine could not be related back to his coal mine employment. Dr.

Selby testified that the fact that he had cough and sputum that ended with his coal mine employment meant he did not have something permanent which was related to working in the coal mine. The fact that it ended with his employment indicated that condition was one that was simply temporary. (Respondent's Exhibit No. 2, pp. 22-23).

Dr. Selby testified that for a person to have coal workers' pneumoconiosis, he must have coal mine dust in his lungs and a tissue reaction to that coal dust. The scarring of coal workers' pneumoconiosis cannot perform the function of normal, healthy lung tissue. Dr. Selby testified that by definition, if a person has pneumoconiosis, he would have impairment in the function of his lung at the very site of his scarring whether that impairment could be measured by spirometry or not. (Respondent's Exhibit No. 2, pp. 26-27). Dr. Selby testified that removal from any further exposure to coal dust is the only treatment for coal workers' pneumoconiosis. He testified that there is no cure for coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, p. 31). Dr. Selby testified that if a miner leaves the coal mine with category 1 pneumoconiosis and does not have any more exposure, for the vast majority it does not progress any. (Respondent's Exhibit No. 2, p. 32).

Dr. Selby saw Petitioner for a second time on March 10, 2014, to perform a methacholine challenge test. Dr. Selby testified that the testing was valid. (Respondent's Exhibit No. 5, pp. 3-4). Dr. Selby testified that Petitioner gave poor effort, but his best efforts and maximum dose showed he had at most an 11% decline in his FEV1 after the methacholine challenge testing. (Respondent's Exhibit No. 5, pp. 4-5). Dr. Selby testified that methacholine challenge testing is done to try to determine whether or not an individual has asthma. The test is a more valuable test in terms of ruling out asthma versus ruling it in. He testified that the methacholine challenge testing, when done appropriately according to the American Thoracic Society Guidelines, is more likely to give a false positive than a false negative. (Respondent's Exhibit No. 5, p. 6). Dr. Selby testified that in Dr. Paul's testing, Petitioner had a 14% decline in his FEV1. Dr. Selby testified that same is not positive for asthma. (Respondent's Exhibit No. 5, p. 6). Dr. Selby testified that in order for the test to be considered positive, there must be consistent valid effort by the subject with appropriate methodology, which means following the American Thoracic Society Guidelines. If those conditions are met, the test equipment is calibrated and accurate, and everything is of valid testing protocol, there must be a drop from the baseline FEV1 of 20% to be considered a positive test. (Respondent's Exhibit No. 1, p. 7). Dr. Selby testified that most people have some reactivity to methacholine so you have to have a 20% decline in the FEV1 for it to be diagnostic of asthma. (Respondent's Exhibit No. 5, pp. 7-8). Dr. Selby testified that there has been a board certification for pulmonary disease since 1941. (Respondent's Exhibit No. 5, pp. 11-12).

Conclusions of Law

In regard to disputed issues (c) and (f) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner did not sustain an occupational disease arising out of and in the course of his employment for Respondent that manifested itself on August 28, 2007.

In support of this conclusion the Arbitrator notes the following:

Dr. Tazbaz testified that based on the simple spirometry he performed on Petitioner, he did not have an obstructive defect. Dr. Tazbaz testified that he would need to have lung volumes performed on Petitioner to rule out a restrictive abnormality. Dr. Selby testified that there was no evidence of restriction based on Petitioner's lung volume measurements. Dr. Paul testified that the testing he performed on March 4, 2013, did not show any evidence of obstruction until after Petitioner inhaled methacholine. Dr. Paul testified that Petitioner had chronic bronchitis that was caused or aggravated by his exposure as a coal miner. Dr. Paul testified that sputum was not required for the diagnosis of chronic bronchitis. Dr. Tazbaz testified that Petitioner qualified for a diagnosis of chronic bronchitis because he coughed up black secretions when he was in the coal mines. Dr. Tazbaz testified that the sputum production was a temporary condition for Petitioner, existing only while he was in the coal mine. Dr. Tazbaz testified that usually one has sputum production with a diagnosis of chronic bronchitis. Dr. Mathur testified that Petitioner might have chronic bronchitis and that same could not be ruled out based on the lack of entries of cough in Dr. Mathur's treatment records. The first time that Petitioner reported a cough to Dr. Mathur was on February 15, 2013. Dr. Tazbaz testified that Petitioner gave him a history of cough with sputum while he was at the mine which went away when he left the mine. About a year after leaving the mine, he developed the cough again. Dr. Selby testified that a cough developing one year out of his last employment in the coal mine would not be related back to Petitioner's coal mine employment.

Dr. Paul testified that the chest x-ray he reviewed of March 4, 2013, looked like coal workers' pneumoconiosis. Dr. Paul is not an A or B-reader. He did not assign the film a profusion rating or record an opacity type. Dr. Tazbaz also found Petitioner's chest x-ray to be positive for pneumoconiosis. Dr. Tazbaz, however, is not a B-reader. Dr. Smith, who is a board certified radiologist and B-reader, interpreted chest x-ray dated March 29, 2009, as positive for pneumoconiosis, profusion 1/0 with P/S opacities in the bilateral middle and lower lung zones. Dr. Smith interpreted the chest x-ray of October 14, 2010, as positive for pneumoconiosis, profusion 1/1 with P/P opacities in all lung zones. Dr. Smith's interpretations are not consistent with the usual progression of coal workers' pneumoconiosis which according to Dr. Wiot and Dr. Meyer generally begins in the upper lung zones. Dr. Alexander, a B-reader and board certified radiologist, interpreted chest x-ray of March 29, 2009, as positive for pneumoconiosis, profusion 1/0 with P/P opacities in all lung zones. He made an identical interpretation of the October 14, 2010, chest x-ray. Dr. Alexander's readings are not consistent with the B-readings of Dr. Smith. Dr. Selby, Dr. Wiot and Dr. Meyer consistently read Petitioner's chest x-rays as negative for pneumoconiosis. These B-readers also noted that the chest x-rays of March 29, 2009, and October 14, 2010, were quality 2 films due to underinflation. The physicians testified that underinflation will accentuate the pulmonary vasculature, particularly in the lung bases.

The Arbitrator finds the opinions of Dr. Selby, Dr. Wiot and Dr. Meyer to be more persuasive and credible than those of Dr. Paul, Dr. Tazbaz, Dr. Smith and Dr. Alexander.

Further, in his testimony Petitioner stated he had won a Strongman contest approximately 10 years ago. When examined by Dr. Mathur on September 27, 2013, Dr. Mathur noted that Petitioner advised he had recently won a Strongman contest in Mt. Olive. Accordingly, the Arbitrator finds Petitioner's credibility to be suspect.

In regard to disputed issues (l) and (o) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's conclusion of law in disputed issues (c) and (f).

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF)
MCLEAN

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tracey Chandler,

Petitioner,

16IWCC0069

vs.

NO: 12 WC 42029
14 WC 9837

State of Illinois/Illinois State University,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, accident, temporary total disability, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 9, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

DATED: JAN 28 2016
KWL/vf
O-1/25/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

16IWCC0069

CHANDLER, TRACEY
Employee/Petitioner

Case# **12WC042029**

14WC009837

ILLINOIS STATE UNIVERSITY
Employer/Respondent

On 6/9/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0564 WILLIAMS & SWEE LTD
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0903 ILLINOIS STATE UNIVERSITY
1320 ENVIRONMTL HEALTH SAFETY
NORMAL, IL 61790

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JUN 9 = 2015

RONALD A.RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0069

Tracey Chandler
Employee/Petitioner

v.

State of Illinois/Illinois State University
Employer/Respondent

Case # **12** WC **42029**

Consolidated cases: **14 WC 9837**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Bloomington**, on **April 22, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ 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

16IWCC0069

FINDINGS

On the date of accident, **September 17, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**35,100.00**; the average weekly wage was $**675.00**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent is entitled to a credit of $**278.00** under Section 8(j) of the Act.

ORDER

The Petitioner failed to prove any current condition of ill-being in her right wrist which is causally related to the injury of September 17, 2012.

No benefits are awarded herein.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

June 4, 2015
Date

12 WC 42029
ICArbDec19(b)

JUN 9 - 2015

FACTS:

The Petitioner testified that on September 17, 2012 and December 11, 2012 she was employed by the Respondent as a building service worker and that her job duties required her to do janitorial type work which included washing walls, cleaning glass, and dumping trash. The Petitioner testified that she spent two to four hours per day reaching at or above shoulder level. The Petitioner testified that she has been employed by the Respondent for 25 years.

The Petitioner testified that on September 17, 2012 she was washing walls, cleaning glass and dumping trash when she began to experience pain in her right shoulder. She testified that she sought treatment with Dr. Powers on September 19, 2012 and that she completed an accident report on September 21, 2012. The Petitioner testified that she then saw Dr. Kolb on October 17, 2012.

The medical records demonstrate that the Petitioner saw Dr. Regina Powers on September 19, 2012 for complaints of right wrist and shoulder pain. She reported that she switched shifts at work and had to wash walls. She reported pain in her right shoulder and wrist that started two weeks prior and became worse over the past three days. Dr. Powers' diagnoses were right wrist tendonitis and right shoulder strain. Dr. Powers referred the Petitioner to Dr. Kolb for her wrist.

The Petitioner completed an accident report on September 21, 2012. It indicates an injury to the right shoulder and wrist and a date of injury of September 17, 2012. The Petitioner indicated that at the time of her injury she was performing her regular job duties.

On October 17, 2012 the Petitioner saw Dr. Edward Kolb for complaints of right wrist pain. Dr. Kolb noted that the Petitioner complained of right wrist pain since September 17, 2012 and reported that she was doing her normal janitorial duties when her wrist began to bother her. She denied any specific trauma. Dr. Kolb noted that right wrist x-rays performed by Dr. Powers revealed a small cyst in the lunate but no other abnormalities. Dr. Kolb's assessment was right wrist tendinitis.

The Petitioner testified that on December 11, 2012 she was again washing walls and cleaning glass when her right shoulder became more painful. She testified that she saw Dr. Kolb that same day and that he injected her right shoulder and prescribed an MRI.

Dr. Kolb's office note of December 11, 2012 demonstrates that the Petitioner presented there for evaluation of her right shoulder and reported that she had right shoulder pain for the past week. She denied any injury but attributed her symptoms to her work activities, specifically repetitive lifting both boxes and mop buckets as well as having to adjust her vacuum cleaner. Dr. Kolb noted that the Petitioner's x-rays did show a type II acromion and his assessment was right shoulder bicipital tendinitis. Dr. Kolb injected the Petitioner's right shoulder and he noted that he felt her symptoms were secondary to her job duties. The Petitioner returned to Dr. Kolb on January 9, 2013 and reported relief from the injection but a return of her symptoms. Dr. Kolb recommended physical therapy and a return in 4 weeks.

The Petitioner completed another accident report on January 10, 2013. That report indicates an injury to the right shoulder and right wrist and a date of injury of December 11, 2012. The Petitioner indicated at the time of her injury she was performing her regular "janitorial duties", and "cleaning glass in the entranceway and dumping heavy trash cans."

The Petitioner returned to Dr. Kolb on April 17, 2013 and it was noted that she "has a long history of issues with her right shoulder". Dr. Kolb's assessment was right shoulder impingement and biceps tendonitis. Dr. Kolb recommended an MRI and indicated that the Petitioner might be a good candidate for right shoulder arthroscopy with subacromial decompression and biceps tenotomy and tenodesis. The MRI was performed on April 18, 2013 and was reported to demonstrate a full-thickness tear of the supraspinatus tendon, subacromial-subdeltoid bursal inflammation with lateral down-sloping of the acromion contributing to outlet-related cuff impingement, and reactive osteoedema at the insertion site of the supraspinatus tendon.

On May 1, 2013 Dr. Kolb noted the MRI findings and recommended surgical intervention with a right shoulder arthroscopy, rotator cuff repair and subacromial decompression. Dr. Kolb noted that due to some family issues the Petitioner wished to delay the surgery for as long as possible. The Petitioner returned to Dr. Kolb on July 12, 2013 and he continued to prescribe surgery for the Petitioner.

The April 25, 2014 deposition testimony of Dr. Kolb was admitted into the record as Petitioner's Exhibit 1. Dr. Kolb testified as to the treatment he rendered to the Petitioner, his diagnosis of a right shoulder full-thickness rotator cuff tendon tear, and his recommendation for surgery. Dr. Kolb opined that the Petitioner's work activities aggravated her underlying right shoulder condition and lead to the need for the treatment she received.

At the request of the Respondent, the Petitioner was examined by Dr. Michael Lewis on September 19, 2014. Dr. Lewis examined the Petitioner and reviewed the records of her medical treatment and he diagnosed her as having a right rotator cuff tear and pre-existing impingement syndrome secondary to lateral downward sloping of the acromion. Dr. Lewis opined that the Petitioner's condition was not work related. With regard to the Petitioner's right wrist, Dr. Lewis indicated that he found no objective evidence of orthopedic pathology.

The February 2, 2015 deposition testimony of Dr. Lewis was admitted into the record as Respondent's Exhibit 1. Dr. Lewis testified as to the medical records he reviewed and his examination findings and his diagnosis of the Petitioner's condition. Dr. Lewis testified that his diagnosis was a tear of the right rotator cuff and a pre-existing downward sloping acromion. Dr. Lewis also testified that his examination of the Petitioner's shoulder and wrist demonstrated no objective evidence of any orthopedic pathology. Dr. Lewis opined that the Petitioner's work activities did not cause her rotator cuff tear.

The Petitioner testified that she currently continues to experience a throbbing pain in her right shoulder which comes and goes depending on her activity level. The Petitioner

testified that her pain is made worse with any reaching activities.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

The Petitioner testified that she experienced an onset of shoulder pain while washing walls on September 17, 2012. The Petitioner sought treatment with Dr. Powers on September 19, 2012 and reported pain in her right shoulder and right wrist which she attributed to over doing it while washing walls at work. The Petitioner completed an accident report on September 21, 2012 indicating an injury to the right shoulder and wrist on September 17, 2012 while she was performing her regular job duties.

On October 17, 2012 the Petitioner saw Dr. Edward Kolb for complaints of right wrist pain. Dr. Kolb noted that the Petitioner complained of right wrist pain since September 17, 2012 and reported that she was doing her normal janitorial duties when her wrist began to bother her. She denied any specific trauma. Dr. Kolb noted that right wrist x-rays performed by Dr. Powers revealed a small cyst in the lunate but no other abnormalities. Dr. Kolb's assessment was right wrist tendinitis. In his deposition testimony, Dr. Kolb testified that he did not examine the Petitioner's shoulder on that date.

The Petitioner testified that on December 11, 2012 she was again washing walls and cleaning glass when her right shoulder became more painful. She saw Dr. Kolb that same day and he injected her right shoulder. Dr. Kolb's office note of December 11, 2012 demonstrates that the Petitioner presented there for evaluation of her right shoulder. She denied any injury but attributed her symptoms to her work activities, specifically repetitive lifting both boxes and mop buckets as well as having to adjust her vacuum cleaner. Dr. Kolb's assessment was right shoulder bicipital tendinitis and he noted that her symptoms were secondary to her job duties.

The Petitioner completed another accident report on January 10, 2013. That report indicates an injury to the right shoulder and right wrist and a date of injury of December 11, 2012. The Petitioner indicated at the time of her injury she was performing her regular "janitorial duties", and "cleaning glass in the entranceway and dumping heavy trash cans."

A right shoulder MRI was performed on April 18, 2013 and was reported to demonstrate a full-thickness tear of the supraspinatus tendon, subacromial-subdeltoid bursal inflammation with lateral down-sloping of the acromion, and reactive osteoedema at the insertion site of the supraspinatus tendon.

Dr. Kolb, the Petitioner's treating physician, testified that the Petitioner had a right shoulder full-thickness rotator cuff tendon tear, and he opined that the Petitioner's work activities aggravated her underlying right shoulder condition and lead to the need for the

treatment she received.

Dr. Lewis, the Respondent's examining physician, agreed that the Petitioner noticed her pain while she was working and that she attributed her pain to performing her regular work including mopping and cleaning. Dr. Lewis did diagnose a rotator cuff tear and he agreed that washing walls could involve an overhead motion that could at least aggravate impingement syndrome.

Based upon the Petitioner's description of her job duties, her testimony that she injured her right shoulder washing walls, and the medical records of Dr. Powers and Dr. Kolb, the Arbitrator finds that the Petitioner suffered an injury to her right wrist on September 17, 2012 and a repetitive trauma injury to her right shoulder which manifested itself on or about December 11, 2012.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator relating to the issue of accident are adopted and incorporated herein.

Following her injury on September 17, 2012, the Petitioner treated with Dr. Powers and Dr. Kolb. On September 19, 2012 Dr. Powers diagnosed the Petitioner as having right wrist tendonitis and right shoulder strain and she referred the Petitioner to Dr. Kolb for her wrist. The Petitioner saw Dr. Kolb on October 17, 2012 and Dr. Kolb noted complaints of right wrist pain. Dr. Kolb noted that x-rays performed by Dr. Powers revealed a small cyst in the lunate but no other abnormalities. Dr. Kolb's assessment was right wrist tendinitis. No mention of the Petitioner's shoulder complaints are noted in the record of that visit and Dr. Kolb specifically testified that he did not examine the Petitioner's shoulder at that time.

In his deposition testimony, Dr. Kolb testified that the bony cyst in the Petitioner's right wrist had no clinical significance. Dr. Lewis testified that his examination of the Petitioner's wrist demonstrated no objective evidence of any orthopedic pathology. The Arbitrator notes that neither Dr. Kolb nor Dr. Lewis offered any specific testimony or opinions as to any causal relationship between the Petitioner's right wrist tendinitis and her work activities. The Arbitrator also notes that there is no evidence which indicates that the Petitioner sought or received any medical treatment or care for her right wrist after she saw Dr. Kolb on October 17, 2012.

The Petitioner next sought treatment from Dr. Kolb on December 11, 2012. Dr. Kolb's office note of December 11, 2012 demonstrates that the Petitioner presented there for evaluation of her right shoulder. She denied any injury but attributed her symptoms to her work activities, specifically repetitive lifting both boxes and mop buckets as well as having to adjust her vacuum cleaner. Dr. Kolb's assessment was right shoulder bicipital tendinitis and he noted that her symptoms were secondary to her job duties. The Petitioner returned to Dr.

Kolb for her shoulder complaints on January 9, 2013, April 17, 2013, May 1, 2013 and July 12, 2013. Dr. Kolb testified that the Petitioner had a right shoulder full-thickness rotator cuff tendon tear, and he opined that the Petitioner's work activities aggravated her underlying right shoulder condition and lead to the need for the treatment she received and the surgery he has prescribed.

Dr. Lewis, the Respondent's examining physician, testified that the Petitioner did have a tear of the right rotator cuff as well as a pre-existing downward sloping acromion. Dr. Lewis testified that his examination of the Petitioner's shoulder and wrist demonstrated no objective evidence of any orthopedic pathology and he opined that the Petitioner's work activities did not cause her rotator cuff tear. Dr. Lewis did, however, agree that washing walls could involve an overhead motion that could at least aggravate impingement syndrome.

Based upon the foregoing, and having considered the totality of the evidence adduced at hearing, the Arbitrator finds that the Petitioner failed to prove any current condition of ill-being in her right wrist which is causally related to either the injury of September 17, 2012 or the injury of December 11, 2012. The Arbitrator further finds that the Petitioner sufficiently proved a causal relationship between the condition of ill-being in her right shoulder and her work duties for the Respondent and that that relationship manifested itself on December 11, 2012.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator relating to the issue of accident are adopted and incorporated herein.

The Petitioner introduced evidence of medical expenses from OSF Medical Group in the amount of $336.00 and Orthopedics of Illinois/Dr. Kolb in the amount of $3,249.85. Based upon the Arbitrator's findings above, as well as the medical records introduced into the record and the Petitioner's testimony, the Arbitrator finds those expenses to be reasonable, necessary, and causally related to the Petitioner's work injury. The Respondent is liable for payment of those expenses subject to the limitations of the Medical Fee Schedule provided for in the Act. The Respondent is entitled to credit for any medical expenses it has paid pursuant to Section 8(j) of the Act.

In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator relating to the issue of accident are adopted and incorporated herein.

Dr. Kolb has prescribed an arthroscopic surgical procedure for the Petitioner's right shoulder condition. In his testimony of April 14, 2014, Dr. Kolb testified that he last saw the Petitioner on July 12, 2013 and that, at that time, he continued to prescribe a right shoulder arthroscopy, rotator cuff repair and subacromial decompression for the Petitioner.

The Arbitrator notes that Dr. Kolb has not seen the Petitioner for almost two years, and there is no evidence in the record that the Petitioner has seen any other physician for her shoulder since she last saw Dr. Kolb. While the Arbitrator finds that the Petitioner is entitled to prospective medical treatment for her right shoulder condition as a result of the injury of December 11, 2012, the Arbitrator finds that Dr. Kolb's prescription for an arthroscopic surgery is stale. The Arbitrator declines to specifically order the Respondent to authorize and pay for the surgical procedure recommended by Dr. Kolb without a current prescription for that surgery.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Edward E. Hafer,
Petitioner,
vs.
City of Springfield,
Respondent,

NO: 14WC 36980

16IWCC0070

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner, herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permanent total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 5, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 8 2016
MJB/bm
o-1/25/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAFER, EDWARD E
Employee/Petitioner

Case# 14WC036980

CITY OF SPRINGFIELD
Employer/Respondent

16IWCC0070

On 5/5/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1157 DELANO LAW OFFICES LLC
CHARLES H DELANO IV
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SPRINGFIELD, IL 62701

0332 LIVINGSTONE MUELLER ET AL
L ROBERT MUELLER
620 E EDWARDS ST PO X 335
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

EDWARD E. HAFER,
Employee/Petitioner

v.

CITY OF SPRINGFIELD,
Employer/Respondent

Case # **14** WC **36980**

Consolidated cases: _____

16IWCC0070

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **4/14/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **5/12/14**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

In the year preceding the injury, Petitioner earned $**59,234.28**; the average weekly wage was $**1,139.12**.

On the date of accident, Petitioner was **62** years of age, *married* with **no** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his bilateral hands due to repetitive work activities, that arose out of and in the course of his employment by respondent and manifested itself on 5/12/14. Petitioner's claim for compensation is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4/29/15
Date

MAY 5 - 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT: 16IWCC0070

Petitioner, a 62 year old, left hand dominant, utility person, alleges he sustained an accidental injury to his bilateral hands due to repetitive work activities that arose out of and in the course of his employment by respondent andt manifested itself on 5/12/14. Petitioner has worked for respondent for approximately 28 years, and as a utility person for 24 of those years. Petitioner works from 7:00 am - 3:30 pm and gets two 15 minute breaks and 30 minutes for lunch.

Petitioner's duties as a utility person include janitorial duties for 2 to 2 1/2 hours each morning. This involves cleaning and mopping bathrooms. He also spends 5 hours a day sweeping, shoveling, and other duties as assigned. He testified that his duties vary by season. In the summer he is outside a lot mowing, weed whacking, and cleaning. When outside he is on the riding tractor 75% of the time, and spends the remaining 25% of the time weed whacking. Petitioner reported that the activities he does in the spring and summer are different from those he does in the fall/winter. In the fall/winter his first 2 to 2 1/2 hours are still janitorial duties, and the remaining hours of the day could be cleaning snow, shoveling, and sweeping inside, and plant maintenance/cleanup. During the spring/summer months sometimes petitioner would be required to do some inside work. Petitioner performed work at all CWLP properties, including Plant 4, Dallman, Lakeside and the maintenance building. His duties at each location varied.

Petitioner testified that after performing his janitorial duties each morning his duties are as assigned and vary from day to day. He stated that he may not shovel every day, and the gaps could be up to a week.

With respect to the janitorial work, petitioner testified that this work does not bother his hands too much. He testified that when he is on the tractor the vibration causes his hands to go to sleep when he holds the wheel tight on angled ground. He also reported difficulty with his hands when using the weed whacker. He reported that a lot of grip strength is needed to hold the machine with both hands and squeeze the trigger. This would also cause his hands to go numb, and sometimes be painful.

In the winter/fall, if there is snow or ice, he would remove that before doing his janitorial duties. Then he would perform whatever orders there were for sweeping different areas or shoveling. When shoveling, petitioner would need to grip firmly when scrapping or picking up rock, ash and coal. Petitioner would also shovel wet slag out from under the pipes and platforms, and this also required firm gripping of the shovel. Even while the Bobcat was taking the slag out of the building petitioner would continue to shovel the slag until it was all gone. After this was completed he would hose down the basement. When petitioner performed these duties his hands would go numb and hurt. Petitioner would also perform sweeping duties, and safety checks on the equipment in the plant.

Petitioner testified that during a typical day he does a lot of heavy gripping, about 50% of the day. He admitted that prior to the alleged date of accident his hands felt best in the morning.

On 5/20/14 petitioner presented to Dr. Lytchakov, his primary care physician complaining of left hand/wrist and elbow pain with numbness and tingling, mostly localized to the 1-4 fingers, with more in the 3rd and 4th digits lately. He reported that it bothers him at night and the numbness has been present for years, and the pain started recently. He reported worsening pain in the 3rd and 4th fingers when he holds a shovel/broom. Dr. Lytchakov completed a Loss Control Medical Slip. Dr. Lytchakov's diagnosis was possible carpal tunnel syndrome versus cervical radiculopathy. Petitioner was prescribed a brace and referred to a Dr. Becker, a neurologist. Petitioner was instructed to avoid repetitive bending in left wrist and pressure on the palm. Petitioner was continued on regular duty work.

On 5/20/14 petitioner presented to physical therapy at Springfield Clinic Physical Therapy Department. Therapist Lightfoot assessed possible carpal tunnel syndrome and gave petitioner a left quick lace wrist splint.

On 5/29/14 petitioner presented to Dr. Cecile Becker with complaints of numbness and tingling in bilateral fingers and some pain in the left elbow area, for the last year. He reported that on 5/12/14 he was picking up a piece of sheet metal with his left hand. He had stingers radiating into his left arm and hand. He stated that before this he already had numbness in his hands at night, worse on the left. Since the incident on 5/12/14 the numbness worsened. He reported a little left grip weakness. Following an examination, Dr. Becker assessed numbness and tingling in petitioner's hands bilaterally, worse on the left, consistent with carpal tunnel syndrome. Dr. Becker ordered an EMG and nerve conduction study.

On 5/29/14 petitioner underwent an EMG/nerve conduction study. The interpretation was bilateral carpal tunnel syndrome severe on left and moderate on the right. Also noted was mild to moderate ulnar mononeuropathy at the right elbow.

On 6/18/14 petitioner presented to Dr. Brett Wolters. He complained of bilateral hand numbness that was going on for two years. He reported that he was working at buildings and grounds at CWLP. He reported that he does a lot of picking up of objects, turning of valves, sweeping, shoveling, mowing and weeding. He stated that 2 months ago her was picking up some sheet metal and had severe shooting pains and numbness into his left hand. He tried splints that did not help. He awakens with bilateral numbness and tingling. Petitioner had right symptoms, not as bad. Petitioner was diagnosed with bilateral carpal tunnel syndrome, severe on left, and moderate on the right. He was further diagnosed with mild to moderate right cubital tunnel syndrome, presently asymptomatic. Dr. Wolters recommended a left carpal tunnel release and right wrist splint.

On 7/28/14 petitioner presented to Dr. Mitchell Rotman for a Section 12 examination at the request of the respondent. Petitioner reported that he injured his left hand picking up a piece of sheet metal on 5/12/14, but the cause of his present condition was his repetitive work activities. He reported that when he picked up the piece of steel he noted a stinger going down the top of the hand into his fingers. Since then things have gotten worse. He reported numbness and tingling in his hands, and occasional elbow pain. He complained of bilateral hand pain.

Petitioner gave a history of working for respondent for 25 years. He gets two 15 minute breaks and a 30 minute lunch. He maintains offices and buildings, as well as grounds. He believes his work is hand intensive. He identified the most common activity that he does as either sweeping or mopping every day. He reported that it might take him 2 1/2 hours to clean the office areas. He also reported that he might have to shovel coal, about two hours a week. He stated that the mopping and use of a sweeper involves heavy gripping, but the heaviest gripping is with shoveling activities. He shovels coal or ash into a wheelbarrow or a Bobcat, and sweeps or mops concrete floors in the work area. Petitioner reported that there are only a few areas that he does not clean and those are the bunker room, the crusher house and the presit area. Other activities he performs include lawn mowing, weed whacking, lifting a power washer, and using hand tools for several jobs that may vary.

Dr. Rotman reviewed the Supervisor's Report of Accident, and the Job Description for a Building and Grounds Utility Person for CWLP, which showed a multitude of activities. He noted that the job involved mowing, cleaning up, trimming, bush removal and other tasks required to maintain the 15 grounds at the power plant complex and at offsite locations. He noted that the job also involved maintaining the cleanliness of buildings at the power plant and offsite locations and performing building maintenance including roofing, tiling and other specialized work as directed, clearing snow, reporting unfavorable conditions, inspecting safety and firefighting equipment, ordering supplies and materials, and assisting others in other activities. The equipment aids and tools used included power lawnmowers, weed whips, hand shears, shovels, rakes, brooms, squeegees, floor buffers and scrubbers, small hand tools, a snow plow, bucket truck, tractor, Bobcat and forklift. The job required a lot of standing, walking, grasping, stooping, climbing, pushing, pulling, reaching, and exerting up to 75 pounds of force at times. Job 1 was maintaining the overall cleanliness of the buildings, and is performed 55% of the time. Job 2 was mowing, cleaning up, trimming and brush removal with regards to maintaining the grounds is performed 15% of the time. Petitioner spends 70% of his time doing these 2 duties, and these jobs require 90% grasping , 60% reaching, 45% lifting, 25% pulling and 10% actual repetitive motions. Six jobs (1, 2, 3, 5, 7, 8) require grasping or applying pressure to an object with the fingers and palm 90% of the time, and four of those (1, 2, 3, 7) also required reaching 60% of the time.

Dr. Rotman also reviewed Dr. Lytchakov's records of 5/20/14 and 5/29/14, Dr. Becker's record of 5/29/14, and Dr. Wolters record of 6/18/14. Following a physical examination and x-ray of the left elbow, Dr. Rotman was of the opinion that petitioner's main problem was bilateral carpal tunnel syndrome, with some changes about the right elbow on the nerve studies that were not causing petitioner any clinical problems with his cubital tunnel. He also noted hypertrophic osteoarthritis of the left elbow that was also not causing petitioner any significant problems that would require treatment. He was of the opinion that petitioner would benefit from bilateral carpal tunnel releases. He noted advanced carpal tunnel on the left which has been coming on for several years. He noted moderate carpal tunnel syndrome on the right.

Dr. Rotman did not believe the lifting up of the piece of sheet metal would have caused the condition noted on the left. He believed it just caused some discomfort from a chronic advanced preexisting condition which would be considered idiopathic. Dr. Rotman was of the opinion that risk factors of idiopathic carpal tunnel would be petitioner's age of 62, and his obesity issues due to a BMI of 35.87. He identified petitioner's work risk factors as occasional heavy gripping activities at work over the last 25 years. He noted that petitioner's activities at time would be more repetitive than others, depending on which job he might be doing at work. He also noted that some of the gripping activities would vary day to day and during the course of the day. He was of the opinion that petitioner might have significant breaks of time between hand intensive activities depending on what he was doing on a day to day basis. Dr. Rotman was certain that there were job activities that petitioner has that involve heavier gripping than others, such as shoveling coal versus mopping or sweeping offices, which would involve lighter grip activities.

Dr. Rotman was of the opinion that it was unclear whether petitioner's work activities truly are aggravating factors for his idiopathic bilateral carpal tunnel condition. He was of the opinion that if petitioner's job involved a significant amount of heavy gripping during the course of the day, then he would opine that petitioner's work activities could be an aggravating factor for the condition. In the alternative, if petitioner's job duties did not involve repetitive heavy gripping for a significant portion of the day at work, then his opinions would change.

Petitioner was diagnosed with carpal tunnel syndrome. Dr. Rotman referred petitioner for carpal tunnel releases. Petitioner was continued on regular duty work.

On 8/26/14 petitioner returned to Dr. Lytchakov for his annual physical and discussed his carpal tunnel. He again recommended the carpal tunnel surgery.

On 9/8/2014 Dr. Rotman drafted an addendum report after reviewing a job site analysis performed by Memorial Industrial Rehab and a video of petitioner's job duties. The video showed petitioner doing some dry

mopping with both hands that involved only light grasping. It noted that petitioner stopped on many occasions to move furniture and change rooms. It also noted that petitioner used his right hand to move chairs and trash cans. Other times he used both hands. It noted that after petitioner got done sweeping, he switched to a wet mop to clean floors. It noted that petitioner used a water bucket with both hands on the handle and then used a right hand to depress the lever on the mop bucket to squeeze out water. Petitioner then used both hands to move the mop around the floor. Petitioner again took frequent brief pauses to move furniture and obstacles. Petitioner was then seen cleaning bathroom fixtures by applying cleaning solution with a spray bottle.

Dr. Rotman noted that petitioner shovels the clinker at many different areas around the power plant, and various amounts of material are to be shoveled from the floor to the ground to the receptacle areas. The time spent shoveling depended on the amount of material that needed to be removed. He believed this was done at a self directed pace and allowed time for breaks and pauses. The job analysis also included an assessment of several tools petitioner used. It also noted that petitioner was not exposed to physiologic significant levels of commonly held risk factors that might be related to carpal tunnel syndrome such as prolonged awkward wrist positions, prolonged high levels of repetition or high levels of exertion and force through the hands and wrists. The job analysis indicated that other intrinsic health factors were the source of petitioner's carpal tunnel problems. This report was filled out by a therapist, Nathan Yeager. Dr. Rotman viewed the video that showed petitioner performing only his morning janitorial duties.

Based on the job video and job analysis Dr. Rotman was of the opinion that the type of work described and seen on the video is not a risk factor for idiopathic carpal tunnel syndrome. He only saw forces that were on the lighter side, and work that was not repetitive enough or hand intensive enough to be an aggravating factor. He noted that hand use was on the lighter side. Dr. Rotman was of the opinion that even though petitioner's work was repetitive at times with use of a mop and handle, it would not be considered heavy enough to be an aggravating factor, since it was interspersed with moving furniture, and generally self paced. He also noted that petitioner was seen going from one place to another and had several breaks in between. He believed petitioner had a fairly easy job without a lot of significant hand force, and is not the type of work that would be considered an aggravating factor for idiopathic carpal tunnel.

On 10/29/14 petitioner followed-up with Dr. Wolters. He was still complaining of numbness and tingling in his hands. He reported that he was dropping keys and brooms would slip out of his hands. Petitioner noted that he usually cleans the office for about 2-2 1/2 hours every morning. These activities are his lighter type activities. Petitioner reported that the rest of the day he does heavy gripping type activities including sweeping, shoveling of slag and coal, mowing, using a weed whacker, 0 turn tractor, weed whipper, or sweeping large

areas of flooring. Petitioner reported that when he sweeps the large flooring areas it takes him about 5 hours to do the areas that are the size of a large football field. He reported that gripping of the shovel for the coal activities is the most vigorous activity that he does during these activities, and he does it once or twice a week for up to 3-5 hours a day. Dr. Wolters opined that petitioner's carpal tunnel was work related. He was further of the opinion that the video Dr. Rotman reviewed only showed a portion of petitioner's job duties, that included the janitorial duties in the morning. Dr. Wolters recommended bilateral carpal tunnel releases.

On 10/30/14 petitioner's Application for Adjustment of Claim was filed. Petitioner alleged carpal tunnel to his bilateral hands due to repetitive trauma that manifested itself on 5/12/14.

On 1/15/15 the evidence deposition of Dr. Mitchell Rotman, an orthopedic surgeon with a subspecialty in the upper extremity, was taken on behalf of the respondent. Dr. Rotman opined that when someone has advanced carpal tunnel, as petitioner did, it does not take a whole lot of activity to bring out the symptoms. Dr. Rotman opined that petitioner does a lot of things all day, and they are on the lighter side. Dr. Rotman opined that petitioner's job duties for respondent did not cause or aggravate petitioner's bilateral carpal tunnel condition.

On cross examination, Dr. Rotman agreed that the video he reviewed only showed petitioner cleaning a toilet, a mirror, and a sink, and mopping and squeezing water out of a mop bucket and mopping again. He admitted that it did not show petitioner using a lawnmower, weed whips, hand shears, shovels, rakes, brooms, floor buffers or floor scrubbers, etc. On the day the video was taken petitioner was cleaning for the first half of the day and shoveling clinker for the second half of the day, but the video did not show petitioner shoveling clinker, which was one of the things that bothered him most. Dr. Rotman had no idea as to the amount of time petitioner spent doing specific tasks. He admitted that weed whacking, due to its vibration, and shoveling, may trigger symptoms in petitioner. Dr. Rotman was of the opinion that if petitioner was doing heavy gripping for a significant portion of the work week his opinions could change.

On 1/30/15 petitioner returned to Dr. Lytchakov for history and physical prior to his carpal tunnel surgery. On 2/6/15 petitioner underwent a left carpal tunnel release, performed by Dr. Wolters. On 2/20/15 petitioner underwent a right carpal tunnel release, performed by Dr. Wolters.

On 3/6/15 petitioner followed-up with Dr. Wolters after his right carpal tunnel release. He stated that he was doing well and had no complaints of any significant pain. He denied any numbness or tingling, and stated that he was not taking any medications. Dr. Wolters assessed status post bilateral carpal tunnel release. He released petitioner to full duty work without restrictions as of 3/30/15.

Respondent offered into evidence during Dr. Rotman's deposition a video of petitioner performing his janitorial duties in the morning. He testified that the video did not show any activities petitioner performed after his 2 to 2 1/2 hours of janitorial duties. Petitioner reported that it did not show the sweeping he did of the sawdust and diesel mix. He testified that he used a larger broom for this activity and would sweep an area as big as a football field. Petitioner reported that this activity required a lot of hand pressure to hold on to the broom. This activity also required heavy gripping.

Randall Lewis, Operations Coordinator-Buildings and Grounds Supervisor, was called as a witness on behalf of respondent. Lewis is petitioner's supervisor. He agreed with the work duties petitioner described. Lewis does go to all work sites where his crew of 10 may be and walks by to make sure everything is being done that needs to be done. Lewis assigns tasks to the crew every day after morning routine. Most jobs, other than safety checks, have 2 or more people assigned. He testified that every four weeks the crews are rotated to different areas and it takes a while to come back around to the same work area. However, in the summer they may all be doing yard work. Lewis testified that he assigns the crew to a task, but the crew decides who does what part of the task.

Lewis assigns work orders that reflect what needs to be done. He testified that they are entered into the system by the areas that need the work, and he prints them out and assigns the jobs to the crew. The workers then sign off on the work sheet and indicate what time they spent on that job. Lewis testified that he just keeps track of the work.

Petitioner offered into evidence Work Order Cost Reports for the period 2/26/13 through 5/16/14. Petitioner testified that these work orders do not account for all his hours and the work he did during this period. He stated that sometimes when the work order has not been received before the work is assigned the crew will allocate their time on those tasks to ground tickets and sweep sheets. He testified that up to 50% of his day can be logged to ground tickets and sweep sheets.

Today, petitioner reports diminished strength in his hands. He testified that the tingling and numbness went away. He reported difficulty opening jars, gripping hard, and grabbing stuff. He indicated that his main problem is the weakness he was experiencing.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers'

Compensation Act is best serviced by allowing compensation in a case ... where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming an injury to his bilateral hands due to repetitive work activities, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury "manifested itself". These dates could be based on one or more of the following, depending on the facts of the case:

1. The date the petitioner first seeks medical attention for the condition;
2. The date the petitioner is first informed by a physician that the condition is work related;
3. The date the petitioner is first unable to work as a result of the condition;
4. The date when the symptoms became more acute at work;
5. The date that the petitioner first noticed the symptoms of the condition.

On 5/20/14 petitioner presented to Dr. Lychakov with complaints of left hand/wrist and elbow pain with numbness and tingling that bothers him at night. He reported that the numbness had been present for years, and the pain started recently. He reported worsening pain in the 3rd and 4th fingers when he holds a shovel/broom. Dr. Lychakov diagnosed a possible carpal tunnel syndrome versus cervical radiculopathy. At no time during this visit did petitioner report an injury on 5/12/14. Petitioner began physical therapy on 5/20/14, and again made no mention of the alleged injury on 5/12/14. It was not until 5/29/14 that petitioner, for the first time, reported that on 5/12/14 he was picking up a piece of sheet metal with his left hand and felt stingers radiating into his left arm and hand. He reported that before 5/12/14 he already had numbness in his hands at night, worse on the left, that worsened after 5/12/14. Dr. Becker assessed possible left carpal tunnel syndrome and ordered an EMG/NCV that revealed bilateral carpal tunnel syndrome, severe on left and moderate on the right.

When petitioner presented to Dr. Wolters on 6/18/14 he reported that the bilateral hand numbness had been going on for two years. Although petitioner reported that he did a lot of picking up of objects, turning of valves, sweeping, shoveling, mowing and weeding, he did not indicate how often he performed each of these tasks. Petitioner specifically reported that other than the janitorial duties he performed for 2-2.5 hours a day, his duties varied.

Petitioner's Job Description for Building and Grounds Utility Person for CWLP indicates that petitioner was responsible for a multitude of activities. These activities include mowing, cleaning up, trimming, bush removal and other tasks required to maintain the 15 grounds at the power plant complex and at offsite locations; maintaining the cleanliness of buildings at the power plant and offsite locations; and performing building maintenance including roofing, tiling and other specialized work as directed. Petitioner's duties also included clearing snow, reporting unfavorable conditions, inspecting safety and firefighting equipment, ordering supplies and materials, and assisting others in other activities. The equipment aids and tools petitioner used includes power lawnmowers, weed whips, hand shears, shovels, rakes, brooms, squeegees, floor buffers and scrubbers, small hand tools, a snow plow, bucket truck, tractor, Bobcat and forklift. These activities require a lot of standing, walking, grasping, stooping, climbing, pushing, pulling, reaching, and exerting up to 75 pounds of force at times. Job 1 was maintaining the overall cleanliness of the buildings, and is performed 55% of the time. Job 2 was mowing, cleaning up, trimming and brush removal with regards to maintaining the grounds is performed 15% of the time. Petitioner spends 70% of his time doing these 2 duties, and these jobs require 90% grasping , 60% reaching, 45% lifting, 25% pulling and 10% actual repetitive motions. Six jobs (1, 2, 3, 5, 7, 8) require grasping or applying pressure to an object with the fingers and palm 90% of the time, and four of those (1, 2, 3, 7) also required reaching 60% of the time. The force of grasping or pressure that was applied was not described.

Petitioner reported that each day he would spend 2-2.5 hours performing janitorial duties in the office area. He specifically testified that the janitorial work was his lighter type work, and did not bother his hands too much. Although petitioner testified that the activities he performs the rest of the day include heavy gripping type activities that include sweeping, shoveling of slag and coal, mowing, using a weed whacker, zero turn tractor, weed whipper, or sweeping large areas of flooring, he failed to provide any evidence to support a finding as to the frequency, duration, and manner in which petitioner performed these activities the remainder of the day. In fact, petitioner testified that the job duties he would perform for the remainder of the day were assigned and varied from day to day, without any specifics. Even when he gave various histories of the work duties he performed at trial and to the healthcare providers the time he stated h spent on various tasks, other than the

janitorial duties, varied. Lewis even testified that every four weeks the crews are rotated to different areas and it takes a while for them to return back around to the same area. Lewis also testified that although he assigns tasks each day he left the crews decide who does what on each task.

Petitioner provided Dr. Wolters a list of activities that he performed. Despite the fact that petitioner did not provide specific and detailed information concerning these work activities, including the frequency, duration, and manner in which he performed these duties, Dr. Wolters opined that petitioner's carpal tunnel was work related. The arbitrator finds it significant that there is no evidence to support a finding that Dr. Wolters ever reviewed petitioner's Job Description for a Building and Grounds Utility Person for CWLP. As a result, the arbitrator gives less weight to the opinions of Dr. Wolters, finding they are not based on a specific and detailed information concerning petitioner's work activities.

In the alternative, Dr. Rotman, before rendering his opinions, took time to review the Supervisor's Report of Accident, the Job Description for a Building and Grounds Utility Person for CWLP, Dr. Lytchakov's records of 5/20/14 and 5/29/14, Dr. Becker's record of 5/29/14, Dr. Wolters record of 6/18/14, and a video that showed petitioner performing his janitorial duties. He also took a history from petitioner, and examined petitioner. Based on this collection of information Dr. Rotman was of the opinion that petitioner's activities involved occasional heavy gripping activities, and activities that at times may be more repetitive than other activities, depending on which job petitioner may be performing, which petitioner and Lewis both testified varied from day to day. Dr. Rotman could not state with any medical certainty whether petitioner's activities were an aggravating factor for his carpal tunnel syndrome because petitioner's activities, which were many, varied from day to day and season to season. Although Dr. Rotman agreed that some of petitioner's duties did require heavy gripping, it is unknown with what frequency petitioner performed these duties. Dr. Rotman opined that petitioner's intrinsic health factors were the source of petitioner's carpal tunnel. These health factors included his age of 62, and his obesity based on a BMI of 35.87. Based on Dr. Rotman's thorough review of the medical records, a review of petitioner's Job Description, and his examination of petitioner, the arbitrator gives greater weight to the opinions of Dr. Rotman.

Based on the above, as well as the credible record, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his bilateral hands due to repetitive work activities, that arose out of and in the course of his employment by respondent that manifested itself on 5/12/14. The arbitrator finds petitioner performed lighter janitorial duties for the first 2-2.5 hours a day, and a multitude of other activities the remainder of the day, based on the assignments give by Lewis. Although many of these activities may require heavy gripping, and some vibration, specific and detailed

information concerning these work activities, including the frequency, duration, and manner in which they were performed was not provided. Additionally, the arbitrator finds it significant that Lewis testified the crews were rotated every four weeks to different areas, and that they may not come back to the same work area for a while. The arbitrator finds it significant that that petitioner could not state with any certainty the work duties he did every day after he completed his janitorial duties, and the duration of time he spent doing them every day, as well as the manner in which he performed them, due to the multitude of different tasks that he could perform on any given day. For example, even when petitioner referred to the task of shoveling coal, within the record itself, he provided different details regarding the time he spent doing this task in a given week that varied from 2-10 hours a week.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?
K. WHAT TEMPORARY TOTAL BENEFITS ARE IN DISPUTE?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Given the fact that the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his bilateral hands due to repetitive work activities, that arose out of and in the course of his employment by respondent and manifested itself on 5/12/14, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Pikor,
Petitioner,

vs.

NO: 13 WC 03607

16IWCC0071

Rosemont Exhibition Services,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, permanent partial disability, medical expenses, prospective medical expenses, penalties and attorney's fees and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 16, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 28 2016

Joshua D. Luskin

o-01/20/16
jdl/wj
68

Ruth W. White

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION
AMENDED

PIKOR, JOHN
Employee/Petitioner

Case# **13WC003607**

ROSEMONT EXHIBITION SRVICES INC
Employer/Respondent

16IWCC0071

On 3/16/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0206 GAINES & GAINES
GEORGE L GAINES
PO BOX 6345
EVANSTON, IL 60202

0210 GANAN & SHAPIRO PC
MICHELLE L LaFAYETTE
210 W ILLINOIS ST
CHICAGO, IL 60654

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
AMENDED ARBITRATION DECISION
19(b)

John Pikor
Employee/Petitioner

v.

Rosemont Exposition Services, Inc.
Employer/Respondent

Case # **13WC 03607**

Consolidated cases:

16IWCC0071

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ketki Steffen**, Arbitrator of the Commission, in the city of **Chicago**, on **October 8, 2014 and November 12, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **11/9/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**86,320.00**; the average weekly wage was $1,660.00.

On the date of accident, Petitioner was **51** years of age, ***single*** with **0** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**72,600.67** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**72,600.67**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,106.66/week for 27-3/7 weeks, commencing 11/10/2012 through 5/20/2013, as provided in Section 8(b) of the Act.

Respondent shall be given credit for $72,600.67 for TTD benefits paid under Section 8(b) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

3-16-15
Date
(Revised 19f)

ICArbDec19(b)

MAR 16 2015

Factual History

Petitioner, John Pikor, was 51 years old at the time of his uncontested work accident. Petitioner was working for Rosemont Exhibition Services as a trade show construction worker/carpenter. Petitioner describes his general job duties as difficult and heavy, with a lot of "aerial" work, involving the use of large crates of materials used in the construction of stages and sets, with occasional lifting of fifty to one hundred pounds.

He had been working as such for Respondent for nine years. On 11-9-2012, while in the process of assembling a trade show booth from a six foot ladder, the ladder broke and Petitioner fell to the floor on his outstretched arms. (Px1, p.12) He was stunned and was not able to arise unassisted due to pain. After he "came to," he noticed he was in a prone position on his outstretched arms and forehead. Most notable was his left arm, which was obviously broken and "twisted like a pretzel." He noticed contusions to his left and right wrists, right elbow and an inability to move his left shoulder. The employer called an ambulance which took Petitioner to Resurrection Hospital. There, Petitioner "reports pain to the left wrist and is concerned about deformity, pain right wrist, pain in the left elbow and pain of the right shoulder." He denied any pertinent medical history. He was found positive for joint swelling (Px1, p.8), "wound," small abrasion to left eyebrow, tenderness of the right shoulder with worsening with abduction of the humerus, minimal tenderness of the right wrist, dorsally displacement deformity of the left radius at the wrist and abrasion to the right fourth finger. Also noted was "wound" (p.9) and "abrasions or friction burn, multiple and unspecified sites." (p.6) Morphine was given. (p.9) Bilateral wrist x-rays were taken revealing an impacted comminuted fracture of the left distal radius (p.10) with "dorsal displacement of a portion of the distal radius fracture fragment. A portion of the articular surface of the fractured radius exhibits a dorsal tilt." (p.13) Petitioner was ordered to apply ice and heat, wear splints and not work until cleared by workman's comp. (p.27) He was ordered to follow up with Dr. Brian McCall of Northwest Orthopedics.

Petitioner testified that he had an "a real hard time" from the date of the accident through the first visit with Dr. McCall. He stated that he had not been treated with attentive care at the hospital and that he had great left-wrist pain, his cast was ill-fitting and that many of his pain complaints were ignored. He had cracked his incisor tooth and loosened another tooth during the fall. He testified that he had pain in his right shoulder, right elbow, right wrist, neck and face from the fall. He has no prior problems with any of the areas of his body.

Petitioner was examined by his Dr. McCall shortly after his release from hospital. The doctor noted "marked displacement" of the fracture fragments of the left radius, a contusion to the left eyebrow, and that "his left bottom incisor tooth has also cracked off." Other descriptions of the fracture were "a dinner fork deformity of the wrist," and "...marked displacement. This is shortened. It has 30 degrees of dorsal tilt and marked dorsal comminution." "This is quite a bad fracture pattern." Regarding the right shoulder, Dr. McCall found "pain with any ROM away from his body or forward. He is able to demonstrate 4+/5 strength to drop arm..." (Px2, p.14) Dr. McCall noted as follows: "...as he recovers from the left wrist we will start him into treatment of his right shoulder as a presumed strain to the rotator cuff..." He found Petitioner incapable of work. (p.15) After pre-operative testing, Petitioner underwent an open reduction internal fixation of the left distal radius, performed by Dr. McCall on 11-15-2012. Seven screws and a plate were used. (Px4) Petitioner's left upper extremity was immobilized for several weeks thereafter.

After surgery, Petitioner began a course of physical therapy at ATI. On December 31, 2012, Dr. McCall noted the condition of Petitioner's left wrist was improving; however, Petitioner complained the right shoulder was the main problem, he could not raise the arm whatsoever and he felt a clicking sensation when he moved the arm into certain positions. On examination, Dr. McCall noted Petitioner complained of pain with any range of motion, but range of motion was full. Dr. McCall felt Petitioner's effort on strength testing was "variable." He recommended a right shoulder MRI to rule out a rotator cuff tear. (PX. 2)

Dr. McCall opined the MRI study demonstrated no tearing of the supraspinatus or infraspinatus tendons and the biceps tendon was intact. Dr. McCall noted a diagnosis of right shoulder strain with weakness and pain

out of proportion to radiograph and physical findings. Dr. McCall opined the pain at the base of the neck was likely coming from the shoulder because there is no evidence of radicular symptoms or neurologic compromise and he did not have mechanism for injury to the neck. He recommended an injection to the shoulder and continued physical therapy. Petitioner also asked Dr. McCall whether he should consider applying for Social Security Disability benefits because he was off work for nearly a year due to an ankle sprain. (PX. 2—Dr. McCall's office note of January 21, 2013)

Around this time, Petitioner sought dental care at City Smiles. There, the fall was cited, and causal connection was found. (PX6, p.8) Fractures of teeth numbers 21, 22 and 23 were found. Extraction of the same was suggested (pp. 5 & 6) "for this prosthetic plan." This was to provide temporary relief in preparation for implants to be placed by an oral surgeon. (p.12) On 4-22-2013, after workers' compensation coverage was established, said teeth were extracted. (p.8) Oral surgical services were later rendered by Dr. Mlynski, and also paid by Respondent. (PX10; RX1)

Petitioner was referred to physical therapy. The ATI Physical therapy notes were admitted into evidence. (PX5) Initially Petitioner's complains were confined to Left wrist and right shoulder. Beginning January 9th, 2013, the records of ATI Physical Therapy noted Petitioner's complaints of neck pain. (Px5, p.8) On January 16, 2013, Petitioner complained of left shoulder pain at that same facility. (p.27)

In the progress note following the January 16, 2013 session, the therapist noted Petitioner "often display[ed]/report[ed] self-limiting behaviors/attitudes and compliance with [home exercise program] as instructed is questionable." She though pain was a limiting factor and recommended Petitioner complete two weeks of occupational therapy and then undergo an FCE. Throughout therapy, ATI noted the following:

- 12/20/2012: "Upon instruction, [Petitioner] was unable to correctly demonstrate [home exercise program exercises] today."
- 12/27/2012: Petitioner asked "Is it possible to feel worse today than yesterday?"
- 1/2/2013: Petitioner stated "Things are neither here nor there today. My MD ordered an MRI – I have yet to schedule it."
- 1/9/2013: "Questionable compliance [with home exercise program due to] inability to correctly demonstrate when periodically asked."

- 1/16/2013: Petitioner stated "Maybe I need to be on disability; it might be over a year before I am better."
- 1/24/2013: Petitioner was very argumentative.
- 1/30/2014: Petitioner stated "I refuse to do an FCE. I am not even discussing it."
- 1/31/2013: "I'm not going to do anything that might make me hurt."

(PX. 5) Petitioner testified the first therapist seemed to be pretty good, but he did not feel he improved as time went by. Petitioner expressed disagreement and dissatisfaction with the treatment he received at ATI.

On January 29, 2013, Dr. McCall documented a conversation with Petitioner's therapist. The therapist reported Petitioner often stated he could not lift a 1 lb. weight, will gesticulate and fail to perform a 1 lb. curl. She then observed Petitioner freely grab the entire coffee pot and comfortably pour a cup of coffee (documented by the therapist in the note for the January 28, 2013 session). The therapist recommended an FCE, and Dr. McCall agreed. (PX. 2) Petitioner refused to schedule the FCE until he spoke with his attorney. (PX. 5)

ATI noted on February 4, 2014 Petitioner called and stated he would schedule the last two appointments once he was ready and directed them not to call him. The therapist discharged Petitioner from the therapy program for non-compliance and decreased participation without maximum effort. (PX. 5)

When Petitioner returned to Dr. McCall on February 6, 2013, Petitioner presented Dr. McCall with a list of questions from his lawyer to go over his injuries, prognosis and treatment plan. No mention was made of the neck or left shoulder. Dr. McCall noted the right shoulder seemed to be Petitioner's greatest concern, but again noted the complaints were out of proportion to the previous physical findings and the radiographic findings. Dr. McCall noted Petitioner did not have adhesive capsulitis in the right shoulder. On February 25, 2013, Dr. McCall again noted the right shoulder was the most pressing issue for Petitioner. Dr. McCall questioned whether pain avoidance resulted in the isolated restriction to forward flex. Because Petitioner was unlikely to regain full function without formal physical therapy, Dr. McCall returned Petitioner to physical therapy. (PX. 2) Petitioner did not return to ATI. Instead, he presented to Athletico for physical therapy. Petitioner testified he argued with the therapist about what treatment was to be provided. He began physical therapy on March 18,

2013, requiring frequent rest breaks while completing the home exercise program and sighing heavily after most repetitions. At Athletico, the following was noted throughout treatment:

- 4/2/2013: Petitioner stated "he would like more treatment. You know that I have issues with both shoulders. I had trauma enough to snap my wrist so my shoulder obviously has pain."
- 4/5/2013: Petitioner responded with "no comment" when asked how he felt about the day's therapy session. When asked whether he would return for additional sessions, Petitioner replied "We'll see."
- 4/9/2013: Petitioner stated "My doctor thinks I'm better, but I am not." Petitioner refused to try a new exercise, stating "I'd better quit while I'm ahead."
- 4/22/2013: The therapist noted Petitioner had not been to therapy for over a week due to illness and flooding in his basement. Petitioner told the therapist he would call Dr. McCall and get the left shoulder added to his case.
- 4/24/2013: Petitioner reported moving boxes and soggy carpet after flooding in his basement
- 4/30/2013: Petitioner reported no pain in his shoulder "when something else is hurting me more" and was frustrated he was not being treated for the left shoulder and right wrist because "it sustained trauma too and it's broken."
- 5/2/2014: Petitioner reported he did not make an appointment with Dr. McCall, as he was previously directed. He also continued to groan loudly with all exercises.

(PX 7)

In his office note of May 8, 2013, Dr. McCall noted Petitioner was dismissed from ATI and had difficulty with Athletico. The therapists "noted some clinical inconsistencies in his exams, discord between subjective reports and clinical observations and are recommending an FCE at this time." Petitioner was concerned about residual pain, but Dr. McCall felt that 6 months post-injury much greater function and fewer complaints of discomfort were expected. Dr. McCall noted a paucity of findings on physical examination and imaging. He also noted the pathology in Petitioner's cervical spine is degenerative and not related to the fall. Dr. McCall recommended an FCE. (PX. 2) Petitioner represented to Athletico on May 20, 2013 for the FCE, but refused to complete it. He stated it would not benefit him in any way. (PX. 7)

Upon recommendation from a friend, Petitioner sought treatment with Dr. Vasquez on May 29, 2013. He previously saw her on both March 26, 2013 and May 24, 2013. The records are difficult to read, but she appeared to note complaints to the left wrist and right shoulder only at the first appointment. At the appointments in May, she noted complaints of bilateral shoulder pain with limited range of motion. She

diagnosed adhesive capsulitis. On June 13, 2013, she provided Petitioner with the names of three orthopedic physicians: Dr. Ellis Nam, Dr. Chadwick Prodromos and Dr. Roberto Levi. (PX. 18)

Petitioner chose Dr. Roberto Levi and saw him for the first time on August 5, 2013. Petitioner complained of pain to shoulders, the right wrist and the neck. On examination, Dr. Levi noted pain in both shoulders with resisted elevation in the direction of the supraspinatus, good strength and pain with abduction and external rotation. He also noted pain with range of motion to the cervical spine, but no neurologic findings. For the right wrist, Dr. Levi noted no deformity, swelling and full range of motion, but complaints of pain. Dr. Levi diagnosed a left distal radius fracture, right wrist sprain and tendinitis to both shoulders. He recommended medication management and physical therapy. (PX. 19)

Petitioner continued under Dr. Levi's care through November 13, 2013. Petitioner testified treatment initially seemed to help the pain. Petitioner testified the treatment never progressed beyond whirl pool session, stretching and manipulation. Petitioner testified the pain remained. On examination, Dr. Levi noted Petitioner complained of pain with every movement of the neck and both shoulders. He suggested an FCE, but Petitioner did not want for one to be done. Dr. Levi noted no significant improvement despite extensive physical therapy. Because Petitioner refused to undergo the FCE, Dr. Levi discharged Petitioner from care and released him to return to work without restrictions. (PX. 19) Petitioner admitted he refused to do the FCE because he did not want to strain himself.

Pursuant to Section 12 and at Respondent's request, Petitioner presented to Dr. Pietro Tonino for evaluation on October 17, 2013. Dr. Tonino diagnosed bilateral shoulder pain and cervical discomfort. He related the condition of Petitioner's right shoulder to the November 9, 2012 injury because the complaints were immediately documented after the fall. He opined the left shoulder condition is not related to the fall because Petitioner made no such complaints until April of 2013 and had otherwise been using the left shoulder normally. Dr. Tonino recommended a 10 lb. lifting restriction until Petitioner completed a functional capacity evaluation,

which would determine whether additional treatment is necessary and determine his physical capabilities. (PX. 20)

In the meantime, Petitioner presented to the Midwest College of Oriental Medicine as well as Heartland Health Center for treatment. Without returning to Dr. Vazquez, Petitioner presented himself to Dr. Ellis Nam on June 5, 2014 for treatment. To Dr. Nam, petitioner complained of pain and stiffness to the neck, numbness in the fingers of both hands, decreased grip strength, shoulder pain and decreased range of motion and weakness. Dr. Nam opined the pain was coming from Petitioner's neck, but noted shoulder pain as well. Dr. Nam referred Petitioner to Dr. Song (a neck specialist), concluding the cervical condition/findings were the source of Petitioner's complaints. (PX. 23) Petitioner never scheduled an appointment with Dr. Song. After the evaluation with Dr. Nam, Petitioner then returned to Dr. Vazquez on June 27, 2013. Dr. Vazquez recommended a cervical MRI study be obtained and recommended Petitioner continued under the care of an orthopedic physician. (PX. 25)

The cervical MRI of July 22, 2014 demonstrated findings hypertrophy at C5-6 and C6-7 with significant foraminal compromise of the bilateral C6 and C7 nerve roots and 4 mm broad based posterior bulging disc ostepohyte complex at C5-6 with compression of the dural sac and mild flattening of the anterior surface of the spinal cord. (PX. 28)

Petitioner presented to Dr. Daniel Laich on September 18, 2014 for evaluation. He complained of increasing cervical and bilateral left greater than right upper extremity pain, numbness/tingling to the middle, ring and small fingers, increased functional weaknesses with dropping items an everything falling part since the November 9, 2012 work injury. Petitioner told Dr. Laich he had never had any MD, DO or chiropractor visits, an x-ray, MRI or missed days from work before November 9, 2012. Dr. Laich interpreted the MRI study to demonstrate cervical degenerative joint disease with segmental instability at C5-6 and C6-7. He recommended Petitioner give consideration to cervical intervention and referred him to psychology for evaluation and treatment. (PX. 33)

Petitioner testified he was unsatisfied with treatment he received from Dr. McCall, ATI, Athletico and Dr. Levi. He testified he was satisfied with treatment provided by Dr. Nam because he examined his neck and was forthright. He was also happy with the treatment Dr. Laich provided. Petitioner testified he is currently looking to secure a 2nd opinion with a cervical specialist and for treatment for his arms. Petitioner testified he has going neck and shoulder pain. He testified he cannot do anything that requires exertion, but he is fine when he stays still.

ANALYSIS/FINDINGS

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO F, WHETHER PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS THE FOLLOWING:

The Accident is uncontested and the Petitioner, John Pikor, suffered a fall from a ladder causing multiple injuries including a fracture to his left wrist, right shoulder strain and injuries to his mouth and teeth. The Respondent does not contest the facture injury to the left wrist or sprain injury to the right shoulder. The injury to the teeth and mouth is also noted and supported by the medical documentation. The initial emergency room records as well as the subsequent medical notes document Petitioner's complaints regarding these areas. The issue at bar is the causal connection between Petitioner's current cervical and left shoulder complaints.

Petitioner argues that the work accident have also caused injuries left shoulder and neck either due to aggravation of pre-existing condition or due to favoring the left wrist and right shoulder during the recovery. Petitioner takes objection with the documented medical history from the emergency room and from Dr. McCall stating that both records are incorrect and failed to note Petitioners complaints regarding these additional body parts. The first recorded mention of complaints regarding these contested injuries is from the physical therapy notes from ATI from January, 2013 and next from Dr. MCall's notes from February, 2013.

The medical history and hospital notes, therapy notes, doctor's notes and findings from x-rays, MRI and other tests have been submitted into the record. In brief, after extensive medical treatment that included setting and healing of his fractured wrist, dental implant work, extensive physical therapy, lab work and x-rays,

Petitioner returned to Dr. MCCall, his treating physican in May, 2013. Dr. McCall examined Petitioner and diagnosed him with a healed left wrist fracture, cervical spine degenerative joint disease and bilateral shoulder complaints consistent with tendinoisis. PX He noted a paucity of findings on physical examination and imaging relating to the causal connection between the left shoulder and the cervical complaints by the petitioner. He opined that the pathology in Petitioner's cervical spine is degenerative and not related to the fall. He directed to undergo an FCE. Petitioner represented to Athletico on May 20, 2013 for the FCE but refused to complete it, stating that it would not benefit him in any way. PX7. Two other physicians, including treating physician Dr. Levi and IME, Dr. Peitro found Petitioner to be at MMI relating to his left wrist and right shoulder injuries causally connected to the work accident and also recommended an FCE.

Petitioner proposes that under Illinois law, a competent person has a common law and statutory right to refuse all types of medical treatment of any kind, including life-saving and life-sustaining procedures. In Re Estate of Longeway, 133 Ill.2d 33, 44-45, 139 Ill.Dec. 780, 549 N.E.2d 292, 297 (1989). 755 ILCS 40/5 (West 1996). This same principle holds true for non-physician health care professionals. See Prairie v. University of Chicago Hospitals, 298 Ill.App.3d 316, 327, 698 N.E.2d 611, 619, 232 Ill.Dec. 520, 528. Therefore, his refusal to submit to the FCE should not affect his rights under the Act. Additionally, Petitioner argues, that in spite of the no causal connection opinions of the doctors, it is obvious and apparent that the severity of the fall caused and aggravated the injuries to the left shoulder and the neck. In support he points out that he had no documented complaints to these body parts prior to his accident of 11/9/12 and that the medical records from physical therapy document his complaints to these body parts in early January, 2013.

The Arbitrator recognizes and agrees that the Petitioner had wide latitude in directing his own medical treatment, including refusing treatment. However, he still bears the burden of proof to show that his current condition is causally related to his work accident. The Arbitrator finds that there is no causal connection between the current left shoulder and cervical complaints and the work accident. In so finding, the Arbitrator notes significant inconsistencies between Petitioner's testimony and the medical records, the lack of objective

medical findings to support causal connection the large gap in time between Petitioner's injury and his complaints relating to these body parts and based on the credibility assessment of the Petitioner.

To infer causation from the nature and/or severity of the fall in spite of the well-reasoned, credible findings of Dr. McCall and Dr. Levi is speculative. Illinois Courts have repeatedly held that the standards in decisions must not be contingent, speculative or merely possible, but there must be such a degree of probability as to amount to a reasonable certainty that such causal connection exists. Manion v. Brant Oil Co., 85 Ill.App.2d 129, 229, N.E.2d 171, 175 (4th Dist. 1967). The evidence in this case does not support such a finding as there is a long gap between the accident and the reporting of the injuries. The MRI and films all point to long degenerative changes in the cervical spine and Petitioner's argument of the left shoulder injury being caused by favoring the right shoulder is speculative.

Even if the Petitioner's condition is pre-existing, the issue of aggravation or acceleration of a preexisting condition because of an accident is a factual determination to be decided by the Industrial Commission. *Roberts v. Indus. Comm'n*, 93 Ill. 2d 532, 538, 67 Ill. Dec. 836, 445 N.E.2d 316 (1983); *Caterpillar Tractor Co. v. Indus. Comm'n*, 92 Ill. 2d at 36-37; *Caradco Window & Door v. Indus. Comm'n*, 86 Ill. 2d 92, 99, 56 Ill. Dec. 1, 427 N.E.2d 81 (1981). The Arbitrator finds that the Petitioner has failed to show sufficient support for such a determination either through his testimony or through medical records or opinions.

It is Petitioner's burden to prove by a preponderance of the credible evidence there is a causal connection between his current condition of ill-being and the November 9, 2012 work injury. *See, Rambert v. Industrial Commission*, 133 Ill.App.3d 895, 477 N.E.2d 1364, 87 Ill.Dec. 836 (1987). Petitioner has failed to meet this burden as there are no complaints of neck pain at either the emergency room or to Dr. McCall. In fact, Dr. McCall's records make reference to Petitioner presenting to him with a list of questions in February 6, 2013. Complaints of left shoulder or of neck pain were again not noted. The Arbitrator finds Dr. McCall's subpoenaed medical records reliable and Petitioner's argument unpersuasive.

Instead the Arbitrator is persuaded by Dr. McCall's finding that there is a lack of corroboration between Petitioner's subjective complaints of pain and the objective findings. He noted a lack or paucity of clinical findings on May 8, 2013. He therefore concluded Petitioner should be capable of much greater function and be less pain focused 6-months post injury. He previously commented Petitioner might have residual complaints that could not be addressed with treatment, suggesting secondary gain motivations were behind Petitioner's complaints. The therapists at ATI and Athletico noted the same inconsistencies as Dr. McCall and also recommended an FCE, likely to determine the extent of effort put forth by Petitioner and establish a valid determination of his physical capabilities.

The Arbitrator finds Petitioner was focused on disability. His repeated injury to ATI regarding getting Social Security Disability at a very early juncture in his recovery is noted. The therapist and several physicians indicate that the Petitioner's efforts towards his recovery were lack-luster. To note just a few points, in addition to Petitioner being dissatisfied with most of his physicians and therapist, he is unable to demonstrate the home therapy program on 12/20/12 and states that "I'd better quit while I'm ahead" when asked to try a new exercise on 4/9/13 by ATI, PX5, PX5. On the other hand, the the therapy notes clearly document that on January 29, 2013 Petitioner was comfortable lifting and pouring a full coffee pot after stating that he could not list a 1 lb. weight during his therapy and on 4/24/13 Petitioner reported moving boxes and soggy carpet after flooding in his basement. The therapist's finding of non-compliance and the documentation of Petitioner 'unusual' behavior weighs heavily in the Arbitrator's assessment of Petitioner's credibility as does his court room testimony regarding his current subjective complaints stemming from his work accident.

The preponderance of the credible evidence established Petitioner sustained injuries to the left wrist (distal radius fracture) and right shoulder (strain) as a result of the November 9, 2012 work injury. The evidence further established Petitioner reached maximum medical improvement and was discharged from care as of May 20, 2013 when he refused to participate in the FCE recommended by both the Athletico therapist and his

treating physician Dr. McCall. Petitioner has failed to meet his burden that he continues to suffer a disability from his work accident or that this accident required further medical treatment after May 20, 2013.

The Arbitrator finds the opinions and recommendations of Dr. McCall, Dr. Tonino and Dr. Levi more credible than those of Dr. Vazquez, Dr. Nam and Dr. Laich. Dr. Tonino did not relate the condition of the left shoulder to the November 9, 2012. There is no opinion to the contrary in the records. Dr. McCall did not relate the cervical condition to the November 9, 2012 injury. There is no opinion to the contrary in the record. The preponderance of the credible evidence established Petitioner sustained injuries to the left wrist (distal radius fracture) and right shoulder (strain) as a result of the November 9, 2012 work injury. The evidence further established Petitioner reached maximum medical improvement and was discharged from care as of May 20, 2013 when he refused to participate in the FCE recommended by both the Athletico therapist and his treating physician Dr. McCall. There is no evidence to support continued disability and the need for medical treatment after May 20, 2013, especially when Dr. Levi and Dr. Tonino also recommended the FCE. Based on the foregoing, the Arbitrator finds Petitioner failed to prove his current condition of ill-being is causally related to the November 9, 2012 work injury.

Based on the foregoing, the Arbitrator finds Petitioner failed to prove his current condition of ill-being is causally related to the November 9, 2012 work injury.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO J, WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY, THE ARBITRATOR FINDS THE FOLLOWING:

Petitioner reached maximum medical improvement and an FCE was recommended by Dr. McCall on May 8, 2013. Petitioner presented to Athletico on May 20, 2013 and he refused to complete the FCE, stating doing so would be of no benefit to him.

The Arbitrator finds that the treatment Petitioner sought after May 20, 2013 was not medically necessary, reasonable or causally connected to the work accident. Specifically, regarding the treatment provided by Dr. Vasquez, Dr. Levi, Dr. Nam, and Dr. Laich the Arbitrator finds that same. When Dr. Levi evaluated

Petitioner on August 5, 2013, he made no mention of the treatment Petitioner received under the direction of Dr. McCall to date. Therefore, the Arbitrator assigns far lesser weight to the opinion of Dr. Levi as he is lacking complete and crucial medical history. He appeared unaware of the physical therapy at either ATI or Athletico. He appeared unaware of Dr. McCall's and the therapist's recommendation for an FCE. He appeared unaware of Petitioner's lack of cooperation with therapy at ATI and Athletico. Additionally, Petitioner complained of pain to both shoulders and the neck, conditions unrelated to the work injury at this point and conditions for which Dr. Levi provided treatment.

As for related treatment, the following providers reflected a $0.00 balance on the exhibits submitted into evidence by Petitioner: (1) Resurrection Healthcare; (2) Northwest Orthopedics & Sports Medicine; (3) Resurrection Healthcare; (4) Belmont Surgery Center; (5) City Smiles; and (6) Athletico. The Arbitrator notes ATI Therapy reflected an unpaid balance of $2,964.36. Respondent's Exhibit No. 3 was the Fee Schedule Analysis for the ATI bills. Based on the fee schedule analysis, the Arbitrator finds the ATI bill was paid in full and no additional payment is owed to this provider.

Having found a lack of causal connection between the injury and Petitioner's condition of ill-being after May 20, 2013, the Arbitrator need not address the issue of whether Petitioner exceeded his choice of physicians under Section 8(a). The Arbitrator finds, though, that clear evidence of a chain of referral for treatment with Midwest College of Oriental Medicine, Dr. Nam, Heartland Health Center and Dr. Laich is lacking.

Based on the foregoing, the Arbitrator finds Petitioner is not entitled to additional compensation for treatment rendered after May, 2013 or for reasonable and necessary medical expenses incurred prior thereto which are over and above the fee schedule.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO K, WHETHER PETITIONER IS ENTITLED TO PROSPECTIVE MEDICAL, THE ARBITRATOR FINDS THE FOLLOWING:

Petitioner is seeking prospective medical treatment in the form of a 2nd opinion for his cervical spine and other unspecified treatment for his shoulders. For the reasons set forth above for issues F and J, the Arbitrator denies Petitioner's request for prospective medical treatment.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO L, TEMPORARY TOTAL DISABILITY BENEFITS, THE ARBITRATOR FINDS THE FOLLOWING:

Petitioner was temporarily and totally disabled beginning on November 10, 2012 through May 20, 2013 when he refused to undergo the FCE for a period of 27-3/7 weeks and was entitled to and paid TTD for the same period.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO M, WHETHER PENALTIES AND FEES SHOULD BE IMPOSED ON RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING:

Penalties and fees are denied. Respondent denied liability based on the opinions and recommendations of Dr. McCall, Dr. Levi and Dr. Tonino. The Arbitrator finds that their opinions are credible, well-reasoned and supported by objective medical findings. The facts that all three physicians reached a similar conclusion further strengths their voice. Respondent's reliance on their opinions is also found to be reasonable.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO N, WHETHER RESPONDENT IS DUE A CREDIT, THE ARBITRATOR FINDS THE FOLLOWING:

Respondent paid $72,600.67 in benefits. Petitioner was entitled to TTD for a period of 27-3/7 weeks at a weekly benefits rate of $1,106.66. Petitioner was therefore entitled to receive a total of $30,354.58. Respondent shall therefore receive a credit of $42,246.09 against any future benefits due to Petitioner.

Signature of Arbitrator

3/16/15
Date

(Reused 19f)

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Priscilla Kelly,
Petitioner,

vs. NO: 98 WC 07320

16IWCC0072

Jewel Food Stores,
Respondent.

DECISION AND OPINION PURSUANT TO §19(h) and 8(a)

This matter comes before the Commission on Petitioner's §19(h) and 8(a) Petition. The underlying claim arises out of a September 20, 1997 accident which was originally tried before Arbitrator Kinnaman in May 2005. On June 13, 2005, Arbitrator Kinnaman awarded Petitioner $16,929.27 for connected medical services, 92 & 1/7 weeks of TTD for time lost during calendar years 1997-1999, and permanent partial disability of 45% loss of use of the person as a whole. On review, the Commission issued a Decision (case reference number 07 IWCC 1154) on August 31, 2007 reducing the permanency award to 37.5% loss to the person but affirming the other aspects of the Arbitrator's award. The claimant originally filed the 19(h)/8(a) Petition on December 7, 2009; following numerous continuance requests, a hearing was eventually held before Commissioner Tyrell in Geneva on September 26, 2014 and the hearing was continued to January 30, 2015 for additional evidence before proofs closed on that latter date.

The record demonstrates that at the time of the original accident, the claimant was employed by Respondent as a deli clerk/manager. On September 20, 1997, she was placing product in the cooler and felt radiating pain from her left hand up her arm. She sought treatment at Mercy Center on October 4, 1997 for pain in her left scapula/shoulder and thereafter began shoulder and neck treatment which culminated in cervical discectomy and fusion at C6-7 in May 1998, followed by a partial hemilaminectomy and foraminotomy at that level in October 1998. She reported ongoing pain complaints thereafter despite the surgery. On April 15, 1999, an FCE suggested she could occasionally lift 20 pounds and no more than 10 pounds frequently, putting her at the light functional demand level. Thereafter, she continued to treat for myofascial pain syndrome with trigger point injections and prescriptions for Lidoderm and Duragesic patches, Neurontin, Oxycontin, and anti-inflammatory medications. The Arbitrator observed in her decision, and the records reflect, that several doctors expressed concern over Petitioner's chronic narcotic use. At the original hearing on May 18, 2005, the claimant testified she continued to suffer pain in her neck and left shoulder; however, she had been working as a customer service manager for FTD beginning in 1999, had continued to work full time in that capacity for approximately six years with occasional overtime, and was earning comparable wages to her pre-injury occupation.

Following the original hearing and the August 31, 2007 issuance of the Commission's Decision, Petitioner filed the instant 8(a), 19(h), 19(k), 19(l), and 16 fee petition on December 7, 2009. However, the review hearing on these petitions was not initiated until September 26, 2014, and proofs were not closed until January 30, 2015, clearly more than 30 months after the Commission Decision was entered; at the September 2014 hearing date, Respondent noted the timely filing of the 19(h) but objected to proceeding under §19(h), based upon the time limitations found in that provision and noting that the hearing was at that point 85 months after the issuance of the Commission's Decision. At that 2014 hearing date, the Petitioner objected to the admission of Dr. Candido's §12 report, so proofs were left open until January 30, 2015, for admission of the transcript of Dr. Candido's deposition as well as additionally obtained medical records obtained from Dr. Chenelle's office. These records included documentation of treatment for a back injury Petitioner suffered in a fall at a casino in 2009. Petitioner insists that this fall did not affect her shoulder or neck, despite two lumbar surgeries (including multi-level fusion) and a settlement of her claim against the casino for $300,000.

At the 19(h)/8(a) hearing, the claimant testified she worked for FTD following the original arbitration hearing until January 2009, when she ceased working. She had treated with multiple medical providers following the original hearing, paying some expenses personally and routing others through group health insurance. While the Arbitrator's original decision noted that the claimant was continuing to treat with Dr. Chinthagada, the petitioner admitted to having compliance problems with his treatment protocol, culminating in his discharging her from the pain program shortly after the original hearing date in 2005, for violation of the program's narcotics control standards, including usage of multiple pharmacies and seeking additional medications from other providers.

The petitioner asserted a history of medical treaters including Dr. Lewis, whom she was suggested to see by the respondent's store manager, and who referred her to Dr. Glessner, Dr. Krieger, and Dr. Mazur, who referred her to Dr. Witt. She also saw Dr. Schiffman on her own, who referred her to Dr. Kazan. She acknowledged Section 12 examinations with Dr. Shea, Dr. Chenelle, Dr. Konowitz, and Dr. Candido. The claimant chose to treat with Dr. Chenelle, who performed neck surgery and referred her to Dr. Chinthagada. She thereafter saw Dr. Branshaw, who referred her to Dr. Oken, who

referred her to a Dr. Mocek in Arkansas, where the petitioner was considering relocating, and she also sought treatment at Delnor Hospital.

The petitioner testified that after the original accident she worked for FTD for 11 years, achieving the rank of a director running 3 departments. Her job there entailed interstate travel, extensive computer work, and routine twelve hour workdays. She asserted that she had not worked anywhere since January 2009, but that FTD did not terminate her until 2010, when she failed to return from a leave of absence. She received both short and long term disability after she ceased work and applied for Social Security Disability, which was granted in July 2011 retroactive to 2009. She testified she had not looked for employment since she stopped working.

Dr. Oken testified in his 2014 deposition that he first began treating the claimant on September 20, 2005. He initially noted medication usage, but in 2009 recommended trigger point injections to the neck, which were performed. While the petitioner had continued use of medication following the original hearing, Dr. Oken admitted her medication usage increased following the 2009 fall at the casino, noting both dosage increases as well as the prescription for the Flector patch, which had not been prescribed before then. He opined that this could be due to back problems, or to tolerance for opiate usage. He continued to treat her until January 2014, and noted that his later treatment notes reflected medical care for both her low back as well as her neck. He observed her strength and reflexes were normal, but opined she was not capable of gainful employment. Notably, the Commission observes that his original intake records from 2005 also include complaints of low back symptoms.

Dr. Konowitz performed a Section 12 examination at the Respondent's request in 2010. He noted waxing and waning symptoms which had periodically been treated with trigger point injections. At the time he saw her; she was recovering from a fall on a wet floor in a restaurant and was contemplating future lumbar surgery to address those symptoms. He assessed her with myofascial pain and recommended weaning her off narcotics. He concluded she could continue to work in a light duty capacity. In a supplemental report, he noted there had been no change in her neck and scapular conditions between December 2003 and May 2010.

Dr. Candido performed a Section 12 examination at the respondent's request. He generated a report, which was tendered to the claimant's attorney on November 11, 2011. No indication of an objection to the report was made either at the time or until the September 2014 hearing date, when a hearsay objection was made. The hearing was bifurcated to allow the deposition. Dr. Candido noted her medical history and symptom patterns. He opined that her primary complaints were related to myofascial pain, not related to the original accident; he noted that there were no findings of cervical radiculopathy or discogenic pain, which would be needed to make a finding of causal connection. He further noted that the treatment provided by Drs. Branshaw and Oken was not related to cervical stenosis or cervical nerve root compression or irritation, and as such was not related to the workplace accident. He recommended she be weaned off opiates and advised that cessation of smoking would also assist in the resolution of the myofascial muscular pain. He further opined that a pain pump would not be indicated for a diagnosis of myofascial pain given current medical literature. He believed she could work light duty as outlined by Dr. Konowitz and in the earlier original treatment records.

16IWCC0072

The Commission concurs with the analyses rendered by Drs. Konowitz and Candido and does not assess a material change in the petitioner's physical condition related to the original injury which would require amendment to the permanent partial disability assessment earlier rendered in this case. Obviously, the petitioner has had ongoing health concerns, including two significant lumbar surgeries, but these are found to be related to an independent intervening incident and not related to the injury in the case at bar. In accordance with the above reasoning, the Petitioner's request for additional benefits under 19(h) benefits is denied.

Petitioner requests payment of medical expenses under Section 8(a); she admits that some of her bills were paid by Medicare, some by her now ex-husband's group insurance, and asserts that some were paid out of pocket. Respondent argues against liability for the claimed expenses in at least three ways: (1) Petitioner exceeded the "two-doctor rule" per Section 8(a) of the Act; (2) Petitioner failed to prove the identified treatment was reasonable, necessary and causally related to her work accident; and (3) the medical bills should not have been admitted as offered.

The Petitioner testified that she first treated with Dr. Lewis, to whom she was referred by her general manager. Petitioner's attorney referred to Dr. Lewis as a "co-choice." The Commission finds sufficient evidence in the record to support a finding that Dr. Lewis was respondent-referred. The Petitioner testified she sought treatment on her own from Dr. Schiffman, who would be her first choice of provider and who also referred her to Dr. Kazan.

Petitioner urges the Commission to find that Dr. Chenelle was also respondent-referred and should therefore be excluded from the choice of physicians analysis. The Commission disagrees with this argument. Respondent originally sent Petitioner to Dr. Chenelle for a §12 exam, not for treatment. It was only at the Petitioner's own request that Dr. Chenelle became a treating physician, eventually performing her second cervical surgery, and therefore Dr. Chenelle is the claimant's second choice of physician. Dr. Chinthagada's treatment course was a referral from Dr. Chenelle, but Dr. Chinthagada discharged Petitioner for violating her opioid contract with his office, which both ended that referral chain and further suggests that the treatment the claimant was interested in pursuing, was not medically supported.

The Petitioner then sought treatment with Dr. Branshaw, who referred her to Dr. Oken, who in turn has now referred her to Dr. Mocek in Arkansas. She has also sought ongoing care at Delnor Hospital. These providers are all outside the Section 8(a) referral chains; the medical bills associated with their offices are therefore denied.

The claimant attempts to argue, in the alternative, that Drs. Kreiger and Oken are both affiliated with Marianjoy and are therefore in the same practice or office setting and thus are a singular provider. The Commission does not find that argument persuasive, given that Dr. Oken testified in his deposition that Dr. Kreiger serves in a separate office and the two do not share records or patients, and that Dr. Kreiger did not refer the claimant to Dr. Oken.

Medical records and claimed expenses following the unrelated 2009 fall in the casino demonstrate ongoing and increasing use of pain medication following that time, and the Commission notes that such would be unrelated to the original injury, despite the claimant's dubious denials of increased symptoms to that anatomy. The records reflect extensive treatment for her low back with Drs. Branshaw, Chenelle, and Oken; the claimant admitted she settled her PI case against the casino for $300,000, although she testified she only cleared $100,000 after the medical liens and attorneys' fees. Dr. Oken's records in January 2014 clearly note ongoing complaints in the lower back and thighs; her allegations that her ongoing disability related exclusively to the 1997 accident defy credulity. Moreover, the claimant has persisted in her attempts to secure ever-increasing narcotic medication despite the persuasive recommendations of Drs. Chinthagada, Konowitz, and Candido.

The Petitioner identified medical bills and offered them as PX "G" and the Respondent objected to the admission of the exhibit. These include:

1) Dr. Branshaw, $2894.00;
2) Marionjoy/Dr. Oken, $36,294.00;
3) Delnor Hospital, $58,630.23;
4) IWP, $36,741.42;
5) Unicare Live and Health Insurance Group Health Lien, $37,805.43;
6) Pharmacy Bills (assorted), $148,319.50

The bills related to Dr. Branshaw and Marianjoy were contained in the subpoenaed exhibits containing the medical records of those providers, but the remaining bills were neither certified nor produced subject to a subpoena. Petitioner testified that she provided Respondent's billing information to her medical providers, but Respondent denied receiving bills prior to hearing, either directly from the providers or from Petitioner's attorney.

The expenses associated with Dr. Branshaw, Marionjoy/Dr. Oken, Delnor Hospital, and their prescriptions are denied as excessive in accordance with the above reasoning. The pharmacy bills appear related to the above providers and primarily post-date the intervening accident and are therefore denied. Any costs borne by the group carrier which apply against Dr. Lewis or his referral chain shall be paid by the respondent to the claimant pursuant to Section 8.2 of the Act; expenses paid to Drs. Branshaw and Oken, or Delnor Hospital, are denied as noted above, as are expenses related to those pharmacy bills.

The Petitioner requests the Commission assess penalties and fees against Respondent for failure to pay medical bills and disability benefits following the Commission's Decision. However, while Arbitrator Kinnaman found, and the Commission confirmed, that Dr. Chinthagada's pain management treatment was reasonable and necessary and causally related to Petitioner's work injury, Dr. Chinthagada thereafter discharged the claimant from treatment for noncompliance, having violated the narcotics control protocol. Dr. Oken did not review Dr. Chinthagada's treatment records and began an independent program, for which the Respondent was not liable. The medical bills were not provided to the Respondent, despite repeated requests, until the date of the hearing. The Respondent further correctly noted a significant intervening incident and secured Section 12 examinations of the claimant contravening her medical care, and properly objected to perceived violations of Section 8(a) referral requirements. The respondent's position was neither vexatious nor unreasonable; the request for penalties and fees is denied.

16IWCC0072

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §19(h) petition is denied and the 8(a) petition is granted to the extent discussed in the above Decision.

IT IS FURTHER ORDERED BY THE COMMISSION that the Petitioner's request for penalties and fees are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 28 2016

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-12/15/15
jdl
68

STATE OF ILLINOIS)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
JEFFERSON		☐ PTD/Fatal denied
	☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

George Fred Engleby,

Petitioner,

vs. NO: 09 WC 15433

Western Express,

Respondent,

16IWCC0073

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses both incurred and prospective,temporary total disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission finds there is no causal connection between the Petitioner's cervical spine condition and the accident on November 9, 2009.

The Commission does find a causal connection between the accident on November 9, 2009 and Petitioner's left carpal tunnel syndrome.

16IWCC0073

Petitioner had a prior cervical surgery in May of 2001. This involved the C5-6 disc level. Dr. Kube admitted under cross-examination, by virtue of this fact alone, there is a 20% to 30% of developing adjacent level disc disease at C4-5. He admitted that that could be the reason he is prescribing the surgery in 2012, 3 years after the accident on March 9, 2009. (Petitioner Exhibit 12 Pgs. 37-38)

Dr. Vaught, an orthopedic spine surgeon, treated Petitioner's cervical spine from August 12, 2009 through November 2, 2009. He reviewed a cervical spine MRI performed on July 29, 2009 in which the radiologist interpreted it as showing a mild bulge at C4-5. He felt that the MRI showed no surgical pathology. Dr. Vaught found that Petitioner was at maximum medical improvement for his cervical strain on November 2, 2009. (Respondent Exhibit 2)

Petitioner did not see another doctor regarding his cervical spine until he saw Dr. Morgan, who had been treating him for his left shoulder, on November 4, 2011. Petitioner complained of left arm problems and Dr. Morgan felt that it was the result of the 2001 cervical surgery. Dr. Morgan saw Petitioner again on January 13, 2012 and Petitioner complained of "acute pain" in his cervical spine. (Petitioner Exhibit 1) Dr. Morgan testified in his deposition that "acute" means "recent pain." (Petitioner Exhibit 2 Pg. 51)

Dr. Kube testified that in his opinion Petitioner needs a C4-5 decompression and fusion surgery. However, he did not see Petitioner until April 4, 2012 over 3 years after the accident. Dr. Kube had not read any of Petitioner's prior treating records and based his causation opinion on the Petitioner's history. Dr. Kube, at his deposition was asked to pull up the June 9, 2009 Cervical MRI as well as the 2012 Cervical MRI. Although the radiologist in the 2009 MRI found a mild stenosis compared to the significant stenosis at C4-5 in the 2012 MRI, he felt that the first radiologist was "wrong." (Petitioner Exhibit 12 Pgs. 43-45) Dr. Kube opined that the November 2009 accident made his symptomology worse and led to the current symptomology requiring the surgery. The accident is "at least" a contributing cause. (Petitioner Exhibit 12 Pgs. 27-28)

The Commission finds Dr. Kube's opinion unpersuasive and finds Petitioner's testimony regarding the intervening accident lacking in credibility. First, he sees the Petitioner almost 3 years after the accident. Secondly, he bases his opinion strictly on Petitioner's testimony. Petitioner told Dr. Kube that there was no real change in his neck pain following the car wreck on May 10, 2010. (Petitioner Exhibit 12 Pgs. 6-8) Yet Dr. Morgan saw Petitioner again on January 13, 2012 and Petitioner complained of "acute pain" in his cervical spine. (Petitioner Exhibit 1) Dr. Morgan testifies in his deposition that "acute" means "recent pain." (Petitioner Exhibit 2 Pg. 51) Third, the Doctor admits that he had no idea what the impact was involved in the auto accident. Fourth, he also admitted after reviewing the hospital records following the car wreck that Petitioner was complaining about neck pain. Fifth, he also admitted that after reviewing the hospital records the car wreck was pretty severe and that if someone's face hit the steering wheel causing facial fractures this would put stress and loading on the cervical spine. (Petitioner Exhibit 12 Pgs. 59-61)

16IWCC0073

The Commission also finds that per the radiologists' reports, the MRI's of 2009, and 2012 show a significant change in Petitioner cervical spine.

Therefore, the Commission finds that Petitioner has failed to prove a causal connection between his current condition as it pertains to his cervical spine and the accident of March 9, 2009. Respondent is not responsible for any medical bills regarding the Petitioner's cervical spine past the November 2, 2009 date when Dr. Vaught found Petitioner at maximum medical improvement.

Petitioner is entitled to temporary total disability from March 27, 2009 through February 12, 2013 based on the shoulder surgery in2009 and his recovery therefrom.

In his deposition, Dr. Morgan was of the opinion that the Petitioner sustained a double crush syndrome of the left hand as well as carpal tunnel syndrome. Petitioner had no history of left hand symptoms prior to the March 9, 2009 accident. He recommended a release of the left hand. The March 9, 2009 accident aggravated the previous carpal tunnel condition because the symptoms escalated. (Petitioner Exhibit 2 Pg. 30- 32)

Therefore, the Commission finds that the Respondent is responsible for the left carpal tunnel release as proposed by Dr. Morgan. It also finds that Respondent is liable for any temporary total disability that results from said surgery.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $517.29 per week for a period of 198 1/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the Petitioner for the medical expenses under §8(a) of the Act and 8-2 as they pertain to the left carpal tunnel release performed by Dr. Morgan. Cervical spine surgery as prescribed by Dr. Kube is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

16IWCC0073

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 8 2016

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

HSF
O: 12/1/15
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

ENGLEBY FRED, GEORGE
Employee/Petitioner

Case# **09WC015433**

WESTERN EXPRESS
Employer/Respondent

16IWCC0073

On 3/16/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0536 RON D COFFEL & ASSOC
502 W PUBLIC SQUARE
PO BOX 366
BENTON, IL 62812

0283 JELLIFFE FERRELL & MORRIS
KELLY R PHELPS
108 E WALNUT ST PO BOX 406
HARRISBURG, IL 62946

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# ARBITRATION DECISION
19(b)

George Fred Engleby
Employee/Petitioner

Case # 09 WC 15433

v.

Consolidated cases: n/a

Western Express
Employer/Respondent

16IWCC0073

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was originally heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on November 8, 2013. The parties waived a full Decision, but this matter was remanded to the Arbitrator for a full Decision. After reviewing all of the evidence that was presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On March 9, 2009, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being in regard to the left shoulder, left hand and neck is causally related to the accident.

In the year preceding the injury, Petitioner earned $40,348.88; the average weekly wage was $775.93.

On the date of accident, Petitioner was 54 years of age, single with 0 dependent child(ren).

Petitioner has not received all reasonable and necessary medical services.

Respondent has not paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $70,330.20 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $70,330.20.

Respondent is entitled to a credit of $27,484.83 under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 22, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of $27,484.83 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for the medical treatment recommended by Dr. Richard Kobe including, but not limited to, cervical fusion surgery and the medical treatment recommended by Dr. Richard Morgan including, but not limited to, left hand surgery.

Respondent shall pay Petitioner temporary total disability benefits of $517.29 per week for 240 4/7 weeks commencing March 27, 2009, through November 8, 2013, as provided in Section 8(b) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator
ICArbDec19(b)

March 9, 2015
Date

MAR 16 2015

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim both of which alleged Petitioner sustained accidental injuries arising out of and in the course of his employment for Respondent. The Application filed in 09 WC 15433 alleged that Petitioner sustained an accident during the course of employment on March 9, 2009, which caused injuries to the neck, left shoulder and left hand (Arbitrator's Exhibit 3). The Application filed in 12 WC 04127 alleged that Petitioner sustained repetitive trauma to both hands which manifested itself on January 20, 2012 (Arbitrator's Exhibit 4). These cases were consolidated and tried on November 8, 2013, in a 19(b) proceeding in which Petitioner sought an order for payment of temporary total disability benefits and medical bills as well as prospective medical treatment.

At the time these cases were tried, counsel for both Petitioner and Respondent waived having the Arbitrator issue a written decision with findings of fact and conclusions of law. The Arbitrator's Decisions in both cases were filed on January 3, 2014. In case number 09 WC 15433, the Arbitrator ruled in favor of the Petitioner and awarded payment of temporary total disability benefits to the date of trial and past medical bills as well as prospective medical treatment. In case number 12 WC 04127, the Arbitrator ruled in favor of Respondent and denied compensability.

Counsel for Respondent filed a review of the Arbitrator's Decision in case number 09 WC 15433 with the Workers' Compensation Commission. The Commission remanded the case to the Arbitrator directing him to issue a full decision with findings of fact and conclusions of law. Counsel for Petitioner did not file a review of the Arbitrator's Decision in case number 12 WC 04127. The Arbitrator directed the Petitioner and Respondent to file Proposed Decisions and they were received on February 17, 2015, and February 18, 2015, respectively.

Petitioner became employed by Respondent in July, 2007, and worked as a truck driver. On March 9, 2009, Petitioner was in the process of pulling on a tarp and he sustained an immediate onset of pain in his neck and left shoulder. Petitioner previously injured his right shoulder while employed by Respondent on April 12, 2008. At the time of the earlier accident, Petitioner injured his right shoulder while tarping a load. Subsequent to the right shoulder injury, Petitioner was treated by Dr. Richard Morgan, an orthopedic surgeon, who performed rotator cuff surgery. Petitioner had just returned to work in February, 2009, approximately one month before sustaining the accident of March 9, 2009.

In 2000, Petitioner underwent left carpal tunnel surgery by Dr. Keith Park. In 2001, Petitioner underwent a cervical fusion at C5-C6 which was performed by Dr. David Kennedy, a neurosurgeon. At trial, Petitioner testified that following both of these prior surgeries, he was able to return to work as a truck driver and had not received any ongoing medical care for a substantial period of time before March 9, 2009.

Subsequent to the accident of March 9, 2009, Petitioner was seen by Dr. Morgan on March 27, 2009. Petitioner informed Dr. Morgan about the accident and that he had symptoms in the left posterior cervical spine with radiation in the left trapezius/shoulder and down the left arm. Petitioner also advised Dr. Morgan that he had a prior cervical fusion but that he had been

asymptomatic until the accident. Dr. Morgan authorized Petitioner to be off work and ordered MRIs of both the left shoulder and cervical spine. In regard to the right shoulder, Dr. Morgan opined that Petitioner was at MMI and not subject to any restrictions for that condition (Petitioner's Exhibit 1).

At the direction of Respondent, Petitioner was examined by Dr. Mark Austin on March 31, 2009. Petitioner complained of left shoulder and neck pain. On clinical examination, Dr. Austin noted considerable muscular spasm in the left side of the neck. He suspected a re-injury of the C5-C6 fusion rather than a new cervical disc herniation (Petitioner's Exhibit 3).

MRIs of the left shoulder and cervical spine were performed on June 29, 2009. The MRI of the left shoulder revealed possible partial tears of the supraspinatus tendon. The MRI of the cervical spine revealed the prior fusion at C5-C6 and bulging of the C4-C5 disc. Dr. Morgan referred Petitioner to Dr. Kovalsky for the neck prior to treating the shoulder; however, Respondent did not authorize the visit with Dr. Kovalsky (Petitioner's Exhibit 1).

At the direction of Respondent's Nurse Case Manager, Petitioner was examined by Dr. Kevin Vaught, a neurologist, on August 12, 2009. Dr. Vaught evaluated Petitioner's spinal injuries and opined that Petitioner sustained cervical, thoracic and lumbar strains as result of the March, 2009 accident. He recommended physical therapy (Petitioner's Exhibit 4).

At the direction of Respondent, Petitioner was examined by Dr. Michael Milne, an orthopedic surgeon, on August 27, 2009. Dr. Milne the examined Petitioner primarily in regard to the left shoulder injury. He opined that Petitioner sustained a partial thickness rotator cuff tear as a result of the accident and that the accident aggravated her pre-existing impingement syndrome and AC joint arthrosis (Respondent's Exhibit 4; Deposition Exhibit 2).

Petitioner was seen by Dr. Morgan on September 24, 2009, and Dr. Morgan recommended Petitioner have further physical therapy (Petitioner's Exhibit 1). Petitioner received physical therapy during September and October, 2009, for his left shoulder and neck; however, Petitioner did not experience any significant improvement of his symptoms (Petitioner's Exhibit 6).

Petitioner was again seen by Dr. Vaught on October 5, 2009, and Dr. Vaught opined that neck surgery was not indicated; however, he opined that a lumbar MRI be performed. In regard to Petitioner's left shoulder injury, he deferred the determination of restrictions regarding that injury to the orthopedic surgeon. Dr. Vaught saw Petitioner again on November 4, 2009, and he opined that Petitioner was at MMI in regard to the cervical and thoracic injuries and that Petitioner should be evaluated by a physiatrist (Petitioner's Exhibit 4).

Dr. Morgan continued to treat Petitioner and, on October 22, 2009, he recommended that Petitioner have left shoulder surgery (Petitioner's Exhibit 1). Respondent declined to authorize same.

At Respondent's request, Dr. Milne prepared a supplemental report dated December 10, 2009, wherein he opined that a left acromioplasty and distal clavicle resection were medically reasonable (Respondent's Exhibit 4; Deposition Exhibit 3). Dr. Morgan continued to recommend

that Petitioner have left shoulder surgery; however, Respondent still declined to authorize same (Petitioner's Exhibit 1).

On May 17, 2010, Petitioner was in a motor vehicle accident in which the car he was driving struck a tree going approximately 35 to 45 miles per hour. Petitioner was subsequently treated at St. Louis University (SLU) Hospital for an L5 burst fracture, right rib fracture, right styloid process fractures and a nasal bone fracture. Petitioner did experience some neck pain and was provided with a cervical collar. However, while at SLU Hospital, Petitioner did not receive any additional testing or treatment for his cervical spine. Further, Petitioner did not receive follow-up care from the SLU doctors for the cervical spine (Respondent's Exhibit 1).

Subsequent to the car accident, Dr. Morgan deferred proceeding with left shoulder surgery. On January 12, 2011, Dr. Morgan performed left shoulder surgery which consisted of acromioplasty and distal clavicle resection (Petitioner's Exhibit 1). Following surgery, Petitioner received physical therapy, subacromial injections and work conditioning (Petitioner's Exhibit 8); however, Petitioner testified that the surgery did not believe his neck and left scapular pain.

At Dr. Morgan's direction, a functional capacity evaluation (FCE) was performed on June 13, 2011. The examiner concluded that Petitioner could work at a light physical demand level with no overhead lifting on a frequent or constant basis. The examiner noted Petitioner's job as a truck driver required him to lift heavy tarps and pull on chains and those duties were clearly not within his work restrictions. Further, the examiner noted that Petitioner did not exhibit any symptom magnification and he passed 100% of his validity criteria (Petitioner's Exhibit 8).

Dr. Morgan saw Petitioner on June 14, 2011, and he reviewed the FCE at that time. Dr. Morgan opined that Petitioner had a permanent lifting restriction of 20 to 25 pounds as well as no overhead activities. At that time, Petitioner also complained of bilateral numbness/tingling in both hands so Dr. Morgan ordered nerve conduction studies (Petitioner's Exhibit 1).

Nerve conduction studies were performed on July 13, 2011, which were positive for moderate to severe bilateral carpal tunnel syndrome but negative for cervical radiculopathy. Dr. Morgan saw Petitioner on July 19, 2011, and opined that Petitioner had double crush syndrome on the left side (Petitioner's Exhibit 1).

At the direction of Respondent, Petitioner was examined by Dr. Juan Carrillo, an orthopedic surgeon, on September 1, 2011. In regard to Petitioner's left shoulder condition, Dr. Carrillo opined that this was related to the accident and that Petitioner was not at MMI. He also opined that the carpal tunnel syndrome was not related to the accident because there was no mention of and in the medical records until June, 2011 (Petitioner's Exhibit 10; Deposition Exhibit 1).

Petitioner continued to be treated by Dr. Morgan and, when evaluated by him on January 13, 2012, Petitioner complained of pain in the cervical spine with radiation into the left trapezius and increased numbness in the left hand. On March 5, 2012, Dr. Morgan referred Petitioner to Dr. Richard Kube, a spine surgeon (Petitioner's Exhibit 1).

At the direction of Respondent, Petitioner was examined by Dr. R. Peter Mirkin, an orthopedic surgeon, on March 7, 2012. Dr. Mirkin and opined that Petitioner sustained a cervical strain as a result of the accident which had resolved. He noted that Petitioner had spondylitic disease and a neck fusion that pre-existed the accident. He opined that Petitioner had been at MMI since four to five weeks post accident and that Petitioner could return to work without restrictions (Respondent's Exhibit 5; Deposition Exhibit 2).

Dr. Kube initially saw Petitioner on April 4, 2012. On clinical examination, Dr. Kube noted paresthesia in the left arm in the C6 and C7 dermatomes. He ordered a new MRI and opined that the accident aggravated pre-existing degenerative disease and possibly caused a herniation (Petitioner's Exhibit 11).

An MRI was performed which Dr. Kube read on May 16, 2012. He noted that it revealed spinal stenosis at C4-C5 and C6-C7. He ordered physical therapy and a discogram (Petitioner's Exhibit 11).

Dr. Kube again saw Petitioner on September 26, 2012, and, at that time, Dr. Kube noted that Petitioner was having difficulties getting the discogram performed because it was not a procedure that Dr. Kube performed. He indicated that he wanted to review the FCE that was previously performed (Petitioner's Exhibit 11).

Dr. Kube subsequently reviewed the FCE and, on October 17, 2012, he opined that Petitioner could work light duty on a permanent basis barring any surgery that might improve Petitioner's situation. He ordered nerve conduction studies which were performed on November 6, 2012, which revealed a C-5 radiculopathy on the left side and bilateral carpal tunnel syndrome (Petitioner's Exhibit 11).

At the direction of Respondent, Petitioner was examined by Dr. Mitchell Rotman, an orthopedic surgeon, on January 14, 2013. Dr. Rotman opined that Petitioner's left shoulder condition, including the need for the surgery that was performed by Dr. Morgan, was not related to the accident of March 9, 2009. In regard to the cervical condition, Dr. Rotman opined that this was an acute problem that had an onset sometime between December 9, 2011, and January 13, 2012, and was not related to the accident. In regard to the carpal tunnel syndrome, Dr. Rotman opined that this was a chronic condition also not related to the accident. Finally, Dr. Rotman opined that Petitioner could return to work without restrictions (Respondent's Exhibit 6; Deposition Exhibit 2).

Dr. Kube performed a cervical epidural steroid injection on February 6, 2013, which gave Petitioner some temporary relief from his symptoms. When Dr. Kube saw Petitioner on March 18, 2013, he recommended that Petitioner have a decompression and fusion procedure performed at C4-C5 (Petitioner's Exhibit 11).

Dr. Milne was deposed on April 19, 2010, and his deposition testimony was received into evidence at trial. Dr. Milne's testimony was consistent with his medical report and he opined that Petitioner's left shoulder condition and the need for the surgery performed by Dr. Morgan were causally related to the accident of March 9, 2009 (Petitioner's Exhibit 9; pp 13-15).

Dr. Carrillo was deposed on January 19, 2012, and his deposition testimony was received into evidence at trial. Dr. Carrillo's testimony was consistent with his medical report and he stated that Petitioner's left shoulder condition was related to the accident of March 9, 2009; however, he also opined that the carpal tunnel syndrome was not related because this diagnosis was not made until June 14, 2011, approximately two years and three months post accident (Petitioner's Exhibit 10; pp 28-30, 40-42).

Dr. Mirkin was deposed on September 17, 2012, and his deposition testimony was received into evidence at trial. Dr. Mirkin's testimony was consistent with his medical report and he reaffirmed his opinion that the neck condition was not related to the accident of March 9, 2009. He opined that Petitioner's current neck symptoms were related to his pre-existing conditions of spondylitis and the prior fusion Dr. Mirkin agreed that he did not review the medical records of either Dr. Kennedy or Dr. Kube (Respondent's Exhibit 5; pp 9-10, 14).

Dr. Kube was deposed on April 10, 2013, and his deposition testimony was received into evidence at trial. Dr. Kube's testimony was consistent with his records regarding his treatment of Petitioner. In regard to the neck injury, Dr. Kube stated that it is common for neck injuries to manifest symptoms in the trapezius and shoulder and that there is significant crossover when there is also a shoulder injury. In regard to causality, Dr. Kube opined that there was a 25 to 30% chance that the prior fusion was the cause of Petitioner's current neck condition; however, he also opined that the accident of March 9, 2009, was, at least, a contributing cause of Petitioner's current condition and the need for the fusion surgery that he recommended (Petitioner's Exhibit 12; pp 11, 27-30).

Dr. Morgan was deposed on June 20, 2013, and his deposition testimony was received into evidence at trial. Dr. Morgan's testimony was consistent with his records regarding his treatment of Petitioner. Dr. Morgan opined that Petitioner had C5 radiculopathy and a possible C4-C5 disc, attritional changes in the rotator cuff, bilateral carpal tunnel syndrome and double crush syndrome on the left. In regard to causality, Dr. Morgan opined that there was a causal relationship between Petitioner's left shoulder condition and the double crush syndrome (inclusive of the left carpal tunnel syndrome) and the accident of March 9, 2009, but that the right carpal tunnel syndrome was not related. In regard to Petitioner's neck condition, Dr. Morgan did not opined as to causality but stated that he would defer to the experts in that area. He renewed his recommendation that Petitioner undergo left carpal tunnel surgery (Petitioner's Exhibit 2; pp 19-22, 27-32).

Dr. Rotman was deposed on July 15, 2013, and his deposition testimony was received into evidence at trial. Dr. Rotman's testimony was consistent with his medical report and he reaffirmed his opinions that none of Petitioner's conditions were related to the accident of March 9, 2009, and that Petitioner could return to work without restrictions (Respondent's Exhibit 6).

Respondent introduced into evidence video surveillance of Petitioner that was obtained on October 9, 2013, when Petitioner was observed putting various items in the back of a pickup truck and driving it afterward (Respondent's Exhibit 7).

At trial, Petitioner testified that subsequent to the prior carpal tunnel and fusion surgeries that he was able to return to work as a truck driver without restrictions and was not receiving any medical treatment for either condition for a significant period of time prior to March 9, 2009. In regard to the motor vehicle accident of May 17, 2010, Petitioner testified that he did not receive any diagnostic procedures or treatment for either his neck or left shoulder when he was hospitalized following the accident.

Petitioner has not been able to return to work and wants to proceed with the fusion surgery recommended by Dr. Kube and the left carpal tunnel surgery recommended by Dr. Morgan.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of March 9, 2009.

In support of this conclusion the Arbitrator notes the following:

While Petitioner had both left carpal tunnel and cervical fusion surgeries performed in 2000 and 2001, respectively, Petitioner's testimony that he was able to return to work as a truck driver afterward and was not receiving any medical treatment for either or both conditions for a significant period of time prior to the accident of March 9, 2009, was unrebutted.

In regard to the left shoulder condition, Dr. Morgan testified that it was related to the accident of March 9, 2009. Two of Respondent's Section 12 examiner's, Dr. Milne and Dr. Carrillo, opined that the left shoulder condition was related to the accident of March 9, 2009; however, two of Respondent's Section 12 examiner's, Dr. Mirkin and Dr. Rotman opined that the left shoulder condition was not related to the accident of March 9, 2009.

The Arbitrator finds the opinions of Dr. Morgan, Dr. Milne and Dr. Carillo to be more persuasive. The Arbitrator notes that Respondent's four Section 12 examiners had inconsistent opinions.

In regard to the cervical spine condition, Dr. Kube testified that the accident of March 9, 2009, was, at least, a contributing factor to his current condition. The Arbitrator finds the opinion of Dr. Kube be more persuasive than that of Respondent's Section 12 examiners, Dr. Mirkin and Dr. Rotman, both of whom opined that none of Petitioner's conditions were related to the accident of March 9, 2009.

In regard to the left hand, Dr. Morgan opined that Petitioner had double crush syndrome (inclusive of the left carpal tunnel syndrome) which was related to the accident of March 9, 2009. The Arbitrator is not persuaded by the opinion of Respondent's Section 12 examiner, Dr. Carillo. Even though Petitioner did not have any left hand symptoms until June, 2011; however, he received extensive medical treatment for his neck and left shoulder conditions and was

diagnosed with double crush syndrome. It was noted that Petitioner had recovered from his prior left carpal tunnel surgery.

The Arbitrator finds the opinion of Dr. Morgan to be more persuasive than that of Respondent's Section 12 examiner, Dr. Carillo.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 22, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of $27,484.83 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the cervical fusion surgery recommended by Dr. Kube and the carpal tunnel surgery recommended by Dr. Morgan.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to payment of temporary total disability benefits of 240 4/7 weeks commencing March 27, 2009, through November 8, 2013.

In support of this conclusion the Arbitrator notes the following:

At trial Petitioner claim entitlement to temporary total disability benefits of 240 4/7 weeks, March 27, 2009, through November 8, 2013 (the date of trial). Respondent's position was that Petitioner was entitled to temporary total disability benefits of 202 4/7 weeks, March 27, 2009, through February 12, 2013. Accordingly, the disputed period of temporary total disability benefits at the time of trial was 38 weeks.

At the time of trial, Petitioner was still unable to return to work as a truck driver and remained in need of active medical treatment.

The Arbitrator was not persuaded by the surveillance video which showed Petitioner loading some items in the back of a pickup truck and driving the truck thereafter. This did not show the Petitioner engaging in activities inconsistent with his claim of being disabled.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cody Locke,

Petitioner,

vs.

No. 13 WC 05296

16IWCC0074

Great Dane Trailers,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary disability, vocational rehabilitation, permanent disability, penalties and attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, maintenance, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Commission finds that the Arbitrator erred in awarding penalties under sections 19(k) and 19(l) and attorney fees under section 16 of the Workers' Compensation Act (the Act). At the outset of the arbitration hearing, Respondent made clear that it was disputing accident.

Petitioner testified that on July 3, 2012, he felt pain in his back while he was using a crane with an air suction hoist to lift a sheet of metal weighing between 300 and 600 pounds. The parties stipulated that Petitioner gave proper notice of the injury. Petitioner testified that for the next two and a half months he continued to work, although his back condition kept getting worse. On September 25, 2012, Petitioner consulted Physician's Assistant Morland at the office

of his family physician. PA Morland's note shows that Petitioner's primary complaint was sore throat. Petitioner also complained of back pain after twisting it the wrong way. The note states the problem started within the past seven days. It is unclear whether it refers to the sore throat or the back pain. The note does not mention a work accident. PA Morland ordered a lumbar MRI. On September 27, 2012, Petitioner underwent the MRI. The MRI report notes the following history: "Recent onset low back pain seven days ago."

On cross-examination, Petitioner was questioned about that history:

"Q. When you presented to *** St. Mary's MRI on September 27, 2012 you indicated that you had a recent onset of lower back pain 7 days ago; is that correct?

A. If that would have been with Dave Morland, yes.

Q. So, that would have been onset of pain about September 20, 2012, correct?

A. Yes.

* * *

Q. If the records reflect that you gave a history on September 27, 2012, also gave a history of pain onset of 7 days earlier, would that be correct?

A. Yes."

Petitioner appeared confused about that line of questioning and maintained that he sustained a work accident on July 3, 2012. Respondent's counsel asked again:

"Q. But on September 27, 2012 you specifically recall giving a history of an onset of pain 7 days before—on September 27, 2012 you specifically recall giving a history of an onset of pain starting 7 days before, correct?

A. I don't know. I don't recall that."

Petitioner admitted that he continued to work full-duty in July, August and September of 2012. Further, Petitioner agreed that he did not receive any medical care until September 25, 2012. The colloquy continued:

"Q. Your onset of pain was September 20, 2012?

A. What do you mean by onset of pain?

Q. That's the onset of pain you specifically recall telling the doctors about on September 27, 2012?

A. Yeah, I went to the doctor but I don't say the pain started that day. The pain started back on July 3rd."

The Commission finds there was a genuine dispute as to whether Petitioner sustained accidental injuries arising out of and in the course of his employment on July 3, 2012, and Respondent appropriately asserted its due process rights in defending the action. It is well established that the employer's reasonable and good faith challenge to liability does not warrant an imposition of penalties. Matlock v. Industrial Comm'n, 321 Ill. App. 3d 167, 173 (2001). Accordingly, the Commission vacates the award of penalties and attorney fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 9, 2015, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of penalties under sections 19(k) and 19(l) and attorney fees under section 16 the Act is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $326.75 per week for a period of 19 weeks, from March 25, 2013, through August 5, 2013, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation, maintenance, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner maintenance benefits in the sum of $326.75 per week for a period of 70 3/7 weeks, from August 6, 2013, through December 11, 2014.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for vocational rehabilitation for Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay related medical bills in evidence in the sum of $19,280.40 that Petitioner incurred from July 3, 2012, through January 30, 2014, pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $43,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

Stephen J. Mathis

DATED: JAN 2 9 2016
o-12/10/2015
SM/sk
44

Stephen Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

LOCKE, CODY
Employee/Petitioner

Case# **13WC005296**

16IWCC0074

GREAT DANE TRAILERS
Employer/Respondent

On 2/9/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4342 REHN & SKINNER LLC
JOHN REHN
5 E SIMMONS ST
GALESBURG, IL 61401

1872 SPIEGEL & CAHILL PC
MILES P CAHILL
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0074

Cody Locke
Employee/Petitioner

v.

Great Dane Trailers
Employer/Respondent

Case # 13 WC 005296

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Peoria, Illinois**, on **December 11, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Is Petitioner entitled to Vocational Rehabilitation?**

FINDINGS

On the date of accident, **July 3, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**25,486.24**; the average weekly wage was $**490.12**.

On the date of accident, Petitioner was **22** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**5,134.60** for TTD paid through July 17, 2013.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $326.75 per week for 19 weeks commencing March 25, 2013 through August 5, 2013, as provided in Section 8(b) of this Act, with Respondent receiving credit for $5,134.60.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of all medical bills related to the July 3, 2012 accident up through January 30, 2014 in the amount of $19,280.40, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for vocational rehabilitation for Petitioner and pay Petitioner maintenance of $326.75 per week commencing August 6, 2013 through the date of hearing December 11, 2014 as provided in Section 8(a) of the Act.

Respondent shall pay penalties in the amount of $10,000.00 under Section 19(l) of the Act; 21,588.52 under Section 19(k) of the Act; and attorneys fees in the amount of $9097.03 under Section 16 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

2/7/15
Date

ICArbDec19(b)

FEB 9- 2015

16IWCC0074

FINDINGS OF FACT:

Petitioner testified that he was a high school graduate with no additional schooling. After finishing high school, he worked at a grocery store and then a meat packing facility before starting at Respondent in 2010. Petitioner worked on a line in a factory that produced trailers for semi-trucks.

Petitioner testified that on July 3, 2012, he was employed as a machine operator for Respondent. On said date, he was performing his job as a press operator wherein he would use a suction hoist to move sheets of metal to a mechanical press. Petitioner used his body to push the hoist and metal towards the press. While moving a piece of metal to the press Petitioner twisted his body and felt pain in his lower back. Petitioner stated that he reported the pain to Respondent and filled out an incident report. Petitioner stated that in the weeks following the incident, he continued to work noticing increasing pain to his lower back.

On September 25, 2012 Locke presented to OSF Medical Group where he was seen by David Moreland, PAC, with complaints of low back pain from twisting his back. (Petitioner's Exhibit 10 p. 540) PAC Moreland diagnosed back pain and ordered a lumbar MRI (PX 10 p 539 & 558). The MRI when performed at OSF St. Mary Medical Center on September 27, 2012 showed a broad-based disc protrusion with slight central prominence at L4-L5 without nerve root effacement. (PX 11 p 603)

According to Petitioner, Respondent then sent him to Princeton Prompt Care. Records submitted show Petitioner presented to Princeton Prompt Care on October 15, 2012. Petitioner saw Dr. Jane Battles with complaints of a work injury to his back that occurred on July 3, 2012 while working a hoist. (PX 14 p 875). Dr. Battles noted low back pain with pain radiating down Petitioner's left leg. (PX 14 p 875) Petitioner was placed on light duty with no lifting over 2-3 lbs. (PX 14 p. 876)

On October 29, 2012, Petitioner returned to Princeton Prompt Care where he saw Dr. Paul Bonucci with continued complaints. Dr. Bonucci reviewed the previously taken MRI and assessed low back pain and L4-5 disc protrusion. The doctor continued Petitioner's light duty restrictions and ordered physical therapy. (PX 14 p 883-884)

Petitioner attended therapy at Advanced Rehab and Sports Medicine from October 31, 2012 through November 28, 2012. (PX 3 p 96) On November 28, 2012, the therapist noted Petitioner conveyed that it felt like someone was jabbing him in his back all day long and his radiating symptoms were constant and traveled to his ankle. (PX 3 p 96)

On November 29, 2012, Petitioner returned to Dr. Bonucci with persistent low back pain. (PX 14 p 890) Dr. Bonucci ordered another MRI of the back, continued light duty and indicated an IME would be necessary if there was no improvement. (PX 14 pgs 890, 895)

Petitioner underwent the prescribed MRI of the lumbar spine at Perry Memorial Hospital on December 4, 2012 which showed an L4-L5 broad-based central disc herniation with abutment of the L5 nerve roots with the herniation also causing thecal sac effacement. (PX 12 p 621)

On December 6, 2012 Petitioner returned to Dr. Bonucci. Petitioner's complaints had not changed. Dr. Bonucci continued light duty and made a referral to an orthopedist. (PX 14 p 900)

On December 14, 2012 Petitioner presented to Midwest Orthopaedic Center with complaints of pain that began in July of 2012 with current left buttock pain which extended to the posterior thigh, posterolateral calf pain and low back pain. (PX 8 p 475) Petitioner saw Dr. Amod O. Sureka who diagnosed him with lumbar radicular pain, ordered restricted work, reordered physical therapy and indicated epidural steroid injections in the future. (PX 8 pgs 475-478)

Petitioner began therapy at Kewanee Physical Therapy on December 17, 2012 (PX 6 p 173). The initial evaluation confirms problems with his low back since an injury at work in July 2012. (PX 6 p 173) Respondent requested a job analysis from Kewanee Physical Therapy that was performed on January 3, 2013. The job analysis showed Petitioner's employment as a general laborer required frequent to occasional lifting, carrying, pushing and pulling of 50 pounds, ½ - 2/3 of a day of reaching, bending, squatting, and walking, 8 hours of standing and 1/3 - 2/3 of the day using his upper extremities. (PX 6 p 192-193). The physical therapist noted the job rated at a heavy physical demand. (PX 6 p 196) The following day the therapist at Kewanee Physical Therapy found Petitioner could perform 58.2% of the physical demands of his job. (PX 6 p 196)

On January 7, 2013, Petitioner returned to Dr. Sureka with complaints of low back pain and leg pain which he rated at 8 out of 10 on a pain scale. (PX 8 p 447) Dr. Sureka discussed epidural steroid injections which the doctor noted Petitioner was not interested in pursuing. Dr. Sureka also indicated a surgical referral could be made on his behalf. Dr. Sureka continued light duty restrictions, therapy and diagnosed Petitioner with lumbar radicular pain secondary to herniation. (PX 8 p 447)

At Respondent's request, Petitioner attended a Section 12 examination with Dr. Singh on January 16, 2013. (RX 9) After performing an examination and reviewing both MRIs, Dr. Singh diagnosed herniated nucleus pulpous at L4-L5. Dr. Singh provided an affirmative causality indicating he believed Petitioner sustained a lumbar disk herniation at the L4-5 level. The doctor indicated that Petitioner's subjective complaints correlated with the objective findings. (RX 9) Dr. Singh indicated Petitioner was not at maximum medical improvement and to continue physical therapy. (RX 9) Dr. Singh also indicated that if therapy did not work, Petitioner would benefit from a L4-L5 laminectomy and discectomy. Dr. Singh further provided that he did not believe epidural steroid injections would benefit Petitioner as too much time had passed since the initial injury. Dr. Singh continued him on restricted work. (RX 9)

Petitioner returned to Dr. Sureka on January 28, 2013 with continued complaints of leg and low back pain. Dr. Sureka continued to recommend epidural injections and advised continued therapy. (PX 8 p 440)

On February 5, 2013, Petitioner presented to Prairie Spine and Pain Institute seeing Dr. Richard Kube II. Dr. Kube continued Petitioner on restricted duty and recommended surgery. (PX 13 pgs 626,627).

Petitioner underwent surgery on March 25, 2013 consisting of a hemilaminotomy with microdiscectomy for decompression traversing and exiting root at L4-L5 on the left. (PX 13 p 628-629) During the surgery there was an incidental durotomy and a repair of the cerebrospinal fluid leak was also performed. (PX 13 p 628-629) Petitioner restarted physical therapy at Kewanee Physical Therapy on April 8, 2013. (PX 6 p 248-252)

Records submitted show that on April 15, 2013, Petitioner called Dr. Kube's office complaining of shooting pains down his leg which woke him at night. (PX 13 p 631) The following day, Petitioner saw Dr. Kube with continual pain in the leg. It was noted that Petitioner never really had a substantial amount of relief. Dr. Kube indicated Petitioner had possible chronic nerve pain or possible post-operative nerve healing. A future visit was scheduled as Dr. Kube wanted to see how Petitioner continued to respond. (PX 13 p 632)

Petitioner returned to Dr. Kube on May 14, 2013. Dr. Kube indicated Petitioner's pain scores had improved by 30-40% and his back scores had marginally improved. (PX 13 p 639) Dr. Kube continued therapy

and allowed Petitioner to return to work on sedentary duty effective May 20, 2013. (PX 13 p 638-640). At Petitioner's visit on May 23, 2013, Dr. Kube noted he was concerned that Petitioner was not making great progress. The doctor ordered another MRI and held Petitioner off work. (PX 13 pgs 641,645)

The prescribed lumbar spine MRI when performed at Methodist Medical Center on May 29, 2013 showed a moderate central disc protrusion which was causing slight compression on the ventral thecal sac at L4-L5. The impression was residual or recurrent central disc protrusion at L4-L5. Also noted was granulation tissue/scar on the left at L4-L5. (PX 7 p 428-429)

Petitioner returned to Dr. Kube on June 4, 2013. Dr. Kube noted the MRI showed a residual central disc bulge but that the deviation of the thecal sac was away from the scar tissue which he believed was causing Petitioner's pain. Dr. Kube believed Petitioner was having an inflammatory reaction and was hoping that an epidural steroid injection would calm down the inflammation. Dr. Kube also noted Petitioner appeared to create quite an abundance of granulation and scar tissue. He was concerned Petitioner would be looking at chronic pain management. At that point, Dr. Kube continued Petitioner off work and referred Petitioner to Dr. Cummings within Prairie Spine for a consultation. (PX 13 pgs 649,651)

Petitioner saw Dr. Cummings on June 18, 2013 with complaints of sharp and severe pain, often in duration in the left lower back which radiated down the lateral aspect of the thigh and into the foot. (PX 13 p 646-648) Dr. Cummings recommended proceeding with left L4-L5 transforaminal epidural steroid injections. (PX 13 p 646)

On July 2, 2013 Dr. Kube noted Petitioner was showing some progress. At that time, the doctor returned Petitioner to work on sedentary duty for 4 hours per day and continue therapy (PX 13 p 656-657).

On July 30, 2013 the therapist at Kewanee Physical Therapy put together a Functional Progress Note which indicated Petitioner demonstrated the ability to perform 22.6% of the physical demands of his job. The therapist noted that based on the Dictionary of Occupational Titles, Petitioner demonstrated the ability to perform within the medium physical demand level. In summary, the therapist indicated that Petitioner continued to have significant pain and limitation of his ability to perform the basic movement patterns required for his normal job at Respondent. (PX 6 p 375-379)

On August 1, 2013, Petitioner returned to Dr. Kube. The doctor noted Petitioner had shown a valid effort and light duty restrictions in what he believed was a functional capacity evaluation (FCE) done by Kewanee Physical Therapy. Dr. Kube discussed a dorsal column stimulator which Petitioner was not enthusiastic about. Dr. Kube placed Petitioner at maximum medical improvement although he felt Petitioner will require chronic medication management and intermittent physical therapy. Dr. Kube placed permanent lifting restrictions consistent with the Functional Progress Note dated August 1, 2013 and referred Petitioner back to Dr. Cummings. (PX 13 p 664)

Records show that on August 5, 2013, Petitioner spoke with a Jack Farrah at the Prairie Spine Institute regarding the FCE. The note indicates, "Cody came into the office today questioning the results from his physical therapy notes that we went over last week…Cody says that Dr. Kube thought he had FCE done. I called and spoke with John @ [K]ewanee [Physical therapy]. [S]aid [patient did not have w/c and [FCE]. He has been doing basic [physical therapy]…" (PX 13 p 665)

On August 8, 2013, Dr. Kube wrote, "…on further review, the functional note we received was like a functional progress report. I cannot really say that I have ever seen this before. We do not work with the Kewanee people that often, and the appearance of the note looked an awful lot like a functional capacity evaluation, but this was not what this note was. I do not know exactly why they are using this note, but it is a

little confusing, so those were not permanent restrictions. I talked to the therapist today, and I guess those were more like goals or what he was hoping to get to. It is the result of an approximately 30 to 45 minutes evaluation, which of course would be, in my estimate, very difficult to project what someone could do for an 8-hour day after only testing someone for 30 to 45 minutes..." Dr. Kube noted that Petitioner was showing "real measurable progress" relying on the report that Petitioner had generated 27% ability to perform his previous job. Dr. Kube felt Petitioner would benefit from additional therapy in the form of conditioning type program. Upon completion of same, the doctor indicated a FCE would be necessary. (PX 13 p 668)

On August 9, 2013, Kewanee Physical Therapy pinned another Functional Progress Note which indicated Petitioner demonstrated the ability to perform 23.5% of the physical demands of his job. The therapist again noted that based on the Dictionary of Occupational Titles, Petitioner demonstrated the ability to perform within the medium physical demand level. The therapist also indicated that Petitioner continued to have significant pain with functional behaviors and activities. It was recommended that Petitioner transition to work hardening. (PX 6 pgs 414-417)

At Respondent's request, Petitioner underwent a second Section12 examination with Dr. Singh on August 12, 2013. In addition to an examination, Dr. Singh reviewed subsequent records generated by Dr. Kube, a surveillance video, and the Functional Progress Note dated August 9, 2013 from Kewanee Physical Therapy, which the doctor categorized as an FCE. Citing the Functional Progress Note ("FCE"), Dr. Singh indicated Petitioner could perform at a medium level which met the physical demand requirements of his job. Dr. Singh opined that Petitioner sustained a L4-5 disk herniation which was appropriately treated and had resolved. Dr. Singh indicated Petitioner had subjective complaints of pain which could not be objectified. He did not feel the referral to pain management was appropriate indicating Petitioner had nonanatomic pain complaints. Dr. Singh felt Petitioner was at maximum medical improvement and able to return to full duty work without restrictions. (RX 9-3)

On September 5, 2013, Petitioner returned to Dr. Kube. The doctor noted Petitioner was not experiencing any additional progress with therapy. As a result, Dr. Kube ordered a FCE to determine permanent lifting restrictions. (PX 13 p 674) Dr. Kube also placed Petitioner on sedentary duty, four (4) hours per day. (PX 13 p 675)

Pursuant to Dr. Kube's referral, Petitioner underwent a FCE at Azer Clinic on January 10, 2014. The FCE found that Petitioner was not capable of performing the physical demands of a 'Fabricator, Industrial.' (PX 4 p 134) The FCE also found Petitioner's current working capacity of light as follows: 10-20 pounds lifting, carrying, pushing and pulling 1/3 of the day, 10 pounds more than 1/3 of the day but not more than 2/3 of the day, a benefit of continued physical therapy to treat the ongoing high levels of pain with activity, work hardening and that Petitioner would perform best in an occupation that allowed frequent postural changes. (PX 4 p 134)

Petitioner returned to Dr. Kube on January 30, 2014. Dr. Kube noted the FCE demonstrated Petitioner at a fairly light level of activity and that he was not able to perform his previous job. Dr. Kube indicated the work restrictions from the FCE were permanent and that Petitioner was at maximum medical improvement. (PX 13 p 867)

Petitioner testified that he had made attempts to find employment but was having difficulty finding employment. Petitioner provided that he met with a vocational rehabilitation counselor, Mary Andrews, and indicated he would be willing to work with her as she tried to assist him in finding employment.

Petitioner testified that currently he has difficulty standing for long periods of time. Petitioner indicated that he experiences pain down his leg with extended standing. Similarly, he has difficulty sitting for long

periods of time. He is currently using Advil and a gel rub to address his pain. He has difficulty walking long distances and/or for more than 15 minutes. He has difficulty riding in a car for more than 30 minutes and has trouble lifting more than 20 lbs.

At Respondent's request, a labor market survey was performed by Triune Health Group. In a report dated April 7, 2014, it was noted that a survey was conducted exploring employment opportunities as an Office Worker, Maintenance Worker and Sales Associate/Customer Service type positions. The labor market survey concluded that Petitioner could acquire employment in the $9.50 to $11.50 per hour range. Petitioner testified he was a Union member while working for Respondent. He was earning $14.60 per hour at the time of his injury and that he would have been making $14.90 per hour if he were still working at Respondent as of the time of the hearing.

Dr. Kube was deposed in this matter. Dr. Kube provided that he first treated Petitioner on February 5, 2013. Petitioner provided a history that he had been working with a lift and a large piece of metal in July 2012 and as he was trying to swing a piece of metal he felt pain in the low back. Dr. Kube explained that Petitioner's history included complaints of leg pain which got worse over time. (PX 2 p) Dr. Kube's examination on February 5, 2013 found positive straight leg raise. Dr. Kube noted numbness and tingling in about the L5 or S1 dermatome pattern on the left side. (PX 2 pgs 4-6) After reviewing a MRI, Dr. Kube diagnosed a disc herniation at L4-5 left side with radiculopathy. (PX 2 pgs 6-7)

Dr. Kube testified that he ultimately performed a micro-decompression on the left side at L4-5 doing a hemilaminotomy and micro-discectomy. (PX 2 p 9) Post surgery, Petitioner continued to have substantial pain in his leg. Dr Kube indicated he was concerned that Petitioner possibly had chronic nerve damage and chronic nerve irritation. (PX 2 p 11) Dr. Kube ordered an additional MRI. The MRI showed scar tissue on the left side at L4-5 and Dr. Kube ordered an epidural steroid injection. (PX 2 pgs 14-16) Dr. Kube testified that he held Petitioner off work from the surgery until July 2, 2013 when he placed Petitioner on sedentary duty. (PX 2 pgs 10-17) In September 2013, Dr. Kube ordered an FCE to determine Petitioner's permanent lifting restrictions. Dr. Kube provided that he reviewed the FCE report prepared by Azer Physical Therapy and agreed with the recommendations in said FCE report. (PX 2 pgs 21-23)

Dr. Kube explained that when he last saw Petitioner on January 30, 3014, he felt Petitioner had chronic pain secondary to a trauma along with radicular complaints. (PX 2 p 23) Dr. Kube explained that Petitioner's injuries were permanent and that the restrictions identified in the FCE are permanent. Dr. Kube further explained that Petitioner's injuries were related to his injury at work in July 2012. (PX 21 pgs 27-28)

Dr. Singh was also deposed in this matter. Dr. Singh testified that he examined Petitioner on two separate occasions, January 16, 2013 and August 12, 2013, pursuant to Section 12 of the Act. At the conclusion of his first examination, Dr. Singh diagnosed Petitioner with herniated nucleus pulposus, L4-5. Dr. Singh provided that he felt Petitioner's disk herniation was causally related to his work injury and that a L4-5 laminectomy and discectomy would be appropriate. (RX 8 pgs 8-14)

Dr. Singh testified that he examined Petitioner again on August 12, 2013. The doctor provided that after performing an examination, reviewing the records of Dr. Kube and the records from Kewanee Therapy Center, as well as surveillance video, he felt Petitioner was status post L4-5 laminectomy. He reiterated that the disk herniation was causally related and was appropriately treated. Dr. Singh stated that he could not objectify Petitioner's complaints during his second examination and felt his condition of ill-being had resolved. (RX 8 pgs 21-23) The doctor also stated that he believed Petitioner was at maximum medical improvement and was capable of returning to work "at least at the medium demand level." (RX 8 pgs 24-26)

On cross-examination, Dr. Singh testified that part in parcel of his August 12, 2013 Section 12 examination, he reviewed a FCE from August 9, 2013 which was in fact was a progress note and not a full functional capacity evaluation. (RX 8 pgs 34-35) D Singh acknowledged that there was a difference between a functional capacity evaluation and a progress report from a physical therapist. Dr. Singh agreed that a functional capacity evaluation is a more detailed evaluation than a progress report from a physical therapist. Dr. Singh testified that he could not state for certainty whether he would have known at the time of his August 12, 2013 IME report that the note from Kewanee Physical Therapy (referred to in the IME report as an FCE) was in fact a physical therapy progress note instead of an FCE report. (RX 8 p 35)

Dr. Singh testified that he was aware that subsequent to his August 2013 IME report, Petitioner had gone through an FCE at Azer Physical Therapy. The doctor provided that he was not aware that the FCE report indicated that Petitioner could not go back to his job at Respondent. (RX 8 p 36) Dr. Singh stated that he classified Petitioner's job as "medium, heavy category of work." (RX 8 p 37)

Dr. Singh was questioned about the therapy record functional evaluation/physical therapy progress record from August 9, 2013. The doctor agreed that the physical therapy progress report found that Petitioner was unable to achieve successfully during his evaluation the occasional shoulder lifting, the occasional power lifting, walking, forward reaching, bending and total standing functions of Petitioner's job at Respondent. Dr. Singh conceded that said progress report noted that Petitioner did not have the ability to perform or match his job in regards to bending and job lifting. Similarly, he agreed the report provided Petitioner did not match the job in regards to occasional power lifting. (RX 8 pgs 41-43) Dr. Singh ultimately agreed that the therapist's assessment in the August 9, 2013 report was that Petitioner could not meet the job requirements with Respondent's job. (RX 8 pgs 48-49)

Dr. Singh also testified that he observed a video of Petitioner. (RX 8 p 49) Dr. Singh noted the video showed Petitioner getting in and out of a car and carrying groceries. (The Arbitrator also reviewed the surveillance video and concurs that same depicts Petitioner getting out of a car and carrying what appeared to be groceries.) Dr. Singh did not have any idea how heavy the groceries were, did not have any idea regarding the time length of the video or how close up the video was to showing Petitioner's face and body. (RX 8 pgs 49-50) Lastly, Dr. Singh confirmed that the MRI image after the surgery showed that Petitioner still had some protrusion and/or minimal evidence of residual disc herniation. He felt same was an incidental finding that did not cause any nerve root compression. (RX 8 pgs 56-57)

Mary Andrews prepared a vocational assessment of Petitioner in September 2014. Ms. Andrews also testified in this matter. Ms. Andrews testified that she is a certified rehabilitation counselor. She provided that she reviewed Petitioner's medical records and met with him to perform a vocational assessment. Ms. Andrews opined that vocational rehabilitation would be appropriate and beneficial for Petitioner. Ms. Andrews noted that Petitioner previously worked in a grocery store unloading trucks and stocking shelves, cleaning aisles and bathrooms and running the register while earning $7.75 per hour from 2007 through 2008. She noted that he also worked at a Bob Evans facility in 2008-2009 earning $14.10 per hour boxing rolls of sausages. She also noted he began working at Respondent in October 2010 earning $11.75 per hour. He was making $14.60 per hour the last time he worked at Great Dane. (Also See PX 1)

Ms. Andrews testimony and her report noted that the physical therapy evaluation by the Kewanee physical therapist, the functional capacity evaluation performed by Azer Physical Therapy and the opinion of Dr. Kube all supported a finding that Petitioner was unable to perform the job functions for his position at Respondent. Ms. Andrews noted that Petitioner did not have a resume and he had done some job searching but had not been able to find a job within his restrictions. Ms. Andrews noted that the constant stress and straining of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding. She felt Petitioner's capabilities did not match the job demands and if Respondent could not accommodate

Petitioner's permanent restrictions, vocational rehabilitation should be considered. She noted he had a good work history which was a positive in his employability and that he had yet to reach his vocational potential since he was only 25 years old. She noted that vocational rehabilitation would be of value to aid in generating vocational options. She provided that vocational rehabilitation would involve development of a rehabilitation plan with a probable inclusion of obtaining computer skills, educational on job seeking skills and provision of job placement services. She noted that the development of computer skills should improve his employability and job search capability. She also noted that given Petitioner's age and degree of physical restrictions, it may also be reasonable for him to pursue additional formal education if it is determined he would have a good likelihood of success in obtaining and maintaining a job in the chosen major of study. (Also see PX 1)

With respect to (C.) Did an accident occur that arose out of and in the course of Petitioner's employment by respondent, the Arbitrator finds as follows:

On July 3, 2012, Petitioner was employed as a machine operator for Respondent. On said date, he was performing his job as a press operator wherein he would use a suction hoist to move sheets of metal to a mechanical press. In order to move the hoist, Petitioner must use his body to push and turn the hoist. Petitioner's testimony shows that when using his body to maneuver the metal, he felt pain in his lower back. Petitioner reported the pain to Respondent and filled out an incident report. Petitioner stated that in the weeks following the incident, he continued to work noticing increasing pain to his lower back. As such, he chose to see a doctor and began treating for same. The medical records are consistent with his recitation of the occurrence.

Based on Petitioner's unrebutted and credible testimony, the Arbitrator finds that Petitioner sustained an accidental injury which arose out of and in the course of his employment with Respondent on July 3, 2012.

With respect to (F.) Is Petitioner's condition of ill being causally related to the accident, the Arbitrator finds as follows:

Petitioner was in a state of good health prior to July 3, 2012 and did not have any complaints of back pain prior to his work injury. After the injury he required extensive treatment for his back including a hemilaminectomy with discectomy.

Petitioner's treating physician, Dr. Kube, opined that Petitioner's condition of ill-being is related to his injury at work in July 2012. At the behest of Dr. Kube, Petitioner underwent a FCE. The FCE performed at Azer Clinic on January 10, 2014 found Petitioner was not capable of performing the physical demands of a 'Fabricator, Industrial.' The FCE found Petitioner's current working capacity of light as follows: 10-20 pounds lifting, carrying, pushing and pulling 1/3 of the day, 10 pounds more than 1/3 of the day but not more than 2/3 of the day, a benefit of continued physical therapy to treat the ongoing high levels of pain with activity, work hardening and that Petitioner would perform best in an occupation that allowed frequent postural changes. When Petitioner last saw Dr. Kube on January 30, 2014, the doctor noted the FCE demonstrated Petitioner at a fairly light level of activity and that he was not able to perform his previous job. Dr. Kube indicated the work restrictions from the FCE were permanent and that Petitioner was at maximum medical improvement. Dr. Kube explained that he felt Petitioner had chronic pain secondary to a trauma along with radicular complaints.

Respondent's Section 12 examiner, Dr. Singh, agreed that a causal relationship exists between Petitioner's condition of ill-being and the work incident; however, felt that Petitioner's condition of ill-being had resolved as of his second IME in November 2013. The doctor believed Petitioner was at maximum medical improvement and was capable of returning to work "at least at the medium demand level." Dr. Singh relied in part on a FCE from August 9, 2013 which was in fact was a progress note and not a full functional capacity evaluation. Dr. Singh acknowledged that there was a difference between a functional capacity evaluation and a progress report from a physical therapist. Dr. Singh agreed that a functional capacity evaluation is a more

detailed evaluation than a progress report from a physical therapist. Dr. Singh testified that he not could state for certainty whether he would have known at the time of his August 12, 2013 IME report that the note from Kewanee Physical Therapy was in fact a physical therapy progress note instead of an FCE report. Dr. Singh testified that he was aware that subsequent to his August 2013 IME report, Petitioner had gone through an FCE at Azer Physical Therapy. The doctor provided that he was not aware that the FCE report indicated that Petitioner could not go back to his job at Respondent. The Arbitrator notes Dr. Singh stated in his August 12, 2013 IME report that Petitioner could return to full duty without restrictions citing the August 9, 2013 Kewanee Physical Therapy report that said in part that Petitioner tested at a medium demand level which met the requirements of his occupation. When queried about the therapy record functional evaluation/physical therapy progress record from August 9, 2013, the doctor agreed that the physical therapy progress report found that Petitioner was unable to achieve successfully during his evaluation the occasional shoulder lifting, the occasional power lifting, walking, forward reaching, bending and total standing functions of Locke's job at the respondent. Dr. Singh conceded that said progress report noted that Petitioner did not have the ability to perform or match his job in regards to bending and job lifting. Similarly, he agreed the report provided Petitioner did not match the job in regards to occasional power lifting. Dr. Singh ultimately agreed that the therapist's assessment in the August 9, 2013 report was that Petitioner could not meet the job requirements with Respondent's job.

Relying on the opinion of Dr. Kube and to a lesser degree, the opinion of Dr. Singh, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the accident sustained on July 3, 2012.

With respect to (J.) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator incorporates the findings noted above in Paragraphs C and F.

Respondent offered no evidence or testimony to dispute the reasonableness or necessity of Petitioner's medical treatment. When offered into evidence at trial, Respondent had no objection to the medical bills contained in Petitioner's Exhibit 15.

Dr. Kube testified that all of the medical treatment rendered to Petitioner was a result of his injury at work in July 2012. Additionally Respondent's doctor, Dr. Singh, testified the surgery Dr. Kube performed was appropriate. Petitioner's Exhibit 15 shows a total outstanding balance of medical expenses of $19,280.40 for medical treatment rendered to Petitioner as a result of his work injury. (A fee schedule adjustment was taken after the hearing and the correct outstanding unpaid balance is $19,280.40 not the $30,473 listed in Exhibit 15 due to an adjustment to the March 25, 2013 date of service of Prairie Spine and Pain Institute.) After reviewing all evidence and testimony in this matter, the Arbitrator hereby finds that all of Petitioner's back treatment to date has been reasonable and necessary to cure Petitioner of his conditions of ill-being. Respondent shall pay all reasonable and necessary medical costs as reflected in Petitioner's Exhibit 15 pursuant to the fee schedule.

With respect to (K.) What temporary total disability benefits and maintenance benefits are in dispute, the Arbitrator finds as follows:

Dr. Kube and the full FCE support a finding that Petitioner has permanent restrictions that prevent him from returning to his work at Respondent. On August 5, 2013 Dr. Kube saw Petitioner for a post FCE consultation and placed Petitioner at MMI on permanent restrictions. Prior to that Petitioner was on light duty restrictions imposed by Dr. Kube for which the employer did not accommodate. Petitioner performed light duty work until March 25, 2013. He has not worked since March 25, 2013. Respondent denies Petitioner is entitled to TTD but if he is, Petitioner is entitled to TTD from March 25, 2013 through July 17, 2013 (see Arbitrator's

Exhibit 2). Respondent's Exhibit 10 shows that a letter was sent to Petitioner telling him he had been released to full duty on August 12, 2013 and that no further light duty was available and that he should return to work. (RX 10) Petitioner testified that he returned to work and informed Respondent of the restrictions prescribed by Dr. Kube. Respondent refused to accommodate him and Petitioner has not worked since August 2013.

As such, the Arbitrator finds Petitioner was entitled to TTD benefits from March 25, 2013 through August 5, 2013, or a period of 19 weeks. Respondent is entitled a credit for TTD paid from March 25, 2013 through July 17, 2013.

Respondent stopped paying Petitioner TTD benefits as of July 17, 2013. It wasn't until August 9, 2013 Petitioner saw Respondent's IME physican for a second IME in which Dr. Singh relied upon what he believed was a FCE and found Petitioner could return to work although the report relied upon actually concluded Petitioner could not do his job. Dr. Singh testified and agreed that the functional evaluation/physical therapy progress record from August 9, 2013 by Kewanee Physical Therapy noted that Petitioner was unable to achieve successfully during his evaluation the occasional shoulder lifting, the occasional power lifting, walking, forward reaching, bending and total standing functions of Petitioner's job. Dr. Singh conceded that the functional capacity evaluation/physical therapy progress report noted that Petitioner did not have the ability or match his job in regards to bending and job lifting. Similarly, Petitioner did not match the job in regards to occasional power lifting. Dr. Singh ultimately agreed that if he relied upon the therapist's assessment in the August 9, 2013 report, Petitioner could not meet the job requirements. Dr. Singh's opinion is undermined by Dr. Kube, the full Azer FCE and the therapy report from Kewanee Physical Therapy.

Based upon the findings in the FCE wherein Petitioner could only perform a light duty job, and Petitioner's request for vocational rehabilitation, the Arbitrator finds that Petitioner is entitled to maintenance in the amount of $326.75 from August 6, 2013 through the date of the hearing.

With respect to (O.) Whether Petitioner is entitled to Vocational Rehabilitation, the Arbitrator finds as follows:

Based upon the FCE testing, Petitioner cannot return to his job as a general laborer. Dr. Kube testified that the restrictions put in place in the FCE are permanent. In order to allow Petitioner to return to the work force with the same earning capacity he had with Respondent, Petitioner would need assistance in job placement and potentially additional training. On October 27, 2014, Petitioner met with Mary Andrews, a rehabilitation specialist, for evaluation on vocational rehabilitation. Based on her assessment, Ms. Andrews concluded that if Respondent could not accommodate Petitioner's permanent restrictions, given his background, Petitioner would benefit from formal vocational rehabilitation services with a certified rehab counselor.

Section 8(a) of the Illinois Worker's Compensation Act provides in part that the employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. A claimant is generally entitled to vocational rehabilitation when he sustains a work related injury that causes a reduction in his earning capacity and there is evidence that rehabilitation will increase that capacity, see *National Tea Company v. Industrial Commission,* 97 Ill. 2d 424, 432 (1983). Pursuant to Section 8(a) of the Illinois Worker's Compensation Act, vocational rehabilitation may include but is not limited to counseling for job searches, supervising a job search program and vocational retraining including education at an accredited learning institution, 820 ILCS 3035/8(a). Any vocational rehabilitation counselors who provide service under this act shall have appropriate certifications which designate the counselor is qualified to render opinions relating to vocational rehabilitation. A written vocational plan is required under Section 7110.10.

A review of the factors in *National Tea* supports the award of vocational rehabilitation. Factors to be considered in *National Tea* include proof that the injury has caused a reduction in earning power. Here Petitioner testified that if he was still working at Respondent he would earn $14.90 per hour. Respondent put into evidence a labor market survey. This labor market survey ultimately concluded that if claimant conducted a diligent job search he could acquire employment with an anticipated starting salary range in the $9.50 to $11.50 per hour range. Thus, the labor market survey report shows that Petitioner without retraining and/or assistance in getting a job would have a significant reduction in pay.

The second *National Tea* factor has evidence that rehabilitation would increase earning capacity to restore the employee to his previous earning level. The vocational rehabilitation counselor testified that vocational services would assist the employee and improve his chances of increasing his earning capacity to restore him to his previous earning level. Petitioner's relative young age and the duration of his work life expectancy are other factors to be considered and further support the granting of vocational rehabilitation services. Petitioner also testified that he was both able and motivated to undertake vocational rehabilitation. There is no evidence that prior rehabilitation services have been unsuccessfully undertaken by Petitioner which further supports the award of rehabilitation services.

The last *National Tea* factor is whether the employee had sufficient skills to obtain employment without further training or education. In this case, Petitioner is a high school graduate who has performed manual labor and now has significant restrictions in regards to his lifting. Petitioner does not have a resume and does not have job search skills. Vocational rehabilitation would be appropriate and is further supported by this *National Tea* factor.

Therefore, the Arbitrator hereby orders Respondent to provide vocational rehabilitation to Petitioner.

With respect to (M.) Should penalties or fees be imposed upon Respondent, the Arbitrator finds as follows:

The Arbitrator finds that Respondent's conduct in this matter was unreasonable and vexations and subject to penalties under section 19(k) of the Act.

In this case, Respondent's IME doctor clearly related the injury and the need for surgery to the accident in July 2012. However, the worker's compensation carrier has failed to pay for all of the medical bills for treatment. Similarly, the IME doctor received a functional evaluation report from a physical therapist. This report when read in full clearly shows that Petitioner could not perform his job. Despite the finding of the report and the conclusions of the therapist, the IME doctor used it as a basis for finding Petitioner could return to work. As noted above, Dr. Singh acknowledged that there was a difference between a functional capacity evaluation and a progress report from a physical therapist. Dr. Singh agreed that a functional capacity evaluation is a more detailed evaluation than a progress report from a physical therapist. Again, Dr. Singh could not state for certainty whether he knew at the time of his August 12, 2013 IME report that the note from Kewanee Physical Therapy was in fact a physical therapy progress note instead of an FCE report. Dr. Singh testified that he was aware that subsequent to his August 2013 IME report, Petitioner underwent a FCE at Azer Physical Therapy that indicated Petitioner could not go back to his job at Respondent. Dr. Singh stated in his August 12, 2013 IME report that Petitioner could return to full duty without restrictions citing the August 9, 2013 Kewanee Physical Therapy report that said in part that Petitioner tested at a medium demand level which met the requirements of his occupation. When queried about the therapy record functional evaluation/physical therapy progress record from August 9, 2013, the doctor agreed that the physical therapy progress report found that Petitioner was unable to achieve successfully during his evaluation the occasional shoulder lifting, the occasional power lifting, walking, forward reaching, bending and total standing functions of Locke's job at the respondent. Dr. Singh conceded that said progress report noted that Petitioner did not have the ability to

perform or match his job in regards to bending and job lifting. Similarly, he agreed the report provided Petitioner did not match the job in regards to occasional power lifting. Dr. Singh ultimately agreed that the therapist's assessment in the August 9, 2013 report was that Petitioner could not meet the job requirements with Respondent's job. Dr. Singh's full duty work conclusion is inconsistent with his testimony.

Respondent's argument in opposition to the vocational rehabilitation is disingenuous. Respondent argues that Petitioner could acquire employment with a salary of $9.50 to $11.50 per hour. It is undisputed that Petitioner was making $14.60 per hour when he last worked at Respondent and he would likely be making $14.90 per hour if he was currently working for Respondent. Despite the significant difference in hourly wage, Respondent suggests that Petitioner has failed to show he would incur a reduction in earning capacity while Respondent's own documents show the reduction in earning capacity. Respondent refusal to provide rehabilitation services is in bad faith

820 ILCS 305/19(k) provides that in a case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation which do not present a real controversy, but are merely frivolous or for delay, then the commission may award compensation additional to that otherwise payable under this act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of the Act, shall be considered unreasonable delay.

Illinois courts have established a test of 'objective reasonableness' to determine whether 19(k) penalties should be awarded, *Board of Education of the City of Chicago v. Industrial Commission,* 91 Ill.2d 1 (1982). There is no objectively reasonable basis for denying the payment of benefits and medical expenses. At a minimum, Petitioner's TTD benefits and medical expenses should have been tendered through August 2013.

Based on the above, the Arbitrator finds that Petitioner is entitled additional compensation in the amount of $10,000.00, the maximum allowed under Section 19(l) of the Act; 21,588.52 [$443.45 (50% of TTD owed, $11,504.87 (50% of the maintenance owed) and $9,640.20 (50% of the outstanding medical expenses)] under Section 19(k) of the Act; and attorneys fees in the amount of $9097.03 (20% of the TTD and maintenance owed and 20% of the 19(k) awarded) under Section 16 of the Act.

STATE OF ILLINOIS)	☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF MADISON)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tom Schaefer,

Petitioner,

vs. NO. 13WC041150

Excel Plumbing,

Respondent.

16IWCC0075

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, causal connection, medical expenses, prospective medical care, notice, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 27, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

16IWCC0075

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 9 2016
SJM/sj
o-12/10/15
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

SCHAEFER, TOM
Employee/Petitioner

Case# **13WC041150**

16IWCC0075

EXCEL PLUMBING
Employer/Respondent

On 5/27/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2396 KNAPP OHL & GREEN
L DAVID GREEN
6100 CENTER GROVE RD
EDWARDSVILLE, IL 62025

0299 KEEFE & DePAULI PC
GREGORY S KELTNER
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

16IWCC0075

STATE OF ILLINOIS)
)SS.
COUNTY OF **Madison**)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Thomas Schaefer
Employee/Petitioner

v.

Excel Plumbing
Employer/Respondent

Case # **13** WC **41150**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Herrin**, on **January 14, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

16IWCC0075

FINDINGS

On the date of accident, **January 2, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**79,905.80**; the average weekly wage was $**1,536.65**.

On the date of accident, Petitioner was **51** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**11,265.92** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**11,265.92**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,024.43/week for 17 weeks, commencing 3/4/13 through 3/17/13 and from 10/2/14 through 1/14/15, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 1/2/13 through 1/14/15, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $11,265.92 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of $78,387.74, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for any medical treatment recommended by Dr. Galatz, including but not limited to surgery, as provided in §8(a) and 8.2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

5/20/15
Date

ICArbDec19(b)

MAY 27 2015

16IWCC0075

BACKGROUND

Petitioner, Thomas Schaefer, a 53 year old plumber, alleges repetitive trauma injuries to both of his shoulders, with a manifestation date of January 2, 2013. Petitioner has not worked for Respondent since October 2, 2014, the date he underwent surgery for a left total shoulder replacement. He is seeking payment of previous medical expenses, prospective medical treatment and TTD benefits. The parties stipulated and agreed Respondent is entitled to a credit of $11,262.92 for TTD benefits already paid.

FINDINGS OF FACT

Petitioner has worked for Respondent for over 20 years as a journeyman plumber. His supervisor while working for Respondent was Dan Ponce, who was a co-owner of Respondent until he died in January of 2014. Mr. Ponce ran his own separate division of Respondent's business. Mike Allen was the other co-owner of Respondent and also ran a separate division. Petitioner testified, and Mike Allen confirmed, that there was very little overlap between the two divisions.

Petitioner testified as to his general job activities as a plumber for Respondent. Petitioner testified that prior to beginning his job within a house he would need to carry the materials and tools needed from the truck inside the house. Some of tools he would have to carry into the house included a 17 pound small hammer drill, a 39 pound large hammer drill, 40 pounds of hand tools in a toolbox, a 19 pound sawzall saw, a 32 pound half-inch copper fitting tray, a 37 pound three-quarter-inch copper fitting tray, a 39 pound chop saw, a 35 pound hole hawg drill and bits, a 30 pound torch, a 26 pound small step ladder, a large step ladder, an extension ladder, a 32 pound pipe threader and a 30 pound pipe vice. (P.Ex.7) Petitioner would also carry 30 feetlengths of 3-inch PCP pipe, weighing 24 pounds, 21 foot lengths of 1-inch black iron pipe, weighing 33 pounds, a 45 pound bundle of half-inch copper pipe, and a box of PVC fittings, weighing 25 to 40 pounds. (P.Ex.7, Tr.19-20). Petitioner stated that when carrying in the piping from the truck, he would have to carry it on his shoulders, using both arms. Petitioner testified that he did not always carry every one of these items to each and every job site, but he would generally need to carry several of these items each day depending on the job. (Tr.52-62). The materials that he would carry into a particular job site sometimes weighed more or less than the weights in Petitioner's Exhibit #7 depending on the amount of materials needed for the job. (Tr.58-61). Petitioner stated that he actually weighed the materials and tools since Dr. Paletta had a job description completed by Mike Allen claiming Petitioner's job only required him to lift and carry up to 25 pounds. (Tr.26-27, R.Ex.4). Mike Allen later testified that the job description he created was inaccurate and Mr. Schaefer would have carried or lifted more than 25 pounds as a plumber. (Tr.90, R.Ex.4).

Petitioner also stated that he occasionally had to carry in fiberglass tubs, 300 pound cast iron tubs, 100 pound water heaters, 60 pound toilet bowls, 35 pound toilet tanks, whirlpool tubs, sinks, urinals and drinking fountains. (P.Ex.7, Tr.24-25). In addition, if the job was a remodel, Petitioner would need to remove similar items from the job site. (Tr.16). He stated that often times a used water heater would weigh more than a new one due to sediment that had collected. (Tr.16-17). He may also be required to remove cast iron tubs from the job site, which would require him to use a sledge hammer to break the tub into smaller pieces that he could carry out of the home. (Tr.16).

Petitioner stated that his job duties included installation of sinks, which would require him to lay on his back and reach up to fasten the faucets. (Tr.25). His tasks also included installing new piping at residential job sites. If the piping was required to go under the floor, Petitioner testified that he would first need to dig a ditch in the ground using either a shovel, or if the ground was too hard, a pic. (Tr.15) He would use both of his arms to do this task. (Tr.15-16). If the job was a remodel, Petitioner would need to use a jackhammer to break up the pre-existing floor before being able to dig the ditches. (Tr.16)

Often times Petitioner would be required to install pipe overhead as he would have to run the pipe through the floor joists to reach an upper level. (Tr.20-22). In order to do this, Petitioner would first need to use a 35 pound hole hawg drill overhead to drill holes in the floor joists to run the pipe. (Tr.22, P.Ex.7). This would require Petitioner to use one hand overhead to guide the drill, and use the other hand overhead to operate the drill. (Tr.22-23) He would have to apply pressure with the arm operating the drill and if the drill bit hit a nail or a knot in the wood, the drill would violently jerk on his shoulder.(Tr.23). After drilling the holes, Petitioner would then need to lift a segment of pipe over his head and support it with one arm. (Tr.21). While doing so he would hammer hangers in place with his other arm. (Tr.21-22) He would next have to glue two segments of the pipe together overhead. (Tr.23). After applying the glue, Petitioner would have to use force with both of his arms overhead and hold the two segments together for about 20 seconds, in order to insure that there was a good seal. (Tr.23-24).

Mike Allen was called as a witness by Respondent. Mr. Allen testified that he was a co-owner of Respondent, and ran his own division. (Tr.74) He admitted that Petitioner was not a plumber in his division and he did not have much contact with Petitioner. Id. Mr. Allen only slightly disagreed with the weights of the materials and tools shown in Petitioner's Exhibit #7. (Tr.77-80) For the weights that he did disagree with, Mr. Allen admitted that he did not personally weigh any of the materials or tools himself. (Tr.77). He testified that some of the materials that Petitioner likely had to work with would have weighed in excess of 100 pounds. Furthermore, despite the fact that Mr. Allen completed the job description form which stated that Petitioner would not lift or carry more than 25 pounds, which Dr. Paletta relied on, Mr. Allen admitted that a plumber would have to lift and carry more than 25 pounds. (Tr.90).

Petitioner testified that he spent 40% to 50% of his time per day working overhead. (Tr.27-28). This estimate was confirmed by Mike Allen's testimony. This was another inconsistency between the facts as they were established at trial and the job duty form completed by Mr. Allen upon which Dr. Paletta relied in formulating his opinions. The job duty form he prepared stated that overhead work would be required on only an occasional frequency, or up to three hours a day which is consistent with Petitioner's testimony. (R.Ex.4, Tr.92). When asked whether the job duty form that he filled out for Dr. Paletta's IME was accurate regarding Petitioner's activities, Mr. Allen testified that the amount of work over the shoulders which he estimated might be low.

Petitioner first saw Dr. Leesa Galatz on the referral of his primary care physician on January 2, 2013. The Petitioner testified that he had previously seen Dr. Craig Beyer for evaluation of his shoulders. He indicated that his son had previously treated with Dr. Beyer, and he had accompanied his son to an appointment with Dr. Beyer in 2011. While he was there, he mentioned to Dr. Beyer that his shoulders bothered him. (Tr.29). Dr. Beyer instructed Petitioner to schedule an appointment, which he did. However, by the time of Petitioner's

appointment on July 12, 2011, Petitioner stated that he was no longer having any problems with his shoulders. He therefore did not follow up with Dr. Beyer after this appointment as he was not having any shoulder complaints. He continued to perform his duties as a plumber, and his shoulder pain returned and got progressively worse. By the end of 2012 he was experiencing increased pain in his shoulders, particularly doing overhead work. (Tr.31-32). He testified that it had gotten to the point that he had to have help at work. (Tr.32). The bilateral shoulder pain became severe enough that he decided to seek treatment.

At his first visit with Dr. Galatz Petitioner indicated that the pain was affecting his ability to work, including carrying tools and materials and working overhead, as well as his ability to sleep and in the performance of his daily activities. (Tr.33-34) These complaints were consistent with Dr. Galatz's records. (P.Ex.1, p.11). During her examination of Petitioner on January 2, 2013, Dr. Galatz noted bilateral shoulder pain, which mostly affected his work as a plumber. (P.Ex.1, p.11). X-rays showed bilateral glenohumeral joint arthritis, with a little bit of joint space maintained on the right compared to the left and loose bodies in both subcoracoid recesses. Id. Dr. Galatz diagnosed Petitioner with bilateral shoulder arthritis and recommended that he undergo arthroscopic debridement and removal of loose bodies. (P.Ex.1, p.11-12). Dr. Galatz noted that Petitioner would need this surgery on both shoulders, and that Petitioner would have to decide which side he wanted done first. (P.Ex.1, p.11-12). Petitioner chose to have his left shoulder operated on first, as it was bothering him more than his right at that time. (Tr.35-36).

Petitioner stated that within a week of this meeting with Dr. Galatz, he informed his direct supervisor, Dan Ponce, that he was going to receive surgery on his left shoulder. (Tr.36-37) He also stated that he informed Mr. Ponce that he was having difficulty at work because of the pain in his shoulders. (Tr.36). Ms. Debbie Runge was also called as a witness by Respondent. Ms. Runge testified that she was the office manager for Respondent and was a contact person for workers' compensation claims. (Tr.94-95) She indicated that either the injured worker or the lead supervisor (Dan Ponce in this case) would apprise her of injuries. She indicated that if injuries were not of a serious nature, such as a laceration, they would instruct the employee "[g]o to the hospital, we'll pay for the bill. If it's a questionable thing, we'll say, Go to the doctor, let me know what is going on with that. If it is more serious, then we have to turn it in to work comp."(Tr.96) She also indicated she had a couple of conversations with Petitioner regarding his shoulders in the March, 2013 time frame. (Tr.97-98) She indicated they were "general conversations a couple of different times on just the injuries on [the shoulders]. I guess, obviously, they were getting worse, and he was seeing a doctor."(Tr.97) She indicated Petitioner came into the office "and was wanting to get some physical therapy done, and he wasn't understanding why we weren't paying for him to go to physical therapy. And I think at that point I said to him, well, until we file a work comp claim, we can't. You have to see a work comp doctor." (Tr.99) When asked if she had reported the injury to the Workers' Compensation carrier after these conversations she indicated "It was always very casual conversation, and he has to report it to me that, okay, he is ready to go to work comp."(Tr.101, emphasis added) Neither Mike Allen nor Ms. Runge disputed that in January of 2013, Petitioner told Dan Ponce of his bilateral shoulder complaints, his ability to work as a result of his shoulders and his plan to have surgery performed by Dr. Galatz. Certainly neither of them indicated that there was any surprise on Respondent's part that Petitioner was claiming his shoulders were work related when the March conversations occurred. In fact, it is clear that at least Ms. Runge was well aware that Petitioner had been seeking treatment for his shoulders. The conversations, as she described them in her testimony indicate that this was a situation where it was uncertain

whether this was a case serious enough to involve the insurance company, and that until the Petitioner made that decision, it was not going to be reported.

On March 4, 2013, Dr. Galatz performed a left arthroscopic debridement, capsular release and removal of loose bodies on Petitioner at Barnes Jewish Hospital. (P.Ex.2, p.13-14). On March 22, 2013, Ms. Amanda Hessel of Apex reported that Petitioner had attended three physical therapy visits since his operation. Petitioner wished to continue his physical therapy on his own through a home exercise program. He had returned to work light duty on March 18, 2013. (P.Ex.1, p.24-25). On May 1, 2013, Dr. Galatz reexamined Petitioner. At that time, Dr. Galatz released Petitioner from care and instructed him to engage in activities as tolerated. Dr. Galatz stated that Petitioner would likely need to obtain a total joint replacement in the future, but would wait to see what pain relief he received from the previous surgery. She also stated that he may want to have the same procedure done to his right shoulder in the Fall. (P.Ex.1, p.30).

Petitioner returned to working full duty following his release from care. Petitioner eventually began experiencing worsening pain in both of his shoulders at work. On January 29, 2014, Petitioner returned to Dr. Galatz with complaints of severe pain in both shoulders, with worse popping and crepitus in his left shoulder. This pain interfered with Petitioner's work, sleep and daily activities. X-rays revealed bilateral shoulder arthritis, left worse than right, and loose bodies in the subcoracoid recess on the right. Dr. Galatz recommended that Petitioner undergo a total shoulder replacement of his left shoulder, and indicated he would likely need this procedure done on his right shoulder, as well. (P.Ex.1, p.32). On July 30, 2014, Dr. Galatz reexamined Petitioner's left shoulder. Petitioner had increasingly worse pain, which interfered with his work. At that time, Petitioner decided to go forward with a left total shoulder replacement. Dr. Galatz noted that as a plumber, Petitioner is required to lift heavy objects, and that following this surgery, he would need to ask for help with these activities. (P.Ex.1, p.39).

Dr. Galatz testified by deposition on August 20, 2014. (P.Ex.6). Dr. Galatz is a board certified orthopedic surgeon who specializes solely in upper extremities and who has performed approximately 1,000 shoulder arthroplasties. (P.Ex.6, p.5-6). She is a professor with the Department of Orthopedic Surgery at Barnes Jewish Hospital in St. Louis.

Dr. Galatz testified that she has knowledge of the work that plumbers perform. (P.Ex.6, p. 15). Dr. Galatz testified that Petitioner's work as a plumber aggravated Petitioner's arthritis and caused his pain to increase in both shoulders, ultimately requiring the March of 2013 surgery and future surgeries. (P.Ex.6, p.15, 28, 89-90). She testified that heavy lifting and repetitive activities in the overhead position as a plumber are hard on the joints and can aggravate symptoms of shoulder arthritis. (P.Ex.6, p.15-16, 89-90). Dr. Galatz was of the opinion that although Petitioner's work as a plumber did not cause the underlying arthritis in his shoulders, it did aggravate "his arthritis to where it's more symptomatic and needs medical treatment."(P.Ex.6, p.27)

Dr. Paletta testified by deposition on December 18, 2014. (R.Ex.1). He performed an §12 examination on Petitioner on May 19, 2014 at Respondent's request. He is a board certified orthopedic surgeon. (R.Ex.1, p.5). Dr. Paletta noted that Petitioner gave a history of bilateral shoulder pain from overhead activities. (R.Ex.1, p.13). He also noted that Petitioner had been having pain from throwing a baseball with his son. (R.Ex.1, p.13-14). Dr. Paletta stated that Petitioner was right hand dominant, but that he had worse pain in his left shoulder

than his right. (R.Ex.1, p.19). Dr. Paletta diagnosed Petitioner with advanced glenohumeral joint arthritis of both shoulders. (R.Ex.1, p.20). Dr. Paletta did not believe that Petitioner's shoulder condition was the result of his work activities because Petitioner did not specifically attribute the onset or increase of pain to his work activities. (R.Ex.1, p.21-27). Dr. Paletta did state that the medical treatment that Petitioner received for his left shoulder up to that point was appropriate. (R.Ex.1, p.20). He also stated that Petitioner would likely need to obtain shoulder replacement surgery in the future, as well. Id.

Dr. Paletta admitted he did not specifically ask Petitioner about his work activities or the specific tools that Petitioner used as a plumber. (R.Ex.1, p.27-28). He also did not recall whether he asked Petitioner about his overhead activities as a plumber. (R.Ex.1, p.39). Instead, Dr. Paletta relied upon the job duties form that was completed by Mike Allen. (R.Ex.1, p.36-40). However, Mike Allen admitted it was not an accurate job description. (Tr.90). Dr. Paletta also admitted that Petitioner's overhead work activities may have made him more symptomatic and that if Petitioner had complaints from work activities, then that may change his opinion on causation. (R.Ex.1, p.42). Finally, Dr. Paletta admitted that repetitive overhead activities can cause an increase of symptoms from arthritis. Dr. Paletta was asked what types of activities that a plumber performs can aggravate or accelerate glenohumeral arthritis. (R.Ex.1, p. 54). Dr. Paletta testified that repetitive overhead lifting could increase symptoms related to osteoarthrtis or heavy lifting up to 100 pounds could also be a contributing factor. (R.Ex.1, p.54-55).

On cross examination, Dr. Paletta admitted that he would have expected that Petitioner's right shoulder symptoms would have been worse if he was throwing a lot with his right arm. (R.Ex.1, p.46).

On October 2, 2014, Dr. Galatz performed a left total shoulder replacement surgery on Petitioner at Barnes Jewish Hospital. (P.Ex.2, p.30-32). Petitioner was restricted from work following the surgery. (P.Ex.4, p.1). On November 12, 2014, Dr. Galatz reexamined Petitioner. (P.Ex.1, p.54). Dr. Galatz restricted Petitioner from work until further notice. (P.Ex.4, p.3). Petitioner began physical therapy at Apex on November 17, 2014. (P.Ex.3, p.2). Petitioner was still undergoing physical therapy at the time of the hearing and had a follow up appointment with Dr. Galatz pending.

CONSLUSIONS OF LAW

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
Issue (E): Was timely notice of the accident given to Respondent?
Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner testified credibly about his work duties, which included carrying tools and materials weighing well over 25 pounds and performing work overhead for three to four hours each day. Petitioner's testimony was corroborated by the testimony of Mike Allen. Mr. Allen's testimony also established the job duty form that he completed for the use of Dr. Paletta's in performing the §12 exam of Petitioner was inaccurate.

Petitioner testified that his bilateral shoulder pain limited his ability to work overhead for Respondent at the end of 2012, and this is why he sought medical treatment from Dr. Leesa Galatz. He stated in his initial visit with Dr. Galatz on January 2, 2013, that he suspected his bilateral shoulder pain was due to his long work history as a plumber. Dr. Galatz confirmed his suspicion and testified that Petitioner's job duties as a plumber

placed stress on his shoulder joints and thus aggravated pre-existing arthritis in both of his shoulders requiring medical treatment.

The Arbitrator finds the causation opinion of Dr. Galatz more persuasive than that of Dr. Paletta. Dr. Paletta admitted that he did not specifically ask Petitioner about his work duties or the tools that he used as a plumber. This would include the amount of overhead work that Petitioner performed as a plumber. Instead, Dr. Paletta relied on the inaccurate job duty form prepared by Mr. Allen. Finally, Dr. Paletta did admit that Petitioner's overhead work activities may have made the arthritis in his shoulder more symptomatic, which led to Petitioner's need to seek treatment for his bilateral shoulder condition.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner proved he sustained repetitive trauma injuries to his shoulders that arose out of and in the course of employment, and Petitioner's bilateral shoulder condition is causally related to his work activities as a plumber, with a manifestation date of January 2, 2013. January 2, 2013 is the manifestation date since Petitioner's bilateral shoulder condition reached a point at work where Petitioner had to undergo more extensive medical treatment for his injuries. Petitioner testified that he told Mr. Ponce, his direct supervisor and co-owner of Excel Plumbing at the time, about his work injuries within a week after his initial examination with Dr. Galatz on January 2, 2013. Respondent presented no evidence to refute Petitioner's testimony about giving notice of his shoulder injuries to Mr. Ponce. In fact, the testimony of Ms. Runge tends to indicate that Respondent was at least aware that Petitioner was claiming a work related condition in his shoulders at some point prior to March, 2013. Thus the notice provided to Mr. Ponce within a week of the date of accident satisfied Petitioner's obligation to place Respondent on notice of his injury within 45 days as provided in the Act.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
Issue (K): Is Petitioner entitled to any prospective medical care?

Petitioner proved that Respondent is liable for payment of past medical services regarding his shoulders, and will be liable for payment of the prospective medical care recommended by Dr. Galatz. Respondent shall pay reasonable and necessary medical services of $78,387.94 as set forth in Petitioner's Exhibits 3 & 5, pursuant to Sections 8(a) and 8.2 of the Act.

Issue (L): What temporary benefits are in dispute?

The Arbitrator finds that Petitioner has proved that Respondent must pay him TTD benefits from March 4, 2013 to March 17, 2013 and from October 2, 2014 to January 14, 2015, at a rate of $1,024.43 per week.

Issue (N): Is Respondent due any credit?

The Arbitrator finds that Respondent is due a credit of $11,265.92 for TTD benefits paid from October 2, 2014 to December 18, 20

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jack Hafliger,

Petitioner,

vs. NO: 11 WC 16170

16IWCC0076

State of Illinois Department of Corrections,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 13, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: JAN 2 9 2016
TJT:yl
o 1/25/16
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAFLIGER, JACK
Employee/Petitioner

Case# 11WC016170

STATE OF ILLINOIS- DEPT OF CORRECTIONS
Employer/Respondent

16IWCC0076

On 5/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1727 LEE, MARK N LAW OFFICE
KEVIN MORRISON
1101 S SECOND ST
SPRINGFIELD, IL 62704

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0514 ASSISTANT ATTORNEY GENERAL
RICK C GLISSON
500 S SECOND ST
SPRINGFIELD, IL 62706

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SYSTEMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

MAY 13 2015

RONALD A.RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0076

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JACK HAFLIGER,
Employee/Petitioner

v.

STATE OF ILLINOIS-DEPARTMENT OF CORRECTIONS,
Employer/Respondent

Case # 11 WC 16170

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **4/21/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **11/13/10**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

In the year preceding the injury, Petitioner earned $**55,810.00**; the average weekly wage was $**1,073.42**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **3** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

The petitioner has failed to prove by a preponderance of the evidence that he sustained an accidental injury to his right hand due to repetitive work activities that arose out of and in the course of his employment by respondent on 11/13/10. Petitioner's claim for compensation is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

5/7/15
Date

MAY 13 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 55 year old Corrections Officer, alleges he sustained an accidental injury to his right hand due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 11/13/10. Petitioner has been a Corrections Officer at Taylorville Correctional Center since 1999, and was at Logan Correctional Center from 1995-1999. His duties in both facilities were the same. Petitioner is right hand dominant.

Petitioner currently works in the housing unit. On or about the date of the alleged injury petitioner testified that he was working in the healthcare unit and housing unit. Petitioner's assignments changed every so often. In 2010 petitioner testified that he worked overtime 2-3 days a week, usually on the day shift. The number of overtime hours he worked varied. This could be in the housing or healthcare unit. Petitioner's regularly assigned shift is the 11pm-7am shift.

When assigned to the healthcare unit petitioner was responsible for signing inmates in and out, and walking the wing and signing the log book every thirty minutes. Inmates would most often sign in and out of the healthcare unit during the day since they regularly went there for checks of their diabetes and blood draw 2-3 times a week. Not many inmates were signed in and out of the healthcare unit during the night shift.

When petitioner worked overtime he may work as a wing officer. In this capacity he would make wing checks every thirty minutes. This would entail walking to the end of the hallway of the wing, removing the padlock on the log box with a key, signing the log book, and replacing the padlock. Petitioner would write the time he signed in, if anything wrong, and his name or initials. (RX11)

As a wing officer he would also open the closet so employees could get cleaning supplies out of it. He would write down the supplies that were taken. The closet was usually opened for inmates no more than 2-3 times on evening and night shift, and 15-20 times on day shift. Respondent offered into evidence the equipment log for a three day period (4/12/15-4/15/15) that showed there were only 10 entries during this entire period. (RX5)

Although petitioner has worked every job on the midnight shift, which included the housing unit, the tower, and healthcare unit, he worked mostly in the housing unit. During the time he is alleging his injury petitioner testified that he was working in the healthcare unit and housing unit.

If petitioner was assigned to desk duty on the day shift he would be required to sign inmates in and out for jobs, call passes, and other papers. This required entering time in and out. (RX20) Inmates moved about more on the day shift. There was very minimal movement on his regular shift, which was nights. If petitioner was

assigned control officer on day shift he would be the one signing the passes. On the day shift he may issue 4-5 call passes. On the preprinted passes the officer would sign their name and time they signed the inmate out. (RX21-22) The officer in central control would also complete a log that listed the inmates name and number, destination, time out and officer signature. (RX24) Petitioner's regular shift was the night shift.

If petitioner was assigned the segregation unit he would use a Folger Adams key to open the chuck holes to pass food through and to open the door to let the nurse in. Petitioner did not work in this area in 2010, and does not work it now. If working in this area petitioner did wing checks every 30 minutes.

Petitioner testified that on a regular shift he may use a key 30-40 times. He testified that on the night shift the inmates were mostly in their cells. They were not allowed to use the laundry room or the day room on the night shift.

If petitioner was assigned the tower officer post he did not use any keys and did not do any writing. His primary job there was monitoring.

Dan Clark, Shift Supervisor at Taylorville Correction Center, was called as a witness on behalf of respondent. He is the one who assigns officers to their posts. He is familiar with all of petitioner's duties. Clark testified that there is less inmate movement and activity on the night shift. He testified that the officer would use a key 2 times to get in the day room for each wing check. He testified that at a minimum the officer would use a key 4 times each half hour. Officers on the night shift got 1/2 hour lunch break. Clark testified that day passes could be prewritten. If there is a last minute request the day officer would hand write the passes. He estimated that the call pass summaries have about 10 entries every 8 hours. He stated that day shift is much busier than the night shift. However, most movement during the day is line movement and there is no sign out.

Clark testified that the healthcare unit has one wing check log, and there are no keys to get at it. However, if someone needed to use the bathroom the officer would use a key to open and close it.

On 10/22/10 petitioner presented to Dr. Mark Greatting for right carpal tunnel syndrome and cubital tunnel syndrome. Petitioner gave a history of right hand numbness, tingling, and pain since August 2010. He denied any injury to his right hand. He reported intermittent numbness and tingling, that has been increasing in frequency as time goes on. He reported that all fingers in his right hand are involved, and it occasionally feels like it radiates up the medial or anterior arm. He denied any weakness. Petitioner reported that the numbness and tingling are usually intensified with computer activities, writing, brushing his teeth, and painting. He made no mention of turning keys at work. Dr. Greatting noted that petitioner works as a correctional officer and was not filing this as a workman's comp. Following an examination and review of the EMG Dr. Greatting assessed

carpal tunnel syndrome, and cubital tunnel syndrome on the right. Dr. Greatting was of the opinion that the findings at the elbow may have been incidental findings on the EMG. Dr. Greatting recommended a surgical release of the right carpal tunnel since conservative treatment had not worked.

On 11/17/10 petitioner returned to Dr. Greatting. At this visit he gave Dr. Greatting a history of being a correctional officer for 15 years. He stated that over time he had developed chronic numbness/tingling in his right hand. He reported that most of his symptoms are during the day. He stated that wearing a splint during the day helps with his work activities including turning keys, which he has to do frequently and repetitively at work, as well as writing. Based on this history Dr. Greatting was of the opinion that petitioner's work activities caused, contributed to, or aggravated his condition of right carpal tunnel syndrome.

On 11/30/10 petitioner would underwent a right carpal tunnel release. This procedure was performed by Dr. Mark Greatting. Petitioner followed up postoperatively with Dr. Greatting on 12/14/10 and 1/20/11. On 1/20/11 petitioner's numbness had resolved. He reported that the incision was still a little sensitive. He stated that his strength was good. He told Dr. Greatting that he was already working without restrictions. Dr. Greatting released petitioner from his care. He noted that petitioner was at maximum medical improvement and could continue to work without restrictions.

On 12/12/11 the evidence deposition of Dr. Greatting, an orthopedic surgeon, was taken on behalf of petitioner. Included as PX2 in Dr. Greatting's deposition is a job description that petitioner drafted before the deposition that stated:

> " When working most assignments as a correctional officer, I am regularly locking and relocking doors and padlocks. Everything is locked to keep inmates from getting things they are not supposed to have without authorization of going somewhere they are not allowed to go.
>
> On a housing unit, I have to walk the wing (area where inmates live) regularly & the book every half hour minimum. This book is in a locked box. There are two wings on each housing unit. The door going onto each wing is also locked which has to be unlocked upon entering and relocked when I exit the wing.
>
> When inmates are cleaning, I have to let them into a locked closet to get brooms and mops for them to clean with. Each time I enter the closet, I have to lock the door, get whatever is needed and resecure the door. This happened several times a shift. It happens even more when I worked overtime on day shift. Each time an inmate is finished with a broom or mop, they have to be returned to the locked closet. The brooms and mops cannot be left unattended.
>
> Another assignment I work regularly is the healthcare unit. It is set up similar to a housing unit only smaller with only one wing. At the healthcare unit the restroom is also locked so I have to unlock the door every time I use the restroom.

I have worked overtime many times on many different assignments. Almost all assignments require unlocking and relocking doors on a regular basis. From May 1, 2008 to June 30, 2009 alone, I was offered over 750 hours of overtime. I worked approximately 90 to 95% of that offering."

Based on the job description and the history that petitioner provided him, Dr. Greatting opined that petitioner's work activities were a contributing factor to the development of carpal tunnel syndrome. On cross-examination Dr. Greatting was of the opinion that petitioner had essentially a normal result from the surgery, and he did not expect him to have any further problems. Dr. Greatting noted that petitioner did not tell him the number of times that he turns keys during the course of a shift. Dr. Greatting was unaware that petitioner also worked in the tower. He testified that if most of petitioner's time before the alleged injury was spent working in the tower that could cause him to change his opinion. Dr. Greatting did not know how much time petitioner spent in the healthcare unit, housing unit, or control tower. Dr. Greatting stated that if petitioner uses a house key as opposed to the Folger Adams key, it could change some of his opinions that he rendered about the key turning. Dr. Greatting was of the opinion that some medical conditions such as thyroid problems, rheumatoid arthritis, obesity, and diabetes can make someone more likely to develop carpal tunnel problems. Dr. Greatting was of the opinion that it's not completely proven the amount of repetitive activity that it takes to cause carpal tunnel syndrome. Dr. Greatting admitted that when he examined petitioner he did not have petitioner's detailed analysis of his job duties that he was given before the deposition. Dr. Greatting agreed that some causes of carpal tunnel are idiopathic.

On 1/18/12 petitioner underwent a Section 12 by Dr. James Williams, at the request of the respondent. Petitioner gave a history of working for the Correctional Department since May 1995. He stated that he worked at the Logan Correctional Center from May 1995 until September 1999. From September 1999 until the present time he has worked at the Taylorville Correctional Center. Petitioner reported that he works the 11 PM to 7 AM shift. He stated that his job involves the following:

" His job involves walking and keeping an eye on stuff. He said the workers come out and clean. He said they take care of cleaning the floors, mopping and buffing for which he said the prisoners do. He said the inmates go to dietary for breakfast about 4:45 a.m. and at about 2:00 a.m. they clean. He said he does work some overtime and when he does that he goes onto the day shift or 1st shift. He said the environment there is a dorm type environment. There are 6 housing units. Each house has 2 wings that are 5 rooms per wing and there are 10 bunk beds per room, so each wing has 10 bunk beds per room, so each wing has 10 bunk beds with 20 people so there are approximately 100 inmates per wing or 200 inmates per house so that are approximately 6 houses with approximately 1200 inmates secured at Taylorville Correctional Center. He said when you walk into the house there is a

control room, on each side there is a wing with a locked door. He said at 9:30 p.m. it stays locked until the 4:00 a.m. count. He said he uses a regular key to unlock the lock, not a large Folger Adams key. He said there is a dayroom with T.V., showers and bathrooms. He said the only time they are in cuffs is when they leave the institution to go either to court or to the doctor. He said he goes down into a wing every 30 minutes, at the end of the wing there is a box that is locked with a padlock where you have to sign that you entered the wing. He said there is a count at 11:00 p.m. as well as 4:00 a.m. where you mark a count slip where you make known how many inmates are in or out, sign and verify where the inmates are if they are out. He said there is a closet with brooms which is locked on the day shift and they have to let them in there. In segregation there are large Folger Adams keys. In the healthcare unit you do use large Folger Adams keys as there are 2 segregation cells. He said over 1 year he worked off and on and then he worked half a shift. He said the first half of the shift was in the tower viewing the monitors. He said he does do firearms certification which is when the carpal tunnel started bothering him. He has to do that one time per year which is the only gun firing he ever does."

Petitioner gave a history of hypothyroidism, hypercholesterolemia, and rheumatoid arthritis. Petitioner reported that he has had rheumatoid arthritis for at least 3 to 4 years, and has had hypothyroidism for at least 48 years. Dr. Williams reviewed the Illinois Form 45, Employer's First Report of Injury or Illness, and the Supervisor's Report of Injury or Illness. He also reviewed a Demands of the Job Description filled out by Penny Pavloka, the shift supervisor. Dr. Williams also reviewed medical records of Dr. Western, Dr. Becker, and Dr. Greatting. Following his examination and record review, Dr. Williams' impression was that petitioner had right carpal tunnel release which appeared to have been successfully treated. He did not feel that petitioner's right carpal tunnel syndrome was either related or aggravated by his job duties based on the job description he reviewed, and based upon the description petitioner gave him of his job, which he did not feel was highly repetitive or involved any forceful repetitive gripping, vibration, or impact. Dr. Williams was of the opinion that petitioner's rather significant medical history of rheumatoid arthritis, hypothyroidism, as well as increased body mass index would more likely be the causative or aggravating factor in the development of his carpal tunnel, then would be his job duties. He was of the opinion that petitioner had reached maximum medical improvement and was capable of working his regular duty job without restrictions.

On 10/24/13 the evidence deposition of Dr. Williams, an orthopedic surgeon, was taken on behalf of respondent. Dr. Williams testified that Section 12 examinations comprises only 5% of his practice. Dr. Williams opined that petitioner's work did not cause, aggravate, or contribute to the development of his right carpal tunnel syndrome. Dr. Williams based his opinion on what petitioner told him about his job, the job description, and the activities petitioner told him he was engaged in at work. Dr. Williams opined that petitioner's work activities did not cause his right carpal tunnel syndrome. He opined that petitioner's other

medical co-morbidities such as his rheumatoid arthritis, hypothyroidism, and increased body mass index were likely the causative factors of his carpal tunnel. Dr. Williams was of the opinion that rheumatoid arthritis is an inflammatory arthropathy, a systemic type condition, which involves inflammation of surrounding tissues and leads to an increased predisposition to one developing carpal tunnel syndrome. With respect to hypothyroidism, Dr. Williams was of the opinion that the hormonal changes involved with thyroid dysfunction leads one to an increased predisposition of the nerve being more susceptible to developing carpal tunnel. Dr. Williams was of the opinion that the greater the body mass index, the greater the risk for developing carpal tunnel syndrome.

Dr. Williams testified that he has had the opportunity to be in four different correctional facilities, and perform many of the activities of which a correctional officer would perform at the correctional facility. One of these correctional facilities was the Jacksonville Correctional Center, where petitioner works. He testified that he has turned keys, cuffed and uncuffed an officer, open and closed the chuck holes, and open and close doors in the normal wings, as well as in segregation. Based on petitioner's history, Dr. Williams did not find any significant repetitive, or ongoing use of the keys. Dr. Williams noted that petitioner told him he spent some time in the control tower, and did not use any keys while working in the control tower. With respect to petitioner's extracurricular activities Dr. Williams noted that petitioner stated that he likes to work on cars and used to ride his motorcycle. Dr. Williams noted that riding a motorcycle involves vibration, and that is something that can obviously develop and/or lead to the symptoms of carpal tunnel. He was further of the opinion that working on cars, involves a lot of gripping, forceful gripping, which also can be significant. With respect to locking and re-locking the doors, and padlocks, Dr. Williams was of the opinion that this activity was intermittent, and not continuous. He was of the opinion there is sufficient rest in between this activity being performed. Dr. Williams testified that more than 50% of his patients with carpal tunnel are of an idiopathic nature. Dr. Williams was of the opinion that petitioner did not have any significant amount of writing and his job. He noted that petitioner had the sign the log every 30 minutes.

On cross-examination Dr. Williams testified that he charges $2,000 for a deposition, and $2,500 for a Section 12 examination. Dr. Williams testified that he saw 5500 patients in the past year . Dr. Williams opined that petitioner's work activities were not an aggravating factor or contributing factor to his carpal tunnel based on the fact that petitioner only used his hands for gross manipulation, grasping, twisting, handling 0 to 2 hours a day.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case ... where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming an injury to his right hand, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury "manifested itself".

Petitioner works as a Correctional Officer at Taylorville Correctional Center. He has been a corrections officer since 1995, and at Taylorville Correctional Center since 1999. Petitioner's regular shift is the night shift, 11 pm to 7 am. On or about the alleged date of accident, 11/13/10 petitioner testified that he worked in the housing unit and healthcare unit. During this same period petitioner worked overtime 2-3 times a week, usually on the day shift. The hours he worked overtime varied.

Petitioner's primary task each night was walking the wings and signing the log book. In the housing unit he was responsible for doing this on 2 wings, and in the healthcare unit doing it for one wing. Every half hour he would walk the wing, use a key to open the padlock, sign the log book, and replace the log book. In the housing unit petitioner would open the closet so that inmates could get cleaning supplies out. He would write down what supplies were taken and when they were returned. On the night shift petitioner may open the closet 2-3 times, and on the day shift it may be 15-20 times. However, respondent offered the log for a three day period and it only showed 10 entries for the entire 3 day period. In the housing unit petitioner would sign out inmates only 2-3 times a week so that they could go to the healthcare unit. If petitioner was working in the healthcare unit he did not have to remove a padlock to sign the log book. Petitioner would have to lock and

unlock the bathroom if he needed to use it. Clark testified that officers on the night shift would use a key at least 4 times a half an hour. Petitioner testified that he used a key 30-40 times a shift when working the housing unit. It would be less in the healthcare unit, and not at all in the tower. There was minimal movement of inmates on the night shift.

On the 2-3 days petitioner would work overtime he may work in the housing unit, healthcare unit or tower. If assigned to desk duty he would sign inmates in and out for jobs, call passes and other paper. He may issue 4-5 call passes a day. On a preprinted call pass he would sign his name and enter the time they signed the inmate in and/or out. Most movement of inmates on the day shift was mass movement and did not require any signing in or out. If assigned to central control petitioner would complete a log that listed the inmates name, number, destination, time out and officer signature. Petitioner did not state the frequency with which he worked central control.

In addition to placing into evidence specific and detailed information concerning his work activities, including the frequency, duration, manner of performing, etc., it is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities. When petitioner first presented to Dr. Greatting on 10/22/10 he specifically stated that he was not filing this as a worker's comp claim, and did not mention his work activities as the cause of his right hand symptoms. In fact, he specifically stated that his symptoms intensified with computer activities, writing, brushing his teeth, and painting. Additionally, he told Dr. Greatting on 11/17/10 that most of his symptoms were during the day. The arbitrator notes that petitioner regularly works on nights, and only 2-3 day shifts on or about the alleged accident date. On 11/17/10, all petitioner told Dr. Greatting was that he was a correctional officer for 15 years. He did not provide any specifics regarding his job duties. Based solely on petitioner's history as a correctional officer for 15 years, Dr. Greatting was of the opinion that petitioner's work activities caused, contributed to, or aggravated his condition of right carpal tunnel syndrome. Dr. Greatting admitted that when he examined petitioner he did not have a detailed analysis of his job duties. Given the fact that Dr. Greatting did not have a detailed and accurate understanding of petitioner's duties when he rendered his causal connection opinion, the arbitrator gives lesser weight to the opinions of Dr. Greatting.

After releasing petitioner from his care, and before his deposition, Dr. Greatting reviewed a job description drafted by petitioner. Although this job description listed more specifics of petitioner's job duties, it does not include the frequency with which he performed these duties or the manner in which he performed these duties. During his deposition Dr. Greatting noted that petitioner did not tell him the number of times he turned the keys during the course of a shift. He was also unaware that petitioner would work in the tower. Dr. Greatting opined

that if petitioner was using house-like keys, as opposed to Folger Adams keys, which he was, that could change some of his opinions that he rendered with respect to key turning.

Dr. Greatting also opined that some medical conditions such as thyroid problems, rheumatoid arthritis, obesity and diabetes, all which petitioner has, can make someone more likely to develop carpal tunnel syndrome.

Dr. Williams also examined petitioner, and performed a record review that included a Job Description by history from petitioner, as well as Job Description filled out by Penny Pavloka, the shift supervisor. Based on this information, which included a detailed and accurate understanding of petitioner's job duties, Dr. Williams opined that petitioner's right carpal tunnel syndrome was not related to, or aggravated by his job duties. Dr. Williams did not feel petitioner's job duties were highly repetitive or involved any forceful repetitive gripping, vibration or impact. He opined petitioner's rheumatoid arthritis, hypothyroidism, as well as his increased body mass index were more likely the causative or aggravating factor in the development of his carpal tunnel syndrome. Dr. Williams was of the opinion that petitioner's job duties did not require any significant, repetitive or ongoing use of keys. He believed petitioner had sufficient rest between the times he had to use keys to open locks. Dr. Williams noted that petitioner's own job description showed that petitioner only used his hands for gross manipulation, grasping, twisting, and handling 0 to 2 hours a day. He was further of the opinion that petitioner's extracurricular activities of riding a motorcycle and working on cars involve vibration, a lot of gripping and forceful gripping, which are activities that can obviously develop and/or lead to the symptoms of carpal tunnel.

Based on the above, as well as the credible evidence, the arbitrator adopts the findings and opinions of Dr. Williams, given the fact that he had an accurate and detailed understanding of petitioner's job duties. The arbitrator gives less weight to Dr. Greatting's opinions based on the fact that he did not have an accurate and detailed understanding of petitioner's work duties. The arbitrator finds the petitioner's use of keys was not repetitive, and the amount of writing he performed daily was minimum and limited to a few words each half hour. Based on the admission of respondent's exhibits relative to the various forms the correctional officers entered data on each day, the arbitrator finds the officer's writing was most frequently limited to times, initials or signature, and a few other words. It was not performed on a repetitive basis, especially on the night shift, which petitioner worked. Additionally, any writing or key use petitioner did on the day shift was no more than 2-3 days a week when he worked overtime. However, the amount of overtime petitioner worked each of these days is unknown.

The arbitrator finds the petitioner has failed to prove by a preponderance of the evidence that he sustained an accidental injury to his right hand due to repetitive work activities that arose out of and in the course of his employment by respondent on 11/13/10.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Having found the petitioner has failed to prove by a preponderance of the evidence that he sustained an accidental injury to his right hand due to repetitive work activities that arose out of and in the course of his employment by respondent on 11/13/10, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS	)	☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF WILLIAMSON	)	☐ 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

David Eldaracher,

Petitioner,

vs. NO: 13 WC18297

Bowen Engineering,

Respondent.

16IWCC0077

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, occupational disease, vocational rehabilitation, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 18, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

16IWCC0077

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 9 2016
TJT:yl
o 1/25/16
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

ELDARACHER, DAVID
Employee/Petitioner

Case# **13WC018297**

BOWEN ENGINEERING
Employer/Respondent

16IWCC0077

On 5/18/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

5404 LAW OFFICE OF FOLEY & DENNY
TIMOTHY D DENNY
PO BOX 685
ANNA, IL 62906

5018 ALLEN KOPET & ASSOCIATES
KATHLEEN ULBERT
33 N LASALLE ST SUITE 2110
CHICAGO, IL 60602

16IWCC0077

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

David Eldracher
Employee/Petitioner

v.

Bowen Engineering
Employer/Respondent

Case # 13 WC 18297

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin, IL**, on **March 13, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?

G. ☐ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other ___

16IWCC0077

FINDINGS

On the date of accident, **February 6, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the accident.

In the year preceding the injury, Petitioner earned $1694.46; the average weekly wage was $1694.46.

On the date of accident, Petitioner was **47** years of age, *single* with **0** dependent children.

Respondent *has* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$56,615.14** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $56,615.14.

Respondent is entitled to a general credit for any medical bills paid by its group medical plan for which credit is allowed under Section 8(j) of the Act.

ORDER

Petitioner sustained an exposure to hydrofluoride on February 6, 2013 that arose out of and in the course of his employment with Respondent but only to his left arm. Petitioner failed to prove he sustained an occupational disease as a result of that exposure or that his current condition of ill-being is causally connected to that exposure. No benefits are awarded.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

May 11, 2015
Date

ICArbDec19(b)

MAY 18 2015

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner has filed a claim pursuant to the Occupational Diseases Act. At the present time Petitioner seeks ongoing TTD, medical and vocational rehabilitation services. Petitioner was the only witness testifying at the 19(b) hearing.

The Arbitrator finds:

An Incident Investigation Report was completed D. Cavens of the Respondent on February 7, 2013. (PX 1) According to the incident report Petitioner was working on the 4th floor of the FMB on the Fluorine side. Petitioner was removing his safety harness when debris fell from the beam into his left sleeve and dusted the back of his neck. Petitioner was noted to have "shook" his sleeve out and continued to work. Petitioner noticed an irritation on his arm and he was taken to the medical facility as a precaution. Calgonate was applied for 30 minutes to Petitioner's arm. It was noted that at the time of the incident Petitioner was wearing his hardhat, ear plugs, overalls, gloves and half face respirator. Terry Parner's statement dated "February 6, 2013" references dust going down Petitioner's sleeve. (PX 1)

Petitioner was taken to Occunet on February 7, 2013. Petitioner completed a statement that was signed by him and noted the time of completion to have been 6:46 p.m. (PX 1, p. 6) Petitioner reported that he was on the "NW corner, 4th floor, FMB Fluorine side torqueing bolts [and] hanging a beamer [when he] felt dust go down sleeve and shirt (neck area) [when] he shook his sleeve out [and] continued working." (PX 1, p. 6)

According to Petitioner's Exhibit 11, the time card entry lists, Petitioner worked full duty for Respondent following his alleged work accident of February 6, 2013 until his lay-off on March 24, 2013. Petitioner worked an average of 60 hours per week following his alleged accidental injury at work.

On February 7, 2013, Petitioner was seen at Occunet, 2535 Broadway, in Paducah, Kentucky for a hydrofluoric burn to his left foreman on February 6, 2013 while at work. The burn had been treated with Calgonate for about a half of hour. (PX 2, p. 2) Petitioner complained that the night before he developed a headache and felt nauseated. He noted that he had not vomited. On exam in regard to Petitioner's mouth/throat Petitioner was noted to be negative for difficulty swallowing, hoarseness, tenderness, no change in voice or mouth ulcers. Petitioner was also noted to be negative for asthma, bronchitis, chronic cough and shortness of breath. Petitioner's respiratory effort was noted to be even and unlabored and breath sounds were normal. On percussion Petitioner's lung fields were clear and equal. Petitioner was diagnosed with a muscle contraction headache with associate nausea. The headache was noted to be self-limited and not related to his alleged exposure or treatment. Petitioner was discharged from care and released to return to work. Petitioner was instructed to follow up only if needed. (PX 2, pp. 2-3)

Petitioner did not seek any medical treatment from 2/8/13-4/11/13 or for 2 months and 4 days. Petitioner's employment with Respondent ended on March 24, 2013 and Petitioner began work for a new employer, United Iron Workers.

On April 12, 2013 Petitioner presented to Cape Medical Group and was seen by Dr. Jeffrey Childers. (PX 3) Petitioner presented with sinus symptoms. On exam Petitioner was noted to have normal lips, teeth, gums, mucosa, palate and posterior pharynx. He was specifically noted to be negative for oral sores/ulcer and a sore throat. Petitioner was negative for chronic cough, dyspnea and frequent wheezing. Petitioner was noted to have diffuse expiratory wheezes. Dr. Childers noted that the petitioner had a normal respiratory rate. Dr. Childers assessment was that Petitioner had acute sinusitis, unspecified, GERD and reactive airway disease. Petitioner was given prescriptions for

Prilosec, Albuterol, Qnasl, Zyrtec, and Doxycycline. There was no comment on work ability in the records.

Petitioner did not seek any medical treatment from 4/13/13 to 8/8/13 or 3 months and 27 days. Petitioner did work for United Iron Workers, D&S Fence (DNS), and Rednour Steel Erectors during that gap in time.

Petitioner signed his Application for Adjustment of Claim herein on April 21, 2013. (AX 2)

On August 9, 2013 Petitioner presented to Barnes Jewish Hospital emergency room. (PX 5) Petitioner presented with complaints of shortness of breath. Petitioner presented a history of working at the Honeywell Plant and in January of 2013 was exposed to powder/dust-an unknown chemical. "WMD's are produced at this plant." In later notes Petitioner reported that he had a chemical exposure in February when "some of the machinery used to make weapons of mass destruction fell on him." (PX 5, p. 7) Petitioner stated that since that time he has had symptoms of rash/burn, back pain, flu-like symptoms, knot behind his left ear, and difficulty breathing. (PX 5, p. 5) The triage assessment determined that Petitioner had good air exchange, his lung sounds were clear and his breathing was unlabored. It was recorded that he was not currently taking any medication. A CT scan of his chest was completed. An incidental liver lesion was seen as was an old posterior sixth rib fracture. Petitioner's lungs were noted to be clear, there was no pneumonia or pulmonary edema, no pneumothorax or pleural effusion. (PX 5, pp. 16-20) Petitioner was diagnosed with a shortness of breath. Petitioner was discharged from care and to his home. (PX 5, p. 23) Petitioner was returned to work with no lifting over 20 pounds for the next 4 weeks and no walking greater than two flights of stairs for the next two weeks. (PX 5, p. 41)

Petitioner was examined by Dr. John Engelhart on August 28, 2013 for the purpose of determining the nature of Petitioner's shortness of breath. In a letter addressed to Petitioner's attorney written the same day, the doctor wrote that after seeing some of the material written about the chemicals Petitioner was exposed to in his employment he was concerned that "this exposure" could have caused Petitioner's symptoms and findings of exertional shortness of breath. He did not feel Petitioner could perform his usual duties at that time. (PX 4)

At the request of his attorneys, Petitioner was seen by Dr. Tuteur at Washington University School of Medicine on September 27, 2013. Petitioner presented with complaints of severe breathing problems, coughing up of black phelm with small amount of blood, left lung pain and kidney pain.(PX 6, p 2) On the general screen he checked that he also had frequent headaches, trouble with eyes/vision, ears/hearing, nose, coughing spells, trouble breathing, heart trouble, high blood pressure, trouble with bowels, loose bowels, trouble with liver, aching muscles/joints, sexual difficulties, weight changes and fatigue. (PX 6, p. 2) Petitioner checked the following issues of note on the respiratory screen: wheezing, night sweats, work as a foundry worker and as a welder and exposure to asbestos and wheat dust. (PX 6, p. 3) A pulmonary function test was completed with the following results: 1) flow volume curve-normal; 2) lung volume-no restrictive ventilatory defect with the cause of the decreased ERV being uncertain; 3) diffusing capacity is normal; 4) arterial blood gas was normal; 5) total lung capacity was measured as normal. (PX 6, p. 10) Dr. Tuteur took an additional history from Petitioner. According to that history Petitioner was working as an ironworker using a cutting torch on an elevated I-beam covered with approximately 3 inches of industrial dust and he developed progressive symptoms. Petitioner claimed that 5 other workers were reported to have similar symptoms and were all out of work because of this. Petitioner reported wearing respirator. Petitioner reported that exposure to the dust resulted in first a skin rash and then blisters in his mouth, burning and irritation of his eyes which resulted in blurry vision. Over times his symptoms worsened particularly the burning of his eyes and his headaches. Petitioner also status that 3 to 4 days after exposure he had breathlessness and kidney pain. Petitioner noted that he was laid off from his job. Petitioner reported that he could not walk more than one block without stopping or climb a half a flight of stairs. Petitioner experiences wheezing and chest pain with exercise. Petitioner alleged that symptoms develop suddenly when he is exposed to a wide variety of triggers including diesel exhaust, exercise, heat, smoke from burning trash, perfumes, colognes, and pine-sol. On physical exam no mouth sores were noted and wheezing was heard on forced expiratory volume. Chest x-ray and chest CT scans were reviewed and noted to be within normal limits. In regard to the completed pulmonary function studies the following were

found: 1) spirometry was normal; 2) lung volumes were normal; 3) no impairment of oxygen gas exchange; 4) diffusing capacity was within normal limits. The impedance oscillometry results were indicative of reversible obstruction of small airways. Dr. Tuteur diagnosed Petitioner with irritant induced bronchial reactivity predominantly in smaller airways due to his exposure while at work. Petitioner's condition was noted as chronic and persistent and he was told not to return to work as an ironworker.

Petitioner presented to the Southeast Hospital emergency room on October 2, 2013 for complaints of worsening shortness of breath. His clinical status was noted to be improving. The impression was that Petitioner had chronic asthma/emphysema type of chronic lung disease. A chest x-ray was completed and was normal. Petitioner was discharged. Petitioner was given scripts for Albuterol, and Advair. (PX 7, pp. 18-20)

Petitioner returned to Southeast again on December 11, 2013. He again complained of difficulty breathing andwas diagnosed with COPD. Petitioner was given scripts for methyl prednisone and albuterol. New x-rays were completed and did reveal any change from prior x-rays or any abnormal findings. (PX 7)

Petitioner established care with Dr. Edward Doyle on December 30, 2013 as recommended to him by Dr. Tuteur. Petitioner gave a history of having COPD and had a list of chemicals he had been exposed to. Petitioner was also noted to have pneumonia. (PX 8)

Petitioner had a return visit to Dr. Tuteur on March 28, 2014. (PX 6, p. 19) Petitioner reported improvement with Advair and albuterol. Petitioner last saw Dr. Tuteur on July 25, 2014. Petitioner had a repeat spirometry that was well within normal limits. Petitioner was again diagnosed with chemically induced, irritant induced bronchial reactivity. He has limitations on exercise and activity due to shortness of breath. (PX 6, p. 21)

At the request of Respondent, Dr. Alan Leff performed a records evaluation on Petitioner. A written report was issued on December 24, 2014. (see RX 1)

Dr. Tuteur was deposed on February 19, 2015. (PX 9) Dr. Tuteur is Petitioner's treating physician. Dr. Tuteur is a pulmonary physician board certified in internal medicine and pulmonary diseases. His practice is predominantly pulmonary medicine

with an interest in occupational and environmental lung disease. Petitioner's Exhibit 9, Page 4. Dr. Tuteur's curriculum vitae in included as an attachment to that exhibit.

Dr. Tuteur testified as follows:

p. 7, lines 3-4	A: ...February 6, 2013, when he [the petitioner] was exposed to a dust, so-called industrial dust, when welding on elevated I-beams.
p. 7, lines 12-20	A: He had a skin rash from where the skin was exposed to these materials and he had burning of his nose and blisters in his mouth and irritation of his eyes. So clearly this material got over the facial aspect of his body and obviously was at the distal end – or the proximal end, I should say, of his ventilatory system. And assuming he was breathing, it got into his lungs.
p. 8, lines 22-4	A:...The point is we have prima facie evidence that he was in contact with caustic material that caused his skin to burn, nose and mouth, and burning of his eyes. So, irrespective of what he was wearing, the protection offered by the device as he wore it that day was incomplete.
p. 9, lines 15-21	Q: What were your relevant findings on the exam? A: The exam was pretty normal...The chest exam was normal.
p. 10, lines 15-20	A: Pulmonary functions were performed and I reviewed both graphic and numerical data. The –the standard, quote/unquote, pulmonary function studies of spirometry, lung volumes, diffusing capacity, rest and exercise arterial blood gas were all normal.
p.11, lines 4-6	A:...we also did an exercise study and there was no impairment of oxygen gas exchange induced by exercise...
p. 12, lines 5-10	A; ...indicative of reversible obstruction in smaller airway. And obviously makes a diagnosis of bronchiolar hyper reactivity with reversibility and this has been described in a variety of situations in response to the inhalation of mixed irritants.
p. 13, lines 23-24	A: My overall diagnosis is irritant-induced bronchial reactivity.
p. 14, lines 3-11	A: The treatment recommendations are twofold. One is medication...and good environmental control.
p. 36, lines 1-7	Q:..So if he an exposure on 2/6/13 and he seeks medical treatment at that time and then he no longer—and then doesn't seek medical treatment until September, is it possible that there's additional or new exposures in that time period?

A: Of course it's possible... 16IWCC0077

Dr. Alan Leff was deposed on March 4, 2015. (RX 1) Dr. Leff was retained by Respondent to perform a records evaluation. Dr. Leff is Professor Emeritus of Medicine, Department of Medicine, Pulmonary & Critical Care Medicine at the University of Chicago Hospital. Dr. Leff is board certified in internal medicine (1976) and pulmonary diseases (1979.) Dr. Leff is also a professor at the University of Chicago in seven different departments or committees including medicine, pediatrics, anesthesia, critical care, pharmacology and physiology. Respondent's Exhibit 1, Page 5-6. Dr. Leff's curriculum vitae in included as an attachment to that exhibit.

Dr. Leff testified as follows:

p.9, lines 4-18: A:Petitioner... alleges that he was exposed to dust falling from an I-beam... There were no liquids or gaseous materials reported at this time, just the dust... And between 4:00 and 4:30, he had an irritation on his left forearm which he [petitioner] showed Mr. Crow who thought it was from hydrofluoric acid which is a chemical used in his workplace. So he was seen by a nurse at the plant who also felt it was hydrofluoric acid (HF.)

P 9, lines 21-23: A:Hydrofluric acid can be a liquid, and if its heated, it can be a gas but it is not a powder.

p.10, lines 1-9: Q: And with hydrofluoric acid, what is the reaction time if your exposed ?
A: It's immediate. It's one of the strongest acids. It etches glass in seconds.
Q: And what would be—if you get it on your skin or you're in contact with it, what would be-what would it cause to a person?
A: It would cause immediate inflammation and ulceration of the skin surface that it was touching.

p.10, lines 19-21 A:... But three inches of dust accumulated being hydrofluoric acid is not really – physically impossible—is physically impossible.

p.11, lines 10-17	A:...he was taken to Paducah, Kentucky where he was seen at Occu Med. There, a full exam is recorded. His respiratory exam was normal. There was no wheezing, lung fields were clear, no chemical burns were noted, no ulceration or burning around the mouth was noted. He was discharged... for immediate return to work.
p. 11, lines 20-23	A: Wheezing is a sound. It is just a high-pitched respiratory sound. It usually means accelerated airflow through a somewhat closed space. So it's airflow that- It's turbulent airflow at a high pitch.
p. 12, lines 15-22	A: ...you can have wheezing and have nothing related due to the lung. It can come from the upper airway or because the patient is trying really hard to get the last drop out and close their glottis. You know, a lot of patients I have to tell to do, when they're exhaling, to open their mouth so that they don't produce wheezing in the upper airways.
p. 13, lines 1-6	A:... So he had a CT scan that showed no abnormalities. His diagnosis was hydrofluoric—HF exposure associated with nausea. And by the way, the symptoms that he reported, extreme headache, blurry vision don't occur with respiratory injury of any kind, and his skin rash was not observed.
p.13, lines 18-24	A: I should also point out that that is widely recognized as something that never occurs. It's called lateral spread of a chemical exposure. People who founded that idea were discredited and thrown out of the American Academy of Allergy and Immunology... the clinical portion of the allergy community...
p.14, lines 2-5	A: But those things are recognized not to exist. There is no such thing as lateral spread, allergic spread, nor does hydrofluoric acid cause any allergic process.
p.16,17, lines 22-5	Q: Now, which of those tests, if any, were done on Mr. Eldracher? A: ... he had a pulmonary function test, and he had a spirometry, and he had an exercise test. All of those came out completely normal. Q: And what does that tell you, if anything? A: It tells you that he doesn't have lung disease, not obstructive lung disease.
p. 17, lines 12-14	Q: Does it tell you whether or not the wheezing is significant? A: It tells it's not significant.
p.19, lines 8-9	A: ...You can't get COPD from a single inhalation.

p. 19, lines19-21 A: And, as I've said already, there is no acute exposure here because he was wearing a respiratory and the product was dust, and that's not hydrofluoric acid.

p. 20, lines 17-21 Q: What do the objective findings in Mr. Eldracher's records tell you about his condition, if anything?
A: They tell me he doesn't have a chronic respiratory obstructive disease.

p.21, lines 6-14 Q: What is the significance of his continuing ongoing sensitivity to different elements when he's out in the world?
A: I don't believe—I don't think it's real...I mean, he may experience it. That isn't to say that he doesn't think he has it, but it's something that's been proven not to occur as a consequence of an industrial exposure.

p.21, lines 15-24 Q: ...Mr. Eldracher is taking a series of long-acting and short-acting inhalers for his complaints. What, if anything, does that tell you?
A: Well, that it—he's not getting better. But I can understand why because every pulmonary function test he takes is normal. So to get better from asthma, you have to have it. And to get better from obstructive airway disease, you have to have some airflow obstruction.

p.31, lines 15-24 A: I'm saying that getting a significant burn for hydrofluoric acid and not even feeling anything for three hours or so and then really not much between 11 and 4 o'clock is really not consistent with a significant HF exposure. Furthermore, it was a dust. And getting that through a ventilator, through a respirator, and into his lungs is equally impossible. And there is only one case I could find in the entire literature when, under the optimal circumstances, an airway reactive syndrome was set up by inhalation of hydrofluoric acid. And a lady was holding—squeezing a bottle that said 8% hydrofluoric acid or something.

p.33, lines 2-15 A: By the way, what do you think...Tuteur has diagnosed him to have.
Q: Well, I believe he called it a reactive airway
A: Okay. So let's do reactive airways...He has normal lung function...He doesn't bronchodilate with inhalers on a pulmonary function test, he can exercise, double his heart rate without even desaturation his blood. He does not have reactive airways disease, which is why he is not getting better on treatment.

p. 37-38, lines 3-12 Q: So how would you approach from –if you're treating this patient what exactly is wrong with him and multiple physicians have diagnosed him with some type of respiratory illness?
A: Well, this is a mess. He's been told by learned people … that he has a problem, and he's never going to get better and his problem is just terrible. And how do you dig a patient out of that sort of situation, I don't know.

p. 39-40, lines 23-7 Q: What type of doctor do you believe he needs to see …?
A: I think he needs to see a pulmonologist who is willing to tell Him that this is—that, really he, doesn't have anything. The physiological data suggests he does not have anything.

Petitioner continues to see Dr. Doyle at Cross Trail Medical Center in follow-up for medication management and as his primary care physician. (PX 8) Dr. Doyle continues to keep Petitioner off of work due to "Toxic Effect of Unspecified Noxious Substance" in his lungs. (PX 8)

Petitioner's case proceeded to arbitration on March 13, 2015.

Petitioner testified that he is 47 years old and currently resides in Eminence Missouri. Eminence is a town of about 600 people and he moved there in August of last year. He graduated high school in 1986 and worked various construction type jobs before he became an ironworker in 1993 or 1994. He is a union ironworker who works out of local 782 in Paducah Kentucky.

On February 6, 2013 Petitioner was working as an ironworker for Respondent in the Honeywell plant in Metropolis Illinois. The Honeywell plant is a chemical plant. He was working on the fluorine side of the plant and was attempting to hang a beamer, which is a safety device for his fall arrest system. As he attempted to attach the beamer to the beam, dust fell from inside the beam and came down on top of him. Petitioner testified that it was product made in the plant as he was advised there was no dirt in the building. He also clarified that it was more than just a few traces and more like a pretty good handful of material that fell

on him. He specified some of the dust went inside his mask at the time of the incident.

Petitioner further testified that at the time of the accident he was wearing a half face respirator as well as a hard hat and safety glasses. When the dust fell on him, he turned and the dust got on his body and into his mouth. He raised his mask to spit some of the dust out and tried to brush the rest of it of his clothes. He clarified the respirator only covered his nose and mouth, but not his eyes. The respirator was provided by Honeywell with an elastic strap. They only came in small, medium, and large sizes. The devices had been used so the elastic was stretched so you just had to put it on and try to get it as tight as you could.

After the accident Petitioner continued working, but as the day went on he began to have itching problems. He reported the problem and was taken to the onsite medical facility where they took his clothes and put him in a shower. The itching on his left arm was treated with calgonate.

Petitioner returned to his hotel room after his shift and through the night began having flu-like symptoms. He reported to work the following morning and was taken to Occunet at the local hospital. He did not feel like working so he asked if he could have the rest of the day off.

According to Petitioner, a safety stand down was held at the plant that day wherein the incident was discussed. After this incident the workers were required to use full face masks and war Tyvek suits with hoods on them as well as yellow sleeves to protect their arms.

Petitioner continued to work for Respondent for approximately 4 weeks. When he was laid off by the Respondent he signed up at his union hall for work and did not draw any unemployment. According to Petitioner, he continued to have flu-like symptoms and could not keep up with the other workers. Specifically, he would have to stop and rest when he was carrying materials and he would also cough. In April he went to see Dr. Childers for his ongoing problems and was given an inhaler by Dr. Childers.

Petitioner testified that he continued to work out of his union hall. His next two jobs were outdoors. In June of 2013 he was working for Rednour Steel Erectors. He was required to carry handrail to the 5th floor of a building, but was unable to perform the work because he had trouble breathing. He was laid off because he looked unsafe to the employer. He has not worked since June 30, 2013. After he was laid off, he again signed up to work at the union hall, but he did not draw unemployment. His status with the union hall is that he cannot go back until he has a doctor's release. He still has full membership at the union hall and continues to pay his dues.

Petitioner testified that after leaving the employment of Respondent he continued to work as a union ironworker and to obtain jobs from the union hall. Petitioner's employment with Bowen ended on March 24, 2013 and Petitioner began work for a new employer, United Iron Workers. Petitioner also worked for D&S Fence (DNS), and Rednour Steel Erectors during that gap in time. Petitioner testified that he worked on the roadways or interstate for both D& S Fence and Rednour. Petitioner was gainfully employed through the end of July, 2013. Petitioner testified that he was laid off at the

end of June in 2031 because "they" said he was breathing too hard. Petitioner never filed for unemployment or disability benefits.

Petitioner testified that he tried to find a doctor who would treat him. He was unable to find a physician who knew what was wrong with him so he went and saw Dr. Engelhart who was his family doctor when he was a child. He then went to the emergency room at Barnes-Jewish Hospital

Petitioner testified that he was then examined by Dr. Tuteur at Barnes Jewish Hospital. Dr. Tuteur diagnosed him with irritant induced bronchial reactivity and recommended he obtain a primary doctor to prescribe inhalers and manage his care. Dr. Tuteur also recommended he stay away from Diesel fuel and all the triggers or to stay at home. Petitioner clarified that has had episodes where colognes, perfumes, foods, or gas fumes triggered an episode. When an episode occurs he feels sick, has trouble breathing and needs to get out in the air.

After seeing Dr. Tuteur Petitioner went to Southeast Hospital because he was unable to get the medications recommended by Dr. Tuteur. He later was able to obtain care from Dr. Doyle, with the assistance of a nurse case manager, who has become his primary care physician. Dr. Doyle has prescribed inhalers, a nebulizer, and pain pills. Dr. Doyle has also prescribed anti-depressants for him from time to time. Petitioner clarified that he has never been prescribed or taken pain pills prior to his exposure on February 6, 2013.

Petitioner testified that he continues to have the same symptoms, but some days are better than others. He has trouble keeping up with others, even when just

taking a walk. He is no longer able to mow his own grass or sweep his own floor because the dust causes problems.

Petitioner testified that after Dr. Tuteur recommended he no longer work as an ironworker he began looking for work. Petitioner's job search records were offered into evidence as Petitioner's exhibit 14. At the request of his attorney, Petitioner met with a vocational counselor who asked him several questions about his vocational background and his medical condition. The vocational counsel also gave him a test. Petitioner testified that he does not own a computer and has rarely used one. He does not use a smart phone because he does not know how to use one. The petitioner did graduate high school, but has not attended college. He is a certified welder, and completed his apprenticeship classes at the union hall. He understood the vocational counselor made recommendations that she be perform a labor market survey to assist him with locating appropriate employment and he would like for her to do provide that service. Petitioner testified that he is willing to work if employment is provided within the limitations set forth by Dr. Tuteur because he is not capable of working as an ironworker.

On cross-examination Petitioner was asked what inhalers he was using at the time of Arbitration. He provided one of his inhalers for the Arbitrator to view and it was Ventolin HFA. Petitioner also indicated that he has steroid spray that he uses that is a spray powder. He is also on Doxycycline which is an antibiotic for an infection in his lungs. He was also still using the nebulizer. All of his current medications are prescribed by Dr. Doyle.

The Arbitrator concludes:

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

The Arbitrator notes that Petitioner claims injuries pursuant to the Occupational Diseases Act occurring on February 6, 2013. In regard to Petitioner's left arm injury, the Arbitrator finds that Petitioner did have an exposure to hydroflouride on his left arm on February 6, 2013; however, Petitioner has failed to prove that he suffered an occupational disease on that date. Petitioner has not requested any benefits, either medical or TTD, related to his left arm pursuant to Section 19(b) of the Act and, therefore, no benefits are awarded with regard to the left arm injury. The Arbitrator adopts and incorporates the records of Occunet, Petitioner's Exhibit 2, in making this finding. The Arbitrator also notes that Petitioner was returned to work at full duty as of February 7, 2013 per the Occunet records.

In addition to a lack of objective medical evidence the Arbitrator finds that Petitioner did not seek medical treatment or experience symptoms until after he had left the employment of Respondent and until after he had worked for three additional employers. The Arbitrator finds it significant that Petitioner worked for D&S Fence (DNS), and Rednour Steel Erectors after he left the employment of Respondent. Petitioner testified that he worked on the roadways or interstate for both D& S Fence and Rednour. Petitioner was gainfully employed through the end of July, 2013. Petitioner never filed for unemployment or disability benefits. It appears that Petitioner was capable of gainful employment following his alleged exposure at work and was able to work full duty as an union iron worker. Petitioner presented no testimony or records from his subsequent employers in regard to any claimed inability to work at full duty or to be unable to perform the skills of an union iron worker.

The Arbitrator also finds that Petitioner's testimony concerning several matters was not altogether credible. The Arbitrator finds that Petitioner's testimony in conjunction with his medical records shows a pattern of manipulation/alteration of the facts. In essence, Petitioner's testimony at arbitration was not corroborated by the early treating medical records or employment records. Petitioner told Dr. Tuteur that he had mouth sores as a result of the exposure and Dr. Tuteur based his causal connection opinion on that fact. However, the medical records fail to note any evidence of Petitioner having mouth sores. Petitioner's mouth was noted to be normal in every examination done after his alleged exposure on February 6, 2013. In support of this finding the Arbitrator adopts and incorporates the following: 1) the testimony of Dr. Leff at p.11, lines 10-17 wherein he testified that Petitioner was taken to Paducah, Kentucky where he was seen at Occunet. There, a full exam is recorded. His respiratory exam was normal. There was no wheezing, lung fields were clear, no chemical burns were noted, no ulceration or burning around the mouth was noted. He was discharged... for immediate return to work; 2) The 2/7/13 records of Occunet wherein it was reported that on exam in regard to his mouth/throat Petitioner was noted to be negative for difficulty swallowing, hoarseness, tenderness, no change in voice or mouth ulcers; 3) the records of Cape Medical Group where Petitioner was seen by Dr. Jeffrey Childers and on exam Petitioner was noted to have normal lips, teeth, gums, mucosa, palate and posterior pharynx. He was specifically noted to be negative for oral sores/ulcer and a sore throat. (PX 3) Additionally, the incident report and initial medical fail to reflect that Petitioner reported getting dust in his mouth. The Arbitrator adopts the incident report, Petitioner's Exhibit

1, and the records of OccuNet, (PX 2) in support of her finding that Petitioner did not get dust in his mouth as the time of his incident on February 6, 2013.

The Arbitrator further finds that there is no medical evidence to support any claim of an occupational exposure in the form of a lung injury diagnosed by Petitioner's expert as irritant induced bronchial reactivity as a result of his work accident on February 6, 2013. In making this finding the Arbitrator adopts and incorporates the medical records of Washington University, Barnes Jewish Hospital, the testimony of Dr. Tuteur and the testimony of Dr. Leff. There are many disputes in this matter but all of the preceding agree that there are no objective findings in regard to Petitioner's pulmonary functions. On September 27, 2014, a pulmonary function test was completed with the following results: 1) flow volume curve-normal; 2) lung volume-no restrictive ventilatory defect with the cause of the decreased ERV being uncertain; 3) diffusing capacity is normal; 4) arterial blood gas was normal; 5) total lung capacity was measured as normal. (PX 6, p. 10) Specifically, the Arbitrator adopts and incorporates the testimony of Dr. Leff where he testified that Petitioner "has normal lung function...He doesn't bronchodilate with inhalers on a pulmonary function test, he can exercise, double his heart rate without even desaturation his blood. He does not have reactive airways disease, which is why he is not getting better on treatment." (RX 1, p. 33 lines 2-15) There is no objective medical evidence to support Petitioner's claim of pulmonary illness due to an occupational exposure on February 6, 2013.

F. Is Petitioner's current condition of ill-being causally related to the injury?

It has been established that to recover compensation under the Act, a claimant must prove both that he or she suffers from an occupational disease and that a causal connection exists between the disease and his or her employment. *Anderson v. Industrial*

Comm'n, 321 Ill.App.3d 463, 467, 254 Ill.Dec. 893, 748 N.E.2d 339 (2001). An occupational activity need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 205, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003); *Freeman United Coal Mining Co. v. Industrial Comm'n*, 308 Ill.App.3d 578, 586, 241 Ill.Dec. 854, 720 N.E.2d 309 (1999). The Arbitrator finds that a causal connection does not exist for the petitioner's pulmonary condition and his alleged work exposure of February 6, 2013. The Arbitrator adopts and incorporates the above section in regard to this issue.

The Arbitrator finds the causal connection opinion of Dr. Tuteur not to be persuasive in this matter. Dr. Tuteur testified that causal connection existed for a pulmonary injury because there was "prima facie evidence that he [the petitioner] was in contact with caustic material that caused his skin to burn, nose and mouth, and burning of his eyes." (Tuteur transcript p. 8, lines 22-24) Dr. Tuteur opined that the offending chemical/dust or irritant entered via Petitioner's mouth and as proven by the existence of sores. This alleged prima facie evidence is just not supported by the medical records and, in fact, the records are devoid of any medical evidence that would support Dr. Tuteur's statement. Additionally, the incident report and initial medical fail to reflect that Petitioner reported getting dust in his mouth. The Arbitrator adopts the incident report, Petitioner's Exhibit 1, and the records of OccuNet, Petitioner's Exhibit 2, in support of her finding that Petitioner did not get dust in his mouth as the time of his incident on February 6, 2013.

The Arbitrator also adopts and incorporates the following: 1) the testimony of Dr. Leff at p.11, lines 10-17 wherein he testified that Petitioner was taken to Paducah, Kentucky where he was seen at OccuNet. There, a full exam was recorded. Petitioner's

respiratory exam was normal. There was no wheezing, lung fields were clear, no chemical burns were noted, no ulceration or burning around the mouth was noted. He was discharged... for immediate return to work; 2) The 2/7/13 records of OccuNet wherein it was reported that on exam in regard to his mouth/throat Petitioner was noted to be negative for difficulty swallowing, hoarseness, tenderness, no change in voice or mouth ulcers; 3) the records of Cape Medical Group where Petitioner was seen by Dr. Jeffrey Childers and on exam Petitioner was noted to have normal lips, teeth, gums, mucosa, palate and posterior pharynx. He was specifically noted to be negative for oral sores/ulcer and a sore throat. (PX 3)

In regard to causal connection the Arbitrator finds the opinion of Dr. Leff to be more persuasive. Dr. Leff testified that if one works off of Dr. Tuteur's diagnosis that Petitioner has reactive airway disease you cannot come to the diagnosis via the objective testing. Specifically, he testified that "So let's do reactive airways...He has normal lung function...He doesn't bronchodilate with inhalers on a pulmonary function test, he can exercise, double his heart rate without even desaturation his blood. He does not have reactive airways disease, which is why he is not getting better on treatment." (Leff Transcript p.33, lines 2-15)

The Arbitrator also finds the gaps in treatment to be significant in finding that a causal connection does not exist. Petitioner did not seek any medical treatment from 2/8/13-4/11/13 or for 2 months and 4 days. Petitioner's employment with Bowen ended on March 24, 2013 and Petitioner began work for a new employer, United Iron Workers. Petitioner did not seek any medical treatment from 4/13/13 to 8/8/13 or 3 months and 27 days. Petitioner had not worked for the Respondent since March 24, 2013. According to

his testimony Petitioner had worked for United Iron Workers, D&S Fence (DNS), and Rednour Steel Erectors during that gap in time. Petitioner testified that his work for his last two employers was on the interstate which arguably would have exposed him to many fumes.

The Arbitrator gives no weight to the opinion letter of Dr. Engelhart dated August 28, 2013. The letter references materials about chemicals that were not identified and no factual representations as to when, how, and where, these alleged chemical exposures occurred was made a part of the exhibit (nor did Petitioner testify to any of the foregoing).

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Consistent with her liability determination as set forth above, the Arbitrator concludes that Respondent is not liable for the medical expenses incurred by Petitioner.

K. Is Petitioner entitled to any prospective medical care? Vocational Rehabilitation?

Consistent with her liability determination as set forth above, the Arbitrator concludes that Petitioner is not entitled to any prospective medical care or vocational rehabilitation. The Arbitrator notes that Petitioner is not in need of vocational retraining because he does not have a pulmonary illness that would limit or prevent his return to work as an iron worker. Furthermore, Petitioner has demonstrated an ability to return to work at full duty by working for three additional employers after Respondent. Petitioner never applied for unemployment benefits or any other type of disability benefits during the time he was not employed.

L. What temporary benefits are in dispute?

Consistent with her liability determination as set forth above, the Arbitrator concludes that Petitioner is not entitled to an award of temporary total disability benefits or maintenance benefits. Petitioner incurred no lost time on account of the burn on his left arm. Petitioner was able to return to continue to work at full duty for Respondent following his alleged occupational exposure at work for a month and a half.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEGAGO

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Croy Fisher,

Petitioner,

vs. NO: 12 WC38778

16IWCC0078

Jack's Tires,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, notice, motion for bifurcation, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 26, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

16IWCC0078

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 9 2016
TJT:yl
o 12/7/15
51

Kevin W. Lamborn

Michael J. Brennan

DISSENT

I respectfully dissent from the majority decision and would award benefits to the Petitioner. The Petitioner proved by a preponderance of the evidence that he sustained an injury on September 11, 2012 that arose out of and in the course of his employment. This is despite the confusion over the date of accident as the Petitioner could not recall the exact date that he was injured. The Petitioner made a motion to continue the arbitration hearing in order to subpoena documents from the Respondent. However, that motion was denied by the arbitrator. I believe that the denial of the motion was error because the acquisition of those documents would have clarified the date of accident.

The Petitioner testified that he informed his then supervisor (who later became and was company president at the time of hearing) the day after his accident that he had hurt his back while changing a tire. The supervisor testified to offering to personally pay for the Petitioner to see a chiropractor, although the supervisor denied having knowledge of an alleged work accident. That behavior is suspect, and it defies common sense that the supervisor offered to pay for a supposedly non-work related injury just to "help" the Petitioner. This is especially true considering the supervisor answered "No" when asked whether he would have paid for Petitioner's antibiotics if the Petitioner had strep throat. Further, the Respondent offers health insurance to their employees. Because of this incident in particular, the evidence supports the conclusion that this accident arose out of and in the course of his employment.

Last, I would also find that the Petitioner gave Respondent sufficient notice of his injury. Although there is a discrepancy as to the finding of notice in the Arbitrator's decision between pages two and four, I would find that timely notice was given to the Respondent. Besides the Petitioner's testimony that he informed his supervisor of his accident, there were corroborating records of a work accident. First, Respondent's exhibit (1) , the First Report of Injury Form filled out by a co-owner of Respondent on October 23, 2012 notes that the administrator was notified of the accident date on September 28, 2012. Also, the chiropractic clinic where the Petitioner first sought treatment received documents via fax from the Respondent's workers' compensation carrier with a fax transmission notation of October 26, 2012. Thus, the Respondent was aware of the Petitioner's timely claim of a work related injury.

16IWCC0078

For the aforementioned reasons, I would find that the Petitioner proved that he sustained an injury that arose out of and in the course of his employment and award him workers' compensation benefits including medical expenses and temporary total disability.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

FISHER, CROY
Employee/Petitioner

Case# **12WC038778**

JACK'S TIRE
Employer/Respondent

16IWCC0078

On 2/26/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2489 LAW OFFICES OF JIM BLACK
TRACY L JONES
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0766 HENNESSY & ROACH PC
ERIN K FIORE
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

16IWCC0078

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CROY FISHER,
Employee/Petitioner

v.

JACK'S TIRE,
Employer/Respondent

Case # 12 WC 38778

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Rockford**, on **January 20, 2015.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☐ What was the date of the accident?

E. ☒ Was timely notice of the accident given to Respondent?

F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?

G. ☐ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other: Is Petitioner entitled to receive certain vocational rehabilitation at the expense of Respondent?

FINDINGS

On the date of accident, **September 11, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this alleged accident *was* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the alleged accident.

In the year preceding the alleged injury, Petitioner earned **$40,904.74**; the average weekly wage was **$786.63**.

On the date of the alleged accident, Petitioner was **28** years of age, *married* with **two** dependent children.

Petitioner *has not* received all reasonable and necessary medical services.

Respondent *has not* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **0.00** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and **$3,137.14** for other benefits, for a total credit of **$3,137.14**.

Respondent is entitled to a credit of $ **2,679.82** under Section 8(j) of the Act.

ORDER

Petitioner failed to prove that he sustained an accidental injury that arose out of and in the course of his employment with Respondent on September 11, 2014.

Petitioner further failed to prove that the condition of ill-being complained of is causally related to any accidental injury sustained while in the employment of Respondent.

All claims for benefits in this matter for this alleged accident made by Petitioner are hereby denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator JOANN M. FRATIANNI

February 19, 2015
Date

ICArbDec19(b)

FEB 26 2015

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

E. Was timely notice of the accident given to Respondent?

F. Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner testified that he worked for Respondent as a mobile tire technician. He was required to drive a Class C work truck to locations to repair and replace tires for semi tractor-trailers, earth moving equipment and farm equipment. Petitioner testified he would clock in and out of the shop at the start and end of each workday, and would travel to where work was needed. He would receive all work orders from the office and would be dispatched by his supervisor either by phone or text. Petitioner testified he would travel up to 100 miles for a job at times and usually worked alone.

Petitioner testified to a repair performed in September of 2012 in Rock County, Wisconsin. Petitioner testified he was changing the left rear tire of a Terra-Gator at a customer location in a cornfield. A Terra-Gator is a large fertilizer spreader with tires approximately 5 feet tall and 3 feet wide. Petitioner testified he was required to jack the vehicle up, remove the wheel, remove the lug nuts, remove the tire, find the hole in the tire, remove the seal using a boom or crane on his own truck and a pry bar, put the tire on its side using the boom, relocate the hole, patch it, clean the ring to ensure proper resealing, lubricate the area, use the boom to flip the tire back over, place the o-ring and snap ring, use the boom to realign the tire, and place the tire back onto the vehicle.

Petitioner testified he would use an air jack that weighed approximately 60 pounds. To jack up the vehicle, he would have to crawl under it and position the jack. He also used a jackhammer that weighed approximately 20 pounds, and pry bar that weighed approximately 8-10 pounds. Removing the seal required a lot of pressure and sometimes he would lift himself in the air while trying to leverage the pry bar under the seal to remove the tire. He further testified to efforts to get the tire realigned with the vehicle. He would use the boom to get the tire close, but the boom would not be able to perfectly align the tire. Petitioner testified this process was more difficult with the Terra-Gator as there are large fenders that lengthens the distance the boom can reach to get to the vehicle. Petitioner would move the tire with his shoulder and a pry bar to roll it closer to the vehicle. Once the openings on the tire were realigned with the studs, he would use an impact gun to replace the 12 lugs. This would require him to reach inside the tire with an extended arm and perform the last task in that position. Petitioner testified he would usually have to take a break after 4 hours, and then complete his work.

Petitioner testified he performed the above task by himself. Petitioner testified he had asked for help but there was no one available to assist him. He further testified he was positive the injury happened at Mallard Feed, which was bought at one point by Agroliance.

Petitioner testified that while moving the tire towards the vehicle, he experienced pain on his left side and lower back. Petitioner testified he then took a breather and finished the job. He then returned to the shop but did not report the incident as the shop was closed. The next day Petitioner testified he was very stiff but went to work. He saw Mr. Ryan Lovejoy, his boss, and mentioned something to the effect of "Are you going to rub the knots out of my back?" Mr. Lovejoy offered to send him to a chiropractor, but Petitioner declined this offer as he felt his condition was not that bad. Petitioner further testified that Mr. Lovejoy tried to take it easy on him at work, and approximately 2 weeks later he decided to visit the chiropractor. Petitioner did not return to work thereafter and was terminated the day before Christmas.

Mr. Ryan Lovejoy testified at the request of Respondent. Mr. Lovejoy testified he is the president of Respondent. His job duties included distributing service calls, overseeing sales and service. Mr. Lovejoy testified he was familiar with Petitioner who worked as a commercial technician. Mr. Lovejoy testified that Petitioner reported back pain in October, 2012. Mr. Lovejoy testified Petitioner did not state that a work accident occurred, but just asked him if he knew a chiropractor. Mr. Lovejoy testified he had an uncle and cousin with a chiropractic practice called Gunderson Chiropractic, and he referred him to them. Mr. Lovejoy testified he offered to pay for the treatment but never received a bill.

There was a great deal of confusion over the date of an alleged accident. Petitioner testified that he was injured on September 28, 2012. When shown an exhibit (Rx6), Petitioner confirmed only one entry under the name of Agroliance with a date of September 11, 2012. The exhibit reflects work orders performed from August 1, 2012 through November 1, 2012. The September 11, 2012 date becomes important because Petitioner was asked if this possibly meant his accident had occurred on that date. Petitioner testified that it "seemed right" and "maybe" but he was unable to recall an accident date. Later during the hearing, Petitioner amended his Application for Adjustment of Claim to allege a September 11, 2012 accident.

Mr. Lovejoy also reviewed the exhibit (Rx6) and testified that after each repair job, the technician would fill out a handwritten work order and turn it in. Mr. Lovejoy enters the work order using a computer software program. He enters this information in order to accurately bill his customers. The software then generates reports of work performed, including work by individual employees. This is called a "Commission Report." Mr. Lovejoy reviewed the Commission Report (Rx6) and testified it represented Petitioner's Commission Report for work performed from August 1, 2012 through November 1, 2012.

Mr. Lovejoy further testified concerning an invoice (Rx7) that reflected a repair to a front tire of a Terra-Gator. Mr. Lovejoy testified that most of the work involved the use of a boom truck and is not very physical.

Mr. Lovejoy testified he saw Petitioner once after the first chiropractic visit and that he had come in stating he had big problems. Petitioner reported he had a cracked vertebra from an accident as a teenager, that he had disc problems and that he would require multiple chiropractic visits. Mr. Lovejoy testified their relationship later deteriorated and Petitioner was fired after failing to report to work. Mr. Lovejoy testified the first time he found out there was a claim for a work injury was when he received paperwork from his workers' compensation insurance carrier. Respondent submitted a First Report of Injury that was completed on October 23, 2012. (Rx1)

Based upon the above, the Arbitrator finds that Petitioner failed to prove that he sustained an accidental injury that arose out of and in the course of his employment with Respondent on September 11, 2012. The confusion over the date of injury remains. Initially a claim was filed for an accident of September 28, 2012, which was later amended to September 11, 2012. The records of Gunderson Chiropractic reflects complaints of back pain for two months during the first visit of October 17, 2012. The records of Dr. Holtan reflect a work accident without a work injury date, and seem to indicate an accident of September 2012 or September 28, 2012. Clearly, Petitioner is a poor historian who could not recall names of doctors or referrals.

Based further upon the above, the Arbitrator finds that Petitioner failed to give Respondent timely notice of an accidental injury as defined by the Act.

Based even further upon the above, the Arbitrator finds that Petitioner failed to prove the condition of ill-being complained of is causally related to any work activities performed on behalf of Respondent.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

See findings of this Arbitrator in "C," "E" and "F" above.

Based upon said findings, all claims made by Petitioner for medical expenses in this matter are hereby denied.

K. Is Petitioner entitled to any prospective medical care?

See findings of this Arbitrator in "C," "E" and "F" above.

Based upon said findings, all claims made for prospective medical care in this matter by Petitioner at the expense of Respondent are hereby denied.

L. What temporary benefits are in dispute?

See findings of this Arbitrator in "C," "E" and "F" above.

Based upon said findings, all claims made for temporary total disability benefits in this matter are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Leopoldo Zarco,
Petitioner,

vs.

NO: 07 WC 52098

Harrington & King,
Respondent.

16IWCC0079

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, permanency and medical and temporary total disability credits and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission notes that while the Arbitrator awarded a credit for temporary total disability payments in the amount of $12,527.84, which is equivalent to 26 weeks at Petitioner's temporary total disability rate of $481.84, the Arbitrator did not award temporary total disability benefits. Based on RX4, the Commission finds that Petitioner was paid temporary total disability benefits of $982.84 from August 27, 2007 through September 9, 2007, was paid temporary total disability benefits of $462.66 from September 10, 2007 through September 16, 2007 and was paid temporary total disability from September 17, 2008 through November 25, 2007 for a period of 11 weeks at Petitioner's temporary total disability rate of $481.84, was paid temporary total disability benefits of $963.68 for the week of December 10, 2007 through December 23, 2007, was paid temporary total disability from December 24, 2008 through February 17, 2007 for a period of 8 weeks at Petitioner's temporary total disability rate of $481.84 and was pay a lump sum payment of $1,445.52 , which is equivalent to 3 weeks for the period of February 18, 2008 through March 9, 2008 for a grand total of $13,009.66/27 weeks at Petitioner's temporary total disability rate of $481.84. The Commission further finds that Petitioner underwent a functional capacity evaluation on February 27, 2008. As such the Commission finds that in addition to the credit for temporary total disability payments in the amount of $12,527.84, which is equivalent to 26 weeks at Petitioner's temporary total disability rate of $481.84 , the Arbitrator

16IWCC0079

should have awarded temporary total disability benefits for a period of 26 weeks.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $481.84 per week for a period of 26 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $433.65 per week for a period of 35 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 7% loss of a man as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $48,381.70 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for $48,381.70 for payment of medical services and $12,527.84 for payment of temporary total disability benefits paid to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 9 2016

MB/jm

O: 12/3/15

43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ZARCO, LEOPOLDO
Employee/Petitioner

Case# **07WC052098**

08WC027726

16IWCC0079

HARRINGTON & KING
Employer/Respondent

On 4/1/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0226 GOLDSTEIN FISHMAN BENDER ETAL
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1 N LASALLE ST SUITE 2600
CHICAGO, IL 60602

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16IWCC0079

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Leopoldo Zarco
Employee/Petitioner

v.

Harrington & King
Employer/Respondent

Case # **07** WC **52098**

Consolidated cases: **08 WC 27726**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Lynette Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on February 20, 2015. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

16IWCC0079

FINDINGS

On **8/13/2007**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**37,583.52**; the average weekly wage was $**722.76**.

On the date of accident, Petitioner was **54** years of age, ***single*** with **3** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**12,527.84** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**12,527.84**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay to Petitioner for the services of Dr. Malek, La Clinica, Fullerton Surgical Center, Preferred Open MRI and MRI Lincoln Imaging, i.e. $48,381.70, for reasonable and necessary medical services pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall to given a credit of $48,381.70 for payments of medical services for the petitioner.

Respondent shall pay Petitioner permanent partial disability benefits of $433.65 per week for 35 weeks because the injuries sustained caused 7% loss of a person as a whole, pursuant to Section 8(d)2 of the Act.

Respondent shall have a credit of $12,527.84 for temporary total disability paid to Petitioner.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Leopoldo Zarco,
Petitioner,

vs.

NO: 08 WC 27726

16IWCC0080

Harrington & King,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary total disability, permanency and medical and temporary total disability credits and being advised of the facts and law, with the exception noted below affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner testified that on June 6, 2008 he was taking parts coming from a washer machine and putting them on a wagon then onto a long skid. He was shaking the skids to put one of the parts down onto the wagon. He does not know how much the skid he was pulling weighed. He knows it was approximately 10 feet long. As he tried to pull the skid, it stuck and he had to yank it to get it loose. When he yanked on it he felt a sharp/pinching pain with weakness in his right shoulder.

Mr. Digby testified he is currently retired but was a supervisor for Respondent for 47 years. When Petitioner came to work on the day shift with him Petitioner had restrictions of no lifting more than 10-15 pounds. At first, he had Petitioner walking around and picking up paper and rages. One day at around 7:30 a.m., he had the Petitioner work on the degreaser/washer machine, which takes the oil off the parts. The parts go through a washer, a rinser and then they are blown dry. He assigned Petitioner to stand at the back of the washer and to put the parts onto a skid to be shipped. The machine was running 22 gauge aluminum, which is pretty thin, with 3/32 holes, punched in it with a 3/16 feed. The pieces were 12 x 12 and they weighed less than a pound. Petitioner was responsible for placing four pieces on a skid. He then would put a piece of paper over the pieces so that they would not be scratch. He would layer the pieces until they had approximately 500 pieces on a skid. Other than the aluminum parts, Petitioner did not have to lift

anything. All he had to do was to take the pieces of metal off the washer and put it on the skid. After the skid was filled, a jeep driver would come by and pick it up and take it to shipping. Petitioner did not stay at work the whole day.

Mr. Jakosz testified his title is the vice president of manufacturing but he is the plant manager and the human rights person as well for the Respondent, which is a perforating company. All of the presses are automatically fed. A computer drives the machines. The operator set up the program and then the material is automatically fed into the machine with feed rolls that pull it through, perforates it and it comes out the end. The machines run coils or sheets. If it is a coil, it is mounted on a coil winder by a forklift. The sheets are put under the feed rolls and they are automatically pulled through so the operator has no hands in the die area. The specifications of the job are set into the machine's computer by the operator. Once the sheet comes out of the press, there is a wagon at the back of the press, so the operator slides (there is no lifting) the sheets off. The wagons are maybe three feet off the ground.

Petitioner contends he got hurt when he came back to work after being given a light duty restriction. The first couple of weeks, we had Petitioner cleaning up/picking up papers. Then we moved Petitioner to the degreaser machine. There he was asked to catch pieces of 12 x 12, 22 gauge aluminum, which weighed approximately 1-1/2 pounds. The piece would be put in one end of the machine. It would go through a conveyor line where it was washed. It would then come out the other end. Petitioner was supposed to start work at 7:30 a.m. Petitioner did not finish his shift. He did not see the Petitioner at work after that day. Since then, he has seen Petitioner out in the community. He has seen Petitioner a number of times at a Mexican restaurant in the area. He saw Petitioner jump in/out of van. He saw him at Menards six months ago where he was with a young guy. Petitioner had drywall on his cart. When Petitioner spotted him he took off. Although a light duty job was offered to Petitioner in 2009, Petitioner never came back to work for the Respondent. He performed an accident investigation on June 6, 2008 with Petitioner's supervisor and the guy Petitioner was working with. Petitioner just left work that day.

The Commission notes that on June 6, 2008 Petitioner was at work and assigned to the washing machine around 7:30 a.m. The very same day Petitioner treated with Dr. Malek. While there is not a time for the appointment listed it appears that the appointment took place after 7:30 in the morning and after Petitioner left Respondent's premise. Dr. Malek's June 6, 2008 records do not address the alleged June 6, 2008 accident. All Dr. Malek's records state on that date is that Petitioner reported that the Respondent has not found him a light duty job. The Commission finds that the first time Petitioner mentioned a June 6, 2008 work accident is on June 13, 2008, approximately one week later, when he again saw Dr. Malek. At this time, Petitioner reported he was lifting a box weighing more than 120 pounds. This history differs from Petitioner's testimony that on June 6, 2008 he was pulling a skid that was stuck. Furthermore, Petitioner claimed that he injured his back and neck and was dizzy. This is also contrary to Petitioner's subsequent testimony that he injured only his right shoulder. Lastly, he states that the June 6, 2008 accident was because the Respondent did not observe his light duty restriction. However, this testimony is rebutted by both Mr. Jakosz and Mr. Digby. The Commission notes that Petitioner's medical records indicate that Petitioner continues to treat with Dr. Malek from June of 2008 forward with no mention of the second alleged incident or the fact that the same allegedly caused his right shoulder pain. The second mention of the alleged June 6, 2008 work accident does not occur until April 3, 2009, some 9 months later, when Petitioner sees Dr. Levi for the first time. At this time Petitioner provides a very generic statement of the alleged June 6, 2008 work accident in which he states he was lifting when he noticed pain again in his back and right elbow. On that same date it was noted that Petitioner brought with him a right shoulder MRI dated February 19, 2009 which shows a tear of the supraspinatus tendon. The MRI itself was

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never placed into evidence. As such, it is unknown who ordered it. Dr. Levi's notes are contained in an April 3, 2009 letter which was addressed to a Dr. Jarava at 848 N. Ashland. Dr. Jarava's records were never admitted into evidence. The only other history that is contained in the record is even more generic in nature. It comes from the June 30, 2009 Suburban Physical Therapy records. It states that Petitioner has a history of a sudden onset of right shoulder pain after a lifting injury at work. There is no mention of a date of accident or the particulars surrounding the alleged injury at work.

Given all of the above, the Commission affirms the Arbitrator's finding that Petitioner failed to prove he sustained an accident on June 6, 2008 work of no accident

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 1, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit of $27,671.37 for temporary total disability benefits and $32,758.21 for medical services paid to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 9 2016

MB.jm

O: 12/3/15

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Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ZARCO, LEOPOLDO
Employee/Petitioner

Case# **08WC027726**

07WC052098

16IWCC0080

HARRINGTON & KING
Employer/Respondent

On 4/1/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0226 GOLDSTEIN FISHMAN BENDER ETAL
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16IWCC0080

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Leopoldo Zarco
Employee/Petitioner

v.

Harrington & King
Employer/Respondent

Case # **08** WC **27726**

Consolidated cases: **07 WC 52098**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Lynette Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on February 20, 2015. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other

16IWCC0080

FINDINGS

On **6/6/08**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**37,583.52**; the average weekly wage was $**722.76**.

On the date of accident, Petitioner was **55** years of age, ***single*** with three dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**27,671.37** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $27,671.37.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

The Petitioner has not proven, by a preponderance of the evidence, that an accident occurred which arose out of and in the course of his employment by Respondent therefore, no benefits are awarded, pursuant to the Act.

Respondent shall be given a credit of $27,671.37 for temporary total disability payments paid to Petitioner.

Respondent shall be given a credit of $32,758.21 for payment of medical services for the petitioner.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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FINDINGS OF FACT

07WC52098

The disputed issues in this matter are: 1) causal connection; 2) medical bills; and 3) the nature and extent of Petitioner's injuries. *See,* AX1.

Leopoldo Zarco (the "Petitioner") testified at trial that on August 13, 2007, he was feeding metal pieces into a machine and that while doing so, felt pain in his lower back on the right. He testified that he was lifting a 60-70 pound sheet of metal in order to put in on the machine. Harrington & King, ("Respondent") sent him to Michael Clinic on Cermak Road in Chicago, on August 16, 2007.

Petitioner's treatment

He was seen by Dr. Anita Shah on August 16, 2007; and diagnosed with acute lumbar muscular strain, with no radiation. An MRI, taken on that date, was read to show "vertebral body heights, alignment and disc spaces are maintained. There appear to be degenerative changes with spurring laterally, mainly at the level of L2-3 and L3-4... Note is made of degenerative changes with anterior spurring in the lower dorsal spine". The radiologist's impressions were "degenerative changes of the lower thoracic and lumbar spine". The patient states that he has no pain radiating down his legs. It is just his lower back". The assessment was acute lumbar strain and the Petitioner was returned to work with five (5) pounds restrictions and no bending or twisting. For treatment, he was given an analgesic balm and cold pack to apply to the area. PX1.

On August 20, 2007, Petitioner presented to Cermak Clinic with pain stated to be "4 to 5 out of 10, now radiating into his right leg", with weakness. The diagnosis was lumbar strain, physical therapy was recommended and his work restrictions were maintained.

On September 6, 13 and 27, 2007, Petitioner presented complaining of low back pain, radiating down his right, lower extremity "3 to 4 out 10" but by the last visit in September, the pain was non-radiating.

On October 4, 18 and 30, 2007, Petitioner presented complaining of pain in his lower back, "2-3 out of 10", non-radiating. Bending forward and backward was uncomfortable and there was some question of a disc protrusion at L3-L4 and disc herniation at L5-S1. Dr. Andrew Zelby was consulted. PX1.

On November 9, 16 and 30, 2007, Petitioner presented complaining of lower back pain "2 out of 10", and having had a poor response to a medical branch block. Physical examinations at the clinic showed that the petitioner had a negative straight leg raising test and was diagnosed with a lumbar strain. Review of image studies, performed at the clinic, indicated that vertebral body heights and alignment of disc spaces were well maintained. There appeared to be degenerative changes without spondylolysis or spondylolisthesis. There were degenerative changes, with anterior spurring, in the lower dorsal spine.

On October 8, 2007, Petitioner began treatment with Dr. Andrew Zelby, who diagnosed him as having degenerative, lumbar disc disease and recommended an MRI. On October 24, 2007, Petitioner was seen by Dr. Zelby and further diagnosed with right leg pain, of unknown etiology. Dr. Zelby recommended epidural injections but no surgical intervention.

In November 1 & 28 2007, the petitioner underwent epidural injections and was then referred to Dr. Malek, who diagnosed him with degenerative disc disease from L3 to S1, with a right-sided disc herniation. Dr. Malek recommended a discogram, which was performed on January 18, 2008; and was read to reveal an L3-4, L4-5 and L5-S1 concordant pain response with L2-3 non-concordant pain.

Dr. Malek again evaluated Petitioner on February 8, 2008 and recommended either an L3-S1 posterior fusion with instrumentation or a functional capacity evaluation ("FCE"). The petitioner declined to have surgery as he testified that "the doctor could not guarantee that it would work".

On February 27, 2008, an FCE was performed at Elite Physical Therapy, which was valid for light-demand level employment. A second FCE was performed on October 2, 2008, with no mention of validity but placing Petitioner into a medium-demand level employment. RX1 & PX10.

CONCLUSIONS OF LAW

F. Is Petitioner's current condition of ill-being causally connected to the injury?

A decision by the Commission cannot be based upon speculation or conjecture. *Deere and Company v Industrial Commission*, 47 Ill.2d 144, 265 N.E. 2d 129 (1970). A petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d 236, 369 N.E.2d 853 (1977). Where a petitioner fails to prove by a preponderance of the evidence that there exists a casual connection between work and the alleged condition of ill-being, compensation is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v Industrial Commission*, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs. Industrial Commission*, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much

his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).

It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); *see also, Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

After a review of Petitioner's medical records wherein it is stated that Petitioner has degenerative changes without spondylolysis or spondylolisthesis but with anterior spurring in the lower dorsal spine; and testimony the Arbitrator finds and concludes that he has proven, by a preponderance of the evidence that he sustained a low back strain on August 13, 2007. This condition does not require surgical intervention, as opined by Dr. Zelby.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Petitioner claims $48,381.70, in outstanding medical services for reasonable and necessary medical services from MRI Lincoln Imaging, Preferred Open MRI, Fullerton Surgical Center, La Clinica and Dr. Malek.

The parties have stipulated that the respondent has paid a total of $81,139.91 in medical expenses in both this and the companion case of 08 WC 27726. With regards to the medical expenses occurred for 07 WC 52098, the respondent has credit for all medical bills paid which amounts to $48,381.70. Any unpaid medical expenses for this injury would be awarded pursuant to Sections 8(a) and 8.2 of the Act. Because there is not itemization of bills paid by Respondent, the remaining amount paid, i.e. $32,758.21, will be credited to case number 08 WC 27726.

L. What is the nature and extent of the injury?

The Arbitrator, based upon the conflicting medical evidence, concludes that the petitioner suffered a back strain, as a result of the accident on August 13, 2007. The Arbitrator finds that the petitioner suffered the permanent partial loss of use of the whole person to the extent of 7% thereof.

08 WC 27726

The disputed issues in this matter are: 1) accident; 2) causal connection; 3) medical bills; 4) temporary total disability; 5) and temporary total disability credit to Respondent; and the nature and extent of Petitioner's injuries. *See,* AX2.

The petitioner testified that on June 6, 2008, he was working on a perforator machine, catching washers when he attempted to pull the top skid of washers down to put it on a wagon. He further testified that the skid was heavy and he hurt his right shoulder and felt a sharp pain, with weakness. He stated that the respondent would not send him to the clinic so he went to his own doctors, at La Familia and Suburban Physical Therapy. PX2

Upon cross-examination, the petitioner stated that he did not have any prior or later accidents involving his right shoulder and that currently; he is unable to do tune-up work on his car or repairs on the houses that he owns and rents. He takes prescription medication for pain and to help him sleep. He further testified that Respondent requested that he return to work some time in July of 2009, which he did.

The petitioner testified that he currently has low back pain that he rates between 8 and 10 out of 10. He was off work from August 27, 2007 through November 25, 2007 and then again from December 10, 2007 through March 9, 2008. All of his temporary total disability benefits ("TTD") were paid for that period. However, Petitioner is claiming additional TTD owed from June 13, 2008 through October 19, 2009, in his second claim, which Respondent is disputing. The petitioner also testified that in addition to his back problems, he has problems with his sex life.

The Respondent's first witness

The respondent presented the testimony of William Jakosz, the vice president and manager at Harrington & King; and he investigated this accident so that he could report to the insurance company. He is the person who hired Petitioner in 2005.

Mr. Jakosz testified that there is really no lifting that the petitioner needs to do while working on the perforating machine. One may have to slide a piece of metal from the machine to a pallet but he does not actually need to stack the pallets. In essence, the machine does most of the work, as there is no stacking needed or moving of skids. Mr. Jakosz also testified that on June 6, 2008, the petitioner was working in a light duty capacity, lifting approximately ten to fifteen (10-15) pounds and cleaning up. Then the petitioner was asked to catch pieces and he abruptly left the premises and did not finish the shift. This witness also testified that he has seen the petitioner outside of work, in Menards buying drywall and the petitioner "took off when he saw me".

Lastly, Mr. Jakosz testified that Petitioner was offered a union position on July 23, 2009, as a clerk in the shipping office. It is an air-conditioned office and the job consisted of making labels and packing slips, faxing documents and paperwork, with no lifting or overhead reaching. RX2.

Respondent's second witness

Mr. Halon Digby testified that he worker for the respondent for approximately forty-seven (47) years, as the day shift supervisor, before he retired five (5) years ago. He testified that he knows the

petitioner as well as the machine the petitioner was working on, i.e., a degreaser, which washes and dries metal pieces. The person working the machine places the pieces onto to skid. The pieces are 22-gauge metal, thin enough to bend and weigh less that a pound. Paper is place between each piece of aluminum and after approximately five hundred (500) pieces are accumulated on the skid, someone other than the person working the machine, takes the skid to the shipping room. The person operating the machine can sit or stand while working.

On June 1, 2009, Petitioner presented to Dr. Kern Singh, of Midwest Orthopaedics at Rush, by request of Respondent. Noted in Dr. Singh's IME report, the petitioner has had prostate surgery. The petitioner never stated that he underwent prostate surgery when he testified at trial and there is no medical evidence that differentiates between back problems arising from injury versus problems due to prostate issues. In addition, the medical records do not reveal any issues or treatment relating to sexual problems.

Dr. Singh felt that the petitioner had degenerative disc disease from L3-S1 and opined that the petitioner's current symptoms, as of the date of his examination in 2009, were not causally related to the June 6, 2208, work incident. Dr. Singh noted that the petitioner had minimal changes on his lumbar spine image studies and did not believe that surgical intervention was warranted, as recommended by Dr. Malek. RX1.

Petitioner also had what Dr. Singh opined was an unreliable discogram. The doctor explained that there were four levels that reproduced pain; which in itself, negated the reliability of the discography. Dr. Singh opined that Petitioner was not a surgical candidate because the discogram, reproducing four levels of pain, was invalidated on that basis. The doctor further explained that a three-level, positive discogram with concordant pain, is a poor prognostic indicator for surgical intervention. Moreover, the petitioner underwent chiropractic treatment by Miguel Jimenez, at La Clinica. The respondent introduced a Utilization Review ("UR"), which opined that the chiropractic treatment was not necessary and was of no benefit to the petitioner, under these circumstances. The chiropractor never responded to the UR. RX3.

The records of Dr. Levy, dated April 3, 2009, note that when Petitioner told him that he had been offered surgery for his lumbar spine, Dr. Levy commented that he did not see any reason why the petitioner would need to have surgery on his lumbar spine. PX7.

The Arbitrator further notes that the petitioner underwent occupational and physical therapy where it is noted on September 4, 2007, that the petitioner was not tremendously compliant with the physical therapy and continually reported little changes in his back pain since the start of his care. The therapist also noted that the petitioner did not wear appropriate footwear to the clinic and that some of his treatment had been limited secondary to the inappropriate footwear. A note of August 30, 2007 noted very poor compliance with the recommended interventions for his back health, particularly with

regard to footwear and posture. The therapist noted that the petitioner would sit with a forward slumped posture with rounded shoulders. PX1.

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his or her claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs. Industrial Commission*, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his or her testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).

The Illinois Supreme Court has held that a claimant's testimony standing alone may be accepted for the purposes of determining whether an accident occurred. However, that testimony must be proved credible. *Caterpillar Tractor vs. Industrial Commission*, 83 Ill.2d 213, 413 N.E.2d 740 (1980). In addition, a claimant's testimony must be considered with all the facts and circumstances that might not justify an award. *Neal vs. Industrial Commission*, 141 Ill.App.3d 289, 490 N.E.2d 124 (1986). Uncorroborated testimony will support an award for benefits only if consideration of ***all facts and circumstances*** [emphasis added] support the decision. *See generally, Gallentine v. Industrial Commission*, 147 Ill.Dec 353, 559 N.E.2d 526, 201 Ill.App.3d 880 (2nd Dist. 1990), see also, *Seiber v Industrial Commission*, 82 Ill.2d 87, 411 N.E.2d 249 (1980), *Caterpillar v Industrial Commission*, 73 Ill.2d 311, 383 N.E.2d 220 (1978). It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence, and assign weight to the witness' testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); *Hosteny v Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009).

After a review of the testimony of all witnesses and the petitioner and a review of the medical records, the Arbitrator finds Drs. Kern and Levy's opinions to be more persuasive than those of Dr. Malek. The Arbitrator further concludes that Petitioner has not proven, by a preponderance of the evidence that an accident occurred, which arose out and in the course of his employment by Respondent. As the petitioner has not proven that an accident occurred, all other issues are moot and will not be addressed.

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ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
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SIGNATURE PAGE

L Thompson

Signature of Arbitrator

April 1, 2015
Date of Decision

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