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

Isadore McKennie,

Petitioner,

vs. NO: 12 WC 33432

City of Chicago,

Respondent.

20IWCC0254

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 penalties, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 19, 2017 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 county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. 820 ILCS 305/19(f)(2). Based upon the named Respondent herein, no bond is set by the Commission. 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.

20IWCC0254

DATED: MAY 1 - 2020
d: 3/19/20
BNF/mw
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McKENNIE, ISADORE
Employee/Petitioner

Case# **12WC033432**

12WC038378

CITY OF CHICAO
Employer/Respondent

20IWCC0254

On 7/19/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.10% 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:

1759 MARTAY LAW OFFICE
WILLIAM H MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

0010 CITY OF CHICAGO ASST CORP COUN
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

Isadore McKennie
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **12** WC **33432**

Consolidated cases: **12 WC 38378**

20IWCC0254

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 **6/14/17**. 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 **8/17/12**, 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.

For the reasons set forth in the attached decision, the Arbitrator finds Petitioner failed to establish a causal connection between his undisputed accident of August 17, 2012 and his current post-fusion condition of ill-being.

In the year preceding the injury, Petitioner earned $**38,995.06**; the average weekly wage was $**749.90**.

On the date of accident, Petitioner was **76** 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.

The parties stipulated Petitioner was temporarily totally disabled from August 17, 2012 through October 25, 2012, a period of 10 weeks. Arb Exh 1.

Respondent shall be given a credit of $**4,999.60** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**4,999.60**.

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

ORDER

THE ARBITRATOR AWARDS NO PERMANENCY BENEFITS IN THIS CASE. SEE THE DECISION IN 12 WC 38378 FOR THE ARBITRATOR'S PERMANENCY AWARD.

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

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

Molly C Mason

Signature of Arbitrator

7/18/17
Date

JUL 19 2017

Isadore McKennie v. City of Chicago
12 WC 33432 and 12 WC 38378 (consolidated)

Summary of Disputed Issues Relative to Both Cases

The parties agree Petitioner sustained injuries on August 17 [12 WC 33432] and October 30, 2012 [12 WC 38378], while working as a custodian for Respondent. Petitioner was 76 years old when these injuries occurred. He ultimately underwent a two-level lumbar fusion in August 2013. His surgeon released him to sedentary duty in accordance with a valid functional capacity evaluation performed in November 2015. On May 5, 2016, Respondent provided him with job search logs and directed him to begin looking for work. He continued receiving duty disability benefits until January 20, 2017, at which point Respondent asserted his job search was invalid.

In 12 WC 33432, the disputed issues include causal connection and nature and extent. Arb Exh 1. In 12 WC 38378, the disputed issues include causal connection, medical expenses, temporary total disability, maintenance, nature and extent and penalties/fees. Arb Exh 2.

Arbitrator's Findings of Fact

Petitioner testified he lives in Chicago. He is now 81 years old. T. 19. He finished tenth grade. He did not graduate from high school or attend college. His jobs have always involved physical labor. T. 26-27. He worked at E. J. Brach for 24 years before being hired by Respondent on May 16, 2001. T. 13-14. He passed a mandatory pre-employment physical examination before he began working for Respondent. He was hired as a custodian. His duties included mopping and waxing floors, removing garbage and shoveling snow. His job required lifting, bending and walking. T. 14-15.

Petitioner testified he performed full duty custodial work for Respondent until August 17, 2012. On that date, he injured his back while moving some tables. He testified he underwent treatment with physicians at MercyWorks and Dr. Wehner following this injury. [No records from these providers are in evidence.] He was off work from August 12 through October 25, 2012, at which point he resumed his custodian job. He testified he "did not feel too good" at that point. T. 15-16.

Petitioner testified he re-injured his lower back on October 30, 2012, when he lifted a full mop bucket. T. 16. He identified PX 1 as his report concerning this accident. In this report, he indicated he lifted a full mop bucket while working at a library on October 30, 2012 and felt "a very sharp pain in [his] lower back that radiated down both legs."

Petitioner testified that, following the October 30, 2012 accident, he began a course of treatment at Elmhurst Primary Care Associates. Records in PX 2 reflect Petitioner actually underwent care at Elmhurst Memorial Hospital's Emergency Room on October 30, 2012 and did not go to Elmhurst Memorial Primary Care Associates until the following day. Petitioner

underwent lumbar spine X-rays and a thoracic spine MRI at the Emergency Room. The reports concerning these studies are not in evidence. The Emergency Room physician prescribed Valium and Tramadol and directed Petitioner to follow up with Dr. Stevens. PX 2. On October 31, 2012, Dr. Stevens noted that Petitioner complained of 8/10 low back pain secondary to lifting a bucket of water and had undergone X-rays at the Emergency Room the preceding day. Dr. Stevens described the X-rays as negative for fracture. After examining Petitioner, he prescribed Norco, Mobic and a Prednisone taper. He imposed a 20-pound lifting restriction and referred Petitioner to Dr. O'Connor, an orthopedic surgeon. A referral form in PX 2 describes Petitioner's "primary insurance" as Coventry Workcomp.

Petitioner first saw Dr. O'Connor on November 6, 2012. In his note of that date, the doctor recorded a consistent history of the two work accidents. He noted complaints of low back pain radiating into the buttocks and posterior thighs along with numbness in both legs. He also noted that Petitioner had previously undergone back surgery in the early 1980s. He described Petitioner as "in obvious distress" and exhibiting a slow, somewhat forward flexed gait. On examination, he noted diminished sensation diffusely over the left leg, positive passive straight leg raising bilaterally, left worse than right, exquisite tenderness in the sciatic notch and lumbar spine and moderate paraspinal spasm. He described Petitioner's symptoms as "suggestive of a large central disc herniation." He prescribed a lumbar spine MRI and continued medication. He found Petitioner unable to work secondary to the back injury. PX 5, pp. 13-14/25.

The lumbar spine MRI, performed without contrast on November 7, 2012, showed a previous right-sided laminectomy at L5-S1, degenerative desiccation at several disc space levels, mild multi-level degenerative spondylosis, a central disc protrusion at L4-L5 "with a question of a small superimposed central disc herniation," a left lateral disc herniation at the same level and a central annular tear at L5-S1 with a "small residual or recurrent right paracentral disc herniation with mild partial effacement of the right descending S1 nerve root." PX 5.

Petitioner returned to Dr. Stevens on November 17, 2012 and reported some relief from the Norco. The doctor reviewed the MRI, continued the Mobic and Norco and directed Petitioner to stay off work and follow up with Dr. O'Connor. PX 2.

On December 14, 2012, Dr. O'Connor prescribed physical therapy and epidural steroid injections. PX 5.

On January 9, 2013, Petitioner underwent transforaminal epidural steroid injections on the left at L4-L5 and on the right at L5-S1. Dr. Belavic administered these injections. He noted a history of both work accidents in his report. PX 5.

At Respondent's request, Petitioner underwent a Section 12 examination by Dr. An of Midwest Orthopaedics on February 5, 2013. In his report of that date, Dr. An recorded a consistent history of both work accidents. He noted current complaints of low back pain

radiating down both legs posteriorly. He also noted that Petitioner had undergone back surgery in the early 1980s but had done well for many years thereafter.

On examination, Dr. An noted tenderness to palpation in the L5-S1 area, a limited range of motion and no abnormal neurologic findings.

Dr. An found Petitioner's history to be "consistent with the injury to the low back" with a pre-existing diagnosis of disc degeneration. He viewed the injury as aggravating the underlying degenerative condition. He recommended non-narcotic medication and six more weeks of therapy. He found Petitioner capable of restricted work with no lifting over 20 pounds and no frequent bending or twisting. He anticipated that Petitioner would be able to resume full duty in six weeks but conceded there was a "small chance" that Petitioner would not improve significantly and might have residual permanent back pain. He indicated he would recommend a functional capacity evaluation "for permanent restrictions" if this proved to be the case. He did not recommend any type of surgery. Resp Group Exh 1.

On February 8, 2013, Petitioner saw Dr. Hennessy, Dr. O'Connor's partner. The doctor recorded a history of the two work accidents and subsequent care. He also recorded a history of a right L5-S1 discectomy in 1981. He indicated that Petitioner reported fully recovering from that surgery and having no back pain thereafter until August 2012. He noted that Petitioner denied any relief from a recent epidural injection. He described Petitioner as walking without an assistive device but moving very slowly. He interpreted the MRI as showing degenerative disc disease at L5-S1 and a small bulge at L4-L5. He recommended an EMG/NCV. PX 5.

Petitioner underwent the recommended EMG and nerve conduction studies on February 28, 2013. Dr. Kim, a physiatrist, performed these studies. He noted a history of an L5-S1 discectomy in 1981. He also noted a history of work accidents in August and October 2012. He indicated that Petitioner complained of back and bilateral leg pain for which he was taking Norco.

Dr. Kim described the EMG/NCV results as abnormal. He noted electrodiagnostic evidence of bilateral sensory neuropathy and bilateral mild chronic L4 to S1 radiculopathy in the lower extremities. PX 5.

On March 8, 2013, Dr. Hennessy reviewed the EMG/NCV results and indicated Petitioner would likely need an L5-S1 laminectomy and fusion. He noted that Petitioner wanted to try conservative care first. He prescribed Norco and physical therapy. PX 5.

Petitioner underwent physical therapy at Elmhurst Memorial Hospital between April 2 and May 16, 2013. The discharge summary of May 16, 2013 reflects Petitioner felt worse and complained of severe spasms and radiating leg symptoms. PX 5, 7.

On April 19, 2013, Dr. Hennessy noted that Petitioner was now using a cane and seemed worse rather than better. He again broached the subject of surgery but noted Petitioner wanted to try more therapy. He prescribed six more weeks of therapy along with X-rays. PX 5.

On May 13, 2013, Dr. Hennessy discussed the details of the proposed surgery with Petitioner and his son. He recommended a discogram "pending approval by workers' compensation." PX 5.

On May 20, 2013, Petitioner saw Dr. Gurevicius at Elmhurst Memorial Hospital's Pain Center. The doctor noted that Petitioner reported doing well following a 1980 lumbar fusion "until eight months ago, while moving heavy tables." He described Petitioner as receiving no relief from an epidural injection performed in January. He indicated Petitioner was walking with a cane with a right leg limp. On examination, he noted positive straight leg raising bilaterally. He agreed with Dr. Hennessy's recommendation of discography. PX 5.

Petitioner underwent a CT discogram at L3-L4 and L4-L5 on May 31, 2013. The CT scan showed Grade 1 anterior spondylolisthesis at L5 relative to S1 secondary to pars defects on the right at L5 with sclerotic/stress response on the left side. PX 5.

On May 3, 2013, Dr. Hennessy noted some inconsistencies in the discogram results but nevertheless recommended a laminectomy and fusion at L4 to S1. He indicated Petitioner might need a repeat MRI "once WC issues [are] cleared up." PX 5.

At Respondent's request, Dr. An re-examined Petitioner on June 18, 2013. He noted that Petitioner described his condition as worsening after the February examination. He also noted the discogram results. On re-examination, he noted significant tenderness to palpation in the L4-L5 and L5-S1 region and paraspinal muscles, along with a "quite limited" range of motion. He again recommended conservative care, with "better pain management", including facet injections, possible rhizotomy, anti-inflammatory medication and non-narcotic analgesics. At one point in his report, he found Petitioner unable to work "because of his significant pain." He later indicated Petitioner could perform sedentary duty with no lifting over 15 pounds and no frequent bending or twisting. With respect to the recommended fusion, he commented that the outcome of such a surgery "is not predictable" for Petitioner. Resp Group Exh 1.

Dr. Hennessy operated on Petitioner's back on August 8, 2013, performing a laminectomy, foraminotomy and fusion with instrumentation from L4 to the sacrum. T. 17. In his operative report, he noted scarring due to a prior right L5-S1 laminotomy. After debriding the scar tissue, he performed a TLIF at the left L5-S1 and a bilateral PLIF at L4-L5, inserting cages, rods and pedicle screws. He prescribed a brace and bone stimulator at discharge. PX 5.

At the initial post-operative visits in August, September and October 2013, Dr. Hennessy noted significant improvement, indicating Petitioner was no longer confined to a wheelchair. On December 27, 2013, he described Petitioner as reporting a "little setback" but noted Petitioner was continuing to walk on his own. He obtained repeat lumbar spine X-rays, which

demonstrated a solid fusion and no loosening of the hardware. He prescribed Mobic, refilled the Norco and recommended that Petitioner stay off work and continue attending therapy. PX 5.

On February 7, 2014, Dr. Hennessy recommended additional therapy and continued to keep Petitioner off work. PX 5.

On May 23, 2014, Dr. Hennessy prescribed a four-week course of work conditioning, to be followed by a functional capacity evaluation. He released Petitioner to light duty. PX 5.

On May 27, 2014, Petitioner's counsel sent Dr. Hennessy's May 23, 2014 records to Respondent's counsel and requested ongoing payment of temporary total disability benefits. PX 5.

On July 25, 2014, Dr. Hennessy continued the light duty restriction and recommended eight more weeks of work conditioning. PX 5.

On July 28, 2014, Petitioner's counsel sent Dr. Hennessy's July 25, 2014 note to Respondent's counsel. In his cover letter, Petitioner's counsel requested the ongoing payment of benefits "unless the City can provide restricted work." PX 5.

On August 15, 2014, Dr. Hennessy placed work conditioning on hold and took Petitioner off work due to regression. He recommended a lumbar spine CT scan and MRI, to be performed with and without contrast. PX 5.

On August 18, 2014, Petitioner's counsel sent Dr. Hennessy's August 15, 2014 records to Respondent's counsel. Petitioner's counsel requested authorization of the recommended studies and ongoing payment of temporary total disability benefits. PX 5.

On September 19, 2014, Dr. Hennessy recommended a pain management consultation and directed Petitioner to remain off work. PX 5.

On October 1, 2014, Petitioner's counsel sent Dr. Hennessy's note to Respondent's counsel. He requested that Respondent authorize the pain management consultation and continue to pay weekly benefits. PX 5.

On December 19, 2014, Dr. Hennessy again recommended a pain management consultation. He continued to keep Petitioner off work. PX 5.

On December 22, 2014, Petitioner's counsel sent Dr. Hennessy's December 19, 2014 note to Respondent's counsel. He requested authorization of the consultation and ongoing payment of benefits. PX 5.

On February 9, 2015, Dr. Katzovitz, Petitioner's internist, noted that Petitioner was still taking Gabapentin for moderate low back pain but felt the medication was making him drowsy. She adjusted his dosage. PX 9.

On March 6 and May 11, 2015, Dr. Hennessy directed Petitioner to remain off work and undergo sacroiliac injections. Petitioner's counsel requested authorization of these injections via letter on May 12, 2015. PX 5. [It appears Petitioner underwent these injections but no records are in evidence.]

At Respondent's request, Dr. An examined Petitioner a third time on August 14, 2015. He noted ongoing complaints of back pain radiating into the right buttock and down the right leg, despite the surgery and subsequent care. He noted that Petitioner recently underwent sacroiliac injections "which did not help."

On re-examination, Dr. An noted a well-healed surgical incision, some tenderness to palpation in the lumbosacral region, particularly on the right side, and a limited range of motion. He reviewed post-operative imaging studies. He indicated these studies showed good positioning of the screws and "good decompression without any evidence of hematoma."

Dr. An found Petitioner's diagnoses to be "consistent with multi-level lumbar spondylosis and spondylolisthesis, which are all pre-existing findings." He described the status of the fusion as "not certain," based on the imaging studies he reviewed. He recommended flexion-extension X-rays and a lumbar spine CT scan to better evaluate the fusion and the positioning of the pedicle screws. He indicated Petitioner could undergo a functional capacity evaluation to set permanent restrictions if these studies did not reveal any problems. He addressed permanency as follows: "I do believe that [Petitioner] will have some permanent partial disability due to his condition and chronicity of his pain." Resp Group Exh 1.

At Dr. Hennessy's recommendation, Petitioner underwent flexion-extension X-rays on September 25, 2015. The interpreting radiologist noted post-operative changes, considerable demineralization of L5 and no subluxation during flexion and extension. PX 5.

On October 19, 2015, Dr. Hennessy directed Petitioner to remain off work and undergo a pain management consultation, followed by a functional capacity evaluation. PX 5.

Petitioner underwent a functional capacity evaluation at Midwest Physical Therapy Center on November 19, 2015. T. 18. The evaluator noted that Petitioner reported 30% improvement after the fusion and was still experiencing back and bilateral leg pain ranging from 5/10 to 7-8/10 for which he was taking Norco. The evaluator also noted that Petitioner was using a cane and reported being unable to tolerate more than brief intervals of walking and sitting before requiring a position change.

The evaluator noted Petitioner's age (79). He described Petitioner as cooperative but "limited during the examination by pain." He indicated Petitioner complained of 9/10 pain with

limited material handling and that "safety issues were raised which would preclude him from safely performing his work duties." He found Petitioner capable of only sedentary work and unable to resume his former medium physical demand level job. The last sentence of his report reads as follows: "The client cannot safely return to his work duties." PX 4.

On January 8, 2016, Dr. Katzovitz noted that Petitioner had undergone three injections and was "now recommended to have nerve stimulator." She indicated Petitioner was considering this recommendation. PX 9.

On April 25, 2016, Dr. Katzovitz issued a note addressed "to whom it may concern," indicating that Petitioner was under her care for failed back syndrome, was "unable to stand for prolonged periods" or lift/push/pull any significant weight, and would be unable to work for "at least the next six months." [See attachment to PX 6,]

On May 5, 2016, Rebecca Strisko, Deputy Commissioner of Respondent's human resources division [hereafter "Strisko"], wrote to Petitioner, informing him that, per the Act, he was required to actively look for gainful employment "in order to continue receiving disability benefits." Strisko enclosed job logs. She directed Petitioner to "complete at least 10 job searches each week" and submit those logs in person on a weekly basis to an "injury on duty manager" based at 30 North LaSalle Street. Strisko also enclosed a "request for reasonable accommodation" form. She informed Petitioner that completion of this form was strictly voluntary. [See attachment to PX 6.]

On May 25, 2016, Petitioner's counsel sent a letter to Respondent's counsel, Strisko and a representative of Respondent's Committee on Finance, referencing Strisko's May 5th letter. Petitioner's counsel indicated that, in his view, the completion of job logs did not constitute vocational rehabilitation. He indicated that formal rehabilitation efforts should begin, given Petitioner's advanced age and sedentary duty restrictions. [See attachment to PX 6.]

On June 23, 2016, Petitioner underwent an injection. A note attached to PX 6 reflects that Dr. Brennan administered this injection and directed Petitioner to remain off work. Petitioner continued obtaining medication from Dr. Katzovitz thereafter.

On April 7, 24 and 28, 2017, Petitioner's counsel wrote to Respondent's counsel, enclosing updated job search logs and requesting a response to his demand for the reinstatement of weekly benefits. He indicated he planned to obtain a trial date on May 8, 2017. [See attachment to PX 6.]

On May 3, 2017, Petitioner's counsel filed a "Petition for Legal Fee and Penalties," alleging that Respondent wrongfully discontinued the payment of benefits in February 2017, despite the transmission of job logs and medical records.

On May 12, 2017, Dr. Katzovitz noted that Petitioner continued to take Meloxicam, Gabapentin and Tramadol (as needed) for chronic lower back pain. PX 9.

Petitioner testified Respondent never offered him sedentary duty or vocational rehabilitation. He never met with a vocational counselor. He received a letter from Respondent directing him to complete and turn in job logs. He regularly turned in these logs (PX 8) until June 9, 2017. T. 19. [The logs in PX 8 list employers (contacted almost exclusively via telephone) on March 16, 2017, March 23, 2017, April 6, 2017, April 20, 2017, April 28, 2017, May 12, 2017, May 19, 2017, May 26, 2017, June 2, 2017 and June 9, 2017.] Respondent stopped paying him duty disability benefits as of January 20, 2017. He has not retired. He is still employed by Respondent. He has received no benefits from Respondent since January 21, 2017. T. 20. He receives regular Social Security and Medicare benefits. T. 20.

Petitioner testified he is no longer engaged in active care such as physical therapy. He sees his personal care physician every three months for medication refills. T. 22. His back feels stiff and tired. When he gets up from a seated position, he must stand for a bit before beginning to move. His legs give out when he walks. T. 25. He takes medication for his symptoms and performs home exercises that Dr. Hennessy prescribed. T. 23.

Petitioner denied undergoing any surgery since his August 2013 lumbar fusion. T. 23. He has not sustained any injuries to his back since October 30, 2012. T. 23-24.

Petitioner testified that Blue Cross/Blue Shield paid the bills relating to his fusion. He does not want to have to repay Blue Cross/Blue Shield. T. 24.

Under cross-examination, Petitioner testified he injured his lower back at work in approximately 1980. He underwent surgery following that injury. He has not injured his back since the accident of October 30, 2012. T. 28-29. He ran the costs associated with his fusion through his HMO. He presented his HMO card to his primary care doctor. He did not go through workers' compensation. T. 29-30. He did not advise Respondent's workers' compensation adjusters of his fusion. T. 30. He is eligible to draw pension benefits from Respondent but has not applied for these benefits. He has not applied to Respondent for ordinary disability, either. T. 31. He never requested vocational rehabilitation. Nor did he ask to undergo computer training. T. 31. He has never asked Respondent for ADA accommodations. T. 31. His job logs from March and April 2017 indicate he looked for custodial positions. He signed these job logs. The logs reflect the employers he contacted were not hiring. T. 33. He cannot physically perform custodial work but he "was going to try it." T. 34. He was "looking for anything [he] could get paid on." T. 34. He did not apply to any employers who were seeking to hire someone. T. 35. He found job leads in the newspaper. He did not look for jobs in person. T. 36. He spent a couple of hours per day going through the Tribune, Times and RedEye, checking the job ads. T. 37-38. When he called the numbers listed in the ads, the employers asked him questions. When he told hem his age, they told him they were not hiring. T. 39. He does not have a computer at home. He has not thought about going to the public library to take computer classes. T. 39. He did not look for work in his neighborhood. T. 39.

On redirect, Petitioner reiterated that no vocational counselor offered him assistance. He looked at "help wanted" ads in the newspaper. No one hired him due to his age. T. 40.

No witnesses testified on behalf of Respondent. Respondent's documentary evidence consisted of Dr. An's three reports and a letter of July 21, 2015 indicating Petitioner failed to appear for an examination on that date. Resp Group Exhibit 1.

Arbitrator's Credibility Assessment

Petitioner came across as hard-working and believable. He was 65 years old when Respondent hired him in May 2001. He successfully performed custodial duties for about eleven years before his undisputed accidents in 2012.

Respondent's examiner, Dr. An, noted no symptom magnification. In his last report, Dr. An found it likely Petitioner would have "some permanent partial disability due to his condition and the chronicity of his pain." Resp Group Exhibit 1.

Petitioner's functional capacity evaluation was valid.

Arbitrator's Conclusions of Law Relative to Both Cases

In 12 WC 33432, did Petitioner establish a causal connection between his undisputed accident of August 17, 2012 and his current condition of ill-being?

Petitioner's testimony concerning his August 17, 2012 accident and subsequent treatment was credible but not supported by medical records. Petitioner did not offer any records from MercyWorks or Dr. Wehner. Petitioner acknowledged resuming full duty about five days before his second accident of October 30, 2012 but testified he did not feel good at that point. There is no evidence indicating that additional care was pending when Petitioner returned to full duty.

On this very limited record, the Arbitrator is unable to find that Petitioner established a causal connection between the August 17, 2012 accident and his current, post-fusion condition of ill-being. The fusion did not take place until 2013 and there is no evidence indicating a physician prescribed an MRI or broached the subject of surgery before the accident of October 30, 2012.

In 12 WC 38378, did Petitioner establish a causal connection between his undisputed work accident of October 30, 2012 and his current lumbar spine condition of ill-being?

In 12 WC 38378, the Arbitrator finds that Petitioner established a causal connection between his undisputed lifting-related accident of October 30, 2012 and his current post-fusion condition of ill-being. In so finding, the Arbitrator relies on the following: 1) the fact that Petitioner worked as a custodian for Respondent between 2001 and the accident (with the

exception of the period Petitioner was off work following his earlier accident of August 17, 2012; 2) Petitioner's credible description of the mechanism of injury; 3) the accident report of October 30, 2012 (PX 1), which reflects Petitioner began experiencing low back and bilateral leg pain after lifting a bucket that was full of water; 4) the histories recorded by Drs. Stevens, O'Connor, Hennessy and An; 5) Dr. Hennessy's and Dr. An's comments that Petitioner reported doing well for many years following his earlier back surgery, which took place in approximately 1980 or 1981; and 6) Petitioner's credible denial of any new back injuries after October 30, 2012. While Dr. An viewed Petitioner's spondylolisthesis as a pre-existing condition, he conceded in his first report that the accident aggravated this condition. Resp Group Exhibit 1.

In 12 WC 38378, is Petitioner entitled to medical expenses?

Petitioner placed medical in dispute in 12 WC 38378 but did not claim any unpaid expenses. Petitioner offered into evidence print-outs of amounts paid by NAMMIL ($13,204.82) and Blue Cross/Blue Shield ($230,788.10). PX 3. The parties agree Respondent is entitled to Section 8(j) credit for medical expenses paid by its group carrier. They did not agree as to a specific amount of credit. T. 5. Respondent disputes liability for medical expenses as well as Petitioner's request that he be held harmless against the payments made.

The Arbitrator finds Petitioner's treatment in 12 WC 38378, including the surgery performed by Dr. Hennessy, to be reasonable, necessary and causally related to the October 30, 2012 work accident. The surgery followed a long course of ultimately unhelpful conservative care. Dr. An had reservations about the surgery but did not deem it unreasonable. He simply indicated the outcome was "not predictable." Resp Group Exhibit 1. No surgical outcome is certain and, in fact, Petitioner initially had a good response.

The Arbitrator, having reviewed PX 3, notes that one of the NAMMIL payments, in the amount of $71.06, and one of the Blue Cross/Blue Shield payments, in the amount of $2,902.55, relate to Emergency Room care rendered on August 17, 2012, in connection with the first case, 12 WC 33432. Petitioner did not claim medical expenses or a hold harmless agreement in that case. The remaining payments clearly relate to care rendered after the second accident, which is the subject of 12 WC 38378. In 12 WC 38378, the Arbitrator finds that Respondent is entitled to Section 8(j) credit for the NAMMIL payments of $13,133.76 and the Blue Cross/Blue Shield payments of $227,885.45, with Respondent holding Petitioner harmless against said payments.

In 12 WC 38378, is Petitioner entitled to temporary total disability benefits from October 31, 2012 through October 16, 2015 and maintenance benefits from October 17, 2015 through the hearing of June 14, 2017? Is Respondent liable for penalties and fees for failing to pay weekly benefits from January 20, 2017 through the hearing?

In 12 WC 38378, the parties agree Petitioner was temporarily totally disabled from October 31, 2012 (the day after the undisputed accident) through August 14, 2015 (the date of Dr. An's last examination). Petitioner claims additional temporary total disability through

October 16, 2015 and maintenance from October 17, 2015 through the hearing of June 14, 2017. Arb Exh 2.

Respondent relies on Dr. An in arguing that Petitioner is not entitled to temporary total disability benefits after August 14, 2015. That reliance is misplaced. Dr. An did not find Petitioner to be at maximum medical improvement as of August 14, 2015. Instead, he prescribed flexion-extension X-rays and a lumbar spine CT scan to rule out arthrosis or problems with the spinal implant. He also recommended that Petitioner undergo a functional capacity evaluation if these studies revealed no problems. Resp Group Exhibit 1. Petitioner underwent the X-rays on September 25, 2015 and the evaluation on November 19, 2015. Records in PX 9 reflect Petitioner underwent additional back-related care, including injections, thereafter and was considering a spinal cord stimulator as of January 2016.

Based on the available treatment records, the Arbitrator finds that Petitioner's causally related lumbar spine condition stabilized on June 23, 2016. This appears to be the date on which Petitioner last underwent active care in the form of an injection. PX 6. Petitioner has continued to undergo medication management with his internist since then. PX 9.

The Arbitrator also finds that Petitioner is entitled to maintenance from June 24, 2016 through the hearing of June 14, 2017. Petitioner's job search efforts during this period were less than perfect but he faced the following significant barriers to re-employment: advanced age (81 as of the hearing), limited education (tenth grade), narrow work history, sedentary duty restriction and chronic leg and back pain. At no point in time did Respondent offer to help him get past those barriers. Petitioner was not legally obligated to request vocational rehabilitation to be entitled to maintenance (see Roper Contracting v. Industrial Commission, 349 Ill.App.3d 500 (5th Dist. 2004)), but did so, through his attorney, on May 25, 2016. There is no evidence Respondent responded to this request. Respondent failed to conduct a vocational assessment, as required by the Commission rules. See Ameritech Services, Inc. v. IWCC, 389 Ill.App.3d 191, 207 (1st Dist. 2009).

Based on the job logs and communications in PX 6 and PX 8, the Arbitrator further finds that Respondent is liable for penalties and fees based on its failure to pay benefits from March 16, 2017 through June 14, 2017. This is a period of 91 days or 13 weeks. The Arbitrator views Respondent's conduct in failing to pay benefits during this period as unreasonable and vexatious. Respondent's expectation (expressed during cross-examination) that Petitioner walk the streets to canvass prospective employers was not logical. Nor was it consistent with its examiner's finding of a chronic pain condition or its directive of May 5, 2016, which said nothing about job contacts having to be in person. The Arbitrator finds Respondent liable for Section 19(l) penalties in the amount of $2,730.00 ($30/day x 91 days), Section 19(k) penalties in the amount of $3,249.61 (50% of the $6,499.22 in benefits awarded from March 16, 2017 through June 14, 2017) and $1,299.84 in Section 16 attorney fees (20% of $6,499.22).

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

Isadore McKennie,

Petitioner,

vs. NO: 12 WC 38378

City of Chicago,

Respondent.

20IWCC0255

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 penalties, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 19, 2017 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 county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. 820 ILCS 305/19(f)(2). Based upon the named Respondent herein, no bond is set by the Commission. 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.

20IWCC0255

DATED: MAY 1 - 2020
d: 3/19/20
BNF/mw
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McKENNIE, ISADORE
Employee/Petitioner

Case# **12WC038378**

12WC033432

CITY OF CHICAGO
Employer/Respondent

20IWCC0255

On 7/19/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.10% 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:

1759 MARTAY LAW OFFICE
WILLIAM H MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

0010 CITY OF CHICAGO ASST CORP COUN
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

Isadore McKennie
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **12** WC **38378**

Consolidated cases: **12 WC 33432**

20IWCC0255

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 **6/14/17**. 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. 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 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 **10/30/12**, 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 $**38,995.06**; the average weekly wage was $**749.90**.

On the date of accident, Petitioner was **76** 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 $**32,997.39** for TTD, $**0** for TPD, $**83,993.25** for maintenance, and $**0** for other benefits, for a total credit of $**116,990.64**.

Respondent is entitled to a credit of $**13,133.76 (NAMMIL payments) and $227,885.45 (BC/BS payments)** under Section 8(j) of the Act, with Respondent holding Petitioner harmless against said payments. Arb Exh 2. PX 3.

ORDER

The parties agree Petitioner was temporarily totally disabled from October 31, 2012 through August 14, 2015. Arb Exh 1. The Arbitrator finds that Petitioner was also temporarily totally disabled from August 15, 2015 through June 23, 2016 (the date of the last injection, based on the records in evidence) and was entitled to maintenance thereafter from June 24, 2016 through the hearing of June 14, 2017. The Arbitrator finds Petitioner's weekly TTD and maintenance rate to be $499.94 based on the stipulated average weekly wage. Respondent is entitled to credit in the amount of $116,990.64, per the parties' stipulation, for the temporary total disability and maintenance benefits it paid. Arb Exh 1.

For the reasons set forth in the attached decision, the Arbitrator finds Respondent acted unreasonably and vexatiously in refusing to pay weekly benefits from March 16, 2017 through June 14, 2017, a period of 91 days or 13 weeks. The Arbitrator finds Respondent liable for $2,730.00 in Section 19(l) penalties, $3,249.61 in Section 19(k) penalties and $1,299.84 in Section 16 attorney fees.

Respondent shall pay Petitioner permanent partial disability benefits at the rate of $449.44 per week for a period of 225 weeks representing 45% loss of use of the person as a whole under 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.

20 1 11 CC0255

Molly C Mason

Signature of Arbitrator

7/18/17
Date

JUL 19 2017

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)
SANGAMON		☐ PTD/Fatal denied
	☐ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Matt Wood,

Petitioner,

vs. NO: 13 WC 41175

City of Springfield Fire Department,

Respondent.

20IWCC0256

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of occupational exposure/disease, causation, 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, with changes as stated herein, said decision being attached hereto and made a part hereof.

While the Commission agrees with the Arbitrator's ultimate determination that Petitioner sustained an occupational disease that arose out of and in the course of his employment on or about 9/6/13, and which was causally related to his employment, we differ slightly as to the analysis. Specifically, the Commission notes that pursuant to *Johnston v. Illinois Workers' Comp. Commission*, 80 N.E.3d 573, 414 Ill. Dec. 430 (2nd Dist. 2017), the employer need only present "some" evidence to support a finding that something other than the claimant's occupation as a firefighter caused his condition in order to rebut the presumption set forth in §6(f) of the Occupational Diseases Act.

Along these lines, and contrary to the Arbitrator's determination, the Commission finds that Respondent successfully rebutted this presumption by submitting evidence of an alternative cause of Petitioner's kidney cancer in the form of the opinion of Dr. Eggener, Respondent's §12 examining physician. However, such a ruling does not end the analysis, let alone doom Petitioner's claim. Indeed, as the court in *Johnston* stated, "... if the employer is successful in rebutting the section 6(f) presumption, at that point the claimant may, if the evidence supports it,

20IWCC0256

assert that his occupational exposure was *a* cause of his condition of ill-being, along the lines of *Sisbro*, thus entitling him to an award of benefits." *Johnston*, 80 N.E.3d at 586.

In the present case, the Commission finds that Petitioner did just that -- proving by a preponderance of the credible evidence that he suffers from an occupational disease arising out of and in the course of his employment on or about 9/6/13 and that his occupational exposure as a firefighter for more than 16 years was a contributing cause of his diagnosis of kidney cancer, pursuant to *Sisbro, Inc. v. Industrial Commission, 207 Ill. 2d 193, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003)*, based on the persuasive opinion of Dr. Orris, Petitioner's unimpeached testimony and the record taken as a whole.

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 3/1/19 is affirmed and adopted with changes as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $917.34 per week for a period of 4-3/7 weeks, from 9/27/13 through 10/27/13, 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 shall pay to Petitioner the reasonable and necessary medical expenses relating to his kidney cancer from 9/6/13 through 1/29/19 as set forth in PX9, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $721.66 per week for a period of 50 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused permanent partial disability to the extent of 10% person-as-a-whole.

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; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, 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: MAY 1 - 2020
o: 3/10/20
DDM: pmo
52

20IWCC0256

D. Douglas McCarthy

Kathryn A. Doerries

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WOOD, MATT
Employee/Petitioner

Case# **13WC041175**

CITY OF SPRINGFIELD FIRE DEPT
Employer/Respondent

20IWCC0256

On 3/1/2019, 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 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5757 HAXEL LAW
MARTIN J HAXEL
310 E ADAMS ST
SPRINGFIELD, IL 62701

0332 LIVINGSTONE MUELLER ET AL
DENNIS S O'BRIEN
PO BOX 335
SPRINGFIELD, IL 62705

20IWCC0256

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

MATT WOOD,
Employee/Petitioner

v.

CITY OF SPRINGFIELD, FIRE DEPARTMENT,
Employer/Respondent

Case # **13** WC **41175**

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 **1/29/19**. 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 **9/6/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**71,552.52**; the average weekly wage was $**1,376.01**.

On the date of accident, Petitioner was **36** 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

Respondent shall pay Petitioner temporary total disability benefits of $917.34/week for 4-3/7 weeks, commencing 9/27/13 through 10/27/13, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services related to petitioner's kidney cancer from 9/6/13 through 1/29/19, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner permanent partial disability benefits of $721.66/week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

2/19/19
Date

MAR 1 - 2019

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 36 year old firefighter, alleges he sustained an occupational disease that arose out of and in the course of his employment by respondent on 9/6/13. Petitioner was hired by respondent as a firefighter in May of 2003. Prior to this petitioner was employed as a firefighter for the City of Springfield, MO since February of 1998. He was subsequently promoted to a Driver Engineer, which he was on the alleged date of injury. Three years ago petitioner was promoted to Captain. The parties stipulated, and the arbitrator took judicial notice that petitioner was not obese. Petitioner testified that prior to his cancer diagnosis he was never diagnosed with hypertension. He was diagnosed with hypertension 1.5 to 2 years ago. Petitioner also denied any problems with his kidneys, including injuries, prior to 9/6/13. Petitioner never smoked. He testified that when he was 3 years old he had open heart surgery. He also testified that he has had arrythmia over the years.

Petitioner testified that his firefight duties were the same while in all three positions, and included actively fighting fires. Petitioner testified that he responded to approximately 4 fires a month. Petitioner has been assigned to Stations 1, 4 and 5. These are the busiest stations and petitioner testified that he worked out of these stations about ½ the time he has been employed by respondent.

In all three positions petitioner held with respondent, he would respond to fires at residential homes, structure fires, building fires, and fires in cars, rubbish and brush. He testified that most of the building fires were residential fires. When petitioner responds to a fire he wears his bunker gear which consists of a fire suit, pants, coat, helmet, gloves, hat, mask, and a self contained breathing apparatus (SCBA), which is like a back pack that carries a cylinder that holds air.

Petitioner testified the procedures for wearing a SCBA changed within the past four years. From the time he was hired by respondent, until four years ago, he would put the SCBA on while on his way to the fire scene. Once at the scene he would actively wear it until the fire was out. Once the fire was extinguished and the duties switched from active firefighting to overhauling, the SCBA would be unhooked. Overhauling involved looking for hidden fires in floors, walls and ceilings by pulling these materials apart to make sure the fire was fully extinguished. He testified that while these duties were being performed there would still be smoke in the structure, but not as bad as when the flames were still active. Once the overhaul procedure was complete, the crew would start cleaning up tools and putting stuff back in the truck. Once they returned to the station he and the others would clean up the tools and get things ready for the next call. They would also take off their bunker gear and clean off the dirt.

When the new procedures went into effect 4 years ago, the firefighters would keep their SCBA on until the on shift safety officer determined, with the LEL monitor, that all gas levels were in the normal range and it was

safe for the firefighters to take the equipment off. Petitioner testified that this resulted in the firefighters masks remaining on longer while they were performing their overhaul duties. Other changes that went into effect four years ago included the firefighters having a spare set of gear ready if the one from the fire was dirty and needed to be cleaned. They use the backup set of gear if they do not have time to wash the gear from the fire before the next fire call. Additionally, he testified that in the past few years there have been wet wipes at the scene for the firefighters to use to clean their face, neck, and hands before leaving the fire.

On 7/29/13 petitioner presented to Express Care with complaints of lower left quadrant abdominal pain and a fever. Labs were performed and petitioner was diagnosed with abdominal pain and discharged. He was instructed to go to the emergency room at Memorial Medical Center, and follow up with Dr. Sandercock, his primary care physician.

That same day, petitioner presented to the emergency room at Memorial Medical Center for his abdominal pain. His labs were reviewed. A CT of the abdomen and pelvis with contrast was performed. The impression was descending colon diverticulitis, and right renal hypodense lesion. It was noted that given petitioner's age it may represent a hemorrhagic cyst. A neoplasm could not be excluded. Further characterization was recommended with a follow-up CT renal protocol. He was diagnosed with diverticulitis and instructed to followup with his PCP for a CT scan due to the cyst on his kidney.

On 7/31/13 petitioner presented to Dr. Sandercock, his PCP. Dr. Sandercock examined petitioner, reviewed the test results, and assessed imaging studies nonspecific abnormal findings and diverticulitis of colon. His plan was CT Renal Mass Protocol.

On 8/30/13 petitioner underwent a CT of the abdomen and pelvis with renal mass protocol. The impression was a 3.5 cm solid right upper pole renal mass worrisome for a papillary renal cell carcinoma. There was no extension beyond the renal fascia and no renal vein tumor thrombus.

On 9/5/13 petitioner presented to Dr. Gillison's office for evaluation of his renal mass. Petitioner reported that he felt well. He reported that his maternal grandmother had breast cancer, and his maternal grandfather had colon cancer. Dr. Gillison discussed his impressions with petitioner and Dr. David Lieber, the urologist. Dr. Gillison's impression was that given the size of the tumor and the relatively high probability of it being a malignant lesion it would need to be resected. Petitioner was referred to Dr. Lieber.

On 9/6/13 petitioner presented to Dr. Lieber. Dr. Lieber examined petitioner and assessed a right renal mass. He recommended a laparoscopic robotic surgery to remove just the upper portion of the kidney where the tumor was with negative margins.

On 9/27/13 the petitioner underwent a right laparoscopic partial nephrectomy with intraoperative ultrasound, performed by Dr. Lieber. The postoperative diagnosis was right renal mass. Petitioner was discharged from the hospital on 9/29/13 with work restrictions. Petitioner followed-up postoperatively with Dr. Lieber on 10/7/13. He was released to unrestricted work on 10/28/13.

On 10/30/13 petitioner followed-up with Dr. Sandercock. He noted that he was doing well and had no concerns. Petitioner's family history includes breast cancer for maternal grandmother, colon cancer for maternal grandfather, and diabetes in father, and paternal grandfather and grandmother. There was no mention of any bladder cancer in any relative. Dr. Sandercock examined petitioner and assessed health maintenance, hyperlipidemia, esophageal reflux, and renal cell carcinoma. The plan was that petitioner get a CBC with differential blood test, Comp met panel, lipid panel with direct LDL, and automated urinalysis. His medications remained the same. He was told to continue to follow up with the specialists.

On 1/19/15 petitioner presented to Dr. Sandercock for a Health Maintenance visit. He stated that he was doing well overall. He was told to follow-up in a year.

On 2/17/15 Dr. Scott Eggener, with the University of Chicago Medicine & Biological Sciences, issued a report on behalf of respondent, after evaluating petitioner. He noted that he regularly evaluates patients with kidney masses in the clinic, performs frequent kidney surgeries, and has 15 separate scholarly publications specifically on kidney cancer. Dr. Eggner is an Associate Professor of Surgery at the University of Chicago and subspecializes in the care of patients with urologic malignancies with a specific clinical and academic interest in kidney cancer. He noted that petitioner has a medical history consisting of atrial fibrillation, diverticulitis, gastroesophageal reflux, and hyperlipidemia. He noted that petitioner had surgeries that included a vasectomy, appendectomy, ventricular septal defect, and robotic partial nephrectomy. Petitioner denied any chemical exposure or secondhand smoke. He also reported no significant tobacco history.

Based on his evaluation of the clinical records, experience as a urologic oncologist, and specialty expertise in kidney cancer, Dr. Eggener was of the opinion that based on the totality of the published medical literature, there is no definitive association or causation evident for firemen being at an increased risk of developing kidney cancer. Dr. Eggener was of the opinion that in the overwhelming majority of people diagnosed with kidney cancer, there is no clear etiology or explanation why cancer develops. He was of the opinion that in a very small percentage of patients there is familial or generic abnormality that predisposes them to developing kidney cancer, which petitioner did not have. With respect to other risk factors for developing kidney cancer, Dr. Eggener was of the opinion that there has been a plethora of studies investigating potential etiologic factors, that include use of tobacco products; obesity and other dietary habits; and more than 100 chemicals that were

identified as potential etiologic factor leading to kidney cancer, with no individual agent having been uniformly and definitively established as a causative agent in human kidney cancer. He noted that most of these agents have been associated with kidney disease in animal models alone and not definitively in human cancer. With respect to occupational risks, Dr. Eggener was of the opinion that there is a very modest increased risk seen in metal, chemical, rubber, and printing industry workers. He was further of the opinion that there is a very large volume of peer reviewed medical literature that addressed the potential association of being a firefighter and the risk of kidney cancer.

Dr. Eggener was of the opinion that the most useful and unbiased report appears to originate from the Institute of Research Robert Suave, which is a scientific research organization funded by both employers and employees since 1980 which has been performing reviews of occupational risk factors for the development of diseases. He noted that in 2005 they issued a report entitled "Risk of Kidney Tumors in Firemen." He was of the opinion that this review confirmed the most established risk factors for developing kidney cancer are cigarette smoking, obesity, and hypertension. He was further of the opinion that the review of 19 studies confirms there is an approximately 2-fold increase in renal cell carcinoma in obese individuals. He noted that in the review of 13 case control studies, the estimated risk of developing kidney cancer among patients with hypertension was approximately 1.75, and a detailed review of 8 specific studies are available in the report, but beyond the scope of his report. Despite not addressing the 8 specific studies, Dr. Eggener noted that the conclusion of the reference report is "It is considered there is limited evidence that exposures entailed as a firemen do increase the risk of kidney cancer. The evidence is limited and not sufficient because of a lack of good exposure assessment in almost all studies. The implication is that there is not, automatically, a "more likely than not" probability (greater than a 50% probability) that a kidney cancer in a fireman is the result of exposures encountered in their occupation."

Dr. Eggener also made reference to multiple recently published papers that specifically address the potential association of being a fireman and kidney cancer. He noted that the IARC published a study in 2010 which reviewed 42 separate studies regarding a fireman and found no association with the development of kidney cancer. He noted that in 2011 nearly 10,000 firefighters were exposed to smoke at the World Trade Center following the September 11th tragedy. Based on this he noted that the paper published in Lancet, authored by Zeig-Ownes, found no increased incidence of kidney cancer. He then made note that Pukkala published a paper in Occupational Environmental Medicine in 2014 which reviewed data of all firemen, which showed no increased risk of developing kidney cancer. He also referenced Daniels publishing a large series in Occupational Environmental Medicine in 2014 which included data from 1950 to 2009 on 30,000 firemen from

the U.S. that showed a 27% increased risk of developing kidney cancer, and a 29% increased risk of dying from kidney cancer. But also noted that this association was only evident if a fireman worked on the force for 20 to 30 years, not those in firemen who had been working for less than 20 years. Dr. Eggener next noted a very large metaanalysis from LeMaster in 2006 incorporating data from 32 separate studies and publishing the report in the Journal of Occupational and Environmental Medicine, which found an increased risk of 4 separate cancers in firemen, a potentially increased risk of 9 other cancers in firemen, but no evidence to suggest that the incidence of kidney cancer was elevated among firemen. Dr. Eggener also noted a study published by IDE in Occupational Medicine in 2014 that evaluated 2000 Scottish firemen that did show an increased risk of being diagnosed with kidney cancer. He was of the opinion that the cohort of 2000 was very small compared to all the other studies that he mentioned. He was further of the opinion that this publication was published in a less respected journal, and he considered it a lower level of evidence than all the other publications.

Dr. Eggener was of the opinion that it is agreed amongst the medical community that the criteria of causation must include 7 specific items: consistency of the observed association; strength of association; temporal sequence of events; dose response relationship; specificity of the association; biological plausibility of the observed association; and experimental evidence. Based on his knowledge of kidney cancer, known etiologic factors for developing kidney cancer, and a review of all the available epidemiological studies investigating the cause of kidney cancer, Dr. Eggener was of the opinion that it is inappropriate and not evidence based to suggest that being a fireman conclusively leads to an elevated risk of developing kidney cancer. He was of the opinion that if there was a significantly increased risk of developing kidney cancer as a fireman, it undoubtedly would be a strong, consistent, and irrefutable finding in virtually all large studies. He was of the opinion that the opposite is true, namely no consistency, occasionally conflicting results, and no obvious evidence of a link with kidney cancer. Dr. Eggener saw no evidence whatsoever to suggest an association or causation evident for firemen being at an increased risk of developing kidney cancer, specifically as it relates to petitioner.

On 7/20/16 petitioner presented to Dr. Sandercock for left lower quadrant and abdominal pain after presenting to Express Care on 7/15/16. He was prescribed medications for his pain. Dr. Sandercock believed the pain was most likely due to diverticulitis.

On 6/7/17 petitioner underwent a Section 12 examination performed by Dr. Peter Orris, at the request of the petitioner. Dr. Orris is Chief of Occupational and Environmental Medicine at the University of Illinois Medical Center in Chicago and Professor in Environmental and Occupational Health at the UIC School of Public Health. In these capacities Dr. Orris has studied and taught how to diagnose and treat diseases related to

the environmental and occupational exposures, particularly as they relate to firefighters. The examination included a history, record review, medical literature review, review of Dr. Eggener's report, and physical examination. Petitioner's past medical history included diverticulitis and renal cancer in 2013; born with a VSD that was repaired in 1980 at 3 years of age; right bundle branch block secondary to surgery for the patent septum; and colonoscopy in June 2016 which showed diverticuli on left lower colon but not inflamed. His past surgical history was appendectomy in 1997 and partial nephrectomy in 2013. His family history included breast cancer for his material grandmother, and bladder cancer in his grandfather. Diverticulitis was also noted in his mother. Petitioner denied he reported that anyone in his family had bladder cancer. Petitioner stated that no one in his family has had bladder cancer. He noted that petitioner had a BMI of 27.

Following petitioner's history, physical examination, literature review, and record review, Dr. Orris noted that petitioner was diagnosed in 2013, after 17 years of fire service, with kidney cancer after an incidental finding on an abdominal CT scan for pain attributed to diverticulitis. Dr. Orris was of the opinion that petitioner has no history or other possible risk factors for the development of renal malignancies such as smoking, hypertension, diabetes, or family members with kidney cancer. Dr. Orris believed it was more likely than not, that petitioner's firefighting for 17 years had contributed to the development of his renal call cancer. He based this conclusion upon known exposures of firefighting and the literature that has evidence confirming the causative relationship between being a firefighter and kidney cancer on a more likely than not basis. The literature Dr. Orris was relying on is the application of Sir Bradford Hill's classic list of characteristics of studies to judge how likely it is that the association observed is causative. He also relied on the Dr. LeMasters' study; a study of the Massachusetts cancer registry; the World Health Organization's International Agency for Research on Cancer review on firefighting; and, a study of a pooled cohort of US Firefighters from San Francisco, Chicago, and Philadelphia. All these studies showed an association between firefighting and kidney cancer.

With respect to Dr. Eggener's report, Dr. Orris was of the opinion that Dr. Eggener's exclusion of firefighting as a causative factor appeared to be based upon a reliance on a selective reading of the literature and a misunderstanding as to how an etiologic causation conclusion is arrived at based upon the medical literature. He believed Dr. Eggener's report gave the characteristic requiring that a study must report a result unlikely to happen by chance alone less than one in 20 times as primacy, before it is subjected to a weight of the evidence review comprising the remaining Hill characteristics. Dr. Orris believed that such an approach allows him to incorrectly characterize any studies where the Confidence Interval includes 1 as negative and dismiss them from further analysis. He was of the opinion that this approach is contrary to the original concepts and accepted

methodology. Dr. Orris also disagreed with Dr. Eggener's 3rd conclusion as he did not explain his personal standard for "definitive association or causation evident". He also disagreed with Dr. Eggener when he noted that he believes the literature should provide evidence that "uniformly and definitively" establishes a causative link. Dr. Orris noted that the requirement that each study conducted, no matter what the design, uniformly showed an association between kidney cancer and firefighting, is not a scientifically accepted criteria for a causation conclusion. He was of the opinion that this criteria would appear to eliminate such well known carcinogens as benzene, cigarette tar, and asbestos. He was of the opinion that the medical literature, by its very nature, cannot provide uniformity in either risk or conclusions which expert opinion based on accepted scientific methodology.

Dr. Orris was of the opinion that Dr. Eggener's personal approach to causation was most evident when he said "most of these aforementioned agents have been associated with kidney cancer in animal models alone and not definitively in human cancer.' Dr. Orris was of the opinion that the use of animal testing to identify probable human carcinogens has been a mainstay of both government policy and scientific consensus. He was further of the opinion that finding a chemical producing cancer in two animal species is well accepted as making it likely that it causes cancer in humans as well without the need to wait 40 years and "count the bodies." Dr. Orris was of the opinion that Dr. Eggener's primary reliance on "the most useful and unbiased report appears to originate from the Institute of Research Robert Suave ...", is an excellent review but it is not a consensus statement by an expert committee or government body, or one developed by a professional society but rather is a monograph produced for a workers compensation insurance agency in Canada.

Dr. Orris was of the opinion that of the 13 studies that are looked at with respect to kidney cancer and firefighting, 9 demonstrated an elevated risk which ranged to a high in several studies of over a fourfold increase or a relative risk of over 4.0. He also noted that the report author stated that "supported studies also include strong associations, the relative risk in the case control study being close to 5, after correction for age and tobacco smoking." Dr. Orris was of the opinion that it is clear therefore, from the primary reference relied upon by Dr. Eggener, that firefighting is at least an equal and perhaps a stronger causative factor than either obesity or hypertension. Dr. Orris was of the opinion that Dr. Eggener seeked to dismiss the literature quoted in McGegor's report, highlighting a potential causative relationship between firefighting and renal cell cancer. Dr. Orris believed that in doing so Dr. Eggener avoided reporting the report author's evaluation of this literature, summarized in part with the statement that "the studies supporting the hypothesis are larger and in some cases have information about exposure assessment. None of the studies not supporting the hypothesis is of similar technical standard." Dr. Orris summarized that it is unfortunate that Dr. Eggener quoted the conclusions of the

author only selectively to support his preconceived notion as to the lack of a relationship between firefighting and renal cell cancer. Dr. Orris was of the opinion that Dr. Eggener did not report the authors description of a number of methods for specific case analysis and assessment or causation, and concludes that despite the limited evidence available in the literature "...it would appear that kidney cancers amongst fireman are more likely to be due to occupational exposures if they occur after employment for 20 years or more." Dr. Orris went on to state that Dr. Eggener's opinion that the IARC Study published in 2010 that reviewed 42 separate studies regarding a fireman found no association with the development of kidney cancer, is not an accurate statement as several of the articles reviewed demonstrated an association between firefighting and kidney cancer. Dr. Orris believed that Dr. Eggener's reliance on a paper published in Lancet authored by Zeig-Owens that found no increased incidence of kidney cancer is an entirely accurate report of the purpose and findings of this paper. Dr. Orris was of the opinion that this paper was actually designed to compare firefighters exposed to the WTC smoke and those firefighters not so exposed. He noted that the chart on page 902 of the report shows a nearly 3 fold increase in kidney cancer for exposed firefighters. He noted that when compared to SEER data as estimates for the population as a whole they found lower rates among both groups which the authors ascribe to a health worker effect, known to be strong in firefighters.

In summary, Dr. Orris was of the opinion that despite the existence of a second risk factor in that petitioner was overweight/obese, he opined that it is likely that petitioner's firefighting for 17 years contributed to the development of his renal cell cancer. He further opined that when compared with obesity as a risk factor, firefighting would appear to be a stronger factor in this causative pathway. Dr. Orris stated that his conclusions are partially based upon petitioner's exposures as a firefighter and the literature that has evidence confirming the causative relationship between being a firefighter and kidney cancer on a more likely than not basis.

On 1/13/14 petitioner underwent a CT of the chest, abdomen and pelvis. The impression was interval right partial nephrectomy; no left renal mass; abnormal appearance of the posterior aspect of the lateral segment left lobe of the liver, that had a benign appearance, but should be followed as well; and, no evidence of thoracic metastatic disease. That same day, he also followed-up with Dr. Lieber. He reviewed the CT scan results. He noted that petitioner was doing extremely well overall with no complaints.

On 4/21/14 petitioner underwent a repeat CT of the chest, abdomen and renal mass protocol. The impression was stable postoperative changes from right partial nephrectomy with no evidence of residual or recurrent neoplasm; no evidence of metastatic disease in the chest or abdomen; and stable abnormal appearance of the left lobe in the liver that has benign appearance, but could be further evaluated with MRI. On 4/29/14

petitioner followed-up with Dr. Lieber. He reviewed the CT scan results and noted that petitioner was going to get an MRI for his liver. He told petitioner to return in 6 months after another follow-up CT scan.

On 5/7/14 petitioner underwent an MRI of the liver. The impression was no evidence of diffuse liver disease.

On 10/1/14 petitioner underwent a repeat CT scan of the abdomen with renal mass protocol. The impression was stable postoperative changes from the right partial nephrectomy; no new mass in either kidney; no retroperitoneal lymphadenopathy; normal appearing liver. On 10/6/14 petitioner followed-up with Dr. Lieber for review of the CT scan. Dr. Lieber reviewed the CT scan and noted that it showed no evidence of recurrent residual disease. He told the petitioner to follow-up in one year.

On 6/9/15 Dr. Paul Pacheco performed a colonoscopy on petitioner. As part of his report, he recommended petitioner undergo genetic testing and undergo a follow procedure in 5 years if genetic testing was normal. Petitioner declined going under the recommended genetic testing. Dr. Pacheco made this recommendation based on a belief that petitioner had multiple family members with bladder cancer. Petitioner denied any family members have bladder cancer of his side of the family.

On 10/24/16 petitioner returned to Dr. Lieber after another follow-up CT scan. Dr. Lieber noted that the CT scan from October 2016 showed no evidence of localized recurrence or metastatic disease. He instructed petitioner to follow-up in 2 years.

Petitioner followed-up for his diverticulitis on 11/29/16. Petitioner had a Health Maintenance visit with Dr. Sandercock on 12/18/17 and reported that he felt well overall. On 6/4/18 petitioner saw Dr. Sandercock with complaints that he might have a hernia following colon resection in the summer of 2017. He was referred to Dr. Kuhnke for this problem.

On 6/28/18 Dr. Eggener drafted a report to Boyd Roberts, after reviewing the report of Dr. Orris. Dr. Eggener was of the opinion that he was not aware of any specific experience or expertise Dr. Orris had with kidney cancer, particularly as it relates to the presentation, clinical care, or outcomes of patients with kidney cancer. Dr. Eggener was of the opinion that the majority of patients diagnosed with kidney cancer have no clear or identifiable etiology. Dr. Eggener was of the opinion that the first 3 peer reviewed manuscripts Dr. Orris mentioned to support an association between being a firefighter and the development of kidney cancer paradoxically shows the exact opposite. He was of the opinion that the LeMasters 2006 paper clearly shows no significant association between being a firefighter and developing kidney cancer with a nonsignificant p-value. He was of the opinion that within Table 5 of the manuscript under the category "likelihood of cancer risks by

criteria, "kidney cancer is listed as "unlikely" to be associated with being a firefighter". Dr. Eggener was of the opinion that the 2008 Kang article included absolutely no statistically significant association between being a firefighter and kidney cancer. He was of the opinion that in the Section of the Discussion titled "Sites with Evidence of Elevated Risks" there are 6 paragraphs summarizing the results and kidney cancer is not mentioned. Lastly, Dr. Eggener was of the opinion that the Delahunt 1995 paper included no statistically significant finding to suggest an association between being a firefighter and the development of kidney cancer. Dr. Eggener was of the opinion that it is common and basic knowledge amongst epidemiologists, statisticians, and clinical researches that statistically nonsignificant findings with a 95% confidence interval that span an odds ration of 1.0 cannot be used to claim an association.

Dr. Eggener was of the opinion that given petitioner's approximate 16 years of firefighting service at the time of his kidney cancer diagnosis, the article by Daniels in 2013 suggests a slightly increased risk of all cancers when employed for 10 to 20 years, but then is of the opinion that the analyses from this paper distinctly show no association between being a firefighter for 10-20 years and the development of kidney cancer. Dr. Eggener was of the opinion that the chromophobe renal cell carcinoma petitioner was diagnosed with is a relatively rare form of kidney cancer that has a completely different etiology compared to more common types of kidney cancer. He was of the opinion that there is absolutely no evidence whatsoever in the medical literature or elsewhere to suggest the development of this kind of kidney cancer being associated with being a firefighter.

Dr. Eggener referenced a 2016 manuscript authored by Glass in Occupational Environmental Medicine titled "Mortality and Cancer Incidence in a Cohort of Male Paid Australian Firefighters" that indicates no increased risk of developing cancer based on being a firefighter. He was further of the opinion that in Table 4 of the article there is no evidence to suggest a risk of kidney cancer for firefighters that have been employed for less than 10 years, or 10 to 20. He noted an association in firefighter employed more than 20 years. Dr. Eggener also investigated 4 separate medical textbooks with chapters on kidney cancer authored by DeVita, Hellman, Rosenberg 10th Edition Cancer, Campbell's Urology 11th edition, Harrison's chapter 94, and Up To Date educational tool. He was of the opinion that each of these sources had a section on potential risks for developing kidney cancer, and none of them mention firefighting as a risk factor or even a potential risk factor. Dr. Eggener was of the opinion that there is no clear, convincing, and overwhelming evidence to suggest any known or definitive association with being a firefighter and developing chromophobe kidney cancer.

On 9/28/18 petitioner underwent a repeat CT scan of the chest, abdomen and pelvis with renal mass protocol. The impression was no evidence of residual or recurrent neoplasm at the operative site, and no mew

or worrisome mass in either kidney; no retroperitoneal lymphadenopathy; tiny nodules involving the peritoneum in the left midabdomen laterally that are likely related to interval colon resection; no evidence of thoracic metastatic disease; ecstasia of the ascending thoracic aorta which measures 4 cm in diameter, and dilatation of the aortic root which measures about 4 cm in diameter, and cardiomegaly with right chamber enlargement. Petitioner last followed-up with Dr. Lieber on 10/1/18. He reviewed the CT scan. He recommended another CT scan in 2 years.

Petitioner offered into evidence a NIOSH study entitled "Findings from a Study of Cancer among U.S. Fire Fighters" where the firefighters studied showed higher rates of certain types of cancer than the general U.S. population. They found that based on U.S. cancer rates that firefighters in our study had a greater number of cancer diagnoses and cancer related deaths that were mostly digestive, oral, respiratory, and urinary cancers. It also showed more cases of certain cancers among young firefighters, namely those under 65 years of age, having more bladder and prostate cancers than expected.

Petitioner testified that after being returned to work full duty without restrictions on 10/28/13 he has never been taken off work for his kidneys. Petitioner was promoted to Captain on 11/8/15 and makes more money than he would if he was still working as a driver engineer. As a Captain petitioner goes in with crews for all fires. Petitioner testified that none of his family members have a history of kidney cancer or bladder cancer.

Petitioner testified that some unpaid bills remain, and he made some out of pocket payments.

C. WAS THE PETITIONER EXPOSED TO AN OCCUPATIONAL DISEASE 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?

Section 1(d) of the Occupational Diseases Act states:

> Any condition or impairment of health of an employee employed as a firefighter, * * * which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension, tuberculosis, or cancer resulting in any disability (temporary, permanent, total, or partial) to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting * * * employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment. This presumption shall also apply to any hernia or hearing loss suffered by an employee employed as a firefighter * * *. However, this presumption shall not apply to any employee who has been employed as a firefighter * * * for less than 5 years at the time he or she files an Application for Adjustment of Claim, concerning this condition or impairment with the Illinois Workers' Compensation Commission. (820 ILCS 310/1(d).)

Given that the petitioner was employed as a firefighter for about 16 years on 9/6/13, pursuant to Section 1(d) of the Occupational Diseases Act, and the fact that petitioner has kidney cancer that resulted in a disability to the petitioner, the petitioner's kidney cancer shall be rebuttably presumed to arise out of and in the course of his firefighting employment, and rebuttably presumed to be causally connected to the hazards or exposures of the employment.

In the case at bar, each party offered the opinions of their own expert. For the petitioner it was Dr. Orris, and for the respondent it was Dr. Eggener.

Both Dr. Orris and Dr. Eggener offered opinions with respect to a causal connection between the petitioner's kidney cancer and his work as a firefighter. Again, both based their opinions of various medical and occupational literature that addressed the potential association of being a firefighter and the risk of kidney cancer. Additionally, both Dr. Eggener and Dr. Orris at times even use the same literature to attempt to bolster their opinion. However, the arbitrator finds it significant that neither doctor offered into evidence any of the literature they cited or relied on.

Dr. Eggener was of the opinion that based on the totality of the published medical literature, there is no definitive association or causation evident for firemen being at an increased risk of developing kidney cancer. Dr. Eggener was of the opinion that in an overwhelming majority of people diagnosed with kidney cancer, there is no clear etiology or explanation why the cancer develops, but noted that in a very small percentage of patients there is familial or generic abnormality that predisposes them to developing kidney cancer, which petitioner did not have.

Dr. Eggener also relied heavily on the 2005 report from the Institute of Research Robert Suave, entitled "Risk of Kidney Tumors in Firemen." He was of the opinion that this review confirmed the most established

risk factors for developing kidney cancer are cigarette smoking, obesity, and hypertension, which petitioner had none of prior to developing kidney cancer. He was further of the opinion that the review of 19 studies confirms there is an approximately 2-fold increase in renal cell carcinoma in obese individuals. However, the parties specifically noted at trial that petitioner was not obese, and the arbitrator took judicial notice of this. Additionally, Dr. Eggener noted in his medical records that petitioner's BMI was only 27, lower than the BMI of 30, which is considered obese, based on evidence offered by petitioner. Dr. Eggener noted that the conclusion of the reference report is "It is considered there is limited evidence that exposures entailed as a firemen do increase the risk of kidney cancer. The evidence is limited and not sufficient because of a lack of good exposure assessment in almost all studies. The implication is that there is not, automatically, a "more likely than not" probability (greater than a 50% probability) that a kidney cancer in a fireman is the result of exposures encountered in their occupation."

Dr. Eggener also made reference to multiple recently published papers that specifically address the potential association of being a fireman and kidney cancer. He made specific note of the IARC study in 2010 which reviewed 42 separate studies regarding a fireman and found no association with the development of kidney cancer; a paper published in Lancet, authored by Zeig-Ownes that found no increased incidence of kidney cancer; a paper published by Pukkala in Occupational Environmental Medicine in 2014 which reviewed data of all firemen, which showed no increased risk of developing kidney cancer; Daniels publishing of a large series in Occupational Environmental Medicine in 2014 which included data from 1950 to 2009 on 30,000 firemen from the U.S. that showed a 27% increased risk of developing kidney cancer, and a 29% increased risk of dying from kidney cancer, if a fireman worked on the force for 20 to 30 years, not in those firemen who had been working for less than 20 years. Dr. Eggener also noted a very large metaanalysis from LeMaster in 2006 incorporating data from 32 separate studies and publishing the report in the Journal of Occupational and Environmental Medicine which found no evidence to suggest that the incidence of kidney cancer was elevated among firemen. Dr. Eggener also noted a study published by IDE in Occupational Medicine in 2014 that evaluated 2000 Scottish firemen that did show an increased risk of being diagnosed with kidney cancer, but tried to diminish the results of this study by finding that the cohort of 2000 was very small compared to all the other studies that he relied on, and in a less respected journal, and thus he considered it a lower level of evidence than all the other publications. As noted above, none of these papers were offered into evidence.

In summary, Dr. Eggener was of the opinion that it is inappropriate and not evidence based to suggest that being a fireman conclusively leads to an elevated risk of developing kidney cancer. He was of the opinion that if there was a significantly increased risk of developing kidney cancer as a fireman, it undoubtedly would be a

strong, consistent, and irrefutable finding in virtually all large studies. However, the arbitrator finds that that petitioner need not prove "conclusively" that his work as a firefighter exposed him to an elevated risk of developing kidney cancer, or that he was at a "significantly" increased risk of developing kidney cancer.

Dr. Orris was of the opinion that petitioner has no history or other possible risk factors for the development of renal malignancies such as smoking, hypertension, diabetes, or family members with kidney cancer. Dr. Orris believed it was more likely than not, that petitioner's firefighting for 17 years has contributed to the development of his renal cell cancer. He based this conclusion upon known exposures of firefighting and the literature that has evidence confirming the causative relationship between being a firefighter and kidney cancer on a more likely than not basis. The literature Dr. Orris was relying on was the application of Sir Bradford Hill's classic list of characteristics of studies to judge how likely it is that the association observed is causative; Dr. LeMasters' study; a study of the Massachusetts cancer registry; the World Health Organization's International Agency for Research on Cancer review on firefighting; and a study of a pooled cohort of US Firefighters from San Francisco, Chicago, and Philadelphia. All these studies showed an association between firefighting and kidney cancer.

Dr. Orris was of the opinion that the use of animal testing to identify probable human carcinogens has been a mainstay of both government policy and scientific consensus. He was further of the opinion that finding a chemical produces cancer in two animal species is well accepted as making it likely that it causes cancer in humans as well without the need to wait 40 years and "count the bodies."

Dr. Orris was of the opinion that it is clear therefore, from the primary reference relied upon by Dr. Eggener, that firefighting is at least an equal and perhaps a stronger causative factor than either obesity or hypertension which petitioner did not have prior to developing kidney cancer.

Both Dr. Orris and Dr. Eggener accuse each other of quoting the conclusions of the authors only selectively to support their preconceived position as to the relationship between firefighting and renal cell cancer.

Dr. Orris opined that his conclusions were partially based upon petitioner's exposures as a firefighter and the literature that has evidence confirming the causative relationship between being a firefighter and kidney cancer on a more likely than not basis.

Although Dr. Eggener was of the opinion that the chromophobe renal cell carcinoma petitioner was diagnosed with is a relatively rare form of kidney cancer that has a completely different etiology compared to more common types of kidney cancer and that there is absolutely no evidence whatsoever in the medical

literature or elsewhere to suggest the development of this kind of kidney cancer being associated with being a firefighter, the arbitrator finds that neither Dr. Eggener nor Dr. Orris addressed a causal connection between firefighting and the breakdown of specific types of kidney cancer. The arbitrator notes that all references either for or against a causal connection between firefighters and kidney cancer discussed herein are as they relate to kidney cancers in general, without any specific references made to any certain types of kidney cancer.

Respondent also argues that it had introduced other evidence which is contrary to the statutory rebuttable presumption. Respondent relies on the record of Dr. Pacheco who noted a history of familial cancers that included a grandfather with bladder cancer. Petitioner denied his grandfather had bladder cancer, and the arbitrator notes no other such reference in any other of petitioner's medical records. The respondent further argues that because petitioner declined to undergo the genetic syndrome testing as recommended by Dr. Pacheco that this evidence constitutes evidence sufficient to support a finding that something other than Petitioner's occupation as a firefighter caused his condition, and the presumption has therefore been rebutted. The arbitrator finds this argument without merit given that there is no credible evidence to support a finding that petitioner's grandfather had bladder cancer, or that any such testing would have provided evidence to support a finding that something other than petitioner's occupation as a firefighter caused petitioner's kidney cancer. The arbitrator finds it significant that petitioner, at the time of his kidney cancer diagnosis, did not have any of the risk factors associated with kidney cancer.

Another piece of evidence the arbitrator finds persuasive is that for the more than 10 years the petitioner was working for respondent the procedures in place for removal of the SCBA had the firefighters removing their SCBA once the active fire was out, but possibly before all the gas levels were within normal range. For ten years petitioner would remove his SCBA with respondent when the fires were extinguished and then began the overhaul process of looking for hidden fires in floors, walls and ceilings by pulling these materials apart to make sure the fire was fully extinguished. This was done while there was still smoke in the structure, and possibly when gas levels were not yet back to normal.

Based on the above, as well as the credible evidence, the arbitrator finds the respondent has failed to overcome the rebuttable presumption that the petitioner's kidney cancer arose out of and in the course of his employment as a firefighter. Although the arbitrator finds Dr. Eggener and Dr. Orris argued their positions well, the arbitrator finds the opinion of Dr. Eggener that "there is absolutely no evidence whatsoever in the medical literature or elsewhere to suggest the development of this kind of kidney cancer being associated with being a firefighter" to be unsupported by the credible evidence. The arbitrator instead finds credible evidence in the various reports and literature relied upon by both experts to support a finding that the respondent has failed to overcome the rebuttable presumption that petitioner's kidney cancer arose out of and in the course of his work as a

fireman for respondent. Based on this finding, the arbitrator further finds the petitioner's current condition of ill-being as it relates to his kidney cancer to be causally connected to the hazards or exposures of the employment.

Lastly, the arbitrator relies on the appellate court's language on this rebuttable presumption in *Johnston v. Illinois Workers' Compensation Commission*, 2017 IL App (2d) 160010WC. In that case the court concluded that clear and convincing evidence was not necessary to rebut the presumption. Rather, the Respondent must "offer *some* evidence sufficient to support a finding that something other than claimant's occupation as a firefighter caused his condition." *Johnston*, at ¶ 45 (emphasis in the original). The arbitrator finds the respondent has failed to offer such evidence in this case, given that petitioner had none of the risk factors for kidney cancer identified by Dr. Eggener or Dr. Orris at the time his kidney cancer was diagnosed.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

Having found the petitioner's kidney cancer arose out of and in the course of his firefighting employment by respondent on 9/6/13, and his current condition of ill-being as it relates to his kidney cancer is causally connected to the hazards or exposures of his employment by respondent on 9/6/13, the arbitrator finds the petitioner is entitled to all reasonable and necessary medical expenses related to the treatment of his kidney cancer from 9/6/13 through 1/29/19, as outlined in petitioner's exhibit 9, pursuant to Sections 8(a) and 8.2 of the Act.

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

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Having found the petitioner's kidney cancer arose out of and in the course of his firefighting employment on 9/6/13, and petitioner's kidney cancer is causally connected to the hazards or exposures of his employment by respondent, the arbitrator finds the petitioner was temporarily totally disabled from 9/27/13 through 10/27/13, a period of 4-3/7 weeks.

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

For injuries that occurred after 9/1/11, according to 820 ILCS 305/8.1B(b) the Commission shall base its determination of permanent partial disability based upon five factors including an AMA report, the occupation of the injured employee, the age of the employee at the time of injury, the employee's future earning capacity and evidence of disability corroborated by treating medical records.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no AMA rating was offered 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 petitioner was a firefighter Driver Engineer at the time of the injury, and is currently working as a Captain. Petitioner was promoted to this position after returning to work after achieving maximum medical improvement. Petitioner continues to perform all firefighter duties in addition to his supervisory duties. Petitioner has voiced no complaints regarding his ability to perform his duties. For these reasons the arbitrator gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 36 years old on 9/6/13. Following the injury on 5/19/16, petitioner underwent removal of a portion of his kidney that was cancerous. He returned to his full duty job on 10/27/13. He was off work for about a month. Given petitioner's relatively young age on the date of injury, he may have many more decades of work with the fire department ahead of him. Petitioner has reported no difficulties performing his job as a Captain. Therefore, the arbitrator gives moderate weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the arbitrator notes that the petitioner has been promoted to Captain since the injury date, and is making more money in that position than he was as a Driver Engineer on 9/6/13. Therefore, the arbitrator gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator finds the petitioner underwent removal of a portion of his kidney and was released to full duty work without restrictions on 10/28/16. Petitioner has followed-up regularly since that date to ensure that the cancer has not returned or spread. To date, petitioner remains cancer free. Petitioner testified that he is able to perform all the duties of his job without restrictions. He did not testify to any current complaints. Therefore, the arbitrator gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds the petitioner sustained a 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)	☐ 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)
SANGAMON		☐ PTD/Fatal denied
	☐ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Beverly Helm-Renfro,

Petitioner,

vs. NO: 17 WC 18249

Illinois State Senate,

Respondent.

20IWCC0257

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, 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, while correcting a clerical error, said decision being attached hereto and made a part hereof.

The Commission corrects a scrivener's error in the Arbitrator's decision at page 8 wherein the concluding sentence in the medical analysis section abruptly and inexplicably ends. The Commission corrects this oversight by completing this sentence so that it corresponds to the credit language set forth on p.2 of the Order form whereby Respondent was allowed "... a credit for 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."

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 11/20/19 is affirmed and adopted with changes as stated herein.

20IWCC0257

DATED: MAY 1 - 2020
o:4/7/20
TJT/pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HELM-RENFRO, BEVERLY
Employee/Petitioner

Case# **17WC018249**

ILLINOIS STATE SENATE
Employer/Respondent

20IWCC0257

On 11/20/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.54% 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:

5703 SGRO HANRAHAN DURR RABIN ET AL
GREGORY P SGRO
1119 S 6TH ST
SPRINGFIELD, IL 62703

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

4993 ASSISTANT ATTORNEY GENERAL
CHELSA GRUBB
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

NOV 20 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20IWCC0257

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

BEVERLY HELM-RENFRO,
Employee/Petitioner

v.

ILLINOIS STATE SENATE,
Employer/Respondent

Case # **17** WC **18249**

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 **10/24/19**. 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 _____

20IWCC0257

20IWCC0257

FINDINGS

On **3/7/17**, 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 $**48,984.00**; the average weekly wage was $**942.00**.

On the date of accident, Petitioner was **71** years of age, ***married*** with **no** dependent children.

Petitioner ***has not*** 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

Respondent shall pay reasonable and necessary medical services from 3/9/17 through 5/3/18 for her contusions; injuries to her right hip, thigh, and feet; and, injuries to her right shoulder, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall also reimburse petitioner for any out of pocket expenses related to this medical treatment.

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

Respondent shall pay Petitioner permanent partial disability benefits of $565.20/week for 25 weeks, because the injuries sustained caused the 5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

11/11/19
Date

NOV 20 2019

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 71 year old Legislative Assistant, alleges she sustained an accidental injury that arose out of and in the course of her employment by respondent on 3/7/17. Petitioner's office is located on the 2nd floor of the Capital building, 8 to 10 feet from the marble staircase. The petitioner testified that the marble staircase is about 6-8 feet wide and the banister is about 8 inches wide. She also testified that the stairs are old, worn and rounded at the edge, with some stairs being more rounded than others. Petitioner testified that the staircase where she fell is not exclusively for use of the employees, and is open to the general public. She also testified that there are multiple staircases in the building, and she is not directed to use any specific one. Petitioner testified that her dress code at work is professional, and she must wear slacks, jacket and nice shirt, or dress, with small heeled or flat shoes.

On 3/7/17 petitioner was wearing small heeled shoes. She got to work at 8:00 am and she worked until 5:30 pm. At the end of the day, petitioner had her purse and her coat in her right hand and began walking down the set of stairs outside of her office. When she got to the 3rd or 4th step from the bottom of the stairwell, her left foot hit the worn dip in the stair. Her left foot went out from under her, and she fell because she could not grasp the banister because it was too wide to get her hand around. Petitioner injured her right side when it hit the stairs. She testified that two fellow employees witnessed the accident. Petitioner reported the injury to her supervisor, Kristen Richards, the next morning, and completed an accident report. She was sent home for three days.

On 3/9/17 petitioner first sought treatment for her injuries with Dr. Winston Townsend, her primary care physician. She gave a history of falling down 2-3 steps at work. She complained that she hurt everywhere, especially her right hip and feet. Her complaints also included right shoulder pain. She described walking down the steps in the State Capital and falling down 3 marble steps landing on her right hip and thigh and injuring her left foot and shin during the fall. She stated that her pain was controlled with aspirin and Tramadol. Petitioner was examined and x-rays were taken. She was assessed with right hip pain, contusion of the right hip, and contusion of the left lower extremity. Petitioner was released to full duty work and instructed to follow up as needed.

On 3/9/17 petitioner completed the TriStar employee's notice of injury. She reported that as she was leaving the building to go home she was walking down the marble stairs from the 2nd floor to the first floor, and slipped, lost her balance and fell down the last three steps on the staircase. She noted that she injured her left leg and foot, and landed on her right thigh and hip. The TriStar Supervisor's Report of Injury or Illness was reported.

On 3/9/17 the TriStar Witness Report was completed by Talia Hubbard-Williams. She wrote "while walking out, leaving from work I witnessed co-worker Bev Helm-Renfro fall forward from the marble staircase. She fell from the 2nd or 3rd stair up and when falling forward she twisted her body and fell on her right side then more to her back. He feet were twisted (shoes off). No one touched her until she stated that she was ok. The security guards came and asked if she was ok. She seemed shaken by the fall. Once she was helped up she stated that she felt bruised and would be bruised in the morning. I walked her out of the building to her car".

On 3/9/17 the TriStar Witness Report was completed by Emily Ozier. She wrote "As I was leaving Tuesday night around 5:45, I turned to say goodbye to Bev and that's when she started to fall over the last 2 steps. I was afraid to grab her after her fall because she was a tangled mess. She managed to get up with the help of 2 men who happened to be in the rotunda. The guard did make it a point to stop her and ask if she was ok. Talia and I walked Bev to her car. She did mention she would feel this in the morning".

On 3/13/17 petitioner returned to Priority Care and was seen by Nurse Practitioner Wendi Campbell. She reported that her right shoulder was hurting. She stated that she did not have significant pain until the last few days, and noticed pain only when she raised her arm. Her pain was in the mid bicep (lateral upper arm). Petitioner had decreased range of motion. She was examined and assessed with right shoulder pain. She was prescribed Meloxicam and Metaxalone. The possibility of a rotator cuff injury was discussed. She was given conservative measures. She was instructed to follow up in a week if not improved.

On 3/21/17 petitioner presented to Dr. Karolyn Senica at Orthopedic Center of Illinois, for her right shoulder. She reported that she fell down some marble stairs at the State House and landed on her right shoulder and right hip. She reported difficulty raising her arm since then and trouble getting her arm behind her back. She noted that it hurt to lay on her right arm at night, and she believed she had lost some strength and mobility. Dr. Senica noted that petitioner may have had some previous problems with her right shoulder in the past since she had x-rays taken of her right shoulder on 2/19/16, and 12/21/16. Petitioner was examined and x-rays of the right shoulder were taken. Dr. Senica's impression was right shoulder pain; right shoulder injury approximately 2 weeks ago; and, glenohumeral arthritis. Petitioner had difficulty raising her arm with decreased motion and strength. An MRI of the right shoulder was ordered. She was also given some motion exercises.

On 4/18/17 petitioner underwent an injection of the right glenohumeral joint performed by Dr. David Wright at Central Illinois Allergy & Respiratory Service.

On 11/10/17 petitioner returned to Dr. Wright and reported that she continued to have problems with her right shoulder. Dr. Wright performed a repeat injection, and instructed petitioner to avoid strenuous activities and do frozen shoulder exercises.

On 12/19/17 petitioner presented to Dr. Chris Wottowa at Springfield Clinic for evaluation of her right shoulder pain. She gave a history of her symptoms starting when she fell as she was walking down the stairs at the Capital. She reported pain over the lateral aspect of the right arm with activity and at rest. She reported that her symptoms had not improved since the injury. Dr. Wottowa examined petitioner and assessed a right shoulder rotator cuff injury. He recommended a repeat injection of the subacromial space with a formal physical therapy program for rotator cuff rehabilitation.

On 1/16/18 petitioner returned to Dr. Wottowa. She reported that her symptoms had improved with the injection initially, but had worsened since. She reported continued pain with any type of activity involving her right upper extremity. She stated that she was not able to get her physical therapy started. Following an examination Dr. Wottowa's impression was continued problems with right shoulder, impingement syndrome. Dr. Wottowa performed another injection into the subacromial space of the right shoulder. He noted that physical therapy was scheduled to begin the next week.

On 1/25/18 petitioner began a course of physical therapy at Springfield Clinic. Petitioner underwent 4 sessions before 3/22/18.

On 3/22/18 petitioner presented to Dr. Wottowa's physician's assistant, David Purves, for follow-up of her right shoulder pain. She reported temporary relief of pain after the injection. She reported pain with activity, and her symptoms with activity away from the body, overhead, and at night. X-rays showed no acute pathology, but showed moderate osteoarthritic changes at the acromioclavicular joint. Purves examined petitioner and his impression was continued problems with right shoulder rotator cuff injury, and cervicalagia. Conservative treatment and physical therapy was continued, as well as a repeat injection. Petitioner underwent 4 additional physical therapy sessions.

On 5/3/18 petitioner returned to Purves. She reported that her symptoms had improved significantly. She reported that she felt a pop during therapy and has not had any pain since then. She reported continued pain with activity away from the body, overhead, and at night with sleeping. Purves examined petitioner and his impression was right shoulder impingement syndrome, now resolved. Purves instructed petitioner to continue her home exercise program, and progress activity as tolerated. She was instructed to follow up as needed.

Petitioner testified that she still has difficulty today with raising her right elbow out to the side of her body to shoulder level, and difficulty brushing and combing her hair. She stated that she cannot lift her right arm overhead, and cannot open a jar with her right hand. She testified that when she does filing she uses her left hand/arm more than her right. Petitioner cannot sleep on her right side, and has aches and pains when she does something wrong. Petitioner reported shooting pains through her right shoulder when typing or moving it certain ways daily. Petitioner is right hand dominant.

B. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

Petitioner claims she sustained an accidental injury that arose out of and in the course of her employment by respondent on 3/7/17. Respondent claims petitioner was at no greater risk than the general public.

It is unrebutted that petitioner fell down the last few steps of the marble staircase located about 8-10 feet from her office in the Capital building. It is also unrebutted that the staircase petitioner fell down was for use by employees and the general public. It is unrebutted that although the staircase petitioner fell down was not the only staircase she could use to get up and down from her office, it was the staircase closest to her office.

Petitioner presented unrebutted testimony that the staircase was marble, and each stair was about 6-8 feet wide; the banister was about 8 inches wide; the stairs are old, worn, and with rounded edges; and, some rounded edges are more rounded than others.

Petitioner testified that she was wearing small heeled shoes, and was carrying her purse and coat in her right hand when she was walking down the stairs. She testified that she had her left hand on the banister. When petitioner got a few steps from the bottom her left foot hit the worn dip in the stair. She lost her balance, but was unable to grasp the banister with her left hand to stop her fall because it was too wide to get her hand around. As a result, petitioner fell down the remaining steps to the floor at the bottom of the staircase. Respondent offered no credible evidence to rebut petitioner's history of how her accident occurred.

Although it is unrebutted that petitioner had the option of taking a different staircase from her office on the 2nd floor to the first floor, the arbitrator finds it reasonable that petitioner would use the staircase closest to her office, which would be the one she fell on, given that it was only 8-10 feet from her office. Additionally, although the staircase petitioner fell down is open to both employees and the general public equally, the arbitrator finds, based on petitioner's unrebutted testimony, that there was a defect in the step petitioner fell on. Petitioner provided unrebutted testimony that there was a worn dip in the marble step that she hit, that caused her to slip and fall. The arbitrator finds this worn dip represented a defect in the stair, and this defect is what caused the petitioner's injury.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner sustained an accidental injury that arose out of and in the course of her employment by respondent on 3/7/17. The arbitrator finds the cause of the petitioner's injury was not simply walking down the stairs, but rather as direct result of the defect, or worn dip in the stairs, that petitioner hit with her heel, thus causing her to slip and fall, and her inability to tightly grasp the 8 inch banister.

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

The credible record contains evidence that petitioner underwent x-rays for her right shoulder on 2/19/16 and 12/21/16. However, none of the medical records pertaining to these x-rays or any treatment associated with her right shoulder condition prior to 3/7/17 were offered into evidence. Therefore, the most the arbitrator can reasonably infer from the fact that petitioner had prior x-rays of her right shoulder, is that the petitioner may have had a preexisting condition as it relates to her right shoulder that did not prevent petitioner from performing her regular duty job prior to 3/7/17.

Following the injury petitioner first sought treatment on 3/9/17. She reported that she hurt everywhere, especially around her right hip and feet, and right shoulder. Petitioner also had a multitude of contusions. By 3/13/17 petitioner had pain with raising her right arm, decreased range of motion, and pain in the mid bicep (lateral right arm). She was assessed with right shoulder pain, and referred to Dr. Senica. Dr. Senica assessed right shoulder pain, right shoulder injury 2 weeks ago, and glenohumeral arthritis. On 4/8/17 petitioner underwent an injection of the right glenohumeral joint. On 11/10/17 she underwent a repeat injection.

When petitioner's pain did not improve after the injections she presented to Dr. Wottowa on 12/19/17. She reported pain over the lateral aspect of her right arm with activity and rest. She reported that her symptoms had not improved since the injury. Dr. Wottowa assessed a right shoulder rotator cuff injury. Petitioner had another injection that provided only temporary relief.

Dr. Wottowa had petitioner undergo a course of physical therapy. Petitioner underwent therapy and continued to follow-up with Dr. Wottowa for her right shoulder injury. She continued to have pain with activity, and symptoms with her right arm away from her body, overhead, and at night. X-rays showed moderate osteoarthritic changes at the acromioclavicular joint.

On 5/3/18 petitioner reported that her symptoms had improved significantly after she felt a pop during therapy. Since then she has had no constant pain, but still had some pain with activity away from the body, overhead, and at night. Purves examined petitioner and his impression was resolved right shoulder impingement syndrome. She was told to follow-up as needed.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner's current condition of ill-being as it relates to her right shoulder is causally related to the injury she sustained on 3/7/17. Based on the x-rays of her right shoulder taken 9 and 3 months prior to this injury, the arbitrator finds petitioner's current condition of ill-being as it relates to her right shoulder was either caused by injury, or the petitioner's preexisting right shoulder condition was aggravated or exacerbated by the injury on 3/7/17.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

Having found the petitioner sustained an accidental injury to her right shoulder that arose out of and in the course of her employment by respondent on 3/7/17, and that petitioner's current condition of ill-being as it relates to her right shoulder is causally related to the injury she sustained on 3/7/17, the arbitrator finds all medical treatment petitioner received from 3/9/17 through 5/3/18, as a result of the fall on 3/7/17, was reasonable and necessary to cure or relieve petitioner from the effects of the injury she sustained on 3/7/17, and respondent shall pay for all this medical treatment pursuant to Sections 8(a) and 8.2 of the Act. The respondent shall also reimburse petitioner for all reasonable and necessary out of pocket expenses petitioner incurred as a result of her injury on 3/7/17 for treatment from 3/9/17 through 5/3/18. The arbitrator finds the respondent shall receive credit for all reasonable and necessary medical expenses that it has

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

For injuries that occurred after 9/1/11, according to 820 ILCS 305/8.1B(b) the Commission shall base its determination of permanent partial disability based upon five factors including an AMA report, the occupation of the injured employee, the age of the employee at the time of injury, the employee's future earning capacity and evidence of disability corroborated by treating medical records.

With regard to subsection (i) of §8.1b(b), neither party offered into evidence an AMA impairment report 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 petitioner was a 71 year old Legislative Assistant. Petitioner did not lose any time from work as a result of this injury. She continues to work full duty for respondent. Petitioner last treated for her injuries on 5/3/18. For these reasons the arbitrator gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that the petitioner was a 71 year old Legislative Assistant. She never lost any time from work and ultimately stopped treating as of 5/3/18. Petitioner continues to work full duty for respondent, and did not state when she plans of retiring. Her primary complaint is difficulty raising her right arm to the side, and lifting it overhead. She reports decreased strength in

her right arm. She experiences shooting pains through her right shoulder when typing or moving it certain ways daily. Despite these complaints, petitioner only reported that with respect to her work duties she has difficulty filing and typing. Petitioner was never given any permanent restrictions. For these reasons the arbitrator gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the arbitrator notes that petitioner was released to full duty work without restrictions. Petitioner testified she makes more money now with respondent than she did on the date of injury. The arbitrator finds no credible evidence to support a finding that petitioner's future earnings capacity has been negatively impacted by this injury. Therefore, the arbitrator gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator finds the petitioner sustained an injury to her right shoulder and right side. Immediately after the injury petitioner sustained multiple contusions, and had right hip and right shoulder pain. All of petitioner's injuries, except her right shoulder, seemed to have resolved by 3/13/17. From that day through 5/3/18 petitioner only treated for her right shoulder. Petitioner underwent conservative treatment that included injections and physical therapy. When petitioner was discharged from care on 5/3/18 she reported that her symptoms had improved significantly. As of that date, she reported that she felt a pop during therapy and has not had any pain since then. She reported continued pain with activity away from the body, overhead, and at night with sleeping. Purves' impression was right shoulder impingement syndrome, now resolved.

Petitioner she still has difficulty raising her right elbow out to the side of her body to shoulder level, and difficulty brushing and combing her hair. She stated that she cannot lift her right arm overhead, and cannot open a jar with her right hand. She testified that when she does filing at work she uses her left hand/arm more than her right. Petitioner cannot sleep on her right side, and has aches and pains when she does something wrong. Petitioner reported shooting pains through her shoulder when typing or moving it certain ways daily. Petitioner is right hand dominant.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner sustained a 5% loss of use of her person as a whole pursuant to Section 8(d)2 of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Machak,

Petitioner,

vs. NO: 17 WC 5080

Joliet Staffing, LLC,

Respondent.

20IWCC0258

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 causation, medical expenses, and 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 9/24/18, 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 $25,000.00. 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: MAY 1 - 2020
TJT:pmo
o 3/24/20
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

MACHAK, ROBERT
Employee/Petitioner

Case# **17WC005080**

JOLIET STAFFING LLC
Employer/Respondent

20IWCC0258

On 9/24/2018, 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 2.29% 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 LAW OFFICES OF MARK N LEE LTD
KEVIN J MORRISSON
1101 S SECOND ST
SPRINGFIELD, IL 62704

0766 HENNESSY & ROACH PC
MITZI WESTERHOFF
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

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
19(b)

Robert Machak
Employee/Petitioner

v.

Joliet Staffing, LLC
Employer/Respondent

Case # 17 WC 005080

Consolidated cases:

20IWCC0258

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 New Lenox, Illinois on August 10, 2018. 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, 10/21/2016, 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 $371.25; the average weekly wage was $371.25.

On the date of accident, Petitioner was **31** years of age, ***single*** with **1** dependent children.

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

Respondent shall be given a credit of $6,010.72 for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $6,010.72.

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

ORDER

Respondent shall pay reasonable and necessary medical services listed in Petitioner's Exhibit #5, as provided in Sections 8(a) and 8.2 of the Act and per the stipulation of the parties, subject to any credit pursuant to Section 8(j).

Respondent shall authorize the treatment as prescribed by Dr. Templin.

Respondent shall pay Petitioner temporary total disability benefits of $253.00/week for 84 6/7 weeks, commencing 10/22/2016 – 10/29/2016, and 1/2/2017 – 8/10/2018 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.

Signature of Arbitrator

9/23/18
Date

ICArbDec19(b)

SEP 24 2018

Attachment to Arbitrator Decision
(17 WC 5080)

Findings of Facts:

20IWCC0258

Petitioner testified that on October 21, 2016, he was employed with Joliet Staffing as a fork lift operator. Petitioner stated that he injured himself while lifting a pallet from the ground in a deep freezer. Petitioner testified he was squatting down and picking up pallets. Petitioner testified that the pallets in question weighed 35 to 40 pounds. Petitioner testified that while lifting one of these pallets which had frozen to the ground, he felt an immediate sharp pain in his lower back. Petitioner stated that he advised his supervisor that he was "sore and hurt." He continued working that day while experiencing increased pain. Petitioner stated "I thought I could work through it." Petitioner stated that he ultimately notified Respondent (Jacob) of the October 21, 2016 occurrence who then sent him to Physicians Immediate Care.

Records submitted show Petitioner presented to Physicians Immediate Care on October 27, 2016, with a reported date of injury of October 21, 2016. It was documented in that note that Petitioner denied back pain prior to the reported injury. Petitioner reported that he hurt his back while stacking pallets at work. Petitioner's complaints consisted of low back pain that radiated into his right leg. Numbness and tingling was also noted. Petitioner was diagnosed with sprain of ligaments of the lumbar spine. He was prescribed medication, placed on restricted sit down work only and advised to return on November 3, 2016. (PX 1)

Petitioner returned on November 3, 2016, Petitioner reported improvement to his symptoms. His reported pain scale was 2-5/10 depending on movement. Physical therapy was prescribed and his work restrictions were continued. (PX 1)

Petitioner continued treating at Physicians Immediate Care. By November 25, 2016, Petitioner reported that he had been working within his restrictions and his pain is usually at 2-3/10 and doing well. Petitioner was ordered to continue physical therapy and his restrictions were upgraded to no lifting or pushing and pulling greater than35 lbs. On December 2, 2016, Petitioner reported his condition has been stagnant for 2-3 weeks. He completed physical therapy and reports pain of 3/10 that increased with bending/twisting to a sharp pain. He also complained of pain radiating down his right posterior thigh with numbness and tingling. Petitioner's restrictions were modified and an MRI was ordered. (PX 1)

On December 12, 2016, Petitioner reported no change but now he had left leg pain. Petitioner also reported that his legs had given out on him several times going up stairs. Radiculopathy, lumbar region was added to his diagnosis. A MRI was again requested and his work restrictions were continued. On January 2, 2017, Petitioner was still reporting pain with his right leg giving out. The requested MRI was pending awaiting approval. His restrictions were continued and a referral was made to Dr. Khana at Physicians Immediate Care in Bolingbrook. (PX 1)

Petitioner saw Dr. Khana on January 25, 2017. Petitioner's reported pain scale was 2-3/10 at rest and 5-6/10 with certain movements. Also noted was that Petitioner had been off work. An examination revealed pain in the right paraspinal muscle with spasm and tenderness. Also noted was abnormal heel-toe ambulation. Dr. Khana added muscle spasm to the diagnosis and imposed sit down work only. The doctor also noted that a MRI was needed "ASAP" to rule out disc protrusion. (PX 1)

The MRI was carried out that same day at Smart Choice MRI. The impression was that Petitioner had disc bulge at L2-L3 with central disc extrusion/herniation. At L3-L4 there was a noted disc bulge which displaced that left L4 nerve root. At L4-L5 there is a disc bulge with protrusion/herniation which affects the

thecal sac and slightly contacts the left L5 nerve root. At L5-S1 there is a disc bulge with protrusions/herniation which displaces the right S1 nerve root. (PX 1)

On February 1, 2017, Petitioner attended a follow up after his MRI with complaints of numbness down his right leg. Petitioner was informed of multiple disc protrusions/herniations and to consult with Dr. Samir Sharma for possible injections. Petitioner work restriction was continued. (PX 1)

At Respondent's request, Petitioner underwent a Section 12 examination with Steven Dr. Mather on April 6, 2017. According to Dr. Mather, Petitioner presented with complaints of low back pain with some radiation to the right lateral thigh with occasional numbness and tingling in his feet. Petitioner also conveyed that his leg gives out. Dr. Mather noted Petitioner reported that he never had prior low back pain and never had problems with his spine. On examination, Dr. Mather noted Petitioner was 6'-1" and weighed 309 pounds. Petitioner extended 10 degrees and forward flexed 10 degrees because of lower back pain. Petitioner had tenderness in the right side of his lumbar spine around the L3-4 and L4-5 region. No spasm was present. Dr. Mather noted Petitioner reported pain complaints with simulated axial rotation but none with axial compression. The doctor indicated Petitioner reported considerable low back pain complaints with any hip range of motion of the right hip and minimal complaints with rotation of the left hip in the supine position. He indicated supine straight leg raising caused Petitioner to complain of severe back pain without leg pain with straight leg raising. Dr. Mather further noted that Petitioner complained of considerable lower back pain with simultaneous hip and knee flexion on the right and none on the left. In summary Dr. Mather stated Petitioner had pain complaints with restricted range of motion of the lumbar spine, pain in lower back as opposed to radicular. He indicated Petitioner had positive Waddell findings, pain with simulated axial rotation, and a difference between his seated and supine straight leg raising. Dr. Mather noted that he reviewed Petitioner's x-rays taken on October 27, 2016 as well as the MRI taken on January 25, 2017. After performing his examination and reviewing medical documentation, Dr. Mather impression was 1.) lumbar strain and 2.) obesity with lumbar spondylosis. Dr. Mather opined that Petitioner's care and treatment to date was reasonable. He noted Petitioner's MRI showed what appeared to be pre-existing lumbar degenerative disk disease. He indicated the MRI strongly suggest these were calcified disk protrusions and not acute disk herniations or acute disk protrusions. The doctor recommended obtaining a CT scan to better evaluate the overall pathology. The doctor stated that given the lack of clinical findings, Petitioner did not sustain a structural injury to the lumbar spine, but rather there was a simple soft tissue strain. He stated that if the CT scan showed calcified disk protrusions, same would reaffirm that Petitioner sustained a lumbar strain and not a structural injury. Until the CT scan was completed, the doctor felt Petitioner could work with a 30-pound weight restriction. (RX1)

The recommended CT scan was carried out on April 11, 2017. The impression was multilevel lumbar spondylosis with most significant findings at L3-4, L4-5 and L5-S1. It was noted that no definite acute lumbar spine abnormality was seen, but, the possibility of disc herniation and soft tissue, including ligamentous, injury could not be entirely excluded. (PX 1)

Petitioner returned to Physician Immediate Care on May 10, 2017. Petitioner's back complaints continued. Petitioner was again directed to treat with Dr. Sharma and his work restrictions were continued. (PX 1)

On May 17, 2017 Dr. Mather issued an addendum opinion after reviewing the CT scan. Dr. Mather stated the CT scan confirmed his suspicion that Petitioner had calcified disk bulges. The doctor stated, '[a]ll the disk bulges are really calcified spondylitic changes. There were no acute disk herniations or protrusions present. These are all preexisting spondylitic degenerative changes. These are all common even in young patients who are obese..." The doctor noted that "...even though the radiologist feels there is some lateral recess stenosis and some foraminal stenosis throughout the spine, this patient did not have radicular pain at the time I saw him, just

lower back pain and occasional tingling in the lower extremities." He concluded that the Petitioner had recovered from his lumbar strain, reached MMI, and could go back to work in a full duty capacity. (RX 2)

On May 17, 2017, Petitioner reported to Dr. Sharma for the first time. He reported 5 out of 10 pain with pain that radiates into his right buttock and posterior and lateral right thigh. Dr. Sharma reviewed his MRI and reported same demonstrated rightward protrusions at L5-S1 with right S1 displacement. An examination revealed limited range of motion with 10 degrees extension and 30 degrees flexion. His right straight leg raising was positive. His facet loading was in the right region for axial low back pain. The Valsalva maneuver and right Fabere test were also positive. Dr. Sherma assessed 1.) low back pain and 2.) lumbosacral radiculitis. Dr. Sharma excused Petitioner from work and a trans-foraminal epidural injection of the right L5, S1 was recommended and carried out. (PX 2)

Petitioner testified that Respondent offered full duty return to work after Dr. Mather's examination. He stated that he did not return as Dr. Sharma prescribed off work.

Petitioner returned to Dr. Sharma on June 26, 2017 with continued low back pain and radiculopathy. According to Dr. Sharma, Petitioner reported some pain relief after the injection. His symptoms had improved since his last visit. Dr. Sherma assessed 1.) low back pain; 2.) lumbosacral radiculitis; and 3.) radicular syndrome of lower limbs. The doctor kept Petitioner off work and a second trans-foraminal injection on the right L5, S1 was carried out. (PX 2)

Petitioner saw Dr. Sharma again on August 3, 2017. At that visit, Petitioner reported that the injection provided a 30% relief of pain. Petitioner also reported overall improvement in the right leg but noticed pain in the upper leg. An examination revealed Petitioner's range of motion was 20 degrees with extension and 40 degrees with pain with flexion. He had a positive right straight leg raise and his facet loading was in the right region for axial low back pain. Dr. Sharma released Petitioner to restricted work, light duty. The doctor also referred Petitioner to an orthopedist. (PX 2)

On September 19, 2017, Petitioner consulted with Dr. Cary Templin. Petitioner reported that he had pain that extended into his right leg. Dr. Templin noted Petitioner's prior medical history was significant for no history of back problems "of this nature." Dr. Templin performed an examination. The doctor noted increased pain with cough to the right buttocks. Hip and knee range of motion was negative for pain. His straight leg raise was positive on the right at about 45-50 degrees, negative on the left. Lumbar flexion was 60 degrees, extension to 5 degrees with increasing pain on flexion. Dr. Templin reviewed the MRI which he indicated demonstrated there was moderately severe stenosis at L2-L3 due to central disc protrusion and degenerative change. L3-L4 level showed left lateral recess stenosis. At L5-S1 he noted a rightward disc herniation that impinges on the right S1 nerve root. Dr. Templin assessed right L5-S1 herniated disc causing a right S1 radiculopathy as a direct result of Petitioner's work injury. The doctor felt Petitioner "...has made persistent complaints of lower back pain extending into the right leg consistent with such an injury." Dr. Templin recommended a L5-S1 laminectomy and discectomy and returned Petitioner to work with a 35-pound lifting restriction. (PX3)

Petitioner testified that he did not undergo the prescribed surgery as Respondent denied authorization and he had no insurance. Petitioner stated that in June 2018, he had a sneezing incident which resulted in back spasms and an emergency room visit.

On May 25, 2018, Dr. Templin was deposed regarding his September 19, 2017, date of treatment. Dr. Templin testified that he had seen Petitioner at the referral of Dr. Sharma. Dr. Templin testified that he obtained a history from Petitioner that he was injured in October of 2016 when he was lifting a heavy pallet and felt lower back pain that extended onto the right leg. The doctor stated that he reviewed the January 25, 2017 MRI which he thought demonstrated moderate stenosis at L2-L3 with central disc protrusion and degenerative

changes. He noted there was some lateral recess stenosis on the left at L3-L4. At L4-5 there was mild degenerative change and at L5-S1 there was a rightward disc herniation impinging on the right S1 nerve root. Dr. Templin stated that he performed an examination wherein Petitioner was able to perform heel to gait without problems. Petitioner complained of pain with coughing. He had a positive straight leg raise on the right at 45degrees and his reflexes were diminished symmetrically. When asked if Petitioner's symptomology presentation, the MRI images and his physical exam were all consistent, the doctor replied, "Yes. He complained of lower back pain extending into the right buttock and posterior thigh which was consistent with an L5-S1 herniation with SI impingement." The doctor provided that he thought Petitioner had undergone exhaustive nonoperative care and as a result, a discectomy at L5-S1 would be reasonable. (PX 4, pp. 6-8)

During the deposition, Dr. Templin was presented with the following hypothetical:

> "Doctor, I want you to assume that Mr. Machak prior to 10/22 of 2016 had a fairly aymptomatic lower back. And on that date, he was working for Respondent and was – or moving pallets from a deep freezer. And he had done a number of these. He estimates they weigh 35 to 40 pounds. On one of these pallets, he was bending using his knees, not necessarily completely over, bending down kind of in a squatting position. He began to lift a pallet which he described as being frozen or kind of frozen to the floor due to some excess condensation. And when he was lifting the pallet, he felt a pop in his back and essentially became symptomatic. He reported his injury and started conservative treatment."

Dr. Templin testified that based on the hypothetical and his examination, Petitioner's mechanism of injury could have aggravated/caused Petitioner's lower back condition to the point surgery became necessary and proper. Dr. Templin stated that bending forward and lifting loads makes the discs subject to a herniation especially in the face of degenerative changes. Dr. Templin stated that he placed Petitioner on a 35-pound weight restriction until the surgery is performed. (PX 4, pp. 7-10, 18-19)

On cross-examination, Dr. Templin testified that he did not review the CT scan previously taken. The doctor stated that a CT scan can provide information as whether there is calcification within a herniation. He stated the calcification will tell you that it's been there longer. He however indicated that it does not affect his diagnosis in regards to his recommended treatment. The doctor stated, "This gentlemen, for instance, has pressure on his S1 nerve root regardless of whether it's calcified or not. That is the proximate cause of his pain and dysfunction. And, therefore, the treatment is the same." (PX 4, pp. 12-13)

Records submitted show Petitioner returned to Dr. Templin on June 7, 2018. Dr. Templin noted he previously recommended surgical intervention which had not been approved. At that visit, Petitioner reported worsening of his pain that now extended into his bilateral legs. Petitioner was reporting a pain scale of 7 out of 10. He also complained of foot drop which had been present for the previous seven (7) to ten (10) days. Petitioner also reported that he went to the emergency room at Silver Cross the previous Friday when he underwent a CT scan. Dr. Templin noted that he reviewed the CT scan which was taken at Silver Cross on June 1, 2018. The doctor indicated same demonstrated multilevel spondylotic change with a congenital stenosis. Also noted was calcified discs at the L2-3, L3-4 and L4-5 levels with at least moderate stenosis. Dr. Templin assessed spinal stenosis and continued back and leg pain after a work injury. Also noted was that Petitioner displayed a foot drop bilaterally. Dr. Templin recommended a follow up MRI and issued an off work status. The recommended MRI was completed on June 13, 2018 demonstrating congenitally slender appearing spinal canal in conjunction with lumbar spondylosis from L2-3 to L5-S1 resulting in areas of central narrowing and neural foraminal stenosis. (PX 3)

Petitioner returned to Dr. Templin on June 20, 2018. Dr. Templin reviewed MRI stating same revealed severe spinal stenosis at the L2-3 and L3-4 with a left sided disc protrusion at L3-4 and L4-5 impinging on the L4 and L5 nerve root. Also noted was a right paracentral disc protrusion at L5-S1. Dr. Templin assessed ongoing and increasing low back pain with radiculopathy with underlying multilevel spinal stenosis at L2-3, L3-4 and a left paracentral disc herniation at L4-5 and a right paracentral disc herniation at L5-S1. Dr. Templin again recommended surgical intervention in the form of a L2-4 lumbar laminotomy, L4-5 laminotomy, and right L5-S1 laminotomy to address stenosis and radicular symptoms. An EMG was also recommended to better assess Petitioner's numbness and weakness. Lastly, Petitioner was again restricted from work. (PX 3)

On July 12, 2018, Petitioner underwent a second Section 12 examination with Dr. Mather at Respondent's request. In his report dated same, Dr. Mather noted Petitioner complaints consisted of bilateral lower back pain traveling down to the feet and the inability to walk on his heels or toes due to weakness and some numbness in both feet. Dr. Mather noted that Petitioner reported that he fell in his front yard after his legs gave out due to back pain on December 17, 2017. The incident required a visit to emergency room. Petitioner also conveyed that he had another visit to the emergency room on May 31, 2018 after a sneezing fit. The doctor stated Petitioner reported the episode resulted in severe bilateral leg pain and bilateral drop feet. (RX 3)

Dr. Mather compared both the MRI from January 2017 with the MRI from June 2018 and opined they were identical. The doctor also provided that he reviewed an MRI from September 2, 2011 which had an indication for low back and leg pain. According to Dr. Mather, the report demonstrated central disk protrusion L2-3, left L3-4 Paramedian disk herniation, left L4-5 paramedian disk herniation, L5-S1 central disk protrusion with moderate to severe bilateral foraminal stenosis. The doctor indicated the follow-up MRI from January 2017 showed no real changes when comparing the radiology readings. Similarly, Dr. Mather compared the April 11, 2017 CT and the June 1, 2018 CT indicating that they both indicted the same pathology, neither showing nerve compression.

After performing an examination, Dr. Mather opined that Petitioner sustained a lumbar strain as a result of the work injury of October 21, 2016. He stated that Petitioner's ongoing complaints of lower back pain and functional complaints of weakness and numbness could not be corroborated by straight leg raising, physical examination, reflex testing and corroboration of the medical records. He felt Petitioner's symptoms appear to be psychogenic in origin. Dr. Mather commented that Petitioner's MRI shows calcified disks that cannot herniate. He also stated the disks are not the type of disks that cause sudden weakness of plantar flexion or dorsiflexion. The doctor opined that Petitioner's treating records demonstrate inconsistent examinations where he had no difficulty with plantar flexion and that Petitioner's ongoing complaints could not been seen as valid. Dr. Mather opined that Petitioner's "...ongoing complaints appear to be functional in nature, not organic. They are not related to his preexisting pathology or the events of October 21, 2016." The doctor opined that a decompressive procedure is not reasonable or necessary to alleviate Petitioner's condition which is related to preexisting pathology and not the alleged accident date. The doctor also opined that a L5-S1 laminectomy discectomy, removing a calcified disk was not in Petitioner's best interest. Dr. Mather stated that given the calcified nature of the disks, same would not be related to the accident. He noted that the June 2018 CT scan did not show nereve compression at L4 or S1 and therefore a decompression procedure was not indicated. Lastly, the doctor opined that Petitioner had reached MMI as of his addendum report dated May 17, 2017. (RX 3)

Petitioner testified regarding the sneezing incident. He stated that he woke up sneezing in the middle of the night. He indicated that he noticed pain radiating down his leg and that he had difficulty walking. He indicated that prior to the incident, he was at "relatively normal pain levels." After the incident, he had increased pain down his leg with spasms. Petitioner stated that currently, his pain levels had returned to the levels (baseline) he experienced prior to the sneezing incident. He also stated that his foot drop is not as prevalent.

In regard to disputed issue (F), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

Petitioner sustained an undisputed accident on October 21, 2016 while lifting a pallet which had frozen to the ground and experiencing. Petitioner felt an immediate sharp pain in his lower back. Ultimately, Petitioner notified Respondent of the October 21, 2016 occurrence and was sent to Physicians Immediate Care. Records submitted show Petitioner presented to Physicians Immediate Care on October 27, 2016 with complaints of low back pain that radiated into his right leg. Numbness and tingling was also noted. Petitioner also denied back pain prior to the reported injury. Petitioner was diagnosed with sprain of ligaments of the lumbar spine.

Petitioner continued treating at Physicians Immediate Care. Physical therapy and an MRI was prescribed. By January 2, 2017, a referral was made to Dr. Khana also at Physicians Immediate Care. Petitioner saw Dr. Khana on January 25, 2017. An examination revealed pain in the right paraspinal muscle with spasm and tenderness. Also noted was abnormal heel-toe ambulation. Dr. Khana added muscle spasm to the diagnosis and noted that a MRI was needed "ASAP" to rule out disc protrusion. The MRI was carried out that same day and the impression was that Petitioner had disc bulge at L2-L3 with central disc extrusion/herniation. At L3-L4 there was a noted disc bulge which displaced that left L4 nerve root. At L4-L5 there is a disc bulge with protrusion/herniation which affects the thecal sac and slightly contacts the left L5 nerve root. At L5-S1 there was a disc bulge with protrusions/herniation which displaces the right S1 nerve root. Thereafter, Petitioner was informed he had multiple disc protrusions/herniations and was referred to Dr. Samir Sharma for possible injections.

Petitioner eventually saw Dr. Sharma on May 17, 2017. The doctor reviewed the MRI and reported same demonstrated rightward protrusions at L5-S1 with right S1 displacement. Dr. Sharma documented positive findings which included limited range of motion with 10 degrees extension and 30 degrees flexion. Petitioner's right straight leg raising was positive and his facet loading was in the right region for axial low back pain. Dr. Sherma assessed 1.) low back pain and 2.) lumbosacral radiculitis. Dr. Sharma ultimately performed two (2) trans-foraminal epidural injection of the right L5, S1. Petitioner reported 30% relief of pain. However, because of continuing complaints and positive findings, the doctor referred Petitioner to an orthopedist.

On September 19, 2017, Petitioner consulted with Dr. Cary Templin. The doctor noted positive findings and reviewed the MRI which he indicated demonstrated there was moderately severe stenosis at L2-L3 due to central disc protrusion and degenerative change. L3-L4 level showed left lateral recess stenosis. At L5-S1 he noted a rightward disc herniation that impinges on the right S1 nerve root. Dr. Templin assessed right L5-S1 herniated disc causing a right S1 radiculopathy as a direct result of Petitioner's work injury. The doctor felt Petitioner "...has made persistent complaints of lower back pain extending into the right leg consistent with such an injury." Dr. Templin recommended a L5-S1 laminectomy and discectomy.

At Respondent's request, Petitioner attended two Section 12 examination with Dr. Mather. At the initial Section 12 examination on April 6, 2017, Dr. Mather's impression was 1.) lumbar strain and 2.) obesity with lumbar spondylosis. Dr. Mather opined that Petitioner's care and treatment to date was reasonable. He noted Petitioner's MRI showed what appeared to be pre-existing lumbar degenerative disk disease. He indicated the MRI strongly suggest these were calcified disk protrusions and not acute disk herniations or acute disk protrusions. The doctor recommended obtaining a CT scan to better evaluate the overall pathology. The doctor stated that given the lack of clinical findings, Petitioner did not sustain a structural injury to the lumbar spine, but rather there was a simple soft tissue strain. He stated that if the CT scan showed calcified disk protrusions, same would reaffirm that Petitioner sustained a lumbar strain and not a structural injury.

The recommended CT scan was carried out on April 11, 2017. On May 17, 2017 Dr. Mather issued an addendum opinion indicating the CT scan confirmed his suspicion that Petitioner had calcified disk bulges. The

doctor stated, '[a]ll the disk bulges are really calcified spondylitic changes. There were no acute disk herniations or protrusions present. These are all preexisting spondylitic degenerative changes. These are all common even in young patients who are obese..." The doctor noted that "...even though the radiologist feels there is some lateral recess stenosis and some foraminal stenosis throughout the spine, this patient did not have radicular pain at the time I saw him, just lower back pain and occasional tingling in the lower extremities." He concluded that the Petitioner had recovered from his lumbar strain, reached MMI, and could go back to work in a full duty capacity.

On July 12, 2018, Petitioner underwent the second Section 12 examination with Dr. Mather. In his report, Dr. Mather noted that he compared both the MRI from January 2017 with the MRI from June 2018 and opined they were identical. Similarly, Dr. Mather compared the April 11, 2017 CT and the June 1, 2018 CT indicating that they both indicted the same pathology, neither showing nerve compression. After performing an examination, Dr. Mather opined that Petitioner sustained a lumbar strain as a result of the work injury of October 21, 2016. He stated that Petitioner's ongoing complaints of lower back pain and functional complaints of weakness and numbness could not be corroborated by straight leg raising, physical examination, reflex testing and corroboration of the medical records. He felt Petitioner's symptoms appear to be psychogenic in origin. Dr. Mather commented that Petitioner's MRI shows calcified disks that cannot herniate. Dr. Mather opined that Petitioner's "...ongoing complaints appear to be functional in nature, not organic. They are not related to his preexisting pathology or the events of October 21, 2016." Dr. Mather stated that given the calcified nature of the disks, same would not be related to the accident.

Petitioner's treating orthopedist, Dr. Templin, also offered a causation opinion in this matter. Dr. Templin testified that he reviewed the January 25, 2017 MRI which he thought demonstrated moderate stenosis at L2-L3 with central disc protrusion and degenerative changes. He noted there was some lateral recess stenosis on the left at L3-L4. At L4-5 there was mild degenerative change and at L5-S1 there was a rightward disc herniation impinging on the right S1 nerve root. Dr. Templin testified that Petitioner's symptomology presentation, the MRI images and his physical exam were all consistent. Specifically, he stated that Petitioner's complaints of lower back pain extending into the right buttock and posterior thigh were consistent with an L5-S1 herniation with SI impingement. Dr. Templin was also presented with a lengthy hypothetical which was similar in nature to the testimony of Petitioner at the time of trial. After considering the hypothetical, the doctor testified that based on the hypothetical and his examination, Petitioner's mechanism of injury certainly could have aggravated/caused Petitioner's lower back condition.

Dr. Templin's records show that he also reviewed the CT scan which was taken at Silver Cross on June 1, 2018. The doctor indicated same demonstrated multilevel spondylotic change with a congenital stenosis. The doctor also noted, as did Dr. Mather, that there was calcification at the L2-3, L3-4 and L4-5 levels. Dr. Templin also noted the CT scan demonstrated at least moderate stenosis. During his testimony, Dr. Templin stated that calcification will tell you that it's been there longer. He however indicated that it does not affect his diagnosis. The doctor stated, "This gentlemen, for instance, has pressure on his S1 nerve root regardless of whether it's calcified or not. That is the proximate cause of his pain and dysfunction. And, therefore, the treatment is the same." Dr. Templin assesses spinal stenosis and continued back and leg pain after a work injury.

The Arbitrator notes that Respondent initially sent Petitioner to Physician Immediate Care for treatment. All care and recommendations for treatment has been rendered by the initial care giver, Physician Immediate Care, and its chain of referrals. During his testimony, Petitioner appeared both credible and truthful concerning his injury and his current condition.

The Arbitrator finds the opinions of Dr. Templin to be more persuasive than those of Dr. Mather. Dr. Mather first notes that Petitioner complained of pain radiating down his leg. Petitioner reported low back pain with some radiation to the right lateral thigh with occasional numbness and tingling in his feet. Petitioner also

conveyed that his leg gives out. In his next report, Dr. Mather , while commenting on the CT scan findings, stated, "...even though the radiologist feels there is some lateral recess stenosis and some foraminal stenosis throughout the spine, this patient did not have radicular pain at the time I saw him, just lower back pain and occasional tingling in the lower extremities." Dr. Mather's findings concerning Petitioner's symptoms, MRI, and treatment recommendation are inconsistent with the findings of Dr. Sharma, Dr. Khana and Dr. Templin. The medical records are replete with Petitioner complaints referencing pain going down his right leg. His complaints have remained fairly consistent throughout his long treatment. At no point did any of Petitioner's treating physician question Petitioner's symptoms or correlation with their exams. In fact, Dr. Templin specifically testified that Petitioner's symptoms were consistent with Dr. Templin's exam and his diagnostic studies. Lastly, both Dr. Templin and Dr. Mather agree Petitioner had calcified disks. Dr. Mather stated that given the calcified nature of the disks, same would not be related to the accident. The doctor did not offer an opinion as to whether or not the accident could have aggravated the pre-existing condition. Conversely, Dr. Templin stated that the calcification does not affect his diagnosis. He stated that Petitioner has pressure on his S1 nerve root regardless of whether it's calcified or not and that same is the proximate cause of his pain and dysfunction. As noted above, Dr. Templin opined that the mechanism of injury could have certainly aggravated Petitioner's underlying pre-existing condition.

Based on all the above, the Arbitrator finds that a causal relationship exists between Petitioner's complained condition of ill-being and the accident occurring on October 21, 2016.

In regard to disputed issues (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; and (K) Is Petitioner entitled to any prospective medical care, the Arbitrator finds the following:

Respondent's argument regarding medical expenses stems from its dispute regarding liability. Having found in favor of Petitioner with respect to causation, the Arbitrator finds that all treatment to date is reasonable and necessary to treat his injury which occurred on October 21, 2016. As such, Respondent shall pay the medical expenses listed in Petitioner's Exhibit #5. Respondent shall receive a credit for bills paid. Further, having relied on the opinions of Dr. Templin the Arbitrator finds that Respondent shall authorize the treatment as prescribed by Dr. Templin.

In regard to disputed issues (L) What temporary benefits (TTD) are in dispute, the Arbitrator finds the following:

The Arbitrator finds that Petitioner is entitled TTD benefits for the weeks of 10/22/2016 – 10/29/2016, and 1/2/2017 – 8/10/2018. Petitioner has never been released from medical care. Records presented at trial show Petitioner was consistently held off work or restricted since his injury. Respondent has not accommodated any light duty restrictions since January of 2017. Therefore, having found in favor of Petitioner in regards to causation and prospective medical, the Arbitrator also awards the above dates subject to Respondent's credit for TTD paid.

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ana Ramirez,

Petitioner,

vs. NO: 16 WC 11352

Sherman Hospital,

Respondent.

20IWCC0259

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, with changes as stated herein, said decision being attached hereto and made a part hereof.

Findings of Fact

The Commission notes that Petitioner proceeded to trial in this matter on a pro se basis. Ms. Ramirez, a 44-year old housekeeper, testified through an interpreter that "[o]n the day of the accident [2/9/16], we always in a hurry and cleaning a lot of rooms. That's how the accident happened. But they have turned their back on me since then." (T.14). Petitioner stated that "... they don't worry for anything about the employees. They don't care how I feel. They never give me the opportunity to work in light duty. The don't want me there until I'm 100 percent, and I want to go back to work. I don't want to be depending on anybody even if I had my pains in my back. I have seen a lot of doctors and my condition, I made – I would last as much as a year with this pain." (T.14-15).

On cross examination, Petitioner indicated that after her injury at work her supervisor took her in a wheelchair to the emergency room. (T.15). She agreed they examined her, took x-rays and "... injected me, and I was there about two hours." (T.16). She indicated that they then

20IWCC0259

sent her to a smaller facility associated with Sherman where she treated through 3/8/16. (T.16-17). Petitioner claimed that the clinic then sent her to see chiropractor Dr. Cascino, who she saw on 3/16/16. (T.17). She agreed that he examined her and sent her for an MRI, which was performed at Sherman Hospital on 3/25/16. (T.17).

In an Advocate Occupational Health "Emergency Department Note" dated 2/9/16, it was recorded that "[t]he presents following fall. The onset was just prior to arrival. The fall was described as slipped. The location where the incident occurred was at work. Location: back. The character of symptoms is pain, no swelling, not tingling and not numbness. The degree at present is minimal. The exacerbating factor is changing position. The relieving factor is none." (PX1). X-rays of the lumbar spine taken at that time revealed "... mild osteopenia. Straightening of lumbar spine is nonspecific. Vertebral body heights and disc spaces are preserved. Early spondylosis is seen at L2-L4 levels with minimal marginal osteophyte formation. There is also mild facet septae at L4-S1 levels. No evidence of acute fracture or subluxation is seen." (PX1). Petitioner was diagnosed with lumbar strain and lumbar contusion, prescribed Flexeril, Naprosyn and Tylenol with Codeine #3 and instructed to follow up with her primary care provider. (PX1).

In an Advocate Sherman Outpatient Center "Work Status/Treatment Report" dated 2/9/16 it was noted that the patient was restricted from work until seen by occupational health with no lifting over 10 pounds. (PX1). The diagnosis was lumbosacral strain/contusion. (PX1).

In an Advocate Sherman Occupational Health "Work Status Discharge Instructions" report dated 2/12/16 it was noted that the patient could return to work on that date with restrictions of no lifting, bending, climbing, pushing or pulling and no work above shoulders. (PX1). The diagnosis was acute lumbar strain and contusion. (PX1).

In an Advocate Sherman Occupational Health "Work Status Discharge Instructions" report dated 2/16/16 it was noted that the patient could return to work on that date with restrictions of sitting only. (PX1). The diagnosis was "back pain s/p fall." (PX1). The same restriction was noted in a similar report dated 2/23/16. (PX1).

In an Advocate Sherman Occupational Health "Work Status Discharge Instructions" report dated 3/1/16 it was noted that the patient could return to work on that date with restrictions regarding maximum lifting of 10 pounds, frequent lifting and bending and sitting/standing/walking 50% of the time. (PX1). The same restriction was noted in a similar report dated 3/8/16. (PX1).

In an office note dated 3/16/16, Dr. Christopher Cascino at Elgin-Barrington Neurosurgery recorded that Petitioner presented "... with a history of thoracolumbar junction and lumbar spine pain that goes to the top of both buttocks bilaterally. This occurred after a fall on February 9th of 2016. She notes no wrap-around chest wall pain. She notes no radiating leg pain. She notes no weakness in the legs, changes in gait, or changes in bowel/bladder function. She notes no saddle numbness. She says, however, that with physical therapy over the last few weeks, and since her fall in February, her symptoms are no better. She says they are exactly the same as they were at their start." (PX1). Following his examination, Dr. Cascino's impression

was "1.) significant thoracolumbar junction and lumbar spine pain that has not improved over 5 weeks. I'm worried about an occult compression fracture. I've ordered an MRI and STIR images. 2.) Intergluteal pain, could be coccygeal in nature. There's an AP and lateral coccyx x-ray ordered as well." (PX1). Dr. Cascino noted that "I have a feeling this is muscular and my workup may be negative. However, given the persistent nature of the patient's symptoms and her inability to return to work and lack of any improvement at all, I think it's appropriate." (PX1).

X-rays of the lumbar spine performed on 3/25/16 showed that "[t]he heights of the vertebral bodies and the intervertebral disk spaces are well maintained. The alignment is anatomic. There is no evidence of fracture or other bony abnormality. There is limited range of motion with flexion and extension. No significant subluxation is identified." (PX1).

An MRI of the lumbar spine performed on 3/25/16 showed that "[t]he alignment of the lumbar spine is normal. No signal abnormalities are seen in the visualized osseous structures. No disc pathology is identified. There are no findings of spinal stenosis or nerve root encroachment at any level. There is no abnormality at the level of the conus medullaris." (PX1). The impression was "[n]egative MRI examination of the lumbar spine." (PX1).

In an office note dated 4/4/16, Dr. Cascino noted that an MRI as well as x-rays of the lumbar spine performed on 3/25/16 were normal and that studies of the sacrum and coccyx done on the same date did not show a fracture. (PX1). Dr. Cascino indicated that Petitioner was "... walking around well without any difficulty. She says, however, that her pain is unchanged. She needs approval from Worker's Compensation, but I would recommend follow-up with a pain clinic doctor. I don't have any specific recommendations based on my exam and my neurologic workup." (PX1). In an addendum to this report, Dr. Cascino stated that he spoke to the nurse and "... explained that the patient has no limitations from my standpoint as the MRI scans and x-rays were all normal. However, the patient states that she's in too much pain to return to work. I therefore will rewrite her work restrictions, and she's to be reassessed by the pain clinic doctor if that's the next doctor who sees her and if that's approved by Worker's Compensation." (PX1).

Petitioner agreed that she returned to Dr. Cascino on 4/4/16. (T.18). When asked whether she told him at that time that she was in too much pain to return to work, Petitioner stated: "I didn't tell him because of the pain I couldn't go back to work. He's the one that told me there's been over a month without work. But when I went back with him, he did tell me I could not work." (T.18). When asked the same question again, Petitioner replied: "I did not mention to him about work. My pain was all day even without work." (T.18). When asked a third time she responded: "I don't remember telling him. I don't remember telling." (T.18). She agreed that she never went back to Dr. Cascino, noting that "[h]e didn't want me. He sent me to put some injections in my back." (T.18-19).

Petitioner agreed that she initially hired attorney Bradley Dworkin, and that she signed that document (presumably the Application for Adjustment of Claim) on 4/7/16. (T.19). She also agreed that Mr. Dworkin sent her to a doctor, but that "... the doctor never saw me. It was just therapy, and I didn't like that because I wanted to know the specialist doctor." (T.19). She agreed that he (presumably Mr. Dworkin) sent her to Dr. Jain. (T.19). However, she maintained

20IWCC0259

that "[t]hey didn't want me to see the doctor, just the therapy." (T.20). She indicated that she never saw Dr. Jain, just the therapist. (T.20).

In a "Patient Status Form" dated 4/13/16, Dr. Neeraj Jain indicated that the patient may not return to work based on a diagnosis of lumbar strain and contusion. (PX1). Petitioner was likewise restricted from work in "Patient Status Form[s]" dated 5/4/16 and 6/1/16. (PX1).

Petitioner agreed that she subsequently fired Mr. Dworkin and hired Mr. Romaker. (T.20-21). She noted Mr. Romaker sent her to Windy City Pain Management, where Drs. Saldanha, Pontinen and Erickson work. (T.20-21). She agreed that they sent her for an MRI at Edgebrook Radiology on 5/16/16. (T.22). She also noted that she did not have any injections at Windy City because "[i]nsurance didn't let them do anything." (T.22). She then agreed that she declined the injections because she was afraid to gain weight due to "[t]he steroids they put in..." (T.22).

An MRI of the sacrum and coccyx performed on 5/16/16 was interpreted as "[u]nremarkable MRI of the sacrum, coccyx, and sacroiliac. There is no disparity between either side and no focal bony or soft tissue abnormalities are seen." (PX1).

Petitioner agreed after she saw these doctors she saw her family physician, Dr. Astacio. (T.22). She noted that "I see him quite often." (T.22). However, she indicated she did not "precisely" see him for her back, noting that "[i]t was because of depression." (T.22-23). She disputed the date of the EMG ordered by Dr. Astacio was on 6/6, noting that "[h]e sent me to have those done when my leg started to get numb, but that was[n't] until September." (T.23). When asked if she saw him for her injury, Petitioner stated: "Him – I would tell him everything." (T.23).

In an "Independent Medical Evaluation" report dated 6/10/16, Dr. Stanford Tack stated that "[b]ased on my review of the verbal history, physical examination, provided medical records, it is my opinion that the appropriate diagnosis for the patient relative to the occupational incident of February 9, 2016, [is] lumbar strain, lumbosacral contusion." (PX1). He noted that "[o]n physical examination performed on June 10, 2016, there are no significant objective physical findings. Nonorganic physical findings include hypersensitivity in the lumbosacral region as well as nonphysiologic complaints of back pain with stabilized range of motion of the right and left hips." (PX1). He indicated that the objective findings do not correlate with her subjective complaints. (PX1). He also stated that "[i]t is my opinion that the diagnosis of lumbar strain and lumbosacral contusion would be related to the incident of February 9, 2016" and that "... the initial treatment provided through the Emergency Department and Occupational Medicine at Sherman Hospital was reasonable and appropriate. It is also my opinion that due to the patient's lack of improvement, the initial evaluation by Dr. Cascino was medically necessary and appropriate. However, after demonstration of no response to symptomatic treatment as well as physical therapy in addition to normal diagnostic imaging, it is my opinion that at that point all subsequent treatment was medically unnecessary as no objective basis for continuation of treatment has been identified. It is my opinion that the recommendations of the Windy City Pain Management physician, Dr. Saldanha, are not medical[ly] necessary or appropriate. It is also my opinion that the treatments dispensed and recommended by Dr. Robert Erickson as described in the verbal history by the patient would be medically necessary [*sic*] and inappropriate. It should

be particularly noted that there is no evidence to support use of durable medical equipment for this diagnosis including use of ice machines or TENS units and that topical creams have not been demonstrated to be appropriate management of low back pain conditions." (PX1). Dr. Tack was also of the opinion that Petitioner had reached MMI and did not require additional medical intervention. (PX1).

Petitioner agreed that the insurance company sent her to see Dr. Tack on 6/10. (T.23). She noted that she then "... started to see [neurosurgeon Dr. Matthew Ross at Midwest Neurosurgery and Spine Specialists] with my insurance." (T.23). When asked whether she was referred to Dr. Ross by a friend, Petitioner responded: "No. Nobody. I looked in the computer, and I wanted him to review the disc." (T.23-24). She agreed that Dr. Ross reviewed the MRI, noting that "... he hardly could see anything. That good thing that I didn't let them inject me because where they were going to put it, he couldn't see anything." (T.24).

In an office note dated 6/20/16, Dr. Ross noted that "Ms. Ramirez's low back pain is most likely due to a lumbosacral strain. We discussed treatment options. I suggested she undergo more intense physical training in a work conditioning program. She may benefit from the use of Lidoderm patches to help control the local muscular pain. I would also recommend an updated MRI in a closed unit. Ms. Ramirez is not capable of returning to work when she is enrolled in a 5-day per week work conditioning program. The patient will return for a followup after completion of her work conditioning." (PX1).

In a letter to Petitioner dated 6/29/16, Robert McDade, Senior Resolution Manager at Gallagher Bassett, noted that based on Dr. Tack's report, Ms. Ramirez was "... considered to be at the maximum medical improvement under this workers' compensation claim and no further treatment or indemnity benefits will be authorized." (PX1). Petitioner acknowledged receiving this letter informing her that the insurance company was stopping her benefits. (T.24-25).

A lumbar MRI performed on 7/10/16 revealed "[c]onus medullaris terminates at the mid L2 level, at the lower limits of normal. Straightening of normal lumbar lordosis. Overall bone marrow signal is normal. No bone marrow edema. Vertebral body heights and disc space heights are preserved. No paravertebral soft tissue abnormality. T12-L1, L1-L2, L2-L3, and L3-L4: Unremarkable. L4-L5: Slight disc bulge, mild ligamentum thickening, and slight facet enlargement. No stenosis. L5-S1: Minimal disc bulge, no stenosis." (PX1).

In an office note dated 7/15/16, Dr. Ross indicated that the MRI scan was of "excellent quality" and "...does not show any evidence of disk herniation or nerve impingement. There is the slightest evidence of disk bulging at the L4-5 and L5-S1 levels. The study is almost normal." (PX1). Dr. Ross concluded that "Ms. Ramirez's back pain is most likely due to lumbosacral and sacroiliac strains. It is unlikely due to disk pathology. I have recommended that she proceed with a right sacroiliac joint block and steroid injection. I specifically instructed the pain specialist to block the intra-articular space and overlying muscle attachments separately. The injection can serve both diagnostic as well as potentially therapeutic purposes. Ms. Ramirez is capable of working on a light duty basis. Specifically, she may lift up to 10 pounds. Bending, squatting, and stooping activities should be performed as tolerated. The patient will be returning for a followup visit after completion of her SI joint injection." (PX1).

In an office note dated 8/30/16, Dr. Ross noted that "Ms. Ramirez's failure to improve with the sacroiliac joint block suggests that her pain is not due to sacroiliitis or sacroiliac strain. She does not have any evidence of nerve impingement that would explain her perceived altered sensation over her legs. There is no surgical treatment that would likely improve her condition. As a result, I have recommended that the patient be evaluated by a specialist in Physical Medicine and Rehabilitation... In the meantime, Ms. Ramirez is capable of working only in a light duty basis. I will increase her lifting to 15 pounds in accordance with her demonstrated performance during the functional capacity evaluation." (PX1).

Petitioner agreed that she saw Dr. Ross on 7/15, to bring him the MRI disc, and again on 8/30. (T.25). She likewise agreed that Dr. Ross told her she did not need surgery and told her to see Dr. Kruger at Marianjoy. (T.25). However, she noted that this "... didn't work. They gave me some patches. I continued taking my pain medicine, the one for inflammation, and it didn't do any good." (T.25). However, she indicated that she never went to Marianjoy and instead went to Dr. Graf at the Illinois Spine Institute. (T.26). When asked if she got his name off the internet as well, she stated: "Not precisely because that's the route and then there is offices there. Very big one. I made the appointment." (T.26). She agreed she found him on her own. (T.26).

In Illinois Spine Institute "New Patient Notes" dated 9/2/16, Dr. Carl Graf noted that he "... personally reviewed an MRI scan of the lumbar spine. Overall this is normal. Demonstrate some mild straightening of the normal lordosis, no disc herniation, nerve root compression or otherwise." (PX1). Dr. Graf indicated that the patient presented with "... the majority of low back pain with some vague radiating leg pain. I had a long discussion with her today regarding her symptoms. They seem to be facet in origin. I did review some recent injection reports which indicated that she was undergoing sacroiliac joint injections. I recommended facet medial branch blocks to her... If she has a good response, she would be a candidate for a rhizotomy." (PX1).

In an EMG/Nerve Conduction Study report dated 9/9/16 the impression was "[n]ormal electromyography and nerve conduction study of both lower extremities." (RX12).

Petitioner indicated that she returned to Dr. Astacio on 9/6 "[c]ause my feet would go numb." (T.27). She agreed she had the EMG at St. Joseph's Hospital on 9/9, and that she went to the Mayo Clinic in October following a friend's recommendation. (T.27). She indicated that she saw a "nerves specialist" at Mayo two times and they gave the MRI disk to the radiologists. (T.27). She noted that they did another EMG of her left leg, which was the worst of the two. (T.27-28).

In a Mayo Clinic "Neurology Specialty Evaluation" report dated 10/10/16, Petitioner was diagnosed with 1) low back pain, post-fall; 2) history of lower limb fatigue and paresthesias; and 3) occasional hand paresthesias, question of carpal tunnel syndrome. (PX1). An MRI of the lumbar spine performed on that date revealed "[m]ildly heterogeneous marrow, within limits for age. Multilevel lumbar spondylosis with disc desiccation, mild facet arthropathy, and fatty atrophy of paraspinal muscles. No significant canal or foraminal stenosis. In particular, there is no mechanical compression of the traversing or exiting L5 nerve roots. Peripheral causes of impingement are not excluded, and could be evaluated with lumbar neurography. Conus

medullaris terminates at L2. Cauda equina nerve roots have a normal appearance. Rectus abdominis diastasis." (PX1). X-rays of the pelvis with sacro-iliac taken at that time were interpreted as showing "[m]ild lumbar facet arthritis. Degenerative change in both SI joints. The lumbar spine and pelvis are otherwise negative." (PX1).

An EMG performed at the Mayo Clinic on 10/13/16 was interpreted as normal with no electrophysiologic evidence of a left L5 or S1 radiculopathy. (PX1).

In a Mayo Clinic "Neurology Subsequent Visit" record dated 10/14/16, Petitioner was diagnosed with 1) chronic low back pain; 2) lumbar spondylosis and mild facet arthropathy, in the setting of normal neurological assessment; and 3) DJD, sacroiliac joints." (PX1). The physician, Dr. M. Milone, noted that "I reassured Mrs. Ramirez about the normal neurological findings and lack of evidence for nerve root compression or injury. The spondylosis and facet arthropathy can be source of pain and, in this regard, I defer recommendations to the Spine physician." (PX1).

Petitioner agreed that after the Mayo Clinic she went back to the Illinois Spine Institute where she saw a different doctor, Dr. Lami. (T.28). She noted that her "personal" doctor had recommended him. (T.28). She indicated that she did not want to see Dr. Graf "... because he told me the only thing he could do was block the nerves in my back and I was scared. I wanted another opinion from Lami." (T.28).

In an Illinois Spine Institute office note dated 10/21/16, Dr. Babak Lami noted that "I reviewed her lumbar MRI which is fairly benign. I do not see any indications for surgery or further injections. My recommendation is physical therapy, home exercise program and work restrictions." (PX1). Dr. Lami's diagnosis was spondylosis without myelopathy or radiculopathy, lumbosacral region. (PX1).

In a letter addressed "[t]o whom it may concern" dated 11/7/16, Dr. Astacio noted that Petitioner "... has been a patient of MarCon Medical Partners for some time and at this time is being treated for multiple conditions of depression with possible fibromyalgia, back pain with sciatica. She is currently taking Cymbalta 60 mg daily with relief from her symptoms. She continues to seek care for back pain from other medical providers due to a work related fall." (PX1).

Petitioner agreed that she had also seen a doctor in Mexico, Enrique Felipe Vazquez Avalos. (T.29). She noted that "I had not gone on vacation a whole year because I can't sit for a long time and when I arrived there, because I was three hours on the plane, I was really sick cause I couldn't even walk because of sitting." (T.29). When asked who sent her there, Petitioner replied: "My family. And there is also an area where I go, too." (T.29). She indicated that she was in Mexico for ten days, and that has been the only trip she has taken from 2/9 through today. (T.29-30). She agreed she flew both ways. (T.30).

In a "[t]o whom it may concern" letter by Dr. Felipe Enrique Vazquez Avalos, translated on 2/9/17, it was noted that Petitioner presented to him on 12/27/16 at which time he assessed her and took an x-ray. (PX1). He indicated that he treated her with anti-inflammatories and pain

relievers and suggested she "... submit to dynamic flouroscopia to determin[e] the level of movability of the coccyx it [sic] necessary in this case. I also recommend[ed] she does [sic] a nuclear magnetic resanacia [sic] to rate the lumbar vertebra." (PX1).

Petitioner agreed that she also saw a Dr. Prpa in Racine, Wisconsin. (T.30). She noted that "[h]e's [an] orthopedist and a spine specialist" and that she got his name from the internet. (T.30). The Commission notes that it does not appear that any records from Dr. Prpa were introduced into evidence. Petitioner indicated that since she visited Dr. Prpa she had seen her personal doctor, Dr. Astocio, about two times. (T.30-31).

Petitioner stated that she has not returned to work for Respondent "yet" and that she has not looked for work anywhere else "[b]ecause I want to return there as a part-timer." (T.31). She noted that "[m]y time was full time, but I would like to try a couple days a week if I don't feel too bad from by back." (T.31). She indicated that before the injury she worked eight hours a day, 40 hours a week, but that she wants to work less "... because of what happens now. I'm afraid as to how I'm going to feel. But in time if I feel better, I do want to work because I like to work all the time. If you see in my income taxes last year, I worked a lot of overtime." (T.31-32). When asked again if she had looked for work anywhere else since, she responded: "No. How am I going to?" (T.32).

When asked by the Arbitrator if there was anything else she wished to add, Petitioner testified that "... all I want to ask is for you to consider me consideration [*sic*] because I can see the lawyers and the companies, they just utilize us when we're good. When I had my health, they didn't want me. And now they going to – they give me bad faces because I'm not going to be working as fast as the others." (T.32-33).

Conclusions of Law

It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, i.e., whether the claimant has reached maximum medical improvement. *Interstate Scaffolding, Inc. v. Ill. Workers' Comp. Commission*, 236 Ill. 2d 132, 142, 923 N.E.2d 266, 271 (2010). TTD compensation is provided for in §8(b) of the Workers' Compensation Act, which provides that "[w]eekly compensation *** shall be paid *** as long as the total temporary incapacity lasts," which the courts have interpreted to mean that an employee is temporarily totally incapacitated from the time an injury incapacitates her for work until such time as she is as far recovered or restored as the permanent character of his injury will permit. *Interstate Scaffolding, Inc.*, 923 N.E.2d at 272.

In the present case, the Arbitrator found that Petitioner was temporarily totally disabled from February 16, 2016 through June 29, 2016, or the date that Dr. Tack's report was forwarded to Petitioner. (Arb.Dec. [Addendum], p.3). The Commission agrees with the Arbitrator's determination that Petitioner had reached MMI and required no further medical treatment with respect to her work-related injury based on the opinion of Dr. Tack following his examination on June 10, 2016. However, the Commission finds that the period of TTD actually commenced on February 9, 2016 (not February 16, 2016) given the Advocate Sherman Outpatient Center "Work Status/Treatment Report" on that date which noted Petitioner was restricted from work until seen by occupational health with no lifting over 10 pounds. (PX1). Thereafter, the record shows that

20IWCC0259

on February 12, 2016 occupational health issued a "Work Status Discharge Instructions" report that found Petitioner could return to work on that date with restrictions of no lifting, bending, climbing, pushing or pulling and no work above shoulders. (PX1). While Petitioner did not specifically address whether she requested accommodated work within her restrictions at that time, there is no evidence to suggest that as a housekeeper Respondent was in any way ready, willing and able to accommodate her along these lines.

Accordingly, the Commission finds that Petitioner was temporarily totally disabled from February 9, 2016 through June 29, 2016, for a period of 20-1/7 weeks (including the additional leap year day in 2016).

All else -- including the Arbitrator's determinations as to causation, medical expenses and nature and extent -- is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 3/2/17 is affirmed and adopted with changes as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $364.91 per week for a period of 20-1/7 weeks, from 2/9/16 through 6/29/16, 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 $328.42 per week for a period of 10 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused permanent partial disability to the extent of 2% person-as-a-whole.

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; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,000.00. 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: MAY 1 – 2020
o: 3/24/20
TJT: pmo
51

Thomas J. Tyrrell

20IWCC0259

Kathryn A. Doerries

Kathryn A. Doerries

Maria Elena Portela

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RAMIREZ, ANA
Employee/Petitioner

Case# **16WC011352**

SHERMAN HOSPITAL
Employer/Respondent

20IWCC0259

On 3/2/2017, 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 0.67% 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 RAMIREZ, ANA
875 PARKWAY AVE
ELGIN, IL 60120

1109 GAROFALO SCHREIBER STORM
SCOTT SCHREIBER
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

SO IMCCOS26

STATE OF ILLINOIS)
)SS.
COUNTY OF **KANE**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ANA RAMIREZ
Employee/Petitioner

v.

SHERMAN HOSPITAL
Employer/Respondent

Case # **16** WC **11352**

Consolidated cases: ___

20IWCC0259

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 **2/10/17**. 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

20 IWCC0259

On **2/9/16**, 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 **$28,462.72**; the average weekly wage was **$547.36**.

On the date of accident, Petitioner was **44** years of age, ***single*** with 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 **$7,037.57** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of **$7,037.57**.

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

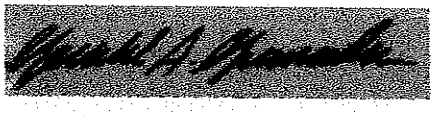
ORDER

Respondent shall pay Petitioner temporary total disability benefits of $364.91/week for 19 2/7 weeks, commencing 2/16/16 through 6/29/16, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $328.42/week for 10 weeks, because the injuries sustained caused the 2% 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

3/1/17
Date

MAR 2 - 2017

DISPUTED

20IWCC0259

FINDINGS OF FACT

This claim involves a Petitioner alleging that she sustained an injury while working for the Respondent on February 9, 2016. Respondent disputes Petitioner's claims based on the following issues at trial: 1) causation, 2) TTD and 3) nature and extent. Petitioner initially signed an Application for Adjustment of Claim on April 7, 2016, which was originally filed by attorney Bradley Dworkin. (RX 16) Shortly thereafter, the Petitioner terminated the services of Mr. Dworkin and hired attorney Charles Romaker who filed a Substitution of Attorney. (RX 17) Subsequently, the Petitioner terminated Mr. Romaker's services. Petitioner proceeded to hearing pro se despite numerous recommendations made by the Arbitrator at prior pre trials and on the trial date. She testified via a Spanish translator.

The parties stipulated that the Petitioner was injured while working for the Respondent on February 9, 2016. At trial, the Petitioner was allowed to make a statement regarding her injuries. She testified briefly about her accident on February 9, 2016 and basically complained of how she had been treated by her employer and still had pain.

On cross-examination, counsel for Respondent elicited dates of treatment from various providers and how the petitioner came to see each provider. The Petitioner testified that she initially reported to the emergency room of Sherman Hospital. A neurological examination was benign with no near deficits. X-rays of the back and ribs were negative for fractures. The diagnosis was a lumbar strain and contusion. The emergency room physician advised her to take medication and follow up with her personal care physician (PCP). She was released to restricted duty. (RX 1)

The Petitioner next sought treatment at the Occupational Clinic. She was seen on multiple occasions through March 8, 2016. Their records reflect that she received medication and was referred for physical therapy. She was released to restricted duty at these visits. She was referred to Dr. Christopher Cascino, a neurosurgeon. (RX 1)

On March 16, 2016, the Petitioner saw Dr. Cascino. (RX 3) Dr. Cascino wanted to rule out a fracture of the coccyx and suggested x-rays and an MRI. On March 25, 2016, the Petitioner underwent an MRI of the lumbosacral spine, which was negative. (RX 2) X-rays of the coccyx were also negative. When she returned to Dr. Cascino on April 4, 2016, he noted that both the x-rays and MRI normal. His record for that visit indicated that from his standpoint, she had no limitations. However, because she stated that she "was in too much pain to return to work", he suggested she see a pain doctor. She was not scheduled for any follow up with Dr. Cascino. (RX 3)

The Petitioner hired attorney Bradley Dworkin and signed her Application on April 7, 2016. (Arbs 2, RX 16) She testified that she was referred to Dr. Jain by Mr. Dworkin, but may have seen his therapist. Dr. Jain is her first doctor choice. She indicated that she did not like him and wanted to see a specialist.

Shortly thereafter, the Petitioner fired Mr. Dworkin and hired attorney Charles Romaker. (RX 17) According to the Petitioner, Mr. Romaker referred her to Windy City where she saw at least three different doctors including Drs. Soldana, Pointen and Erickson. Windy City was her second doctor choice. Records from her visit on May 4, 2016 indicate that she was not experiencing any weakness, numbness or tingling. She did complain of radiating pain. An examination revealed negative straight leg raising and 5/5 strength, with no sensory deficit. She did have subjective tenderness. Despite an essentially normal examination, except for her subjective complaints of tenderness and pain, the doctors recommended facet injections, medications, off work status and

20IWCC0259

another MRI. (RX 5) She underwent the MRI at Edgebrook, which was normal. (RX 6) She declined the injections, as she was concerned about gaining weight.

On June 6, 2016, the Petitioner reported to Dr. Astacio, her PCP who had treated her in the past for other conditions. This was her third doctor choice. He suggested that she bring her MRI and x-rays for his review. He also recommended an EMG. (PX GROUP 1)

The Petitioner underwent an independent medical evaluation with Dr. Tack on June 10, 2016 at the request of the Respondent. This examination was also normal and Dr. Tack opined that the Petitioner did not require any further care after her treatment with Dr. Cascino. He felt she had reached maximum medical improvement and could return to work without restriction. (RX 7) The Petitioner never attempted to return to her full duty job at Sherman or elsewhere. On June 29, 2016, a letter was sent to the Petitioner advising her that benefits were terminated based upon her release to return to full duty.(RX 8)

Apparently dissatisfied with her treatment at Windy City, she next sought treatment with Dr. Matthew Ross, another neurosurgeon on June 30, 2016. She stated that she obtained the name of Dr. Ross from the Internet. Dr. Ross was her fourth doctor choice. He reviewed the May 16, 2016 MRI and stated that it was normal. He diagnosed a lumbar strain. Dr. Ross recommended: a closed MRI, physical therapy, Lidoderm patches and work conditioning. (RX 10)

Respondent secured two Utilization Reviews (UR). The UR dated July 13, 2016 indicated non-certification for a VascuTherm cold therapy unit. The second UR on July 20, 2016 indicated non-certification for the compound Lidoderm Patches. (RX 15)

On July 10, 2016, the Petitioner underwent a closed MRI at Cadence/DelNor Hospital. The report revealed minimal bulges without stenosis. (PX 9) At her follow up visit on July 15, 2016, Dr. Ross opined that the study was "almost normal with the slightest evidence of disc bulging at L4-5 and L5-S1. There was no evidence of disc herniation or nerve impingement." He suggested sacroiliac blocks and restricted duty. (RX 10)

The Petitioner returned to Dr. Ross on August 30, 2016. He noted she had undergone a sacroiliac injection without any improvement and therefore concluded that her problem was neither sacroiliitis nor a sacral strain. She also noted that therapy, the patches and medication did not work. Dr. Ross did not feel she was a surgical candidate. He referred her to Marianjoy to see Dr. Krieger, a physical medicine specialist. It is unclear if she ever reported to Marianjoy. (RX 10)

The Petitioner sought out yet another physician on the Internet, Dr. Michael Graf. Dr. Graf is her fifth doctor choice. His examination was essentially normal. However, given her complaints of pain, he recommended facet medial branch blocks. She did not return to Dr. Graf. (RX 14)

On September 6, 2016, the Petitioner returned to Dr. Astacio. He referred the Petitioner for an EMG, which was performed at St. Joseph Hospital on September 9, 2016. It was an entirely normal examination. (RX 12)

The Petitioner also reported to the Mayo Clinic. Their records indicate she was self-referred while the Petitioner testified a friend had recommended this provider – which became her sixth doctor choice. X-rays at the Mayo Clinic revealed degenerative changes but were otherwise normal. The doctor reviewed the MRI noting only slightly bulges of the discs. The Petitioner was referred for another EMG on October 13, 2016 for her left leg. That test was also normal with no evidence of radiculopathy. (RX 13)

20IWCC0259

The Petitioner next sought treatment from Dr. Lami. While Dr. Lami is in the same practice as Dr. Graf, she was not referred to him by Dr. Graf but chose Dr. Lami because she did not like Dr. Graf's recommendations and at the referral of her PCP. Dr. Lami is her seventh doctor choice. Dr. Lami reviewed the MRI and commented that no surgery was needed. He suggested a home exercise program and therapy. (PX 14) The Petitioner never returned to Dr. Lami.

In December 2016, the Petitioner traveled to Mexico. She traveled by plane and testified this was a three hour flight. She stated that she had pain in her back. In Mexico she saw a Dr. Enrique Felipe Vasquez Avalos on December 27, 2016 through a referral from a friend. Dr. Avalos is her eighth doctor choice. His report is in Spanish. She also testified that she saw Dr. Brambo Prpa, a physician in Racine, Wisconsin on January 14, 2017. Dr. Prpa is her ninth doctor choice. (PX GROUP 1)

The Petitioner testified that she never returned to Advocate nor did she attempt to look for work anywhere else throughout her course of care. At the time of trial, she indicated that she wanted to return to work part time and wanted to work less as she was afraid of how she would feel.

CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that the Petitioner's diagnosed lower back strain is causally related to her February 9, 2016 work accident. This finding is supported by the medical evidence and the Petitioner's testimony elicited during her cross-examination.

2. With regard to the issue of TTD, the Arbitrator finds that the Petitioner was temporarily totally disabled from February 16, 2016 up to June 29, 2016, a period of 19 and 2/7 weeks. Prior to her IME with Dr. Tack, a number of medical providers gave the Petitioner restrictions on her return to work. Dr. Tack examined the Petitioner on June 10, 2016 and opined that the Petitioner required no further care, was at MMI and could return to work without restrictions. That report was sent to the Petitioner June 29, 2016. The Arbitrator finds the opinion of Dr. Tack to be credible and supported by the multiple MRI's, EMG's and negative findings at multiple examinations by the numerous treating doctors involved.

The Arbitrator further finds that any recommendations for lost time and/or restricted duty after the independent medical evaluation are not supported by any objective medical evidence. The sole basis for those restrictions was the Petitioner's subjective complaints of pain, which were unfounded given the lack of any objective findings. It is unclear whether several of her treating doctors ever had the benefit of a prior doctor's records and findings, thereby leading to similar recommendations and repeat diagnostics.

3. With regard to the issue of nature and extent, the Arbitrator notes that 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 makes the following findings listed below.

ESTIMATES

20IWCC0259

(i) Impairment. No level of impairment was offered into evidence and therefore, the Arbitrator gives no weight to this factor.

(ii) Occupation. Petitioner testified that she performed housekeeping duties for the Respondent, and although the Petitioner never returned to this job, there was no evidence offered indicating that she could not return to her previous occupation nor did Petitioner ever attempt to return to her job despite the normal physical examination findings from her various physicians. The Arbitrator gives this factor considerable weight.

(iii) Age. Petitioner was 44 years old at the time of her accident. Given the evidence in this case, Petitioner's age did not factor significantly in this case.

(iv) Future Earning Capacity. There was no evidence presented regarding Petitioner's future earning capacity and therefore the Arbitrator give this factor no weight.

(v) Evidence of Disability. There was evidence of disability corroborated by the medical evidence, which showed that the Petitioner sustained a lower back strain for which she underwent multiple examinations and tests – all of which were essentially normal. Nevertheless, Petitioner continued to complain of pain despite all the normal objective findings. The Arbitrator finds persuasive the opinions of Dr. Tack on this matter, since many of the treating physicians were in agreement with Dr. Tack's findings. The Arbitrator gives this factor significant weight.

Considering all of the factors required under Section 8.1(b), as well as the Petitioner's trial testimony and the medical evidence, the Arbitrator finds that the Petitioner has suffered the permanent and partial loss of use of the person as a whole to the extent of 2% thereof due to her injury.

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 Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mike Gabriel,

Petitioner,

vs.

NO: 15 WC 24061

Menards,

20IWCC0260

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

In the interest of efficiency, the Commission primarily relies on the Arbitrator's detailed recitation of facts. The Commission finds Petitioner sustained permanent disabilities due to the July 11, 2015, work incident. An August 27, 2015, lumbar MRI had the following impression: small midline disc herniation at L4-5 with mild encroachment on the L5 nerve roots bilaterally; moderate-sized midline and right paramedian disc herniation at L5-S1 with encroachment on the S1 nerve roots bilaterally, right more than left; and degenerative change with no additional sign of significant spinal canal compromise or nerve root encroachment. Dr. Yuk diagnosed degenerative lumbar spine disease and a right L5-S1 disc herniation. Dr. Yuk did not believe Petitioner was a surgical candidate and recommended Petitioner continue to undergo conservative treatment. When Petitioner's complaints did not improve with pain medication, Dr. Yuk recommended a trial of lumbar ESIs. Petitioner underwent a series of bilateral ESIs at L5-S1 and injections in the right SI joint in late 2015.

A February 2016 lumbar MRI had the impression of mild central stenosis at L3-4 and L4-5, and at L5-S1 a small disc protrusion slightly left para-median without compressing any neural elements. Dr. Yuk confirmed that Petitioner was not a candidate for surgical intervention. An April 15, 2016, FCE was deemed valid and determined Petitioner met only 60.71% of his job demands. The evaluator noted that Petitioner's job requirements were at the medium/heavy duty level; however, Petitioner was only able to perform at the medium demand level. The evaluator wrote, "If the client is able to have accommodations [to] perform activity at the occasional basis, and

lifting only in the medium physical demand level (under 40 lbs. for this patient), that patient could begin to gradually return to work…"

Petitioner last visited Dr. Fliman on April 28, 2016. On that date, Petitioner reported an improved tolerance to standing and less numbness and tingling with medication. He was using a TENS unit each day for symptom relief and still had occasional pain radiating into his buttocks and thighs. Petitioner also reported a constant ache over the low back radiating into the bilateral hip and groin area. Petitioner also complained of occasional numbness and tingling radiating from the right buttock down to the posterior lateral thigh and posterior calf. Dr. Fliman released Petitioner to return to work with the 40 lb. lifting restriction identified in the FCE. She placed Petitioner at MMI and noted that Petitioner might continue to use Neurontin for treatment of paresthesias and may eventually taper over a course of several weeks. Petitioner sought no further treatment relating to this work injury.

After carefully considering the totality of the evidence, the Commission finds Petitioner sustained a 15% loss of use of the whole person. In so finding, the Commission assigns less weight to factor (ii) of Section 8.1b(b)—the occupation of the injured employee. The valid FCE revealed Petitioner fell short of meeting all the official physical demands of his job. Pursuant to that FCE, Dr. Fliman prescribed a permanent lifting restriction of 40 lbs. Petitioner returned to work full duty in April 2016; however, it is undisputed that he was able to receive assistance when lifting heavy items when necessary. He continued to work in his normal position as a millwork department manager with minor adjustments for approximately a year before he decided to pursue a different career. While Petitioner testified that he changed careers in order to find something less physically demanding, there is no evidence that any doctor ever recommended a change in careers. During the almost year that he continued to work for Respondent after achieving MMI, Petitioner sought no additional medical treatment and did not complain to any doctors about his ongoing low back symptoms. Furthermore, the Commission finds there is no evidence that Petitioner was unable to find another job in his original profession within his permanent lifting restriction. Instead, Petitioner independently decided he wanted to pursue a more sedentary job.

For the foregoing reasons, the Commission find Petitioner's eventual job change was not related to the July 11, 2015, work incident. Thus, after weighing the five factors pursuant to Section 8.1b of the Act, the Commission finds Petitioner sustained a 15% loss of use of the whole person.

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 July 23, 2019, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner permanent partial disability benefits of **$369.93** for **75** weeks, because Petitioner's injuries caused **15%** loss of use of the whole person, as provided for in §8(d)2 of the Act.

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

20IWCC0260

IT IS FURTHER ORDERED that Respondent pay to Petitioner interest pursuant to §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 $27,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 1 - 2020

d: 4/7/20
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GABRIEL, MIKE
Employee/Petitioner

Case# **15WC024061**

MENARDS
Employer/Respondent

20IWCC0260

On 7/23/2019, 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 2.01% 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:

0700 GREGORIO & MARCO
SEAN C STEC
TWO N LASALLE ST SUITE 1650
CHICAGO, IL 60602

1296 CHILTON YAMBERT PORTER LLP
DANIEL T CROWE
303 W MADISON ST SUITE 2300
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF **Lake**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michael Gabriel
Employee/Petitioner
v.
Menards
Employer/Respondent

Case # **15** WC **24061**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica A. Hegarty**, Arbitrator of the Commission, in the city of **Waukegan**, Illinois on 3/20/19. 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 in jury?

20IWCC0260

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

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

20 IWCC0260

FINDINGS

On **7/11/15**, 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 $**32,060.60**; the average weekly wage was $**616.55**.

On the date of accident, Petitioner was **36** years of age, ***married*** with 3 dependent children.

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $**410.62** for TTD, $**10.844.86** for TPD, N/A for maintenance, and N/A for other benefits, for a total credit of $**11,255.48**.

Respondent is entitled to a credit of $**7,397.65** for overpayment of TPD.

ORDER

Respondent shall pay Petitioner permanent disability benefits consistent with the Arbitrator's finding that Petitioner's injuries caused the **25%** loss of the person as a whole, as provided in Section 8 (d) 2 of the Act. (See the attached Addendum for the Arbitrator's analysis 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.

Jason C. Mozenter

Signature of Arbitrator

7/22/19
Date

ICArbDecFatal p. 2

JUL 23 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MIKE GABRIEL, Petitioner,	)	
vs.	)	No. 15 WC 24061
MENARDS Respondent.	)	20IWCC0260

ADDENDUM TO THE DECISION OF THE ARBITRATOR

Findings of Fact

The Petitioner was hired by Respondent in 1999. On the accident date, the Petitioner's job title was Millwright Department Manager which involved occasional lifting up to 50 pounds, 25 pounds frequently, and 10 pounds constantly.

The parties stipulated the Petitioner was injured in a work-related accident on 7/11/15 (Arb. 1). On that date, while lifting an acrylic pallet weighing 50-75 pounds, Petitioner noticed the onset of pain in his lumbar spine.

On 7/12/15, the Petitioner presented to Centegra Hospital with a history of pain in the lumbosacral spine after lifting a pallet. (PX 1). Lumbar x-rays were normal. Petitioner was started on Ibuprofen, Flexeril and administered an injection of Toradol. Petitioner returned 3 days later when he was given a Medrol Dosepak and referred to Dr. Margarite Fliman. (PX 1).

On 7/20/15, Dr. Margarite Fliman at Centegra Physician Care noted a history of lumbar radiculopathy to the left foot after lifting a 50-60 pound pallet at work. (PX 3). Petitioner reported feeling 90% better but reported occasional numbness in his hips. A history of degenerative disc disease and lumbar spinal stenosis for which Petitioner had previously treated with therapy and epidural steroid injections was noted. Petitioner reportedly was asymptomatic prior to the accident date at issue for two years. On exam, Dr. Fliman noted tenderness to palpation over the left lower lumbosacral paraspinals and right upper buttock. Lumbar flexion caused pain radiating into the right posterior thigh while lumbar extension to a lesser degree exacerbated this pain. Straight leg raise increased right buttock pain and diminished right Achilles reflex was noted. Dr. Fliman noted a diagnosis of lumbar radiculopathy, ordered an MRI, provided a lumbar brace and issued a 5 pound work restriction. (Id.).

The Respondent accommodated the restrictions and the Petitioner returned to limited duty within said restrictions on 7/20/15.

On 8/11/15, Petitioner returned to Dr. Fliman with a history of increased weakness in the right leg after working 2-3 hours, increased numbness and tingling radiating from the right buttock down to the posterior lateral thigh and calf, and constant burning over the right shin. The prior recommended MRI and physical therapy was not authorized as of this date. On exam, lumbar flexion beyond 30 degrees exacerbated pain radiating into the right posterior thigh while lumbar extension exacerbated this pain to a lesser degree. Lower extremity strength was limited by pain with right hip flexion and weakness of right plantar flexion when doing toe raises was noted. Light touch sensation was diminished over the

right lateral thigh. Diminished right Achilles reflex was also noted. Straight leg raise bilaterally increased Petitioner's right buttock pain.

Dr. Fliman noted Petitioner's worsening weakness and parasthesias were consistent with right S1 radiculopathy. (Id.). The doctor continued to recommend the MRI, noting Petitioner may require epidural steroid injections. Petitioner was to continue with his current medications of Medrol, Tramadol, and Lansoprazole. (Id.).

On 8/27/15, the Petitioner underwent the MRI at MH Imaging. The following impressions were noted:

- Small midline disc herniation at L4-L5 with mild encroachment on LS nerve roots bilaterally;
- Moderate sized midline and right paramedian disc herniation at LS-S1 with encroachment on the S1 nerve roots bilaterally, right greater than left;
- Degenerative change with no additional sign of spinal canal compromise or nerve root encroachment. (PX 2).

On 8/31/15, the Petitioner followed up with Dr. Fliman who noted complaints of bilateral radiating buttocks pain, numbness and tingling radiating from the right buttock into the posterior lateral thigh and calf, and constant burning over the right shin. (Id.).

The doctor reviewed the recent MRI noting at L4-L5, a small midline disc herniation associated with annular tear and mild encroachment of the bilateral L5 nerve roots. At L5-S1, annular tear with moderate sized midline and right paramedian disk herniation was noted with moderate encroachment of the L5 nerve root bilaterally and moderate bilateral facet hypertrophic changes.

On exam, Dr. Fliman noted similar findings to Petitioner's prior exam. Petitioner's restrictions were continued and the doctor referred him to Dr. Antonio Yuk (neurosurgeon) for a surgical consult. Dr. Fliman also referred Petitioner to Dr. Jing Liang, a physiatrist.

On 9/14/15, Dr. Antonio Yuk noted Petitioner presented with a history of back pain and bilateral hip and calf burning after lifting a 50 pound pallet. (PX 4) The Petitioner reported pain alternating between both hips and both calves, bilateral alternating numbness and tingling in his feet and frequent burning in his right calf. (PX 4). The doctor noted the MRI scan showed "some disc bulges at multiple levels". (Id.). Dr. Yuk further noted "he does have a more specific disc herniation lateralizing toward the right side at L5-S1. (Id.). Dr. Yuk noted no specific symptom or neurologic finding that required urgent surgical intervention and recommended conservative treatment. Petitioner was released to work at his current capacity. Petitioner indicated he preferred a non-surgical treatment approach. (Id.).

On 9/29/15, the Petitioner presented to Dr. Liang who reviewed the MRI films, noting a significant disc herniation at L5-S1. The Petitioner reported a pain level of 7/10. Dr. Liang administered a transforaminal epidural steroid injection (ESI) at L5-S1 bilaterally and recommended physical therapy.

On 10/27/15, the Petitioner followed up with Dr. Liang reporting no relief from the prior ESI. Suspecting the source of pain was in the Petitioner's sacroiliac joint, Dr. Liang recommended a diagnostic injection into that joint. He instructed the Petitioner to continue with the restrictions, working no more than six hours per day.

On 12/1/15, Dr. Liang noted the diagnostic ESI indicated that Petitioner's sacroiliac joint may be the pain source.

20 IWCC0260

The Petitioner underwent his initial physical therapy evaluation on 1/5/16.

On 1/12/16, Petitioner followed up with Dr. Fliman's office reporting noticed improvement in his lower back and bilateral hips after participating in physical therapy. He reported 5/10 pain radiating bilaterally into his buttocks after standing for more than several hours and occasional numbness and tingling radiating from his right buttock into his posterior lateral thigh and calf. He reported receiving a right sacroiliac joint injection on November 24, 2015 without improvement. A follow up injection to the same area one month later provided some improvement. He continued to take Valium and Norco for pain relief.

On exam, Dr. Fliman noted tenderness over the lower lumbosacral paraspinals and right buttock. Lumbar flexion beyond 45 degrees exacerbated pain radiating into the right posterior thigh. Lumbar extension was intact. Lower extremity strength was limited by pain for bilateral hip flexion 4 out of 5. Weakness of the right plantar flexion when doing toe raises was noted as was diminished light tough sensation over the right lateral thigh, leg and foot and bilateral diminished Achilles reflexes. Straight leg raise and FABERS were negative. (PX1).

Dr. Fliman recommended Petitioner continue with physical therapy for another month and if symptoms stabilize, he would likely be at maximum medical improvement. (Id.). Work restrictions were continued. (Id.).

The Petitioner was next seen by Dr. Liang on 1/14/16 reporting his pain level was at 5/10 and a 20% improvement in his sacroiliac joint. Dr. Liang indicated the Petitioner may be a surgical candidate and instructed him to follow up with Dr. Fliman and Dr. Yuk.

The Petitioner underwent a second MRI on 2/19/16. The interpreting radiologist noted mild stenosis at L3-L4 and L4-L5 and at L5-S1, and a small disc protrusion slightly left paramedian that did not compress any neural elements.

On 2/25/16, Dr. Yuk reviewed the recent MRI scan and agreed with the radiologist's description of rather diffuse and mild structural findings. Dr. Yuk further noted the MRI scan did not "explain and correlate" with Petitioner's clinical course and response to conservative treatment including physical therapy and three epidural steroid injections resulting in further increase in symptoms "not only on the right but also on the left." The doctor concluded he could not justify an operative procedure and strongly recommended Petitioner seek additional opinions noting an independent medical evaluation could, perhaps, be scheduled. (PX4).

The Petitioner was next seen by Dr. Fliman on 3/3/16 at which time he reported symptoms of bilateral lumbar radiculopathy now affecting distribution of the L3 nerve as well with pain shooting from both hips to his feet. (PX1) The doctor reviewed the MRI with Petitioner noting no evidence of significant degenerative changes. The doctor ordered Petitioner to repeat use of a Medrol Dosepak and begin taking Neurontin for treatment of parasthesias. Petitioner was referred for EMG/NCV to evaluate the extent of radiculopathy and peripheral neuropathy. (PX 1).

On 3/29/16, Dr. Fliman noted Petitioner's report of improved tolerance to standing up to 5 hours and less numbness and tingling with Neurontin taken 3 times daily. (Id.). Petitioner complained of pain radiating to the buttocks and thighs 6/10 in severity and constant aching over the lower back radiating to the bilateral hip and groin area. Occasional numbness and tingling radiating from the right buttock into the posterior lateral thigh and posterior calf. Dr. Fliman recounted the results of the 8/2015 MRI and reviewed the 2/2016 MRI noting: at L3-L4, a mild posterior disc bulge causing a mild degree of central spinal stenosis; at L4-L5, a minimal posterior disc bulge and facet hypertrophy causing central

spinal stenosis; at L5-S1, a small central protrusion of the disc slightly asymmetric to the left without foraminal or spinal stenosis. (Id.). Dr. Fliman also reviewed the recent EMG noting mild slowing of the conduction velocity which could be normal or suggest early peripheral neuropathy, however, without evidence of lumbar sacral radiculopathy. (Id.). Dr Fliman noted the Petitioner had exhausted conservative management and referred him for a Functional Capacity Exam ("FCE") noting he would then be considered at MMI.

On 4/15/16, Petitioner underwent an FCE at Athletico. (PX 5). The evaluator stated that the Petitioner put forth a maximum effort, noting he did not demonstrate the physical capabilities and tolerances to perform all the essential job functions for Respondent. Petitioner had the most difficulty with bending activities. The evaluator noted, "The farther down he has to bend and the heavier weight that he has to lift, his mechanics decrease and the lift becomes unsafe". The evaluator concluded Petitioner's job demands were at a medium/heavy physical demand level while Petitioner was able to perform activity at the medium demand level.

The evaluator concluded the Petitioner was capable of performing 60.71% of his pre-accident job demands with a 40 pound lifting restriction. (Id.)

On 4/28/16, Dr. Fliman noted Petitioner reported improved tolerance to standing and symptom relief with daily use of the TENS unit recently provided. He had less numbness and tingling with Neurontin 300 taken 3 times per day. He continued to have pain radiating down the buttocks and thighs occasionally and a constant ache over his low back radiating to the bilateral hip and groin. Occasional numbness and tingling radiating from the right buttock down into the posterior lateral thigh and posterior calf was noted. Dr. Fliman reviewed the FCE and released the Petitioner to return to work, no lifting over 40 pounds. (PX 1).

Pursuant to Section 12, the Petitioner was examined by Dr. Frank Phillips of Midwest Orthopedics at Rush on 6/16/16. Dr. Phillips reviewed the Petitioner's medical records, the MRI images from 8/27/15, and the MRI report of 2/25/16. His description of what the MRI images showed is significantly different from that of the interpreting radiologist. Dr. Phillips noted a diagnosis of lumbar strain/sprain with some underlying disc degeneration. Dr. Phillips commented that the Petitioner had undergone appropriate conservative treatment and that his symptoms had essentially resolved. Dr. Phillips noted the Petitioner was back working regular duty and there was no indication that he was not capable of doing so. Dr. Phillips opined that the accident of 7/11/15, caused the diagnosis that he entered, the Petitioner had reached MMI, and that he was capable of returning to his pre-accident occupation. (RX 1).

Dr. Phillips gave his evidence deposition on 3/27/18. With respect to his review of the images seen in the MRI performed on 8/27/15, he testified they showed disc desiccation throughout the lumbar spine, mild degeneration at L3-4, L4-5, and L5-S1, a right disc protrusion at L4-5, and a right sided bulge at L3-4, with no impingement on the thecal sac. (Id.).

Dr. Phillips characterized these findings as "very minor". With respect to the EMG that was performed on 3/15/16, Dr. Phillips testified the findings demonstrated no radiculopathy. Dr. Phillips stated a diagnosis of lumbar strain, noting the Petitioner had reached MMI and could return to work, full duty, at his pre-accident job.

The Petitioner resumed his full duty position as a millwright department manager on 5/6/16. From 5/6/16 through 8/3/17 the Petitioner earned $64,095.57. He voluntarily resigned from his employment with the respondent on 7/13/17; his last day of work was 8/3/17. In the "Voluntary Separation"

document the Petitioner completed on 7/13/17, Respondent's Exhibit # 4, in response to the inquiry "my reason for leaving", the Petitioner wrote "taking a different career path with a new company, Medline".

Petitioner testified that before the accident at issue he had never been provided a permanent lifting restriction of 40 pounds and did not have any problems lifting heavier items at work.

After the accident when he returned to work as a Millwright Manager, he had a permanent lifting restriction of 40 pounds and wasn't able to lift heavier items. He delegated these duties and relied on help from outside his department.

Petitioner testified he left his job with Respondent because he wanted to find work that was easier on his body and back, a desk job. On 8/3/17, he resigned from Respondent and began a new job, working in the call center at Medline, a company that manufactures and sells medical supplies.

Petitioner has three children. Before the accident he had no problems playing with them. Now, he cannot pick up his 4-year-old son and cannot play basketball with his kids or participate in intramural basketball as he did prior to the accident. Activities that involve bending or lifting cause Petitioner to be "mindful". For pain, he now uses a Tens unit and takes ibuprofen.

The Petitioner has not had any treatment for his lumbar strain since Dr. Fliman released him to return to work on 4/28/16.

CONCLUSIONS OF LAW:

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

The Arbitrator finds that Petitioner's current condition of ill-being, as it relates to his lower back is causally related to his work injury on July 11, 2015.

The Findings of Fact, as stated above, are adopted herein. The Arbitrator notes that, although Petitioner suffered an injury to his lower back on 10/13/11, he recovered from that work injury in approximately eight (8) months and enjoyed good health for the next three years. He worked in a full duty capacity for Respondent from 6/12/12 through 7/11/15 and did not have any problems with his lumbar spine. In addition, Petitioner did not receive any medical care for his lumbar spine and did not miss any time from work due to lower back problems during that period.

Both Petitioner and Respondent's witness, Amanda Teschler, testified that Petitioner's job as a millwork department manager often involved lifting doors and windows and moving materials weighing in excess of 40 pounds. The Arbitrator finds that Petitioner's ability to perform this work from 6/12/2012 through 7/11/15 without lower back problems is persuasive evidence that Petitioner's lower back was in good health prior to the accident at issue.

The Arbitrator relies on the history provided by Petitioner to Dr. Margarita Fliman on July 20, 2015, in support of her finding. Petitioner's history states:

> "...here for evaluation of low back pain with initial radiation to both legs after he lifted a 50-60 pound pallet on the job as a sales manager at Menards on July 11, 2015...After lifting a 60 pound pallet patient immediately felt lower back pain [rating] down to the left foot. He presented to occupational health the following day with pain affecting both hips and numbness and tingling down into both feet." (Petitioner's Exhibit #1).

Upon examination of Petitioner's lumbar spine on 7/20/15, Dr. Fliman found, "tenderness to palpation over the lower lumbosacral paraspinals and right upper buttock. Lumbar flexion exacerbates causes pain radiating into the right posterior thigh. Lumbar extension to a lesser degree exacerbates his pain." (Petitioner's Exhibit #1).

Petitioner's lumbar spine complaints are consistently documented within his treating medical records from Dr. Fliman, Dr. Liang, and Dr. Yuk from his work accident through his last appointment with Dr. Fliman on 4/28/16. In addition, there is no evidence of any subsequent injuries to Petitioner's lumbar spine following his work accident on 7/11/2015. (PX1, 3, & 4).

When Dr. Fliman evaluated Petitioner for the final time on April 28, 2016, she found:

> "...tenderness to palpation over the lower lumbosacral paraspinals. Lumbar flexion beyond 45° exacerbates mid lumbar pain. Lumbar extension limited by lower facet and SI area pain. Lower extremity strength limited by pain for bilateral hip flexion at 4 out of 5. Patient with difficulty heel walking. Patient has weakness of right plantar flexion when he does toe raises. Light touch sensation diminished over the left lateral thigh medial leg and foot. Patient has bilaterally diminished Achilles reflexes, Straight leg raise bilaterally exacerbates low back pain, no clonus. FABERs bilaterally exacerbates low back pain." (PX1).

Based on a review of the above-referenced medical records, the Arbitrator finds ample evidence that Petitioner's lower back complaints immediately followed his work injury and continued thereafter.

Further, Respondent's Section 12 medical examiner, Dr. Phillips, concluded that Petitioner suffered an injury to his lumbar spine as a result of his work accident on July 11, 2015, and that the treatment he received from Dr. Fliman, Dr. Liang, and Dr. Yuk, was reasonable and necessary as a result of his work injury. (RX 1, Deposition Exhibit #2).

For the reasons cited above, the Arbitrator finds that the Petitioner has proved, by a preponderance of the evidence, that his condition of ill-being, as it relates to his lumbar spine, is causally related to his work accident at issue.

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

With regard to subsection (i) of §8.1b(b):

- No weight will be accorded to this factor as no permanent partial disability impairment report and/or opinion was submitted into evidence.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee:

- The Petitioner was employed as a millwork department manager at the time of the accident. He was required to lift and exert up to 50 pounds occasionally, up to 25 pounds of force frequently, and up to 10 pounds of force constantly. He was also required to move, stand, sit, stoop, bend, reach, twist, lift, push and pull inventory and other objects. (RX2).

- According to the FCE, Petitioner was incapable of performing approximately 40% of his pre-accident job demands. Petitioner avoided work activities that exceeded his 40 pound lifting

restriction such as stocking supplies and lifting heavy objects like doors and windows. Petitioner delegated those tasks to co-workers or people outside of his department.

- Petitioner was released to return to his prior job with a 40 pound lifting restriction by his treating physician from Centegra.
- Although Petitioner did return to work for Respondent in that same position, there were several activities that were part of his job that required lifting in excess of Petitioner's permanent 40-pound lifting restriction. This was confirmed by Respondent's witness, Amanda Teschler. Petitioner delegated those tasks that were in excess of his permanent work restrictions after April 28, 2016. Therefore, while Petitioner was able to return to work for Respondent as a millwork department manager as a result of said injury, his activities were modified.
- On 8/3/17, Petitioner resigned from his position with Respondent in favor of a less physically demanding desk job making less money, initially. Petitioner testified he wanted a job that was easier on his back.

The Arbitrator places a *significant* amount of weight on this factor.

With regard to subsection (iii) of §8.1b(b), the age of the Petitioner:

- Petitioner was 36 years old at the time of the accident.

The Arbitrator lends greater weight to this factor because of Petitioner's young age and the many years he has left with which to live with the physical limitations and permanency due to the accident at issue.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity:

- Petitioner credibly testified he left his job with Respondent as a millwork department manager in favor of a less physically demanding job for less money at Medline as a customer service representative, a sedentary desk job.
- Initially, when he left Respondent's employ, Petitioner suffered a decrease in wages due to lost commissions, bonuses and profit sharing. At the hearing, however, Petitioner's earnings with his new employer has increased to an amount commensurate with his earnings while employed by Respondent.

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:

- Petitioner treated with Dr. Fliman from 7/20/15 until his release on 4/28/16 when Dr. Fliman noted Petitioner's report of improved tolerance to standing and symptom relief with daily use of a TENS unit. Petitioner was taking Neurontin three times daily which decreased symptoms of numbness and tingling. He reported occasional pain radiating down his buttocks and thighs and a constant ache over his low back radiating bilaterally to his hips and groin and occasional numbness and tingling radiating from the right buttock down into his posterior lateral thigh and posterior calf.

- Upon examination of Petitioner on 4/28/16, Dr. Fliman noted that Petitioner exhibited lumbar flexion beyond 45 degrees exacerbated Petitioner's mid lumbar pain while lumbar extension was limited by lower facet and SI area pain. Lower extremity strength was limited by pain with bilateral hip flexion 4 out of 5. Petitioner had difficulty heel walking and weakness of right plantar flexion when doing toe raises. Light touch sensation was diminished over the left lateral medial thigh, medial leg and foot. Petitioner had bilaterally diminished Achilles reflexes and straight leg raise bilaterally exacerbated his low back pain. Dr. Fliman further noted on exam that FABERS bilaterally exacerbated Petitioner's low back pain. (PX1).
- The FCE, performed at Athletico Physical Therapy on April 15, 2016 and deemed valid by the evaluator, concluded the Petitioner did not demonstrate the physical capabilities and tolerances necessary to perform all the essential job functions for his position as a millwork department manager for Respondent. Petitioner had the most difficulty with bending activities. The evaluator noted, "The farther down he has to bend and the heavier weight that he has to lift, his mechanics decrease and the lift becomes unsafe". The evaluator concluded Petitioner's job demands were at a medium/heavy physical demand level while Petitioner was able to perform activity at the medium demand level and that the Petitioner was capable of performing 60.71% of his pre-accident job demands with a 40 pound lifting restriction. (Id.)
- Dr. Fliman reviewed the results from the FCE and released the Petitioner to return to work with a 40-pound lifting restriction. (PX 1).
- Petitioner now works a sedentary desk job and has modified his daily activities, especially involving bending and lifting. He continues to use a TENS unit and takes Ibuprofen for pain. He has three children. He testified he cannot pick up his four-year-old or play with his children as he did prior to the accident at issue due to his physical limitations.

The Arbitrator finds the treating medical records are corroborative of Petitioner's testimony regarding permanency. The Arbitrator 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 25% loss of use of loss of the person as a whole, as provided in Section 8 (d) 2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joseph Parr,

Petitioner,

vs. NO: 19 WC 18610

University of Illinois,

Respondent.

20IWCC0261

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issue of nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner is a building mechanic for Respondent. On December 13, 2017, he sustained a significant right ankle injury after falling off a ladder. X-rays of the right ankle taken that same day revealed a mildly comminuted mildly oblique fracture of the distal shaft of the fibula, a fracture of the posterior malleolus of the tibia with a widening and disruption of the tibiotalar relationship, and ankle mortise with posterior displacement of the talus relative to the tibia. The initial diagnoses were an acute traumatic displaced bimalleolar (lateral/posterior) fracture of the right ankle and a possible acute traumatic syndesmotic disruption of the right ankle. That night, Dr. Romine performed surgery consisting of open reduction internal fixation of closed displaced right lateral malleolus fracture and closed treatment without manipulation of the right posterior malleolus fracture. As part of the surgery, Dr. Romine implanted screws and a Synthes 1/3 tubular plate was inserted along the lateral aspect of the bone. The postoperative diagnosis was an acute traumatic displaced bimalleolar (comminuted lateral malleolus, posterior malleolus) fracture of the right lower leg.

On December 29, 2017, Dr. Romine examined Petitioner. X-rays of the right ankle showed well-placed hardware spanning the comminuted lateral malleolus fracture and a nondisplaced posterior malleolus fracture that remained well-reduced. Petitioner continued to regularly follow up with Dr. Romine approximately once a month. In late February 2018, Petitioner began attending physical therapy. Petitioner was discharged from therapy on June 6, 2018, with the therapist

writing that Petitioner met all the established therapy goals. On June 8, 2018, Petitioner returned to Dr. Romine and reported feeling that he could finally return to work full duty. Petitioner complained of some continued swelling at the end of the day. Updated x-rays of the right ankle showed the fractured lateral malleolus was well healed and the syndesmosis was intact without widening. Dr. Romine cleared Petitioner to return to work full duty beginning June 13, 2018. Dr. Romine examined Petitioner for a final time on July 6, 2018. Petitioner reported tolerating his return to full duty work well. The doctor wrote:

> "He feels very comfortable working full duty. He has done extremely well postoperatively from a severe ankle fracture and dislocation. He continues to have some swelling at the end of the day but feels as though this is going to go away as well."

The exam revealed minimal soft tissue swelling, full range of motion of the ankle, no tenderness overlying the fractures, the hardware was palpable but nontender, there was normal ankle stability without laxity, and strength at 5/5. Dr. Romine placed Petitioner at MMI and cleared him to continue working without restrictions. He recommended an impairment rating and told Petitioner that if the hardware becomes bothersome in the future, Petitioner may have it removed.

During the arbitration hearing, Petitioner testified that his treatment helped improve his condition. He continues to work full duty without any restrictions. He testified that he still has some symptoms and still has hardware in his right leg. Petitioner testified that he still has a bit of swelling if he is on his feet all day. Petitioner testified that he sometimes gets "a knot right up at the top where that plate is, and then just charley horses." He testified that standing on a ladder for prolonged periods or doing overhead work will make his right leg go numb. He testified that if he rotates his right ankle the charley horses go away. He takes over the counter ibuprofen usually twice a week. Petitioner testified that while he still raises cattle, he sometimes needs a little help with certain tasks. He testified that the charley horses at times affect his sleep. He also complained of a burning sensation in his right leg when it rains. Petitioner admitted that he has not returned to Dr. Romine or sought any additional treatment relating to this injury since July 2018. He agreed that his job as a building mechanic is strenuous and requires him to climb a lot of ladders and stairs. He also does all the HVAC repairs, roofing repairs, concrete work, and general maintenance. Petitioner testified that he is currently the only maintenance worker so he performs all his work alone.

After carefully considering the evidence, including Petitioner's testimony of ongoing complaints, the Commission finds Petitioner sustained a 45% loss of use of the right foot. There is no question that Petitioner sustained a significant injury due to the work accident. However, the Commission finds Petitioner sustained an injury to his right ankle, not his right leg. Petitioner's fractures were located at the ankle joint and the implanted hardware does not extend far past the joint. Furthermore, the numerous right ankle x-rays, operative report, office visit notes, and physical therapy records support the Commission's finding that Petitioner sustained a significant injury to his right ankle only.

The Commission otherwise agrees with the Arbitrator's evaluation pursuant to Section 8.1b of the Act. Petitioner's ankle injury required surgical intervention and several months of physical

20IWCC0261

therapy. While Petitioner has not sought any medical treatment relating to this work injury, he credibly testified that he continues to suffer chronic complaints. Petitioner still experiences swelling in his lower leg if he stands for prolonged periods. He also at times experiences charley horses in the leg near the top of the implanted hardware. Petitioner also occasionally notices numbness in his right leg. Petitioner is still able to raise cattle, but he at times needs help with certain tasks. However, there is also no dispute that Petitioner returned to his very physically demanding job and has continued to work in his original position without any assistance. He routinely climbs ladders and stairs, works on roofs, and even performs HVAC repairs. For the forgoing reasons, the Commission finds Petitioner sustained a 45% loss of use of the right foot due to the December 13, 2017, work incident.

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 October 24, 2019, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner permanent partial disability benefits of **$531.50** for **75.15** weeks, because Petitioner's injuries caused **45%** loss of use of the right foot, as provided for in §8(e) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay compensation that has accrued from **07/06/2018** through **09/11/2019**, and shall pay the remainder of the award, if any, in weekly payments.

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

IT IS FURTHER ORDERED that Respondent pay to Petitioner interest pursuant to §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: **MAY 1 – 2020**

d: 4/7/20
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PARR, JOSEPH
Employee/Petitioner

Case# **19WC018610**

UNIVERSITY OF ILLINOIS
Employer/Respondent

20IWCC0261

On 10/24/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.60% 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 RICH RICH & COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0734 HEYL ROYSTER VOELKER & ALLEN
JOSEPH K GUYETTE
301 N NEIL ST SUITE 505
CHAMPAIGN, IL 61824

1073 UNIVERSITY OF ILLINOIS
100 TRADE CENTER DR
SUITE 103
CHAMPAIGN, IL 61820

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

OCT 24 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

18IWCC0261

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

Joseph Parr
Employee/Petitioner

v.

University of Illinois
Employer/Respondent

Case # **19** WC **18610**

Consolidated cases: **N/A**

20IWCC0261

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 **Michael Nowak**, Arbitrator of the Commission, in the city of **Herrin, Illinois**, on **September 11, 2019**. By stipulation, the parties agree:

On the date of accident, **12/13/2017**, 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 $**46,063.48**, and the average weekly wage was $**885.84**.

At the time of injury, Petitioner was **35** years of age, ***single*** with **3** dependent children.

Necessary medical services and temporary compensation benefits have been **or will be** provided by Respondent.

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

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 the sum of **$531.50**/week for a further period of **86** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **40% loss of use of the right leg**.

Respondent shall pay Petitioner compensation that has accrued from **07/06/2018** through **09/11/2019**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

9/30/19
Date

ICArbDecN&E p.2

OCT 24 2019

20IWCC0261

FINDINGS OF FACT

On the date of the accident, Petitioner was a 35 year-old building mechanic for Respondent at the University of Illinois. (T. 10) The parties stipulated that he sustained accidental injuries on December 13, 2017 when, while changing ballast out on a light, he slipped on the ladder and his leg went in between the rungs, breaking his right lateral malleolus. (T. 11) He was immediately taken to Western Baptist Hospital, where he was given x-rays and placed in a temporary cast. (T.11, 12; PX3) The x-rays showed distal fibula and tibia fractures on the right, as well as a closed fracture of the right ankle, specifically the lateral malleolus. (PX3) Dr. Spencer Romine performed emergency surgery the same day in the form of an open reduction internal fixation of the closed displaced right lateral malleolus fracture and treatment without manipulation of Petitioner's right posterior malleolus fracture. *Id.* Following surgery, Petitioner was placed on bedrest and then prescribed physical therapy. (PX3; PX4, 2/21/18; PX5)

At Arbitration, Petitioner showed the Arbitrator a six to seven inch scar for the parties to view, indicating the location of the surgery. (T. 13) Despite the improvement resulting from surgery, Petitioner testified that he still had all the implanted hardware in his lower leg and that he has a little bit of swelling if he is on his feet all day. (T. 14) He has switched to lace-up boots, which help. *Id.* However, he gets a knot right up at the top of his plate implant and then experiences Charley horses. *Id.* This happens when he stands on a ladder for any extended period of time, or when he is working overhead. *Id.* During this activity, he notices numbness in his leg and then it will quickly trigger Charley horses. *Id.*. When this happens, he rotates his ankle and usually gets them to go away. *Id.* For his symptoms, Petitioner takes over-the-counter ibuprofen, depending on his activity. (T. 14, 15) He also uses ice in the evening. (T. 15) His hobby of raising cattle has been adversely affected. *Id.* His sleep has also been adversely affected, as he wakes up with Charley horses. *Id.*

CONCLUSIONS

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §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. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an impairment rating. 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 work for Respondent as a building mechanic and, while he is able work full duty, he still experiences symptoms, particularly when working on a ladder or doing overhead work. (T. 13, 14) The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that : Petitioner was 35 years of age at the time of his injury. (AX1) He is a younger individual and must live and work with his disability for an

extended period of time. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact that Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time. The Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no direct evidence of reduced earning capacity contained in the record. The Arbitrator therefore gives *no* 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. As a result of his accidents, Petitioner sustained a fractures of his right fibula and tibia, as well as a closed fracture of the right ankle, specifically the lateral malleolus. (PX3) Petitioner underwent emergency surgery at Western Baptist Hospital the same day as the injury in the form of an open reduction internal fixation of closed displaced right lateral malleolus fracture and closed treatment without manipulation of the right posterior malleolus fracture. *Id.* He followed up several times with his surgeon, Dr. Romines, and underwent several months of physical therapy following the injury. (PX4, 12/29/17-7/6/18; PX5) Petitioner still has a plate in his leg from the surgery. (T. 14) He experiences some swelling if he is on his feet all day and he gets a knot above the plate. *Id.* He also experiences numbness followed by Charley horses. *Id.* These occur when he stands on a ladder, stands for an extended period of time or works overhead. *Id.* He also experiences Charley horses in the middle of the night, something that he had never experienced prior to the accident. (T. 15) Due to the metal plate in his leg, he experiences burning in his leg when it rains. (T. 15, 16) His hobby of raising cattle at home has been adversely affected, as he now must watch what he does and requires help with same at times. (T. 15) To manage his ongoing symptoms, Petitioner normally takes ibuprofen and uses ice on his leg twice a week. (T. 14, 15) 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 40% loss of use of the right leg pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Watson,

Petitioner,

vs. NO: 17 WC 20345

City of Chicago,

Respondent.

20IWCC0262

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, 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 26, 2019, 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.

20IWCC0262

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: MAY 1 - 2020
TJT:pmo
o: 4/7/20
51

Maria E. Portela

Kathryn A. Doerries

DISSENT

I dissent. I disagree with the Arbitrator's determination that Petitioner suffered no permanent disability as a result of this undisputed accident. The evidence shows that on the date of the incident Petitioner suffered contusions to his right elbow, right shoulder, right lower back and right upper thigh when he was thrown from the machine he was operating. He was treated conservatively, including a round of physical therapy, and was given restrictions which prevented him from working for two weeks. He thereafter returned to full duty work as a hoisting engineer and has suffered no new injuries since. He currently notices a "[n]umb sensation in the elbow, stiffness in the shoulder, lower back pain and stiffness in the upper right thigh" for which he takes over-the-counter Tylenol three days a week. He also noted that he asks for assistance if he has to lift anything heavy. He indicated that he did not have these problems before the 6/15/17 injury.

Based on the above, I believe Petitioner clearly sustained a compensable accident and suffered permanent disability as a result thereof, albeit modest, and that the Arbitrator's failure to recognize as much amounted to reversable error.

Therefore, I would have awarded permanent partial disability benefits of 2% person-as-a-whole pursuant to §8(d)2 of the Act.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WATSON, JAMES
Employee/Petitioner

Case# **17WC020345**

20IWCC0262

20IWCC0262

CITY OF CHICAGO
Employer/Respondent

On 9/26/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.86% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1759 MARTAY LAW OFFICE
WILLIAM H MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

0010 CITY OF CHICAGO ASST CORP COUN
LUCY HUANG
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

Reparations

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Watson
v.
City of Chicago
Employer/Respondent

Case # **17** WC **20345**
Consolidated cases:

20IWCC0262

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 **July 19, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **06/15/17**, 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 **$98,949.76** ; the average weekly wage was **$1,902.88**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **1** dependent child.

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

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

Respondent shall be given a credit of $ for TTD, **$2,537.30** for TPD, $ for maintenance, and $ for other benefits, for a total credit of **$2,537.30**.

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

ORDER

Petitioner suffered no permanent injuries as a result of the accident.

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

09-26-19
Date

SEP 26 2019

S8S000108

20IWCC0262

James Watson v. City of Chicago
17 WC 20345
Arbitrator Carlson

STATEMENT OF FACTS

It is stipulated to by the parties that Mr. James Watson (hereinafter referred to as "Petitioner") sustained an injury in the course and scope of his employment with the City of Chicago (hereinafter referred to as "Respondent"). His job title was Hoisting Engineer for the Department of Transportation.

On June 15, 2017, Petitioner fell and injured his right elbow, shoulder, back, and right upper thigh. Petitioner received treatment at US Health Works on the same day (Px.1). Physical examination was within normal limits. X-rays of the right elbow were performed on the same day, which revealed normal findings. Petitioner was diagnosed with contusion of the right elbow, contusion of right back wall of thorax, and contusion of the right thigh. Petitioner was taken off work and prescribed with Naproxen and Flexeril. Dr. Beverly Deck recommended using ice and heat and following up on June 16, 2017 (Px.1).

Petitioner attended follow-up visits on June 16, 2017 with Dr. Deck, and the doctor recommended physical therapy (Px.1).

Petitioner underwent physical therapy and attended another follow-up visit on June 22, 2017 (Px.1).

On June 29, 2017, Petitioner attended the last office visit with Dr. Deck. Petitioner reported that his symptoms had improved. Examination of the upper extremities showed full ranges of motion in the elbows. Examination of the lower extremities showed full ranges of motion in the hips. Examination of the spine revealed full ranges of motion in the lumbar spine and negative straight leg raising. The neurological examination was completely normal without any motor, sensory or reflex deficits (Px.1).

At the hearing, Petitioner testified that he has had no new injuries to his right elbow, shoulder, back, and upper thigh since his return to work. Petitioner stated he continues to experience stiffness in the right shoulder, lower back, and upper thigh. Petitioner takes Tylonel about three days a week for the pain. Petitioner also acknowledges that he is not seeing a doctor, and he does not have any upcoming appointment for his right elbow, shoulder, back, and upper thigh.

CONCLUSIONS OF LAW

In regards to (F), "Is the Petitioner's current condition of ill-being related to the injury?" the Arbitrator finds:

The Arbitrator finds that Petitioner has proven by the preponderance of the credible evidence that Petitioner's current condition of ill-being is causally related to his work accidents on June 15, 2017.

In regards to (G), "What were Petitioner's earnings?" the Arbitrator finds:

The Arbitrator notes that the parties stipulate that Petitioner's average weekly wage was $1,902.88. However, the parties disagree with the regard to the information of Petitioner's earnings during the year preceding the injury. It was noted that Petitioner claims that his earnings were $98,949.76 during the year preceding the injury, and Respondent claims that Petitioner's earnings were $60,073.85 during the year preceding the injury on the Request for Hearing form.

Petitioner testified he worked full time for the year preceding his injury which occurred on June 15, 2017. Respondent submitted into evidence a document showing the calculation of Petitioner's earnings during the year preceding the injury and the average weekly wage (Rx.2). Based on this document, it is unclear as to the variance between the average weekly wage noted as $1,902.88 and the yearly wage noted as $60,073.85 (Rx.2). Based on Petitioner's average weekly wage of $1,902.88, the earnings for the preceding year should have been $98,949.76.

Therefore, the Arbitrator finds that Petitioner's earnings for the year preceding Petitioner's injury were $98,949.76 and the average weekly wage per Section 10 of the Act was $1,902.88.

In regards to (L), "What is the nature and extent of Petitioner's injury?," the Arbitrator finds:

An AMA impairment rating was not done in this matter; however, Section 8.1(b) of the Act requires consideration of five factors in determining permanent partial disability:

1. The reported level of impairment;
2. Petitioner's occupation;

3. Petitioner's age at the time of the injury;
4. Petitioner's future earning capacity; and
5. Petitioner's evidence of disability corroborated by treating medical records.

Section 8.1(b) also states, "No single 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 a physician must be examined." The term "impairment" in relation to the AMA Guides to the Evaluation of Permanent Impairment 6th Edition is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

1. The reported level of impairment

An AMA impairment rating was not done in this case. This does not preclude an award for partial permanent disability.

2. Petitioner's Occupation

On the date of the accident, Petitioner was a Hoisting Engineer for Department of Transportation. He was able to return to work to his usual and customary position without restrictions. This must be given great weight.

3. Petitioner's age at the time of injury

Petitioner was 48 years old at the time of injury. Petitioner is still young, and he has a greater likelihood of full recovery than an older worker who sustains the same injury. This is relevant and should be given some weight.

4. Petitioner's future earning capacity

Petitioner has no loss of earnings. Nothing in the record, including his testimony, suggests that his future earning capacity has been affected by the injury sustained. Petitioner testified that he is currently working in the same position, and he receives a wage increase after his return to work. Again, great weight must be placed on this factor.

5. Petitioner's evidence of disability corroborated by medical records

In evaluating the above factors, the Arbitrator finds that Petitioner is not entitled to an award of permanency. Petitioner's injuries were not severe, (he was diagnosed with contusions) and he failed to prove that they are permanent. A review of the record reflects that claimant's

pain complaints generally appear to be disproportionate to the objective medical findings. Petitioner's right elbow, shoulder, back, and upper thigh pain complaints are referenced off and on in the treating progress notes of his treating physician, Dr. Deck, but with little objective evidence to support them. Dr. Deck's physical examination findings were within normal limits. Note, in particular, the examinations showed normal gait and station, normal strength, normal ranges of motion, and normal sensation and reflexes. None of these examinations reflects sensory or reflex deficits. Petitioner was diagnosed with contusions of the right elbow, right back wall of the thorax, and right thigh. Petitioner was off work for approximately two weeks from June 16, 2019 through June 29, 2019, but this seems excessive in light of his minimal injuries. His medical treatment was limited. He attended a total of five physical therapy sessions for his contusions.

The record also shows that Petitioner's treatment and medication use has been generally effective in alleviating his symptoms. Petitioner was able to return to work full duty and worked in the same job that he worked prior to this incident. The Arbitrator further notes that the treatment that he has received has been essentially routine and conservative in nature. Petitioner had no surgical intervention, and none has been recommended. This evidence suggests that his condition was not considered to be particularly serious or debilitating by Petitioner's treating physician. The record shows that Petitioner made a complete recovery and returned to his usual and customary position with no restriction. That must be given weight. The work injury has not adversely affected his position or salary. In fact, Petitioner receives a wage increase after his return to work. Additionally, the medical record does not show that Petitioner has any future medical appointment to address the alleged issues with his contused right elbow, back, shoulder, and thigh.

Petitioner testified that since returning to work, he has had issues with his right elbow, shoulder, back, and upper thigh. However, the medical evidence simply does not provide an apparent reason for the extent of the Petitioner's allegedly difficulties with work activities. The record shows that Petitioner's subjective pain complaints are not consistent with the record, and the nature and extent of his injury are not as severe as he has alleged.

No permanency award is rendered.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LYNDA ODUM,

Petitioner,

vs. NO: 17 WC 10430

CITY OF GRANITE CITY,

Respondent.

20IWCC0263

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 and 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 19, 2019 is hereby affirmed and adopted.

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. Based upon the denial of compensation herein, no bond is set by the Commission. 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: MAY 4 – 2020

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

Stephen J. Mathis

Stephen Mathis

D. Douglas McCarthy

D. Douglas McCarthy

LEC/mck

D: 4/28/2020

43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ODUM, LYNDA
Employee/Petitioner

Case# **17WC010430**

CITY OF GRANITE CITY
Employer/Respondent

20IWCC0263

On 8/19/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.89% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4463 GALANTI LAW OFFICE PC
GIAMBATTISTA "JB" PATTI
PO BOX 99
E ALTON, IL 62024

0299 KEEFE & DePAULI PC
JAMES K KEEFE JR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Lynda Odum
Employee/Petitioner

v.

City of Granite City
Employer/Respondent

Case # 17 WC 10430

Consolidated cases: N/A

20IWCC0263

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 **Collinsville**, on **1/15/2019**. 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 **3/1/2017** 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 $**48,511.58**; the average weekly wage was $**932.92**

On the date of accident, Petitioner was **54** years of age, ***married*** with **1** dependent children.

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

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

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

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

ORDER

Because Petitioner failed to prove that she sustained an accidental injury arising out of and in the course of her employment or that her bilateral carpal tunnel syndrome is causally connected to her work activities, 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

8/12/19
Date

AUG 19 2019

20IWCC0263

FINDINGS OF FACT

At the time of the alleged accident Petitioner was 54 years of age and right hand dominant. She had been employed with Respondent as the Fire Chief's secretary for 32 years. She retired September 4, 2018. Petitioner alleges that her work activities contributed to bilateral carpal tunnel syndrome.

Petitioner testified that she worked eight hour days, five days per week. She took one hour for lunch, and took only one cigarette break per day at work. She admitted to socializing with other firefighters about work throughout the day. Petitioner had extended absences from work for a 2013 injury and a hysterectomy surgery. She took medicine for hypertension.

Petitioner testified her work activities required keyboarding, moussing, answering phones, paperwork and lifting file boxes. She initially indicated the typing was pecking, but stated she also typed with both hands. Petitioner testified no one assisted her with her work.

Petitioner testified in November 2016 she developed a gradual onset of numbness and tingling in both hands. She stated the symptoms were worse when typing and lifting boxes of files.

On March 1, 2017, Petitioner underwent nerve conduction studies that revealed bilateral carpal tunnel syndrome. (Px. 1at 9).

Andy Vitale from Apex Physical Therapy performed an Ergonomic Analysis of Petitioner's position from May 31 until June 7, 2017. It included installing a keyghost keystroke capturing device on Petitioner's computer. Petitioner told Mr. Vitale she typed and used the mouse 6 hours per day. (Rx. 1 at 13). Mr. Vitale concluded that based upon his observations and the keyghost data that Petitioner's work activities were not a work related muscoskelatal hazard. (Rx.1).

Vince Martinez testified for Respondent. He has been employed 32 years as a firefighter for Respondent and the Fire Chief since August 2014. As Chief, he works at Firehouse 1 with Petitioner. He interacted daily with Petitioner and was familiar with her work activities. Chief Martinez reviewed the report prepared by Mr. Vitale. He testified it fairly depicted the amount of Petitioner's work activities.

Kenneth Prazma testified for Respondent. He has been the Assistant Fire Chief since August 2014 and works in Firehouse 1 with Petitioner. For the last couple years he took over for Petitioner creating the schedule for firefighters, which required data input. He observed Petitioner take smoke breaks at work. He testified every summer interns assisted Petitioner perform her work activities, including computer work.

On August 2, 2017, Petitioner came under the care of Dr. George Paletta. She related her carpal tunnel syndrome to her work activities for Respondent. She stated the onset and worsening of symptoms occurred at work. She admitted to intermittent symptoms at night. (Px. 2 at 10)

Dr. Paletta diagnosed bilateral carpal tunnel syndrome and recommended surgery. Dr. Paletta reviewed Vitale report. He opined that Petitioner had risk factors for carpal tunnel including gender, age and hypertension.

However, he felt based upon her job description that the work activities were a contributing factor to the carpal tunnel syndrome. (Px. 2 at 11-12).

On September 12, 2017, Dr. Paletta performed a right carpal tunnel release. (Px. 3 at 3-4). On October 24, 2017, Dr..Paletta performed a left carpal tunnel release. (Px. 3 at 1-2). Dr. Paletta kept Petitioner off work or on restrictions that Respondent did not accommodate until he released her to return to work full duty and placed her at MMI January 2, 2018. (Px. 2 at 1).

Respondent secured a Section 12 examination with Dr. Evan Crandall April 5, 2018. Dr. Crandall, based upon Petitioner's history, the Vitale report, and job video, opined that her work activities for Respondent were not a contributing factor to bilateral carpal tunnel syndrome. He explained she had well known risk factors of age, gender, menopause and smoking. He opined that she suffered a 2% impairment of each hand in accordance with the 6th Edition AMA Guidelines. (Rx. 2).

Petitioner deposed Dr. Paletta on June 22, 2018. (Px. 4). Dr. Paletta testified that while Petitioner had risk factors for carpal tunnel syndrome, including her gender, age and hypertension, it was his opinion the work activities over 32 years would be a contributing factor to her bilateral carpal tunnel syndrome and need for surgery. (Px. 4 at 10-11). Dr. Paletta explained carpal tunnel syndrome is multi-factorial and if Petitioner's history was accurate about her work activities then it would have contributed to the condition. (Px. 4 at 17-19).

On cross examination, Dr. Paletta acknowledged her risk factors of age, gender, smoking and hypertension irrespective of work could cause her carpal tunnel. (Px. 4 at 19). He conceded that Petitioner's work activities of typing, mouse work and lifting files would have to be performed at least half of her work day or four hours for the work activities to be a contributing factor to the carpal tunnel syndrome. (Px. 4 at 20-23). He testified that answering phones and paperwork would not have anything to do with carpal tunnel syndrome. (Px. 4 at 22).

Respondent deposed Dr. Crandall June 26, 2018. (Rx. 2). Dr. Crandall identified Petitioner's gender, age, hypertension and smoking as the primary risk factors and the cause of her carpal tunnel syndrome. (Rx. 2 at 12-14). He opined based upon her job description and the physical demands analysis that there was no relationship between the carpal tunnel syndrome and work activities. (Rx. 2 at 13-14). He explained that according to the keyghost analysis she typed the equivalent of 7.75 pages in one work week. (Rx. 2 at 10).

On cross examination, Dr. Crandall's opined unless Petitioner performed four hours of continuous typing or 40 times more than the keyghost captured that there was no causal relationship between her work activities and carpal tunnel syndrome. (Rx. 2). He explained that the ergonomic analysis for typing and mouse work was nowhere close to the threshold necessary to contribute to carpal tunnel syndrome. He testified that Petitioner would have to type forty times the amount that was documented on the keystroke study for it to contribute to carpal tunnel. (Rx. 2 at 34, 39, 42-43).

Respondent deposed Andy Vitale August 24, 2018. (Rx. 1). Mr. Vitale is an occupational therapist. Half of Mr. Vitale's work involves performing ergonomic evaluations and working with employers to make positions more ergonomically safe. (Rx. 1 at 4-6). Mr. Vitale performed an evaluation of Petitioner's job as the secretary for the

Granite City Fire Department. He installed the ghost key device on Petitioner's computer May 31, 2017. It measured her tying use through June 7, 2017. (Rx. 1 at 6-8).

Mr. Vitale explained the observations and history he took from Petitioner on June 7, 2017. (Rx. 1 at 8-9). Based upon all the information he gathered, including repetitions, duration and postures, he input the observations into several ergonomic tools. (Rx. 1 at 9). Each tool concluded that Petitioner's job activities as a secretary, and in particularly the typing and mouse use, did not put her at risk for musculoskeletal injury. (Rx. 1 at 10-17). Mr. Vitale explained that the lack of repetition and, more significantly, the lack of force explained the results of each tool.

On cross examination, Mr. Vitale acknowledged that his measurements were only taken on one particular day and that if Petitioner typed more or used more force it could impact his opinions. (Rx. 1 at 40).

CONCLUSIONS

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

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

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, 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 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.*

The Appellate Court in *City of Springfield v. Illinois Workers' Comp. Comm'n*, 901 N.E.2d 1066 (4th Dist., 2009) issued a favorable decision in a repetitive trauma case to a claimant whose 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. *Id.* "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.*

In this case, the evidence shows that Petitioner was employed by Respondent as a secretary for 32 years. Both Dr. Paletta and Dr. Crandall opined that in order for Petitioner's job duties to have contributed to her carpal tunnel syndrome she would have had to type and mouse at least four hours out of her day. The evidence, including the ghost key findings which the Arbitrator found significant, indicates that Petitioner did not type or key board at least four hours out of her work day.

Based upon the foregoing and the record taken as a whole the Arbitrator finds Petitioner has failed to meet her burden of establishing that she sustained an accident which arose out of and in the course of her employment or that her current condition of ill-being is causally related to her employment.

Benefits are denied. All other issues are 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	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEREMY BAKER,

Petitioner,

vs. NO: 18 WC 36899

GRP MECHANICAL COMPANY,

Respondent.

20IWCC0264

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, earnings, average weekly wage (AWW), temporary total disability (TTD) benefits, temporary partial disability (TPD) benefits, prospective medical, and credit, 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. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties. The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A. O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972).

10MC0058

20IWCC0264

The Commission modifies down Petitioner's average weekly wage of $3,289.09 to $2,559.60. According to the Act, the average weekly wage "shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury." *820 ILCS 305/10*. At the time of Petitioner's injury, Petitioner was hired to work "Six ten's" or Monday through Saturday, ten-hour days. (T.16-17). There is no dispute that overtime was mandatory. Petitioner's hourly rate was $42.66. (T.17). Based on the record in its entirety and the proof of earnings adduced at arbitration, Petitioner's average weekly wage did not extend beyond a 60-hour work week at $42.66 per hour – for an average weekly wage of $2,559.60.

Based on that calculation, the Commission affirms the Arbitrator's Order for TTD covering March 16, 2018 through February 10, 2019, and May 15, 2019 through May 24, 2019 (48 6/7 weeks). Petitioner's TTD rate remains subject to the maximum rate. Therefore, $1,463.80 x 48 6/7 weeks totals $71,521.27. Per the parties' stipulation at arbitration, Respondent shall be given a credit in the amount of $48,305.40 for TTD previously paid. The Commission modifies the amount of TPD benefits, for the period of February 11, 2019 through May 14, 2019 (13 2/7 weeks), as follows:

-$2,559.60 x 13 2/7 = $34,017.08 - $26,404.88 (PX7) = $7,612.20
-$7,612.20 x 2/3 = $5,074.80

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed July 8, 2019, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to prospective medical treatment including, but not limited to, the MRI of Petitioner's left knee and further medical treatment as recommended by Dr. Darnell Blackmon.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $1,463.80 per week for 48 6/7 weeks, commencing March 16, 2018 through February 10, 2019, and May 15, 2019 through May 24, 2019, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary partial disability benefits of $5,074.80 for the period of time commencing February 11, 2019 through May 14, 2019, as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $48,305.40 for temporary total disability benefits previously paid to Petitioner.

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

A85053:105

20IWCC0264

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $28,400.00. 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 the Circuit Court.

DATED: MAY 4 – 2020

D. Douglas McCarthy

Stephen J. Mathis

L. Elizabeth Coppoletti

DDM/pm
D: 4-28-20
052

Microfilmed

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

BAKER, JEREMY
Employee/Petitioner

Case# **18WC036899**

GRP MECHANICAL COMPANY
Employer/Respondent

20IWCC0264

On 7/8/2019, 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 2.04% 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:

0299 KEEFE & DePAULI PC
JAMES K KEEFE JR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

0734 HEYL ROYSTER VOELKER & ALLEN
AMBER D CAMERON
105 W VANDALIA ST SUITE 100
EDWARDSVILLE, IL 62025

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jeremy Baker
Employee/Petitioner

v.

GRP Mechanical Company
Employer/Respondent

Case # 18 WC 36899

Consolidated cases: n/a

20IWCC0264

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on May 24, 2019. 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. [x] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were 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?
[x] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

20IWCC0264

FINDINGS

On the date of accident, March 15, 2018, 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 $6,578.17; the average weekly wage was $3,289.09.

On the date of accident, Petitioner was 41 years of age, married with 5 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 $48,305.40 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $48,305.40.

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

ORDER

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the MRI of Petitioner's left knee and further medical treatment as recommended by Dr. Darnell Blackmon.

Respondent shall pay Petitioner temporary total disability benefits of $1,463.80 per week for 48 6/7 weeks commencing March 16, 2018, through February 10, 2019, and May 15, 2019, through May 24, 2019, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner temporary partial disability benefits of $11,527.12 for the period of time commencing February 11, 2019, through May 14, 2019, as provided in Section 8(a) of the Act.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

July 2, 2019
Date

JUL 8 - 2019

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on March 15, 2018. According to the Application, Petitioner was "Cutting bolts and stepping down" and sustained an injury to his "Left calf and Left knee" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of temporary total disability and temporary partial disability benefits as well as prospective medical treatment. In regard to temporary total disability benefits, Petitioner claimed he was entitled to payment of temporary total disability benefits of 48 6/7 weeks, commencing March 16, 2018, through February 10, 2019, and May 15, 2019, through May 24, 2019 (the date of trial). In regard to temporary partial disability benefits, Petitioner claimed he was entitled to temporary partial disability benefits of 13 2/7 weeks, commencing February 11, 2019, through May 14, 2019. Respondents disputed liability on the basis of causal relationship and claimed the period of temporary total disability benefits Petitioner was entitled to was 33 1/7 weeks, commencing March 16, 2018, through November 2, 2018 (Arbitrator's Exhibit 1).

Petitioner and Respondent stipulated Petitioner sustained an injury to his left calf as a result of the accident of March 15, 2018. Respondent disputed Petitioner's left knee condition was causally related to the accident. The prospective medical treatment sought by Petitioner was an MRI scan of Petitioner's left knee and whatever other treatment was determined to be appropriate thereafter. There was also a dispute as to the appropriate method of computing Petitioner's average weekly wage. Petitioner alleged the average weekly wage was $3,289.09. Respondent alleged the average weekly wage was $1,513.49. At trial, counsel for Petitioner and Respondent stipulated that the determination of the appropriate average weekly wage depended upon what manner of computation was used under Section 10 of the Act (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a pipefitter and was hired out of the union hall. Petitioner lives in Oklahoma and travels wherever work is available. Petitioner was hired by Respondent to work on a special project at the Phillips 66 refinery in Wood River. The special project was scheduled to last six weeks and Petitioner was hired to work at an hourly rate of $42.66, which was higher than the normal hourly rate for pipefitters. Further, Petitioner was hired to work six days a week, 10 hours a day.

Petitioner started working for Respondent on February 28, 2018, and sustained the accident on March 15, 2018, having worked for Respondent for 14 days. Petitioner tendered into evidence a wage statement which showed Petitioner worked 154.2 hours from February 28, through March 15, 2018, and, at the straight time rate of $42.66 earned $6,578.17 (Petitioner's Exhibit 6). Dividing that amount by two weeks computes to an average weekly wage of $3,289.09.

At trial, Petitioner testified that he chose to work at jobs that paid the highest hourly rate. Had Petitioner not sustained the injury, he could have continued to work for Respondent at the hourly rate of $42.66 for almost another four weeks. Petitioner stated that after completing the job for Respondent, he was going to work at a job in California making $53.00 per hour.

The standard hourly rate for a pipefitter employed by Respondent was $39.76. Respondent tendered into evidence wage statements of two pipefitters employed by Respondent for the year preceding the date of Petitioner's accident (Respondent's Exhibit 6). At trial, Petitioner and Respondent stipulated those wage statements computed to an average weekly wage of $1,513.49.

Lenny Portell testified for Respondent in regard to the average weekly wage issue. Portell was Respondent's safety supervisor. He agreed Petitioner was hired to work on a special project for six days a week, 10 hours a day; however, upon completion of the project all of the pipefitters who were regular employees of Respondent would go back to a 40 hour work week at the standard hourly rate.

On March 15, 2018, Petitioner had just cut some bolts with a torch and, when he stepped down off of a wooden box, he felt a "snap" in his left calf and fell to the ground. Petitioner testified that thereafter he was unable to put any weight on his left leg.

Petitioner was initially evaluated at Midwest Occupational Medicine on March 16, 2018, by Lynn Brown, a Nurse Practitioner. At that time, Petitioner complained of pain in his left calf especially with weight bearing/movement. NP Brown opined Petitioner had sustained a probable plantaris tendon rupture versus gastroc tear. She ordered an MRI scan (Petitioner's Exhibit 1).

The MRI was performed on March 19, 2018. According to the radiologist, the MRI revealed a Grade 2 intramuscular injury/partial tearing of the distal medial head of the gastrocnemius (Petitioner's Exhibit 2).

Petitioner was again seen by NP Brown on March 20, 2018. She reviewed the MRI and agreed it revealed a tear of the gastrocnemius. NP Brown applied an Ace wrap and walking boot (Petitioner's Exhibit 1).

Petitioner returned to his home in Oklahoma and sought medical treatment from Dr. Darnell Blackmon, an orthopedic surgeon. Dr. Blackmon initially evaluated Petitioner on April 11, 2018. At that time, Petitioner advised Dr. Blackmon of the work-related accident. Dr. Blackmon also diagnosed Petitioner with a tear of the gastrocnemius and applied a cast which he anticipated would remain in place for four weeks (Petitioner's Exhibit 4).

Dr. Blackmon subsequently saw Petitioner on May 9, 2018, and removed the cast and applied a boot. He also ordered physical therapy (Petitioner's Exhibit 4).

Dr. Blackmon next saw Petitioner on June 6, and July 10, 2018. On those occasions, he ordered additional physical therapy (Petitioner's Exhibit 4).

Petitioner received physical therapy from May 12, through October 22, 2018. In the physical therapy record of July 25, 2018, Petitioner advised his leg was getting stronger and he was able to walk, but still had balance/pain issues on uneven surfaces. In the physical therapy record of August 1, 2018, Petitioner noted his left knee hurt, especially when he knelt (Petitioner's Exhibit 5). This was the first time Petitioner complained of any symptoms referable to the left knee.

When Petitioner was seen by Dr. Blackmon on August 14, 2018, Petitioner advised him he was having left knee pain. Dr. Blackmon's record of that date noted that at the time of the accident, Petitioner had injured his left calf and was not able to ambulate on his left leg. Dr. Blackmon's medical records noted "He does admit that he is not certain of when the pain started in his knee, but he did notice it once he started to ambulate and put pressure on in the knee.... As he continues to recover from calf and is able to weight bear more, the knee becomes worse." In that record, Dr. Blackmon addressed the issue of causality and noted Petitioner had sustained a forceful injury which tore the gastrocnemius muscle and would have been enough force to possibly tear a meniscus. Specifically, Dr. Blackmon's record of that date noted "It is understandable that this was not reported in the initial visit as the pain in the calf could have certainly been more distracting" (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. William Gillock, and occupational medicine specialist, on September 13, 2018. In connection with his examination of Petitioner, Dr. Gillock reviewed medical records provided to him by Respondent. Dr. Gillock opined Petitioner's left knee condition was not work-related because there was no objective evidence of a work-related injury and the sole cause of Petitioner's condition was not his employment (Respondent's Exhibit 2).

When Dr. Blackmon saw Petitioner on September 20, 2018, he noted Petitioner's calf was better. However, Petitioner continued to have instability in the left leg and Dr. Blackmon was not willing to release Petitioner to return to work because he feared that if Petitioner worked on a height, he might fall. Dr. Blackmon restated his opinion Petitioner's left knee condition was related to the accident and recommended an MRI scan (Petitioner's Exhibit 5).

Petitioner was last seen by Dr. Blackmon on October 18, 2018. At that time, Dr. Blackmon opined Petitioner's left calf injury had resolved. However, Dr. Blackmon would not give Petitioner a release return to work without restrictions as Petitioner's left leg was still unstable because of the knee condition and Petitioner had to work on heights. Dr. Blackmon released Petitioner to return to work, but with restrictions of no squatting, kneeling, crawling and no climbing ladders or walking on any heights until the knee condition was addressed (Petitioner's Exhibit 4).

In his record of October 18, 2018, Dr. Blackmon reaffirmed his opinion Petitioner's left knee condition was related to the accident at work. He again described it as a "distracting injury" and noted it was very common that one would not notice knee symptoms until he started weight bearing (Petitioner's Exhibit 4).

At the direction of Respondent, Dr. Gillock prepared a supplemental report dated October 30, 2018. He reaffirmed his opinion Petitioner's left knee condition was not work-related. Further, he opined Petitioner was at MMI and able to return to work without restrictions in regard to his work-related injury (Respondent's Exhibit 3).

Petitioner was able to return to work for another employer on February 11, 2019. Petitioner worked as a pipe fitter; however, the work was within the restrictions imposed by Dr. Blackmon because Petitioner did not have to work at heights or on uneven surfaces. Petitioner worked at this job through the May 14, 2019, a period of 13 2/7 weeks. At that time, Petitioner stated he had to quit because of his left knee pain. Petitioner tendered into evidence his pay stub which noted Petitioner had earned $26,404.88 (Petitioner's Exhibit 7).

Dr. Blackmon was deposed on April 3, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Blackmon's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Dr. Blackmon testified the work restrictions he imposed on Petitioner on September 20, 2018, were in regard to Petitioner's left knee and Petitioner was at MMI in regard to the left calf as of October 18, 2018 (Petitioner's Exhibit 3; pp 23-24).

In regard to Petitioner's left knee condition, Dr. Blackmon testified Petitioner sustained a meniscal tear as a result of the accident. In explaining this opinion, Dr. Blackmon noted the torn gastroc was a painful injury to sustain which would have been a "distracting injury" and Petitioner did not notice knee symptoms until he started weight bearing. In regard to Petitioner not complaining of any knee symptoms until August, 2018, Dr. Blackman observed this coincided with Petitioner's beginning to bear weight on the left leg. In regard to the mechanics of the injury, Dr. Blackman stated that if one stepped down with enough force to tear the gastroc, it would also be enough force to tear the meniscus (Petitioner's Exhibit 3; pp 27-30).

On cross-examination, Dr. Blackman agreed Petitioner did not report any twisting of the knee when he sustained the accident. However, Dr. Blackman also stated that the typical mechanics is a step and then a pivot or step. He noted people have been walking, stepped off of a curb, and torn a meniscus (Petitioner's Exhibit 3; p 38).

Dr. Gillock was deposed on April 30, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Gillock's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. In regard to the cause of Petitioner's knee condition, Dr. Gillock testified it was not related to Petitioner's employment primarily because Petitioner did not report any twisting injury to the knee (Respondent's Exhibit 1; pp 10, 19).

On cross-examination, Dr. Gillock testified that 90% to 95% of his practice consists of performing legal examinations, most of which are done at the request of employers or insurance companies. Dr. Gillock also agreed he had never performed any knee surgeries (Respondent's Exhibit 1; pp 24-25).

At trial, Petitioner testified he continues to have left knee pain and is still subject to the work restrictions imposed by Dr. Blackmon. Other than the aforestated period of time that Petitioner worked with restrictions, he has not been able to work since the date of accident. Petitioner wants to proceed with the MRI and, if indicated, further treatment as recommended by Dr. Blackmon.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of March 15, 2018.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on March 15, 2018, which caused a tear of the left gastrocnemius muscle.

Petitioner's primary treating physician, Dr. Blackmon, an orthopedic surgeon, opined Petitioner's left knee condition was related to the accident of March 15, 2018. Dr. Blackmon described the gastroc tear as being a "distracting injury" which would cause one not to notice knee symptoms until he started weight-bearing. Petitioner did not begin to complain of knee symptoms until August, 2018, which was concurrent with his beginning weight-bearing. Further, Dr. Blackmon also noted that if Petitioner stepped with enough force to cause a gastroc tear, this could also be enough force to tear a meniscus.

Respondent's Section 12 examiner, Dr. Gillock, opined the accident of March 15, 2018, did not cause Petitioner's left knee condition, primarily because Petitioner did not report a twisting injury. However, Dr. Gillock is an occupational medicine specialist, not an orthopedic surgeon, and has never performed knee surgeries. Further, Dr. Gillock's practice consists almost exclusively of performing legal examinations for employers and insurance companies.

Given the preceding, the Arbitrator finds the opinion of Dr. Blackmon to be more persuasive than that of Dr. Gillock in regard to causality.

In regard to disputed issue (G) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner had an average weekly wage of $3,289.09.

In support of this conclusion the Arbitrator notes the following:

Section 10 of the Act specifies four methods for determining the average weekly wage of a Petitioner. This was specifically noted by the Supreme Court in *Sylvester v. Industrial Commission*, 756 N.E.2d 822, 826 (Ill. 2001).

The first method is for an employee who has consistently worked for the employer at least one year. The average weekly wage is computed by taking the employee's earnings, excluding overtime and bonus, and dividing by 52. The second method is for an employee who has consistently worked for an employer for at least one year, but who has missed five or more days of work during the year. The average weekly wage is computed by taking the employee's earnings, excluding overtime and bonus, and dividing by 52 minus the number of days/weeks the

employee missed work. Obviously, neither of these methods of computing the average weekly wage are applicable in this case.

The third method of computing the average weekly wage is for an employee who has worked for the employer less than one year. In this instance, the employee's total earnings, excluding overtime and bonus, are divided by the number of weeks/days the employee worked for the employer. This is the method of computation of the average weekly wage that has been used by Petitioner's counsel.

The fourth method of computing the employee's average weekly wage is when the employment relationship is so short or casual that it is impractical to use one of the first three methods. In this situation, the average weekly wage is computed by using the average weekly wage of a similarly situated employee for the year preceding the date of accident. This is the method of computing the average weekly wage has been used by Respondent's counsel.

There was no question that Petitioner worked for Respondent for 14 days and had an average weekly wage of $3,289.09. Petitioner was hired to work for Respondent on a special project for specific period of time, six weeks, and work six days a week, 10 hours a day.

The Arbitrator finds Petitioner's employment by Respondent was not of such a short duration or so casual that it is impractical to compute his average weekly wage using method three. Therefore it has been calculated using method three.

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 MRI of Petitioner's left knee as recommended by Dr. Blackmon, as well as further treatment recommended by Dr. Blackmon depending on the MRI findings.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that an MRI of Petitioner's left knee is medically reasonable and necessary. Dr. Blackmon has opined Petitioner sustained a torn meniscus and may have further treatment recommendations once the MRI is performed.

In regard to disputed issue (L) the Arbitrator makes the following conclusions of law:

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 48 6/7 weeks, commencing March 16, 2018, through February 10, 2019, and May 15, 2019, through May 24, 2019.

The Arbitrator concludes Petitioner is entitled to temporary partial disability benefits of 13 2/7 weeks, commencing February 11, 2019, through May 14, 2019.

In support of these conclusions the Arbitrator notes the following:

During the periods of temporary total disability, Petitioner has been subject to restrictions because of both his left calf and left knee injuries which have prevented him from working in a full and unrestricted capacity as a pipefitter.

During the period of time Petitioner was able to return to work, he worked as a pipefitter, but in less than a full and unrestricted capacity and during this period of time, Petitioner earned $26,404.88.

The total temporary partial disability owed by Respondent to Petitioner is $11,527.12 which is computed by $3,289.09 (average weekly wage) times 13 2/7 weeks which equals $43,695.56 minus $26,404.88 (amount actually earned) for a difference of $17,290.68, two thirds of which is $11,527.12.

William R. Gallagher, Arbitrator

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jared Garrett,
Petitioner,

vs. No. 18 WC 32235

Chad-Nic Management Services, Inc., LLC,
d/b/a/Shiloh Commons,
Respondent.

20IWCC0265

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 expenses, and employment relationship, 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 5, 2019, is hereby affirmed and adopted.

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

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

20IWCC0265

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

Bond for 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: MAY 6 - 2020

Marc Parker

Barbara N. Flores

o-04/16/20
mp/wj
68

DISSENT

I respectfully dissent from the Decision of the Majority. The Majority affirmed and adopted the Decision of the Arbitrator who found Petitioner sustained his burden of proving he was an employee of Respondent. I would have found that Petitioner did not sustain his burden of proving he was an employee of Respondent, reversed the Decision of the Arbitrator, and denied compensation.

The claimant has the burden of proving all aspects of their claim, including employment relationship. A representative from Respondent, Ms. Free, testified that Respondent hires various independent contractors to perform specific maintenance functions at the housing complex it managed. She also testified that Petitioner was hired as an independent contractor to perform specific maintenance duties. Both she and Petitioner testified that no other "employee" at the complex could perform the specific tasks Petitioner did. They also agreed that all employees were paid on the 1st and 15th of each month. However, Petitioner's pay stubs show that out of the total of 22 pay stubs submitted, eleven, or half of those payments, were made on days other than the 1st and 15th. In addition, the pay stubs indicate that Petitioner generally did not work full 40-hour weeks for Respondent, Petitioner acknowledged that he was responsible for his own taxes, Respondent issued Petitioner a W9 for tax purposes, and Petitioner received no employment benefits such as vacation time, *etc.* In addition, Respondent had separate checking accounts. One was used for payroll and the other was used to pay other expenses, including outside vendors. Petitioner was paid through the account used for expenses other than payroll.

20IWCC0265

Petitioner also testified that prior to working for Respondent he was self-employed for eight years rehabbing housing, which was the same type of work he was doing for Respondent. Finally, the record shows that Petitioner did not work for Respondent every day but rather if a problem arose for which he was needed, Respondent would phone or text him to come in to do the work. No residents would contact him to perform maintenance work, Respondent did. These factors all suggest an independent contractor relationship rather than an employment relationship.

For the reasons stated above, I would have found that Petitioner did not sustain his burden of proving he was an employee of Respondent, reversed the Decision of the Arbitrator, and denied compensation. Therefore, I respectfully dissent from the Decision of the Majority.

Deborah L. Simpson

Deborah L. Simpson

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

GARRETT, JARED
Employee/Petitioner

Case# **18WC032235**

CHAD-NIC MANAGEMENT SERVICES INC LLC
Employer/Respondent

20IWCC0265

On 6/5/2019, 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 2.25% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4620 ADWB LAW LLC
JOHN WINTERSCHEIDT
51 EXECUTIVE PLAZA CT
MARYVILLE, IL 62062

2965 KEEFE CAMPBELL BIERY & ASSOC
SHAWN BIERY
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

20IWCC0265

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)

Jared GARRETT
Employee/Petitioner

v.

CHAD-NIC MANAGEMENT SERVICES, INC. LLC
Employer/Respondent

Case # **18** WC **32235**

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 **Ed Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **March 20, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **October 3, 2018**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$31,200.00**; the average weekly wage was **$600.00**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **3** dependent children.

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

Respondent shall be given a credit of **$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

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $35.41 to Petitioner for his out-of-pocket medical expenses, and $132,577.80, as itemized in Petitioner's Exhibit 10, to Petitioner, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for Dr. Pet's recommended medical treatment, including but not limited to physical therapy and possible surgery, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act until Petitioner reached maximum medical improvement.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $400.00/week for 11 6/7 weeks, commencing October 4, 2018 through December 26, 2018, 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.

Signature of Arbitrator

6/4/19
Date

ICArbDec19(b)

JUN 5 - 2019

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

20 I W C C 0 2 6 5

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION 19(b) DECISION

JARED GARRETT,
Employee/Petitioner,

v. Case # 18 WC 032235

CHAD-NIC MANAGEMENT SERVICES, INC., L.L.C.,
Employer/Respondent.

MEMORANDUM OF 19(b) DECISION OF ARBITRATOR

FINDINGS OF FACT

While "accident," "causation," past and future "medical expenses," "temporary total disability" and "penalties" are also disputed issues in this Hearing pursuant to Sections 19(b) and 8(a), the determinative issue is whether Petitioner was an "employee" of Respondent, as defined by the Act, when he sustained accidental injures on October 3, 2018. For purposes of this Decision, "Shiloh Commons" is the same legal entity as "Chad-Nic Management Services, Inc., L.L.C." (hereinafter, "Chad-Nic"). However, it is necessary to refer to the two separately to fully explain Petitioner's relationship with Chad-Nic, so the generic term, "Respondent" will not be used when differentiation is necessary.

Chad-Nic, locally based in Mascoutah, Illinois, owns apartment complexes nationally, including Shiloh Commons in Shiloh, Illinois. Jana Free, a 20 year employee and present Regional Manager for Chad-Nic, testified that while she is not familiar with the day-to-day operation of Shiloh Commons, an essential component of operating an apartment complex includes picking-up trash from common areas, maintaining and replacing heating and air conditioning units in common buildings and individual apartment units, electrical maintenance throughout the complex, wall and door repair in the common buildings and

units, and repair and replacement of cabinets and fixtures in the individual units. To perform these necessary, daily tasks, Shiloh Commons hires "Maintenance Techs" to perform the work. For extraordinary work, such as sewer work or pest extermination, outside vendors are called.

Petitioner is 36 years old and began working for Shiloh Commons in August 2017 after completing a job application and submitting it to Shiloh Commons' then Property Manager, Ramah Crowell. Ms. Free testified that she could not locate a copy of the application, but did provide a copy of federal tax form, W-9, signed by Petitioner on August 25, 2017, that stated his status as "Individual/sole proprietor or single-member L.L.C."

After completing the application, Petitioner was given two yellow shirts by Ms. Crowell to wear while he worked and Petitioner began his tenure at the apartment complex, working on average, 40 hours-a-week, from 8:30 a.m. to 5:00 p.m., Monday through Friday, with a scheduled lunch break daily from 12:30 p.m. to 1:00 p.m. Chad-Nic paid Petitioner $15.00 an hour for the time he worked at Shiloh and another Chad-Nic apartment complex in O'Fallon, Illinois (as verified by pay-check stubs offered in evidence by both Petitioner and Respondent), and was paid overtime rates for weekly hours in excess of 40 and bonus rates for work performed on weekends and holidays.

The Shiloh Common tenants were provided a telephone number to call in the event their individual units were in need of repairs. When that number was called, Manager Crowell would call or text Petitioner and instruct him to immediately address the issue- regardless of the time of day or night and regardless of whether it was on a weekend or holiday. Petitioner was not allowed to hire additional help for any project, nor was he allowed to decline any work. According to Petitioner, he would be fired if he did so. If his cell phone was not operational during his normal work hours, he was required to report to Manager Crowell's office every hour or two during the work day for assignments.

Unless responding to a maintenance call as indicated above, Petitioner reported each morning to Shiloh Commons at 8:30 a.m. when he was given a daily work sheet prepared by Manager Crowell. The tasks listed thereon included everything from picking-up trash in the common areas of the complex to electrical work, wall and door repair,

cabinet repair and replacement to changing locks and heating and air conditioning repair. Manager Crowell provided Petitioner with a master key granting him access to all buildings and apartment units in Shiloh Commons for performing these services.

Petitioner was given access to a Shiloh Commons' credit card that he would use about three-times-a-week to purchase materials or supplies to perform his work for the apartment complex.

In addition to being given daily work sheets, Manager Crowell regularly gave him "work orders" that, Petitioner explained, were requests by tenants for specific work to be performed in their respective units. Petitioner was not permitted to decline any of these requests, as doing so would result in his immediate termination. Petitioner also testified that he could also be fired at any time, for any reason.

When Petitioner completed his assigned daily tasks, he would hand-write the hours he worked on a time sheet and submit them to Manager Crowell. At the conclusion of a particular Chad-Nic pay period, Manager Crowell would forward the time sheets to Chad-Nic, where they were calculated by Chad-Nic personnel by multiplying the number of hours Petitioner worked during that pay-period by his hourly rate of $15.00 (or overtime/weekend/holiday rates when applicable). Chad-Nic would then issue paychecks, made payable to Petitioner, accordingly. At the time of his accident, Petitioner was paid by Chad-Nic on the 1st and 15th of the month (as was Chad-Nic Regional Manager, Free), and Petitioner would pick-up his pay checks at the Chad-Nic office in Mascoutah.

In approximated January 2018, Petitioner was invited to attend, and did attend a banquet held by Chad-Nic at its Mascoutah headquarters for its employees. The dinner and festivities were paid for by Chad-Nic.

Copies of Petitioner's available pay check stubs were submitted in evidence by both Petitioner and Respondent, but are not representative of the entire period Petitioner worked for Shiloh Commons, neither individually or collectively. The check stubs also lack uniformity, as some of the stubs indicate pay periods, others reflect specific hours worked and those hours multiplied by $15.00, some reflect overtime hours without specific pay

rates, while still others reflect only a date and the amount of the check. Thus, it is impossible to accurately determine how the amount of each individual pay check was calculated, but it is apparent that Petitioner was paid at a base rate of $15.00 an hour for his work. Nowhere on any of the pay check stubs is there any identifiable indication of Petitioner's status as an employee, independent contractor, vendor or otherwise. Respondent produced a tax form 1099 that reflected payment of $8,752.50 to Petitioner for the partial year worked during 2017.

Regional Manager Free testified that Petitioner was categorized as a "vendor" or "outside contractor" by Chad-Nic. Petitioner testified that during the entire period he worked for Shiloh Commons, from August 2017 through his accident date of October 3, 2018, no one on behalf of Chad-Nic or Shiloh Commons told him that he was not an employee of Shiloh Commons. To the contrary, Petitioner testified that he believed he was employed by Shiloh Commons until after his work accident.

Shiloh Commons provided the tools for Petitioner's work, that were kept in a locked tool shed, to which Petitioner was provided a key. Shiloh Commons also published a newsletter for its tenants that listed Ms. Crowell as Property Manager, listed the Assistant Manager by name and job title, and published Petitioner's name with his job title of Maintenance Tech.

While Petitioner worked for Shiloh Commons, he held no other employment.

Petitioner reported to work on October 3, 2018 and was given a daily work sheet by Manager Crowell. One of the assigned tasks was to install a kitchen cabinet in one of the units. The cabinet required cutting, and Manager Crowell provided Petitioner with a circular saw for that purpose. While cutting the cabinet, the saw kicked-back, resulting in a deep laceration of Petitioner's dominant, right hand and wrist. Petitioner was transported by ambulance to Belleville Memorial Hospital. After recording the history of Petitioner's accident, taking X-rays of his hand and noting the exposed bone at his injury site, Petitioner was airlifted by helicopter to Barnes-Jewish Hospital in St. Louis.

Petitioner was admitted to Barnes-Jewish Hospital and underwent surgery that day for the complex injury to his right 1st web space, palm and carpal tunnel. Cable grafting for complete laceration of the medial nerve was performed, using sural nerve graft from Petitioner's right calf. Cable grafting was also necessary due to laceration of the median nerve to the thumb. Surgery was also required to release the carpal tunnel. In addition to nerves being harvested from Petitioner's right calf, the surgeon harvested live tissue from his right ankle. After two days of hospitalization, Petitioner was discharged with instructions to remain off work and to follow-up with his surgeon, Dr. Michael Pet.

Petitioner initially saw Dr. Pet post-operatively on October 10, 2018. He was provided with a brace, his off-work status was continued, and he was referred to Washington University Occupational Therapy. Petitioner underwent the therapy and testified that it improved his condition.

On November 5, 2018, Dr. Pet performed another surgical procedure, this time debriding Petitioner's wound of dead tissue under anesthesia. Dr. Pet last saw Petitioner on December 26, 2018, at which time he allowed him to return to work (with primary use of his left hand, according to Petitioner) and advised him that he may require additional surgery to improve function in his injured hand. Additional therapy was recommended and Petitioner's next follow-up appointment with Dr. Pet is scheduled for April 29, 2019.

Petitioner last received therapy in February 2019, and testified that his rehabilitation was discontinued due to his inability to pay for the treatment.

Because of the medical care Petitioner received for his work injury, medical bills totaling $132,613.21 were generated by the providers referenced above. Of that amount, Petitioner paid $35.41 and balance of $132,577.80 remains outstanding.

Excluding symptoms referable to his right calf and right ankle graft sites, Petitioner has lost sensation in his right hand, his right thumb and every finger on that hand. He has little strength in the hand and is in constant pain. He demonstrated significant loss of motion and dexterity in his thumb and fingers of the hand and testified that he would like to undergo the additional treatment recommended by Dr. Pet.

CONCLUSIONS OF LAW

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

As is evident by Petitioner's accident described above, Respondent is an enterprise in which sharp edged cutting tools are used, so Respondent is automatically operating under the Illinois Workers' Compensation Act, pursuant to Section 3 (8) of the Act. 820 ILCS 305, Sec. 3 (8).

Issue B. Was there an employee-employer relationship?

There is no one rule that has been or could be adopted to govern all cases where an employee/employer relationship is in dispute. Rather, various factors have been discussed to help identify when a person is an employee. O'Brien v. Industrial Comm'n, 48 Ill.2d 304 (1971) and Henry v. Industrial Comm'n, 412 Ill. 279 (1952). Factors include: "Whether the employer may control the manner in which the person performs the work; whether the employer dictates the person's schedule; whether the employer pays the person hourly; whether the employer withholds income and Social Security taxes from the person's compensation; whether the employer may discharge the person at will, and; whether the employer supplies the person with materials and equipment." Robertson v. Industrial Comm'n., 225 Ill.2d 159 (2007). However, the "right to control" is deemed the most important factor in making the determination. Weir v. Industrial Comm'n, 318 Ill.App.3d 1117 (2002). "An independent contractor is defined by the level of control over the manner of work performance." Horowitz v. Holabird & Root, 212 Ill.2d 1 (2004).

In this case, it is clear that Chad-Nic, through Shiloh Commons Property Manager, Ramah Crowell, controlled the manner in which Petitioner performed his work. Petitioner was given two yellow shirts by Manager Crowell to wear while he worked. Petitioner worked regular hours, from 8:30 to 5:00 with a half-hour scheduled lunch break from 12:30 to 1:00, and was given a master key that allowed him access to every apartment in the complex and access to all other locked rooms or buildings in the complex. Shiloh

Commons published a newsletter for its tenants that listed Petitioner' name and job title as "Maintenance Tech" for the complex.

When Shiloh Commons tenants needed repairs in their units, they called Manager Crowell, who in turn, called or texted Petitioner with instructions to address the tenants' maintenance issues. Petitioner was not allowed to hire help for any project, nor could he decline any particular job. If his cell phone was not operational during his work day, he was required to report to Manager Crowell's office at regular intervals to receive work instructions. While Petitioner worked for Shiloh Commons, he held no other employment.

When Petitioner was not responding to a particular maintenance call from a tenant, he reported to Manager Crowell at the onset of each work day when he was given a daily work sheet prepared by Manager Crowell that listed tasks to be completed during that day. Manager Crowell also gave Petitioner work orders that directed him to perform various maintenance projects in the units.

Petitioner was not paid by the job or project. Rather, he was paid a base rate of $15.00 an hours and paid overtime rates for time worked more than 40 hours a week and time worked on weekends and holidays. When Petitioner completed his assigned tasks, he was required to complete daily time sheets by documenting the hours he worked on any given day, those hours then multiplied by his hourly rate of pay by Chad-Nic personnel, who would then issue paychecks on the 1st and the 15th of each month, the same dates on which Chad-Nic's other employees are paid. Petitioner would collect his checks at Chad-Nic's office. Nowhere on the paychecks is Petitioner categorized as a "independent contractor" or otherwise.

Chad-Nic Regional Manager Free testified that the company categorized Petitioner as a 'vendor" or "outside contractor." While Petitioner signed federal tax W-9, provided by Shiloh Manager Crowell when he completed his employment application, that labeled him as "Individual/sole proprietor or single-member L.L.C." and Chad-Nic provided him with federal tax form 1099 for the year 2017, Petitioner testified that he believed he was an employee during the entire time he worked for Shiloh Commons and no-one told him

otherwise. Chad-Nic also invited Petitioner, and he attended, a banquet held at Chad-Nic headquarters for its employees.

Shiloh Commons provided Petitioner tools for the work he performed for the apartment complex, and Manager Crowell personally gave him the circular saw that caused his injury. He was provided a key to the complex's tool room and was given access to a Shiloh Commons' credit card to purchase materials and supplies for the apartment complex.

Applying the Robertson criteria to the facts here:

(1). Whether the employer may control the manner in which the person performs the work? Shiloh Commons' Manager Crowell dictated Petitioner's schedule every day he worked, either in person, by telephone call or text, daily work sheet or work order relayed from a tenant. It is clear that Shiloh Commons controlled the manner in which Petitioner performed his work.

(2). Whether the employer dictates the person's daily schedule? Petitioner was required to report to work at Shiloh Commons at 8:30 a.m. on each work day and was required to work until 5:00 p.m. A daily lunch break from 12:30 p.m. to 1:00 p.m. was also dictated by Shiloh Commons. Thus, it is readily apparent that Shiloh Commons dictated Petitioner's daily schedule.

(3). Whether the employer pays the person hourly? Petitioner was not paid by the project or the job. He was paid $15.00 an hour with bonus pay for hours in excess of forty hours a week and for work on holidays or weekends.

(4). Whether the employer withheld income or Social Security taxes from the person's employment? Chad-Nic withheld neither.

(5). Whether the employer may discharge the person at will? Petitioner testified that he could be fired at any time for any reason, or for no reason at all. Chad-Nic General Manager Free did not contradict this testimony.

(6). Whether the employer supplied the person with materials and equipment? Petitioner was given access to a Shiloh Commons credit card that he regularly used to purchase materials to perform his duties as a Maintenance Tech for Shiloh Commons. Not only was Petitioner given a key to the tool room for access to equipment to perform his work for Shiloh Commons, Shiloh Commons Manager Crowell provided him with the very circular saw that caused his injuries.

Every Robertson criteria for determining Petitioner's status dictates that he was an employee of Respondent at all times relevant herein, except that Chad-Nic did not withhold income or Social Security taxes from his checks. 225 Ill.2d 159 (2007).

Considering the above, I find that an employee-employer relationship existed between Petitioner and Respondent on October 3, 2018.

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

Petitioner was using a circular saw, provided by Shiloh Commons' Manager Crowell, cutting a kitchen cabinet in a Shiloh Commons apartment when the saw kicked back and severely lacerated his right hand. An accident did therefore occur that arose out of and in the course of Petitioner's employment with Respondent.

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

Immediately following Petitioner's accident, he was taken by ambulance to a local hospital and shortly thereafter airlifted to Barnes-Jewish Hospital where he underwent emergency surgery that day. Common sense and a chain-of-events analysis conclusively dictates that Petitioner's injuries were caused by his October 3, 2018 accident. "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester. Industrial Comm'n, 93 Ill.2d 59, (1982). Petitioner's current state of ill-being is causally related to his October 3, 2018 work injury.

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?

There is no evidence of unreasonable or excessive treatment found in the record, and the treatment Petitioner has received since October 3, 2018 is directly related to his right-hand injury.

Therefore, Respondent is hereby ordered to pay Petitioner the sum of $35.41 for his out-of-pocket medical expenses and is further ordered to pay him the sum of $132,577.80 for outstanding medical bills listed in Petitioner's Exhibit 10, pursuant to the Act's Medical Fee Schedule.

Issue K. What temporary benefits are in dispute?

Petitioner was excused from work by either the Barnes-Jewish hospital personnel, or by treating surgeon, Dr. Michael Pet from October 4, 2018 through December 26, 2018, a period of 11 6/7 weeks. This period of total disability is supported by Petitioner's credible testimony and the medical records in evidence. Respondent offered no evidence to contradict Petitioner's claimed period of temporary total disability. Therefore, Respondent is ordered to pay Petitioner the sum of $4,742.80 ($400.00 per week for a period of 11 6/7 weeks), that being the period for which temporary total benefits are owed.

Issue K. Is Petitioner in Need of Prospective Medical Treatment?

Petitioner remains under active medical care with surgeon, Dr. Pet. He last saw Dr. Pet on December 26, 2018 and has a follow-up appointment on April 29, 2019. Dr. Pet has recommended Petitioner undergo additional physical therapy for his hand, but Petitioner has been unable to do so for lack of funds. Dr. Pet has also discussed future surgery to improve the function of Petitioner's hand. Petitioner testified that he would like to receive the treatment Dr. Pet has recommended.

Considering all the evidence, I find that Petitioner is in need of prospective medical treatment to cure and relieve the effects of his October 3, 2018 work injury. Respondent is

therefore ordered to authorize Dr. Michael Pet's recommended treatment and ordered to pay for that treatment pursuant to the Act's Medical Fee Schedule until Petitioner reaches maximum medical improvement from his October 3, 2018 work related injury.

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

While it is clear that Petitioner was an employee of Respondent on October 3, 2018, I cannot say that Respondent's dispute of that issue was vexatious or in bad faith, given the fourth Robertson factor. Therefore, Petitioner's request for penalties and attorney fees pursuant to Sections 19(k), 19(l) and 16 of the Act are hereby denied.

Edward Lee

Edward Lee

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 PEORIA)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mary Fran Wessler,
Petitioner,

vs. No. 15 WC 22355

20IWCC0266

Peoria Public School District 150,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that, the Decision of the Arbitrator filed January 16, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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.

SOIACC0588

20 I W CC 0266

Pursuant to §19(f)(2) of the Act, no appeal bond is set in this case. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 6 - 2020

Marc Parker

mp/wj
04/02/20
68

Barbara N. Flores

DISSENT IN PART AND CONCURRENCE IN PART

I respectfully dissent in part from, and concur in part with, the Decision of the Majority. The Majority affirmed and adopted the Decision of the Arbitrator who found Petitioner sustained her burden of proving that a stipulated accident caused a condition of ill-being of her right knee. She awarded Petitioner 8&1/7 weeks of temporary total disability ("TTD") benefits and 96.75 weeks of permanent partial disability ("PPD") benefits representing loss of 45% of the right leg. I would have affirmed the Decision of the Arbitrator regarding accident, causation, and temporary total disability. However, I believe that the PPD award is excessive, based on the excellent recovery Petitioner had after her surgeries. Therefore, I concur with the Decision of the Majority regarding accident, causation, and TTD and dissent from the Decision of the Majority affirming the Arbitrator's PPD award.

Petitioner sustained a stipulated accident on September 11, 2014 when a student collided with her at work. She sustained a right-knee injury which resulted in surgery to repair a meniscus tear. She also eventually had right-knee replacement surgery, which the Arbitrator found was causally related to her work injury because it aggravated her pre-existing degenerative joint disease.

To her credit, Petitioner testified that the surgery gave her back her life. She had no problems with her right knee. She was able to return to work at her prior job at the same wage and without restrictions. She also testified that she needed no ongoing treatment due to the work accident. In my opinion, the award of loss of 45% of the right leg is excessive. Petitioner herself testified she had no ongoing problems and the Arbitrator seems to have awarded PPD for multiple surgeries and for overall "pain and suffering" which is not appropriate in Workers' Compensation awards. Rather, the Commission is directed to award PPD based only on a claimant's actual degree of permanent disability. In looking at the entire record before us, I believe a PPD award of 64.5 weeks, representing loss of the use of 30% of the right leg would be appropriate here. Therefore, I dissent from the Decision of the Majority affirming the Arbitrator's PPD award representing loss of 45% of the right leg.

20 IWCC0266

For the reasons stated above, I concur with the Decision of the Majority regarding accident, causation, TTD, and medical expenses. However, I dissent from the Decision of the Majority affirming the Arbitrator's PPD award.

Deborah L. Simpson

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WESSLER, MARYFRAN
Employee/Petitioner

Case# **15WC022355**

20IWCC0266

PEORIA PUBLIC SCHOOL DIST 150
Employer/Respondent

On 1/16/2019, 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 2.46% 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:

0192 CUSACK GILFILLAN & O'DAY
DANIEL CUSACK
415 HAMILTON BLVD
PEORIA, IL 61602

5354 STEPHEN P KELLY
ATTORNEY AT LAW LLC
2710 N KNOXVILLE AVE
PEORIA, IL 61604

20IWCC0266

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

- [ ] 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

MaryFran Wessler
Employee/Petitioner

v.

Peoria Public School Dist. 150
Employer/Respondent

Case # **15** WC **22355**

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 **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Peoria**, on **November 21, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **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*** 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.

Per the stipulation of the parties, in the year preceding the injury Petitioner earned **$36,224.69**; the average weekly wage was **$928.83**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **0** dependent child.

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

Respondent shall be given a credit of **$1,147.65** for TTD, **$0** for TPD, **$0** for maintenance, **$0** in non-occupational indemnity disability benefits and **$5,000.00** in other benefits (*i.e.*, agreed PPD advancement), for a total credit of **$6,147.65.**

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

ORDER

Respondent shall pay the reasonable and necessary medical services as included in **Petitioner's Exhibit 10** as provided in Sections 8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner. Respondent is entitled to a credit for all benefits paid under its group health plan under Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$619.22**/week for **8 4/7** weeks, for the timeframes of **April 9, 2015 through April 26, 2015** and **March 23, 2017 through May 3, 2017,** as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$557.30/week** for **96.75 weeks**, because the injuries sustained caused **45% loss of the right leg**, as provided in Section 8(e) of the Act.

Respondent shall be given a credit of **$1,147.65** for TTD, **$0** for TPD, **$0** for maintenance, **$0** in non-occupational indemnity disability benefits and **$5,000.00** in other benefits (*i.e.*, agreed PPD advancement), for a total credit of **$6,147.65.**

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

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

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

Signature of Arbitrator

1/11/19
Date

JAN 16 2019

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MaryFran Wessler
Employee/Petitioner

Case # **15** WC **22355**

v.

Consolidated cases: **N/A**

Peoria Public School Dist. 150
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that she is 62 years old and that she began working for Respondent in 2003 as a paraprofessional. Petitioner testified that while working for Respondent on September 11, 2014, she was taking a lunch break with her co-workers in a classroom when they began to hear sounds across the hall. She testified that the employees went to see what was going on and there had been a physical altercation between two students. She testified that per protocol, they began to direct the students out of the classroom and that one of the male students who had been involved in the altercation began to taunt a female student involved in the altercation who was being restrained. She testified that she directed the male student to get out of the classroom when the female student broke free and charged the male student, colliding with Petitioner. She testified that she had her feet planted and her arms out and that when the female student hit her body, she twisted her right knee and stumbled. She testified that security arrived and restrained the students and that when leaving the classroom, she felt pain and instability in her right knee. She further testified that she informed the school secretary that day and decided not to file a formal claim because she wanted to wait and see if the pain got better. She testified that the next morning when her knee was worse, she reported it to the school secretary and was sent to IWIRC.

With regard to prior knee problems, Petitioner testified that she had problems with both of her knees in the past. She testified that she went to her primary care physician who referred her to an orthopedic physician, Dr. Orlevitch. She testified that she saw Dr. Orlevitch several times for both of her knees between 2010 and 2013, and further testified that she had several injections as well as having had both of her knees drained of fluid. She testified that Dr. Orlevitch also performed an arthroscopy procedure on her right knee in July 2012. Petitioner further testified that her knees got better and that she did not require any treatment from the last time that she was seen by Dr. Orlevitch on February 8, 2013 until the incident at issue, which was approximately 19 months later. She also testified that she continued to work full duty during this 19-month timeframe as well.

Petitioner testified that after the incident on September 11, 2014 but prior to the knee replacement surgery having been performed, she had to travel to a conference in Las Vegas and had to switch planes in Minneapolis. She testified that she required gate assistance and rode in a wheelchair because of the pain she was experiencing in her right knee. She testified that approximately one year after the total knee replacement was performed by Dr. Akeson, she was sent to Boston in May 2018 with work colleagues for training and that on this particular trip, she needed no assistance and was able to carry her own bags and walk from gate to gate without the need for any type of assistive device.

Petitioner testified that she began seeing the physicians at IWIRC the day after her injury where she received prescriptions, ice packs, a brace and physical therapy. She testified that she also had an MRI performed, which showed a tear in her knee. She testified that she was then referred her to Dr. Akeson, who recommended an arthroscopic surgery on her right knee which was performed on April 9, 2015. She testified that after the scope, she continued to have constant pain that would wake her up at night and that she was unable to go to the grocery store, do laundry or pick up her grandchildren. She testified that Dr. Akeson ultimately recommended a knee replacement and that following the knee replacement and post-operative physical therapy, her right knee was "great." Petitioner denied having any trouble with her right knee currently and when asked if she felt that the total knee replacement helped, Petitioner responded affirmatively and stated that she got her life back. Petitioner further testified that she has not had any problems with her left knee since her treatment ended with Dr. Orlevitch in 2013.

On cross examination, Petitioner agreed that after she returned to work after the total knee replacement, she had been able to work in the same capacity as a paraprofessional for Respondent and that she has not seen Dr. Akeson since she was released from his care.

On cross examination, Petitioner agreed that she and Dr. Orlevitch had talked about possibly needing a total knee replacement down the road for both of her knees.

The transcript of the deposition of Dr. Jeffrey Akeson taken on August 24, 2016 was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. Dr. Akeson testified that he is an orthopedic surgeon and that half of his practice dealt with general pediatric orthopedics and that the other half was general adult orthopedics. (PX1).

Dr. Akeson testified that he first saw Petitioner on February 6, 2015 and that she gave a history that she had been a patient at Great Plains Orthopaedics, that she previously had an MRI scan, that she had a scope done by Dr. Orlevitch and that she had had evidence of a meniscus tear and some joint surface deterioration. He testified that Petitioner stated that her insurance had changed so she was changing groups, that she stated that the scope was not fully successful, that she still had some degree of pain made worse by certain activities, that most of her pain was medial and that occasionally the knee locked up on her. He testified that on physical examination, Petitioner had a pretty good-sized amount of fluid in the knee joint and tenderness along the medial joint line. He testified that the left knee was relatively normal in appearance and that the right knee was much more swollen and tender, that Petitioner had pseudolaxity and that she had good mobility. He testified that x-rays showed that there was some narrowing of the joint space medially, worse on the right than the left, and that Petitioner was close to the point where her bone was touching together, but that otherwise her x-ray findings were not remarkable. He testified that they discussed various treatment options and conservative therapies and that he thought that given her age and situation, it might be valuable to have another arthroscopic exam. (PX1).

Dr. Akeson testified that he scoped Petitioner on April 9th, which revealed that she had some damage to each side of her meniscus, medial and lateral but primarily medial-side damage, that she had inflammation which he described as diffuse in most parts of the joint and that there was wear behind her kneecap with some bone showing behind her kneecap on the medial side of the joint. He testified that Petitioner's joint surfaces looked good on the lateral side but that she had some damage to the front half of her lateral meniscus as well. He testified that his physician's assistant saw Petitioner again about two weeks after the scope on April 22nd and that Petitioner seemed to be doing okay at that time. He testified that Petitioner was still taking some Hydrocodone, that she had an effusion and that range of motion was reasonably good. He testified that his physician's assistant aspirated Petitioner's knee and gave her a cortisone injection. He testified that Petitioner was again seen by his physician's assistant on May 13th, at which time she had some erythema anterior to the knee and that it appeared as if she might have some

cellulitis, and that her knee joint itself seemed okay. He testified that Petitioner's antibiotic was switched as she had had some reaction to Keflex. He testified that Petitioner was seen approximately one week later and that she was still hurting some, but that the erythema was gone at that point. He testified that Petitioner was still slightly swollen, that she had good range of motion but was still having enough pain, and that they talked about her having further surgery sometime which might be a partial knee replacement on the right knee. (PX1).

Dr. Akeson testified that Petitioner was recommended to undergo physical therapy after that and she continued to have pain. He testified that Petitioner was functional and that she had been back to work with some restrictions, but still felt significantly limited in her day to day activities. He testified that he next saw Petitioner on June 11th at which time there were no signs of cellulitis, that she said her pain was essentially the same as it had been before the most recent scope procedure, mostly on the medial joint line, and that she had a large effusion. He testified that Petitioner's knee was aspirated of 150 cc's (which was as much as he had ever aspirated from a person's knee) and that she was again injected with cortisone. He testified that when he saw Petitioner on October 21, 2015, she still had quite a bit of swelling and that she had mentioned going back to IWIRC. He testified that Petitioner had been through all conservative options and that she was still functioning poorly, and that he told her that she had to decide when she had reached the point where she had to make a change. He testified that this was the last time that he saw Petitioner. He testified that if Petitioner were in the same situation with the same complaints, he would still be recommending surgery. (PX1).

Dr. Akeson testified that he had a comment in his notes about Petitioner working light duty and managing after the scope procedure and that he did not see any other reference to her work situation subsequently. He testified that as far as he knew, he never had Petitioner totally off work. He testified that he did not remember the restrictions that were placed. He testified that he was aware that Petitioner had prior work done on both her left and right knees. He testified that in his review of Dr. Orlevitch's records, Petitioner had had some degree of knee symptoms for a few years previously starting in approximately 2010 and that in 2012 she had a scope done on each of her knees with at that time relatively similar findings, and that she had had MRI scans done which showed meniscal damage. (PX1).

When posed a hypothetical question asking him to assume that Petitioner's last office visit with Dr. Orlevitch was on February 8, 2013 and that she saw no one until September 11, 2014 when she twisted her knee, Dr. Akeson testified that he believed that the surgery he had recommended would help her. Dr. Akeson testified that Petitioner's pain became worse after the fight so at least, by history, her symptomatology was substantially worse than it had been a year before he saw her. When asked if he had an opinion whether the incident with the fight triggered, caused or accelerated surgery on the right side, Dr. Akeson responded that he thought it may have accelerated surgery but that he could not be 100% positive to what extent. When asked whether Dr. Orlevitch made statements about how bad the arthritis was, Dr. Akeson responded that in his operating report he described chondromalacia and to his recollection did not describe any bone visible, but felt that there was enough of it to warrant him doing the chondroplasty portion of his procedure. When asked if one had arthritis whether it made one more or less prone to injury when a trauma was superimposed, Dr. Akeson responded that it probably made one more prone to at least having pain after a trauma as opposed to a person with a normal knee. He testified that if Petitioner returned and indicated that she wanted surgery, he would perform it. (PX1).

On cross examination, Dr. Akeson agreed that he was only provided one history of a potential work accident, which occurred on September 11, 2014. He agreed that he had no evidence or any type of information regarding any work accident pre-dating September 11, 2014, nor did he have any evidence or indication of any accident occurring at work after September 11, 2014. He agreed that he really did not know what happened at the time of the altercation on September 11, 2014 to Petitioner's right or left knees. He agreed that he knew that there was an altercation on that date according to Petitioner, and that he had to

rely on the patient's accuracy in giving opinions in a case. He agreed that if that accuracy was not on point, it could change his opinion on causation. (PX1).

On cross examination when asked if from what he knew according to his records whether he was sure if the incident that Petitioner described to him had any effect on her right knee, Dr. Akeson responded that all he could do was go by Petitioner's history that she appeared to be doing better before and that subsequent to what occurred at work, she had more pain which had persisted. He agreed that in looking at his medical records, there was no indication of any type of twisting injury to the right knee. He agreed that he knew that there was an altercation but that he did not know what effect it had on either the right or left knee, but further testified that Petitioner said that she had been shoved out of the way. He agreed that he could not say what happened to either knee. (PX1).

On cross examination, Dr. Akeson agreed that he could not tell what stage or what the arthritis looked like in the right knee on September 10, 2014. He agreed that we could assume that there was arthritis in the knee on September 10, 2014. He agreed that he could not state what condition the meniscus was in on September 10, 2014. (PX1).

On cross examination, Dr. Akeson agreed that doctors in this situation when talking about knee replacements talked about their doing the replacement when the patient came forward and stated that they needed it. He agreed that he encouraged patients, considering their age, jobs, and weight, to hold off as long as possible before they did a knee replacement and that he agreed that he held that same philosophy in this case. (PX1).

On cross examination, Dr. Akeson testified that Petitioner at some point subsequent to the scopes had the opinion that the scopes were not 100% successful based on her history. He agreed that Petitioner informed him in her history that the scopes that were performed by Dr. Orlevitch had not been a full success. He agreed that this led him to believe that Petitioner was still having pain after those procedures. (PX1).

On cross examination, Dr. Akeson agreed that his records indicated that Petitioner had fluid build-up on the right knee leading up to the described work injury. He agreed that this would lead him to believe that there was an active process in the knee when it came to a degenerative condition. He agreed that based on that information, Petitioner may have needed a knee replacement prior to the work injury. He agreed that according to Petitioner's records she was symptomatic prior to the work injury and that she was having fluid aspirated from the knee prior to the work injury, but that he did not know whether or not she was actively treating. (PX1).

On cross examination, Dr. Akeson agreed that prior to the work injury Petitioner had had a surgery done to the knee, that she had been provided a diagnosis by her orthopedic surgeon prior to the work injury, that she had received treatment to the knee by an orthopedic surgeon prior to the injury, that she provided a history of some fluid build-up after the surgery, that she provided him a history that the surgery did not make her 100% better, that she was overweight and that it was more likely than not that she probably needed a knee replacement absent the work injury. He agreed that he had not seen Petitioner since October 2015 and that he could not say whether there had been any other new accidents to the knee since that timeframe. He agreed that he could not say absolutely what Petitioner's current condition of her knee was at that time. He agreed that the arthritic condition in the knee could be aggravated by certain activities, that if at the time of trial it was shown that she was engaged in gardening activity and she had an increase in symptoms, that that could be aggravating her arthritic knee. He agreed that long walking while shopping in St. Louis was the type of activity that could aggravate the knee, that picking up grandchildren was such an activity that could aggravate the knee and that trying to get in fitness classes and performing aerobics or those types of activities could aggravate the knee. (PX1).

On redirect, Dr. Akeson testified that he could not say, absent this accident, when if ever Petitioner would have needed a knee replacement. He agreed that it was possible that Petitioner could need one and that she go her life without replacing it. When asked whether he had reviewed or had any evidence that Petitioner saw a doctor from when she stopped seeing Dr. Orlevitch until September 11, 2014, Dr. Akeson responded that all he had was that she was referred from IWIRC but that he did not absolutely know that she was seeing a doctor there. He testified that he did not have any records that the day before or shortly before September 11, 2014 that Petitioner had fluid on the knee. (PX1).

The medical records of IWIRC were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner was seen on September 12, 2014, at which time it was noted that she was seen for an initial evaluation of her right knee. It was noted that Petitioner stated that the injury occurred on September 11, 2014, that she was assisting students out of a classroom when a student bumped into her causing her to lose her balance, and that she did not fall down. It was noted that Petitioner's pain was rated 7/10 at initial onset and was currently 5/10. It was noted that Petitioner described symptoms of a sharp, burning sensation along the inner area of the right knee and under the kneecap, and that she had been taking over-the-counter aspirin and applied ice for symptom relief. It was also noted that Petitioner reported a history of multiple bilateral knee problems with surgery, that she stated that she had knee pain everyday but that this felt different, and that she had noted increased swelling in the medial knee. The assessment was noted to be that of a right knee MCL strain. Petitioner was dispensed various items including a knee brace and a ThermalSoft Gel Cold/Hot Pack and was also dispensed over-the-counter Aleve. Petitioner was also returned to work with restrictions. (PX2).

The records of IWIRC reflect that Petitioner was seen on September 17, 2014, at which time it was noted that she stated that her symptoms had improved since the last office visit. It was noted that Petitioner stated that she still had pain that would primarily increase when using stairs or standing/sitting for prolonged periods of time, and that she rated her current pain level at 4/10. It was noted that Petitioner was currently taking over-the-counter Naproxen and Tylenol, that she continued hot/cold two times per evening, that she was doing range of motion exercises and that she wore a knee brace as directed. It was also noted that Petitioner stated that she was doing better but still had trouble with stairs and standing/sitting for too long, and that she stated that she always had swelling. The assessment was noted to be that of right knee MCL strain. Petitioner was recommended to continue the Tylenol, knee brace, ice/heat and range of motion exercises. Petitioner was dispensed over-the-counter Aleve and was issued work restrictions. At the time of the September 24, 2014 visit, it was noted that Petitioner stated that her symptoms had improved since the last office visit. It was noted that Petitioner stated that she had a constant ache in her right knee with increase in pain when using stairs or sitting/standing for prolonged periods of time, and that she rated her current pain level at 2-3/10. It was noted that Petitioner was currently taking over-the-counter Tylenol and Naproxen, that she continued hot/cold packs two times per evening, that she was doing range of motion exercises and that she wore her knee brace as directed. It was also noted that Petitioner stated that she was doing well, that she reported aching slightly worse than normal with intermittent sharp, shooting pains with certain movements, and that she continued to wear a brace. It was noted that Petitioner was ready to get off restrictions. The assessment was noted to be that of right knee MCL strain, resolving. Petitioner was recommended to continue the ice/heat, Naproxen and Tylenol, and to continue the knee brace at work. Petitioner was also recommended to increase her exercise frequency to at least three times per day. Petitioner was allowed to return to work regular duty. (PX2).

The records of IWIRC reflect that Petitioner was seen on October 1, 2014, at which time it was noted that she stated that her knee was about the same but that the pain was worse when going down the stairs. It was noted that Petitioner had tenderness medially and a "hotter" pain, that she used more ice than heat but used heat as well, and that her knee had swelling but that she believed it was due to arthritis. It was noted that Petitioner rated her current pain at 3/10 and that she was currently taking Naproxen and Tylenol. It was also noted that Petitioner stated that she was about the same as the last office visit, that she

reported continued intermittent pain with certain movements, more with stair use but especially when going down stairs, and that she stated that she was alternating Naproxen and aspirin and taking over-the-counter Tylenol. It was also noted that Petitioner felt that she had more swelling than at the last office visit. The assessment was noted to be that of right knee MCL strain and that with the continued pain and worsening effusion, they would rule out new internal derangement with an MRI. Petitioner was dispensed over-the-counter Tylenol and was recommended to continue ice/heat, Tylenol, knee brace and exercises as previously instructed. Petitioner was allowed to return to work regular duty. At the time of the October 8, 2014 visit, it was noted that Petitioner stated that her symptoms had stayed about the same, that she had her MRI done and was there for the results, and that she was using ice/heat, wearing her brace and doing exercises. It was noted that Petitioner rated her current pain level at 2/10 and that she was currently taking Naproxen. It was also noted that Petitioner stated that she still had the pain in the medial side of the right knee. The assessment was noted to be that of right knee medial meniscus tear noted on MRI. Petitioner was referred to orthopedics. Petitioner was also dispensed over-the-counter Naproxen and was recommended to continue ice/heat, over-the-counter Tylenol, knee brace and exercises as previously instructed. (PX2).

The records of IWIRC reflect that Petitioner was seen on October 22, 2014, at which time it was noted that she stated that her symptoms had worsened recently due to an increase in activity, that she rated her current pain at 4/10, that she stated the pain increased with going down steps and that she described the pain as sharp with tightness and burning. It was noted that Petitioner was currently taking Naproxen and Tylenol and that she stated that she had not yet seen orthopedics due to not receiving prior medical records from Great Plains. It was also noted that Petitioner stated that she felt worse on that date, that she reported that she had done a lot of walking over the weekend and believed the increased activity made the pain worse, and that she was contacted by Midwest Orthopaedics and was awaiting transfer of records from Great Plains prior to having a consultation scheduled. It was noted that Petitioner continued to have pain with stairs, worse when going up, and that she denied any significant functional changes. The assessment was noted to be that of right knee medial meniscus tear, awaiting orthopedic consultation. Petitioner was dispensed Nabumetone and was recommended to continue ice/heat, bracing, over-the-counter Tylenol and gentle range of motion exercises as previously instructed. Petitioner was also allowed to return to work without restrictions. At the time of the November 5, 2014 visit, it was noted that Petitioner stated that her symptoms had remained about the same since the last office visit, that she rated her current pain at 3/10, that the pain was constant and would increase with overuse, and that the pain was least in the morning and increased as the day went on. It was noted that Petitioner stated that at times the right knee would "lock up" and feel unstable, that she was currently taking Naproxen and Tylenol, and that she was wearing the brace as directed. It was also noted that Petitioner reported that after her medical records were received by Midwest Orthopaedics and that her case was declined due to multiple previous knee surgeries by another provider. The assessment was noted to be that of right knee medial meniscus tear. It was noted that Petitioner was to be referred to Great Plains Orthopedics due to multiple previous contacts. Petitioner was dispensed Nabumetone and a ThermalSoft Gel Cold Pack. Petitioner was also referred to physical therapy and was recommended to return to work without restrictions. (PX2)

The records of IWIRC reflect that Petitioner was seen on November 19, 2014, at which time it was noted that she stated that her symptoms had stayed about the same, that she was still having swelling and sharp pain and felt that the knee was unstable and that she was waiting for an orthopedic appointment. It was noted that Petitioner was using ice/heat and was wearing a knee brace during the day and that she rated her pain at 3/10 and was currently taking Nabumetone. It was also noted that Petitioner had pain in the medial knee and that her strength was improved. The assessment was noted to be that of right knee medial meniscus tear, improving. It was noted that Petitioner was awaiting orthopedics and was recommended to continue physical therapy. Petitioner was dispensed Nabumetone and was recommended to use heat and wear her brace during exertion. Petitioner was allowed to return to work with no restrictions. At the time of the December 3, 2014 visit, it was noted that Petitioner stated that her symptoms had improved and

included achy, tight, and hot at the medial knee, that the swelling was improved, that the sharp pain had decreased but would return by the end of the day, and that she rated her current pain at 2-3/10. It was noted that Petitioner stated that she was still awaiting orthopedics and was currently taking Nabumetone, doing exercises every hour, using a heat pack and wearing a knee brace. The assessment was noted to be that of right knee medial meniscus tear, improving. Petitioner was noted to be awaiting orthopedics and was recommended to continue physical therapy. Petitioner was dispensed Fast Freeze and was recommended to continue ice/heat, to wear her brace during exertion, to continue Nabumetone and to return to work full duty. (PX2).

The records of IWIRC reflect that Petitioner was seen on December 17, 2014, at which time it was noted that she stated that her symptoms had remained about the same, that she was becoming frustrated with the little improvement that had occurred, that she stated that the pain got worse as the day went on and that she was still awaiting her orthopedics appointment. It was noted that Petitioner rated her current pain at 2-3/10 and that she was currently taking Nabumetone. It was also noted that Petitioner stated that her right knee locked up with rising occasionally, that she was able to prevent it by manipulating the back of the knee, that she stated that she had had surgeries done on both knees and that they were both unstable and that she stated that she had degenerative joint disease in both knees. The assessment was noted to be that of right knee medial meniscus tear, improving. Petitioner was noted to be awaiting orthopedics and was recommended to hold physical therapy until after she saw orthopedics. Petitioner was recommended to continue Fast Freeze, to wear her brace during exertion and to return to work full duty. Petitioner was also dispensed Nabumetone. At the time of the December 30, 2014 visit, it was noted that Petitioner stated she had an appointment with Dr. Atkinson [*sic*] on January 14, 2014, that she stated that her symptoms had remained about the same since her last office visit and included a constant ache in the medial right knee with intermittent sharp pain with use, that she stated that the pain increased by the end of the day with swelling, and that the knee would almost lock up when going from a sit to stand position. It was noted that Petitioner rated her current pain at 2-3/10, that she was currently taking Nabumetone, that she was using Icy/Hot as she was out of the Fast Freeze, that she was wearing a knee brace, that she was alternating ice/heat packs and doing home exercises for the knee twice a day, and that she was currently working regular duty. It was also noted that Petitioner continued to have a clicking sensation in the medial right knee and pain with rotation. The assessment was noted to be that of right knee medial meniscus tear, improving. Petitioner was recommended to follow-up with orthopedics, to continue home physical therapy, to use heat, to use Fast Freeze, to take Nabumetone, to wear her brace during exertion and to return to work full duty. (PX2).

The records of IWIRC reflect that Petitioner was seen on January 8, 2015, at which time it was noted that she stated that all her symptoms remained and that they had not increased or decreased in intensity. It was noted that Petitioner still had an ache medially which could occasionally become sharp upon certain movements and usage, and that her appointment at Midwest Orthopaedics had been rescheduled. It was noted that Petitioner was currently using Fast Freeze and taking Nabumetone, and that she rated her current pain level at 2-3/10. It was also noted that Petitioner continued to have medial knee pain with movement and that she had decreased range of motion due to pain. The assessment was noted to be that of right knee medial meniscus tear, stable. Petitioner was recommended to follow-up with orthopedics, perform range of motion exercises, use heat, take Nabumetone and return to work full duty. At the time of the January 21, 2015 visit, it was noted that Petitioner stated that her knee was not any better or worse, that she still experienced an ache medially which at times became sharp depending on movement, that she was to see orthopedics on February 6th, that she stated that her knee had not displaced or locked up for almost a week and that she stated that she had good range of motion. It was noted that Petitioner applied heat and ice, that she rated her current pain level at 2-3/10 and that she was currently taking Nabumetone. The assessment was noted to be that of right knee medial meniscus tear, stable. Petitioner was recommended to follow-up with orthopedics, perform range of motion exercises, use heat, take Nabumetone and return to work full duty. (PX2).

The records of IWIRC reflect that Petitioner was seen on February 13, 2015, at which time it was noted that she stated that her symptoms had stayed about the same, that she had some stiffness, aches and some burning pain at times, that she rated her current pain level at 4/10 and that she was currently taking Nabumetone, using a gel pack and doing range of motion 2-3 times per day. It was noted that Petitioner had seen an orthopedist and was waiting on approval of some type of surgical plan. It was also noted that Petitioner continued to have pain in the medial knee, that she had pain at rest and with exertion, and that wearing a brace helped. It was also noted that there had been confusion and that Petitioner's orthopedic management had been on hold. The assessment was noted to be that of right knee medial meniscus tear, stable. It was noted that Petitioner was to continue orthopedic referral and management and was to use heat, perform range of motion exercises, continue Nabumetone, wear a brace and return to work full duty. At the time of the March 2, 2015 visit, it was noted that Petitioner stated that her symptoms had included soreness and tenderness, that she rated her current pain level at 2-3/10 and that she was currently taking Nabumetone, applying heat, doing her range of motion and wearing a brace. It was noted that Petitioner reported that she would have surgery on April 9th. The assessment was noted to be that of right knee medial meniscus tear, stable. Petitioner was recommended to follow-up with orthopedics, use heat, do range of motion exercises, take Nabumetone and wear her brace. (PX2).

The records of IWIRC reflect that Petitioner was seen on March 23, 2015, at which time it was noted that she stated that her symptoms had gotten worse, that she rated her current pain at 4/10, that she was currently taking Nabumetone and was using heat, doing exercises and wearing her brace, and that she was on regular work. It was also noted that Petitioner had had increased discomfort due to an altercation with a student on March 13, 2015, and that she had increased pain and decreased range of motion in the right knee. The assessment was noted to be that of right knee medial meniscus tear, stable. Petitioner was noted to be scheduled for surgery on April 9th, that she was referred for physical therapy, that she was to use heat, wear her brace, do range of motion exercises and take Nabumetone, and that she was to return to work with no restrictions. At the time of the March 25, 2015 visit, it was noted that Petitioner was seen for evaluation of her bilateral knee strain. It was noted that Petitioner stated that her symptoms had remained the same since her last office visit and included constant aching in the right knee with tenderness and pain above the knee to below the patella, that in the left knee her symptoms included constant tenderness above the left knee to below the patella and along the medial and posterior knee, and that she stated that her range of motion had improved. It was noted that Petitioner rated her current pain at 3-4/10, that she was currently taking Nabumetone, using a heat pack and doing home exercises, and that she was currently working her regular job duties. It was also noted that Petitioner stated that she still had a dull ache with rest 3-4/10 that worsened with walking and was really bad with climbing down stairs, and that she had been doing her exercises, applying ice and heat, taking Nabumetone and using Fast Freeze as suggested. The assessment was noted to be that of (1) bilateral knee strain; (2) right knee medial meniscus tear, not related to this injury. Petitioner was recommended to continue ice/heat, continue range of motion, continue Nabumetone and return to work regular duty. Petitioner was also dispensed Fast Freeze. (PX2).

The records of IWIRC reflect that Petitioner was seen on March 31, 2015, at which time it was noted that she stated that her symptoms had slightly improved, that she was still having very distinct sharp pains right under her patella on her right knee and that she rated her current pain at 3/10 but that it could spike up to 7/10 with certain movements. It was noted that Petitioner was currently taking Nabumetone and applying heat which helped loosen the muscles, and that she stated that the Fast Freeze helped. It was also noted that Petitioner's pain predominantly was in the left knee medial and inferior to the patella, and that her pain increased with exertion. The assessment was noted to be that of (1) bilateral knee strain, improved; (2) right knee medial meniscus tear, not related to this injury. Petitioner was recommended to use heat, continue physical therapy, take Nabumetone and return to work full duty. At the time of the April 13, 2015 visit, it was noted that Petitioner stated that since she just had surgery on April 9th, that it was too soon to tell if her knee had improved or not, that she stated that she could bend her knee and put weight on it, and that she rated her current pain at 4/10. It was noted that Petitioner was currently taking Nabumetone.

It was also noted that Petitioner still had moderate pain and edema with decreased range of motion, that she still had a dressing in place and that she was using crutches for walking. The assessment was noted to be that of right knee medial meniscus tear, stable. Petitioner was recommended to follow instructions with orthopedics and follow-up with them as directed. Petitioner was also allowed to return to work with restrictions. (PX2).

The records of IWIRC reflect that Petitioner was seen on May 8, 2015, at which time it was noted that she stated that her last orthopedics appointment was two weeks after surgery and that she was scheduled to return at the end of May. It was noted that Petitioner stated that they drained her right knee but not as much as they were able to, that she stated that she could bear more weight on her right knee now, and that she stated that the pain increased as the day went on and by the evening the knee felt hot inside. It was noted that Petitioner rated her current pain level at 3/10, that she was currently taking Nabumetone, that she had discontinued the knee brace due to it making her lower leg swell, and that she was on sedentary restrictions. It was also noted that Petitioner stated that the right knee remained swollen on the lateral side after a month, that she used an ice block all night on the knee, that she stated that it was impossible to be on sedentary duty and had to climb stairs occasionally, and that she had not yet started physical therapy. The assessment was noted to be that of right knee medial meniscus tear, slowly improving. Petitioner was recommended to follow instructions from orthopedics, follow-up with orthopedics as directed, return to work with restrictions and alternate ice/heat. At the time of the May 22, 2015 visit, it was noted that Petitioner stated that her last orthopedics appointment was two days ago due to having an infection, that she was given an antibiotic and the infection had started to clear, and that she stated that the knee felt okay right now but that the pain increased as the day went on. It was noted that Petitioner stated that when she was bearing weight on her right knee it felt full, that she rated her current pain level at a constant 2-3/10, and that she was currently alternating ice and heat when she was able. It was noted that Petitioner was unsure when her next orthopedics appointment would be and that she was told they were trying to decide on the next form of treatment. It was also noted that Petitioner's knee remained enlarged. The assessment was noted to be that of right knee medial meniscus tear, infection resolving. Petitioner was recommended to follow instructions from orthopedics, follow-up with orthopedics as directed, return to work with restrictions and alternate ice/heat. (PX2).

The records of IWIRC reflect that Petitioner was seen on June 4, 2015, at which time it was noted that she stated that her symptoms were the same since the last office visit, that she rated her current pain level at 3/10 and that it could go up to a 5-6/10 if she was standing for a long period or walking, and that she was currently taking no medication. It was also noted that Petitioner's infection was gone but that she still had the underlying 3/10 pain that went up to a 5-6/10 after standing for long periods or walking. The assessment was noted to be that of (1) right knee medial meniscus tear; (2) right knee post-op infection; (3) underlying right knee degenerative joint disease. It was noted that Petitioner was discussing total knee replacement with orthopedics. Petitioner was recommended to follow instructions from orthopedics, follow-up with orthopedics as directed, return to work with restrictions and continue ice/heat and range of motion exercises. Petitioner was also dispensed Fast Freeze. At the time of the June 18, 2015 visit, it was noted that Petitioner stated that her symptoms had improved since the last office visit, that she stated that she saw orthopedics the week before and had had 150 cc's of fluid drained from the right knee which alleviated the pain, and that she rated her current pain at 1/10. It was noted that Petitioner was currently taking Nabumetone and using ice/heat and Fast Freeze as directed, and that she had also started physical therapy and had more sessions scheduled. The assessment was noted to be that of (1) right knee medial meniscus tear; (2) degenerative joint disease, right knee. Petitioner was recommended to follow instructions from orthopedics, follow-up with orthopedics as directed, return to work with restrictions, continue ice/heat and range of motion exercises and continue Fast Freeze as needed. Petitioner was also recommended to continue physical therapy. (PX2).

The records of IWIRC reflect that Petitioner was seen on June 30, 2015, at which time it was noted that she stated that her symptoms had included tenderness and swelling, that she rated her current pain at 2.5-3/10 and that she was currently doing physical therapy twice per week, doing range of motion daily and using ice/heat for comfort. It was also noted that Petitioner still had swelling and some pain, and that she stated that she had pain with physical therapy. The assessment was noted to be that of (1) right knee medial meniscus tear; (2) degenerative joint disease, right knee. Petitioner was recommended to follow-up with orthopedics as scheduled, to return to work with restrictions, and to continue physical therapy and her home exercise program as directed. Petitioner was also dispensed Nabumetone. At the time of the August 3, 2015 visit, it was noted that Petitioner stated that her symptoms had remained the same since her last office visit, that she rated her current pain at 3/10 with constant throbbing, that she was currently taking Nabumetone and was doing physical therapy and that she stated that it was helping. It was also noted that Petitioner still had trouble with full extension and full flexion. The assessment was noted to be that of (1) right knee medial meniscus tear; (2) right knee degenerative joint disease. Petitioner was recommended to follow-up with orthopedics as scheduled, to return to work with restrictions, to continue physical therapy and home exercise program as directed, and to continue Nabumetone. (PX2).

The records of IWIRC reflect that Petitioner was seen on August 27, 2015, at which time it was noted that she stated that her symptoms had remained the same since her last office visit, that she rated her current pain at 2-3/10 that would increase as the day progressed, that she continued to take Nabumetone as directed and alternate ice/ heat, and that she continued to do physical therapy and a home exercise program as directed. It was also noted that Petitioner stated that her knee was more stable and that she could do more with the knee prior to surgery, that prior to surgery she could kneel, walk stairs and pick up her grandchildren, and that after surgery she was very unsteady on her feet, was careful with rising and needed to walk using her hands to steady herself. It was also noted that Petitioner was unable to kneel or squat and required assistance when walking stairs, that she could not lift her grandchildren or lift anything with weight now and that she stated that her knee was constantly swollen. The assessment was noted to be that of (1) right knee medial meniscus tear; (2) right knee degenerative joint disease. Petitioner was recommended to follow-up with orthopedics as scheduled, to return to work with restrictions, and to continue physical therapy and home exercise program as directed. Petitioner was also dispensed Nabumetone. At the time of the September 23, 2015 visit, it was noted that Petitioner stated that her symptoms had included swelling that got worse as the day progressed, some tenderness and a constant pain that was always there, and that she stated that by the end of the day she had a grinding-like sensation in the knee. It was noted that Petitioner rated her current pain at 2-3/10 but could increase to 6/10, and that she was currently taking Nabumetone, doing her home exercise program and applying ice/heat. It was also noted that Petitioner reported progress that had "stagnated" over the last few visits and that she was discussing joint replacement with orthopedics. It was noted that Petitioner stated that her pain was manageable, but that the loss of function was what really bothered her. The assessment was noted to be that of (1) right knee medial meniscus tear; (2) right knee degenerative joint disease. Petitioner was dispensed Nabumetone and Fast Freeze and was recommended to continue ice/heat, to continue physical therapy and to return to work with restrictions. (PX2).

The records of IWIRC reflect that Petitioner was seen on November 3, 2015, at which time it was noted that she stated that her knee was not very well on that date because it was increasingly aggravated at work the day before, that she stated that her surgery did not go as planned and that she had not been well since, and that she had fluid drained off her knee about two weeks prior. It was noted that Petitioner was to follow-up with orthopedics in December and was awaiting approval for another surgery, and that she did physical therapy twice but that it had been discontinued. It was noted that Petitioner rated her current pain at 3/10 and that she was currently taking Nabumetone. It was also noted that Petitioner stated that she had never gotten back to near where she was prior to the injury, that she felt that she needed more surgery on the knee and that the process had been started with insurance. The assessment was noted to be that of (1) right knee medial meniscus tear; (2) severe degenerative joint disease, right knee. Petitioner was dispensed

Nabumetone and was recommended to follow-up with orthopedics as directed, to continue heat and exercises as directed and to work with restrictions per orthopedics. At the time of the December 7, 2015 visit, it was noted that Petitioner stated that her symptoms had remained the same since the last office visit, that she rated her current pain at 2-3/10, that she stated that her pain would increase with certain movements and as the day went on, and that she stated that the swelling continued. It was noted that Petitioner was currently taking Nabumetone, doing a home exercise program and alternating heat/ice as directed. It was also noted that Petitioner had had an IME done and was waiting to hear back. The assessment was noted to be that of (1) right knee medial meniscus tear; (2) severe degenerative joint disease, right knee. Petitioner was recommended to continue to follow-up with orthopedics as scheduled and to work with restrictions as per orthopedics and was released from care. Included within the medical records of IWIRC were physical therapy notes for the timeframe of November 19, 2014 through December 16, 2014. (PX2).

The medical records of Touchstone Imaging were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner underwent an MRI of the right knee at Peoria Imaging Center on October 6, 2014, which was interpreted as revealing (1) horizontal tear medial meniscus mid posterior horn to posterior body with the tibial surface tissue of the posterior body and posterior juncture mildly displaced into the inferior gutter; mild maceration of the body which is completely extruded from the joint space; (2) inner rim truncation of the body of the lateral meniscus, moderately extruded from the joint space; (3) moderately severe diffuse chondromalacia medial of the medial tibial plateau and medial to posterior medial aspect of the medial femoral condyle; (4) severe chondromalacia midline aspect of the lateral tibial plateau in the mid-coronal plane; (5) severe diffuse lateral patellar chondromalacia; (6) mild patella alta with approximately 7 mm lateral patellar translation; moderately developmentally shallow trochlear groove; (7) very large hemarthrosis; prominent lipoma arborescens within the suprapatellar bursa. (PX3).

The medical records of Midwest Orthopaedic Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner was seen on June 21, 2017 for a re-check of her right knee. It was noted that she was status post right total knee arthroplasty, that she reported she had had a fall onto the right knee recently and had some soreness after, and that she was otherwise doing well overall. The assessment was noted to be that of replacement of the right knee. It was noted that additional post-operative instructions were reviewed and that activity, exercise, medication and ongoing expectations were discussed. Petitioner was recommended to follow-up in nine months for a one-year post-op recheck. At the time of the June 13, 2017 visit, it was noted that Petitioner stated that she fell the night before, that she was carrying items and did not watch where she was walking, and that the knee was a little sore but that everything seemed fine. It was noted that Petitioner had been on vacation, that she drove several states without any issues traveling and that she went to get out of the pool and did not think of her knee and used her total knee arthroplasty knee to step up on the ladder. It was noted that Petitioner was doing her exercises, that she was back to doing her housework and shopping, and that she was playing with her grandkids. Petitioner was to be discharged from physical therapy and was to continue her home exercise program. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen for physical therapy on May 23, 2017, at which time it was noted that her knee felt good, that she had no pain and just stiffness, and that she reported no functional deficits at that time. It was noted that Petitioner still struggled with eccentric quad control as evident with step-downs but that even that was improved, and that her range of motion was coming along nicely. It was noted that Petitioner was going to be out of town for a few weeks visiting her grandchildren and that her home exercise program was updated. At the time of the May 18, 2017 physical therapy visit, it was noted that Petitioner's knee felt good, that she had no pain and just stiffness, and that she reported no functional deficits at that time. It was noted that Petitioner still struggled with eccentric quad control as evident with step-downs but that even that was improved, and that her range of motion was coming along nicely. It was noted that Petitioner was going to be out of town for a few

weeks visiting her grandchildren and that her home exercise program was updated. At the time of the May 16, 2017 physical therapy visit, it was noted that Petitioner's knee was very sore on that date, that she had sat in a course for two hours which caused her knee to stiffen up and that it was now sore, and that she otherwise had no complaints. It was noted that Petitioner still struggled with eccentric quad control as evident with step-downs but that even that was improved, and that her range of motion was coming along nicely. At the time of the May 10, 2017 physical therapy visit, it was noted that Petitioner noted that her right knee was a little more stiff and sore following increased activity at work on that date, that she noticed that the knee had been swelling more with her increased activity, and that she had been able to make an icing schedule at work to help control symptoms. It was noted that Petitioner stated that although she was more active, she did not experience pain in the knee ever. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on May 4, 2017 for physical therapy, at which time it was noted that she had returned to work full-time on that date, that she stated that she had some slight increase in soreness and that she noticed the knee was fatigued but no complaints of pain. At the time of the April 28, 2017 physical therapy visit, it was noted that Petitioner felt a little stiff and was having some mild discomfort, that she had been feeling more pain in the evenings which told her that she had been overdoing it, and that she was able to go up stairs fine but needed to use hand support to go down stairs in a reciprocal pattern. It was noted that Petitioner was concerned about returning to work, that she felt her balance and endurance were poor and that she may not meet the physical demands of her job. At the time of the April 25, 2017 physical therapy visit, it was noted that Petitioner stated that her knee felt "funny" at the start of the session, that she stated that the best way to describe it was that the knee felt wobbly and unstable, and that she stated that despite feeling "off" on that date, everything had been feeling much better and she had been able to perform more of her activities of daily living with no issues. It was noted that overall Petitioner was very pleased with the way her knee had been progressing in therapy and mentioned being excited to be released back to work possibly the next week. Included within the records was a return to work slip dated April 21, 2017, allowing Petitioner to return to work full duty on May 4, 2017. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on April 21, 2017, at which time it was noted that she was four weeks status post right total knee arthroplasty on March 23, 2017, that she reported doing well and denied much pain, and that physical therapy was ongoing. It was noted that Petitioner ambulated with the assistance of a cane on that date. It was noted that Petitioner was to be provided with a work slip to return to work on May 4th and that she was to follow-up in two months. At the time of the April 21, 2017 physical therapy visit, it was noted that Petitioner was doing really well on that date with minimal pain, that she stated that she was walking much better and felt she did not need her cane, and that she still had difficulty falling asleep and that that was the only time she was taking her pain medication. At the time of the April 18, 2017 physical therapy visit, it was noted that Petitioner felt as though her right knee had been making strength and range of motion gains over the past week, that she did note over the past couple of days a new, inconsistent pain within the hardware, and that she had been woken up by the uneasy sensation. It was also noted that Petitioner stated that after about one or two "shots" of pain, it went away. It was noted that Petitioner was very motivated and did not complain with any increase to exercises. At the time of the April 13, 2017 physical therapy visit, it was noted that Petitioner continued to have good and bad days with her right knee, that she stated that the day before was a consistently painful day but that on that date she had no pain at all, and that sleeping was still very uncomfortable. It was noted that Petitioner stated that she rarely took pain medication for the knee anymore and was back to driving with no issues at all, and that although she was not back to the activity level she was at prior to surgery, she mentioned that she had been working on doing a little more each day around the house and out in the community. It was noted that Petitioner came to therapy with a straight cane and had no noted gait deviations. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on April 10, 2017 for physical therapy, at which time it was noted that she reported having increased stiffness in the right knee on that date especially through the posterior side of the knee, and that she was still not sleeping well at night and only getting a reported 3-4 hours of solid sleep. It was noted that Petitioner ambulated well in therapy with a straight cane with no significant gait deviations. At the time of the April 7, 2017 physical therapy visit, it was noted that Petitioner stated that she had been doing well overall, that she was not using her walker much in the house and that she felt that she could go without it. It was noted that overall, Petitioner felt like she was improving. At the time of the April 5, 2017 physical therapy visit, it was noted that Petitioner reported she was walking more around the house, that she noticed her pain level was up and down based on the amount of activity, and that sleeping tended to still be a struggle at night. It was also noted that Petitioner stated that she was taking pain medications on an as needed basis. At the time of the April 3, 2017 physical therapy visit, it was noted that Petitioner reported no increase in pain beyond the usual for her since surgery, that she felt as though her swelling had gotten better although she still noticed quite a bit around the mid-knee as expected, and that her biggest challenge had been navigating stairs to get up to the bathroom and down to the laundry room. At the time of the March 31, 2017 physical therapy visit, it was noted that Petitioner was back to using her wheeled walker over the cane, that she felt as though her right knee felt unstable, and that she was having difficulty sleeping through the night and continued to take medication and use ice as needed for pain relief. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on March 29, 2017 for physical therapy, at which time it was noted that she stated that her knee was sore and that she had been using her cane at home, transitioned herself to the cane and when she was going up her stairs, the railing "gave way" and she shifted all of her weight on her right leg. It was noted that Petitioner had been compliant with her home exercise program and icing when she could. At the time of the March 27, 2017 physical therapy visit, it was noted that Petitioner stated that she underwent surgery on March 23rd for a full knee replacement and that she had been doing pretty well since surgery. It was noted that Petitioner had been walking with her walker, but used her cane for the stairs. It was noted that prior to her knee injury in 2014, Petitioner had no difficulty with her knee. It was noted that Petitioner's deficits contributed to functional limitations including difficulty ascending and descending stairs, unable to shop, unable to drive to and from work, unable to restrain kids at work, and unable to stand and cook, among other issues. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on March 8, 2017, at which time it was noted that she reported continued right knee pain and swelling, that the pain could be severe at times, and that treatment had included aspiration and cortisone injection. The assessment was noted to be that of localized primary osteoarthritis of the right knee. It was noted that Petitioner had failed conservative treatment and that she was scheduled for right total knee arthroplasty on March 23rd. At the time of the January 18, 2017 visit, it was noted that Petitioner had a history of right knee arthroscopy on April 9, 2015, that she had had aspiration and cortisone injection at her last office visit on December 23, 2015, and that at that time they had discussed partial versus total knee replacement to reach maximum medical improvement. It was noted that Petitioner had been waiting for an arbitration hearing. It was also noted that Petitioner admitted to continued right knee pain and swelling, and that the pain could be severe at times. It was also noted that x-rays of the right knee were interpreted as revealing medial joint space narrowing, worse than previous films. The assessment was noted to be that of (1) localized primary osteoarthritis of the right knee; (2) intermittent hydroarthrosis of knee. Petitioner's right knee was injected with Depo Medrol and was also aspirated. It was noted that a discussion was had as to the role of injection therapy for the temporary treatment of arthritis symptoms. Petitioner was recommended to return as needed. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on October 21, 2015, at which time it was noted that she was status post right knee arthroscopy on April 9, 2015, that Dr. Akeson had previously aspirated and injected the knee two visits ago, and that she continued to have swelling to

the knee but stated that it did not seem quite as severe as when she was last aspirated. It was noted that Petitioner was scheduled to have an arbitration hearing sometime in November, and that her clinician did not believe any continued therapy would lead her to reaching her baseline short of a knee replacement. The assessment was noted to be that of (1) osteoarthritis of knee; (2) intermittent hydroarthrosis of knee. Petitioner was given an injection of Depo Medrol and was also aspirated. Petitioner was recommended to return in three months. At the time of the September 23, 2015 physical therapy visit, it was noted that Petitioner's knee was still tender, that she had good and bad days, that she went to her IWIRK [*sic*] appointment on that date and was told that her knee was bone-on-bone, and that they were not sure what else could be done short of surgery. It was noted that Petitioner was able to alternate up and down stairs at times but had to use step to pattern at other times, that shopping had good and bad times, that mornings tended to be the best and that the more she did in the day, the less she tolerated activity-wise later. It was noted that Petitioner had not been able to take her grandkids to the park by herself and that walking for fitness depended on the time of day and the daily activities. It was noted that Petitioner had reached a plateau in her progression and in tolerance of functional activities, and that she had demonstrated understanding of the home exercise program. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen for physical therapy on September 10, 2015, at which time it was noted that she stated that posterior left knee pain continued and that using stairs was difficult. At the time of the September 8, 2015 physical therapy visit, it was noted that Petitioner reported that her posterior knee pain was less constant but that the frequency increased with activity, that she stated that while shopping on Thursday she experienced a marked increase in right knee pain and had to stop what she was doing twice, and that she stated that she needed help to get the groceries in the house and put away. It was noted that Petitioner reported that her posterior knee pain was still present but less constant, that it increased with activity, and that she experienced marked pain while shopping at Wal-Mart on Thursday. At the time of the August 28, 2015 physical therapy visit, it was noted that Petitioner reported that the knee was doing pretty good and that as the day went on the knee would start hurting, and that she described it as tenderness and a hot feeling on the backside of the knee. At the time of the August 25, 2015 physical therapy visit, it was noted that Petitioner reported that she saw the doctor but that he did not aspirate any fluid from her knee but that he may need to do so at the next visit, and that she wondered if she had a Baker's cyst, adding that the posterior knee still really hurt. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on August 19, 2015, at which time it was noted that she returned once again for a follow-up regarding her right knee swelling. It was noted that aspiration of 150 cc's of joint effusion and a cortisone injection had provided Petitioner relief of about seven days, that she was still continuing with physical therapy and that she was awaiting decision regarding her worker's compensation. The assessment was noted to be that of (1) cellulitis; (2) osteoarthritis localized primary involving lower leg; (3) tear of medial cartilage or meniscus of knee. It was noted that Dr. Akeson thought that Petitioner would knee a knee replacement, either a unicompartmental or total, and that at her age he hoped to avoid a total replacement, if possible. Petitioner was recommended to continue physical therapy and to try and maximize her hamstring and quadriceps strength. At the time of the August 13, 2015 physical therapy visit, it was noted that Petitioner reported that her hamstrings continued to bother her the most and that she stated that they had been especially inflamed due to her preparing her classroom for the start of the school year during the past week. It was noted that Petitioner's pain and edema continued. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen for physical therapy on August 11, 2015, at which time it was noted that she reported that her hamstrings were acting up, that they had been tightening up at times and that it felt hot and sore on the medial side of the knee. It was noted that Petitioner's swelling was doing better, that she was back at school starting the day before, that she was doing housework but that her husband was doing the laundry (which was located in the basement) and that she was doing what she could while sitting. It was noted that shopping depended on how Petitioner felt

and that on a bad day she could not tolerate all the walking. It was noted that Petitioner was not walking for fitness or taking the grandkids to the park, that she was not yet doing gardening, and that she felt like the knee locked on occasion. At the time of the August 6, 2015 physical therapy visit, it was noted that Petitioner reported that her knee continued to feel as if it was going to give out but that it had not done it, and that she complained of increased swelling in her knee and added that she had not changed or increased her activities. At the time of the August 4, 2015 physical therapy visit, it was noted that Petitioner reported that her knee continued to lock up initially with sit-to-stand, and that she stated that it generally took about 4-5 steps to normalize. It was noted that Petitioner added that she did a lot of riding in the car over the weekend, including a trip to St. Louis, without a single rest stop. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen for physical therapy on July 28, 2015, at which time it was noted that she stated that she had experienced more sharp pain at the medial knee, that she avoided stairs whenever possible and that she had recently had two episodes of her knee locking upon standing with sit-to-stand and that it was frightening for her. It was noted that Petitioner's mild to moderate pain continued, especially at the medial knee. At the time of the July 23, 2015 physical therapy visit, it was noted that Petitioner noted continued discomfort in the knee with a grinding sensation that she felt that she could hear, that she also noted that when she went to turn or step the wrong way she had a lot of discomfort in the medial portion of the knee, and that she felt the tape seemed to have helped a little but came off after a couple of days. It was noted that Petitioner tended to hyperextend her knee with ambulation and remained to have a lot of inflammation surrounding her knee, and that it was felt that she may benefit with a good brace to prevent hyperextension during ambulation. At the time of the July 16, 2015 physical therapy visit, it was noted that Petitioner reported that she had experienced sharp pain since the last treatment session and that she was not sure if the kinesio tape helped. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen for physical therapy on July 6, 2015, at which time it was noted that she reported that the knee was fair, that she had had a rough weekend, that she went out on Friday where she did a lot of stairs and walking, that on Saturday she did some walking and a lot of sitting, and that on Sunday she spent a lot of time down with ice. It was noted that Petitioner felt the exercises were helping, that the knee felt more stable and that she was not as guarded with the knee. It was noted that Petitioner was making slow but gradual progress. At the time of the July 2, 2015 physical therapy visit, it was noted that Petitioner reported that over the last few days she had experienced some increase in edema but without increased activity. At the time of the June 30, 2015 physical therapy visit, it was noted that Petitioner reported that the fluid which was aspirated from her knee a few weeks ago was returning, and that she assumed that this would always be the case. It was also noted that Petitioner added that she had difficulty with fluid in her knee prior to surgery. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen for physical therapy on June 18, 2015, at which time it was noted that she had been having knee pain for years, that she had a history of degenerative arthritis and scope, and that she had not completely recovered since her surgery in April. It was noted that Petitioner had had 150 cc's of fluid drained from the knee the week prior, that she complained of aching and sharp pain on the medial side of the knee and occasionally inferior to the patella, and that the swelling tended to be more laterally. It was noted that twisting the knee increased the pain, that Petitioner was limited with stairs, walking distances, shopping and performing housework, and that she did no kneeling and avoided squatting, if possible. It was noted that Petitioner's hobbies included walking for fitness, reading, and being with friends and family, and that she could not do any gardening now due to her knee. It was also noted that Petitioner was not able to take her grandkids to the park and that she wanted to get back to performing her normal daily activities without pain. The assessment was noted to be that of (1) osteoarthritis localized primary involving lower leg; (2) pain in joint involving lower leg; (3) muscle weakness; (4) abnormality of gait. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on June 11, 2015, at which time it was noted that her cellulitis had resolved completely, that she had ongoing pain and that it was essentially where it was before surgery. It was noted that the pain was primarily in the medial joint line and that she had a very large knee effusion on that date, which was recommended to be aspirated and injected. It was noted that although Dr. Akeson thought that Petitioner had underlying issues previously, her work injury appeared to have exacerbated the problem and sped up her symptomatology. It was noted that he thought that Petitioner would need a knee replacement, either a unicompartmental or total, and that at her age he hoped that they could avoid a total replacement, if possible. It was noted that Petitioner was recommended to go through some physical therapy to try and maximize her hamstring and quadriceps strength as she had not been able to function at a very high level recently. Petitioner's right knee was aspirated and injected with Depo Medrol. At the time of the May 20, 2015 visit, it was noted that Petitioner had done well on the Levaquin with her erythema resolving, but that she still complained of pain in the right knee. It was noted that Petitioner was interested in discussing further options and that she did not feel she recovered as much as she wished with the arthroscopy. It was noted that Petitioner had minimal relief from the cortisone injection as well. It was noted that Petitioner had moderate to severe degenerative changes of the knee with really minimal relief from the arthroscopy as well as all other conservative measures, and that they would be planning on most likely proceeding with a knee replacement surgery. It was noted that Petitioner would be a candidate for a partial knee with preparation for a total, and that she had patellofemoral wear noted with arthroscopy. It was noted that Petitioner wished to start the scheduling process. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on May 13, 2015, at which time it was noted that she was a little over a month post-operative of her right knee arthroscopy and that she started developing some erythema to her right knee a couple of days ago. It was noted that Petitioner stated that the pain had decreased in the knee and was really minimal at that point, and that the redness was improving some. It was noted that Petitioner likely had a superficial infection and would be treated with oral antibiotics, and she was recommended to stop the Keflex and take Levaquin as it was suspected that she was having an allergic reaction to Keflex. A return to work slip was issued on April 22, 2015, allowing Petitioner to return to work on April 27, 2015 with restrictions. At the time of the April 22, 2015 visit, it was noted that Petitioner was seen for a two week follow-up after her right knee arthroscopy and medial meniscectomy. It was noted that Petitioner was having some edema but otherwise had no concerns and that her pain was well controlled. Petitioner's right knee was aspirated and cortisone was injected into the intraarticular space. It was noted that Petitioner needed to return to work on April 27th but was willing to go on light duty, and it was noted that this plan was acceptable if she was careful not to get injured again. Petitioner was recommended to follow-up in one week if not improving or one month otherwise. (PX4).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on February 6, 2015, at which time it was noted that she was seen for a second opinion on her right knee medial meniscus tear which occurred on September 11, 2014. It was noted that Petitioner was breaking up a fight at school where she worked when she got shoved out of the way which caused her injury, that she was initially evaluated by Great Plains and was diagnosed with right medial meniscus tear after an MRI, and that she had right knee arthroscopic medial meniscectomy, partial lateral meniscectomy, chondroplasty of the patellofemoral and medial compartment for significant grade 3 changes done by Dr. Orlevitch, but due to insurance issues had to switch for treatment. It was noted that per Petitioner the arthroscopy was only partially successful, that she rated her pain as 3/10 and reported that it was worse with stairs, prolonged standing, and twisting the joint, and that her pain was worse medially. It was noted that Petitioner also reported that her knee locked up sometimes and that the locking and pain had started limiting her activities of daily living. It was noted that x-rays taken on that date showed bilateral medial joint space narrowing, right slightly worse than left, that her right medial compartment was close to bone-on-bone and that her right patellofemoral compartment showed well maintained joint space narrowing, but that it could be artificially good because

of her effusion. The assessment was noted to be that of osteoarthritis localized primary involving lower leg and tear of medial cartilage or meniscus of knee. It was noted that a discussion was had as to right knee arthroscopy and right unilateral medial knee replacement. It was noted that Petitioner would need to get approval by IWIRC before she could have a procedure. It was noted that Dr. Akeson believed that a second right knee arthroscopy would be appropriate for her situation. The Medical History Questionnaire completed by Petitioner on February 6, 2015 noted that she had undergone previous surgeries including right and left knee surgeries in 2012, and that she had had significant fluid build-up in the right and left knees post-surgery. (PX4).

The medical records of Cardinal Medical Group were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner was seen on March 30, 2015 for pre-operative clearance. (PX5).

The medical records of OSF St. Francis Medical Center dated March 23, 2015 were entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The records reflect that Petitioner underwent pre-operative testing on that date. (PX6).

The medical records of OSF St. Francis Medical Center dated April 9, 2015 were entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The records reflect that Petitioner underwent surgery by Dr. Akeson on that date, which was that of a right knee arthroscopy and medial meniscectomy for a pre- and post-operative diagnosis of right medial meniscus tear. (PX7).

The medical records of OSF St. Francis Medical Center dated March 2, 2017 were entered into evidence at the time of arbitration as Petitioner's Exhibit 8. The records reflect that Petitioner underwent pre-operative testing on that date. (PX8).

The medical records of OSF St. Francis Medical Center dated March 23, 2017 through March 24, 2017 were entered into evidence at the time of arbitration as Petitioner's Exhibit 9. The records reflect that Petitioner underwent surgery by Dr. Akeson on March 23, 2017, which was that of a right total knee arthroplasty for a pre- and post-operative diagnosis of degenerative arthritis of the right knee. (PX9).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 10.

The medical records of Great Plains Orthopaedics were entered into evidence at the time of arbitration as Petitioner's Exhibit 11. The records reflect that Petitioner was seen on February 8, 2013, at which time it was noted that she was 11 weeks out from a left knee scope and six months out from a right knee scope. It was noted that the left knee looked good, that there was no effusion, and that range of motion was within normal limits. It was noted that the right knee had a moderate to large effusion on that date and that this had been the worst knee for Petitioner, and that it looked she had had either a shaving scratch to the knee or a scratch in the knee. Petitioner's right knee was aspirated on that date and was given a Kenalog injection. Petitioner was instructed to ice the knee and return in eight weeks. At the time of the January 15, 2013 visit, it was noted that Petitioner was eight weeks out from left knee surgery, that she had had a lateral release in the right knee and was four weeks out from an aspiration and injection. It was noted that Petitioner had an effusion in the right that was moderate and a mild effusion in the left, but was overall doing well. It was noted that Petitioner was much more pain-free and was working on a daily basis. Petitioner was recommended to return in six weeks. It was noted that if Petitioner still had swelling in the right knee, it may be aspirated and injected at that time. (PX11).

The records of Great Plains Orthopaedics reflect that Petitioner was seen on December 14, 2012, at which time it was noted that she was seen in follow-up of both knees. It was noted that Petitioner was a little more than three weeks out from a left knee partial meniscectomy and debridement for grade 3 severe

patellofemoral and medial, and that she was overall doing well with regard to that. It was noted that Petitioner's right knee was four weeks out from Euflexxa injection series and that she had accumulated a large effusion once again. Petitioner's right knee was aspirated and injected with Depo-Medrol. Petitioner was recommended to return in four weeks for both knees. At the time of the November 26, 2012 visit, it was noted that Petitioner was one week out from left knee surgery and that the knee had a mild to moderate effusion. It was noted that Petitioner's wound was healing well. Petitioner was fit with a Jobst stockinette and was recommended to return in three weeks. At the time of the November 16, 2012 visit, it was noted that Petitioner was scheduled for Euflexxa injection #3. It was noted that Petitioner had an effusion but not as much as the last time, but still a significant amount caused by her arthritis. Petitioner's right knee was injected with Euflexxa on that date. It was noted that Petitioner was going to be following up with Dr. Orlevitch for surgery on her left knee and that they would continue to monitor the right. (PX11).

The records of Great Plains Orthopaedics reflect that Petitioner was seen on November 9, 2012, at which time it was noted that she was status post right knee partial lateral meniscectomy, chondroplasty of the medial compartment, and patellofemoral chondroplasty with lateral release. It was noted that Petitioner had grade 4 changes in the patellofemoral joint and that it was causing her reaccumulate large effusions in the knee. It was noted that Petitioner had grade 3 in the medial compartment. Petitioner was given a Euflexxa injection #2 on that date and was instructed to return in one week for her third. It was noted that Petitioner just finished her Medrol Dosepak and that she was to take Relafen. At the time of the November 2, 2012 visit, it was noted that Petitioner continued to attain large effusions in the right knee, even a year ago when they were aspirating her for an injection series at that point. It was noted that Petitioner had severe medial and patellofemoral degeneration, that they had done a lateral release for severe lateral tilt and grade 4 chondromalacia of the lateral facet of the patella and that she was progressing. It was noted that Petitioner again had the grade 4 on the patellofemoral joint and that the arthritis was causing her knee to contain swelling. Petitioner was recommended to take a Medrol Dosepak and undergo Euflexxa injection series to treat the arthritis. Petitioner's knee was aspirated and was instructed to ice it down and return in one week. It was noted that Petitioner was feeling fine except for the swelling. (PX11).

The records of Great Plains Orthopaedics reflect that Petitioner was seen on October 5, 2012, at which time it was noted that she was more than nine weeks post-surgery on the right knee. It was noted that Petitioner had an effusion and that other than that, the joint felt good. It was noted that Petitioner was just uncomfortable with the tightness of the effusion and that Dr. Orlevitch thought it was coming from the grade 4 lateral patella arthritis. Petitioner's right knee was aspirated and was given a Kenalog injection. Petitioner was instructed to use ice and her compression stocking. Petitioner was recommended to return in 3-4 weeks. It was noted that Petitioner was scheduled for surgery on her left knee on November 19th. At the time of the August 28, 2012 visit, it was noted that Petitioner was five weeks post right knee arthroscopic partial medial meniscectomy, partial lateral meniscectomy, and chondroplasty of the patellofemoral and medial compartment significant grade 3 changes. It was noted that Petitioner had a slight effusion but overall was feeling well. Petitioner's right knee was aspirated and injected with Celestone. Petitioner was fit with another Jobst stockinette and was recommended to return in five weeks. It was noted that the left knee was very similar with torn medial and lateral menisci and severe degenerative change, and that Petitioner was going to be set up for November for arthroscopy, partial and medial lateral meniscectomies, chondroplasty and possible lateral release. (PX11).

The records of Great Plains Orthopaedics reflect that Petitioner was seen on May 11, 2012, at which time it was noted that her bilateral knees showed similar findings of severe medial and patellofemoral degeneration. It was noted that Petitioner had medial meniscal tears in both, degenerative tears in the lateral menisci in both and that they looked very similar, but that the right knee had been more consistently symptomatic. It was noted that Petitioner had pain with patellar grind on that date, pain with medial joint line stress and positive McMurray testing in the right and left knees. It was noted that since the right had been worse for Petitioner, Dr. Orlevitch recommended arthroscopy, partial medial meniscectomy, partial

lateral meniscectomy, chondroplasty and possible lateral retinacular release. Petitioner was to schedule at her convenience. At the time of the April 20, 2012 visit, it was noted that Petitioner had bilateral knee patellofemoral mainly slightly more than medial degenerative joint disease, that the right was usually a little worse than the left and usually swelled more than the left, but that both were significantly symptomatic. It was noted that Petitioner had never had MRIs of her knees and that Dr. Orlevitch wanted to see if she had eccentric wear of the lateral facet and any other internal derangement intraarticularly in both knees. It was noted that considering Petitioner's relatively young age whether an arthroscopic debridement and lateral release might be in order or whether repeating the Euflexxa injections was the best option. Petitioner was recommended to undergo the MRIs. (PX11).

The records of Great Plains Orthopaedics reflect that Petitioner was seen on January 3, 2012, at which time it was noted that she was 13 weeks out from bilateral knee Euflexxa injections. It was noted that Petitioner's right knee had a mild to moderate effusion, that the left knee had no effusion and that she had been using Relafen. It was noted that Petitioner stated that her knees were definitely improved, but that after the holidays they seemed to start to get sore again. Petitioner was recommended to take Glucosamine and to return in April for restart of the injection series. At the time of the October 4, 2011 visit, it was noted that Petitioner was there for bilateral knee Euflexxa injections #3 which were performed on that date. Petitioner's right knee was also aspirated on that date but no effusion was noted in the left knee. Petitioner was recommended to return in 12 weeks. It was noted that Petitioner felt that she was improving. At the time of the September 27, 2011 visit, it was noted that Petitioner was seen for bilateral knee Euflexxa injections which were performed on that date. It was noted that Petitioner did "okay" with her first round and that she stated that she had had more range of motion and decreased pain. It was also noted that Petitioner had mechanical symptoms, right greater than left. Petitioner's right and left knees were aspirated on that date. Petitioner was recommended to ice down and follow-up in one week for her third round of injections to both knees. (PX11).

The records of Great Plains Orthopaedics reflect that Petitioner was seen on September 20, 2011, at which time it was noted that her right knee had been bothering her since November 2010. It was noted that a corticosteroid injection had been performed to the left knee in 2010 and that it had helped, and that at that time Petitioner had significant effusion in the left knee. It was noted that Petitioner's pain in both knees was spontaneous in its onset and that she was diagnosed with patellofemoral arthritis. It was noted that Petitioner's left knee had been aspirated and injected with Depo-Medrol, and that now the right knee was bothering her more than the left. It was noted that x-rays were performed and interpreted by Dr. Orlevitch, and that they showed some medial compartment narrowing but mainly lateral facet patellar narrowing in both knees with lateral subluxation and tilt of the patella to a small degree on the Merchant view. It was noted that Petitioner got stiffness, that both knees were swollen on that date and that the right was more symptomatic than the left. Petitioner was recommended to undergo Euflexxa injections to both knees, which were performed on that date. Petitioner's right and left knees were also aspirated. Petitioner was instructed to ice down both knees and follow-up in one week. At the time of the December 10, 2010 visit, it was noted that Petitioner was doing very well six weeks from aspiration and injection to the left knee. It was noted that Petitioner had no complaints at that point and was doing well, and that she had successfully danced at her son's wedding. It was noted that Petitioner had just a trace of effusion on that date. Petitioner was recommended to follow-up as needed. (PX11).

The records of Great Plains Orthopaedics reflect that Petitioner was seen on October 26, 2010, at which time it was noted that she had had a spontaneous onset of left knee pain and swelling over the last month, that she had pain with sitting for a period of time and standing for a period of time in one position, and that it got very stiff and difficult to start to ambulate. It was noted that getting up from a seated or squatted position was difficult as well, that Petitioner avoided squatting as much as possible because it hurt, and that her pain was diffuse anteriorly and posteriorly and sometimes medially. The diagnosis was noted to be that of patellofemoral arthritis with an effusion that was inhibiting Petitioner's quadriceps and causing

dysfunction in the knee. Petitioner was recommended an aspiration and injection, which was performed. Petitioner was recommended to follow-up in six weeks. Petitioner was also prescribed Mobic. (PX11).

Included within the records of Great Plains Orthopaedics was a History and Physical dated November 12, 2012, which noted that Petitioner had noted gradual progressive pain, swelling, instability and grinding in the left knee. It was noted that Petitioner was scheduled for left knee arthroscopy, partial medial and lateral meniscectomies, possible lateral retinacular release on November 9, 2012 at Methodist Medical Center. The diagnosis was noted to be that of left knee meniscal pathology. Included within the records of Great Plains Orthopaedics was a History and Physical dated July 10, 2012, which noted that Petitioner stated that she had had significant pain in the right knee for approximately one year, that she was only able to walk 50-100 feet without pain but did need to stop sometimes on a more frequent basis, that she was able to climb the stairs but only taking one at a time and while holding a railing, and that she denied the use of a scooter or crutches but once in a while would use a cane, if needed. It was noted that Petitioner was scheduled July 23, 2012 at Methodist Medical Center for right knee arthroscopy, medial meniscectomy, possible retinacular release chondroplasty. The diagnosis was noted to be that of right knee medial meniscus tear. Also included within the records of Great Plains Orthopaedics was an Operative Report dated July 23, 2012, which noted that Petitioner underwent surgery by Dr. Orlevitch on that date which consisted of (1) right knee arthroscopic partial medial meniscectomy with chondroplasty of the medial compartment; (2) arthroscopic partial lateral meniscectomy; (3) patellofemoral chondroplasty; (4) arthroscopic lateral retinacular release for pre-operative diagnoses of right knee torn medial meniscus, torn lateral meniscus with significant degenerative joint disease of the medial and patellofemoral compartments with lateral tilt and compression of the patella and post-operative diagnoses of right knee torn medial meniscus, torn lateral meniscus with significant degenerative joint disease of the medial and patellofemoral compartments with lateral tilt and compression of the patella, specifically severe grade 3 medial femoral condyle, grade 3 and 4 lateral facet patella, grade 2 trochlea with lateral tilt and compression. (PX11).

Included within the records of Great Plains Orthopaedics was an Operative Report dated November 19, 2012, which noted that Petitioner underwent surgery by Dr. Orlevitch on that date which consisted of (1) left knee arthroscopic partial medial meniscectomy with chondroplasty of the medial compartment; (2) partial lateral meniscectomy; (3) patellofemoral chondroplasty for pre-operative diagnoses of left knee torn medial meniscus, torn lateral meniscus, and degenerative joint disease mainly of the medial and patellofemoral compartments and post-operative diagnoses of knee torn medial meniscus, torn lateral meniscus, and degenerative joint disease mainly of the medial and patellofemoral compartments, specifically significantly truncated tear of the medial meniscus with a displaced flap of the body portion tucked behind the tibial plateau and severe grade 3 changes throughout the medial femoral condyle, grade 3 changes in the patella over the central and lateral aspects as well as the medial and medial trochlear, grade 3 diffuse patellofemoral degenerative joint disease, mild chondromalacia of the lateral femoral condyle with tear of the anterior horn of the lateral meniscus. (PX11).

Included within the records of Great Plains Orthopaedics was an interpretive for an MRI of the left knee performed at Proctor Hospital on May 3, 2012, which was interpreted as revealing (1) MR findings supportive of a patellar tracking abnormality with moderate chondromalacia patella; (2) degenerative fraying of the free edge of the body of the lateral meniscus; (3) a horizontal tear of the posterior horn and body of the medial meniscus with displaced inferior flap into the inferior recess of the joint space; there is an associated popliteal cyst of the posterior horn of the medial meniscus; (4) moderate to severe chondromalacia involving the medial compartment of the knee. The records also reflect that Petitioner also underwent an MRI of the right knee at Proctor Hospital on May 3, 2012 as well, which was interpreted as revealing (1) MR findings supportive of a patellar tracking abnormality with moderate to severe chondromalacia patella; (2) joint effusion and synovitis of the joint space; (3) a radial tear of the posterior horn of the medial meniscus involving about 50% of the width of the meniscus associated with extrusion of the body of the meniscus; there are moderate to severe cartilage abnormalities of the medial

compartment; (4) degenerative fraying of the free edge of the body of the lateral meniscus; (5) intraarticular body of the posterior central aspect of the joint capsule. (PX11).

The Standing Order of the U.S. District Court regarding Dr. Dru Hauter was entered into evidence at the time of arbitration as Petitioner's Exhibit 12.

The transcript of the deposition of Dr. Lawrence Lieber taken on January 18, 2017 was entered into evidence at the time of arbitration as Respondent's Exhibit 1. Dr. Lieber testified that he is an orthopedic surgeon and has performed more than 2,000 joint replacement surgeries. (RX1).

Dr. Lieber testified that he saw Petitioner for an IME on November 30, 2015 and that she gave a history of an alleged work event on September 11, 2014, that there was an altercation with two students and that she sustained a twisting injury to her right lower extremity knee area. He testified that Petitioner indicated that she was initially seen at IWIRC, that she had a subsequent MRI, that she was evaluated by Dr. Akeson and that she had surgery in April of 2015. He testified that Petitioner indicated that she had continued knee pain, that she had been in therapy, and that her doctor told her that she needed a total knee replacement. He testified that Petitioner also gave a significant history of bilateral knee pain right greater than left, that she had had achiness over her knee for many years and that she had pain and discomfort with her knee due to activity up to the date of the isolated alleged event of September 11, 2014. He testified that Petitioner also indicated that she was working light duty and was restricted from going up and down stairs, standing and walking. He further testified that x-rays taken in his office revealed degenerative osteoarthritis of the right knee with associated varus deformity. (RX1).

Dr. Lieber testified that the diagnosis that he rendered was that of degenerative osteoarthritis of the right knee. He testified that he felt that Petitioner might benefit from continued conservative treatment of a cortisone injection and exercises, but eventually at some point would most likely need a total knee replacement. He agreed that it was his opinion that the arthroscopic procedure performed by Dr. Akeson and the care and treatment associated with that procedure was causally related to the injury described to him by Petitioner, and that the treatment that she received was reasonable and necessary as a result of the work accident up until the point that he saw her. He testified that as of the time that he saw her, Petitioner was at maximum medical improvement from her claimed work accident. He testified that he did not foresee any additional medical care and treatment was reasonable and necessary as a result of the meniscal tear that Petitioner suffered or the alleged event. (RX1).

Dr. Lieber testified that Petitioner did not require any ongoing restrictions as a result of the alleged work accident as of the time that he saw her. He agreed that Petitioner was at maximum medical improvement as of the date of the IWIRC visit on December 7, 2015. He agreed that Petitioner related to him that she had significant problems with both of her knees prior to her claimed September 11, 2014 accident. He testified that it was his opinion that Petitioner did not do anything to cause, aggravate or accelerate her arthritis as a result of either her work accident or the subsequent arthroscopic repair performed by Dr. Akeson. He agreed that Petitioner admitted to him that she was symptomatic for the arthritis before her work accident. (RX1).

Dr. Lieber agreed that if the evidence revealed that Petitioner was suffering from symptomatic arthritis for a period of years prior to the accident, it would be consistent with the natural progression of an arthritic condition in the knee. When asked how he would describe in terms of progression of arthritis in the knee if someone were requiring pain medications, anti-inflammatories, cortisone injections, aspirations and Euflexxa injections, Dr. Lieber responded that it would be significant, severe and end stage, and that they were getting to the point where the only treatment left would be a total knee replacement. He testified that the purpose of Euflexxa injections was that of a pain reliever. He testified that once conservative treatment had been exhausted for a patient that took medications and underwent cortisone and Euflexxa injections, the next step in degenerative knee arthritis was that of a total knee replacement. (RX1).

Dr. Lieber testified that when individuals got effusions in the knee and had to have them drained for arthritis, it indicated that their arthritis was becoming symptomatic and causing a physiological response from the knee in that fluid was being produced within the knee as an attempt to respond to the causative nature of the arthritis. When asked if it was suggestive of end stage arthritis in the knee, Dr. Lieber responded that he did not know necessarily that people with end stage arthritis were going to get more effusions than those people that did not, but that one of the underlying reasons that people got recurrent effusions was arthritis. (RX1).

On cross examination, Dr. Lieber agreed that Petitioner noted to him that she had bilateral knee problems. He testified that he did not know how Petitioner's left knee was doing. When asked if one had Petitioner's diagnosis and whether that made that person more susceptible to injury when a trauma was superimposed, Dr. Lieber responded affirmatively. He agreed that if a person with that situation got hurt, the injury could often be more severe with a longer healing period. (RX1).

On cross examination, Dr. Lieber agreed that the injury of September 11, 2014 necessitated the scope performed by Dr. Akeson as well as the follow-up treatment for the scope. He agreed that he did know what Dr. Akeson had recommended for further treatment. He testified that it did not surprise him that there were no medical records substantiating treatment by any doctor for Petitioner's knees during the timeframe of February 8, 2013 until September 11 or 12, 2014 (*i.e.,* one year and seven months). He testified that he did not review any medical records that contradicted this proposition. He testified that he did not know whether Petitioner saw any doctor from February 8, 2013 until September 11, 2014. (RX1).

On cross examination, Dr. Lieber testified that Petitioner told him that she was having problems with the right knee all the way through and up until the date of injury at work on September 11, 2014. He agreed that Petitioner told him that the problems got worse after the work injury. He agreed that when he did surgery, he did not just rely on radiological films and that he actually looked at the x-rays and MRIs himself. He agreed that other than the films that he took, he did not look at any other scans regarding this case. (RX1).

On redirect, Dr. Lieber testified that chondromalacia was the generalized term for cartilage degeneration and that one of the grading systems was 1, 2, 3 and 4. He agreed that 4 indicated that one had lost almost all of the cartilage and that 3 was close to losing all cartilage. When asked whether one had lost all of the cartilage in the knee and was symptomatic in the knee for arthritis and whether one was potentially at the point of needing a knee replacement, Dr. Lieber responded that he would say grade 4 or 3 chondromalacia needed to be present prior to when he would do a knee replacement on someone, and that just because someone had grade 4 did not necessarily mean that someone was indicated for a knee replacement. He agreed that someone that had grade 4 changes in the patellofemoral joint, grade 3 changes in the medial compartment, large effusions that had to be aspirated, and previous treatment of oral medications including anti-inflammatories, pain medications, Medrol dose packs, Relafen, cortisone injections and Euflexxa injections was someone that was symptomatically arthritic in the knee to the point where they were potentially requiring a knee replacement. (RX1).

The IME report of Dr. Lawrence Lieber dated November 30, 2015 was entered into evidence at the time of arbitration as Respondent's Exhibit 2. The report reflects that Petitioner gave a history of an alleged work event on September 11, 2014 while working as a teaching assistant paraprofessional and that she stated that while involved in an altercation with two students, she sustained a twisting injury to her right lower extremity knee area. It was noted that Petitioner stated that she had had consistent bilateral knee pain, right greater than left, with achiness over many years, and that she stated that she had continued pain and discomfort within her knee due to activity up to the date of the isolated alleged September 11, 2014 event. It was noted that Petitioner complained of a constant right knee pain that bothered her with ambulation as well as with sitting, that she had difficulty going up and down stairs and pain and night, and

that she had pain going from a sitting to standing position. It was noted that Petitioner complained of a grinding in her knee but no popping, and that she complained of weakness about the knee with giving way. (RX2).

The IME report reflects that Dr. Lieber's impression was that of degenerative osteoarthritis, right knee. It was noted that Petitioner showed evidence of significant pre-existing right knee pain with associated degenerative changes, that the objective findings were that of effusion as well as decreased range of motion and noted antalgic gait, and that subjective findings consisted of the discomfort and pain with inability to ambulate and carry on activities of daily living as noted. It was noted that Petitioner's subjective complaints were supported by the objective evidence, that of end stage osteoarthritis of the right, knee and that no significant non-work activities contributed to Petitioner's present complaints. It was noted that the prognosis was poor due to the underlying degenerative osteoarthritis and need for, most likely, a total knee replacement, and that Petitioner was able to return to work with no restrictions in association with the alleged September 11, 2014 work event. (RX2).

The IME report reflects that Petitioner's current problems were related to preexisting degenerative abnormalities within the right knee that were neither caused, associated nor related to the alleged isolated September 11, 2014 event, that there was no evidence that Petitioner would have any future impairment in association with the alleged work event of September 11, 2014, that Petitioner's present complaints were related to preexisting degenerative osteoarthritis that was neither caused, associated, accelerated or related to the alleged September 11, 2014 event, and that treatment recommendations would be continued conservative treatment, potential cortisone injections and eventually total knee replacement, all of which would not be related to the alleged September 11, 2014 event. It was noted that Petitioner was able to perform normal work activities in association with the alleged September 11, 2014 event and that no significant activity restrictions were necessary in association with the alleged September 11, 2014 event, but that certainly from a symptomatic standpoint due to preexisting degenerative osteoarthritis of the knee, she may benefit from sitting to standing as tolerated and minimal bending and stooping. (RX2).

The medical records of IWIRC were entered into evidence at the time of arbitration as Respondent's Exhibit 3. The records were primarily duplicative of those as contained in Petitioner's Exhibit 2, but also contained additional physical therapy records from November 2014 and December 2014. Additionally, the records reflect that Petitioner was also seen on March 8, 2016, at which time it was noted that she was seen for initial evaluation of right knee pain. It was noted that Petitioner stated that the injury occurred on March 8, 2016 at 1230 hours, that she stated that she was standing in the hall by a door when a student pushed past her to enter the door and caused her to twist with her knees, and that she did not fall but that her right knee started to tighten up and had slight loss of range of motion. It was noted that Petitioner stated that she had had surgery on the right knee in April of 2015, that the left knee was slightly painful, that her pain was rated 3/10 at initial onset and was now 4/10, and that she described her symptom as aching, tightening and throbbing. It was also noted that Petitioner felt that she planted the knee behind her and may have hyperextended the knee slightly with the jolt from the student. It was noted that Petitioner had a history of chronic knee pain from degenerative disease, that she stated that the knee was end stage and "bone on bone," and that she had had several aspirations of chronic fluid in the knee as well as a meniscectomy about one year ago on the right. The assessment was noted to be that of (1) right knee sprain, no evidence of internal derangement; (2) end stage right knee arthritis, an old chronic problem. Petitioner was dispensed a knee immobilizer, was dispensed Nabumetone, Fast Freeze and a ThermalGel Soft Gel Cold Pack, and was issued work restrictions. (RX3; PX2).

The records of IWIRC reflect that Petitioner was seen on March 10, 2016, at which time it was noted that she stated that her symptoms had included a painful noodle-like sensation and felt unstable but not worse, that she stated that she could touch where she was having the pain on the outer areas of the knee and that she stated that it was not tender and that she just felt it deep inside the knee. It was noted that

Petitioner rated her current pain at 2-3/10 but that it could increase to 4-5/10 at the end of the day, and that she was currently taking Nabumetone and applying Fast Freeze and ice. It was also noted that Petitioner stated that she was improved but not back to normal, that she reported new pain isolated to the lateral superior knee area and that she continued the restrictions and stated that they seemed to help. The assessment was noted to be that of (1) right knee sprain; (2) end stage right knee arthritis. Petitioner was recommended to continue knee immobilizer/Ace wrap as instructed, to continue Nabumetone, to take over-the-counter Tylenol as needed and to start physical therapy. Petitioner was also issued work restrictions. At the time of the March 17, 2016 visit, it was noted that Petitioner stated that her knee was getting better because she was not using it, that there was a decrease in tenderness and inflammation but that the instability remained, and that she had limited range of motion and deep medial knee pain. It was noted that Petitioner stated that there was tenderness in the calf as well as superior and inferior lateral knee pain. It was also noted that the knee was unstable with ambulation so Petitioner worse the brace constantly. The assessment was noted to be that of (1) right knee sprain, improving; (2) end stage right knee arthritis. Petitioner was recommended to continue the knee immobilizer, to continue over-the-counter Tylenol as needed, and to undergo physical therapy. Petitioner was also dispensed Nabumetone and was issued work restrictions. (RX3).

The records of IWIRC reflect that Petitioner was seen on March 28, 2016, at which time it was noted that she stated that her symptoms had remained about the same since the last office visit, that she rated her current pain at 2/10, that she stated that the pain was not too bad since she had not used the knee much on that date, and that she was currently taking Nabumetone. It was also noted that Petitioner stated that she had intermittent numbness in the bottom of her 3rd and 4th right toes. The assessment was noted to be that of (1) right knee sprain; (2) end stage right knee arthritis. Petitioner was recommended to undergo physical therapy, to continue the brace as directed, to continue Nabumetone, ice and heat as directed and to return to work with restrictions. At the time of the April 7, 2016 visit, it was noted that Petitioner stated that her symptoms had remained the same, that therapy helped her and that it felt like it loosened up her muscles, and that depending on what she was doing she stated that it felt better at certain times than others. It was noted that Petitioner also stated that she got some tingling in her right foot toes intermittently and that her right knee was swollen and was constantly aching. It was also noted that Petitioner stated that she continued to have a constant ache in the right knee that became sharp with certain movements, and that it was more intense and pronounced that baseline prior to her injury. The assessment was noted to be that of (1) right knee sprain, improving slowly; (2) end stage right knee arthritis. Petitioner was recommended to stop the immobilizer, to continue Nabumetone, to continue ice/heat and over-the-counter Tylenol for comfort, to continue physical therapy as instructed and to return to work with restrictions. (RX3).

The records of IWIRC reflect that Petitioner was seen on April 21, 2016, at which time it was noted that she stated that her knee was not too bad so far, that there was swelling, pain, and tightness behind the knee along with limited range of motion, and that she stated that she was making progress. It was noted that the pain increased as the day went on or when climbing stairs, and that she was currently taking Nabumetone. It was also noted that Petitioner stated that she was doing better but was not yet back to normal, that she continued to have pain/tightness in the posterior knee and that she reported that the pain increased above baseline after being on her feet all day. The assessment was noted to be that of (1) right knee sprain; (2) end stage right knee arthritis. Petitioner was dispensed Nabumetone, was recommended to continue ice/heat and over-the-counter Tylenol for pain as needed and was recommended to continue physical therapy and her home exercise program as instructed. Petitioner was also returned to work with restrictions. At the time of the May 4, 2016 visit, it was noted that Petitioner stated that her knee was probably as good as it was going to get, that she stated that at the end of the day was the worst pain, that she had pain behind her knee that was new, and that she alternated heat and ice daily. It was noted that Petitioner's pain increased as the day went on or when climbing stairs, and that she was currently taking Nabumetone. It was also noted that Petitioner was able to stand a little on her toes and heels but not for long, that she was slow to rise and slow with a slight antalgic gait, and that the joint was stable. The

assessment was noted to be that of (1) right knee sprain, resolved; (2) end stage right knee arthritis. Petitioner was recommended to return to work with restrictions. It was noted that Petitioner had been returned to baseline without symptoms and that an impairment rating was to be performed for discharge. (RX3).

The medical records of Great Plains Orthopaedics were entered into evidence at the time of arbitration as Respondent's Exhibit 4. The records were effectively duplicative of those as contained in Petitioner's Exhibit 11. (RX4; PX11).

The Payment Sheets were entered into evidence at the time of arbitration as Respondent's Exhibit 5. The Acknowledgement of PPD Advancement was entered into evidence at the time of arbitration as Respondent's Exhibit 6.

The medical records of Dr. Akeson dated March 7, 2018 were entered into evidence at the time of arbitration as Respondent's Exhibit 7. The records reflect that Petitioner was seen on that date for her annual check-up of her right knee. It was noted that Petitioner was status post right total knee arthroplasty on March 23, 2017, that she was pleased with her post-operative outcome and that she stated that she had much better functioning and quality of life. It was noted that Petitioner continued to experience pain in the left knee and would like to consider left total knee arthroplasty in the future. The assessment was noted to be that of replacement of the right knee. It was noted that Petitioner's right knee replacement remained stable and that she was pleased with her outcome. (RX7).

CONCLUSIONS OF LAW

With respect to disputed issue (F) pertaining to causation, the Arbitrator finds that Petitioner has met her burden of proving that her current condition of ill-being is causally related to the accident of September 11, 2014.

The Arbitrator notes at the outset that the primary dispute as it relates to the issue of causation was that of the total knee replacement performed on Petitioner's right knee rather than the arthroscopy procedure performed by Dr. Akeson on April 9, 2015, as Dr. Lieber testified that it was his opinion that the arthroscopic procedure performed by Dr. Akeson and the care and treatment associated with that procedure was causally related to the injury described to him by Petitioner, and that the treatment that she received was reasonable and necessary as a result of the work accident up until the point that he saw her. (RX1).

Having reviewed the considered the entirety of the medical evidence in this case, the Arbitrator finds that post-arthroscopy as performed by Dr. Akeson, Petitioner's right knee did not appear to return to its baseline condition. The Arbitrator notes that the physical therapy records at Midwest Orthopaedic Center on September 23, 2015 noted that Petitioner had reached a plateau in her progression and in tolerance of functional activities. (PX4). Similarly, the medical records of Midwest Orthopaedic Center further reflect that at the time of the October 21, 2015 visit, it was noted that Petitioner's clinician did not believe any continued therapy would lead her to reaching her baseline short of a knee replacement. (PX4). These medical records, in addition to Petitioner's testimony at the time of arbitration that after the incident on September 11, 2014 but prior to the knee replacement surgery having been performed she had to travel to a conference in Las Vegas and had to switch planes in Minneapolis and required gate assistance and a wheelchair because of the pain she was experiencing in her right knee – which was not something that she had needed when traveling during the timeframe of February 8, 2013 until the time of the incident at issue – lead the Arbitrator to believe that post-arthroscopy as performed by Dr. Akeson, Petitioner's right knee did not appear to return to its baseline condition. As a result thereof, the Arbitrator finds that Petitioner has

met her burden of proving that her current condition of ill-being is causally related to the accident of September 11, 2014.

With respect to disputed issue (J) pertaining to reasonable and necessary medical services, in light of the Arbitrator's aforementioned conclusions, the Arbitrator finds that Petitioner's care and treatment was reasonable, necessary and causally related to her work accident of September 11, 2014. As a result thereof, Respondent shall pay all reasonable and necessary medical services as contained in Petitioner's Exhibit 10 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit for all 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 disputed issue (K) pertaining to temporary total disability benefits, the Arbitrator notes that Petitioner claims that she is entitled to temporary total disability benefits for the timeframes of April 9, 2015 through April 26, 2015 and March 23, 2017 through May 3, 2017. (AX1). The Arbitrator further notes that the parties agreed at the time of arbitration that Petitioner was entitled to, and did received payment of, temporary total disability benefits for the timeframe of April 9, 2015 through April 26, 2015. (*Id.*).

The records reflect that Petitioner underwent surgery by Dr. Akeson on March 23, 2017, which was that of a right total knee arthroplasty. (PX9). Furthermore, the medical records of Midwest Orthopaedic Center reflect that a return to work slip was issued dated April 21, 2017, allowing Petitioner to return to work full duty on May 4, 2017. (PX4). As a result of the foregoing, the Arbitrator finds that Respondent shall pay temporary total disability benefits for a period of 8 4/7 weeks, for the timeframes of April 9, 2015 through April 26, 2015 and March 23, 2017 through May 3, 2017, with Respondent to receive credit for temporary total disability benefits already paid. (AX1).

With respect to disputed issue (L) pertaining to the nature and extent of Petitioner's injuries, 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 respect to Subsection (i) of Section 8.1b(b), the Arbitrator notes that neither party submitted an AMA impairment. As a result thereof, the Arbitrator gives no weight to this factor.

With respect to Subsection (ii) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that she was a paraprofessional for Respondent at the time of the accident at issue. The Arbitrator places greater weight on this factor when making the permanency determination.

With respect to Subsection (iii) of Section 8.1b(b), Petitioner was 58 years old on the date of the accident at issue. In light of Petitioner's release to full duty by her treating physician, the Arbitrator places lesser weight on this factor when making the permanency determination.

With respect to Subsection (iv) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that she returned to work as a paraprofessional for Respondent upon the completion of her medical treatment with Dr. Akeson. As there was no evidence proffered at arbitration to demonstrate that Petitioner's work accident has impaired or otherwise affected her future earnings capacity, the Arbitrator places lesser weight on this factor when making the permanency determination.

With respect to Subsection (v) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that her right knee was "great." Petitioner denied having any trouble with her right knee currently and when asked if she felt that the total knee replacement helped, Petitioner responded affirmatively and stated that she got her life back. At the time of June 21, 2017 visit with Dr. Akeson, it was noted that Petitioner was status post right total knee arthroplasty, that she reported she had had a fall onto the right knee recently and had some soreness after, and that she was otherwise doing well overall. The assessment was noted to be that of replacement of the right knee. (PX4). The Arbitrator concludes that Petitioner's evidence of disability at the time of arbitration was corroborated by her treating records at the conclusion of her treatment. The Arbitrator accordingly places greater weight on this factor in determining permanency.

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all of 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 concludes that Petitioner sustained permanent partial disability to the extent of **45% loss of use of the right leg** as provided in Section 8(e) of the Act, with Respondent to receive credit for the $5,000 permanency advancement already issued as agreed to by the parties at the time of arbitration.

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 Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT POWER,

Petitioner,

vs. NO: 17 WC 07518

ILLINOIS STATE POLICE,

Respondent.

20IWCC0267

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical, and permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, reverses the Decision of the Arbitrator on the issue of accident and vacates the permanency award in the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission adopts the Arbitrator's Statement of Facts, however, views the evidence differently than the Arbitrator. Therefore the Commission strikes the Arbitrator's Conclusions of Law and modifies the Decision as follows.

Conclusions of Law

Accident

A workers' compensation claimant has the burden of proving by a preponderance of the evidence that the injury arose out of and in the course of her employment. *820 ILCS 305/2* (West 2010). Both elements must be present in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 605, 137 Ill. Dec. 658 (1989).

Suter v. Ill. Workers' Comp. Comm'n, 2013 IL App (4th) 130049WC, P14, 998 N.E.2d 971, 975, 2013 Ill. App. LEXIS 785, *7, 376 Ill. Dec. 261, 265, 2013 WL 6022310

Petitioner alleges his accident occurred in front of his residence on February 8, 2017. Petitioner did not seek medical treatment until five days later, on February 13, 2017, when he saw his general practitioner, Dr. Kaitlin Delaney Henry. The orthopedic evaluation, under History of Present Illness, documents the mechanism of injury as "none." Petitioner complained of right knee pain, three days in duration, with no injury that he remembered, which, the Commission notes, coincides with an onset of knee pain on February 10, 2017. Petitioner also reported that he had recurrent locking and popping in his right knee. The Petitioner reiterated that the onset was three days when he reported to Dr. Henry that this usually resolves on its own "except for the past 3 days, has had swelling and stiffness, cannot fully extend knee," and he rated his pain as 2/2. (PX1a, p. 0016)

The Commission finds that the initial treating medical record does not comport with the date of the alleged accident, nor is there a history of a specific accident. The Petitioner did report to Dr. Henry that he was unsure if "this is related to his job, works as a police officer and runs, carries a lot of equipment, and gets in and out of car all day long." (PX1a, p. 0016)

Dr. Henry prescribed a right knee MRI and noted:

> Patient needs to decide if he is going to go to workman's comp, if he is, he needs to start over with their clinic to get imaging re-ordered. He understands that he cannot come here for a workman's comp case. (PX1a, p. 0017)

Petitioner testified that he initially filled out an incident report on either February 12, or February 13, 2017, when his supervisor returned to work. He further testified that because "either I turned it in incomplete or it wasn't filled out correctly he had to bring it back and give me that one back, the original, and had me fill out another one on the date." When asked what happened to the first report, Petitioner testified that he shredded it. (T, p. 13)

Respondent's attorney questioned Dr. Henry about the second incident report, dated February 17, 2017, noting that it describes Petitioner getting out of a car. Respondent's attorney asked Dr. Henry if Petitioner's reported history, "Due to the small size of the door frame he stepped awkwardly and his knee popped" was consistent with the history Dr. Henry recorded in her note or the history Petitioner gave to her. Dr. Henry responded, "Well, it's similar but he did not talk about one specific incident with me." (PX1, pp. 0011-0013)

According to the attachment to the Application for Adjustment of Claim, dated on February 27, 2017, in answer to "How did the accident occur?" the Petitioner, "sustained injury while exiting his vehicle." (ARBX2) The description then detailed the reason exiting the vehicle was "more difficult."

Petitioner next consulted Dr. John Krause, from The Orthopedic Center of St. Louis on April 10, 2017. The handwritten New Patient Information form states the date of accident/onset

was February 9, 2017. In answer to "Describe the recent events that brought on this orthopedic problem" Petitioner responded, "I got out of my work vehicle and my right knee "popped" caused significant pain and swelling and stiffness." In answer to "How long has this been a problem?" the response states, "Since 2/8/17." Petitioner listed his activities outside of work as "lift weights, jogging, cycling." (PX2b, pp. 0055, 0057)

Dr. Krause's History of Present Illness describes: "He was working on 2/8/17 when he got out of his car. As he stepped out he caught his foot on the running board and twisted his knee. He did not fall to the ground." (PX2b, pp. 0052)

Petitioner testified "I just pulled up like I always do in front of my residence to end my duty shift, ...and when I got out of my car my trail leg, which would be my right leg, or my right knee, my foot became stuck or lodged in the floorboard and when I pulled out my right foot or tried to get out of the car it either caused my knee to twist or torque in a way that caused pain." (T, pp. 9-10) On cross-examination, Petitioner conceded he did not know exactly what it got caught on. (T, p. 23)

> Although an employee's testimony about an alleged accident might be sufficient, standing alone, to justify an award of benefits under the Act, it is not enough where consideration of *all* facts and circumstances demonstrate that the manifest weight of the evidence is against it. *Caterpillar Tractor Co. v. Industrial Comm'n*, 83 Ill. 2d 213, 218, 414 N.E.2d 740, 46 Ill. Dec. 687 (1980).

Hosteny v. Ill. Workers' Comp. Comm'n, 397 Ill. App. 3d 665, 677, 928 N.E.2d 474, 484, 2009 Ill. App. LEXIS 1322, *28, 340 Ill. Dec. 475, 485

In the instant case, Petitioner denied a specific accident occurred when he first saw his general practitioner, Dr. Henry on February 13, 2017. Dr. Henry's office notes, although closest to the onset of the injury date, do not document a specific accident occurred. Further, in the same, initial office note, the date of onset of pain was noted to be three days prior, February 10, 2017, and does not comport with the date of accident alleged in the instant claim. The Commission finds Dr. Henry's records and testimony are more persuasive than the totality of the other evidence and Petitioner's testimony.

The Commission takes note of the fact that Petitioner testified that he filled out two accident reports, the first one on February 12th or February 13th, which would coincide with Petitioner's visit to Dr. Henry, yet that initial report was returned to Petitioner either because he "turned it in incomplete or it wasn't filled out correctly." (T, p. 13) The Commission reasonably infers if Petitioner reported the same history he gave to Dr. Henry at that same time, that Petitioner failed to report a specific work accident. However, Petitioner shredded the first report. The second accident report, completed on February 17, 2017, after the first one was returned and shredded, alleged that Petitioner got out of his car awkwardly, and his knee "popped."

The Commission finds that the Petitioner's second incident report alleging that his knee "popped" does not comport with his first medical history wherein he denied a specific incident. Further, "getting out of his car awkwardly" fails to establish a compensable accident. The first

20IWCC0267

mention of Petitioner's foot getting stuck "in the running board" was two months after the onset of his pain when Petitioner saw Dr. Krause in April 2017. Thus, the Commission is not persuaded by Petitioner's testimony that his "foot got stuck or lodged in the floorboard."

Therefore, the Commission reverses the Arbitrator's Decision and finds Petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury that arose out of and in the course of his employment by Respondent on February 8, 2017. Based upon the Commission's finding that the Petitioner failed to sustain his burden of proving he suffered an accidental injury arising out of and in the course of his employment with Respondent, the Commission further modifies the Arbitrator's Decision and finds and that Petitioner's current condition of ill-being is not causally related to the accident, all other issues are moot and compensation is denied. The Commission further vacates the Arbitrator's permanency award.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 29, 2019, is hereby reversed for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's demand for compensation is denied based on his failure to prove by the preponderance of the credible evidence that he sustained an accident that arose out of and in the course of employment with Respondent on February 8, 2017.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of 15% loss of use of the right leg as provided in Section 8(e) is hereby vacated.

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

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

Pursuant to Section 19(f)(1) of the Act, this decision is not subject to judicial review. *820 ILCS 305/19(f)(1) (West 2013).*

DATED: MAY 8 - 2020
KAD/bsd
O031020
42

Kathryn A. Doerries

Maria E. Portela

Dissent:

I respectfully dissent from the Majority's opinion. I find the Arbitrator's Decision to be thorough

20IWCC0267

and well-reasoned. I rely on the Arbitrator's detailed findings and would affirm and adopt this Decision.

D. Douglas McCarthy

Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

POWER, ROBERT
Employee/Petitioner

Case# **17WC007518**

ILLINOIS STATE POLICE
Employer/Respondent

20IWCC0267

On 8/29/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.84% 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:

1413 BRAD L BADGLEY PC
26 PUBLIC SQUARE
BELLEVILLE, IL 62220

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

4948 ASSISTANT ATTORNEY GENERAL
WILLIAM PHILLIPS
201 W POINTE DR SUITE 7
BELLEVILLE, IL 62226

2202 ILLINOIS STATE POLICE
801 S 7TH ST
SPRINGFIELD, IL 62794

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

AUG 29 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

:t.

trator addressed in the attached findings of
spondent shall pay Petitioner the sum of
ection **8(e)** of the Act, because the injuries

eview within 30 days after receipt of this
s, then this decision shall be entered as the

l, interest at the rate set forth on the *Notice*
e day before the date of payment; however,
; award, interest shall not accrue.

8/28/19
Date

18IWCC0584

CC0267

ons of the Act.

tioner and Respondent.

the course of employment.

lent.

erage weekly wage was **$1,395.36**.

1 dependent children.

essary medical services.

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

Robert Power
Employee/Petitioner

v.

Illinois State Police
Employer/Respondent

Case # **17** WC **07518**

Consolidated cases: **N/A**

20IWCC0267

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 **Collinsville**, on **7/29/19**. 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. [ ] 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 _____

ıe previous office note of Dr. Henry dated
February 8, 2017. That note did not make
hat the note provided a history in terms of
Petitioner's body habitus pre-disposed him
)f stepping out of his squad car and his foot
In regard to causality, Dr. Krause testified
ar.

Henry's office note reflects that if Petitioner
:t all over and get reimaged.

)r. Henry's office note would suggest a

ot expect a 40 year old man like Petitioner,
rauma.

ırch 2018, approximately eight (8) months
: report on February 17, 2017. He testified
ı content and form. His Supervisor directed
flected an injury date of February 8, 2017
did not expect the injury to be serious and

getting out of the driver's seat of his squad
Given the small size of the door frame, he

CC0267

er deposition testimony was received into
he indicated that a physical examination
at it was a work related injury which she
ıt her practice does not treat work injuries,
ɔ start over with another clinic.

)ner did not provide her with a specific
ent.

ition testimony was received into evidence
eferred to him by the Respondent. He was
led him a history of having caught his foot
sical examination and diagnostic work-up
2017. Petitioner was placed on light duty

20

FINDINGS

On **2/8/17**, Respondent ***was*** operating under and subject to the pr

On this date, an employee-employer relationship ***did*** exist between

On this date, Petitioner ***did*** sustain an accident that arose out of an

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

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

In the year preceding the injury, Petitioner earned $**72,559.00**; th

On the date of accident, Petitioner was **40** years of age, ***married*** v

Petitioner ***has*** received all reasonable and necessary medical servic

Respondent ***has*** paid all appropriate charges for all reasonable and

Respondent shall be given a credit of $**33,088.78** for TTD, $**0** fo
benefits, for a total credit of $**33,088.78**.

Respondent is entitled to a credit of $**Any** under Section 8(j) of th

ORDER

Based on the factors enumerated in §8.1b of the Act, which the
fact and conclusions of law, and the record taken as a whole
$**775.18**/week for a further period of **32.25** weeks, as provided
sustained caused **15% loss of use of the right leg**.

RULES REGARDING APPEALS Unless a party files a *Petition fo*
decision, and perfects a review in accordance with the Act and
decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this a
of Decision of Arbitrator shall accrue from the date listed below
if an employee's appeal results in either no change or a decrease i

Michael K. Nowak, Arbitrator

AUG 29 2019

FINDINGS OF FACT

Petitioner filed an Application for Adjustment of Claim which alleges that he sustained an injury arising out of and in the course of his employment by the Respondent on February 8, 2017. According to the Application, Petitioner, while in the course of his employment by the Respondent, sustained an injury while exiting his vehicle. Petitioner was originally assigned a Ford Crown Victoria vehicle. In September 2014, he was assigned a small Chevy Impala patrol car which was kept at his home. Because of the smaller size of the vehicle, exiting is more difficult due to Petitioner's size and the equipment he wears, consisting of a bullet proof vest and duty belt with accessories. Petitioner seeks an award for the nature and extent of his injury. Respondent disputed liability on the basis of accident and causal relationship.

Petitioner has been employed by Respondent for the past seven (7) years as a patrolman. As a part of his duties, he is required to wear equipment weighing 40 pounds and drive a Chevy Impala, which is a small patrol vehicle. Petitioner had to get in and get out of that vehicle many times during the course of his work day.

Petitioner testified that on February 8, 2017, while in the process of existing his vehicle, his right leg and knee got caught up in the inside of the squad car, twisting his right knee. He experienced the immediate onset of right knee pain.

Thinking that his condition would improve, he did not seek medical treatment until February 13, 2017. He saw Dr. Kaitlin Delaney Henry, a general practitioner. At that time, Petitioner complained of right knee pain three (3) days in duration, with no injury that he remembered. He had recurrent locking and popping in the right knee. It usually resolved on its own, with the exception of the past three (3) days. He complained of swelling and stiffness and inability to fully extend the knee. He claimed a 2/2 pain. He was unsure if this was related to his job. He indicated that he worked as a police officer, runs, and carries a lot of equipment and gets in and out of his squad car all day long.

Due to the fact that Petitioner was contemplating a worker's compensation claim, the doctor indicated to him that he needed to start over with another clinic because her clinic did not take work injury claims.

Petitioner was subsequently referred, by Respondent, to Dr. John O. Krause, an orthopedic surgeon, on April 10, 2017.

At that time, Petitioner provided a history that he worked as a State Trooper for the State of Illinois. On February 8, 2017, he got out of his squad car and his foot caught on the running board, causing him to twist his knee. He did not fall. He iced his knee that night and at work over the next several days. He was eventually seen by his primary care provider, Dr. Kaitlin Delaney Henry. Dr. John Krause did not review those records. The doctor, on the first visit, ordered an MRI which showed a tear of the posterior horn of the medial meniscus. That condition was treated surgically on June 1, 2017.

Petitioner's post-operative recovery was uneventful and he was released, having reached maximum medical improvement, on July 19, 2017. He was released to return to work without restrictions, although the doctor believed that he had suffered some permanent functional impairment.

e record. The Arbitrator therefore gives *no*

ility corroborated by the treating medical There is ample evidence in the record that n associated with physical activity. His eposition testimony of June 21, 2019. The

he Arbitrator finds that Petitioner sustained it leg pursuant to §8(e) of the Act.

ICC0267

of disability corroborated by the treating ingle enumerated factor shall be the sole

that neither party submitted an impairment

f the employee, the Arbitrator notes that restrictions for his former employer as a e since that date. The Arbitrator therefore

s that Petitioner is 42 years of age and has ve. The Arbitrator therefore gives *greater*

Dr. Kaitlin Delany Henry was deposed on July 13, 2018 evidence at trial. She verified the accuracy of her office note confirmed evidence of an injury. Further, there was a suggestio discussed generally with Petitioner. She stated that due to the fac if he wished to pursue workers' compensation, it would be necessa

On cross-examination, the doctor acknowledged that P accident date, nor did he provide a history of a specific traumatic a

Dr. John O. Krause was deposed on June 21, 2019. His d at trial. On direct examination, the doctor stated that Petitioner w a patient between April 10, 2017 and July 19, 2017. Petitioner p on the door frame while exiting his squad car. The doctor's revealed a torn medial meniscus. Surgery was performed on Ju between that date and July 19, 2017 at which time the doctor relea

On cross-examination, opposing counsel showed the doc February 13, 2017, approximately five (5) days after the accident mention of a specific accident. However, the doctor acknowled an accident and prior complaints. The doctor further acknowled to a meniscal tear. He again stated that Petitioner provided a hist got caught in a running board and twisted his knee as he describ that the accident Petitioner described did cause the medial menisc

On re-direct examination, the doctor acknowledged that was going to pursue a worker's compensation claim, he needed t

On re-cross examination, the doctor acknowledged th repetitive type motion injury versus a one time event.

On re-direct examination, the doctor testified that he wo to tear a meniscus by just getting out of a car without an identifia

Petitioner was first notified that his claim was denied i after he concluded his treatment. Further, he completed an inc that he had prepared an earlier report, however it was unacceptal him to redraft the same. He did not keep a copy. That repo wherein he stated that he could not bear weight until 24 hours a his knee was not swollen or stiff.

Petitioner indicated that at the time of the accident, he car in front of his residence. His foot got caught inside the c stepped out awkwardly and his knee popped and gave out.

CONCLUSIONS

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

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

At arbitration, Petitioner described at length the size and weight of the equipment he was required to wear on a daily basis. Further, the assignment of a smaller sedan made it more difficult for him to enter and exit the vehicle. Finally, as part of his duties, he was in and out of his vehicle on a number of occasions during the course of a work day. In the process of exiting his vehicle on February 8, 2019 wearing the equipment previously discussed, Petitioner's right foot became lodged inside the vehicle causing him to twist his right knee.

Respondent argues that Petitioner's injury never happened based upon the note of Dr. Henry. It is not lost on the Arbitrator that Dr. Henry's records indicate Petitioner did not make note of a traumatic injury. It is also crystal clear that Dr. Henry and her clinic wanted nothing to do with a Workers' Compensation claim.

Petitioner's testimony that he had not suffered a prior accident or injury, nor had he received prior treatment to his right knee, was unrebutted.

Petitioner did acknowledge prior occasional knee pain associated with entering and exiting his vehicle.

Petitioner's primary treating physician, to whom he was referred by Respondent, testified that the accident described was the cause of his torn medial meniscus. Dr. Krause was provided a history of Petitioner catching his foot on a running board, causing him to twist his knee. In his Supervisor's Injury Report, Petitioner provided a history of stepping out awkwardly. At arbitration, Petitioner testified that his right foot was caught on the inside of the vehicle, all of which represent a traumatic incident which could represent a cause of his work related injury. A review of Dr. Krause's testimony reflects that notwithstanding the note of Dr. Henry and the history contained in the Supervisor's Report, it did not change the doctor's opinion on medical causation.

With respect to the information provided to Dr. Henry, considering Petitioner's testimony, the history Petitioner provided was a general recitation versus an inconsistent recitation of what took place. The Arbitrator noted that Dr. Henry indicated that her medical clinic did not treat work injuries and that he would be required to seek treatment elsewhere. Further, the history provided to Dr. Krause, his primary treating physician, was a complete statement of what transpired. These differences, taken as a whole, do not render Petitioner's testimony incredible.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner met his burden of establishing that he sustained accidental injuries which arose out of and in the course of his employment and that his current condition of ill being is causally related to the accident.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §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) evid
medical records. 820 ILCS 305/8.1b. The Act provides that, "
determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator n
rating. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupati
Petitioner, on July 19, 2017, was released to return to work wit
Patrolman. He has not seen the doctor for treatment of his right
gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator
another 23 years of gainful employment in a job that is physically
weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's
there is no direct evidence of reduced earning capacity contained i
weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of
records, the Arbitrator notes the Petitioner was a credible witn
Petitioner suffered permanency consisting of occasional knee
condition and complaints are supported by Dr. Krause's eviden
Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a wh
permanent partial disability to the extent of 15% loss of use of the

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KELLY MELTON,
Petitioner,

vs.

NO: 16 WC 23796
16 WC 23797
16 WC 23798

KNIGHT HAWK COAL, LLC,
Respondent.

20IWCC0268

DECISION AND OPINION ON REVIEW

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

The Commission finds that the Petitioner failed to prove that his current cervical condition is causally related to his accidents of February 2, 2015, April 15, 2016 or July 14, 2016. The Commission further finds that Petitioner's cervical condition reached maximum medical improvement (MMI) as of March 11, 2015, the date Petitioner last sought treatment at Fry Chiropractic.

Petitioner last sought medical treatment on March 11, 2015 following his February 2, 2015 accident. He returned to work on March 13, 2015 and continued to work without restrictions until April 15, 2016 at which time he sustained a lumbar injury (the parties do not dispute the lumbar injury or subsequent lumbar disc replacement). There are no medical records documenting any ongoing cervical complaints between March 11, 2015 and April 15, 2016. The initial medical records subsequent to April 15, 2016 fail to document any cervical complaints as well.

The first mention of neck pain following March 11, 2015 was not until Dr. Coyle's July 5, 2016 Section 12 examination. Dr. Coyle recommended a cervical MRI, which revealed mild disc desiccation with a diffused annular disc bulge without significant central canal stenosis or neural exit stenosis at C3-C4. There also was mild disc desiccation with a mild broad based central and right paracentral disc protrusion without significant central canal stenosis or neural foraminal exit

SOIMCC0868

stenosis at C5-C6. RX.1. Based upon his examination and review of the MRI, Dr. Coyle opined there was no indication for cervical surgery. *Id.*

Petitioner began treating with Dr. Gornet for his lumbar and cervical issues on July 26, 2016. Dr. Gornet performed an L4-L5 and L5-SI disc arthroplasty on June 14, 2017 and a C3-C4 and C5-C6 disc replacement on April 4, 2018. Dr. Gornet opined that the cervical condition and need for surgery was causally related to his work accidents. PX.14. Petitioner saw Dr. Gornet on September 10, 2018. Dr. Gornet noted that Petitioner could not return to work safely as a coal miner and provided Petitioner with permanent restrictions or no underground coal mining, no lifting over 40 pounds, and no overhead work. The restrictions were the result of both surgeries. Dr. Gornet further noted that Petitioner was to follow-up in May 2019. At that time, Dr. Gornet would perform an x-ray and CT scan of Petitioner's neck and an x-ray of his low back. Petitioner would then be at MMI in relation to both injuries. PX.9. Petitioner followed-up with Dr. Gornet on May 6, 2019 and the x-rays revealed that the implants were properly positioned and functioning well. *Id.*

The Commission finds that Petitioner failed to prove that his cervical condition after March 11, 2015 is causally related to his work accident. The medical records do not document any ongoing cervical issues between March 11, 2015 and July 5, 2016. During this period, there are several medical records for various other issues, none of which were related to the cervical spine. Petitioner sustained a second accident on April 15, 2016 to his low back and the records again failed to document any complaints to his cervical spine. Based upon the lack of supporting records corroborating any ongoing cervical complaints between March 11, 2015 and July 5, 2016, the Petitioner failed to prove causal connection.

The Commission affirms that Arbitrator's award of TTD benefits. When determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force. *Interstate Scaffolding, Inc. v. Ill. Workers' Comp. Comm'n*, 236 Ill. 2d 132, 146 (2010). The dissenting Commissioner would terminate TTD benefits effective September 10, 2018. The Majority respectfully disagrees. While Dr. Gornet returned Petitioner back to work on September 10, 2018, he placed permanent restrictions on the Petitioner as a result of both surgeries that included, among other restrictions, no underground coal mining. Dr. Gornet further indicated that Petitioner could not safely return to work as a coal miner. Dr. Gornet noted that Petitioner was to follow-up in May 2019 at which time Petitioner would be placed at MMI from the surgeries. While the Commission finds that Petitioner reached MMI for his cervical injury as of March 11, 2015, the Commission finds that the Petitioner did not reach MMI relative to his lumbar spine until May 6, 2019. Accordingly, the Commission affirms the Arbitrator's award of TTD benefits.

The Commission further finds that Petitioner is entitled to medical expenses relative to his cervical spine through March 11, 2015, the date Petitioner reached MMI for his cervical injury. The Commission finds that any cervical treatment thereafter is not causally related to his work injury.

The Commission affirms the award of 45% MAW as it relates to Petitioner's lumbar condition but modifies the analysis by placing no weight on Petitioner's cervical issues.

20IWCC0268

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 1, 2019, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $842.50 per week for a period of 122-4/7 weeks, February 5, 2015 through February 12, 2015 and January 3, 2017 through May 6, 2019, 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 $735.37 per week for a period of 225 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused 45% loss of use of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses that are related to the lumbar spine and all reasonable and necessary medical expenses related to the cervical spine through March 11, 2015, as provided in §8(a) of the Act, and subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit for medical benefits that have been paid through its group carrier, 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.

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.

MAY 11 2020

DATED:
DDM/tdm
d: 4/28/20
052

D. Douglas McCarthy

Stephen Mathis

Basados

20IWCC0268

SPECIAL CONCURRENCE/DISSENT

I concur with all aspects of the Majority's decision save the award of temporary total disability benefits for the period of September 11, 2018 through May 6, 2019. As to this portion of the award, I respectfully dissent.

"This court has held that an employee is temporarily totally incapacitated from the time an injury incapacitates him from work until such time as he is far recovered or restored as the permanent character of his injury will permit." *Archer Daniels Midland Co v. Industrial Commission*, 138 Ill. 2d 107, 119, 561 N.E.2d 107 (1990). Therefore, the question presented is whether the employee's condition has stabilized *i.e.* whether maximum medical improvement has been reached. "The factors to be considered in determining whether a claimant has reached maximum medical improvement include: (1) a release to return to work; (2) the medical testimony concerning the claimant's injury; (3) the extent of the injury; and (4) 'most importantly,' whether the injury has stabilized. [citations omitted]." *Mechanical Devices v. Industrial Commission (Johnson)*, 344 Ill. App. 3d 752, 760, 800 N.E.2d 819 (2003).

On June 14, 2017, Dr. Gornet performed a two-level lumbar disc replacement surgery. PX9. Dr. Gornet continued to periodically evaluate Petitioner following the lumbar surgery. On February 15, 2018, Dr. Gornet evaluated Petitioner who advised "his back is doing relatively well and overall he is fairly pleased with his progress." *Id.* During his deposition, Dr. Gornet explained "I told [Petitioner] until his back is doing well, I'd not shift gears to his neck." PX18, p. 11. Dr. Gornet testified as of the February 15, 2018 evaluation, he recommended further surgery for Petitioner's cervical spine as "[Petitioner] continued to say that his low back was doing well, but again, I felt he would need some restrictions regarding that." *Id.*, p. 14.

Following the February 15, 2018 evaluation, Dr. Gornet's treatment of Petitioner focused solely on his cervical spine, presumably since Petitioner's low back condition had progressed so well. On September 10, 2018, one year and three months post-lumbar surgery, Dr. Gornet released Petitioner to return to work with permanent restrictions. PX9. From February 15, 2018 through May 6, 2019, no medical treatment was recommended for Petitioner save an x-ray, and Petitioner received no medical treatment save periodic visits which were focused on his cervical complaints. Petitioner's lumbar condition stabilized as of September 10, 2018. Therefore, temporary total disability benefits are not owed for the period of September 11, 2018 through May 6, 2019. Therefore, I respectfully dissent.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

8850011.105

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MELTON, KELLY
Employee/Petitioner

Case# **16WC023796**

16WC023797
16WC023798

KNIGHT HAWK COAL LLC
Employer/Respondent

20IWCC0268

On 7/1/2019, 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 2.03% 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 RICH RICH & COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

2999 LITCHFIELD CAVO LLP
GREGORY S KELTNER
222 S CENTRAL AVE SUITE 110
ST LOUIS, MO 63105

88SC0268

20IWCC0268

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

KELLY MELTON
Employee/Petitioner

v.

KNIGHT HAWK COAL, LLC
Employer/Respondent

Case # 16 WC 23796

Consolidated cases: 16 WC 23797
16 WC 23798

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 17, 2019**. 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 **February 2, 2015,** 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 **$14,752.60**; the average weekly wage was **$1,237.63**.

On the date of accident, Petitioner was **37** years of age, ***married*** with **2** 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 **$416.11** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of **$416.11**.

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

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's group exhibit, as provided in § 8(a) and § 8.2 of the Act.

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

Respondent shall pay Petitioner temporary total disability benefits of **$825.09**/week for the disputed **4/7** weeks Petitioner was off work as it related to his cervical spine, commencing **February 5, 2015,** through **February 12, 2015,** as provided in § 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$735.37**/week for 225 weeks, because the injuries sustained caused the **45%** loss of the **body 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.

Carl Lee
Signature of Arbitrator

6/24/19
Date

JUL 1 - 2019

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MELTON, KELLY
Employee/Petitioner

Case# **16WC023797**

16WC023796
16WC023798

KNIGHT HAWK COAL LLC
Employer/Respondent

20IWCC0268

On 7/1/2019, 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 2.03% 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 RICH RICH & COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

2999 LITCHFIELD CAVO LLP
GREGORY S KELTNER
222 S CENTRAL AVE SUITE 110
ST LOUIS, MO 63105

20 IWCC0268

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

KELLY MELTON
Employee/Petitioner

v.

KNIGHT HAWK COAL, LLC
Employer/Respondent

Case # 16 WC 23797

Consolidated cases: 16 WC 23796
16 WC 23798

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 17, 2019**. 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

B. [ ] 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 _____

8SEOUNTY

FINDINGS

On **April 15, 2016,** 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 **$14,752.60**; the average weekly wage was **$1,237.63**.

On the date of accident, Petitioner was **37** years of age, ***married*** with **2** 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 **$416.11** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of **$416.11**.

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

ORDER

Adjudicated in companion case number **16 WC 23796.**

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

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

Edward Lee
Signature of Arbitrator

6/24/19
Date

JUL 1 - 2019

FINDINGS OF FACT

This matter came for hearing on Petitioner's motion for hearing on all issues. At the time of his injuries, Petitioner was employed by Respondent, Knight Hawk Coal, as a coal runner. (T.9) His job entailed hauling coal from the miner to the coal feeder in a vehicle referred to as a "ram car." (T.9-10) The parties stipulated that he sustained 3 injuries in the course and scope of his employment respectively on February 2, 2015, (16 WC 023796), April 15, 2016, (16 WC 023797), and July 14, 2016, (16 WC 023798). The disputed issues in all three of Petitioner's claims are liability for medical expenses with respect to Petitioner's cervical spine, liability for temporary total disability benefits, and the nature and extent of his injuries. (T.8; AX1; RX1, p.13, 32-33)

On February 2, 2015, Petitioner injured his cervical spine when his ram car ran over a large rock. (T.10) Petitioner immediately sought treatment at Fry Chiropractic, where he reported sharp shooting pains in his neck accompanied by headaches. (PX3) Petitioner also saw his primary care physician shortly after this injury with complaints of neck pain with a burning sensation radiating down his right upper arm to his elbow and underwent x-rays, which were negative for fracture. (PX4, 2/5/15) Petitioner advised his primary care physician he began treating with a chiropractor, and his family physician prescribed cyclobenzaprine and prednisone and instructed Petitioner to follow up in one week. *Id.* When Petitioner returned on February 12, 2015, he still reported residual pain radiating from his neck into his upper extremities despite the improvement in his headaches, dizziness and radicular pain from medication. (PX4, 2/12/15) Petitioner continued to treat with Dr. Fry for approximately 5 weeks until March 11, 2015, and reported improvement in his condition at the time of his discharge. *Id.* Petitioner kept working and managed his residual symptoms conservatively with medication and therapy exercises, and he reported no intervening accidents until his second injury on April 15, 2016. (T.12)

The parties stipulated that Petitioner sustained accidental injuries again on April 15, 2016, when he was leaving the feeder in an entry still being cut, which he described as "really rough and potholed." (T.13) While traveling down this rough path, Petitioner hit several potholes which jarred his back and caused instant burning pain from his waist to his toes. (T.13) Petitioner reported to Quality Healthcare Clinics in Sparta, IL one week after the accident, with the following history:

> PT STATES THAT HE WAS DRIVING HIS RAM CAR AT WORK AND THE CAR HIT A WHOLE [*SIC*] IN THE GROUND AND TWISTED HIS ENTIRE BACK. PT STATES THAT HE INSTANTLY HAD BURNING/HEAT GOING DOWN BOTH OF HIS LEGS. PT STATES THAT SOMETIMES BOTH HIS FEET GO NUMB. PT ALSO STATES THAT WHEN HE IS SITTING HE GETS SHARP PAINS SHOOTING BOTH OF HIS LEGS. DAC MA (PX6, 4/22/16)

When x-rays of Petitioner's lumbar spine were normal, Petitioner was diagnosed with a low back strain with intermittent paresthesias to the lower extremities and discharged with prescriptions for Flexeril and Ibuprofen. *Id.*

Petitioner returned to Quality Healthcare Clinic on April 29, 2016, where the history of the injury was taken again and it was noted that Petitioner was not getting any relief from Motrin and only some relief from Flexeril. (PX6, 4/29/16) On examination, Petitioner exhibited low back pain to palpation and the family nurse practitioner noted pain radiating down Petitioner's bilateral legs at times mostly to the left. *Id.* Petitioner stated that he wished to try one more week of conservative treatment before starting physical therapy. *Id.* Petitioner's medication was continued. *Id.*

Petitioner returned on May 6, 2016. (PX6, 5/6/16) Petitioner indicated he still had tingling and numbness with left leg pain and was also seeing a chiropractor.* *Id.* Petitioner returned on May 25, 2016, and was referred for physical therapy. (PX6, 5/25/16) The therapy notes of Joyner Physical Therapy were admitted into evidence and showed that Petitioner received some but not complete relief. (PX8) Petitioner was also referred for an MRI by nurse practitioner Alyssa Mueth. (PX7) This was done on June 29, 2016, at Cedar Court Imaging. (PX7) The impression of the radiologist was:

> Impression:
> 1. Neural foraminal narrowing is moderate at L5/S1 on the left. There is mild-to-moderate narrowing at L4/5 bilaterally and at L5/S1 on the right. Other levels as above.
> 2. No significant spinal canal narrowing.
> 3. Annular tear of the L4/L5 disc, can be a source of pain. There may also be a subtle annular tear of the L5/S1 disc. *Id.*

An MRI of the thoracic spine performed the same day was negative. *Id.*

Petitioner had yet another accident on July 14, 2016, when, while shoveling in mud up to his knees, he attempted to get out of the way of a ram car coming through. (T.15) As he was pulling his legs out of the mud, he aggravated his low back. (T.15) He testified this was the same type of pain he experienced following his second accidental injury. (T.15) Petitioner reported back to Primary Care Group, where the history was taken that Petitioner "was working and pulled something in back [*sic*] while shoveling , this aggravated everything more and feels [*sic*] like his left leg is being pulled off." (PX4, 7/18/16) His physician, Dr. Vargo, also noted that Petitioner had been seen at Respondent's request by a physician of its choosing on July 5th and July 11th and that Petitioner was considering treating with a specialist, Dr. Gornet, for his ongoing low back problems. *Id.*

Respondent sent Petitioner to be evaluated by Dr. James Coyle on July 5, 2016. (RX1, p.6-10) Dr. Coyle took the history of the first two accidents, noted that Petitioner was a very pleasant, physically fit 38-year-old male. *Id.* Dr. Coyle's examination showed Petitioner sat with a compensatory trunk shift toward the left. *Id.* Petitioner had pain on lumbar extension past neutral and flexion limited to 60 degrees secondary to pain. *Id.* On examination of the cervical

* The referenced chiropractic notes were requested many times, said notes were never produced to Petitioner or Respondent.

spine, Petitioner had crepitus on range of motion with only 60% of normal rotation to the right and 50% to the left, but had a negative Spurling's sign. *Id.* Dr. Coyle reviewed the thoracic and lumbar MRIs, which he believed showed desiccated discs at L4-5 and L5-S1 with a central annular fissure at L4-5. Dr. Coyle's impression was discogenic low back pain with an annular fissure at L4-5 and cervicalgia, and he recommended an MRI of Petitioner's cervical spine. *Id.* at 10. He did not believe Petitioner was at maximum medical improvement. *Id.* at 11.

Petitioner was sent back to see Dr. Coyle on July 11, 2016, at which time Dr. Coyle reviewed the MRI he ordered, which showed a disc bulge to the right of midline at C3-4 and a central and broad-based right paracentral protrusion at C5-6. (RX1, p.11-13, Resp. Exh. 2) Dr. Coyle did not see any indication for surgery, but he thought Petitioner would benefit from a supervised, structured course of conservative treatment that would include epidural steroid injections, kinetic physical therapy, and medication. (RX1, p.12-13)

Dr. Gornet saw Petitioner on July 26, 2016, took the history of the injuries, and noted that Petitioner had no problems of significance with either his neck or low back prior to his work injuries. (PX9, 7/26/16) Dr. Gornet's examination showed limited range of motion in Petitioner's cervical spine in all directions with pain. *Id.* Although Petitioner's low back range of motion was normal, Petitioner's lower extremity examination revealed decreased EHL and ankle dorsiflexion reflexes on the left. *Id.* Dr. Gornet reviewed x-rays of the cervical spine, which showed no degeneration, and reviewed x-rays of the lumbar spine, which were similarly benign. *Id.*

Dr. Gornet reviewed the MRI scan of June 29, 2016, taken at Cedar Court Imaging, and believed it was of moderate-to-poor quality. *Id.* Despite the poor visibility, Dr. Gornet believed it showed annular tears present both at L4-5 and L5-S1. *Id.* He also reviewed the MRI of the cervical spine ordered by Dr. Coyle, which Dr. Gornet believed showed an obvious annular tear at C5-6 and also one at C6-7. *Id.* Dr. Gornet reviewed the notes of Dr. Vargo and the report and supplemental report of Dr. Coyle. *Id.* Dr. Gornet believed that Petitioner's symptoms were causally connected in both the neck and low back to Petitioner's work injuries, and Dr. Gornet agreed with Dr. Coyle's recommendation of steroid injections of the lumbar spine with follow-up thereafter. *Id.* He prescribed Petitioner medication and kept Petitioner's work restrictions in place. *Id.*

Petitioner returned to see Dr. Gornet on October 3, 2016, with ongoing symptoms despite the injections, which he reported gave him 2 weeks of relief before his symptoms returned. (PX9, 10/3/16) Dr. Gornet again related Petitioner's symptoms to his work accidents, and he noted that Petitioner's neck was still an issue, stating:

> His neck is still an issue, but we have placed this on hold and are focusing on his low back, which is the bigger problem. Our working diagnosis is disc injury at L4-5 and L5-S1. He should continue to work light duty with a 20 pound limit, no overhead work and no ram car driving. I would recommend a plain CT, MRI spectroscopy and we will specifically evaluate L3-4 to make sure there are no significant painful chemicals present

there. He will ultimately require a new high quality MRI, but we will hold on this for now. *Id.*

For the first time, Dr. Gornet recommended potential surgery given Petitioner's failure of conservative measures. *Id.*

On October 18, 2016, Respondent had Petitioner evaluated by Dr. Coyle again. (RX1, p.15) Dr. Coyle's examination of Petitioner's cervical spine showed full range of motion in flexion and extension, negative Spurling's sign, but only 60% to 70% of cervical rotation bilaterally. *Id.* He also noted bilateral paracervical tenderness with bilateral trapezius tenderness. *Id.* With regard to Petitioner's low back, Dr. Coyle noted left sided sacroiliac joint tenderness, limited flexion with pain, and moderate discomfort with extension. *Id.* at Although straight leg raising test was negative, Dr. Coyle noted tight hamstrings with weakness in Petitioner's lower extremities. *Id.* at 16. Dr. Coyle's impression was cervicalgia with a small disc bulge at C3-4 and a central and right sided annular fissure at C5-6, discogenic low back pain in all likelihood from an annular fissure at L4-5. *Id.* at 16.

Petitioner returned to Dr. Gornet on December 21, 2016, and brought Dr. Coyle's note from October 18, 2016. (PX9, 12/21/16) Dr. Gornet noted that Dr. Coyle recommended aquatic therapy, but Dr. Gornet personally believed that it had little to no chance of curing or relieving the effects of Petitioner's injuries. *Id.* He nevertheless stated he would prescribe same if asked. *Id.* Dr. Gornet noted Dr. Coyle recommended anesthetic discography. *Id.* Dr. Gornet thought the better plan was a plain discogram to confirm that L5-S1 was indeed painful as suggested by Petitioner's previous MRI spectroscopy and use L3-4 as a control level. *Id.* Dr. Gornet noted that if Petitioner wanted to try aquatic therapy, he would need permission to leave work early, as no facilities would be open in his area when he got off work at 4:30 p.m. in December. *Id.*

The discogram was completed on January 27, 2017, and showed a non-provocative disc at L3-4 and provocative discs at L4-5 and L5-S1 with concordant pain. (PX14, 1/27/17) Petitioner was stoic throughout the procedure and showed no functional overlays. *Id.* While L3-4 discogram was mildly asymptomatic, the post-discogram CT revealed an anterior annular tear. *Id.*; (PX13, 1/27/17) The summary was normal nucleogram at L3-4 with an anterior annular tear, posterior annular tears at L4-5 and L5-S1. *Id.* On March 2, 2017, Dr. Gornet's assessment remained the same, and he recommended surgery consisting of a two level disc replacement at L4-5 and L5-S1. (PX9, 3/2/17)

Surgery was completed on June 14, 2017, and objective intraoperative findings showed a large central annular tear straight down to the dura at L5-S1. (PX14, 6/14/17) At L4-5, there was a midline central annular tear and a central disc herniation. *Id.* Disc replacements were placed at both levels, and following surgery, Petitioner reported significant improvement in his back pain and resolution of the paresthesias in his legs to Dr. Gornet on June 29, 2017. *Id.*; (PX9, 6/29/17)

Petitioner returned to Dr. Gornet on July 24, 2017, and Dr. Gornet asked Petitioner to begin walking and abdominal strengthening exercises. (PX9, 7/24/17) Petitioner still experiencing neck pain; however, Dr. Gornet advised that until Petitioner's back was doing well, he would not "shift gears to [Petitioner's] neck." *Id.*

On September 25, 2017, Petitioner reported to Dr. Gornet that his back was doing well. (PX9, 9/25/17) Dr. Gornet began treating Petitioner's neck with a recommendation for a new MRI scan. *Id.* This was done the same day and showed disc pathology at C3-4 and C5-6, but Dr. Gornet believed at that time that C3-4 was the only level that was causing symptoms and needed treatment. *Id.* He recommended a single injection at C3-4 and asked Petitioner to begin a home exercise program. *Id.*

When Petitioner returned in February of 2018, his main complaint was neck pain and headaches. (PX9, 2/15/18) Dr. Gornet stated that Petitioner suffered from a bilobular disc herniation at C3-4 and a smaller protrusion at C5-6 with an annular tear. *Id.* Because the majority of Petitioner's current symptoms were axial neck pain and headaches, Dr. Gornet believed at that time that both C3-4 and C5-6 needed to be treated. *Id.*

Petitioner underwent surgery on April 4, 2018, by way of disc replacement at C3-4 and C5-6. (PX14, 4/4/18) Dr. Gornet videotaped the operation. *Id.* At C3-4, there was a large rent in disc from right to left, along with a small central disc herniation. *Id.* At C5-6, there were both a central left sided tear and right sided tear. *Id.* Prosthetic disc devices were placed in both levels. *Id.* Petitioner returned in April of 2018, and advised Dr. Gornet he felt "a dramatic improvement" in his axial neck pain and that headaches were significantly improved. (PX9, 4/21/18) Dr. Gornet also noted that Respondent was sending Petitioner back to Dr. Coyle, and Dr. Gornet attempted to expedite his dictation and give Dr. Coyle all the necessary information. *Id.* Dr. Gornet also allowed Petitioner to visualize the objective intraoperative findings. *Id.*

Dr. Coyle saw Petitioner on April 26, 2018, and reviewed Dr. Gornet's operative report, the procedure note for the C3-4 cervical epidural steroid injection, and the cervical CAT scan and MRI. (RX1, p.20) Dr. Coyle disagreed with the radiologist's interpretation of a C5-6 bulge resulting in dural displacement on Petitioner's CT of February 15, 2018. *Id.* at 22. He did not believe the dura could be clearly seen on the CT scan and stated that only shadows could be visualized without a myelogram. *Id.* at 22-23. He testified that he did not believe any of Petitioner's MRIs reflected any dural displacement and felt that those were better studies for observing said pathology. *Id.* at 23-25. Based on his impression of the diagnostic studies and the lack of motor or sensory deficits in Petitioner's upper extremities, Dr. Coyle was of the opinion that Petitioner's surgery at C3-4 and C5-6 was not medically indicated. *Id.* at 29.

Petitioner continued to follow up with Dr. Gornet, and on September 10, 2018, reported that he continued to do well and that "the surgeries had made a huge difference in his life." (PX9, 9/10/18) Despite the improvement, Dr. Gornet did not believe Petitioner could work safely as a

coal miner. *Id.* He returned Petitioner back to work with permanent restrictions of no underground coal mining, no lifting over 40 pounds, and no overhead work. *Id.* Dr. Gornet saw Petitioner again on May 6, 2019, and Petitioner informed Dr. Gornet that he was continuing to do well for the most part, as long as he stayed within his restrictions. (PX9, 5/6/19) Diagnostic studies showed that Petitioner's implants were properly positioned and functioning well. *Id.*

Petitioner testified at Arbitration that following his accidents and prior to surgery, he had constant migraine headaches from putting up with his symptoms for over 3 years. (T.17) He testified that his life was like living in a dark cloud. (T.17) He candidly testified that the surgery helped him and removed the cloud, enabled him to smile, and stated, "It just -- it feels great, it really does." (T.19) Petitioner testified accurately to his restrictions and advised the court that while he was off work receiving workers' compensation benefits, he was terminated. (T.19) Petitioner is currently not looking for work but is looking to enroll in school in the fall semester. (T.20) He previously acquired 27.5 credit hours in a Criminal Law and Procedure curriculum. (T.21-22) He testified that he was B student in High School and used to be in sales for food when he moved back to Southern Illinois and decided to try coal mining. (T.21) Prior to the multiple work-related accidents, Petitioner had no workers' compensation claims, injuries, or treatment for his neck or low back. (T.21)

Despite the dramatic improvement in his symptoms resulting from surgery, including the resolution of the burning pain that once radiated down his arm, he still suffers from loss of range of motion and has difficulty turning his neck backwards. (T.22) He stated, "I know what my limit is, but I just ... feel better with it done." (T.22) Petitioner testified that he does not want to take medicine for his neck or back symptoms and stated that he would "just rather deal with" his symptoms rather than "be on medicine and pain pills." (T.23) Petitioner testified that he was also doing well with regard to his low back. (T.23) He understood that he is unable to perform heavy lifting, but appreciated being able to lift moderate weight with proper posture. (T.23) He uses a low bench to help him put on his socks and take off his pants. (T.23) Petitioner exercises on an elliptical to reduce the weight he gained during the convalescence from his surgical procedures. (T.24-25) Petitioner desires to enroll at a junior college and potentially transfer to Southern Illinois University. (T.25)

Both Dr. Coyle and Dr. Gornet testified by way of deposition.

Dr. Coyle's deposition was taken February 2019, and he was given a copy of Dr. Gornet's deposition taken October 15, 2018, and made many references to it in his last report. (RX1) On direct examination, his testimony exactly to what he had stated in his reports summarized in the body of this decision. He noted Petitioner underwent disc arthroplasty at L4-5 and L5-S1 on June 14, 2017, but it wasn't "clear to him whether or not he underwent a hybrid fusion arthroplasty, but he had two levels treated surgically." *Id.* at 21. He placed special emphasis on the MRI of July 5, 2016, and believed that the findings at C3-4 and C5-6 would benefit from injections, therapy and medication rather than surgical intervention. *Id.* at 12-13.

When asked whether Petitioner's cervical spine surgery was related to the accident and whether it was reasonable and necessary to cure or relieve the effects therefrom, he agreed that while Petitioner sustained an injury to his cervical spine, there was not an indication for surgery. *Id.* at 34-35, 38. Dr. Coyle's main point was that both MRIs clearly show that there was no canal cord or foraminal nerve compression, and he recommended that the films be taken to a totally independent radiologist. *Id.* at 27, 38. This was not done.

On cross-examination, it was noted that Dr. Coyle's deposition had been scheduled and cancelled by Respondent twice previously, and that he had issued 7 reports in this case. *Id.* at 41. When asked if he would only operate on a patient with cord or nerve root impingement, motor or sensory deficit, foraminal compression, or dural displacement, Dr. Coyle could not give an answer and indicated it would depend on the circumstances. *Id.* at 42-45. He acknowledged that despite Petitioner's axial neck pain and unremitting headaches, he would not have performed surgery. *Id.* at 45-46. Although Dr. Coyle viewed the videos, he maintained that it was impossible for anyone to state with any degree of certainty that there was an annular tear, because such a tear would always be in the back. *Id.* at 47-48. When asked if he took videos himself, he stated:

> I don't think that you can prove anything one way or another from a medical/legal standpoint by taking microscopic video. Most people who look at it don't know what they're looking at and can't vouch for the credibility of the testimony, because it's a different field. *Id.* at 49.

He also disagreed with Dr. Gornet waiting to place Petitioner at maximum medical improvement at the one-year mark and stated that Respondent's counsel could verify that. *Id.* at 52-54. Dr. Coyle could not identify the cause of Petitioner's pathology in his cervical spine. *Id.* at 56-57.

Both Dr. Coyle and Respondent's counsel acknowledged that there was no dispute over Dr. Gornet's care and treatment of Petitioner's lumbar spine. *Id.* at 13, 32.

Dr. Gornet also testified by way of deposition. (PX18) He is a board certified orthopedic spine specialist who has authored numerous publications looking at disc replacement treatment in different populations, including injured workers. *Id.* at 4-5; (Pet. Dep. Exh.1) He lectures on this topic throughout the United States and throughout the world. *Id.* at 5. He has given presentations dozens of times at the North American Spine Society and is author or co-author of some of the latest publications regarding spine surgery. (PX18, Pet. Dep. Exh.1) Dr. Coyle was last published over 15 years ago. (RX1)

Dr. Gornet explained a disc replacement as removing an injured disc, removing irritation, providing stability, but allowing motion. (PX18, p.6) He testified that in large prospective randomized clinical trials or what he called evidence based medicine, disc replacement surgery has been found to show substantial benefits, including earlier return to work, better patient

satisfaction, improved functional outcome scores, and – particularly in multiple level disc replacements – superior outcomes overall when compared with fusion. *Id.* at 6.

Dr. Gornet first saw Petitioner on July 26, 2016. *Id.* at 7. Because Petitioner's low back condition was more severe, Dr. Gornet opted to treat the lumbar spine first. *Id.* at 11. Following Petitioner's recovery from low back surgery, he began to address Petitioner's cervical spine condition. *Id.* at 11. He saw Petitioner on September 25, 2017, with axial neck pain into both trapezii. *Id.* at 11-12. Petitioner's MRI scan showed significant disc problems at C3-4 and to a lesser extent at C5-6. *Id.* at 11-12. Dr. Gornet printed those films and they were introduced into evidence at the hearing. Dr. Gornet drew black lines pinpointing the disc herniations, which the Arbitrator has observed.

Following the MRI scan, Dr. Gornet recommended a single epidural injection at C3-4 in an attempt to relieve Petitioner's symptoms without resorting to surgery. *Id.* at 13. When the injection provided only temporary relief, Dr. Gornet performed surgery on April 4, 2018. *Id.* at 13-14. Intraoperative objective findings included a large rent in the disc from right to left, which Dr. Gornet videotaped. *Id.* at 14. He clarified his note which read C4-5, but was really C3-4. *Id.* at 14. At C5-6, he identified a central left-sided tear, which was also videoed. *Id.* at 14-15. He testified that he takes videos, because, "I believe that this provides visual documentation, which correlates with our verbal documentation, so I think it's essentially medical evidence that is irrefutable." *Id.* at 15. He had absolutely no problem with disseminating the videos to Dr. Coyle. In contrast, Dr. Coyle testified that he occasionally took operative videos, but would not disseminate them to anyone. (RX1, p.49) Dr. Gornet stated that Petitioner did well following surgery with both his axial neck pain and his headaches. (PX18, p.15-16)

Dr. Gornet had the opportunity to review Dr. Coyle's reports and noted that Dr. Coyle was against surgery, because there was no evidence of compression of the dura. *Id.* at 16-17. He stated:

> Dr. Coyle, it appears, believes that there is no evidence of compressing the dura. The dura is the white – or is the small skin around the spinal fluid that holds the spinal fluid in, and so if you look at just the image along and look at the white material beyond the gray spinal cord structure, the only way that the white stays where it is is that there is a skin around it called the dura.
>
> By definition if you look at Image 8 of 17 or any of the other images, you will see that this disc protrudes and compresses the amount of white material next to the spinal cord. That is by definition dural displacement. There is no other plausible explanation. So I'm not sure what Dr. Coyle is referring to that there is no dural displacement, because that factually incorrect and it's inconsistent with the MRI. *Id.* at 17-18.

When asked if a patient could have dural displacement and have serous spinal fluid in the cervical spine, Dr. Gornet answered:

> You can have dural displacement and have spinal fluid around it, yes, because it comes on the other side of the spinal cord. If you have sometimes such severe, you can obliterate all of the cervical spine fluid, but in this case we don't believe that is the case. It's more on the ventral side, and that's well-described in the radiologist's report, and the radiologist's report is, again, consistent with the images themselves. *Id.* at 18.

Dr. Gornet believed that Petitioner's diagnostic tests, the injection, and the surgery were causally related to Petitioner's work-related accidents. *Id.* at 21-22. He noted that Petitioner had no prior workers' compensation claims or complaints. *Id.* at 22. He gave Petitioner permanent restrictions of no lifting over 40 pounds, no overhead work, and no underground coal mining. *Id.* at 20-21. The reason for the restrictions where that the type of coal mining work/overhead work Petitioner engaged in would aggravate Petitioner's condition or potentially cause further injury. *Id.* at 22. With regard to Petitioner's low back, he believed it was unwise to push Petitioner too far and risk wearing out his facet joints prematurely. *Id.* at 22-23. Dr. Gornet believed that if Petitioner was clinically doing well, it was best that he moved on and found other types of employment. *Id.* at 22-23.

On cross-examination, Dr. Gornet again testified that the problem at C3-4 was a tear and herniation, and the problem at C5-6 was a tear with a small herniation, both of which produced axial pain as opposed to radicular pain. *Id.* at 28. Dr. Gornet testified that he believed Petitioner's problem in his cervical spine began on February 5, 2015, and that he did not believe Petitioner ever had complete resolution of his symptoms for a period of time that he would call clinically significant. *Id.* at 32-34. He believed that there was waxing and waning, especially with both a cervical and lumbar injury. *Id.* at 33-34. Specifically, he testified that the pathology visible on MRI had not changed significantly since July 5, 2016, and it was present and essentially identical. *Id.* at 34-35. Dr. Gornet's notes regarding the possibility of operating at C5-6 were consistent, and from the very beginning he mentioned the pathology at that level, stating that the problem with not treating the pathology present at that level would lead to less-than-optimal results including further treatment and more surgery. *Id.* at 35-36.

When asked why he believed that Petitioner's condition was related to the February 2015 accident, he stated:

> Well, one, we've seen this before, and can tell you Dr. Coyle and I have seen this before. I can tell you for a fact that Dr. Coyle has treated people for axial neck pain with a cervical fusion who have head their head driven up into the canopy. I've seen the patients before.
>
> So this is not an unusual thing. There's a sudden mechanical load. His head is jammed, and it only makes sense that the disc gave way. If you think about it, when people jump into a swimming pool and become paralyzed, what happens is that axial load is transmitted just up their spine and the disc gives way and then ultimately the bone gives way and splinters and injures your spinal cord.

This gentleman fortunately only had the disc give way, and that coupled with the load to his head caused that disc injury, but I know for a fact I've seen other patients that Dr. Coyle has treated with similar type of injuries and that's a common thing that we see. *Id.* at 38-39.

When asked if his opinion was predicated only on the history given by Petitioner, he stated that his opinion was predicated on the history of the injury, the mechanism of injury, the objective MRI scans, the objective intraoperative findings shown on the video, and Petitioner's positive post-operative result. *Id.* at 39-40.

CONCLUSIONS OF LAW

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

In addition to or aside from expert medical testimony, circumstantial evidence may also be used to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill.App.3d 92, 631 N.E.2d 724 (4th Dist. 1994); *International Harvester v. Industrial Comm'n*, 442 N.E.2d 908 (1982). The evidence is clear that Petitioner suffered no prior injuries or complaints with respect to his neck prior to his accidental injury in February of 2015. (T.21) Petitioner suffered an injury on February 5, 2015, which immediately produced symptoms for which he promptly received medical treatment. (PX3) Despite a considerable period of conservative care, Petitioner improved marginally and continued to be symptomatic with neck pain, headaches, and limited range of motion. (PX4; PX9)

Dr. Gornet observed no clinically significant period in the medical records where experienced substantial relief from his cervical spine symptoms and likewise noted the absence of any prior injuries or complaints. (PX18, 21-22, 32-34) Dr. Gornet's records and testimony reflect that the only reason Petitioner was not able to receive continuous care for his neck complaints was that he subsequently sustained more severe injuries to his lumbar spine which diverted the focus of Petitioner's care and treatment. (PX9, 10/3/16; PX18, p.11) As was noted by the Commission in *Gordon*, the ultimate issue is not whether there was a gap in treatment, but rather, whether the initial accident was a causative factor in the condition of ill-being which was produced, whether the symptoms and findings later in the treatment match up to the symptoms immediately following the accident, and whether the gap was logically explained. *William Gordon v. State of Illinois DOT Joliet Yard*, 07 I.W.C.C. 1599 (2007). In addition to noting the credible consistency of Petitioner's complaints, Dr. Gornet further noted that Petitioner's MRI demonstrated objective findings of disc injuries in his neck consistent with Petitioner's accident mechanism. (PX9; PX18) Based upon the foregoing facts and medical evidence, Dr. Gornet concluded that Petitioner's current condition of ill-being was causally related to his work accident.

Dr. Coyle likewise agreed that Petitioner suffered disc injuries to his neck, but he disagreed that these resulted in dural displacement and warranted surgical intervention. (RX1) That disputed, however, is not one of causation, but of the reasonableness and necessity of Petitioner's care and treatment. The Arbitrator sees absolutely no basis for a dispute of causal connection and finds that Petitioner met his burden of proof on this issue.

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?

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

The Arbitrator finds Dr. Gornet's testimony concerning the reasonableness and necessity of Petitioner's care and treatment credible and persuasive. While it is not uncommon for physicians to differ in opinions as to the nature of injuries treatment recommendations, the Arbitrator finds that in this case, the opinion of Dr. Coyle enjoys substantially less support from the objective medical evidence than the opinion of Dr. Gornet. The Arbitrator notes that Dr. Gornet is well-qualified and versed in the identification and treatment of disc injuries given his involvement in numerous studies, publications, and FDA trials. The Arbitrator also places substantial weight on the fact that Petitioner had failed all conservative options to manage his cervical spine complaints, and the fact that he had a favorable surgical outcome. Given said evidence, the Arbitrator finds that the care and treatment given to Petitioner's cervical spine was reasonable and necessary to cure Petitioner of the effects of his work-related neck injuries.

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

Based upon the above findings as to causal connection and the reasonableness and necessity of Petitioner's care and treatment, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the period of disability from February 5, 2015, through February 12, 2015. Respondent shall have credit for the amount of $416.11 in benefits paid.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) 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. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation**: Petitioner is no longer able to work as a coal miner. Dr. Gornet placed Petitioner under permanent restrictions of no lifting greater than 40 pounds, no underground work, and no overhead work. (PX9, 5/6/19) Since Petitioner is no longer able to pursue his usual and customary employment, the Arbitrator places significant weight on this factor.

(iii) **Age**: Petitioner was 37 years old at the time of his injury. He is very young to have permanent restrictions and must yet live and work with his disability for a prolonged number of years. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016), the Arbitrator places substantial weight on this factor.

(iv) **Earning Capacity**: Given that Petitioner is no longer able to perform his usual and customary employment and is procuring further education to reenter the job market and obtain gainful employment. As it stands, there is no evidence before the Arbitrator as to permanent loss in earning capacity, but since Respondent has not provided vocational rehabilitation assistance or maintenance, Petitioner has suffered at least a temporary loss in earning capacity. As such, the Arbitrator places some weight on this factor.

(v) **Disability**: As a result of his work accident, Petitioner sustained disc injuries at C3-4 and C5-6 resulting in tearing and herniation and underwent a two-level cervical spine disc replacement. (PX9) Petitioner also sustained disc herniations at L4-5 and L5-S1 in his lumbar spine, which also required a two-level disc replacement. Despite the improvement from disc replacement surgery, including the resolution of the burning pain that once radiated down his arm, he still suffers from loss of range of motion and has difficulty turning his neck backwards. (T.22) With respect to his back, Petitioner also testified that he understood he was now limited in what he could lift and stated he uses a low bench to help him put on his socks and take off his pants. (T.23) Turning to the evidence, Petitioner's complaints are fully borne out by the treatment records. Dr. Gornet did not believe Petitioner could work safely as a coal miner. *Id.* He returned Petitioner back to work with permanent restrictions of no underground coal mining, no lifting over 40 pounds, and no overhead work. *Id.* The Arbitrator therefore places substantial weight on this factor.

Based upon the foregoing, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in the 45% loss of his body as a whole. In *Bentz v. Village of Gurnee*, the claimant was formerly a firefighter and sustained injuries to his hip and a single level in his lumbar spine that prevented him from returning to his customary employment as a firefighter/paramedic. Based thereon, the Commission determined that the claimant sustained

serious and permanent injuries that resulted in the 50% loss of his body as a whole. *Bentz v. Village of Gurnee*, 09 I.W.C.C. 0160.

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

MAUREEN COOK,

Petitioner,

vs. NO: 18 WC 4529

STATE OF ILLINOIS,
DEPARTMENT OF HUMAN SERVICES,

20IWCC0269

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 and permanent partial disability (PPD) and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator provided an analysis of the three types of risks that an employee may be exposed to and noted that Petitioner's work duties included cleaning up after her patients and washing their dishes. The Arbitrator was of the opinion that the act of rolling up her sleeves to wash the dishes constituted an act that she would be reasonably expected to perform as part of her job duties. As her job duties required her to clean dishes, she was at an increased risk of injury while rolling up her sleeves to get ready to wash the dishes. In fact, while rolling up her sleeves, she hit her left wrist on the wall and sustained injuries. Therefore, her injury was compensable. The Arbitrator also indicated that Petitioner's injury was compensable under the "personal comfort" doctrine.

The Commission agrees with the Arbitrator's finding that Petitioner was injured due to an employment-related risk; however, the Commission finds that the "personal comfort" doctrine is not applicable in this case. Therefore, the Commission affirms and adopts the Arbitrator's ultimate

20IWCC0269

decision, but modifies the Decision by striking the "personal comfort" doctrine analysis from the Decision. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 25, 2019, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $659.64 per week for a period of 13-5/7 weeks, April 2, 2018 through July 6, 2018, 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 $593.68 per week for a period of 15.375 weeks, as provided in §8e(9) of the Act, for the reason that the injuries sustained caused 7.5% loss of use of the left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,690.11 for medical expenses under §8(a) of the Act and subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive a credit of $1,290.11, pursuant to Section 8(j) of the Act.

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

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

DATED: MAY 11 2020
DDM/tdm
d: 4/8/20
052

Douglas McCarthy

Stephen Mathis

DISSENT

I respectfully dissent. Accepting Petitioner's testimony in totality, her claim fails. "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that [she] has suffered a disabling injury which arose out of and in the course of [her] employment. [citations omitted]. 'In the course of employment' refers to the time, place and circumstances surrounding the injury." *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 203,

797 N.E.2d 665 (2003). "Arising out of" speaks to risk- is the risk encountered by the employee a risk incidental to the employment as not all injuries suffered while at work are compensable. See *e.g. Brady v. Louis Ruffolo & Sons Construction Company*, 143 Ill. 2d 542, 552, 578 N.E.2d 921 (1991) ("This court has previously declined to adopt the positional risk doctrine, believing that the doctrine would not be consistent with the requirements expressed by the legislature in the Act"). "To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro* at 203. Petitioner's incident occurred while she was in the course of her employment, but such incident did not arise out of her employment.

Accident

The Commission's first task in determining whether the injury arose out of the claimant's employment is to categorize the risk to which the claimant was exposed in light of the Commission's factual findings *regarding the mechanism of the injury. First Cash Financial Services v. Industrial Commission*, 367 Ill. App. 3d 102, 105, 853 N.E.2d 799 (2006) (Emphasis added); see also *Baldwin v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 472, 478, 949 N.E.2d 1151 (2011) (To determine whether a claimant's injury arose out of her/his employment, "we must first determine the type of risk to which [s/he] was exposed."). There are three categories of risk to which an employee may be exposed: (1) risks that are distinctly associated with one's employment, (2) risks that are personal to the employee, such as idiopathic falls, and (3) neutral risks that have no particular employment or personal characteristics, such as those to which the general public is commonly exposed. *Springfield Urban League v. Illinois Workers' Compensation Commission*, 2013 IL App (4th) 120219WC, ¶ 27, 990 N.E.2d 284; see also *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d at 552 (noting that "neutral" in workers' compensation terms means "neither personal to the claimant nor distinctly associated with the employment" (internal quotation marks omitted)).

"Injuries resulting from a risk distinctly associated with employment, *i.e.*, an employment-related risk, are compensable under the Act." *Steak 'n Shake v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150500WC, ¶ 35, 67 N.E.3d 571. "Risks are distinctly associated with employment when, at the time of injury, 'the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties.'" *Id.* "A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his duties." *Orsini v. Industrial Commission*, 117 Ill. 2d 38, 45, 509 N.E.2d 1005 (1987).

Alternatively, neutral risks "generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Commission*, 407 Ill. App. 3d 1010, 1014, 944 N.E.2d 800 (2011). "Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Id.*

The majority mistakenly focuses its risk analysis on Petitioner's act of rolling up her sleeves finding such maneuver to be incidental to her employment. What such analysis fails to appreciate is that Petitioner did not sustain any injury due this maneuver. The mechanism of injury was Petitioner's hand contacting the wall. The risk of injury is therefore the wall and presumably the placement of the wall. Petitioner testified the incident occurred in the kitchen doorway. T. 11. Petitioner further testified the lighting was perfect; the pathway was not unusual; and she was not carrying any items. T. 12; T. 32-33. Petitioner repeatedly testified it was "a freak accident," and she did not know how it occurred. T. 12; 32. There is simply no hazard nor defect and no employment risk.

Therefore, the appropriate analysis is a neutral risk analysis. Nothing about Petitioner's employment duties of caring for mentally challenged residents either quantitatively or qualitatively increased her risk of colliding with a wall.

I would respectfully submit that the majority under the guise of an employment risk analysis has adopted the positional risk doctrine in contravention to long-standing Illinois law. I, therefore, dissent.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

COOK, MAUREEN
Employee/Petitioner

Case# **18WC004529**

DEPT OF HUMAN SERVICES/STATE OF ILLINOIS
Employer/Respondent

20IWCC0269

On 2/25/2019, 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 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4442 LAW OFFICE OF TIMOTHY E TAKASH
111 W WASHINGTON ST
SUITE 1500
CHICAGO, IL 60602

6512 ASSISTANT ATTY GENERAL
DREW DIERKES
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 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

FEB 25 2019

Brendan O'Rourke, Assistant 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
CORRECTED ARBITRATION DECISION

Maureen Cook
Employee/Petitioner

v.

Dept of Human Services/State of Illinois
Employer/Respondent

Case # **18** WC **04529**

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 **Brian T. Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **November 29, 2018** and **December 20, 2018**. 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 **August 16, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**51,452.01**; the average weekly wage was $**989.46**.

On the date of accident, Petitioner was **43** years of age, ***single*** 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 $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

ORDER

Respondent shall pay Petitioner $**659.64**/week, from **April 2, 2018** through **July 6, 2018**, which represents a period of **13-5/7** weeks, because Petitioner was temporarily totally disabled during this time, pursuant to Section 8(b) of the Act.

Respondent shall pay Petitioner $**2,690.11** in medical bills for the reasonable, necessary and related medical services rendered, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

Respondent shall receive a credit of $**1,290.11**, pursuant to Section 8(j) of the Act.

Respondent shall pay Petitioner $**593.68**/week for **15.375** weeks because Petitioner has sustained a permanent loss of use of her left hand to the extent of **7.5%**, pursuant to Section 8(e)(9).

Respondent shall pay Petitioner benefits that have accrued since **July 7, 2018**, 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

2-25-2019
Date

FEB 25 2019

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

20IWCC0269

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MAUREEN COOK,	)	
Petitioner,	)	
	)	
vs.	)	Case No. **18 WC 04529**
	)	
DEPARTMENT OF HUMAN	)	
SERVICES/STATE OF ILLINOIS,	)	
Respondent.	)	

ATTACHMENT TO ARBITRATION DECISION

I. Findings of Fact

A. Testimony of Maureen Cook

Maureen Cook testified that on August 16, 2017, she was working for the State of Illinois as a Mental Health Tech III. Petitioner's job duties include working with mentally challenged patients and taking care of everyday needs of the patients. Petitioner had worked in that capacity for 19 years. Petitioner is right handed and prior to August 16, 2017, never had any problems with her left hand or received any medical treatment for her left hand.

On August 16, 2017, Petitioner was working in DT 14, which is a ranch style house for the patients. Petitioner had been working at DT 14 for years prior to the accident. Petitioner was beginning to clean up after lunch to do dishes. As Petitioner walked to the kitchen, she rolled her sleeves up and struck her hand on the wall. Petitioner testified that the lighting was good. Petitioner testified that nothing caused her to hit her hand and that it was a "freak accident".

Petitioner did not have anything in her hands at the time. Petitioner had walked the same path several times to get to the kitchen before. Petitioner testified that there was nothing unusual about the pathway.

Petitioner notified her supervisor, Athena Alexiou, of the injury that same day. On the day after the injury, she presented to Dr. Dore DeBartolo. Petitioner had x-rays taken and was told to follow up. She was diagnosed with a contusion by Dr. DeBartolo. Petitioner was under Dr. DeBartolo's care for several months before being referred to Dr. Paschal Panio. Dr. Panio performed a surgery on April 2, 2018. Prior to the surgery, Petitioner was working in a light-duty capacity. After the surgery, Dr. Panio had Petitioner off work until July 6, 2018, when she was released in a full-duty capacity.

Petitioner testified that the problems she has with her left hand do not really affect her daily activities. She is able to do all her normal duties at work. She does not put too much pressure on her left index fingers but uses her other fingers. She testified that she still feels pain, which is constant. She takes Ibuprofen for the pain only if it becomes unbearable. She massages her hand. She further testified that she performs the exercises that they taught her before she underwent surgery. Petitioner is unable to make a complete fist as sometimes her index finger will lock.

B. Petitioner's Medical Treatment

Petitioner presented to Dr. Dore DeBartolo of the Chicago Center for Sports Medicine and Orthopedic Surgery on August 17, 2017, the day after the accident, with complaints of an injury to her left hand/finger. (PX 1, PX 3).

In the first documented history of accident on the intake form, when asked how the injury occurred, Petitioner wrote: "Accidentally hit hand on wall while walking." (PX 1)

The next documented history of accident, which she gave later that evening, states: "Patient said she had just feed (sic) the men at her job and she went into the kitchen. She started to roll up the sleeve and she hit the door when she went to roll up her sleeve …" (PX 1)

Petitioner's middle finger, index finger, and thumb were swollen. X-rays of the left hand showed no evidence of fracture, dislocation, or osteochondral injury. Dr. DeBartolo diagnosed

Petitioner with a contusion of the left hand and prescribed Ibuprofen and a splint. Petitioner followed up on August 26, 2017 and reported her symptoms had stayed the same. On September 1, 2017, Petitioner saw Dr. DeBartolo and reported her index finger was still very painful. Dr. DeBartolo prescribed a course of occupational therapy. (PX 1)

Petitioner began occupational therapy at Chicago Center for Sports Medicine and Orthopedic Surgery on September 7, 2017. The plan of treatment included therapeutic exercise, range of motion exercises, functional lifting, carrying, and push/pull activities. Petitioner was to attend two times a week for four to six weeks. Petitioner attended 11 sessions through October 6, 2017. (PX 1, PX 3)

On September 25, 2017, Petitioner followed up with Dr. DeBartolo and reported her symptoms had minimally improved. Dr. DeBartolo ordered an MRI of the hand and noted that the pain was out of proportion. The MRI showed no fracture or ligament injury. On November 8, 2017, Dr. DeBartolo noted Petitioner had developed arthrofibrosis and prescribed occupational therapy. Petitioner saw Dr. DeBartolo on December 4, 2017, January 5, 2018, February 5, 2018, and March 5, 2018, but had no change in her symptoms as she had not started occupational therapy because she was awaiting approval. Dr. DeBartolo referred her for hand surgery. (PX 1)

Petitioner presented to Dr. Paschal Panio on March 7, 2018. (PX 4). Petitioner complained of a left index finger work injury and that she was unable to bend the finger. Dr. Panio's physical exam showed no evidence of any tenosynovitis to the flexor tendons, although she did have intrinsic tightness to her index finger. Dr. Panio instructed her to return with the MRI films which she did on March 28, 2018. Dr. Panio's review of the MRI revealed fluid accumulation within the flexor tendon sheath. Dr. Panio recommended a tenosynovectomy. Dr. Panio performed the surgery on April 2, 2018 at South Suburban Hospital. (PX 5) On April 4, 2018, Petitioner had a post-operative appointment with Dr. Panio. Dr. Panio noted that after the surgery Petitioner had regained full flexion to her index finger. (PX 4)

II Conclusions of Law

The Arbitrator adopts and incorporates the above findings in support of the following 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?

A petitioner bears the burden of proving by a preponderance of the evidence that "she has suffered a disabling injury arising out of and in the course of ... her employment." *Metro. Water Reclamation Dist. of Greater Chicago v. Illinois Workers' Comp. Comm'n,* 407 Ill. App. 3d 1010, 1013, 944 N.E.2d 800, 803 (2011) see also 820 ILCS 305/2 (West 2004). To satisfy that burden the Petitioner must show that the cause of the injury is a risk that is "connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.* See also *Caterpillar Tractor Co.*, 129 Ill.2d at 58, 133 Ill. Dec. 454, 541 N.E.2d 665.

The Court recognizes three types of risks. First, risks that are distinctly associated with the employment; second, risks that are personal to the employee; and third, neutral risks that do not have any particular employment or personal characteristics. *Id.* For an injury resulting from a neutral risk to be compensable a petitioner must show that they were "exposed to the risk to a greater degree than the general public ... Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public. Id. An injury resulting from a neutral risk to which the general public is equally exposed does not arise out of Petitioner's employment. *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill. 2d 52, 59 [1989].

In this case, while she was cleaning up after lunch, Petitioner struck her hand on the wall while rolling up her sleeves as she was preparing to wash her patients' dirty dishes.

"Arising out of" is primarily concerned with the causal connection to the employment. Thus, there must be a causal connection between the employment and the injury, i.e. the employment must be a causative factor. For example, in *Memorial Medical Center v. Indus. Comm'n*, 72 Ill. 2d 275, 381 N.E.2d 289 (1978), the Illinois Supreme Court ruled that an injury by a cleaning lady was compensable who injured herself bending over to polish a kick plate on a door. "To come within the statute the employee need only prove that some act or phase of the

employment was a causative factor of the resulting injury." *Id. See also, e.g., Interlake, Inc. v. Indus. Comm'n,* 161 Ill.App.3d 704, 515 N.E.2d 202, 113 Ill.Dec. 393 (1st Dist. 1987) (compensation was awarded to an employee who experienced back pain when he bent over to pick up a screwdriver); *Komatsu Dresser Co. v. Indus. Comm'n*, 235 Ill.App.3d 779, 601 N.E.2d 1339, 176 Ill.Dec. 641 (2d Dist. 1992) (compensation awarded to employee who experienced back pain when he bent over to pick up a part).

Petitioner testified that she was walking into the kitchen at the time of the accident, and that there was nothing unusual about the pathway she took. Thus, there was no defective condition of the pathway. At the time her left hand struck the wall, Petitioner was not carrying anything, including dirty dishes, in her hands. She testified that it was a "freak accident.".

However, Petitioner's work duties included cleaning up after her patients and washing their dishes. During the process of cleaning up, Petitioner testified, she rolled up her sleeves while walking into the kitchen to wash the lunch dishes. While rolling up her sleeves, she struck her left hand on a wall.

The Arbitrator finds that by rolling up her sleeves, Petitioner was performing an act she would reasonably be expected to perform as part of her job duties. As her employment required her to clean up after her patients and wash their dishes, she was at an increased risk of an injury when she was rolling up her sleeves to get ready to wash dishes. Thus Petitioner has established an accident arising out of and in the course of her employment.

In addition, Petitioner's injury is also compensable under the "personal comfort" doctrine, which provides that an employee does not remove himself from the course of his employment when, within the time and place of his employment, he attends to matters of personal comfort, as long as his actions in so doing were not unreasonable.

The Commission case of *Stafford v. Ford Motor Co.*, 99 IIC 0216, is analogous. In *Stafford*, claimant suffered an accidental injury while changing out of his dirty coveralls after work. The Commission found the injury to be compensable since claimant was engaged in an act of personal comfort which was incidental to his employment and it was reasonable to assume claimant would remove the dirty coveralls before leaving work.

The case of *Conner v. Mid-City National Bank*, 95 IIC 0565, also provides guidance. In *Conner*, the Commission affirmed a finding under the personal comfort doctrine. Claimant injured herself after work when she slipped while putting on boots because she knew it was

snowy outside. The Commission found the injury compensable under the personal comfort doctrine as claimant was performing a reasonable act of personal comfort which was incidental to her employment, which was sufficient to establish an accident arising out of the employment.

The personal comfort doctrine was similarly applied in *Underwood v. Metropolitan Water Reclamation District*, 99 IIC 403. In *Underwood*, claimant was injured in a collision with a co-worker when she was putting a cup of leftover chili in the refrigerator. In ruling that the act of putting the leftover chili in the refrigerator was reasonably related to the personal comfort of eating, the Commission found the injury to be compensable. Thus, the accident arose out of and in the course of claimant's employment.

The above Commission decisions all recognize that acts of personal comfort, during work hours and work space, do not take the employee out of the scope of his employment.

In the case at bar, Petitioner injured herself while rolling up her sleeves as she was preparing to wash her patients' dishes, presumably to avoid getting dirty dishwater on her clothing. This was a reasonable act of personal comfort. Because Petitioner was in a place she was reasonably expected to be and was engaged in reasonable conduct, this accident falls under the personal comfort doctrine.

Therefore, the Arbitrator finds that on August 16, 2017, Petitioner sustained an accident that arose out of and in the course of her employment by Respondent.

With regard to causation, Petitioner testified that Dr. John Fernandez examined her hand and asked how she injured it. Petitioner testified that she then told Dr. Fernandez how she did it, and that he responded: "Yeah, you did hurt it at work."

The Arbitrator relies on the chain of events analysis to find causation. Petitioner testified that prior to the accident, she had no problem with, or treatment for, her left hand. The day after the August 16, 2017 accident, she sought treatment for her left hand and has had some degree of disability since that time. There is no documentary evidence or testimony by a witness that Petitioner experienced prior symptoms in, or treatment for, her left hand.

"A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Indus. Comm'n*, 93 Ill. 2d 59, 63-64 (1982)

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

The Arbitrator has found that Petitioner sustained an accidental injury to her left hand as a result of the work accident of August 16, 2017. Petitioner underwent surgery to her left hand on April 2, 2018. Dr. Panio took Petitioner off work for the surgery. His last off-work note is dated May 16, 2018. (PX 4) Petitioner testified that on July 6, 2018, she was released to return to full-duty work. The Arbitrator finds Respondent liable to Petitioner TTD benefits of $659.64/week from April 2, 2018 through July 6, 2018, which represents a period of for 13-5/7 weeks.

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

Petitioner submitted, as P. Ex. 7, an itemization of medical bills paid through group health insurance, for which a credit may be allowed under Section 8(j) of the Act. The payments were made to Dr. Primus and Dr. DeBartolo at Chicago Sports Orthopedics; Dr. Paschal J. Panio; and Dr. Shahla F. Zaldi and amounted to $1,290.11. Petitioner also presented as P. Ex. 6 a bill from Tinley Park MRI for $1,400.00.

Petitioner is entitled to have and receive from Respondent $2,690.11 for reasonable and necessary medical treatment.

ISSUE (M): Should penalties or fees be imposed upon Respondent?

The Arbitrator finds that Respondent is not liable for penalties and attorney's fees since there was a bona fide accident dispute.

In the first documented history of accident, on the intake form, when asked how the injury occurred, Petitioner wrote: "Accidentally hit hand on wall while walking." (PX 1)

The next documented history of accident, which she gave later that evening, states: "Patient said she had just feed (sic) the men at her job and she went into the kitchen. She started to roll up the sleeve and she hit the door when she went to roll up her sleeve …" (PX 1)

So, the first history indicates that she hit her hand on a wall, not on a door. Moreover, the first history makes no mention of the act of rolling up her sleeve at the time she struck her hand.

Furthermore, one could argue that rolling up her sleeve or sleeves is not a risk connected with or incidental to her employment by Respondent and that no quantitative evidence of the number of times she rolled up her sleeve or sleeves each work day was presented.

Petitioner proved accident when (1) she credibly testified at trial that she struck her left hand against the corner of a wall in the doorway to the kitchen while in the act of walking to the kitchen and rolling up her sleeve (2) she offered treating records, and (3) she cited pertinent case law.

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

In *Botao Kou v. Southwest Airlines*, 17 IWCC 0191, claimant was a 34-year-old ramp agent who sustained an accidental injury to his right hand on January 3, 2013. Claimant underwent surgery for stenosing tenosynovitis and trigger finger of his right middle finger. The AMA impairment rating was 0% UEI. The Commission awarded claimant 7.5% loss of use of his right hand.

Pursuant to Section 8.1b of the Act, for accidental injuries that occur on or after September 1, 2011, the following criteria are to be used in the determination of permanent partial disability:

(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 reported level of impairment pursuant to subsection (a), the Arbitrator notes that neither Petitioner nor Respondent submitted a report setting forth an AMA impairment rating. The Arbitrator finds that an impairment rating is not necessary based on the Appellate Court's holding in *Corn Belt Energy v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150311WC (3d Dist. 2016). The Court held that an AMA Impairment Rating is not required for the Arbitrator to award permanent partial disability benefits. *Id.* Accordingly, the Arbitrator will not consider this factor as it relates to the nature and extent of the injury.

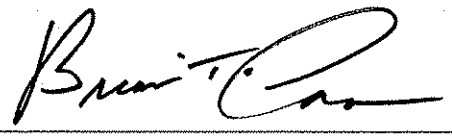
With regard to subsection (ii) of §8.1b(b), the occupation of the injured employee, the Arbitrator notes the record reveals that Petitioner is a Mental Health Tech III. Her job duties include working with mentally-challenged patients and taking care of their everyday needs. She feeds them, dresses them, and takes them to the work sites. Petitioner testified that she is able to perform all her normal duties, although she has not had to hold 2 patients at the facility. The Arbitrator finds that these facts weigh in favor of increased permanency. The Arbitrator gives moderate weight to this factor.

With regard to subsection (iii) of §8.1b(b), the age of the employee at the time of the injury, the Arbitrator notes the record reveals Petitioner was 43 years old. The Arbitrator takes judicial notice that Petitioner is neither a younger worker nor an older worker (18 → 65) and therefore finds that Petitioner's age weighs in favor of neither an increase nor a decrease in permanency. The Arbitrator gives little, if any, weight to this factor.

With regard to subsection (iv) of §8.1b(b), the employee's future earning capacity, the Arbitrator notes the record reveals that no evidence was offered to show that Petitioner's future earning capacity was affected by this accidental injury. The Arbitrator gives minor weight to this factor. He finds that the facts weigh in favor of slightly increased permanency.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the record reveals that as a result of the accident, Petitioner initially underwent a course of occupational therapy for her left hand. She then developed arthrofibrosis. She presented to Dr. Paschal Panio on March 7, 2018. Petitioner complained of a left index finger work injury and an inability to bend the finger. An MRI revealed fluid accumulation within the flexor tendon sheath. Preoperatively, Dr. Panio noted, Petitioner was unable to flex the finger down to the palm by approximately 2 centimeters. On April 2, 2018, Dr. Panio performed a tenosynovectomy, superficial and deep flexor tendons, left index finger. Initially, he made a longitudinal oblique incision over the volar MP crease and A1 pulley. After the surgery, Dr. Panio noted that Petitioner had regained full flexion of her left index finger. On May 16, 2018, Dr. Panio, he wrote that Petitioner is still able to just get her finger down to her palm, although there was some problem with the sheath. Petitioner was later released to return to full-duty work. Petitioner is right-hand dominant. The Arbitrator gives major weight to this factor. He finds that these facts weigh in favor of increased permanence.

Determination of permanent partial disability ("PPD") is not simply a calculation but is an evaluation of the 5 factors. The Arbitrator has carefully considered all 5 factors. By applying §8.1b and by considering the relevance and weight of all 5 factors, the Arbitrator finds that as a result of the August 16, 2017 accident, Petitioner has sustained a permanent loss of use of her left hand to the extent of 7.5%, pursuant to Section 8(e)9 of the Act.



2-25-19

Brian T. Cronin

Date

Arbitrator

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

Trina White,

Petitioner,

vs. No. 15 WC 32244

State of Illinois,
Shapiro Developmental Center,

Respondent.

20IWCC0270

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 3, 2018, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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. 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.

20 IWCC0270

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: MAY 11 2020

Marc Parker

Barbara N. Flores

o-04/16/20
mp/wj
68

DISSENT

I respectfully dissent from the Decision of the Majority. The Majority affirmed and adopted the Decision of the Arbitrator who found Petitioner sustained her burden of proving she sustained a compensable accident which caused a condition of ill-being of her left leg. I would have found that Petitioner did not sustain her burden of proving she sustained an accident which arose out of her employment, reversed the Decision of the Arbitrator, and denied compensation.

Petitioner sustained an injury to her left knee when she fell while at work on September 8, 2015. She testified that she was making rounds at night and was in a patient's room when she encountered something slippery and fell. She testified that she did not see water or powder, but she assumed that she encountered powder because it is more difficult to see than water. Petitioner also testified that patients are often dried and powdered in their rooms and that housekeeping did not clean the rooms until the morning. The Arbitrator concluded that "the facts here allow for a reasonable inference to be drawn that Petitioner's slip and fall was caused by a risk incidental to her employment, namely, powder and water."

Petitioner had the burden of proving that her fall was caused by a risk associated with her employment rather than being an idiopathic fall which had no apparent cause. In this instance, if Petitioner did not show a hazardous condition, *i.e.* a slippery surface, she did not sustain her burden of proving her accident and injury were associated with any risk associated with her employment. Here, there is no objective evidence of any hazardous condition. There was neither any wetness nor powder found on her clothing after her fall. In my opinion, the "inference" made by the Arbitrator and the Majority that Petitioner was injured because of a hazardous condition is not based on objective findings but rather based on speculation, which is inappropriate. Not only is establishing compensability on speculation prohibited under our Act, it could result in shifting the burden of proof by allowing a trier of fact to "infer" a compensable cause of an accident when there is no objective evidence to support such a compensable cause. Use of such inferences could result in requiring the employer to disprove a compensable accident rather than requiring the Petitioner to prove a compensable accident, as required under the Act.

20 IWCC0270

For the reasons stated above, I would have found that Petitioner did not sustain her burden of proving she sustained an accident which arose out of her employment, reversed the Decision of the Arbitrator, and denied compensation. Therefore, I respectfully dissent from the Decision of the Majority.

O-4/16/20
DLS/dw
46

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WHITE, TRINA
Employee/Petitioner

Case# **15WC032244**

ST OF IL SHAPIRO DEVELOPMENT CENTER
Employer/Respondent

20IWCC0270

On 7/3/2018, 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 2.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1067 ANKIN LAW OFFICE LLC
JONEL MERAJ
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

6149 ASSISTANT ATTORNEY GENERAL
DANIELLE CURTISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

JUL 3 - 2018

Brandi A. Rhoades, Acting Secretary
Illinois Workers' Compensation Commission

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

Trina White
Employee/Petitioner

Case # **15** WC **32244**

v.

State of Illinois, Shapiro Developmental Center
Employer/Respondent

20IWCC0270

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 **Kankakee**, on **May 17, 2018**. 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

20IWCC0270

FINDINGS

On **September 8, 2015**, 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 $**57,824.00**; the average weekly wage was $**1,112.00**.

On the date of accident, Petitioner was **49** years of age, ***single*** 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.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $16,159.90 to Presence St. Mary's Hospital, $300.00 to Online Radiology Group, $922.50 to EMP of Kankakee County, LLC, $715.00 to Oak Orthopedic, and $476.00 to Riverside Community Health Center.

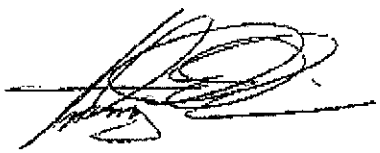
Respondent shall be given a credit for medical benefits that have been paid through its group medical plan, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $**741.33**/week for **5 1/7** weeks, commencing **09/09/2015** through **10/14/2015,** as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**667.20**/week for **21.5** weeks, because the injuries sustained caused the **10**% loss of the **left leg**, as provided in Section 8(e) of the Act.

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

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



Arbitrator Anthony C. Erbacci

June 29, 2018
Date

JUL 3 - 2018

FACTS:

On September 8, 2015, the Petitioner was employed by the Respondent as a Mental Health Technician at the Shapiro Developmental Center, having been so employed for 26 years. The Petitioner worked the overnight shift and her job duties included taking care of mentally ill patients. The Petitioner could not recall her exact salary at the time of her injury, however, she produced pay stubs to substantiate her earnings for the 52 weeks prior to the accident.

Petitioner testified that on September 8, 2015 she was working the overnight shift which began at 11:00 PM. Part of her job is to walk around the facility and check in on the patients. Petitioner testified that she was walking inside a room when her right foot slipped on the floor and slid forward. She testified that her right leg slid out in front of her causing her to fall directly onto her left knee. Petitioner testified that this happened between 2:00 AM and 3:00 AM. Petitioner testified that she did not feel immediate pain, however, her knee began to hurt later in her shift. Petitioner testified that although she could not see anything on the floor, she noted that something slippery on the floor caused her to fall. Petitioner testified that every night before bedtime, the patients at the facility are bathed and brought into their rooms where they are dried off with a towel and powdered with baby powder. Petitioner testified that occasionally, water and powder will fall on the floor. Petitioner testified that the powder is white, as is the color of the tile floor and thus any residue on the floor is not clearly visible. Petitioner testified that the cleaning crew does not come around until the morning to do a thorough cleaning of the facility. Petitioner testified that the floors in the facility are white tile. Petitioner testified that she has not had any prior slips in other areas of the facility. She was wearing regular gym shoes on the date of accident.

Following the slip and fall, the Petitioner continued to work her shift. She filled out an accident report later that morning with her supervisor, Oscar. Petitioner told Oscar that she "slipped on the floor on something slippery and she fell on her knee." Petitioner was not sent for any medical treatment by her supervisor.

Petitioner first sought medical treatment the following day on September 9, 2015 at Presence St. Mary's Hospital. The Petitioner gave a history of a "slip from ground level onto the left knee" and she complained of left lateral distal thigh pain after a fall yesterday. The Petitioner reported that she had no prior history of any left knee problem. An x-ray done to the Petitioner's knee showed no fractures or dislocation and the clinical impression was that of a left thigh strain resulting from a "mechanical fall."

Petitioner followed up with Dr. Olatunji Akintilo at the Riverside Medical Center on September 15, 2015. She gave a history of "slipping on a wet surface while at work at Shapiro and fell on left knee" and she complained of having moderate pain in the knee since the fall which was aggravated by weight bearing and walking. the Petitioner was diagnosed with left knee pain and an MRI of the left knee was ordered. Petitioner was advised not to return to work starting September 15, 2015 for 14 days. The Petitioner followed up with Dr. Akintilo on September 30, 2015 and complained of continued pain in the left knee which is aggravated by weight bearing and walking. Dr Akintilo recommended she stay off work for an additional 2 weeks.

A left knee MRI was performed on October 6, 2015 at Presence St. Mary's and the impression reported was that of myxoid change medial meniscus with degenerative tear junction of the body and posterior horn extending to the inferior articular surface. Moderate chondomalacia medial joint

compartment was noted. A Baker's cyst measuring 3.8 cm was also noted as well as subcutaneous fluid surrounding the proximal patellar tendon with small patellofemoral joint effusion. The Petitioner followed up with Dr. Akintilo on October 13, 2015 and Dr. Akintillo gave her a referral to see Dr. Eddie Jones, an orthopedic surgeon, to evaluate her for the left knee pain and Baker's cyst. Dr. Akintilo also prescribed physical therapy 2-3 times a week for 4-6 weeks and he returned the Petitioner to work to her regular duties.

The Petitioner was evaluated by Dr. Jones on October 23, 2015. The Petitioner reported a history of a fall at work on September 8, 2015 and reported that her pain comes and goes and is aggravated by sitting down. Review of the MRI was noted to show a posterior horn medial meniscal tear in the left knee and the Petitioner elected to proceed with an intraarticular cortisone injection in to the left knee joint. The Petitioner followed up with Dr. Jones on November 11, 2015 and it was noted that she had a much improved left knee with underlying left medial meniscal tear. She was advised to return to the clinic as needed.

The Petitioner testified that she has been working her regular duties as of the date of the last visit with Dr. Jones. She testified that she still feels pain in her knee from time to time. She further testified that in 2017, she went to a clinic to get a checkup on her left knee as her pain had increased. Petitioner testified that she could not remember the name of the clinic but that they recommended physical therapy for her pain.

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 Arbitrator finds that the accident arose out of an in the course and scope of the Petitioner's employment with the Respondent. In order to obtain compensation under the Workers' Compensation Act (hereinafter "Act"), a claimant must show by a preponderance of the evidence that he has suffered a disabling injury arising out of and in the course of his employment. Both elements must be present at the time of the claimant's injury in order to justify compensation. *IL Bell Telephone Co. v. Indust. Comm'n.*, 131 Ill.2d 478, 483 (1989). Here, both elements have been met.

Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, are generally deemed to have been received "in the course" of the employment. *Caterpillar Tractor Co. v. Indust Comm'n.*, 129 Ill.2d 52, 57 (1989). Petitioner testified that on September 8, 2015, she was inside the Shapiro Developmental Center making her rounds. After checking a patient's room, the Petitioner slipped on something slippery causing her right leg to slide forward and fall onto her left knee. Petitioner was required to be in the room in order to conduct her nightly rounds. The Petitioner performed this task on the Respondent's premises when she injured herself and therefore her injury was in the course of her employment.

The arising out of component refers to the origin of cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Indust Comm'n.*, 129

Ill.2d 52, 58 (1989). As a general rule, risks that an employee may be exposed to are categorized into three groups: (1) risks distinctly associated with employment, (2) risks personal to the employee, and (3) neutral risks that have no particular employment or personal characteristics. *Illinois Consol. Tel. Co. v. Indus. Comm'n*, 314 Ill. App. 3d 347, 352, (2000). In the context of falls, employment risks include tripping on a defect at employer's premises or falling on uneven or slippery ground at the work site. *Id.* Because the general public is not exposed to employment risks, such risks universally arise out of employment. *Id.*

The Arbitrator finds that Petitioner was exposed to a risk directly associated with her employment. Petitioner testified that on September 8, 2015, the patients at the facility were bathed and powdered in their rooms. Petitioner testified that often, there will be water and white powder residue on the floor that is not always fully cleaned after the patients are dried and powdered. Petitioner testified that between 2:00 AM and 3:00 AM, she was in a patient's room when her right foot slipped on something slippery and she fell on her left knee. Petitioner testified that the cleaning crew comes in the morning to clean the facility and therefore the room had not been cleaned. The facts here allow for a reasonable inference to be drawn that Petitioner's slip and fall was caused by a risk incidental to her employment, namely, powder and water. As such the Arbitrator finds the Petitioner's injury arose out of her employment with the Respondent.

The Arbitrator notes that no evidence of any physical condition existing in the claimant caused the fall. Petitioner testified that she had no symptoms of dizziness on the date of the accident. Petitioner told her supervisor Cesar that she slipped on something slippery and this was noted in Petitioner's Notice of Injury. (Resp. Ex #1). Petitioner told her doctor at Presence Saint Mary's, that she slipped from ground level. (Pet. Ex #2). Petitioner told Dr. Akintilo that she slipped on a wet surface. (Pet. Ex #4). The mechanism of injury in the medical records at Presence St. Mary's is "mechanical fall" and not a fall due to a physical condition. (Pet. Ex #2) Lastly, Respondent did not produce any medical evidence to support a conclusion that the cause of the fall was due to Petitioner's previously diagnosed Meniere's disease.

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 finds that the Petitioner's current condition of ill-being is causally related to her work accident. A causal connection between work duties and a condition may be established by a chain of events including petitioner's ability to perform the duties before the date of the accident, and inability to perform the same duties following that date. Pulliam Masonry v. Industrial Comm'n., 77 Ill.2d 469, 471 (1979). Proof of prior good health and change immediately following and continuing after an injury may establish that an impaired condition was due to an injury. Land and Lakes Co. v. Indust. Comm'n., 359 Ill.App.3d, 593 (2d Dist. 2005). The Petitioner was injured in a work-related accident on September 8, 2015. Prior to that incident the Petitioner was able to perform all of the duties of her employment without difficulty and the Petitioner testified that she did not have any pain complaints related to her left knee prior to this work accident. On September 8, 2015, Petitioner slipped and fell onto her left knee. Dr. Akintilo related the knee pain to her slip and fall at work. Petitioner's orthopedic physician Dr. Jones related the meniscal tear to the slip and fall. Accordingly, all of the medical evidence in this case establishes causation, and the Arbitrator finds a causal connection between the Petitioner's medial meniscal tear and the slip and fall accident.

In Support of the Arbitrator's Decision relating to (G.), What were Petitioner's earnings, the Arbitrator finds and concludes as follows:

The Arbitrator finds that the Petitioner's wages in the 52 weeks prior to the accident were $57,824.00 making her average weekly wage $1,112.00. Computation of average weekly wage is controlled by section 10 of the Act, which provides that, "average weekly wage' . . . shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime and bonus dived by 52." *Sylvester v. Indus. Comm'n, 197 Ill. 2d 225, 230, 756 N.E.2d 822, 826 (2001).* Petitioner testified that she could not remember exactly what her salary was at the time of the injury. She testified however that she has access to every pay stub through a portal provided by her employer. As such Petitioner produced copies of her pay stubs for the 52 weeks preceding the date of injury. (Pet. Ex. #5). These pay stubs reflect the actual wages Petitioner earned from the week ending September 15, 2014, through the week of September 15, 2015. (See Pet. Ex. #5). The pay stubs show that Petitioner earned $57,824.00, in the 52 weeks prior to her accident. Respondent did not offer any evidence to refute Petitioner's earnings in the 52 weeks preceding the accident. Accordingly, the Arbitrator finds that Petitioner's average weekly wage as reflected by her accurate pay stubs is $1,112.00.

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 Arbitrator finds that the Petitioner's medical care has been reasonable and necessary. Petitioner incurred $18,573.40 in medical charges to treat her left knee injury caused by her work accident. (Pet. Ex. #1). Specifically, Petitioner incurred $16,159.90 from Presence St. Mary's Hospital, $300.00 from Online Radiology Group, $922.50 from EMP of Kankakee County, LLC, $715.00 from Oak Orthopedic, and $476.00 from Riverside Community Health Center. *Id.* There is no dispute as to the reasonableness and necessity of treatment in this case. Accordingly, The Arbitrator finds that all treatment has been reasonable and necessary in an attempt to achieve maximum medical improvement. Petitioner testified that her medical bills have been paid through her group health insurance that she receives through her employer. Responded paid an unknown amount thorough its group medical plan for which credit may be allowed under Section 8(j) of the Act.

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

The Arbitrator awards the Petitioner Temporary Total Disability benefits from September 9, 2015, through October 14, 2015, corresponding to a period of 5 1/7 weeks. The Petitioner's medical records all document that the Petitioner did not work and was in an off work status from September 9, 2015, through October 14, 2015. Accordingly, the Arbitrator awards the Petitioner Temporary Total Disability benefits for 5 1/7 weeks from September 9, 2015, through October 14, 2015.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

Because the Petitioner's work accident occurred after September 1, 2011, Section 8.1(b) of the Act requires consideration of the five criteria set forth in determining the level of permanent partial disability.

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 employed as a mental health technician at the time of the accident and that she is able to return to work in her prior capacity as a result of said injury. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 49 years old at the time of the accident. Petitioner will likely remain in the workforce for another 15 years in her current role. Because Petitioner will be working with a tear in her left meniscus which will degenerate over time, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner has not suffered a reduction in pay as she was able to return to her previous job at Shapiro. Because Petitioner is earning the same wage, the Arbitrator therefore gives no 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 medical records document a consistent course of medical care and consistent complaints from Petitioner. Petitioner complained of pain in her left knee, which is exacerbated by walking and weight bearing. An MRI of Petitioner's left knee revealed a tear of the posterior horn of the medial meniscus. This tear was not surgical repaired and is still present. Petitioner testified that her job involves her walking around the Shapiro Developmental center and she works through the pain. Petitioner testified that because of the pain, she has gone in for further evaluation of her knee at a clinic of her choice. Her pain never went away and the meniscal tear will degenerate over time. She testified that she is unable to do heavy lifting as she did prior to the accident and struggles with daily activities because of the pain in her knee. Because of Petitioner's credible testimony or disability corroborated by her medical records, 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 10% loss of use of the Left Leg pursuant to §8(e) 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 McLEAN	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Odelia Garcia,
Petitioner,

vs. No. 15 WC 34790

20IWCC0271

Manpower,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical expenses, temporary total disability, permanent partial disability, benefit rate and 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 April 26, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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.

20IWCC0271

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: MAY 13 2020

Marc Parker

mp/wj
05/07/20
68

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GARCIA, ODELIA
Employee/Petitioner

Case# **15WC034790**

MANPOWER
Employer/Respondent

20IWCC0271

On 4/26/2019, 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 2.40% 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
WILLIAM D TRIMBLE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

5354 STEPHEN P KELLY
ATTORNEY AT LAW LLC
2710 N KNOXVILLE AVE
PEORIA, IL 61604

STATE OF ILLINOIS)
)SS.
COUNTY OF **MC LEAN**)

☐ 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

Odelia Garcia
Employee/Petitioner

v.

Manpower
Employer/Respondent

20IWCC0271

Case # **15** WC **34790**

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 **Bloomington**, on **3/1/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **7/30/15**. 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 $**26,000.00**; the average weekly wage was $**500.00**.

On the date of accident, Petitioner was **30** 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 for any related medical expenses it has paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, subject to the medical fee schedule, of $2,416.56 to IWIN, $30,178.52 to Orthopedic & Shoulder Center, $19,950.84 to Ireland Grove Center for Surgery, $403.14 to Ambulatory Anesthesiology, and $9,869.69 to Prescription Partners, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $333.33/week for 30-4/8 weeks, commencing 8/3/15 through 3/4/16, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $300.00/week for 53.75 weeks, because the injuries sustained caused the 25% loss of the left leg, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator Gerald Granada

4/25/19
Date

APR 26 2019

20 IWCC0271

FINDINGS OF FACT

This case involves a Petitioner alleging injuries sustained while working for the Respondent on July 30, 2015. Respondent disputes Petitioner's claims and the issues in dispute are: 1) accident; 2) notice; 3) causation; 4) average weekly wage; 5) age & marital status; 6) medical expenses and 8(j) credit; 7) TTD; and 8) nature and extent.

On July 30, 2015, Petitioner was employed by Respondent, and was a loaned employee to Identity Optical. Although Identity Optical was a borrowing employer, the parties stipulated for purposes of this claim that Manpower is the Respondent in this case.

Petitioner testified that she was concurrently employed as a waitress at Cracker Barrel. She testified that she earned between one hundred and one hundred twenty dollars a week from her concurrent employment. Petitioner testified that she believed that she made Respondent aware of her concurrent employment, as it was necessary to arrange her schedule so that she could work in both jobs.

Petitioner testified that on July 30, 2015, while working for Respondent, she was sitting at a metal desk assembling eyeglasses. A coworker had left a drawer open on Petitioner's side, of which Petitioner was unaware. When a supervisor called across the lab to Petitioner, Petitioner swiveled and twisted quickly in her chair and struck her left knee on the open desk drawer. This caused immediate pain. Petitioner was able to complete her shift. After her shift, Petitioner did not work at her second job as a waitress at Cracker Barrel.

On July 31, 2015 Petitioner told her supervisor/manager John that she had hurt her knee the day before, at work. At John's instruction, Petitioner called Respondent and made a verbal report of her injury. Petitioner was able to complete an entire shift that day. Later that evening, Petitioner was only able to work as a waitress at Cracker Barrel for one and a half hours, due to pain in her knee. Because of her knee pain, Petitioner was not able to work as a waitress at Cracker Barrel on the following Saturday, August 1, or Sunday, August 2, 2015.

On August 3, 2015, Petitioner's knee was bruised, and had increased swelling in her left knee. She reported the work injury in person at Manpower. Her supervisor directed her to obtain treatment at IWIN. The Form 45 accident report dated August 3, 2015 indicated that on July 30, 2015, at 12:01 p.m., Petitioner was working assembly next to another employee, who had a drawer open, and that Petitioner turned while sitting in her chair and hit her left knee on the open drawer. (RX 2) The Accident Witness Statement submitted into evidence contains a statement dated August 4, 2105, by a Justin Schultz indicating that he "... was informed/asked about accident on 8-3-15 to inquire by [Petitioner] who she should report this to. I told her to speak to her employer (Manpower) and to let Dan (Director of Operations at Acuity) know." (RX 3)

On August 3, 2015 Petitioner sought medical attention at IWIN. (PX 2) Petitioner testified that at that time she had trouble both extending and flexing her knee, her knee was examined and x-rayed at IWIN, where she was given physical therapy. Records of IWIN note that on examination, an abrasion on Petitioner's knee was noted, with fluid in the prepatellar bursa surrounding the abrasion. Petitioner was noted to be tender to touch on the front of the knee, and to have pain with extension and flexion of the knee. X-ray reports from IWIN of Petitioner's knee noted no fracture. She was provided with Naproxen/Aleve and a ThermalSoft Gel Cold pack, with instructions to apply heat to the affected area twenty minutes per hour. (PX 2)

20 IWCC0271

Petitioner testified that she next returned to IWIN on August 6, 2015, and that her knee felt tender, painful, unstable, and hurt when her left foot touched the ground. She had reduced extension, and was limping. An MRI was ordered for her, and Petitioner was provided work restrictions. (PX 2)

On August 7, 2015, Petitioner underwent an MRI, and physical therapy was ordered. Petitioner underwent physical therapy until her discharge from therapy on August 19, 2015. Petitioner testified that the physical therapy did not help.

Petitioner testified that on August 20, 2015, she sought treatment from orthopedic surgeon, Dr. Lawrence Li. (PX 6) Petitioner described her injury to Dr. Li and told him that she was injured at work, that she had undergone physical therapy, she had taken Naproxen, and her knee was in pain. Dr. Li prescribed a venous doppler, and prescribed physical therapy On September 8, 2015, after Petitioner had undergone physical therapy, she was again seen by Dr. Li, who gave her an injection in her knee. The injection had some effect for four to five days, and helped her perform her physical therapy. She continued to undergo physical therapy. (PX 5) On October 26, 2015, Petitioner had been doing physical therapy without having satisfactory results, and Dr. Li recommended that Petitioner have another injection for short term benefit, and schedule surgery in the future. At this point, Dr. Li recommended that Petitioner not work until she underwent surgery.

Petitioner underwent arthroscopic knee surgery on January 8, 2016. At the time of surgery, Dr. Li diagnosed Petitioner with a medial meniscus tear and grade 2 chondral injury. (PX 4) She testified that after surgery, she had swelling, and that for the first week after her arthroscopic surgery, she slept with a special pillow. Her knee condition gradually improved. Petitioner still has knee pain. According to Dr. Li, Petitioner will probably always have some knee pain. (PX 1, pg. 18) After arthroscopic surgery, Petitioner continued to undergo physical therapy, participating in over 20 sessions, continuing through June 17, 2016. (PX 7) Petitioner also continued to follow up with Dr. Li. (PX 6)

Petitioner testified that following her injury, she wanted to go back to work, but was told by Manpower that she was not allowed to go back to work until she resolved her knee problem. She testified that Manpower never again scheduled her to work, that she did not receive disability pay from Manpower while she was not working, and that Manpower did not pay her medical bills. Respondent has submitted evidence of payment of a small number of medical bills (RX 4), consistent with bill information submitted by Petitioner (PX 8), which shows an outstanding amount due of $62,818.75, after payment to IWIN and Prescription Partners.

Petitioner testified that as of the time of arbitration, her knee was still sometimes painful, and sometimes she could not walk. She testified that when it is cold, her knee is painful. When Petitioner sleeps with air conditioning on, it will cause her knee pain. Petitioner is currently working at Little Island Preschool, taking care of children from six to 18 months of age. Her ability to work as a preschool teacher is affected because it is difficult for her to interact with children on the floor. Petitioner testified that her knee injury affects her ability to drive. She testified that she is currently living in South Carolina, and that a friend drove her from South Carolina to attend the arbitration. The trip took several days because Petitioner could not remain in one position for very long, and had to keep stopping so she could get out, change position or rest.

Dr. Li testified via evidence deposition on May 23, 2016. Dr. Li testified that "it is my opinion to a reasonable degree of medical certainty that the injury that she suffered at work where she turned her knee and then hit it against a metal desk drawer caused the medial meniscus tear and the chondral injury to the patella leading to the need for treatment and ultimately the surgery." (PX 1, pg. 18-19) On examination, Dr. Li testified that he

20IWCC0271

noted mild swelling, positive medial and lateral McMurray's, pain with palpation in the medial joint line, lateral joint line, and posteriorly. Furthermore, Petitioner had range of motion from 0° to 100° which is less than normal. (PX 1, pg. 6-7) Dr. Li testified that when he saw Petitioner on September 8, 2015, she had persistent posterior lateral pain made worse with any type of pivoting, twisting, prolonged walking, or standing, with some benefit from therapy. He noted mild swelling, and positive lateral McMurray's; Petitioner had pain in the medial joint line and lateral joint line; her range of motion was the same as in the previous exam; and that Petitioner had mild atrophy. Dr. Li testified that the significance of Petitioner's swelling was that there was something inside the knee that was causing inflammation and irritation. He testified that the atrophy was a function of her not using her left leg as much as she normally would, as a result of her pain. (PX 1, pg. 8-9) Dr. Li testified that McMurray's is a positive finding for medial meniscal pathology. (PX 1, pg. 9) Because of positive patella compression test, persistent pain with palpation in the lateral joint line and persistent swelling, and because medications, therapy, and injections had not been providing adequate relief, Dr. Li recommended left knee arthroscopy. (PX 1, pg. 11-12) On January 8, 2016, Dr. Li performed left knee arthroscopic surgery on Petitioner which involved, a partial medial meniscectomy, and abrasion chondroplasty of the patella. Dr. Li noted grade 2 chondral injury, which he considered to be a result of a direct blow to the patella. Dr. Li testified that he knew this because the patella is on the front of knee, and when it receives a direct blow, the patella cartilage can actually be pounded onto the femur and damaged. During that surgery, Dr. Li also found a radial tear of the medical meniscus. (PX 1, pg. 13-14) Dr. Li testified that as of the date of surgery, Petitioner would have been unable to work. (PX 1, pg. 14)

Following the surgery, Dr. Li followed up with Petitioner on January 15, 2016. At that time she was on crutches, had moderate discomfort, had trouble sleeping, and had a lot of pain anteriorly. Dr. Li was using the Game Ready Vasopneumatic Compression therapy to reduce swelling and pain. (PX 1, pg. 14) On examination on that date, Dr. Li noted Petitioner had moderate swelling, moderate bruising and a range of motion from 5° to 80°. She also had mild atrophy. (PX 1, pg. 14-15) Dr. Li again saw Petitioner in follow up on March 4, April 1, and April 29. During these visits he continued her on therapy and continued her on medications to help reduce her pain. Petitioner experienced gradual improvement, and as of the last visit, April 29, she did not have any swelling at all, although she had some mild quad atrophy and some persistent anterior knee pain. Dr. Li testified that Petitioner is likely to continue to have patellofemoral pain. (PX 1, pg. 17-18) Dr. Li testified that he would have released Petitioner to mainly sedentary work between six and eight weeks after her January 8, 2016 surgery. (PX 1, pg. 17)

Respondent's IME doctor, Dr. George Paletta Jr. testified by evidence deposition on May 11, 2018. Dr. Paletta testified that Petitioner's history given to Dr. Li was consistent to that which she had told Dr. Hauter. (RX 1, pg. 16-17) Dr. Paletta testified that it was his opinion after review of the records that Petitioner had some patellofemoral chondrosis and, based on operative findings, a tear of the medial meniscus. (RX 1, pg. 23) He testified that he did not believe Dr. Li's decision to perform arthroscopic surgery on Ms. Garcia's knee was unreasonable. (RX 1, pg. 33) Dr. Paletta agreed that he had no facts to dispute that Respondent had referred Petitioner to occupational medical therapy's Dr. Hauter, and agreed that Petitioner's complaints to Dr. Hauter were the same as the accident report, the date of injury she gave him was the same as on the accident report, and that the history of accident given was consistent with the accident report. (RX 1, pg. 39-40) Dr. Paletta testified that the history he received from Petitioner of her mechanism of injury is consistent with the accident report, Dr. Hauter's notes, and Dr. Li's notes. (RX 1, pg. 64) Dr. Paletta testified that the bruising that Dr. Hauter described could indicate an injury, and agreed that the same type of force that could cause bruising to a knee could cause medial meniscus tear or chondral injury. (RX 1, pg. 45) Dr. Paletta agreed that an individual with the complaint the Petitioner had of pain at extreme range of motion could have medial meniscus tear or chondral injury. (RX 1, pg. 45)

20 IWCC0271

Dr. Paletta agreed that he had no evidence from any source whatsoever that Petitioner had any prior surgical procedures to her left knee or physical therapy, injections or MRI's, or doctor's visits, or complaints to the left knee. (RX 1, pg. 66-67)

Dr. Paletta had no reason to disagree with Dr. Li's finding on December 14, 2015 of swelling, patella compression, and decreased range of motion. (RX 1, pg. 74) He did not see any indication in Dr. Li's notes that Petitioner had symptom magnification. (RX 1, pg. 75) He testified that a chondral injury may be a result of a direct blow to the knee. (RX 1, pg. 78)

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's credible, unrebutted testimony, which is also supported by the medical evidence. The evidence shows that Petitioner sustained an accident on July 30, 2015, when she struck her left knee on an open drawer while working for the Respondent on that day.

2. Regarding the issue of notice, the Arbitrator finds that the Petitioner has met her burden of proof. Petitioner credibly testified that she told her supervisor about her July 30, 2015 accident soon thereafter. Although the Arbitrator notes that Respondent submitted a document signed by Petitioner that indicates a date of injury of July 3, 2015, this is clearly an error. (RX 3) The overwhelming evidence in this case is that Petitioner suffered a work injury on July 30, 2015, and that she reported it no later than August 3, 2015.

3. On the issue of causation, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this finding, the Arbitrator again relies on the Petitioner's credible, unrebutted testimony and the medical evidence. The Arbitrator finds the opinions of the treating surgeon Dr. Li persuasive on this issue. The evidence shows that Petitioner sustained a left knee injury while working on July 30, 2015, which resulted in a medical meniscus tear and chondral injury to the patella leading to the need for treatment and ultimately surgery. There was little to no evidence offered to rebut the Petitioner on this issue.

4. Regarding the issue of average weekly wage, the Arbitrator finds that the Petitioner's average weekly wage was $500.00 per week. This finding is based on the Petitioner's testimony of earning $120.00 per week from her concurrent employment in addition to the $380.00 she has claimed on her Application for Adjustment of Claim. (AX 2) There was no evidence offered to refute Petitioner's claims on this issue.

5. Regarding the issue of Petitioner's age and marital status, the Arbitrator finds that the Petitioner was 30 years old and married at the time of her accident. Petitioner claimed on her Application for Adjustment of Claim a birthdate of July 12, 1985 and that she was married at the time. (AX 2) This is consistent with the Petitioner's claims on the Request for Hearing form, that indicate her age at 30 years old and her marital status as married. The Arbitrator also notes that the medical records also support this finding.

6. Regarding the issue of medical expenses, the Arbitrator finds that the Petitioner's medical treatment as set forth in the medical evidence has been reasonable and necessary in addressing her work-related injury. Specifically, the Arbitrator finds that treatment, surgery, and rehabilitation, at IWIN, Orthopedic & Shoulder Center Ireland Grove Center for Surgery and Ambulatory Anesthesiology, as well as medication relative to Petitioner's condition was reasonable, necessary, and causally related to the accident in question. There was no

20IWCC0271

evidence offered to the contrary. Accordingly, the Arbitrator awards Petitioner all outstanding, reasonable, related and necessary medical expenses as set forth in Petitioner's Exhibit 8. Pursuant to Section 8(j), Respondent shall receive a credit for any expenses it has already paid.

7. With regard to the issue of TTD, the Arbitrator finds that the Petitioner was temporarily totally disabled from August 3, 2015 through March 4, 2016. This finding is supported by the Petitioner's testimony and the medical evidence -which show that the Petitioner was unable to work for the time period in question. There was no evidence offered to rebut the Petitioner on on this issue. Therefore, the Respondent shall pay Petitioner TTD benefits from August 3, 2015 through March 4, 2016, representing a period of 30-4/8 weeks.

8. With regard to the issue of nature and extent, the Arbitrator notes that 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 makes the following findings listed below.

(i) Impairment. There was no evidence of an impairment rating and therefore the Arbitrator gives no weight to this factor.

(ii) Occupation. Petitioner was employed by Respondent as an eyeglasses lab assistant, and worked concurrently as a waitress at the time of the accident. The evidence shows that she was not able to return to work in her prior capacity as a result of said injury. The Arbitrator gives considerable weight to this factor.

(iii) Age. Petitioner was 30 years old at the time of the incident and the Arbitrator gives some weight to this factor.

(iv) Future Earning Capacity. There was no direct evidence offered regarding Petitioner's future earning capacity. The Arbitrator therefore gives little weight to this factor.

(v) Evidence of Disability. There was evidence of disability corroborated by the medical records, which show that Petitioner suffered an injury to her left leg resulting in a medial meniscus tear and chondral injury to the patella, for which Petitioner underwent surgical intervention involving a partial medial meniscectomy, and abrasion chondroplasty of the patella, followed by physical therapy. The evidence shows that Petitioner continues to have complaints of discomfort and pain in the knee, for which she takes medication, which has limited some of Petitioner's activities, including sitting, walking, driving and sleeping. Based on the evidence introduced at trial, the Arbitrator gives significant weight to this factor.

Based on the factors above, the Arbitrator concludes the injuries sustained by Petitioner caused a 25% loss of the left leg, as provided in Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Moore,
Petitioner,

vs. No. 17 WC 22317

20 IWCC0272

Mach Mining, LLC,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 16, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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.

20 IWCC0272

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: MAY 13 2020

Marc Parker

Deborah L. Simpson

Barbara N. Flores

mp/wj
05/07/20
68

SOLICITUD

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MOORE, ROVERT JASON
Employee/Petitioner

Case# **17WC022317**

MACH MINING
Employer/Respondent

20IWCC0272

On 7/16/2019, 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 2.01% 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 RICH RICH & COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

2999 LITCHFIELD CAVO LLP
GREGORY S KELTNER
222 S CENTRAL AVE SUITE 110
ST LOUIS, MO 63105

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

ROBERT JASON MOORE
Employee/Petitioner

v.

MACH MINING
Employer/Respondent

20IWCC0272

Case # 17 WC 22317

Consolidated cases: ____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **May 17, 2019**. 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 6, 2017**, 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 **$69,393.50**; the average weekly wage was **$1,499.92**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **3** 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 **$71,235.04** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of **$71,235.04**.

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

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's group exhibit, as provided in § 8(a) and § 8.2 of the Act.

Respondent shall be given credit for medical benefits that have been paid through its group carrier, 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 is liable for all temporary total disability benefits that have been paid. Respondent is not entitled to credit for overpayment, as there has been no overpayment of benefits.

Respondent shall pay Petitioner permanent partial disability benefits of **$775.18**/week for **225** weeks, because the injuries sustained caused the **45%** loss of the **body 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.

Signature of Arbitrator

7/14/19
Date

JUL 16 2019

FINDINGS OF FACT

On the date of the accident, Petitioner was a production supervisor for Respondent, Mach Mining. (T.9) He was the supervisor in charge of 11 employees running the coal in a specific section of the mine. (T.9) He took gas checks, made sure equipment ran smoothly, and ensured everyone was safe and sound. (T.9) The parties stipulated that Petitioner sustained accidental injuries June 6, 2017, when while attempting to hang a heavy mining cable, the cable came unhooked and struck Petitioner in his head, neck, and left shoulder and knocked him to the ground. (T.10-11) Petitioner was seen in Respondent's health clinic by a nurse, who referred him to the Orthopaedic Institute of Southern Illinois. (T.11-12)

Petitioner presented to the office of Dr. Robert Golz at the Orthopaedic Institute as instructed and saw his nurse practitioner, Mr. Robert Deaton, on June 27, 2017. (PX3, 6/27/17) Dr. Golz took the history of the injury and noted that Petitioner was having left upper extremity pain rated 8 out of 10 from his scapula to his little finger accompanied by numbness. *Id.* Examination showed pain with range of motion in his left shoulder, pain with testing of the left rotator cuff, a positive left drop arm sign, and decreased cervical range of motion with some aggravation of his discomfort. *Id.* Clinical tests for carpal and cubital tunnel syndrome were negative. *Id.* X-rays of Petitioner's neck showed only age-related changes in Petitioner's neck at C5 through C7, and left shoulder radiographs were benign. *Id.* Mr. Deaton's clinical examination/plan was cervicalgia, pain in the left shoulder, cervical disc herniation, and radiculopathy affecting upper extremity. *Id.* Petitioner was referred for an MRI of his left shoulder, placed under restrictions of right upper extremity activities only, and taken off work until he could be re-evaluated. *Id.*

The MRI completed July 5, 2017, showed C4-5 bilateral foraminal narrowing, severe on the right and moderate-to-severe on the left; C5-6 severe bilateral narrowing; C6-7 bilateral foraminal narrowing, severe on the left and moderate-to-severe on the right; C7-T1 bilateral foraminal narrowing, severe on the left and moderate-to-severe on the right; C5-6 mild-to-moderate spinal canal narrowing; C4-5 and C6-7 mild spinal canal narrowing; and straightening of the normal curvature of the cervical spine likely exacerbated by muscle spasm. (PX3, 7/5/17) Petitioner returned to Dr. Golz on July 10, 2017, and was diagnosed with a cervical disc herniation. (PX3, 7/10/17) Dr. Golz advised that Petitioner would require ongoing care and placed Petitioner under restrictions of no lifting, pushing, or pulling with the left upper extremity. *Id.*

Respondent began directing Petitioner's care and treatment and referred Petitioner to Dr. James Coyle. (PX4) Dr. Coyle evaluated Petitioner on July 12, 2017, took the history of the injury; noted that Petitioner was a pleasant 43-year-old 5'8" and 165 pound male, noted the lack of any prior cervical spine injury, and noted Petitioner's persistent symptoms of left scapula pain radiating into the left arm over the ulnar aspect of the forearm and into the small finger. (PX4, 7/12/17) Petitioner exhibited decreased grip strength in his left upper extremity, pain with

forward flexion of the cervical spine, positive Spurling sign to the left, and weakness in the left triceps versus normal strength on the right. *Id.* Dr. Coyle reviewed the x-rays and agreed that they showed spondylitic/degenerative changes from C4 to C7. *Id.* He also reviewed the MRI, which he believed showed a combination of disc and osteophyte abutting the spinal cord at C4-5 and C5-6 with severe foraminal narrowing on the right at C4-5, at C5-6 bilaterally, at C6-7 on the left, and at C7-T1 on the left. *Id.* Dr. Coyle's impression/discussion was as follows:

> IMPRESSION: Acute cervical disc herniation.
>
> DISCUSSION: Neither the MRI nor the MRI report explains Mr. Moore's profound weakness of triceps, grip strength, intrinsic strength, and extensors of his digits. There is an area of decreased signal density behind the C6 vertebral body, which may represent an extruded fragment. The MRI appears to be a low-field strength study. I recommend that we repeat this with a 3 Tesla MRI. I will see Mr. Moore back for followup [*sic*] as soon as this is available for review. Based on the history given and mechanism of injury, his work injury was the cause of his current condition and need for treatment. (PX4, 7/12/17)

The new MRI was completed on July 18, 2017, and according to Dr. Coyle, showed a C5-6 disc herniation, primarily central and right-sided, and at C6-7, a lateral foraminal disc and osteophyte complex producing foraminal stenosis. (PX4, 7/18/17) Given the positive MRI findings, the ongoing complaints, and the continued symptoms, Dr. Coyle recommended an EMG and nerve conduction study. *Id.* This was completed the same day in consultation with Dr. Daniel Phillips, who reported that Petitioner's findings were most consistent with acute, severe left C8 radiculopathy. *Id.* Dr. Coyle believed it was best to proceed cautiously and order a CT Myelogram. *Id.*

The CT Myelogram completed on July 26, 2017, showed effacement of the C6, C7, and C8 nerve roots with a left C7-T1 foraminal disc herniation, a broad-based C6-7 disc bulge, and a right C5-6 disc herniation. (PX5, 7/26/17; PX4, 8/2/17) When Dr. Coyle's examination was still markedly positive during Petitioner's follow-up on August 2, 2017, he recommended an anterior cervical microscopic discectomy and arthrodesis with an allograft spacer, BMP, and an anterior cervical plate. (PX4, 8/2/17) Dr. Coyle indicated he recommended surgery due to the profound weakness in Petitioner's left upper extremity. *Id.* He stated that Petitioner's need for surgery was referable to Petitioner's work injury of June 6, 2017. *Id.*

Petitioner sought a second opinion with Dr. Matthew Gornet on August 4, 2017. (PX6, 8/4/17) He took a consistent history of the injury and noted that Dr. Coyle was recommending immediate surgery. *Id.* Dr. Gornet's examination of Petitioner showed significant decrease in bicep and wrist dorsiflexion with significant loss of intrinsic strength in Petitioner's left hand when compared with his right, along atrophy in the thenar imminence with decreased sensation from C7-T1. *Id.* Dr. Gornet reviewed all diagnostic studies and agreed with the findings of the radiologist and Dr. Coyle, but Dr. Gornet noted the absence of foraminal views on the MRI

omitted a significant amount of information. *Id.* Dr. Gornet also asked Petitioner to obtain his CT Myelogram from Mercy Hospital. *Id.*

Petitioner underwent an MRI with foraminal views the same day and returned to Dr. Gornet on the same day. (PX6, 8/4/17; PX8, 8/4/17) Dr. Gornet believed there was no herniation at C7-T1 on the left; instead he believed there was a large cyst and spur encroaching on the nerve from the posterior aspect of that level. (PX6, 8/4/17) Dr. Gornet later appreciated this detail from the CT Myelogram when Petitioner provided him with same. *Id.* Dr. Gornet also believed that Petitioner had significant foraminal narrowing with acute-on-chronic disc herniations at C4-5, C5-6, and C6-7. *Id.* Dr. Gornet's rationale was:

> To really resolve this issue, I think he will require disc replacements at C4-5, C5-6, and C6-7 followed by a posterior foraminotomy at C7-T1. I would not fuse C7-T1, as the disc appears to be healthy and all pathology appears to be on the posterior aspect. My general suspicion is a posterior decompression alone may be all he needs and therefore, a fusion would not occur. If the plan initially, (I do not have Dr. Coyle's notes) was not fuse C7-T1 only, I believe this would have a potential disastrous effect, as from a bony and disc standpoint, this is the most narrowed level on the left side and would not address the posterior pathology causing his intrinsic hand weakness and atrophy. We have discussed all of these issues today. I will move forward with potential treatment there. *Id.*

On follow-up, Dr. Gornet noted no contraindications for disc replacement on Petitioner's CAT scan. (PX6, 8/10/17)

Petitioner underwent the first stage of his surgery on August 16, 2017, and Dr. Gornet was met with significant objective intraoperative findings of major compression coupled with a facet cyst which had inflamed the nerve at C7-T1, at which time Dr. Gornet performed laminotomy and foraminotomy. (PX9, 8/16/17) Three weeks later, Petitioner reported dramatic improvement in his left upper extremity pain notwithstanding a residual component of his symptoms in his left posterior arm with decreased biceps on the left at C4-5. (PX6, 8/30/17) Petitioner's improvement was so significant during the visit on August 30, 2017, that Dr. Gornet thought a period of observation best to see if Petitioner could avoid disc replacement from C4 to C7. *Id.*

In the interim, Respondent obtained an independent medical examination with Dr. Benjamin Crane, who agreed that Petitioner's symptoms were causally connected the June 2017 work injury and agreed that Dr. Gornet's surgery was appropriate and related to the accident. (PX6, 9/21/17) However, he digressed in that he would opt to treat Petitioner with a three level fusion as opposed to disc replacement. *Id.* Respondent did not offer said report into evidence, but its contents are contained in Dr. Gornet's treatment note of September 21, 2017, in which he commented on Dr. Crane's report. *Id.*

Petitioner returned to see Dr. Gornet on December 4, 2017, in follow-up of the posterior decompression at C7-T1. (PX6, 12/4/17) Petitioner was doing well; however, he continued to

have significant pain into both sides of his neck. *Id.* As a result, Dr. Gornet recommended proceeding with disc replacement surgery, and stated:

> Originally [Petitioner] had seen Dr. Coyle who did feel his symptoms were causally connected. He recommended a C4 to C7 fusion. He had also seen Dr. Crane. Dr. Crane also felt that a three level arthroplasty was a viable option. Given this fact and I agree with Dr. Crane and Dr. Coyle, I think his best option is to move forward with treatment and my recommendation would be multilevel cervical disc replacements. I have again explained to both he and his wife that multilevel cervical disc replacement is superior to multilevel fusion in all categories and I think this is probably giving him his best option. Certainly Dr. Crane agreed that his is a viable option and we will move forward with this. Again, a portion of his left arm symptoms is dramatically improved and we are pleased with this. We have dispensed today Cyclobenzaprine 10 mg p.o. q.h.s. X 90 days. These were filled in the office. We will schedule him for three level disc replacement. The risks and benefits have been explained. *Id.*

The second phase of Petitioner's surgery was completed on January 10, 2018, and again Dr. Gornet was met with objective intraoperative findings of multiple herniations from C4 through C7. (PX6, 1/10/18) Disc replacements were inserted without incident, and follow-up visits showed Petitioner made significant improvement. *Id.*; (PX6, 2/22/18, 4/23/18) Dr. Gornet referred Petitioner for post-operative physical therapy on April 23, 2018, while noting that Respondent scheduled Petitioner yet again for a § 12 examination. (PX6, 4/23/18; PX3)

On June 19, 2018, Respondent had Petitioner examined by Dr. Robert Bernardi, who testified by way of deposition as to the findings he authored in his report. (RX1) He testified that he is a board certified neurosurgeon who performs virtually every type of surgery from the neck of the base of the spine except disc replacements. *Id.* at 5. When discussing his reluctance to perform disc replacements, he stated, "In fact, my understanding of the literature on the subject is that individuals undergoing disc replacements are needing revision surgeries at a rate that is very similar to those undergoing disc replacements." *Id.* at 6. Consequently, he believed that every patient who received a disc replacement would ultimately require revision surgery. *Id.* at 6.

On direct examination, Dr. Bernardi testified that Petitioner had no pain when he came to his office, that Petitioner's scan revealed degenerative disc disease, and that his clinical examination of Petitioner was positive for muscular atrophy along the left side of the incision. *Id.* at 10-11. He noted left finger flexor reflexes were absent on the left and that Petitioner had some slight atrophy in the intrinsic muscles of the left hand. *Id.* Notwithstanding, Petitioner's neurological examination was normal. *Id.* Dr. Bernardi's diagnosis was multi-level degenerative disc disease, multi-level foraminal stenosis, left C8 radiculopathy, status post posterior C7-T1 hemilaminotomy and C8 foraminotomy, and status post C4-5 through C6-7 disc replacement. *Id.* at 12. When asked by Respondent's counsel as to whether any of these conditions were caused by the accident, the following exchange took place:

Q: With regard to the pathology that you identified, did you reach an opinion, Doctor, within a reasonable degree of medical certainty as to what, if any, of those conditions were related to the June 6th, 2017, accident?

A: Yes.

Q: Which ones?

A: I didn't think any of them were actually caused by the accident. Based on Dr. Gornet's operative note –

Q: Which one?

A: I'm sorry, the first operative note from the posterior decompression – it would seem most likely that his accident had aggravated his preexisting left C8 foraminal stenosis. *Id.* at 13.

Respondent's counsel elicited testimony from Dr. Bernardi that disc replacement surgery was approved by the FDA for the management of cervical radiculopathy and myelopathy, which are symptoms associated with spinal cord compression, neither of which he believed Petitioner suffered. *Id.* at 15-16. He stated, "He had a neck ache." *Id.* Dr. Bernardi testified that he took no issue with Petitioner's first surgery. *Id.* at 16. However, when Respondent's counsel also asked Dr. Bernardi whether he had an opinion as to the cause of the neck pain Petitioner experienced after Dr. Gornet's first surgery, he blamed Dr. Gornet's first surgery as the culprit rather than the pathology named by Dr. Coyle, Dr. Gornet, and Dr. Crane. *Id.* at 18. He then stated that he believed Petitioner's second surgery and the subsequent physical therapy were entirely unnecessary. *Id.* at 19-20.

When asked whether he believed that structural neck pain requires treatment, he indicated that it was perfectly reasonable to treat structural neck pain if a patient suffers from a broken neck and the cervical spine is unstable. *Id.* at 25-26. He believed that in the "vast, vast, vast majority of cases," structural neck does not warrant surgical treatment. *Id.* He stated that he based his opinion on an abundant body of literature stretching back decades, and that said literature showed that surgery was ineffective in treating a flare-up of "degenerative disease." *Id.* He referenced an article from the Journal of Manipulative Physiology and Therapeutics authored in February of 2009. *Id.* at 29.

On cross-examination, Dr. Bernardi acknowledged that he had reviewed the reports from Dr. Crane and that Dr. Crane and Dr. Gornet recommended surgery from C4 to C7. *Id.* at 31-32. He acknowledged the only divergence was that Dr. Crane believed that a fusion was preferable to disc replacement and acknowledged Dr. Crane stated:

> In my hands I usually recommend a three-level anterior cervical discectomy and fusion, not a three-level disc arthroplasty, but again Dr. Gornet's recommendations do not fall out of the realm of normal surgical procedures. *Id.* at 32.

Dr. Bernardi further acknowledged that the FDA only exists to monitor marketing of products that are either on the market or approaching the market. *Id.* at 33. He admitted that the FDA does not govern the practice of medicine, and that physicians have been prescribing "off-label" usage of products for decades. *Id.* at 33-34.

Petitioner's treating physician, Dr. Matthew Gornet, also testified by way of deposition. (PX12) He is a board certified orthopedic spine specialist who has performed cervical disc replacements since 2005 or 2006. *Id.* at 5-6. He participated in at least 3 or 4 FDA clinical trials regarding cervical disc replacement and authored numerous publications regarding same. *Id.* The clinical studies showed that disc replacements are found to be superior to multi-level fusions in every parameter, including reoperation rate, complication rate, patient satisfaction, return to work speed, and functional outcome scoring. *Id.* at 6.

Dr. Gornet testified he is versed in the history of the injury and reviewed all pertinent medical records including the reports of Dr. Bernardi and Dr. Crane. *Id.* at 8-10. After Dr. Gornet testified to the findings on his initial examination and summarized the diagnostic studies, he recapped his recommendation for an MRI with foraminal views. *Id.* at 10-12. He testified that foraminal views were defined in 2016 as being the appropriate standard of care for all cervical MRIs, particularly with any type of suspicion of foraminal narrowing, because foraminal views detect 30% more pathology than standard MRI views. *Id.* at 12-14. Dr. Gornet testified that after reviewing Petitioner's history and all of the diagnostic and clinical evidence, he reached the conclusion that Petitioner's work accident caused central disc herniations at C4-5 and C5-6, aggravated underlying foraminal herniations at C5-6 and C6-7 on the left, and aggravated underlying foraminal pathology at C7-T1 on the left. *Id.* at 14.

Dr. Gornet also outlined why he believed Dr. Coyle's decision to fuse C7-T1 would have resulted in severe instability and an extremely poor result. *Id.* at 14-15. Since Petitioner suffered from severe atrophy at C7-T1, Dr. Gornet performed a very conservative posterior laminotomy with foraminotomy on the left, which addressed the injury and nerve root irritation at C7-T1 without destabilizing Petitioner or creating a need for fusion. *Id.* at 15-16. Dr. Gornet noted Petitioner's report of dramatic improvement in left arm pain as a result of this approach, though it did not completely resolve all of his symptoms of pain in his posterior arm and neck. *Id.* at 16. Consequently, Dr. Gornet testified that the subsequent disc replacement surgery was warranted and preferable to fusion, since fusion from C4 to C7 would have also fused Petitioner to the posterior foraminotomy at C7-T1 and serve as a catalyst for rapid deterioration. *Id.* at 18. Dr. Gornet testified to Petitioner's excellent outcome following his second procedure as well, though he acknowledged that Petitioner developed some subsidence attributable to the side effects of Petitioner's seizure medication, Dilantin, which causes significant osteoporosis or weakening of the bones. *Id.* at 19-20. When asked to comment on Dr. Bernardi's disdain for a multi-level disc replacement, Dr. Gornet stated:

> Well, my response would be for Dr. Bernardi to review the upcoming journal of the International Spine Journal which I'm the editor of [,] that talks about cervical arthroplasty at three and four levels. It would discuss the clinical outcomes of [*sic*] that are very good. So if we look at aggressive approach, what would be an aggressive approach, what would be an aggressive approach to – a road toward disability in this person would be to do Dr. Bernardi's plan, leave him alone, not do anything. It is obvious objective pathology that multiple providers feel needs to be treated. And to do that and leave him at that point, I think places him on a road toward unemployment. In this situation, we addressed the pathology. He's back to work full duty. And while it doesn't always work that way, I think the result speaks for itself even in the face of his bone quality which I agree with Dr. Bernardi, he does have a potential for decreased bone quality. And clearly he's had some minor complications; but that is the beauty of cervical disc replacements, oftentimes even with the minor complications, the patients maintain good to excellent results. *Id.* at 25-26.

On cross-examination, Dr. Gornet testified that he performed the surgery at C7-T1 to free up Petitioner's C8 nerve root, a procedure agreed upon by all physicians, and that following that operation, Petitioner's condition had been trending so positively that he gained hope that Petitioner might not require further intervention. *Id.* at 31. He testified, however, that Petitioner unfortunately still had some atrophy, and so he believed along with Dr. Crane that a three level procedure was needed. *Id.* at 18, 32-35. Dr. Gornet testified that Petitioner was currently doing well and working without restrictions. *Id.* at 36.

Dr. Gornet allowed Petitioner to return to light duty work on June 28, 2018, with restrictions of no lifting greater than 25 pounds and no overhead work. (PX6, 6/28/18) During the follow-up visit of September 10, 2018, Petitioner was doing well enough to be returned to work full duty with no restrictions. (PX6, 9/10/18) On January 18, 2019, Petitioner was placed at maximum medical improvement. (PX6, 1/18/19) Dr. Gornet noted that Petitioner still had a level of radicular symptoms along with sensitivity to touch in the C6 distribution, likely due to permanent nerve damage. *Id.* However, Petitioner was doing well, and Dr. Gornet noted that Petitioner was looking to get a welding job. *Id.*

At Arbitration, Petitioner that after Respondent discharged him for his extended absence following his injury, he was successful in finding work in the welding and fabricating field. (T.20-22) He currently works for K & E Technical in West Frankfort, Illinois, where he repairs hydraulic cylinders and welds and fabricates parts in the machine shop. (T.22-23) He works 45 to 50 hours per week and makes $16.50 an hour. (T.23)

Petitioner reported significant improvement from his prior condition during the hearing, and reported that his arm is no longer atrophied. (T.19, 23-24) Petitioner testified that despite the improvement from his surgeries and the subsequent physical therapy, he still has residual symptoms of stiffness and weakness from the base of his neck into his trapezii which occasionally develops into a headache. (T.24) His symptoms are predominantly activity driven and flare when he performs a lot of pushing, pulling, and/or overhead work. (T.24) He takes

over-the-counter Aleve, or in the case of severe symptoms, his prescription narcotic pain medication, which he estimated occurs once or twice a week. (T.24-25) Petitioner also suffers from loss of range in lateral tilt motion. (T.25) He can no longer participate in his life-long hobby of bow hunting, which he stated he has done from the age of 15, as he is unable to pull back his bow. (T.26) His sleep and his family hobbies of competitive fishing, horseback riding, and ATV riding have also been adversely affected. (T.26-27)

Petitioner also testified that his new employment involves physical activity and lifting. (T.33) If something is too heavy for him, he uses an overhead crane. (T.33) He lifts things like welding wire, however, which weighs approximately 33 pounds and testified to performing grinding and loading cylinders onto dollies. (T.34-35) Petitioner testified that while he is able to perform these job activities, it is not without discomfort. (T.35)

CONCLUSIONS OF LAW

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

Petitioner offered no exhibits to support the average weekly wage claimed on the Request for Hearing form. Petitioner also testified on cross-examination that the average weekly wage indicated by Respondent was correct. (T.29) Respondent also offered a Wage Statement as its Exhibit 4. (RX4) Accordingly, the Arbitrator finds that Petitioner's average weekly wage is $1,499.92.

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?

Although Respondent agrees that Petitioner's sustained a compensable accident and that said accident in part is causally related to his current condition of ill-being and the treatment Petitioner received up to his first surgical intervention and subsequent therapy, Respondent disputes that Petitioner's second disc replacement is reasonable and necessary and related to the injury. However, the Arbitrator sees no credible basis in the record to conclude that Petitioner's second surgery was not reasonable and necessary.

Respondent went to great lengths to find an independent medical examiner that would render an opinion favorable to its position. Unfortunately for Respondent, the opinion of its third examiner's opinion is completely unsupported by the evidence and contrary to the opinion of the overwhelming majority, who based their opinions on the objective medical evidence and irrefutable circumstantial evidence before them, namely the absence of any such prior complaints before Petitioner's traumatic injury and the MRIs, the EMG nerve conduction study, CT myelogram, and consistent clinical examinations evidencing pain, paresthesias, and weakness.

Respondent's first two physicians, Dr. Coyle and Dr. Crane, concur with Petitioner's treating physician, Dr. Gornet, that Petitioner suffered from pathology from C4-5 through C7-T1 that is causally related to Petitioner's work injury. Dr. Coyle recommended an anterior cervical microscopic discectomy and arthrodesis with an allograft spacer, BMP, and an anterior cervical plate. (PX4, 8/2/17) Dr. Crane recommended surgery as well by way of fusion. (PX6; RX1, p.31-32)

While Respondent seems to have taken issue with the fact that Petitioner underwent two separate procedures, Dr. Gornet reasonably sought to wait following Petitioner's first surgery given Petitioner's dramatic improvement in the hopes that a multi-level operation could be avoided. (PX6, 8/30/17) Notwithstanding the fact that this approach allowed Petitioner to avoid having an artificial disc placed at C8, the Arbitrator does not believe any physician should be forced to operate under fear of reprisal from taking a patient, metered approach to surgical intervention in the hope that more drastic action could be avoided.

Based upon the aforementioned, the Arbitrator finds Petitioner's care and treatment in its entirety has been reasonable, necessary, and causally related to the undisputed work injury. Respondent shall therefore pay the expenses outlined in Petitioner's group exhibit, and shall authorize and pay for Petitioner's medical care

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

Based on the above findings as to the reasonableness and necessity of Petitioner's care and treatment, the Arbitrator finds that Petitioner is entitled to a further period of temporary total disability benefits for his period of disability following his second surgical intervention. Respondent paid all benefits, but requests credit for an overpayment based on its dispute. Since the Arbitrator has determined that Petitioner was entitled to the benefits paid, there has been no overpayment, and Respondent's request is denied.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) 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. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator uses the remaining factors to evaluate Petitioner's permanent partial disability.

(ii) **Occupation**: Petitioner is now employed as a welder. He testified that his not job required a measure of lifting and physical activity, which he testified causes symptoms and discomfort. (T.33-35) The Arbitrator places greater weight on this factor.

(iii) **Age**: Petitioner was 44 years old at the time of his injury. He has diminished healing capacity as a result thereof. Petitioner is young and must live and work with his disability for an extended number of years. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016), the Arbitrator places greater weight on this factor.

(iv) **Earning Capacity**: Petitioner testified that his lost his coal mining position working for Respondent due to his extensive disability period following the accident. Petitioner currently works as a welder and earns significantly less at $16.50 an hour. Petitioner has gone from an average weekly wage of $1,499.92 to an average of $742.50 per week. Given a nearly 50% drop in his earning capacity, the Arbitrator places significant weight on this factor.

(v) **Disability**: As a result of his accident, Petitioner sustained severe injuries to his cervical spine which warranted surgical intervention from C4 to T1 in his spine. Petitioner reported significant improvement from his prior condition during the hearing, and reported that his arm is no longer atrophied. (T.19, 23-24) Petitioner testified that despite the improvement from his surgeries and the subsequent physical therapy, he still has residual symptoms of stiffness and weakness from the base of his neck into his trapezii which occasionally develops into a headache. (T.24) His symptoms are predominantly activity driven and flare when he performs a lot of pushing, pulling, and/or overhead work. (T.24) He takes over-the-counter Aleve, or in the case of severe symptoms, his prescription narcotic pain medication, which he estimated occurs once or twice a week. (T.24-25) Petitioner also suffers from loss of range in lateral tilt motion. (T.25) He can no longer participate in his life-long hobby of bow hunting, which he stated he has done from the age of 15, as he is unable to pull back his bow. (T.26) His sleep and his family hobbies of competitive fishing, horseback riding, and ATV riding have also been adversely affected. (T.26-27)

Petitioner also testified that his new employment involves physical activity and lifting. (T.33) If something is too heavy for him, he uses an overhead crane. (T.33) He lifts things like welding wire, however, which weighs approximately 33 pounds and testified to performing grinding and loading cylinders onto dollies. (T.34-35) Petitioner testified that while he is able to perform these job activities, it is not without discomfort. (T.35) Petitioner also suffered a significant wage loss as a result of his discharge from Respondent's employ secondary to his prolonged, injury-related period of disability, as noted above.

Turning to the medical evidence corroborating Petitioner's testimony, Dr. Gornet noted at the time he placed Petitioner at maximum medical improvement that he likely had a measure of permanent nerve damage, evidenced by his residual symptoms of radiculopathy along with sensitivity to touch in the C6 distribution. (PX6, 1/18/19) The Arbitrator therefore places

significant weight on this factor and finds that Petitioner sustained serious and permanent injuries that resulted in the 45% loss of his body as a whole.

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 PEORIA)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Susan Bevill,
Petitioner,

vs. No. 16 WC 12496

20IWCC0273

Unitypoint Health-Methodist,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that, the Decision of the Arbitrator filed July 19, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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 $62,300.00. 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: MAY 13 2020

Marc Parker

mp/wj
05/07/20
68

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BEVILL, SUSAN
Employee/Petitioner

Case# **16WC012496**

20 IWCC0273

UNITYPOINT HEALTH-METHODIST
Employer/Respondent

On 7/5/2019, 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 2.04% 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:

0225 GOLDFINE & BOWLES PC
KEVIN ELDER
4242 N KNOXVILLE AVE
PEORIA, IL 61614

5354 STEPHEN P KELLY
ATTORNEY AT LAW
2710 N KNOXVILLE AVE
PEORIA, IL 61604

20 IWCC0273

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

SUSAN BEVILL
Employee/Petitioner

v.

UNITYPOINT HEALTH - METHODIST
Employer/Respondent

Case # **16** WC **12496**

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 **PAUL SEAL**, Arbitrator of the Commission, in the city of **PEORIA**, on **APRIL 23, 2019**. 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 **9/03/2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**40,144.00**; the average weekly wage was $**772.00**.

On the date of accident, Petitioner was **59** 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 $**N/A** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**22,615.06** under Section 8(j) of the Act.

ORDER

Petitioner is awarded 16 5/7ths weeks of T.T.D. at $514.67 per week for various off-work times between 10/30/2015 and 07/16/2017.

Petitioner is awarded medical expenses in the amount of $39,127.51.

Petitioner is awarded permanency of 10% loss of use of each hand, 10% loss of use of the right arm, 10% of the left index finger, 10% of the left middle finger, 10% of the right index finger, 10% of the right ring finger, 10% of the right middle finger, and 10% of the right small finger, for a total of 87.4 weeks at a P.P.D. rate of $463.20.

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 30, 2019
Date

JUL 5 - 2019

ATTACHMENT TO ARBITRATOR'S DECISION

Susan Bevill vs. UnityPoint Health-Methodist

IWCC No.: 16 WC 12496

In Support of the Arbitrator's decision regarding **(C) Did an accident occur that arose out of and in the course of Petitioner's employment with Respondent,** and **(F) Is Petitioner's current condition of ill-being causally related to the injury,** the Arbitrator notes as follows:

Petitioner is now a 63-year old woman who has worked full-time for Respondent UPH Methodist Hospital for 35 years. She worked as a pharmacy technician for approximately fifteen years. In approximately 2000, Ms. Bevill became an "outpatient scheduler" and is still working for Respondent in that position as of the date of arbitration.

Ms. Bevill described her job duties as a scheduler as sitting at a computer with a headset on, receiving and making phone calls from doctor's offices and to and from patients for scheduling tests, procedures, and appointments. She works at a desk which is circular around her, with a standard flat keyboard and mouse, 2 monitors, with books of diagnostic codes and test codes on either side of her for quick reference. Her normal work hours are Monday through Friday, 8 hours per day, with a 15-minute break in the morning and afternoon, and a half hour lunch.

Ms. Bevill testified that as she finishes one call, another call drops into her computer monitor, she types in patient identification, doctor's information, test codes, and dates. On some calls, she must type in additional notes which can be one sentence long or several sentences. A call's length can vary from a few minutes to fifteen

minutes. The amount of typing per call varies. When calls aren't waiting, Ms. Bevill has additional duties of responding to and sending faxes and calling patients from the "cue", answering questions and scheduling outpatient procedures and tests as needed.

Petitioner additionally put into evidence a written job description for a "patient scheduler" at UPH Methodist. (Petitioner Exhibit 5) Required computer skills include word processing, spread sheets, email application, web browsers, use of Windows OS, and the ability to learn new applications. (Petitioner Exhibit 5, p.2) "Physical requirements" include the ability to perform repetitious tasks (emphasis added), reach above shoulder level, ability to grip/grasp, manual and finger dexterity, and the ability to sit for up to 4 hours. (Petitioner Exhibit 5, p.2) "Environmental conditions" include "exposure to vibration" and the ability to work in areas that are close and crowded. "Performance requirements" include responding promptly to scheduling requests, obtaining complete information accurately and efficiently, timely accurate recording and reporting, scheduling multiple tests for a patient in a timely manner, and consistently answering the phone in one ring. (Petitioner Exhibit 5, p.3)

"Efficient work techniques" include scheduling patients accurately in a timely manner, maintaining patient flow, exhibiting a high level of proficiency in the use of the computerized scheduling system, and process faxes when not scheduling.

Petitioner's Exhibit 5 includes on the last page, a "Description of Physical Demands". In it, two-thirds of work time is said to involve the use of hands and fingers. Also listed under "Repetitive Motion Actions" is 7 hours or more per shift of "repetitive use of both hands". (Petitioner Exhibit 5, p.6)

In approximately 1998, Ms. Bevill developed left-sided carpal tunnel syndrome and cubital tunnel syndrome. She underwent surgery for both conditions. Her surgeon placed permanent restrictions on her at the conclusion of her care of taking a 10 to 15-minute break for each hour of typing. Petitioner settled this workers' compensation claim for 25% loss of use of her left arm in 2004. She worked under these restrictions for Respondent for several years. Ultimately, Methodist Hospital merged with Proctor Hospital to form UnityPoint Health. Petitioner was concerned that her restrictions might jeopardize her ongoing employment after the merger, so she dropped her restrictions in approximately 2014.

Ms. Bevill is ambidextrous. She has an older personal computer at home, but no internet service. She does not own a laptop. She does no typing at home other than finger pecking on her cell phone. She does not have rheumatoid arthritis and has no hobbies that are hand intensive, such as crochet, bowling or fly fishing. She was diagnosed in 2017, after treating for bilateral carpal, cubital tunnel and multiple trigger fingers, with non-insulin dependent diabetes for which she takes 1 pill per day and treats only with her primary care physician, not a specialist.

In approximately 2014, Petitioner began to develop bilateral hand numbness and tingling. Her symptoms progressed throughout that year and during 2015. On September 3, 2015, her hand pain at work prompted her to report her problems to her supervisor and to seek medical treatment. Respondent's Exhibit 3 is the Employee Incident Report Form which was completed by Ms. Bevill on September 3, 2015. She reported "problems with right hands, fingers, wrist to elbow pain, fingers locking".

Under "Factors Which Contributed To the Incident", she wrote, "Repetitive years mouse and computer/writing in forms eventual problems".

Respondent directed Ms. Bevill for her initial medical care, to consult with IWIRC. (Respondent Exhibit 6) On September 4, 2015, she reported achiness in her right wrist over the past week and a locking sensation in her right-sided third, fourth, and fifth fingers. Ms. Bevill reported her typing and computer use and reported that she has had pain and burning symptoms sometimes up to her elbow, for "many years but has increased recently". She was diagnosed with right-sided carpal tunnel syndrome and trigger fingers of the right 3rd-5th fingers. IWIRC concluded that her job was not ergonomically hazardous and that her current problem was "most likely due to global degenerative changes". (Respondent Exhibit 6, p.1)

Following the IWIRC consult, and a denial of her workers' compensation claim, Ms. Bevill chose to treat with Midwest Orthopedic, where she had treated previously. She came under the care of Dr. James Williams, initially seeing him on October 19, 2015. She reported pain, numbness and tingling in her bilateral hands, right greater than left in all five fingers, with symptoms ongoing for months with catching and locking of the last three fingers on her right hand. (Petitioner Exhibit 1, p.106) Dr. Williams diagnosed bilateral carpal and cubital tunnel syndromes, with triggering of her right middle finger.

Thereafter, Ms. Bevill underwent five surgeries between October 20, 2015 and June 23, 2017. Her first surgery was a right carpal and cubital tunnel release, and trigger finger releases of her right 3rd, 4th and 5th fingers. (Petitioner Exhibit 1, pp.24-26) On December 4, 2015 she underwent a left-sided carpal tunnel release, and

recurrent left cubital release. (Petitioner Exhibit 1, pp.21-23) On March 17, 2016 Ms. Bevill underwent a left middle finger release for triggering. (Petitioner Exhibit 1, p.19) On November 18, 2016 she underwent a right index finger release for triggering. (Petitioner Exhibit 1, p.17-18) Finally, on June 23, 2017, Ms. Bevill underwent a left index finger release for triggering. (Petitioner Exhibit 1, pp.15-16) She has brief periods of lost work time following each of these surgeries. (11 total weeks for the hand and elbow surgeries) and ultimately was released by Dr. Williams to full duty work. Dr. Williams declined to offer any opinions on causal connection.

Petitioner was evaluated at her attorney's request by Dr. Lawrence Nord. He was deposed by the parties. (Petitioner Exhibit 2) Dr. Nord is a board eligible orthopedic surgeon who has performed more than 2,000 carpal tunnel releases and more than 5,000 trigger finger releases in his 37 years of surgical experience. His current practice is 95% active treatment and 5% performing I.M.E.'s (Deposition, pp.5-6) Dr. Nord reviewed the treatment notes of Dr. Williams, which were sufficient for him to understand her injuries and treatment. (deposition, pp.7-8) Dr. Nord took a history from Ms. Bevill that she types and performs secretarial duties for over 17 years at Unity Point Methodist. (Deposition Exhibit 2, p.1)

As to his positive causal connection opinion for Ms. Bevill's bilateral carpal and cubital tunnel and trigger fingers, Dr. Nord provided that opinion while answering a hypothetical question.

> Doctor, I would like you to assume that Miss Bevill has been employed by UnityPoint. I believe she was at Proctor, but it might have been Methodist. They've gone together. But she's been employed there for 31 years. The last 17 years on the job leading up to the present that she has been an outpatient procedure scheduling person, that she wears a headset, she receives phone

calls, calls come in, she's speaking with a person, she takes down their information, she sits at a computer with a keyboard and receives information from the patient, types in procedures to be done either by diagnosis codes or with short sentences, kind of fill in the blanks and schedules a person, that a phone call might take anywhere from 30 seconds to two minutes and that when she's done with that call, hangs up, another call drops into her headset, that in a typical day she might handle as many of 350 to 400 calls, that she sits at her desk and types in those things and speaks on the headset, that she is required as part of this job to have basic computer knowledge using work processing, spreadsheets, e-mails, web browsers and the Windows system, and that the job was described by her employer to the independent examiner, a Dr. Mitchell Rotman, as the job activities including scheduling tests, answering the phone, utilizing the computer, keeping pace of the calls moving, managing call time effectively, two thirds of the time involved using the hands for fingering and feeling, weights are minimal, simple grasping is noted in both hands as well as firm and heavy grasping and fine dexterity with repetitive use of both hands. I would like you to assume that that's what she does on the job.

Based upon that description that I've given you and then based upon the additional history that Miss Bevill gave you, based upon the records that I sent you to review, based upon your examination findings and the diagnoses that you've rendered in this matter, do you have an opinion based upon a reasonable degree of medical and surgical certainty as to whether those activities that I've described either caused in whole or in part of the conditions that you have diagnosed in Miss Bevill?

Mr. Kelly: Objection to foundation. You can answer, Doctor.

A. Yes.

Q. And what is that opinion, Doctor?

Mr. Kelly: Show a continuing objection.

Mr. Elder: Absolutely, Steve.

A. That the patient's diagnoses and treatment of those diagnoses could have been caused from the work-related activities that you just described or at least they were aggravated by those work activities.

Q. Okay. Doctor, same hypothetical that I won't repeat - -

Mr. Elder: And same standing objection, Steve.

Mr. Kelly: Thank you.

By Mr. Elder:

Q. –do you have an opinion based upon a reasonable degree of medical and surgical certainty as to whether those job activities played a role in creating the necessity for the surgeries that were performed?

A. Yes. I felt that did.
(Deposition, pp.13-15)

It should be clear that Dr. Nord's opinion is based upon a very specific job description which incorporated both Ms. Bevill's description and the written job description put into evidence as Petitioner's Exhibit 5. This is the same job description which Respondent's independent examiner, Dr. Rotman, reviewed. Dr. Nord was given additional information on co-morbidities such as gender, age, weight, and diabetes, and he testified that those items did not change his opinion that her conditions were caused and/or aggravated by her work activities. (Deposition, pp.15-16) The Petitioner's testimony at Arbitration closely mirrored the hypothetical as well.

Respondent's independent examiner, Dr. Mitchell Rotman, was also deposed. (Respondent Exhibit 2) Dr. Rotman spends a half day per week, or 10% of his work time on I.M.E.'s (Deposition, p.8) 90% of his I.M.E.'s are for Respondents. (Deposition, p.22) Dr. Rotman reviewed the same medical records as Dr. Nord, with the addition of the 1 ½ pages of IWIRC notes. (Deposition, p.13) Dr. Rotman opined that Ms. Bevill's work activities "have nothing to do with her upper extremity conditions" because they aren't "forceful enough" or involve enough "heavy elbow activities". (Deposition, p.18) On cross-examination, Dr. Rotman opined that data entry doesn't ever cause or aggravate carpal tunnel, cubital tunnel (in most cases) or trigger fingers. (Deposition, pp.21-22)

The Arbitrator notes that both medical opinions come from independent examiners who reviewed the same records and only saw Petitioner on one occasion. The Arbitrator does not agree with Dr. Rotman that data entry can never cause or aggravate conditions such as Petitioner's. The Arbitrator finds it significant that

Petitioner has worked her scheduling job on a full-time basis for over 17 years. The Arbitrator notes that Respondent's own job description includes a finding that 2/3rds or more of all work time is spent using the hands and/or fingers and that 7 or more hours of an 8-hour day require "repetitive use of hands".

Based upon the above, the Arbitrator finds that Petitioner has established that her job duties constitute a repetitive trauma accident under the Act, and that those activities have caused in part, or aggravated her underlying conditions. The Arbitrator finds the issues of accident and causal connection in favor of Petitioner.

In Support of the Arbitrator's decision regarding **(J) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services**, and **(K) What temporary benefits are in dispute,** the Arbitrator notes as follows:

Having found the issues of accident and causal connection in favor of Petitioner, it logically follows that the related medical bills and liens, and lost work time, are properly awarded as well.

Petitioner's Exhibit 7 consists of unpaid medical bills and liens which total $39,127.51. The medical bills are from Midwest Orthopedic Center – Dr. Williams, Methodist Hospital where her surgeries and testing were performed, Peoria Pathology for blood and specimen testing relative to her surgeries, outpatient therapy, anesthesiology and radiology. The Specialists in Medical Imaging bill for chest x-rays on June 16, 2017 in the amount of $65.00 was a pre-operative study, and is awarded. (Petitioner Exhibit 1, p.47) Finally, there is a "UMR" health insurance lien for

$22,615.06. The itemized lien is for payments to Dr. Tony (EMG tester), Dr. Williams, Methodist Hospital (also the Respondent), anesthesiology and Dr. Debbie Bailey on December 4, 2015 (date of second surgery) and to Dr. Sauter and Golter on October 30, 2015 (date of first surgery). These payments are for treatment related to Petitioner's claim, so the Arbitrator awards this lien, subject to Section 8(j) credit.

The total medical award is $39,127.00.

As for temporary total disability, Petitioner alleged a total of 16 5/7ths weeks covering various dates between Petitioner's first surgery on October 30, 2015 and her fifth surgery on July 6, 2017. Petitioner testified that she only missed approximately a month after each of her first two surgeries for her carpal and cubital tunnel release, and only missed a few days after her trigger finger releases. She was never paid any T.T.D. benefits.

More specifically, Dr. Williams' notes indicate that Petitioner was off work during the following periods:

10/30/2015 to 12/03/2015 following first surgery
12/4/15 to 1/15/16 following second surgery
3/17/16 to 4/4/16 following third surgery
11/18/16 to 11/28/16 following fourth surgery
6/23/17 to 7/6/17 following fifth surgery

These dates are found in Petitioner's Exhibit 1, pp. 73, 85, 97, and 101-103.

T.T.D. awarded totals 16 5/7ths weeks covering the above time frames.

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

Petitioner underwent bilateral carpal tunnel releases, bilateral cubital tunnel releases, and trigger finger releases of her right index, middle, ring and small fingers,

and trigger releases of her left middle and index fingers. She obtained a full duty release after all five of her surgeries. She testified that her arms, hands, and fingers are now "98% healed", and are "pretty good", and that the fingers no longer lock up on her. She testified that after a day of heavier typing or of overtime, she experiences soreness in her hands and fingers.

The Arbitrator notes that neither party obtained a P.P.I. rating.

Examining the five factors in Section 8.1(b), the Arbitrator gives no weight to the first factor, the P.P.I. rating.

The second factor is Petitioner's occupation, which is light duty with repetitive hand motions. In light of Petitioner's injuries, which are all arms, hands, and fingers. Petitioner's job, although light, exposes Ms. Bevill to potentially aggravating motions on an everyday, nearly all-day basis. The Arbitrator places great weight on this factor as Petitioner is vulnerable to these activities and risks the re-development of her injuries.

The third factor is the age of Ms. Bevill, who is now 63 years old. This factor weighs against permanency as Petitioner will not suffer from her condition for more than 3 or 4 years. The Arbitrator places a small degree of significance on this factor.

The fourth factor is how the injuries affect her future earning capacity. Petitioner has returned to her job, earning the same pay as pre-accident. The injuries have not affected her earnings, so this factor cuts against compensation. The Arbitrator places some significance on this factor.

The fifth factor is the evidence of disability corroborated by the medical records. Dr. Williams' notes indicate a routine recovery after each surgery and fairly

successful resolution of symptoms. This factor supports a lower permanency Award. The Arbitrator places some significance on this factor.

Accordingly, the Arbitrator Awards 10% loss of use of each hand, 10% loss of use of Petitioner's right arm, and 10% loss of use of each trigger finger. Respondent is entitled to a credit of 25% loss of use of the left arm from Petitioner's previous settlement.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joel Maddy,

Petitioner,

vs. NO: 19 WC 5686

Purdy Brothers Trucking,

Respondent.

20IWCC0274

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, 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 October 1, 2019 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.

20IWCC0274

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 $3,400.00. 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: MAY 13 2020
d: 050720
BNF/mw
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ATSDR 1176052

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

MADDY, JOEL
Employee/Petitioner

Case# **19WC005686**

PURDY BROTHERS TRUCKING
Employer/Respondent

20IWCC0274

On 10/1/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.79% 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:

0192 CUSACK GILFILLAN & O'DAY
DANIEL P CUSACK
415 HAMILTON BLVD
PEORIA, IL 61602

1120 BRADY CONNOLLY & MASUDA PC
PETER STAVOPOULOS
10 S LASALLE ST SUITE 600
CHICAGO, IL 60603

ANNOUNCE

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JOEL MADDY
Employee/Petitioner

Case # **19** WC **5686**

v.

Consolidated cases: _____

PURDY BROTHERS TRUCKING
Employer/Respondent

20IWCC0274

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 **Paul Seal**, Arbitrator of the Commission, in the city of **Rock Island**, on **August 6, 2019**. 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 _____

20IWCC0274

FINDINGS

On the date of accident, **6-6-18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**46,800.00**; the average weekly wage was $**900.00**.

On the date of accident, Petitioner was **60** 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 $**N/A** for TTD, $**8,796.29** for TPD, $**N/A** for maintenance, and $**4,166.33** for other benefits, for a total credit of $**12,962.62**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $599.40/week for 25 4/7 weeks, commencing 2-9-19 through 4-12-19 and 4-18-19 through 5-26-19, as provided in Section 8(b) of the Act.

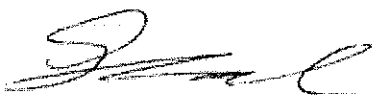
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $755.00 to Kaufman Wellness Center and $132.00 to Midwest Orthopedic Center, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay for and approve Petitioner's prospective surgery as recommended by Dr. James Williams.

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.



September 11, 2019

Signature of Arbitrator

Date

ICArbDec19(b)

OCT 1 - 2019

20IWCC0274

FINDINGS OF FACTS

Petitioner testified that in July 2017 he began his employment with the Respondent, Purdy Brothers Trucking, as a driver. In that capacity, Petitioner operated a semi-tractor with a trailer and would do day trips within a 150-mile radius of the Respondent's office located in Princeton Illinois. Petitioner subsequently became what the Respondent called a "spotter." A spotter would move tractor trailers in a designated area of a manufacturing plant. When the Petitioner's alleged injury occurred, he was employed as a spotter at a food processing plant called Sensient.

At Sensient, the Petitioner would move trailers containing products to different docks depending on where the Sensient employees were working at the time. Petitioner testified that he was provided no training by the Respondent on what his job duties were to be. Respondent did not provide any manuals nor any training videos on how to be a spotter. The only guidance the Petitioner received from Purdy as to his job responsibilities was from his manager, Dave. Dave told the Petitioner to "do as Larry Beck did." Larry Beck was also employed by the Respondent at the Sensient location.

While working at the Sensient location, the Petitioner would use what was called a spotter truck and move product around the Sensient facilities. The Petitioner was never given any training on how to use the spotter truck. As a spotter, the Petitioner could spend all day in the cab of the truck. Although, Petitioner testified that other spotters employed by the Respondent at the Sensient location would do more than purely spotting. The Petitioner observed other spotters for the Respondent replacing air lines on tractors and refueling refrigerated trailers. Petitioner also testified that Larry Beck had a key fob to access a locked door that led to the inside of the dock area where product was being delivered. The Petitioner also testified that he observed some of the Respondent's spotters parking trailers in docks and then going inside to help load the trailers.

Petitioner also testified that he observed Larry Beck helping repair the electric doors at the docks at the Sensient location. Petitioner testified that on one occasion while backing a trailer into the dock that he knocked one of the doors of the trailer. Petitioner was directed to pick the door up and move it out of the way. Petitioner also described an instance where a seal on the spotter truck's engine broke and sprayed oil all over the road near the dock. The Petitioner was directed to clean up the oil spill. Petitioner was also directed to climb into and look through various trailers to find specific products that Sensient employees were looking for and then to deliver the product to the docks.

Petitioner further testified that he wanted to paint lines on the road near the docks in order to make backing the trailers easier. The Petitioner asked Larry Beck whether that would be allowed, and Mr. Beck told him to "just do it." Moreover, Mr. Beck recommended that the Petitioner should paint lines on the walls near the docks to make it even easier to back the trailers up. The Petitioner believed that by painting these lines he was helping the business relationship between the Respondent and Sensient because Sensient's business involved a production line and this helped the spotters to get the trailers to the docks faster.

On the night of Petitioner's injury, June 6th, 2018, the Petitioner was told by a Sensient employee to go out to the yard and get the trailer containing barrels that were used to ship Sensient's products. The barrels were made of cardboard and were about four feet high and weighed about two pounds when empty. The Petitioner drove the spotter truck with the trailer filled with the barrels to the dock. The Petitioner then used the key fob to go into the inside of the dock area. A Sensient employee named James asked the Petitioner to help him move the barrels from the trailer to a skid loader that was located near the rear of the trailer. The Petitioner testified that he had helped Sensient employees move barrels off of the trailers in the past. While the Petitioner was moving one of the barrels, he tripped on a strap that was in the trailer that was being used to secure the barrels. The Petitioner fell to the ground and hit his knee and wrist.

While he was on the ground the Petitioner told James that he was hurt. James told the Petitioner that he had indeed tripped over one of the straps in the trailer. James had a clear view of how the Petitioner fell because James was behind the Petitioner at the time of the fall.

The Respondent does not dispute the medical treatment received by the Petitioner. Respondent is challenging whether the Petitioner's injures arose out of and in the course of his employment. Accordingly, the Arbitrator will rely upon the medical records and bills contained in Petitioner's exhibits.

The Respondent presented Rollen Copeland as witness. Mr. Copeland has been employed by the Respondent since 1996. His current title is a terminal manager. Mr. Copeland's prior experience as a customer service representative for Purdy Brothers has given him insight into the operations at Sensient. Mr. Copeland testified that the Respondent had been providing a spotter at Sensient since 1996. Mr. Copeland testified that spotters were not allowed to help unload trailers. Mr. Copeland also testified that employees of the Respondent could provide help in unloading trailers if the customer paid for the service, which he called a "lumper." Although, Mr. Copeland testified that Sensient did not pay for the Respondent to be a "lumper." Mr. Copeland also testified that Respondent's employees should not have been repairing trucks or equipment owned by its customers.

On cross-examination, Mr. Copeland admitted that there was no employee manual that covered the job responsibilities of a spotter. Mr. Copeland also admitted that there were no videos for spotters to watch that would describe their job duties. Mr. Copeland stated that employees of the Respondent would have an orientation in Tennessee – but, he could not state whether the job responsibilities of a spotter were discussed at the training. Mr. Copeland also testified that employees of the Respondent would not be given any written instructions on how to be a spotter. Mr. Copeland agreed that he could not say whether or not employees of the Respondent had helped unload trailers prior to the Petitioner's injury.

In regard to disputed issue (C), did an accident occur that arose out of and in the course of Petitioner's employment with Respondent, the Arbitrator makes the following conclusions of law:

The Arbitrator concludes that the Petitioner did sustain an injury to his wrist and knee while working for the Respondent.

To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment. Sisbro, Inc. v. Indus. Comm'n, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). The "arising out of" component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Sisbro, 207 Ill.2d at 203

Stated otherwise, "an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." Id. at 204

Moreover, our courts have found that incidental, or nonessential acts of the employment, such as seeking personal comfort, may not be within the course of employment if done in an unusual, unreasonable, or unexpected manner. In such cases, however, even if the conduct is unreasonable or unusual, yet if the employer has knowledge of or acquiesces in such conduct as a custom or practice, there is liability under the Act. Union Starch, Div. of Miles Labs., Inc. v. Indus. Comm'n, 56 Ill. 2d 272, 277–78, 307 N.E.2d 118, 121–22 (1974)

Here, the petitioner established that he was given very little instruction on what his job responsibilities were or how to perform his responsibilities as a spotter. Indeed, even the Respondent's witness, Mr. Copeland, admitted that there was no written job description, written directions on how to do the job, nor could Mr. Copeland state that the Petitioner's job duties were discussed at the training the Respondent provided in Tennessee.

The Petitioner testified that he was told to simply follow the direction of his co-worker, Larry Beck. The Petitioner testified that he saw other employees of the Respondent doing much more than simply moving trailers at the Sensient facility. There has been no evidence provided that the Petitioner was told not to help remove the loads from the trailers he was moving.

At the time the Petitioner was allegedly injured he was not doing anything that could be deemed unreasonable or unusual. Indeed, the assistance in removing loads from the trailers was a service that the Respondent provided, which they called "lumping." Even though the evidence presented shows that Sensient did not purchase the Respondent's "lumping" services, there is no evidence that the Petitioner was told not to assist in removing the loads from the trailers at the Sensient facility. The Petitioner reasonably believed that he was benefiting his employer by assisting Sensient in removing the loads faster so the production line would not be disrupted.

Stated another way, the Respondent acquiesced to the Petitioner's actions of helping remove the loads from the trailer because the Respondent never told him not to do so, and the act that the Petitioner was performing was reasonably believed to be part of his job and for the benefit of his employer.

In regard to disputed issue (F), is the Petitioner's current condition of ill-being causally related to the injury, the Arbitrator makes the following conclusions of law:

The Arbitrator concludes that Petitioner's condition of ill being with regard to his wrist and knee is causally related to the work accident of June 6th, 2018.

The Petitioner testified that he tripped and fell while preforming what he reasonably believed to be his job duties and injured his wrist and knee. The Petitioner immediately felt pain and sought medical treatment for those injuries the next morning after his fall.

The medical records attached as Petitioner's exhibits support this finding. Moreover, no testimony was provided that disputes that the Petitioner's current condition of ill-being is causally related to the alleged work accident of June 6th, 2018.

In regard to disputed issue (J), were the medical services that were provided to Petitioner reasonable and necessary? Has the Respondent paid all appropriate charges for all reasonable and necessary medical services? The Arbitrator makes the following conclusions of law:

The Respondent argues that there was no accident and therefore the medical services were not reasonable and necessary. As stated above, the Arbitrator finds that the Petitioner did suffer a compensable injury. Moreover, based on the medical records provided as Petitioner's exhibits the Petitioner's medical treatment is reasonable and necessary. Accordingly, the Arbitrator concludes that the medical services provided to the Petitioner were reasonable and necessary.

In regard to disputed issue (K), Is the Petitioner entitled to any prospective medical care? The Arbitrator makes the following conclusions of law:

The Respondent disputes only that the Petitioner did not sustain a compensable injury and therefore no prospective medical care is owed to the Petitioner. As state above, the Petitioner did sustain an injury that arose out of and in the course of his employment. Accordingly, the Petitioner is approved for surgery as recommended by Dr. James Williams.

In regard to disputed issue (L), What temporary benefits are in dispute? TTD. The Arbitrator makes the following conclusions of law:

As stated above, the Arbitrator concludes that the Petitioner did sustain an injury that arose out of and in the course of his employment. The Petitioner is entitled to TTD from 2-9-2019 through 4-12-2019 and 4-18-

2019 through 5-26-2019, representing 14 4/7 weeks. Accordingly, the Petitioner is awarded TTD in the amount of $8,796.29.

In regard to disputed issue (M), Should penalties or fees be imposed upon Respondent? The Arbitrator makes the following conclusions of law:

The respondent's behavior was not unreasonable, vexatious or dilatory in that it had a legitimate good faith dispute. Penalties and fees under sections 19 and 16, respectively, are accordingly denied.

In regard to disputed issue (N), Is the Respondent due any credit? The Arbitrator makes the following conclusions of law:

Respondent shall be given a credit of $**8,796.29** for TPD and $**4,166.33** for other benefits, for a total credit of $**12,962.62**.

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

Antonio Nellum,

Petitioner,

vs. NO: 18 WC 32382

Prairie Farms,

Respondent.

20IWCC0275

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed pursuant to Section 19(b) by the Petitioner 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, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 16, 2019 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.

20IWCC0275

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: MAY 13 2020
d: 050720
BNF/mw
045

Barbara N. Flores

Deborah L. Simpson

Deborah L. Simpson

Marc Parker

Marc Parker

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

NELLUM, ANTONIO L
Employee/Petitioner

Case# **18WC032382**

PRAIRIE FARM
Employer/Respondent

20IWCC0275

On 10/16/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.62% 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:

0980 HASSELBERG GREBE SNODGRASS
KENNETH SNODGRASS
401 MAIN ST SUITE 1400
PEORIA, IL 61602

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

STATE OF ILLINOIS)
)SS.
COUNTY OF **Peoria**)

- [ ] 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)

Antonio L. Nellum
Employee/Petitioner

v.

Prairie Farms
Employer/Respondent

Case # **18** WC **32382**

Consolidated cases: **N/A**

20IWCC0275

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 **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Peoria**, on **August 12, 2019.** 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. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

20IWCC0275

FINDINGS

On the date of accident, **October 4, 2018**, 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.

Per the stipulation of the parties, in the year preceding the injury Petitioner earned **$42,900.00**; the average weekly wage was **$825.00**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **3** dependent children.

Respondent is entitled to a credit of **$0** for all benefits paid through group insurance under Section 8(j) of the Act.

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

ORDER

Petitioner failed to prove that he sustained an accident that arose out of and in the course of his employment with Respondent and, as such, all benefits are denied. The remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

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.

Melinda M. Rowe-Gillman

Signature of Arbitrator

9/30/19

Date

ICArbDec19(b)

20IWCC0275

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Antonio L. Nellum
Employee/Petitioner

Case # **18** WC **32382**

v.

Consolidated cases: **N/A**

Prairie Farms
Employer/Respondent

20IWCC0275

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that he began working as a back dock worker for Respondent in mid-September of 2018 but would occasionally work as a stacker in the cooler after he finished his regular shift. Petitioner testified that testified that the stacker position moved stacks of milk around with a metal hook by placing the hook in the bottom crate and then dragging the stack to where it needed to be placed in the cooler. He testified that four gallons of milk were in a crate and that a stack was six crates high.

Petitioner testified that at approximately 11:15 p.m. on October 4, 2018 he was in the cooler stacking milk when he grabbed a stack and the bottom crate split down the corner, and that when this happened the top crate fell towards him so he stuck his right arm out to catch the falling crate and then maneuvered his body around the stack to try to "down stack" the stack with his left arm. Petitioner explained that down-stacking was removing the top crate from the stack, then the next crate, etc., until you reached the broken crate and could re-stack the entire stack. He testified that Petitioner testified that he was unable to down-stack the stack so he started waiving his left arm and hollering for someone to come help him, and that he waited approximately 3-4 minutes for someone to appear. According to Petitioner, after the 3-4 minutes had passed a co-worker came to his aid and down-stacked the stack of crates for him.

Petitioner testified that after this incident his whole right shoulder had a sharp pain in it and that it went weak. Petitioner admitted, however, that he did not report this incident to anyone before he left work at 12:09 a.m. on October 5, 2018. Petitioner also admitted he knew he hurt himself on October 4, 2018, but did not report it because there was nobody around to report it to. On cross examination, however, Petitioner admitted that his supervisor, Kyle Hansen, was at the plant when his shift ended at 12:09 a.m. on October 5, 2018.

Petitioner testified that when he returned to work for Respondent on Friday, October 5, 2018 at 1:59 p.m. as a back dock worke,r he looked to report what had occurred the previous night to the supervisor on duty which he claimed would have been "Kyle." Petitioner testified that he called Kyle on the back dock phone, that he spoke with Kyle, and that he told Kyle that he hurt his shoulder the night before and that he thought he needed to go see a doctor. However, on cross examination, Petitioner admitted he did not tell Kyle Hansen about this accident until 4:00 p.m. or 5:00 p.m. In addition, Petitioner claimed that he did not see any supervisors when he clocked in on Friday at 1:59 p.m., but admitted that there were supervisors there to whom he could have reported this accident.

Bruce Clevenger was called as a witness by Respondent at the time of arbitration. He testified that he is a jug side cooler worker for Respondent and that he was working with Petitioner in the cooler at the time of the accident at issue. He testified that he was working no more than 15 feet away from Petitioner at the time of this alleged accident. He testified that when the case "barely split" Petitioner asked for help, and that he came to Petitioner's assistance within 15-20 seconds. He testified that he then re-stacked the stack for Petitioner. He testified that the stack was only slightly leaning and that he could hold up the stack "with a finger" and that "a minute, two minutes, tops" went by from when he walked over to Petitioner until he completed re-stacking the stack for Petitioner. He further testified that after this incident he continued to work with Petitioner in the cooler for approximately 45 minutes, and that Petitioner never told him that he had hurt himself.

Mr. Clevenger testified that there were two supervisors at the plant when this incident occurred and that employees were to report any accidents immediately. In addition, Mr. Clevenger testified that the night before this alleged accident occurred, Petitioner had complained about working in the cooler.

On cross-examination Mr. Clevenger was asked by Petitioner's counsel where Mr. Hansen was in the facility to which he responded that "we have a phone that we call Kyle Hansen to the cooler, and, boom, he is right there."

Kyle Hansen was called as a witness by Respondent at the time of arbitration. He testified that he is a night-shift production supervisor and works 4:00 p.m. to 1:00 a.m. He testified that employees were taught to report accidents by the end of their shift when they occurred, and that he was there around the time that Petitioner claimed that he was hurt.

Mr. Hansen testified that on October 5, 2018 at some point after 4:00 p.m. he called Petitioner into the office to tell him he was going to work in the cooler after his regular shift ended at 10:00 p.m. He testified that Petitioner told him that he was not going to be able to do the job (*i.e.,* referring to the cooler job) because of the pins in his shoulder. Mr. Hansen further testified that Petitioner said that he was not going to do it (*i.e.,* referring to the cooler job). He testified that he then discharged Petitioner for refusing to work in the cooler. He testified that only after Petitioner was told he was terminated did he tell him that he had hurt himself the night before. He testified that Petitioner never requested to see a doctor. He further testified that there were five supervisors at the plant at 2:00 p.m.

The Application for Adjustment of Claim was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The Petition for 19(b) Hearing was entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The Notice of Motion and Order was entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The Request for Hearing was entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The Petition in Support of TTD Benefits and Medical Treatment was entered into evidence at the time of arbitration as Petitioner's Exhibit 5.

The transcript of the deposition of Dr. Miguel Ramirez taken on June 13, 2019 was entered into evidence at the time of arbitration as Petitioner's Exhibit 6. Dr. Ramirez testified that he is an orthopedic surgeon, that he is board-certified in orthopedic surgery, and that he specializes in shoulder and elbow surgery. (PX6).

Dr. Ramirez testified that he performed surgery on Petitioner on October 17, 2017, at which time it was noted that he had a superior labral tear, degenerative changes in his shoulder, and a full-thickness rotator cuff tear. He testified that he performed debridement of the shoulder as well as rotator cuff repair, an arthroscopic biceps tenodesis, and a subacromial decompression. He testified that prior to performing surgery he reviewed Petitioner's MRI dated July 31, 2017, which revealed a high-grade partial thickness tears of the rotator cuff, a very large labral tear, and cartilage damage to the shoulder. He testified that the

previous surgery was performed as a result of a different accident at work for a different employer, and that he eventually released Petitioner to return to work with no restrictions on April 16, 2018. (PX6).

Dr. Ramirez testified that before Petitioner was returned to work in April 2018, he performed an injection into the right shoulder on March 15, 2018 as he was having some tendonitis-type symptoms and a little bit of scar tissue. He testified that a corticosteroid injection was given to help bring down the inflammation in Petitioner's rotator cuff and to hopefully get rid of the some of the scar tissue that was causing him pain. He testified that it was not uncommon for him to have to do an injection like this after a surgery. When asked whether the injection seemed to help Petitioner, Dr. Ramirez responded that he believed that it helped as evidenced by the fact that he saw him the following visit and he was ready to go back to work full duty. He testified that Petitioner followed-up with him again on July 16, 2018 for another injection, at which time he had a different problem than he previously had. He testified that Petitioner had more biceps tendonitis in July, so the pain that he had was anterior as opposed to the typical lateral pain that he had before. He testified that he told Petitioner that if the injection did not improve his pain that he would order an MRI, and that he did not return until November 29, 2018. (PX6).

Dr. Ramirez testified that at the time of the November 29, 2018 visit, Petitioner stated that he was lifting a heavy object, that it was falling back on him, and that since then he had been having anterior shoulder pain. He testified that he thought that Petitioner had re-aggravated the biceps tendonitis that he had seen him for, so he gave him another cortisone injection at that point to hopefully reduce the inflammation in the biceps. He testified that the injection did not help and that Petitioner indicated that he wanted an MRI because the pain had not improved. He testified that as of November 29, 2018 and thereafter Petitioner's subjective complaints increased, as he stated that the pain was worse than it was, especially after the injury, and that the injections that helped him before did not help him at that point. He testified that his plan at that point was to obtain an MRI to see if there were any new tears that were causing some of Petitioner's pain. (PX6).

Dr. Ramirez testified that Petitioner called in again on December 26, 2018 and reported increased pain, and that the MRI was eventually performed on January 8, 2019. He testified that the MRI showed that Petitioner had a full-thickness re-tear of the rotator cuff, that he had some fraying of the labrum which one sees post-operatively, and that he had a little arthritis as seen before, but that the salient findings were a re-tear of his rotator cuff. He testified that the re-tear was of the supraspinatus tendon, which was one of the tendons that Petitioner tore previously. He testified that when he saw Petitioner on January 14, 2019, he gave him the options of proceeding with another injection, doing more therapy, or repairing the rotator cuff. He testified that Petitioner at that time was still having increased subjective complaints, which was consistent with a re-tear of the rotator cuff. He testified that Petitioner wanted to get it repaired. (PX6).

Dr. Ramirez testified that as of January 14, 2019, he took Petitioner off work. He testified that he has not seen Petitioner since that date. He agreed that he understood that Petitioner was a truck driver. He testified that the basis for keeping Petitioner off work was that he was in a significant amount of pain and did not feel like he could perform his duties safely with the amount of pain that he had from the rotator cuff tear. He agreed that rotator cuff tears of the nature Petitioner had can be painful, that they can restrict someone's lifting abilities, and that he thought it was reasonable to keep him off work. When asked whether he thought the condition was going to improve based on what he had found as of January 14, 2019 without the surgery, Dr. Ramirez responded that rotator cuff tears did not heal and if anything, they just got bigger over time. He testified that symptoms could improve even though the tear did not heal, but that the natural history showed that eventually it catches up and the pain usually comes back. (PX6).

Dr. Ramirez testified that untreated rotator cuff tears get bigger over time and can lead to rotator cuff arthropathy where the tear gets very big, you start developing osteoarthritis, and eventually the rotator cuff tear is no longer repairable and you require a shoulder replacement as opposed to a rotator cuff repair. When asked to compare the MRIs dated October 17, 2017 and January 8, 2019, Dr. Ramirez testified that

the MRI that was done in 2017 showed basically a high-grade partial thickness tear of the rotator cuff, so the rotator cuff was intact but basically "hanging by a thread." He testified that Petitioner also had a large labral tear and some degenerative changes. He further testified that the most recent MRI did not show labral pathology but basically post-operative changes, and that Petitioner had a full-thickness tear of the rotator cuff at that time as opposed to the high-grade partial thickness tear. He testified that the high-grade partial thickness meant that the rotator cuff was still attached, that it was just almost completely torn, and that it had not torn all the way through. He testified that in a full-thickness tear, it was torn all the way through and completely detached from the bone. He testified that the type of surgery he would perform for Petitioner would be that of an arthroscopic rotator cuff repair, which would involve debridement, another decompression of the inflamed bursa, and then repairing the rotator cuff back to where it came from. (PX6).

Dr. Ramirez testified that he believed that Petitioner's accident on October 4, 2018 -- when a stack of milk crates about 5-6 feet high fell against his right shoulder and he attempted to hold the remaining crates so they would not fall over – could have caused a re-tear of his rotator cuff. He testified that Petitioner's right shoulder condition that had previously been repaired made him more susceptible to having a re-tear and that once you repaired the rotator cuff, sometimes either part of it cannot heal or does not heal so that it is susceptible to re-tearing. When asked what other things by way of the MRI that he saw that might have evidenced an additional trauma other than the rotator cuff tear, Dr. Ramirez responded that it was really hard to say and that other than the fact that it was torn at the area where they had repaired it, it was almost impossible to tell if it was a new trauma or it was old. When asked whether the milk carton accident could have aggravated any sort of degenerative changes that Petitioner had in his right shoulder, Dr. Ramirez responded in the affirmative and testified that every time you injured the shoulder it was an arthritic shoulder and that you could have an aggravation of the joint. (PX6).

Dr. Ramirez testified that the surgery that he proposed for Petitioner was causally related to the accident that he described having occurred on October 4, 2018. He testified that he had no other reason to believe that there was another injury, that Petitioner stated that this had happened, and that since then he was having increased pain so it "kind of falls together." He testified that there was nothing that he had seen in Petitioner's records which would indicate any other evidence of trauma other than what he described to him occurring on October 4, 2018. (PX6).

On cross examination, Dr. Ramirez agreed that the operative report of October 17, 2017 made reference to his having seen a full-thickness rotator cuff tear. He agreed that the prior injury that necessitated the October 17, 2017 surgery was a significant injury to Petitioner's right shoulder. He agreed that if someone had had a rotator cuff tear, they were potentially more susceptible to additional rotator cuff problems in the future. He agreed that individuals did not need to have a specific event to have future rotator cuff pathology, but further testified that given enough time eventually most of them did re-tear. (PX6).

On cross examination, Dr. Ramirez agreed that at the time of the March 15, 2018 visit, Petitioner complained of anterior shoulder pain. He agreed that anterior shoulder pain could be a sign of rotator cuff pathology, but further testified that it depended on where exactly the location was. He agreed that he gave Petitioner a subacromial injection on that date and that a subacromial injection was given for suspected rotator cuff pathology. He agreed that Petitioner stated that he received relief from that injection. He agreed that when Petitioner came back on April 16, 2018 he said he was doing well, that his pain had been well controlled, and that he was released to full duty without restrictions and instructed to return as needed. He agreed that on July 16, 2018 Petitioner returned again because he started having increased pain in his right shoulder, and that the pain was mostly anterior. He agreed that this was the same area of the shoulder that had pain on March 15, 2018. He agreed that Petitioner did not mention any additional accident or event that caused that increased pain. He agreed that increased pain could signify rotator cuff pathology. He further agreed that it was possible that Petitioner had increased pain because the injection wore off. (PX6).

On cross examination, Dr. Ramirez agreed that on July 16, 2018 he gave Petitioner another subacromial injection, which was the same injection he have him on March 15th. He agreed that the plan was to see what, if any, relief Petitioner had from that injection and to go from there. He agreed that he was considering ordering an MRI at that time but was going to hold off and see how Petitioner did. He agreed that it was possible that since Petitioner did not return to him after July 16th until November 29th, either he did not receive relief and merely did not return or he received some relief at least for some period of time. (PX6).

On cross examination, Dr. Ramirez agreed that Petitioner reported to him that he was lifting a heavy object and then started having anterior shoulder pain. When asked what he was lifting, Dr. Ramirez responded that he believed it was a milk crate. He testified that he believed that it was on something and that it fell. He testified that he was not clear as to whether Petitioner was putting it up on something or something was falling necessarily, and that they did not talk about the specifics of the injury. He testified that he did not know the weight of the object that Petitioner was lifting, nor did he know how he was lifting it. He agreed that if the history of lifting a heavy object was inaccurate, his opinions regarding causation as to the right shoulder could change. (PX6).

On cross examination, Dr. Ramirez agreed that the shoulder pain at the visit on November 29, 2018 was in the same area of the shoulder that Petitioner had pain on March 15th and July 16th. He agreed that he gave Petitioner a subacromial injection on November 29, 2018, which was the same injection he gave him on March 15th and July 16th. He agreed that relief from a subacromial injection was going to vary patient by patient and by condition as well. He agreed that he may give a subacromial injection to a patient and never see them again, that they may call two weeks later and say that it did not help at all, or that they may call three months later and say that it was not helping anymore but that it did. He agreed that the March 15, 2018 subacromial injection gave Petitioner approximately four months of relief. He agreed that it was possible that the right shoulder pain Petitioner claimed to have experienced in early October of 2018 could have been from no injury or event at all, but just because the July 16, 2018 injection wore off. (PX6).

On cross examination, Dr. Ramirez testified that at the time of the November 29, 2018 visit, he did not believe that he gave Petitioner any work restrictions. When asked if, after he saw Petitioner on July 16, 2018, he would have undergone an MRI between July 16, 2018 and October 4, 2018 he would agree that it was possible that the pathology seen on an MRI in that timeframe could have been the same as the MRI that he saw January 8, 2019, Dr. Ramirez responded in the affirmative. When asked whether Petitioner asked to be taken off work as of the time of the January 14, 2019 visit, Dr. Ramirez responded that he believed that he asked him if he felt that he could continue doing his job, and that he stated that he could not keep doing his job safely so he decided to take him off. He testified that it was his understanding that Petitioner was working then. When asked if he knew where, Dr. Ramirez responded that his understanding was that Petitioner was at Prairie Farms and testified that he did not know if he had a new job at that point or not. He testified that he assumed that Petitioner was still working at the same location, but that he did not ask him if that was different. (PX6).

On cross examination when asked what changed between November 29, 2018 and January 14, 2019 as far as work restrictions were concerned, Dr. Ramirez testified that in November he believed that the pain was reasonable at the time and that the injection would probably knock it down in a couple of days so that Petitioner could go back to work. He testified that at the January visit after the MRI was obtained he figured it was not going to get better, that Petitioner had a rotator cuff tear, and that they should protect the shoulder. (PX6).

On cross examination, Dr. Ramirez agreed that it was fair to say that it was possible that Petitioner would have needed the surgery he was recommending before October 4, 2018 if an MRI diagnosed it. He testified that a forceful contraction on the rotator cuff could make a tear. He testified that it was impossible to say how much weight there would need to be in order to cause the rotator cuff tear, and that it depended

on the strength and integrity of the rotator cuff at the time, the individual, and their age. He testified that it was highly unlikely that just being struck by something caused a tear on the rotator cuff. (PX6).

On redirect, Dr. Ramirez testified that when he gave the injections in March and July of 2018, he was not suspecting another rotator cuff tear at that time. He testified that it would be consistent with his treatment plan sometimes that he would have to give a patient an injection for scar tissue. He agreed that when he saw Petitioner on July 16, 2018 he also gave him another injection and thought it might be biceps tendonitis. He testified that he was not at that point in time suspecting that Petitioner had another rotator cuff tear because his complaints were different. He agreed that he released Petitioner to return to work on April 15, 2018 without restrictions, and that at that point in time he indicated that he was satisfied with his recovery. (PX6).

On redirect, Dr. Ramirez agreed that he gave Petitioner an injection on November 29, 2018 and that previous injections had given him months of relief. He agreed that, in this case, when Petitioner reported the new injury, the injection did not help. He agreed that Petitioner was calling in indicating that he was having ongoing pain and was asking for pain medication, which was different. He agreed that at that point in time he started to suspect that there might be a rotator cuff tear and decided that he was going to get an MRI. When asked to assume that Petitioner had come back to him after the injections within a week or two as he did with the last one and how he would have changed his treatment plan, Dr. Ramirez responded that he would have just obtained an MRI. (PX6).

On redirect when asked of the significance of the change in Petitioner's complaints after the November 29, 2018 visit, Dr. Ramirez testified that he felt that shortly after his surgery his complaint was more biceps-related so he was going more down the route of thinking biceps pathology and that this time, he felt more pain and that it was more globalized. He testified that Petitioner still had the same anterior pain but he also had some more lateral-sided pain and more diffuse pain, which "tipped" him to whether there was something else going on. (PX6).

On redirect, Dr. Ramirez agreed that at no time when he did the July 16, 2018 injection did he restrict Petitioner from work. He agreed that when Petitioner had the July 16th injection he was released to return to work full duty with no restrictions. He testified that it was very unlikely that he would release someone to return to work full duty with no restrictions if he thought they had a rotator cuff tear. When asked what was the most significant thing that led him to place restrictions on Petitioner in regards to his work as of January 14, 2019, Dr. Ramirez responded that it was the amount of pain that he was having and his basically stating he was unable to return to work, as well as the MRI findings. He agreed that he knew that Petitioner had a complete tear of the rotator cuff. (PX6).

On redirect, Dr. Ramirez agreed that the type of event or trauma as described by Petitioner's attorney was the type that could cause a reccurrence of a rotator cuff tear as evidenced on the MRI based on his physical examination findings. When asked specifically what was significant to him in regard to the trauma, Dr. Ramirez responded that it was mostly the description of having to hold up the cartons from falling, as that particular motion could cause the tear. (PX6).

On further cross examination, Dr. Ramirez agreed that Petitioner could have had a rotator cuff tear in the timeframe of March 15, 2018 and July 16, 2018 and that he just did not suspect it. He agreed that on November 29, 2018, he did not restrict Petitioner from work. He agreed that he was not sure how much the crates weighed or exactly what amount of force was towards Petitioner. (PX6).

On further redirect, Dr. Ramirez agreed that 24 gallons of milk was not an insignificant amount of weight to be holding up. (PX6).

With respect to Group Exhibit 3 (*i.e.*, medical records of OSF Orthopedics) attached to the transcript of the deposition of Dr. Ramirez, the records reflect that Petitioner was seen on July 31, 2017 with a chief complaint of right shoulder pain. It was noted that Petitioner worked at Brenntag Midwest as a truck driver, that he stated he as at work pulling a one-ton cylinder, and that it got caught on uneven ground while he was still pulling. It was noted that Petitioner felt a sharp pain in the bicep, that he stated his pain was posterior and radiated into the bicep, and that his range of motion was limited with certain movements. It was noted that Petitioner noticed tingling in the right hand, that he was unable to sleep, and that the pain was constant. The impression was noted to be that of (1) acute pain of the right shoulder; (2) labral tear of the right shoulder; (3) hyperlipidemia with target LDL less than 100; (4) essential hypertension; (5) uncontrolled type 2 diabetes mellitus with hyperosmolarity without coma, without long-term current use of insulin; (6) obstructive sleep apnea. It was noted that Petitioner had a labral tear as well as high-grade partial-thickness rotator cuff tears. It was noted that given Petitioner's age, occupation, and activity level, Dr. Ramirez recommended right shoulder arthroscopic labral repair, decompression, and possible rotator cuff repair. Included within the records was an interpretive report for an MRI of the right shoulder performed on July 6, 2017, which was interpreted as revealing (1) articular surface delaminating partial-thickness tear of the supraspinatus tendon; underlying mild tendinosis; (2) articular surface delaminating partial-thickness tear of the infraspinatus tendon extending along the myotendinous junction; (3) high-grade partial-thickness tear of the cranial fibers of the subscapularis; mild loss of muscular bulk; (4) extensive, near circumferential labral tear, particularly affecting the posterior labrum; clinical correlation for findings of multidirectional glenohumeral joint instability recommended; (5) significant articular cartilage loss along the posteroinferior glenoid; (6) mild to moderate degenerative changes of the acromioclavicular joint, with mild associated mass effect; Type III acromion with laterally downsloping orientation; correlation with clinical findings of impingement recommended; (7) subacromial/subdeltoid bursa. (PX6).

The records of OSF Orthopedics reflect that Petitioner underwent x-rays of the right shoulder on July 31, 2017, which were interpreted as normal. At the time of the October 27, 2017 visit, it was noted that Petitioner stated that he was doing well and that his pain had been well-controlled. The assessment was noted to be that of non-traumatic complete tear of the right rotator cuff. Petitioner was recommended to continue the sling and not to lift anything heavier than a coffee cup. Petitioner was recommended to start physical therapy in three weeks and to follow-up in three weeks. At the time of the November 17, 2017 visit, it was noted that Petitioner stated that he was doing well and that his pain had been well-controlled. It was also noted that Petitioner continued to have anterior pain and that he complained of numbness. It was also noted that Petitioner was to still use the sling for sleeping and when outdoors for the next two weeks, and that he could remove it altogether after that. Petitioner was recommended not to lift anything heavier than a coffee cup and also to start physical therapy. Petitioner was further recommended to return in six weeks. At the time of the December 18, 2017 visit, it was noted that Petitioner stated that he was doing well, that he was working with physical therapy, and that his pain had been well-controlled. It was also noted that Petitioner continued to have a "knot" on his upper bicep, which caused pain with certain movements. Petitioner was recommended to advance to phase 3 of the therapy protocol and could progressively increase lifting at home to match strengthening done in therapy. Petitioner was recommended to return in six weeks and it was noted that he would likely be released to full activity at that point. (PX6).

The records of OSF Orthopedics reflect that Petitioner was seen on January 29, 2018, at which time it was noted that he continued to experience pain both at rest and with movement, that he stated his shoulder was still swollen and that ice made it worse, and that he was in therapy but stated that he still felt weak and did not believe that they had started strengthening. Petitioner was recommended to continue in therapy, remain off work and follow-up in six weeks. The records reflect that Petitioner underwent a right shoulder subacromial injection on March 15, 2018. At the time of the March 15, 2018 visit, it was noted that Petitioner stated that he was doing well, that he complained of anterior shoulder pain, and that he was working with physical therapy and doing well. It was noted that Petitioner had a well-healed cuff but

continued to have anterior shoulder pain, likely a little bit of scar tissue versus biceps tendonitis. Petitioner was recommended to undergo a corticosteroid injection and continue with therapy. Petitioner was also recommended to return in one month for re-evaluation and it was noted that he was likely to be returned to full activity at that point. At the time of the April 16, 2018 visit, it was noted that Petitioner stated that he was doing well, that he had completed therapy and continued home exercises, that his pain had been well-controlled, and that he was very satisfied with his results. It was also noted that Petitioner stated that he was doing well, that he stated that he only had issues when reaching up to get this, that he stated his last physical therapy session was last week, and that he was continuing to do stretches and exercises at home to keep his range of motion and strength. It was noted that Petitioner's rotator cuff was well-healed, that his pain was low, that he had good strength, that he was very satisfied with his result, and that he was released to full activity without restrictions. Petitioner was instructed to return as needed. (PX6).

The records of OSF Orthopedics reflect that Petitioner underwent a right shoulder subacromial injection on July 16, 2018. At the time of the July 16, 2018 visit, it was noted that Petitioner stated that he recently started having increased pain, that it was mostly anterior, and that he had had no injuries that he remembered. It was noted that it was likely biceps tendinitis and that Dr. Ramirez would try a corticosteroid injection to see how it did over the next couple of weeks. It was noted that if Petitioner had no relief from the injection, an MRI would be ordered. Petitioner was recommended to return as needed. Petitioner was also given a prescription for Tramadol. At the time of the November 29, 2018 visit, it was noted that Petitioner stated that he thought he may have re-injured himself at work, that he stated that he was lifting a heavy object, and that he then started having anterior shoulder pain. It was noted that Petitioner denied any previous shoulder pain prior to this episode. It was also noted that Petitioner stated that cases of milk fell on him at Prairie Farms, that he denied taking pain medication, and that the pain was in the same area of his shoulder as his original injury. It was noted that Petitioner likely had biceps tendinitis and that he was recommended to undergo a corticosteroid injection. Petitioner was recommended to return as needed. (PX6).

The records of OSF Orthopedics reflect that Petitioner called in on December 13, 2018, at which time it was noted that he stated that the injection had not helped at all, and that the pain was in the front of the shoulder and did not radiate. It was noted that Petitioner was asking for an MRI. The Telephone Encounter dated December 19, 2018 noted that Petitioner was calling in regards to wanting Dr. Ramirez to change the MRI order to with contrast, that he stated that the last time he had an MRI without contrast it did not show anything, that he had to have another MRI with contrast, and that he was wanting to avoid this issue again. The Telephone Encounter dated December 26, 2018 noted that Petitioner stated that he was still having pain in the right shoulder and wanted Dr. Ramirez to order him something to help with the pain, that he was not doing anything to help relieve pain, and that he was to ice the shoulder and take over-the-counter pain medications until hearing back from Dr. Ramirez. At the time of the January 14, 2019 visit, it was noted that Petitioner was seen for the MRI results and that he denied a change in symptoms. The assessment was noted to be that of (1) complete tear of right rotator cuff; (2) essential hypertension; (3) uncontrolled type 2 diabetes mellitus with hyperglycemia; (4) morbid obesity due to excess calories; (5) obstructive sleep apnea. It was noted that Petitioner had a re-tear of his rotator cuff and that after a discussion was had about treatment options, he had opted for surgical repair. (PX6).

Included within the records of OSF Orthopedics was an interpretive report for an MRI of the right shoulder performed on January 8, 2019, which was interpreted as revealing (1) post-operative changes of the rotator cuff repair with full-thickness, partial width tear of the supraspinatus tendon; (2) degenerative fraying/tear of the posterior to posteroinferior glenoid labrum with associated subcortical cystic change and small paralabral cyst; (3) mild to moderate degenerative arthritis right glenohumeral and acromioclavicular joints. Also included within the records of OSF Orthopedics was a work slip dated January 14, 2019, which indicated that Petitioner would be out of work until his follow-up after surgery. The Operative Report dated October 17, 2017 noted that Petitioner underwent (1) right shoulder extensive glenohumeral debridement;

(2) right shoulder arthroscopic double row rotator cuff repair; (3) right shoulder arthroscopic biceps tenodesis; (4) right shoulder subacromial decompression for pre-operative diagnoses of right shoulder labral tears, right shoulder biceps tendinitis, and right shoulder subacromial impingement and post-operative diagnoses of right shoulder superior labral tear, right shoulder degenerative anterior and posterior labral tears, right shoulder glenohumeral osteoarthritis changes, right shoulder biceps tendinitis, right shoulder full-thickness rotator cuff tear, and right shoulder subacromial impingement. (PX6).

The Office Note of May 30, 2019 was entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The records reflect that Petitioner was seen on that date, at which time he stated that he continued to have uncontrolled, constant pain as well as decreased range of motion and strength within the shoulder. It was noted that Petitioner would still like surgery and was working with work comp to do so. It was noted that Petitioner wanted to talk about getting pain mediation [*sic*]. It was also noted that Petitioner still needed surgery to repair the cuff and may schedule at any time. Petitioner was given a prescription for Tramadol. (PX7).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 8.

The Application for Adjustment of Claim and Approved Settlement Contract for 17 WC 18245 was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The Application for Adjustment of Claim for 17 WC 18245 referenced an alleged date of accident of June 7, 2017 involving the right shoulder and bicep while moving a cylinder. The Settlement Contract Lump Sum Petition and Order for 17 WC 18245 was approved on January 16, 2019 and was settled for approximately 13.3% of the body as a whole. (RX1).

The transcript of the deposition of Dr. Chris Kostman taken on July 10, 2019 was entered into evidence at the time of arbitration as Respondent's Exhibit 2. Dr. Kostman testified that he is a board-certified orthopedic surgeon. He testified that approximately half of his practice was upper extremity injuries, including shoulders. (RX2).

Dr. Kostman testified that he performed an IME of Petitioner. He testified that Petitioner reported that the bottom crate broke and that the stack leaned forward towards his body, and that he supported the stack of milk crates with his right palm and left palm with the crates coming forward and resting onto his right shoulder. He testified that Petitioner also reported that he was alone when this occurred, that he described that in the cooler where this occurred he was waving for someone's attention, and that it was 3-5 minutes later when someone arrived to pull the crates one by one off from the stacked leaning position against his body. He testified that Petitioner also reported that he started a new job driving semi-tractor trailers on October 17th with an orientation, that he started driving activities two days later around October 19th, that he described his work as driving a manual transmission semi-tractor trailer truck without any manipulation of his loads, and that he had some difficulty with this activity that he did 7-8 hours a day for approximately four days a week until November 30th when he was released from that occupation because he was unable to get a postal license. (RX2).

Dr. Kostman testified that after performing a physical examination he thought that Petitioner's rotator cuff weakness was consistent with his MRI scan findings demonstrating a rotator cuff tear, and that his AC joint tenderness was consistent with his AC joint arthritis evident on plain films and his MRI scan. He testified that the four-view shoulder x-rays that were performed showed two prior metal anchors in the greater tuberosity, prior evidence of acromioplasty, degenerative change involving the glenohumeral joint with inferior osteophyte formation off the humeral head and neck, and moderate AC joint degenerative changes. He testified that he reviewed the MRI of the right shoulder from July 6, 2017 and that there was a high-grade tear of the supraspinatus that was found at the time of surgery to be full-thickness, but that he agreed with the radiologist's interpretation that it looked like a high-grade tear on the MRI scan. He testified

that he further agreed with the radiologist as to arthritis involving the glenohumeral joint as well. He testified that he reviewed the operative report from the surgery of October 17, 2017 as well. (RX2).

Dr. Kostman testified that he reviewed medical records from Dr. Ramirez dated March 15, 2018, and that they indicated that Petitioner continued to have anterior shoulder pain, that it was elected to give him a corticosteroid injection along with the recommendation of continuing to do more therapy, and that the injection was delivered into the right shoulder joint through an interval portal. He testified that he also reviewed the medical records of Dr. Ramirez dated April 16, 2018, at which time it was noted that Petitioner was doing well, had completed therapy, and continued his home exercise program. He testified that Petitioner was released to full activity without restrictions and was recommended to follow-up on as needed basis. He testified that he also reviewed the medical records of Dr. Ramirez dated July 16, 2018, at which time Petitioner came back having been released from care for right shoulder pain. He testified that Petitioner described recently having increased pain, mostly anterior, and that Dr. Ramirez recommended a corticosteroid injection, similar to the one previously given. (RX2).

Dr. Kostman testified that he also reviewed the medical records of Dr. Ramirez dated November 29, 2018, and that the notes described a possible distal clavicle resection but that this was not performed according to the records. He testified that it was noted that Petitioner was one-year status post rotator cuff repair and that he may have re-injured it at work lifting a heavy object, and that he started having anterior shoulder pain. He testified that the injection that was given was to the posterior part of the shoulder joint, and that it was different from the prior two injections which were given in the interval and likely to be, based on the location of the injection, intraarticular. He testified that the formulation was also different on that injection. He testified that there were a variety of reasons that someone would get a subacromial injection, such as rotator cuff tendinitis, subacromial bursitis, and several different inflammatory conditions. (RX2).

Dr. Kostman testified that he had seen the situation where a steroid injection might be beneficial initially, but that follow-up injections were less beneficial and may not be as effective. He testified that in some cases the steroid no longer had a significant effect as far as decreasing inflammation, and that in this case the last injection was a bit different formulation and also appeared through the notes to have been given in a different location. He testified that he also reviewed the MRI of January 8,2019, and that it showed post-operative change rotator cuff repair with a full-thickness supraspinatus rotator cuff tear, and that it also showed findings involving the glenohumeral joint that were very similar in that they were degenerative changes. (RX2).

Dr. Kostman testified that his diagnosis of Petitioner's right shoulder was that of a right shoulder strain, right shoulder rotator cuff tear, right shoulder glenohumeral joint arthritis, right shoulder acromioclavicular joint arthritis, and status post right shoulder rotator cuff repair and biceps tenodesis. He testified that it was his opinion that the accident of October 4, 2018 did not cause or permanently aggravate Petitioner's right shoulder rotator cuff tear or the right shoulder glenohumeral joint arthritis. He testified that the incident described by Petitioner was a series of stacked milk cartons weighing approximately 40 pounds each where the base carton broke, and that he stopped that from falling over and basically supported it with his bilateral hands. He testified that it was essentially supporting someone who was leaning over against you, and that he did not think that that was a mechanism for a recurrent rotator cuff tear or a permanent aggravation of Petitioner's glenohumeral arthritis. He testified that he did not believe that the incident of October 4, 2018 was a cause or permanent aggravation of Petitioner's AC joint arthritis for the similar reason, in that he did not believe that the mechanism of injury fit with permanent aggravation or causing that diagnosis. (RX2).

Dr. Kostman testified that it was his opinion that Petitioner may elect to have medical management or operative management for his right shoulder because of his underlying rotator cuff tear. When asked whether Petitioner required restrictions for his right shoulder, Dr. Kostman responded that he did not believe

that he required restrictions as related to his October 4, 2018 incident, but that his patients who had rotator cuff tears, glenohumeral arthritis, and AC joint arthritis may have difficulty with heavy lifting activities, particularly above-chest lifting and reaching activities. He testified that what he typically recommended for his patients with those diagnoses would be that they avoid heavy above-chest lifting, but that he typically did not have any restriction for below-chest lifting. He testified that he believed that Petitioner was at maximum medical improvement for his right shoulder related to his accident. (RX2).

On cross examination, Dr. Kostman testified that he did not find in any of his review of the documentation any other incident or trauma or accident that would have been related by Petitioner subsequent to his return to work from his surgery in October of 2017. He testified that there was nothing in his review of the records which would indicate that the event did not occur on October 4, 2018. He agreed that he reviewed the witness statement of Bruce Levenger, which he believed was consistent with the history that was provided by Petitioner. (RX2).

On cross examination when asked whether he agreed that Petitioner had another tear in the shoulder, Dr. Kostman responded that whether it was another tear or whether it was a failure of the healing, he thought the MRI clearly identified a tear in the supraspinatus tendon of Petitioner's shoulder. He agreed that other than the event that Petitioner described to him which was corroborated by a co-worker, they did not have any other evidence of any type of trauma to the shoulder area in the medical records following Petitioner's surgery. (RX2).

On cross examination, Dr. Kostman agreed that he reviewed Dr. Ramirez's deposition. He agreed that Dr. Ramirez compared the two MRIs, but further testified that he did not agree with his comparison of those two MRIs. He testified that he did not agreed that the first MRI showed a high-grade partial thickness tear of the rotator cuff. He did agree, however, that the second MRI showed that the rotator cuff was completely torn. He testified that he agreed with the interpretation of the initial MRI scan but that the intraoperative findings demonstrated that it was a full-thickness tear, which was a more accurate assessment than the MRI scan. (RX2).

On cross examination, Dr. Kostman testified that from what he had reviewed there were no diagnostic films prior to October 4, 2018 that indicated that Petitioner's first surgical repair had not been done successfully. He agreed that Petitioner's physical examination findings were consistent with his MRI scan findings. He agreed that trauma could cause rotator cuff tears. He agreed that trauma could aggravate the type of arthritis that he had described on direct examination and that it could make it symptomatic. He testified that he did not have any comment as far as the medical necessity of the procedures performed by Dr. Ramirez. He testified that it was relatively uncommon to have an injection subsequent to surgery and that he rarely gave injections after surgery. He testified that the basis for that was that injections, especially intraarticular injections, could weaken structural tissues that were trying to heal. (RX2).

On cross examination, Dr. Kostman agreed that Petitioner was released to return to work full duty as of April 16, 2018. He agreed that Petitioner's first injection was approximately three months later on July 16, 2018 and that he was told if there was no relief that Dr. Ramirez may order an MRI. He agreed that Petitioner did not return to see Dr. Ramirez after his release until November 29, 2018, which was about 4½-5 months later. He agreed that at that point in time, the medical records indicated that Petitioner had had a new injury that he reported on October 4, 2018. He agreed that Petitioner indicated that subsequent to the October 4, 2018 incident at work with the milk crates, he had had increased discomfort and pain. (RX2).

On cross examination, Dr. Kostman testified that the note dated April 16, 2018 stated that Petitioner was allowed to work full activity without restrictions. He agreed that there was nothing that he reviewed in the medical records that indicated that Petitioner would have been restricted in any fashion from his activities prior to October 4, 2018. He testified that he did not believe that Petitioner needed any restrictions

related to the October 4, 2018 event. He testified that for patients that presented in his practice with glenohumeral arthritis and rotator cuff tears that had difficulty with above-chest lifting, he would write restrictions for those activities if they had difficulties with those activities. He testified that weight restrictions could vary, depending on the patient. When asked that type of weight limitations he would place on someone having difficulty with above-shoulder lifting, Dr. Kostman responded that it could range anywhere from 5-30 pounds depending on the patient. (RX2).

On cross examination, Dr. Kostman testified that he assumed Petitioner's position as a truck driver was a heavy job. He testified that Petitioner described being a left-handed individual. He agreed that, taking out the causation issue as to the October 4, 2018 event, surgery was a reasonable alternative for treating Petitioner's current condition, and he further testified that it would be a revision rotator cuff repair. He testified that many of his patients with rotator cuff tears and glenohumeral arthritis could perform at the heavy workload capacity and agreed that some did not. He agreed that it varied from patient to patient. (RX2).

On redirect, Dr. Kostman testified that a rotator cuff tear could be symptomatic without trauma and agreed that this was something that he saw in his practice. He agreed that arthritis could become symptomatic without trauma and that this was something that he saw in his practice. (RX2).

The medical records of OSF Center for Occupational Health were entered into evidence at the time of arbitration as Respondent's Exhibit 3. The records reflect that Petitioner was seen on June 7, 2017, at which time it was noted that he was trying to spin a one ton cylinder by him to move it on a customer site to get it on the truck, that he was bent forward and pulling on the edge of the container toward him when the container got caught on an uneven part of the parking lot, and that he then felt a sharp pain in the right shoulder anteriorly and laterally. It was noted that Petitioner had some transient numbness and weakness for a few minutes after the injury where he felt the whole arm on the right was affected. The assessment was noted to be that of acute pain in the right shoulder. It was noted that Petitioner appeared to have an internal derangement or other issue like a proximal bicep tear. It was noted that an MRI was recommended to determine the pathology and that Petitioner had "a big mechanism of injury." Petitioner was issued work restrictions and was given a prescription for Hydrocodone-Acetaminophen. At the time of the June 21, 2017 visit, it was noted that Petitioner reported that the Norco was not helping, that he had not taken his blood pressure medications, and that, per the patient's request, he was allowing his supervisor to be in the same room. It was noted that Petitioner requested something stronger for his pain and that he was scheduled for an MRI arthrogram on July 6, 2017. It was noted that Dr. Braun was not sure why Petitioner's pain was so severe at that point, and that they would try some Percocet and refer him to a pain specialist for further pain management. It was noted that Petitioner may be a non-responder to opioids, and that his non-occupational health issues made it difficult to treat with non-opioids. It was also noted that Petitioner was referred to an orthopedic specialist to at least consider a steroid injection to help him with his pain, and may need further treatment advice pending his MRI. Petitioner was issued work restrictions. (RX3).

The records of OSF Center for Occupational Health reflect that Petitioner was seen on November 21, 2017, at which time it was noted that he stated that he went through the work comp process with a second opinion through an IME, that was surgery was done October 17, 2017, that he stated that he had repair of his rotator cuff, labrum and biceps tendon, that he saw Dr. Ramirez on November 17, 2017, and that he planned to start physical therapy as soon as it was approved by work comp. It was noted that Petitioner worked as a truck driver and was currently off work, and that he had a restriction of no lifting on the right and had been instructed to maintain his arm to his side and not abduct it. It was noted that Petitioner stated that Dr. Ramirez stopped his Oxycodone and started him on Norco, that he did not feel that this controlled his pain as well, and that he had an area of pain in his anterior shoulder that was the most significant. It was noted that Petitioner stated that Dr. Ramirez told him that it was due to a nerve being cut, that he stated that his pain radiated to his elbow at times, that when sitting his pain was 4-5/10 and worsened with arm movement, and that he had noticed decreased strength in his right hand and arm. The

assessment was noted to be that of a complete rotator cuff tear/rupture of the right shoulder, not trauma. Petitioner was taken off work until his next appointment, and was recommended to return on December 19, 2017. (RX3).

The medical records of Dr. Mary Stapel were entered into evidence at the time of arbitration as Respondent's Exhibit 4. The records reflect that Petitioner was seen on June 21, 2017, at which time it was noted that he refused a blood pressure check in his right arm due to shoulder pain. It was noted that Petitioner stated that he had been depressed and had been having a lot of right shoulder pain. It was noted that Petitioner did not want to be working and that he wanted to switch to Dr. Stapel for his worker's comp case. It was noted that Petitioner was feeling "pretty ok", that he was moving the cylinders by himself prior, that it was about a one-ton cylinder, that he was spinning it to line it up with his trailer, and that it stuck and that that was when he was hurt. It was noted that Petitioner was lifting weights, that he was working out, that his energy was really good, and that he was actually losing weight. It was also noted that Petitioner's 17-year-old son was hit by a car and killed on May 1, 2017, that it was hard for him to talk about it, and that he had grief from that. The assessment was noted to be that of uncontrolled hypertension, acute pain of the right shoulder, and uncontrolled type 2 diabetes mellitus, among other issues. Petitioner was recommended to take his blood pressure medications. (RX4).

The records of Dr. Stapel reflect that Petitioner was seen on June 27, 2017, at which time he was seen for right shoulder pain. It was noted that the date of accident was that of June 7, 2017, that it happened at 9:30 a.m., that Petitioner was picking up and moving a one-ton cylinder that was 1300 pounds empty, that he was rolling them up the piece of wood, that he was bumping it up onto the piece of wood, and that he was turning it. It was noted that the parking lot was uneven, that Petitioner was yanking it around, that it got caught on an uneven part of the parking lot, and that it was "like yanking on a parked car." It was noted that Petitioner felt something in his shoulder that let go, that it hurt, that he had pretty much gotten it up onto the trailer at that point, that it pretty much hurt immediately, and that it constantly hurt. It was noted that Petitioner had tried ice and heat as well as Icy Hot topically. It was also noted that Petitioner hurt more in the upper arm near the front of the shoulder as well as a bit on the biceps groove area, and also a bit through to the back. It was noted that it was always aching through the side or the back and that movement created sharp pain. It was noted that an MRI was scheduled and that Petitioner was seeing an orthopedist. It was noted that it felt similar to what happened on the left with the biceps, that it was not in good shape, and that Petitioner went through a lot in the waiting and that it was in worse shape due to continuing to work. The assessment was noted to be that of acute pain of the right shoulder. It was noted that Petitioner was unable to work even with basic office work, as even filing or holding a phone hurt his primary/dominant arm. (RX4).

The medical records of Dr. Miguel Ramirez were entered into evidence at the time of arbitration as Respondent's Exhibit 5. The records were duplicative of those as contained in Petitioner's Exhibit 6. (RX5; PX6).

The medical records of Center for Health were entered into evidence at the time of arbitration as Respondent's Exhibit 6. The records were duplicative of those as contained in Petitioner's Exhibit 6. (RX6; PX6).

The medical records of OSF St. Francis Medical Center were entered into evidence at the time of arbitration as Respondent's Exhibit 7. The records reflect that Petitioner was seen for physical therapy on March 15, 2018, at which time it was noted that he continued to limited by pain in the anterior region of the right shoulder (near the bicipital groove), that he stated that he had been doing better and was up to 50% better, but when it flared up last Tuesday (no mechanism of injury, just woke up with it) he had slid back and the pain was very limiting to any overhead greater than 70 degrees. It was noted that Petitioner felt that the pain was what was limiting him from strengthening his arm like he felt it could, and that presently his pain got up to a 5/10 with overhead motion. It was noted that Petitioner stated that he had always had

pain in the anterior aspect of the shoulder with flexion, but that the side was not that bad. It was noted that Petitioner had presented to 28 physical therapy sessions, that throughout the course of therapy he had been motivated and compliant, and that subjectively he was reporting improvement until last week when he woke up with magnification of pain in the right anterior shoulder with decreased shoulder range of motion. It was noted that Petitioner had been consistently experiencing limiting pain to shoulder range of motion greater than 90 degrees in the sagittal plane throughout the course of therapy, and that this recent flare-up had set him back significantly, even causing pain in the frontal and scapular plane. It was noted that Petitioner's strength was improving in the available range, but functionally he lacked strength and range of motion for all overhead motion and work duties. It was noted that there was visible and palpable swelling of the right shoulder anteriorly and that Petitioner was hypersensitive over the right bicipital groove. It was further noted that Petitioner may benefit from further medical work-up to address the limiting right anterior shoulder pain and further skilled physical therapy to address continued limitations. (RX7).

The records of OSF St. Francis Medical Center reflect that Petitioner underwent physical therapy on March 27, 2018, at which time it was noted that he reported decreased pain after the injection, that he was able to reach overhead again with less pain in the right arm, and that he stated he was still having discomfort with reaching like he did before the injection but nothing like it was after his flare-up. It was noted that Petitioner had functional limitation or restriction including difficulty reaching overhead, difficulty with lifting or carrying, decreased independence with self-care tasks such as bathing and dressing, difficulty with work due to an inability to raise the arm and exhibit enough strength to hold the steering wheel, and difficulty performing work duties of driving a semi. (RX7).

Timecards were entered into evidence at the time of arbitration as Respondent's Exhibit 8. The 2018 Calendar was entered into evidence at the time of arbitration as Respondent's Exhibit 9.

The Sheehy Mail Contractors Employment Records were entered into evidence at the time of arbitration as Respondent's Exhibit 10. It was noted that Petitioner's start date was that of October 17, 2018. The Driver Statement of On-Duty Hours noted that Petitioner worked 10-hour days for the timeframe of October 9 through October 13, 2018. The Contract Personnel Questionnaire noted that Petitioner worked for Central Transport from April 2018 to October 2018, and that he worked for Sheehy Mail from October 2018 to present; no reference was made of his having worked for Respondent. The Application for Employment dated October 9, 2018 noted that Petitioner's Employment History included having worked for Central Transport from April 2018 to present; no reference was made of Petitioner having worked for Respondent. The DOT Mandated Drug Test Results Medical Review Officer Report noted a collection date of October 9, 2018 for Pre-Employment Testing. (RX10).

Correspondence To/From Petitioner's Counsel dated July 25, 2019 were entered into evidence at the time of arbitration as Respondent's Exhibit 11. The letter pertained to a subpoena for production of employment records subsequent to Petitioner's departure from Respondent. (RX11).

The Medical Payments Ledger was entered into evidence at the time of arbitration as Respondent's Exhibit 12. The 19(b) Response was entered into evidence at the time of arbitration as Respondent's Exhibit 13.

The Prairie Farms Safety Rules were entered into evidence at the time of arbitration as Respondent's Exhibit 14. As it pertains to the Plant, #4 referenced a requirement to report all injuries, accidents and near accidents to your supervisor before the end of the work day. (RX14).

CONCLUSIONS OF LAW

With respect to disputed issue (C), the Arbitrator finds that Petitioner failed to prove that he sustained an accidental injury on October 4, 2018 that arose out of and in the course of his employment with Respondent.

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

The "arising out of" component refers to an origin or cause of the injury that must be in some risk connected with or incident to the employment, so as to create a causal connection between the employment and the accidental injury. *Id.* There are three categories of risk to which an employee may be exposed: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks, which have no particular employment or personal characteristics. *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2103 IL App (4th) 120219WC, ¶ 27; *Young v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130392WC. Injuries resulting from a neutral risk are not generally compensable and do not arise out of the employment unless the employee was exposed to the risk to a greater degree than the general public. *Id.*

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

While the Arbitrator does not question that a milk crate in the stack slightly tore and leaned towards Petitioner on October 4, 2018, the Arbitrator does question the veracity of the accident description as provided by Petitioner at the time of arbitration. Related thereto, the Arbitrator finds the testimony of Petitioner's co-worker, Bruce Clevenger, to be credible and of great significance in this matter.

Mr. Clevenger testified that he was working near Petitioner at the time of this alleged incident and that he came to assist him within 15-20 seconds of his having called for help. According to Mr. Clevenger, the milk crate barely split, the stack was slightly leaning, and when he helped Petitioner he was able to hold up the stack "with a finger." He testified that he then down-stacked the stack for Petitioner, and that the entire incident took no more than two minutes. This is in stark contrast, however, to Petitioner's claims that he held the stack for 3-4 minutes before anyone assisted him, the size of the split in the crate, and the extent to which the stack was leaning towards him. In addition, the evidence reveals that Petitioner continued to work with Mr. Clevenger for approximately 45 minutes after this incident and yet he never told him he was injured, despite Petitioner's assertions that he had sharp pain in his right shoulder as well as weakness at the time of the incident at issue.

As to Petitioner's assertions that he did not report this incident on October 4, 2018 because there was nobody around to report it to, the Arbitrator finds Petitioner's claim that there was no one to report this accident to as not credible. The witness testimony reveals there were supervisors at the plant during Petitioner's shift on October 4, 2018 into the early morning hours of October 5, 2018, and even Petitioner himself admitted on cross examination that Kyle Hansen was at the plant when his shift ended at 12:09 a.m. on October 5, 2018. In addition, Mr. Clevenger testified there is a phone in the cooler "that we call Kyle Hansen to the cooler, and, boom, he is right there." Furthermore, the Arbitrator notes that Petitioner signed that he received and reviewed the "Safety Rules" that he was to report any accident to his supervisor before the end of his work day. (RX14).

The witness testimony further reveals that there were supervisors at the plant before Petitioner's shift began at 1:59 p.m. on October 5, 2018, that there were supervisors at the plant when Petitioner's shift began at 1:59 p.m. on October 5, 2018, and that there were supervisors present for at least two hours while Petitioner was working at the plant before he claims he reported this incident to Kyle Hansen at approximately 4:00 p.m. on October 5, 2018. Despite all of these supervisors being available to report this incident to at these times, the Arbitrator notes that Petitioner failed to report this incident until *after* he was terminated. That said, the Arbitrator has great difficulty believing Petitioner's reasons for not reporting this incident when it occurred, before, or at the end of his shift at 12:09 a.m. on October 5, 2018, before the start of his shift at 1:59 p.m. on October 5, 2018, at the start of his shift at 1:59 p.m. on October 5, 2018, or at any point between 1:59 p.m. and 4:00 p.m. or 5:00 p.m. on October 5, 2018.

The Arbitrator also finds the records from Petitioner's subsequent employment with Sheehy Mail Contractors to also be of significance in calling into question his credibility. Petitioner appears to be adamant he did not work anywhere after October 5, 2018 besides at Sheehy but, if so, the Arbitrator finds no plausible explanation as to why Petitioner would claim to Sheehy that he worked 10 hours on October 9, 2018, 10 hours on October 11, 2018, 10 hours on October 12, 2018, and 10 hours on October 13, 2018 – for a total of 40 hours those 4 days. (RX10). The Arbitrator places little, if any, weight upon Petitioner's assertion that he meant to write "zero" instead of 10 each time and that he meant to write "zero" instead of 40. In addition, Petitioner claims he did nothing for Sheehy besides drive a truck. However, the records from Sheehy show, at minimum, the "road test" given by Sheehy would have required him to do more than just drive a truck. (RX10). More significantly, Petitioner even wrote in the training documents he could suffer a "shoulder injury from pulling the pin" to release the 5th wheel. (*Id.*).

Finally, Petitioner asserted at the time of arbitration that he called Dr. Ramirez's office sometime between October 5, 2018 and October 17, 2018, but both parties submitted a significant number of records from Dr. Ramirez's office which included phone messages, and the records are devoid of any contact between Petitioner and Dr. Ramirez's office between those dates. (RX5; PX6). This, when coupled with Petitioner's apparent failure to disclose an accurate employment history on his post-accident application in the Sheehy Mail Contractors Employment Records as evidenced on the Application for Employment dated October 9, 2018 (*see* RX10), causes the Arbitrator to admittedly place little weight upon Petitioner's testimony in this matter.

Having reviewed and considered the entirety of the evidence in this matter, the Arbitrator finds that Petitioner failed to prove that he sustained an accidental injury on October 4, 2018 that arose out of and in the course of his employment with Respondent. In light of the Arbitrator's findings with disputed issue (C), the Arbitrator makes no findings with respect to disputed issues (F), (J), (K) and (L), as those issues are rendered moot. The claim is denied.

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

John Joiner,

Petitioner,

vs. NO. 07WC028642

Southern Illinois University/State of Illinois,

20IWCC0276

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, causal connection, prospective medical care, 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 November 20, 2018 is hereby affirmed and adopted.

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

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

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

DATED: MAY 14 2020
SJM/sj
o-4/28/2020
44

Stephen J. Mathis

Douglas D. McCarthy

20IWCC0276

SPECIAL CONCURRENCE/DISSENT

I concur with all aspects of the Majority's Decision save its finding of a causal relationship between Petitioner's accident and his need for a right total knee replacement. As to this finding, I dissent. I would find Petitioner failed to prove the requisite causal relationship. As such, I would vacate the medical bills awarded and reduce the permanent partial disability benefits awarded to 20% loss of use of the right leg pursuant to Section 8(e) of the Act.

It is well settled that an injured employee may recover benefits if an accident aggravates or accelerate his underlying pre-existing condition. See *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC, ¶ 28 ("A claimant with a pre-existing condition may recover where employment aggravates or accelerates that condition. [citation omitted]."). "Cases involving aggravation of a preexisting condition concern primarily medical questions and not legal ones." *Long v. Industrial Commission*, 76 Ill. 2d 561, 565, 394 N.E.2d 1192 (1979).

The Majority in affirming and adopting the Arbitrator's decision affords greater weight to Dr. Davis' opinion finding he "persuasively testified to causation between the two arthroscopic procedures and Petitioner's right total knee replacement stating that the accident caused or aggravated Petitioner's knee problems." *Arbitration Decision*, p. 17. The fatal flaw in this finding is- no such testimony exists.

On direct examination, Dr. Davis was posed the following question, "Q. Okay. Doctor do you have an opinion, to a reasonable degree of medical certainty, as to whether or not the care and treatment that you provided for his right knee was causally connected or aggravated by the work accident that he described to you from May of 2006?" PX5, p. 12-13. Dr. Davis answered in the affirmative, *i.e.*, yes, he did have an opinion but provided no additional testimony as to what his opinion was. As Dr. Davis failed to provide his opinion, there was likewise no testimony regarding the basis of his opinion. Relative to the left knee, Dr. Davis, again, on direct examination testified he had an opinion but failed to articulate that opinion. PX5, p. 13. That failure, however, was remedied on re-direct examination, when Dr. Davis detailed his opinion as

arsdocs

to causation for the left knee as well as the basis for the same; to be clear, no such remedy was provided regarding right knee causation and Dr. Davis' opinion on that issue remains unexpressed. PX5, p. 16-17.

The only testimony in the record regarding causation for the right knee and the need for a total knee replacement is that of Dr. Nogalski. Dr. Nogalski testified Petitioner's need for a total knee replacement was not due to Petitioner's accident. RX6, p.7. In providing the basis for his opinion, Dr. Nogalski explained as follows: "Mr. Joiner had a very small meniscal tear and did not have any other objective findings at arthroscopy to correlate with damage to his joint surface or injury to the knee that would be reasonably considered enough to necessitate a knee replacement." *Id.*

As such, I would afford greater weight to the opinions of Dr. Nogalski and find Petitioner failed to prove a causal relationship between his accident and his need for a right total knee replacement. For the above stated reasons, I respectfully dissent.

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JOINER, JOHN
Employee/Petitioner

Case# **07WC028642**

SIU/STATE OF ILLINOIS
Employer/Respondent

20IWCC0276

On 11/20/2018, 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 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1167 WOMICK LAW FIRM CHTD
CASEY VANWINKLE
501 RUSHING DR
HERRIN, IL 62948

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0588 ASSISTANT ATTORNEY GENERAL
NATALIE N SHASTEEN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

NOV 20 2018

RONALD R. RIOPELLE, Acting Secretary
Illinois Workers' Compensation Commission

20 IWCC0276

STATE OF ILLINOIS)
)SS.
COUNTY OF **Williamson**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

John Joiner
Employee/Petitioner

v.

SIU/State of Illinois
Employer/Respondent

Case # **07** WC **28642**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin**, on **September 19, 2018**. 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 **5/16/06**, 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 $**63880.56**; the average weekly wage was $**1228.48**.

On the date of accident, Petitioner was **51** 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 $**375,810.30** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**375,810.30**.

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

Respondent shall pay Petitioner permanent partial disability benefits of **$591.71/week** for **96.75 weeks** because the injuries sustained caused the loss of **45% of the right leg**, as provided in Section 8(e) of the Act.
Respondent shall pay Petitioner permanent partial disability benefits of **$591.71/week** for **32.25 weeks** because the injuries sustained caused the loss of **15% of the left leg**, as provided in Section 8(e) of the Act.

Respondent shall pay reasonable and necessary medical services as further set forth in PX 6 subject to the Medical Fee Schedule, as provided in Section 8a) and 8.2 of the Act. Respondent shall receive credit for all bills it has paid, including those paid by its group medical plan for which credit is allowed under Section 8(j) of the Act and shall hold Petitioner harmless from liability for same.

Respondent shall pay Petitioner compensation that has accrued between **May 16, 2006** and **September 19, 2018** and shall pay the remainder of the award, if any, in weekly installments.

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

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

Signature of Arbitrator — **November 15, 2018** Date

NOV 20 2018

John Joiner v. State of Illinois – SIU, Carbondale, 07 WC 28642

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arbitrator finds:

The parties agree that on May 16, 2006, Petitioner was employed as a refrigeration mechanic for Respondent when he sustained work-related injuries to his left and right knees after slipping in oil. According to the Supervisor's Report, Petitioner slipped on oil and twisted both knees with the right knee being worse than the left. Petitioner's statement (RX 2) indicates he fell on both knees. (RX1; RX2; RX3).

On May 16, 2006, Petitioner presented to Memorial Hospital of Carbondale with bilateral knee pain, right greater than left, following an unspecified fall at work. (PX4). Upon physical examination, Petitioner exhibited tenderness in the patella/anterior surface of both knees but good extension. (PX4). Petitioner underwent x-rays of both knees. (PX4). With the exception of mild arthritic changes noted in the right knee, both were essentially negative. (PX4). Petitioner was diagnosed with bilateral knee contusions, prescribed Darvocet and Clinocil, and discharged home. (PX4).

On June 14, 2006, Petitioner presented to Dr. Mike Davis at the Orthopedic Institute of Southern Illinois (SIOC). As part of the examination Petitioner completed a Patient Questionnaire in which he indicated he was having problems with both knees after falling on May 16th. While Petitioner's chief complaints were noted to be constant, sharp, moderate pain and stiffness in the right knee, Dr. Davis' notes also indicate that Petitioner's complaints were to the "bil knees." Petitioner reported his symptoms were aggravated by standing, walking, and traveling the stairs and his symptoms were relieved by rest. Dr. Davis' musculoskeletal exam was normal except as noted in the "HPI" and "chief complaint" (mentioned earlier in this paragraph). While no definitive treatment plan was noted, the doctor's off work slip of the same date indicated Petitioner was not to return to work pending workers' compensation approval for an MRI. (PX 1; RX5)

An MRI of Petitioner's right knee was performed on July 6, 2006 by Dr. Barren (SIOC). It revealed small right knee effusion, an intact ACL and PCL, and a partial tear of the posterior aspect of the right medical meniscus. (PX 1; RX5; PX4).

On July 12, 2006, Petitioner returned to Dr. Davis' office and was examined by Roger Smith, PA (SIOC). Petitioner was noted to have ongoing pain with any ambulation or range of motion. He was experiencing popping and catching with give away and the left side was bothering him more than the right at the time. On physical examination, Petitioner had markedly positive medial McMurray signs bilaterally and left knee effusion. He was walking with an antalgic gait. Mr. Smith reviewed the MRI and felt it showed an acute injury to the posterior horn of the medical meniscus. The working diagnosis was a left [sic] knee medial meniscal tear but Mr. Smith felt it would be very beneficial to obtain an MRI of the left knee; however, workers' compensation had refused to approve one up to that point in time. Petitioner was still

unable to work and was considered a suitable candidate for right knee arthroscopic surgery. He was given a refill of Vicodin. (PX 1; RX5; PX4).

On July 19, 2006 CMS approved the left knee MRI. However, it refused to authorize the right knee surgery given the negative MRI of the right knee. (PX 1)

On July 26, 2006, an MRI of the left knee performed and reviewed by Dr. Barren revealed a small left knee joint effusion, intact ACL and PCL, focal subcortical bone contusion/bone edema/osteonecrosis changes, and distal left lateral femoral condyle. Degenerative changes involving the posterior aspect of the left medial meniscus were noted but there was no identifiable full thickness tear. (PX 1; RX5; PX4).

A follow-up with Mr. Smith was held on August 2, 2006. At this visit, Petitioner was complaining more about his right knee than his left. He was scheduled for right knee surgery in the upcoming week and the left knee was continuing to be painful and he was having trouble getting around even at home. Petitioner's physical examination was positive for bilateral McMurrays and effusion. In reviewing the MRI Mr. Smith noted he saw some degenerative changes to the medial meniscus and a small fluid accumulation along the course of the medial collateral ligament. Mr. Smith's working diagnosis was that of an exacerbation of a degenerative medial meniscus tear with a medial collateral ligament strain. They discussed conservative management versus surgery. Petitioner wished to proceed with surgery and approval was to be attempted. (PX 1)

On August 8, 2006, Petitioner underwent a right knee arthroscopy, which revealed a meniscal tear and chondromalacia of the patellofemoral joint. (PX 1; PX4). A partial medial meniscectomy was performed. The operative report revealed significant thickening of the medial shelf synovial plica, grade I to II chondromalacia of the patellofemoral joint (described as early and minimal), and good patellar tracking. (PX4; RX5). The medial and lateral menisci were intact. A chondroplasty of the patellofemoral joint was performed. *Id.*

As of August 21, 2006, Petitioner was feeling better and engaged in full weight bearing. He was still off work and taking his pain medication about every other day. There was some mild swelling noted. Petitioner was advised to continue with his home exercise program of quadriceps strengthening and hamstring stretching. (PX 1)

When Petitioner returned to see Dr. Davis on September 11, 2006 he was described as "doing very well." He still felt a little weak but his pre-operative symptoms were much improved and he was every happy with his results and wished to proceed on the left side. He was able to ambulate independently with a slight limp on the left. He was not yet ready for unrestricted work. (PX 1)

On October 8, 2006, Petitioner underwent the left knee arthroscopy. (PX 1; PX4). The operative report revealed significant hypertrophy and thickening of the medial shelf synovial plica and the parapatellar synovium, both medially and laterally. Grade II chondromalacia of the patellofemoral joint was also noted. The hypertrophic medial shelf synovial plica was resected

and a limited medial and lateral parapatellar synovectomy was performed. There was no evidence of a meniscal tear. (PX 1; PX4; RX5).

Petitioner returned to see Mr. Smith on October 12, 2006 regarding his left knee. Petitioner had full extension of his knee but was exquisitely tender to palpation over the inferior arthroscopic portals. They reviewed the arthroscopic findings with him. He was to continue with his home exercise program. He was given restrictions, but Petitioner advised that no light duty was available. He was to return in four weeks. No right knee complaints were noted. (PX 4)

As of November 6, 2006, when Petitioner returned to see Dr. Davis, he reported he was no better or worse since his surgery. He complained of mild pain and swelling in his left knee. In a script of that same day, Petitioner was referred to physical therapy for his right knee. (PX 1)

Petitioner presented for a physical therapy evaluation on November 7, 2006. He gave a history of bilateral knee pain and crepitus. He denied any therapy prior to this visit. He reported his left knee was still swelling and he felt a "pulling' with his knee in extension. The goal was to improve the pain and strength in both knees. (PX 1)

When he attended therapy on November 13, 2006 Petitioner complained of soreness on the left side and pain when his left leg went "sideways." When he returned on November 20, 2006 he reported soreness due to fixing a sink on his knees over the weekend as he felt like he had "knelt down on marbles." He was having a lot of pain, especially in the left knee. Petitioner had increased range of motion in his right knee but decreased on the left. When he returned on December 1, 2006 he complained of pain with all body weight on his knees. (PX 1)

Mr. Smith re-examined Petitioner on December 11, 2006 noting that Petitioner "had made several attempts at returning to normal work activities and simulating them independently." He was continuing to have pain under the patella when rising from a seated position. He was neurovascularly intact and had good range of motion of his knee (which one wasn't identified). Some patellofemoral crepitus was noticed but it was more pronounced on the right than the left. He was given a script for a Medrol Dosepak and advised to begin Aleve after that. He was also told to start taking glucosamine chondroitin. He was not yet ready to return to work given his job involved ladders and kneeling. (PX 1)

As instructed, Petitioner returned to see Mr. Smith on January 8, 2007 at which point he was still not back to normal work activity and still having pain in the patellofemoral region whenever he would attempt to kneel or squat. He improved with the Medrol-Dosepak but the symptoms returned thereafter. He walked with a smooth even gait. He had good range of motion of his knee with no ligamentous instability appreciated. He was referred for work conditioning and told he could not return to work at this time if it involved kneeling, climbing or squatting as "This is due to his diagnosis, chondromalacia patellae." (PX 1)

Petitioner began work conditioning on January 11, 2007, and he was to undergo it four times a week for four weeks. As of January 17th he was feeling better but having trouble with pain, especially on stairs. He also reported some catching and some motions. On January 22nd, he reported right knee soreness. He was noted to be non-complaint with the therapy sessions which

he attributed to soreness. As of January 29, 2007, he was still complaining of pain and soreness with steps. (PX 1)

Dr. Davis re-examined Petitioner on February 5, 2007 regarding his knees. It was noted that Petitioner still could not do stairs. He was taking Arthrotec 75, Lopressor and Vicodin. He remained off work. (PX 1)

Petitioner returned to see Dr. Davis on March 5, 2007 with continued complaints in the patellofemoral regions of both knees with certain activities such as kneeling or squatting. (PX 1; PX4; RX5). One day his left knee would be more symptomatic, the next day the right. Dr. Davis noted that the residual knee pain had plateaued and was not improving over the last several months. He had a detectable limp bilaterally and lacked the last few degrees of terminal extension of both knees. Dr. Davis' impression was that of residual arthritic type symptoms after surgery, bilaterally. He recommended an FCE to determine restrictions. (PX 1)

Petitioner was discharged from therapy on March 27, 2007. (PX 1)

A functional capacity evaluation (FCE) was performed on April 27, 2007. It indicated that Petitioner could work in the light physical demand level, which would preclude his ability to return to work for Respondent in his pre-accident position. He gave full physical effort during the testing. He had pain and weakness with resisted testing of both quadricep muscle groups and audible and painful popping in both knees with extension in weightbearing positions. He was unable to kneel or squat due to pain and unable to crawl because of inability to weight bear on his knees and get into a kneeling position for crawling. Climbing ladders was slow and painful. He walked .2 miles before pain limited his activity. His gait pattern was described as antalgic. (PX 1; PX2).

Dr. Davis re-examined Petitioner's knees on May 7, 2007. He described the visit as "routine follow-up of painful arthritic bilateral knees status post arthroscopy. He had no new complaints or problems although his pain was "slightly increased" since his earlier FCE. He was ambulating with a slight limp and was advised to continue with conservative measures as previously outlined, including his home exercises and protective body mechanics. The doctor felt he could return to work with restrictions as outlined in the FCE and was to return in two months for follow-up. (PX 1)

On June 7, 2007, Petitioner returned to see Mr. Smith. Mr. Smith noted that the follow-up frequency was being dictated by the workers' compensation carrier. Petitioner had been told he could only return to work if he had no restrictions at all. He felt he was growing weaker, not stronger. He ambulated with a relatively smooth even gait and had full extension of his bilateral knees to 110 degrees. He could only do a deep knee bend to about 80 degrees of flexion. Mr. Smith noted that it would be beneficial to Petitioner if he could return to work. At the request of the workers' compensation carrier, Petitioner was to return in thirty days. (PX 1)

Petitioner signed his Application for Adjustment of Claim herein on June 19, 2007. (AX 2)

Petitioner followed up with Dr. Davis on July 9, 2007 for his "W/C mandated re-eval." Petitioner reported that his symptoms were unchanged and sometimes worse. He had tried simulating some work duties and it exacerbated his symptoms. Petitioner was told to continue his activity as tolerated and the doctor further noted that he could return to work if the employer wished to permit it. (PX 1)

When Petitioner returned to see Dr. Davis on August 6, 2007 he reported popping under the patellas. There were no other changes to report. He was to return in thirty days for another W/C evaluation. Dr. Davis again felt he could return to work within the FCE restrictions. (PX 1)

As of September 10, 2007, Dr. Davis noted no change in Petitioner's bilateral knee symptoms. Petitioner walked with a slightly noticeable limp when first arising. No changes in treatment were provided. Respondent's unwillingness to return Petitioner to work was noted. (PX 1)

Mr. Smith re-examined Petitioner on October 15, 2007 noting it was now 11 months post-op and Petitioner's symptoms were exactly the same (crepitus with range of motion, pain prohibiting kneeling or squatting). Petitioner reported using narcotic pain medication if he attempted to walk any distance at all. His work restrictions remained in effect. Mr. Smith noted that in one month Petitioner would be one year post-op and he anticipated Petitioner being at maximum medical improvement at that time. (PX 1)

Petitioner continued to follow-up with Dr. Davis for arthritic pain post-arthroscopy. On November 19, 2007, Petitioner informed Dr. Davis he was experiencing increased pain after changing a tire on his vehicle over the weekend. (PX1; PX4).

When seen by Dr. Davis on December 17, 2007 Petitioner reported his pain in his knees seemed to get worse since the weather became colder and his employer would still not let him return to work with restrictions. (PX 1)

On January 14, 2008, Petitioner complained of marked increase in pain with normal activities, particularly with the right knee. Dr. Davis noted Petitioner's knees were suffering from a progression of osteoarthritis bilaterally (right more than left) and he recommended a total right knee replacement. (PX 1; PX4).

The workers' compensation carrier was contacted about approving the total knee replacement and advised that Petitioner would be undergoing an independent medical examination. This occurred in February of 2008. (PX 1)

Petitioner returned to see Dr. Davis in March of 2008. Petitioner reported he had not heard anything form workers' compensation and had been unsuccessful in getting it to tell him anything. Respondent was continuing to refuse to allow Petitioner to return to work and his pain was keeping him from even his normal daily activities. While waiting for approval for the right TKA, the doctor suggested visco-supplementation. His office was going to attempt to get approval for the right side first and then the left knee. (PX 1)

On April 1 (or 10), of 2008 Dr. Davis completed a CMS Physician's Statement for disability leave and return to work. He noted that Petitioner had been treating with him since June 14, 2006 for bilateral knee issues. He was now recommending injections for both knees and that he, essentially needed sedentary work. (PX 1)

Petitioner returned to see Dr. Davis on April 14, 2008 and there "really was not much new." He still had activity related arthritic knee pain and was, by Petitioner's report, awaiting word from the arbitrator to see if he could be scheduled for a TKA. Petitioner was ambulating with a noticeable limp especially when he first got up. The diagnoses remained degenerative arthritis status post knee arthroscopy of both knees. (PX 1)

In a noted from Dr. Davis' office dated June 16, 2008 Petitioner had advised he still had not been to arbitration but had been told it would be that week. Respondent had still not offered him any work within his restrictions. (PX 1)

On June 26, 2008 Dr. Davis' office made a note that the carrier had called the office regarding the approval for the total knee replacement and advised that Petitioner's case was in litigation and the office would have to wait until after a hearing as she was not denying nor was she approving the surgery at that time. (PX 1)

Petitioner continued to follow up with Dr. Davis for his bilateral knee pain and on August 18, 2008 he advised the doctor that his pain had progressed to the point he was no longer able to tolerate it and wished to proceed with the knee replacement as he was very frustrated by the functional limitations that his knee had placed upon him. Dr. Davis noted that Petitioner was unable to arise from a seated position due to significant patellofemoral compression pain and he described Petitioner's condition as persistent and worsening post-traumatic osteoarthritis of the knees. (PX 1)

After being cleared for surgery by his cardiologist, Petitioner underwent an uncemented total right knee replacement on October 22, 2008 for his "degenerative arthritis of his right knee." The operative report indicated there was eburnated bone in the medial compartment. Petitioner suffered an allergic reaction to Benzoin resulting in admission to the hospital from severe pitting edema from his knee to his right ankle. (PX 1)

Physical therapy was initiated and continued through January 10, 2009 when Petitioner was discharged with instructions for an independent home exercise program. Petitioner continued to complain of substantial discomfort in both knees. In the right knee, he had complaints of pain and weakness with sitting, but alleviated pain when walking. Petitioner continued to complain of activity-related pain in the left knee. (PX 1)

Dr. Davis re-examined Petitioner on November 17, 2008 for routine post-op care of the right knee. He reported his leg was swelling resulting in limited range of motion. He also mentioned that his right leg had a tendency to swell since an old ankle injury. X-rays showed everything was in excellent alignment. (PX 1)

As of January 19, 2009, Mr. Smith described Petitioner's flexion as doing better. He was having some difficulties with extension and was using his cane for safety. A mildly antalgic gait was noted. He was discharged from formal therapy, but he was to get a knee extension device to help regain the last few degrees of extension. He was not yet ready for unrestricted activity. (PX 1)

Dr. Davis re-examined Petitioner on February 23, 2009 at which point Petitioner was reporting some "increasing discomfort" that he localized to the lateral aspect of his knee. Dr. Davis noted, "He relates his symptoms to possibly something he did on the knee crank and reports he has stopped using it now." Pain medication and Naprosyn were refilled. (PX 1)

Petitioner was again examined by Dr. Davis on March 23, 2009 regarding both of his knees. His right knee was reportedly doing better although he still had trouble going up stairs. He had tried to increase his activities a little bit and saw his range of motion worsen after "going to [sic] far." He also reported substantial discomfort with his left knee. (PX 1)

Mr. Smith re-examined Petitioner's right knee on April 27, 2009. Petitioner reported improvement with his extension but it had been substituted for a slight loss in flexion. He still required pain medication if he over did it. Petitioner had full extension and ambulated with a light uneven gait. His work restrictions of no kneeling, squatting or climbing remained in effect. His pain medication was refilled. (PX 1)

Petitioner continued to see Dr. Davis/ P.A. Smith on a monthly basis throughout 2009 regarding, primarily, his right knee and with no real change in his symptoms and complaints being noted. The doctor and his PA continued to note some left knee discomfort, but Petitioner did not feel strong enough to proceed with a left-sided knee replacement. Petitioner's right knee range of motion was improving, however. Pain with too much activity was an ongoing issue. (PX 1)

Petitioner reported having undergone surgical treatment for oral cancer when he saw Mr. Smith on November 23, 2009. He felt his positioning during the surgery might have bothered his knees, especially the right. (PX 1)

Petitioner was seen by Dr. Steven Young on December 28, 2009 seven weeks after undergoing a right carpal tunnel release. (PX 1)

Due to continued and increased complaints of bilateral knee pain, Petitioner underwent a bone scan at Memorial Hospital on December 31, 2009. The scan showed the right knee prosthesis in place without scintigraphic evidence of infection or loosening, intense isotope activity in the mandible possibly due to benign or metastatic bone tumor, and other degenerative joint changes through his shoulder, hips, spine, and ankles.

Petitioner was evaluated by Dr. Kostman on January 5, 2010[1]. Dr. Kostman diagnosed Petitioner as being status post right knee medial meniscus tear, partial medial meniscectomy, and right knee degenerative arthritis. Dr. Kostman further diagnosed Petitioner with a left knee contusion. Dr. Kostman did not believe that the May 16, 2006 injury necessitated a right total

[1] The actual report is not included in the record; however, Dr. Nogalski briefly discussed it in his report (see RX 5).

knee arthroplasty nor was there evidence to suggest that the left knee contusion had progressed based upon arthroscopic findings or x-ray findings. Dr. Kostman did not believe that Petitioner would benefit from a left total knee arthroplasty nor did he feel one was indicated. He did recommend a follow up functional capacity evaluation. (RX 5, pp. 7-8 of report)

Petitioner returned to see Dr. Davis on February 1, 2010. He reported that his right knee was about the same. Once he would get up and walk, he really experienced no pain or symptoms at all. He could maneuver steps if he was slow and cautious but when he would move his knee side to side (like rolling over in bed or sitting down) he experienced pain in the lateral aspect of his knee. His right knee was bothering him more than his left knee. The doctor reminded him that there was no evidence of infection or loosening so he required no additional surgery. "Per his workman's comp rules, I have to see him back next month." The doctor again noted he could return to work with restrictions. (PX 1)

Petitioner continued seeing Dr. Davis/Mr. Smith on a monthly basis throughout 2010 as required by "workman's comp." On April 5, 2010 Petitioner reported ongoing crepitus in his knee. He had started a walking regimen and had lost 35 lbs. It had not resulted in a noticeable change in his knee symptoms. He was using the left unoperated knee to assist with getting up from a seated position. (PX 1)

Deposition of Dr. Davis

The deposition of Dr. Davis was taken on April 22, 2010. (PX 5) On direct examination, Dr. Davis testified regarding his treatment of Petitioner following the work incident on May16, 2006. Dr. Davis testified that Petitioner presented to him on June 14, 2006 reporting a sudden onset of knee pain after he slipped in oil at work and fell on his knees approximately 4 weeks earlier. Dr. Davis obtained an MRI of Petitioner's right knee. Dr. Davis testified the MRI of Petitioner's right knee revealed abnormal signal changes in the posterior horn of the medial meniscus. Dr. Davis ordered a cortisone injection to the right knee and physical therapy, which provided no significant relief to Petitioner. Dr. Davis performed a right arthroscopy on August 8, 2006 and found an unstable undersurface tear of the posterior horn of the meniscus and arthritis of the patellofemoral joint. A partial meniscectomy was performed. Dr. Davis testified that Petitioner had an uneventful recovery following that procedure and on September 11, 2006, Petitioner was happy with the results and wanted to discuss treatment of his left knee. Dr. Davis testified an MRI of Petitioner's left knee was taken on July 26, 2006, with a radiological diagnosis of osteonecrosis changes in the lateral femoral condyle. Physical therapy and a cortisone injection were ordered which did not result in significant improvement to Petitioner's symptoms. Dr. Davis testified that he performed a left knee arthroscopy on October 3, 2006, where he found chondromalacia, or early arthritis under the kneecap. Dr. Davis testified that the arthritic condition found in Petitioner's left knee was not an acute injury, but a condition developed over a period of time. Dr. Davis testified he performed a synovectomy in which the inflamed tissue surrounding the kneecap was debrided and smoothed.

Dr. Davis testified that Petitioner was initially pleased with the results of the right knee arthroscopy but continued to have ongoing pain complaints. In the two years that followed, Petitioner was prescribed multiple medications, given home exercises, had routine appointments

with Dr. Davis, and was given restrictions of limited kneeling and squatting so as not to exacerbate his symptoms. Since conservative measures did not alleviate Petitioner's symptoms, Dr. Davis recommended a total knee replacement. Petitioner had no post-operative complications following his knee replacement. Dr. Davis testified he almost immediately ordered physical therapy and medications. Dr. Davis testified Petitioner did well in the first year following the knee replacement with some reported pain with certain activities. A bone scan was obtained, which showed no loosening, infection, or other abnormalities related to his knees. Dr. Davis testified Petitioner was fighting other medical issues in the year following his total knee replacement. Dr. Davis testified he kept Petitioner on restrictions of no kneeling or crawling.

Dr. Davis testified Petitioner's left knee arthroscopy was uneventful. There were no complications. However, Dr. Davis testified Petitioner noted persistence in progression of his left knee complaints over the past several years. Given Petitioner's ongoing medical conditions and his discomfort after his right knee replacement, Dr. Davis did not recommend a total knee replacement for his left knee. Dr. Davis testified further treatment would include continued exercises to maintain quadricep strength and flexibility. Dr. Davis opined Petitioner was at maximum medical improvement regarding his right knee. He further opined there would be permanent restrictions but he wanted to order a functional capacity evaluation to determine those restrictions. Dr. Davis opined that the care and treatment he provided to Petitioner's right and left knee was causally connected to or aggravated by the work accident in May, 2006. He further opined the care and treatment he provided for the right and left knee was medically reasonable and necessary. (PX 5, p. 13)

On cross-examination, Dr. Davis confirmed that the purpose of the right arthroscopy was to repair a right meniscal tear, which ultimately progressed to a right total knee replacement. (PX5). Dr. Davis further testified he was suspicious of a meniscal tear in the left knee, but the MRI and subsequent arthroscopy showed intact menisci and cartilage. Dr. Davis confirmed he only found degenerative arthritis in the left knee during the scope, which was not caused by the work fall in May of 2006. Dr. Davis further testified the reason for the arthroscopic surgery on the left knee was to correct the degenerative arthritis in the left knee, and any total knee replacement of the left knee was due to Petitioner's degenerative arthritis. Dr. Davis confirmed Petitioner would likely have permanent restrictions of limited kneeling, crawling, or climbing with both knees. Dr. Davis again confirmed the degenerative arthritic condition found in Petitioner's left knee was not caused by the work-related accident in May of 2006.

On re-direct, Dr. Davis opined Petitioner's work injury did not cause the degenerative arthritis, but it did accelerate or exacerbate the treatment of his arthritic condition. Dr. Davis further opined the arthritic process was multifactorial including the natural aging process, repetitive kneeling and squatting at work or at home, Petitioner's weight, and/or a traumatic episode. (PX 5, p. 17)

Additional Medical Treatment

As of May 3, 2010, when Petitioner returned to SIOC, Petitioner had lost forty pounds and his knee was feeling better so he wished to hold off on any further surgery and the doctor totally agreed. Petitioner looked better and reported he could get up from a chair much more

easily and had no significantly noticeable limp when walking. His "degenerative arthritis of the left knee" appeared under control with conservative measures. It did have some crepitus with range of motion. Continued non-operative care for the left knee was recommended (homes exercises and limited kneeling and squatting). With regard to his right knee he was to continue with his rehabilitative exercises and activity as tolerated at home. He was also to observe his work restrictions. Per the comp carrier, Petitioner was to return in one month. (PX 1)

Petitioner returned to Dr. Davis on June 7, 2010 to have his right knee examined. He was still requiring pain medication two times a day – partly because of the right knee and partly because of the left. (PX 1)

As of July 12, 2010, Petitioner was re-examined by Mr. Smith regarding his right knee and he reported it was very stiff and sore if he increased his activity. He was to return in one month per the w/c carrier. (PX 1)

Mr. Smith re-examined Petitioner's bilateral knees on August 9, 2010. His right knee was "absolutely no better" and he was very frustrated by his lack of progress. He was walking with a fairly smooth gait. His current restrictions remained in effect and he was to return in one month per the w/c carrier. (PX 1)

Dr. Davis re-examined Petitioner on September 27, 2010 regarding his right knee. He complained of constant popping and pain in the knee and trouble getting up out of a chair. He was given a script for Vicodin. (PX 1)

Mr. Smith again examined Petitioner on November 1, 2010. Petitioner had complaints regarding both knees. He was not even able to fish because he couldn't walk on uneven surfaces. He still hadn't been able to return to work. His pain medication was refilled. (PX 1) Petitioner's complaints and exam were consistent on December 6, 2010. (PX 1)

As of January of 2011, Dr. Davis elected to begin seeing Petitioner every six months although monthly reports to the workers' compensation carrier were to continue. (PX 1)

Petitioner returned to see the doctor on February 4, 2011 regarding his right knee. (PX 1)

As of August 15, 2011, Petitioner's knees were "pretty much the same" with pain in the right knee whenever he attempted to arise from a seated position and the inability to stand for prolonged periods of time. Petitioner complained of more pain in his left knee with walking. His restrictions remained in effect. (PX 1)

As of March 5, 2012, Dr. Davis was noting some slowly improving range of motion of the right knee. Petitioner's left knee was not mentioned. (PX 1)

On July 10, 2012 Dr. Davis' office noted that the insurance carrier was requesting that "Dr. Mike" address MMI or order an FCE. As a result, Petitioner presented to the doctor's office on August 13, 2012 for a progress report. He reported ongoing symptoms with his knees. His right knee was fine when walking but he had trouble getting up and down from the floor. He

would use his left knee to help with that. When walking, he noticed left knee pain. Petitioner felt there were work activities he could do but his employer wouldn't accommodate any work restrictions. He noted that "our" workers' compensation department was now requesting a final evaluation to state he was at MMI. On exam, he walked independently. There was crepitus in his left knee. He had full extension and approximately 120 degree flexion of the right knee. Dr. Davis ordered an FCE with a return to work within those guidelines as he was at maximum medical improvement and could return to see the doctor as needed. (PX 1)

A functional capacity evaluation was performed on October 17, 2012. The FCE found Petitioner had reached maximum medical improvement but would have significant positional limitations and would have to avoid kneeling, squatting, crawling, climbing stairs or ladders, or prolonged walking. (PX3).

Petitioner continued to follow up with Dr. Davis with no new complaints. Dr. Davis saw Petitioner on February 11, 2013, August 12, 2013, and October 13, 2014. At the latter visit he was offered, but declined, a cortisone injection to the left knee, as the symptoms "weren't bad enough yet." During these visits Dr. Davis consistently noted that Petitioner was experiencing some soreness and stiffness in his right knee when sitting but no pain once he was up and walking. Conversely, in his left knee he had no pain when sitting but pain with activity. (PX 1)

Petitioner returned to see Dr. Davis on October 12, 2015, having not been seen in one year. Petitioner was noted to be 61 years old and complaining of bilateral knee pain, right greater than left. His symptoms had been chronic non-traumatic and aggravated by daily activities and sleeping in any position. Petitioner reported seeing another orthopedist for a second opinion on his left knee[2] and he stated that he should have a replacement; however, Petitioner wanted to focus on his right knee first as it was causing the most discomfort. Dr. Davis felt Petitioner had a painful knee post TKA and moderate to advanced left knee osteoarthritis. He recommended an injection and examination of the right knee under anesthesia and that he be referred for allergy testing to determine if he had any allergies to metal. (PX 1)

On/about January 22, 2016 Petitioner underwent an examination of his right knee and aspiration under sedation performed by Dr. Davis. (PX 1)

Petitioner returned to see Dr. Davis on February 5, 2016. His current restrictions were kept in effect for one year. No new complaints were noted. Petitioner reported pain at rest with his right knee and pain with activity in his "non-operated arthritic knee." Dr. Davis recommended Petitioner continue home exercises and perform activities as tolerated. Dr. Davis placed Petitioner at MMI. Petitioner was to return as needed and his restrictions remained in effect for one year. (PX 1)

Petitioner has undergone no further treatment for his knees since being released by Dr. Davis on February 5, 2016.

At the request of Respondent, Petitioner was examined by Dr. Michael Nogalski on July 12, 2016. A written report issued. (RX 5). In his report Dr. Nogalski noted that Petitioner was not

[2] Not a part of the record.

currently working. Petitioner told him he hurt himself on May 16, 2006 when he fell in "oil, I guess, I fell and twisted them." He had continued pain in both knees and ultimately underwent arthroscopic surgery on both of them in 2006. Petitioner also related undergoing a right total knee replacement in October of 2008 with difficulties ever since leading to a knee evaluation under anesthesia in January of 2016. Petitioner was not really happy with his right knee and didn't wish to have any further treatment for his left knee until the right one was "right." Petitioner reported difficulty going back to work and the inability to kneel or squat. He didn't think he could get up and down stairs comfortably and the stairs "kill him." He reported that going down is worse. Petitioner denied any knee problems prior to the accident and worked as a maintenance man with no difficulties. His current complaints included constant right knee pain with difficulty sleeping at night as a result. His right knee was reportedly better than the left one but, at night, "they both go sideways." He couldn't get up and bend his knees comfortably when going from a chair to standing. He denied any specific catching or locking and predominantly noticed pain in the front and the insides of his knees.

Dr. Nogalski was provided with a great deal of medical records to review, including accident forms, and pertinent medical records regarding earlier treatment. He examined Petitioner's knees noting 2+ pitting edema of both lower extremities with tenderness over both knees. His gait was relatively normal with some mild bent knee gait bilaterally and he moved relatively slowly and walked with slight external rotation of both lower extremities. Dr. Nogalski's impression was that Petitioner was status post a right total knee replacement and had left knee pain, resolved contusion and was status post debridement for plica syndrome and grade II chondromalacia of the patellofemoral joint.

Dr. Nogalski did not believe there was a causal relationship between Petitioner's minimal objective findings and the work accident. His current objective findings in the right knee related to the knee replacement done at Petitioner's election. He had some eburnated bone. There was no clear finding that supported Petitioner having a specific area of damage to that bone at the time of the arthroscopy or were there objective documented findings on the MRI study which would support that. Dr. Davis, he noted, did not note any chondromalacia or cartilage abnormalities in the medial compartment other than a meniscal tear which he debrided. There was some mild grade I-II chondromalacia of the patellofemoral joint but he did not make specific note of that in his operative report. Dr. Nogalski also noted that there was a focal bone contusion noted in the anterior articular surface of the distal right lateral femoral condyle; however, there was no corresponding finding on the arthroscopy or operative report supporting specific damage to that reason. He had a contusion which would have reasonably resolved and his symptoms did not focally localize to that region. With respect to the left knee, the operative findings and MRI findings support only some thickening of the soft tissues around the anterior knee and the synovial plica regions. There was no evidence of any articular cartilage damage. The MRI showed some contusions and edema in the distal left lateral femoral condyle but no appreciable correlating factor was noted at arthroscopy. Those bone contusions would have reasonably resolved.

Dr. Nogalski explained that he felt Petitioner's pains were from soft tissue and possible neuropathic or generalized soft tissue problems about the knees. He did not have strong radiographic findings in his left knee to validate a knee replacement. The December 31, 2009,

bone scan did not identify any specific bone scan abnormalities in the left knee which further indicates there is no particular abnormality in the knee that would respond to knee replacement and it further supports resolution of a bone contusion about three years earlier.

Dr. Nogalski felt Petitioner's treatment, to date, had been reasonable and necessary to treat the meniscal tear and contusion to the right knee and contusion top the left knee. Treatment after 8 to 10 weeks would reasonably terminate a need to cure and relieve him from the accident. He has had significant subjective symptoms without objection correlation. Dr. Nogalski did not think further treatment, including a left knee replacement, was necessary. As for the right knee meniscal tear, he determined a two percent (2%) impairment of the right lower extremity. He also determined a two percent (2%) impairment for the left lower extremity contusion. (RX 5)

Deposition of Dr. Nogalski

The deposition of Dr. Nogalski was taken on September 12, 2016. (RX 6) Dr. Nogalski testified that he examined Petitioner on July 12, 2016. He obtained a history of injury from Petitioner as outlined in his IME report. Dr. Nogalski further testified that he reviewed Petitioner's medical records and treatment history for his report. Petitioner indicated to Dr. Nogalski that he was not pleased with the results of his right knee and did not wish to proceed with treatment of his left knee until the right knee was corrected. At the time of Dr. Nogalski's examination, Petitioner had difficulty kneeling, squatting, and climbing stairs. He complained of constant right knee pain that disrupted his sleep. Petitioner reported difficulty and pain when he went from a sitting to standing position. Dr. Nogalski noted no specific catching or locking in either knee. Petitioner reported predominant pain in the front and inside of his knees.

Dr. Nogalski also testified that he reviewed medical records, imaging studies, and operative reports as outlined in his IME. Dr. Nogalski testified about each procedure Petitioner underwent to address symptoms related to his claimed injury of May of 2006. The lateral and medial menisci were examined during both arthroscopies and there was an unstable tear of the medical meniscus on the right knee. The left knee had intact meniscus tissues. The findings from both scope procedures supported the findings of Petitioner's previous MRI studies.

Dr. Nogalski felt Petitioner was more susceptible to degenerative arthritis based on his age, cardiac issues, and previous cancer diagnosis. It was Dr. Nogalski's opinion that these factors, as a whole, might create changes in Petitioner's general body which could cause less physical reserve or strength. Nogalski opined Petitioner's right knee replacement addressed his osteoarthritis and his left knee pain was related to soft tissue issues and early osteoarthritis.

Upon examination of the right knee, Petitioner was lacking approximately 5 degrees of extension and almost normal for flexion. Mild tenderness was noted with relatively solid strength. Petitioner's x-rays of the right knee showed good position of his knee replacement with proper function. Examination of his left knee revealed some tightness. Petitioner lacked seven degrees of full extension and flexion of 125 degrees. Dr. Nogalski testified there was less motion on the left knee than the right. Petitioner had good strength in the left knee despite walking with a bent knee gait. X-rays of the left knee showed minimal joint space narrowing and minimal osteophyte changes. Petitioner also had clips from a previous vein harvest-bypass

harvest in his left knee region. During the examination, Petitioner complained of pain in both knees with the right knee more symptomatic than the left. Petitioner stated his pain was located in the front and inside of his knees. Petitioner stated at the time of the examination that his left knee was more symptomatic than his right, which was the opposite of his initial reported complaints to Dr. Nogalski of more intense pain in the right knee versus the left. Dr. Nogalski testified it was odd Petitioner had not complained of left knee pain at his initial examination with Dr. Davis in June of 2006, and did not complain of left knee pain to Dr. Davis until July 12, 2006.

Dr. Nogalski testified Petitioner's subjective complaints did not match his objective findings. Regarding his left knee, Dr. Nogalski recognized some decreased range of motion, but well preserved joint spaces on his x-rays. While Petitioner's MRI taken July 26, 2006 showed some bone contusion and edema changes, the arthroscopy performed on October 8, 2006 did not show any correlated findings to support an objective validation of that diagnosis. Regarding his right knee, there was also decreased range of motion. Petitioner's x-ray showed good position of his joint replacement. Petitioner's MRI performed in July of 2006 and subsequent arthroscopy performed in August, 2006 merely showed a small tear of the meniscus which was addressed by Dr. Davis.

Dr. Nogalski commented, generally, on the absence of information from Dr. Davis's initial examination with Petitioner on June 14, 2006 (specifically, that a physical examination was not performed nor was a plan of care executed).

Dr. Nogalski testified that, based on Dr. Nogalski's review of the medical records, history of injury, and physical examination, he diagnosed Petitioner as being status post right total knee replacement and left knee pain with resolved contusion and status post debridement for plica syndrome and grade II chondromalacia in the left knee. Dr. Nogalski opined Petitioner's right knee scope was causally related to the work injury sustained in May of 2006 based on Petitioner's report of injury to Dr. Davis, subsequent evaluation with MRI, and the right scope performed based upon the history provided to Dr. Davis on June 14, 2006.

Dr. Nogalski further opined Petitioner's total right knee replacement performed on October 22, 2008 was not related to his alleged work injury because Petitioner had a very small meniscal tear and did not have other objective findings at arthroscopy to correlate damage to his joint surface or injury to the knee significant enough to necessitate a knee replacement. (RX 6, p. 21)

When asked about a causal relationship between the left knee scope and the work accident, Dr. Nogalski testified, "I got to tell you that's a stretch, but I believe giving every benefit of the doubt it would be reasonable to say yes." (RX 6, p. 21) He then testified that there were really minimal findings in the left knee. There weren't good correlating objective findings in the MRI study and Dr. Davis' operative findings showed some minimal changes consistent with some soft tissue inflammation and some mild chondromalacia of the patellofemoral joint. That chondromalacia did not correlate with the MRI findings completely and the operative findings were relatively benign. (RX 6, p. 21)

Dr. Nogalski testified Petitioner was a marginal candidate for left knee replacement based on his objective findings and his unresolved pain post right total knee replacement. Dr. Nogalski opined a left total knee replacement would not be related to his work injury.

Dr. Nogalski testified that he diagnosed Petitioner with a left knee strain or contusion following the work injury in May of 2006. Dr. Nogalski opined it would take approximately four to eight weeks for a strain or contusion to heal. Regarding the right knee meniscal tear, Dr. Nogalski estimated an eight to ten weeks healing period after a diagnostic and therapeutic arthroscopy for a meniscal problem. Any ongoing complaints of pain related to Petitioner's bilateral knees thereafter would not be related to his work injury in May of 2006. Dr. Nogalski felt Petitioner was at maximum medical improvement and did not require any additional treatment to his bilateral knees as they related to his work injury in May of 2006. Dr. Nogalski further opined that the restrictions imposed on Petitioner following his functional capacity evaluations in 2007 and 2012 were not a result of his work injury. Those restrictions were likely related to his ongoing edema in lower extremities, history of cancer, and soft tissue tightness surrounding his knees.

On cross-examination, Dr. Nogalski testified that an arthroscopic procedure by and in itself would not accelerate or exacerbate an underlying degenerative condition unless there was a complication following the procedure, such as an infection or other untoward event. (RX 6, p. 25).

The Arbitration Hearing

Petitioner's case proceeded to arbitration on September 19, 2018. The disputed issues were causal connection, medical bills, nature and extent, and credit to Respondent for the right total knee replacement and left knee arthroscopy. Petitioner and Jeni Batson were witnesses. Ms. Jeni Batson was present throughout the hearing as Respondent's representative.

Petitioner testified that he was injured on May 26, 2006 when he slipped in oil and fell on both knees. Petitioner notified his employer of the injury and began treating with Dr. Mike Davis, orthopedic surgeon. Petitioner had an initial evaluation with Dr. Davis on June 14, 2006. After treating with Davis for a short period of time, Petitioner underwent a right arthroscopic knee procedure on August 8, 2006. After a brief recovery, Petitioner underwent a left arthroscopic knee procedure on October 3, 2006. Petitioner testified neither procedure helped his knee condition in any way. Petitioner continued to treat over the next two years with no symptomatic relief. Both knees were equally painful.

Petitioner testified that he proceeded with a right total knee replacement on October 22, 2008. Petitioner sustained no symptomatic relief from the total knee replacement. After his right total knee replacement, Petitioner went through a period of rehab, medication, and multiple functional capacity evaluations (FCE). The initial FCE was completed on April 27, 2007, which indicated he could work in a light duty with minimal walking, no squatting, kneeling, climbing, or crawling. Light duty was not available through his employer. Petitioner testified Dr. Davis possibly declared Petitioner at MMI after his second FCE in 2012, which mirrored the restrictions from his 2007 FCE. Petitioner testified he was paid TTD through August 31, 2016.

Benefits were ceased after Respondent's physician found him at maximum medical improvement. Petitioner testified he was "fired' from his employer after his benefits were terminated.

Petitioner testified his left knee is still symptomatic. A left knee replacement was recommended, but Petitioner chose not to pursue it based on the results of his right knee. Petitioner is afraid a left knee replacement would prevent him from getting up from a chair.

On cross-examination, Petitioner testified he is currently prescribed a blood pressure medication and baby aspirin by his primary care physician, Dr. Fasnacht, in Carbondale, Illinois. Petitioner testified his treating cardiologist "fired him." Petitioner underwent a coronary artery bypass surgery prior to his knee condition. Petitioner is not currently treating for his left or right knee, he is not undergoing any physical therapy, taking pain medication, or receiving injections. Petitioner smokes approximately one to two packs of cigarettes per day. He does not wear any type of brace or protective device for his knee.

When questioned about his termination from Respondent after his benefits were ceased, Petitioner testified he did not file a petition for reinstatement of his benefits with the court and was given the option to take disability or retirement. Petitioner chose to retire because he received more money versus disability.

Petitioner testified he sustained no relief from his total right knee replacement. His right knee continued to bother him more than his left. Petitioner underwent a procedure to manipulate his knee to provide relief, but it did not provide relief and they did not find anything wrong with his knee replacement during that procedure. Petitioner sought a second opinion about correcting his right knee replacement and "you" (referring to Respondent or its attorney) scheduled an appointment in Effingham. According to Petitioner, the doctor wanted $1,000.00 up front and they wouldn't look at the right knee since another doctor had performed the initial surgery. Petitioner testified his knee replacement is not loose or misaligned. Petitioner has been off work since May, 2006. After his arthroscopies in 2006, he was given restrictions by Dr. Davis which were never lifted.

Petitioner testified that, to his knowledge, all of his medical bills were paid through workers' compensation because he never received any bills.

Ms. Batson testified to the process which occurred after an employee's TTD benefits are ceased. Ms. Batson sends a letter to the injured employee or their attorney outlining their options, which usually included returning to work, apply for disability leave, resign, or retirement. In Petitioner's case, Ms. Batson faxed a letter to his attorney on September 28, 2016, with the option to return to work, apply for disability leave with the State's university retirement system, apply for retirement with SERS, request an unpaid personal leaver, or resign his position. Ms. Batson received a phone call from Petitioner's attorney indicating Petitioner wanted to apply for disability benefits but elected for retirement effective August 31, 2016.

Petitioner's medical bills are contained in PX 6. Many of the bills found in PX 6 contain zero balances or proof of payment by Respondent.

Proofs were closed.

20IWCC0276

The Arbitrator concludes:

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

Petitioner's current condition of ill-being in his knees is causally related to his work accident of May 16, 2006. This conclusion is based upon Dr. Davis' opinion and testimony, concessions by Dr. Nogalski, and a chain of events.

Respondent agreed to causation between the accident and Petitioner's right medial meniscus tear and need for arthroscopy. It has disputed liability for Petitioner's right total knee replacement and any treatment for Petitioner's left knee.

Petitioner testified, without rebuttal, that he had no problems with his knees prior to the work accident and he was working full duty as a refrigerator mechanic for Respondent. The physicality of the job is found in the two FCEs included in the record. On the day of the accident, Petitioner, who was 51 years old, fell onto both of his knees and may have also twisted them. He immediately sought medical treatment and was taken off work. He has never been allowed to return to work and he has never reached his pre-accident asymptomatic condition in either of his knees. He has not really had any major gaps in treatment or indication of intervening injuries to either knee.

Dr. Nogalski agreed that the accident was the cause of the need for the right knee arthroscopy. He also, albeit with some reservation, agreed that the need for the left knee arthroscopy was causally related to the accident. One of the Arbitrator's major issues with Dr. Nogalski and his opinions is that he seemed to take exception to Dr. Davis' first office note, feeling that the doctor did not include any mention of left knee complaints or indication of a physical examination. A careful reading of that office visit shows the opposite. Dr. Davis' Patient Questionnaire which Petitioner completed on the first day of their visit clearly references that he was complaining of both knees after falling. In the "History of Present Illness" it was indicated that Petitioner was complaining of "constant, sharp, moderate, pain and stiffness in bil knees." When mentioning the symptoms the doctor used the plural and referenced going downstairs, upstairs, standing and walking. Under "Review of Systems" there is a section for "Musculoskeletal" and by it the doctor indicated "Normal, except as noted in HPI and chief complaint." Thus, by reference the doctor referred to the presenting HPI and section on chief complaints. While a treatment plan note was not expressly stated in page two of the office note, the off-work slip indicated he could not return to work pending "w/c approval for an MRI." Thus, one might reasonably infer an MRI had been recommended for the right knee, which was the more troublesome of the two at the initial visit. (PX 1)

Dr. Davis was deposed presumably because Respondent had Petitioner undergo an IME with Dr. Kostman who, based upon Dr. Nogalski's summary of the actual report, disputed causation for the recommended procedures. Dr. Davis persuasively testified to causation between the two arthroscopic procedures and Petitioner's right total knee replacement stating that the accident caused or aggravated Petitioner's knee problems. While he also acknowledged that any total knee replacement on Petitioner's left knee would be due to degenerative arthritis he later

testified that the work accident accelerated or exacerbated the need for treatment of the arthritic condition. While the arthritis was multi-factorial, the trauma of May 16, 2006 remained a cause of the need for treatment and, under current Illinois law, that suffices. Again, even with evidence of osteoarthritis in Petitioner's knees, he had been working full duty without any restrictions and there is no evidence in the record of any prior treatment to either of his knees or suggestion of a need for a total knee replacement.

While Dr. Davis testified that he thought Petitioner was at maximum medical improvement for his right knee at the time of the deposition he added that an FCE would be necessary to address the need for any restrictions. Shortly after the deposition Petitioner followed up with Dr. Davis and he continued to treat with the doctor in 2010, 2011, and 2012. As of August 13, 2012 Dr. Davis felt Petitioner was at maximum medical improvement and could return to work within the restrictions to be set forth by a second FCE. That was conducted on October 17, 2012 and indicated Petitioner would, indeed, need restrictions. Dr. Davis had further indicated in August of 2012 that Petitioner could return to see him, as needed.

From August 13, 2012 through February 5, 2016 Petitioner has continued to treat with Dr. Davis and Mr. Smith on a fairly regular basis. His symptoms and complaints regarding both knees have remained relatively consistent. The left knee hurts with activity and the right knee hurts when sitting and getting up but then feels better with activity. Dr. Davis has never removed the permanent restrictions and Respondent has never offered Petitioner work within those restrictions. The Arbitrator views Petitioner's treatment with Dr. Davis during this time period as largely palliative in nature, necessary and reasonable. Dr. Davis has not seen Petitioner since February 5, 2016. At that time he imposed restrictions to remain in effect for one year and instructed Petitioner to return as needed. Petitioner was examined by Dr. Nogalski on July 12, 2016. Respondent terminated TTD benefits on August 31, 2016. Petitioner retired thereafter. At the time of his retirement, he was under permanent restrictions which precluded him from returning to work for Respondent as Respondent never offered him a job within the restrictions. Those restrictions stemmed from the work accident. Again, in finding causation, the Arbitrator relies upon the more persuasive opinions and reasoning of Dr. Davis along with his office notes and a chain of events.

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?

Consistent with her causation determination, Petitioner is awarded the medical bills contained in PX 6. Respondent's attorney stipulated that it would pay those medical bills found to be causally related to Petitioner's injury. (AX 1) Respondent shall receive credit for any medical bills previously paid including those paid by its group medical plan for which credit is allowed under Section 8(j) of the Act. The Arbitrator further notes that Petitioner testified, and many of the bills found in PX 6, confirm, that most have been paid.

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

Section 8.1b of the Act is not applicable to this claim as the accident occurred before September 1, 2011. Petitioner has undergone bilateral knee arthroscopic procedures and a total

right knee replacement. He has permanent restrictions which have prohibited him from returning to work for Respondent; however, he subsequently retired and voluntarily removed himself from the workforce. Petitioner's primary ongoing symptoms and complaints consist of pain when arising from a seated position (right knee) and pain with activity/walking (left knee). He takes no medication, wears no braces, He has not undergone any further treatment since February of 2016. As such, the Arbitrator finds that Petitioner has sustained 45% loss of use of the right leg and 15% loss of use of the left leg.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF LA SALLE)

☐ 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

TERRY RICCOLO,

Petitioner,

20IWCC0277

vs.

NO: 12 WC 23439

CAPTAIN'S CONCRETE,

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, notice, medical expenses, and nature and extent, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of accident as stated below, but attaches the Decision of the Arbitrator for the Statement of Facts with the modifications noted below.

The Commission views the evidence differently as it relates to Petitioner's credibility and finds Petitioner failed to prove he sustained an accidental injury that arose out of and in the course of his employment with Respondent on May 8, 2012. Although the Arbitrator included some examples of the conflicting testimony and evidence in the Statement of Facts, she did not fully address, in the Conclusions of Law, how these various discrepancies reflect on Petitioner's credibility.

The Arbitrator, in support of finding accident, wrote, "He went to Dr. Hutter, D.C. [on] May 10, 2012 indicating he hurt his back at work, neck, shoulder and hip at work." *Dec. at 5.* Dr. Hutter's May 10, 2012 record does indicate that Petitioner had left C7 through T3 pain and right L3 to S2 pain with radiation to the right leg. It also states that these conditions were "caused by work accident." However, it indicates an onset date of "5/10/12." That is the same date that Petitioner first saw Dr. Hutter and is not consistent with an onset at work on May 8, 2012.

A history form, entitled "Intermediate Application for Care at {Practice Name}," was also completed by Petitioner on May 10, 2012, and signed by Dr. Hutter. It indicates that Petitioner's injury happened at "work" but indicates that the problem began on "5/9/2012." This, again, is inconsistent with an injury on May 8, 2012.

20IWCC0277

Not only are Dr. Hutter's records devoid of any mention of an accident on May 8, 2012, they also lack any description of Petitioner's alleged mechanism of injury. As discussed below, Petitioner did not solely work for Respondent. He was a part-time police officer for the Village of Dwight (*T.8*), and he also ran his own concrete business called R.E.M. Construction. *T.34.* Since there is no description of the mechanism of injury in Dr. Hutter's records, the Commission is not willing to simply ignore the glaring inconsistencies regarding the onset dates and assume that the "work" where Petitioner allegedly injured himself, as referenced in Dr. Hutter's records, actually happened at Respondent as opposed to one of Petitioner's other jobs.

The Arbitrator also wrote, "Although petitioner did not report his back was hurting [when] the skidster cage was removed, petitioner reported to Ferrari on May 9, 2012 that he had hurt his back the day before." *Dec. at 5.* However, one of the key questions in this case is whether Petitioner told Paul Ferrari about this alleged work accident *before or after* Mr. Ferrari told Petitioner that his job was coming to an end. This is quite significant in terms of whether Petitioner is credible about having sustained a work injury.

Petitioner testified that he only worked "part of the day" on May 9, 2012, because his back was "getting really sharp pains" so he decided to "curtail the day and told Paul [Ferrari] I was going to the doctor, that I couldn't work no more. I hurt too bad." *T.14.* However, Mr. Ferrari testified that Petitioner worked his entire shift on May 9th. *T.77.* He claimed that Petitioner did not appear to be injured in any way nor did he say anything about having injured himself the previous day. *T.77-78.* Mr. Ferrari testified that the first time Petitioner told him that he had been injured the day before was at the end of the day on May 9th when Mr. Ferrari told Petitioner that the project was over and he would no longer be needed. *T.79-80.* Mr. Ferrari "couldn't believe it" because they had just finished the hardest day on the job (May 9th), Petitioner performed his regular work duties that entire day, and he had not said anything prior to that. *T.81-82.* Unfortunately, the parties withdrew all exhibits relating to average weekly wage so there are no time records to show whether Petitioner worked only part of the day on May 9th.

In any event, there are other examples of Petitioner being unable to keep the timeline straight. He testified:

> Q: At what point did you tell anyone from work or speak directly to anyone at -- from work about the lifting accident?
>
> A: The next day I told Paul I hurt my back yesterday and now I was having problems, and I'm going to the doctor. I left work and went to my doctor, my chiropractor, [Dr. Hutter]. *T.14.*

The Commission notes that this testimony is confusing. When Petitioner said he told Paul the "next day" that he hurt his back "yesterday," this would indicate that Petitioner told Paul on May 9th that he hurt his back on May 8th, the alleged date of accident. In that same answer, Petitioner testified that he "left work and went to my doctor, my chiropractor, [Dr. Hutter]." However, the evidence shows that Petitioner did not see Dr. Hutter until May 10th.

Petitioner testified that, after he saw Dr. Hutter on May 10th, he went "on Friday" (May 11th) to turn in his hours, at which time Paul gave him a workers' compensation form to fill out. *T.16-17.* This alleged form is not in evidence and, unfortunately, Mr. Ferrari was not asked whether Petitioner ever completed any accident forms. Therefore, Petitioner's testimony is unrebutted on this issue. However, the Commission is not bound to accept Petitioner's testimony considering his other inaccurate

20IWCC0277

testimony. Overall, we find the testimony of Mr. Ferrari more persuasive than that of Petitioner.

The Arbitrator found accident and causation despite pointing out that Petitioner was not credible:

> Although when he saw Dr. Templin on [8/28/12], he complained of low back and neck pain, the Arbitrator questions the credibility of those complaints as petitioner reported he injured his back when he lifted a 600-pound cage and fell backwards and that he had not been working since the [5/8/12] accident. Both statements are not supported by the evidence. *Dec. at 5.*

First, the Commission agrees that Petitioner's description of the injury to Dr. Templin is exaggerated and not even consistent with his own testimony. Therefore, any causation opinion of Dr. Templin is based on inaccurate information. Second, Petitioner admitted that he told Dr. Templin that he had not worked since the May 8, 2012 incident. *T.48.* He then testified:

Q: But that's not true of course, correct?
A: Well, I was doing the laborers work. The work that I was doing when I got hurt is correct, because I wasn't doing that work.
Q: Well, you were working, correct? You were doing other work before [8/28/12], but after [5/8/12], correct?
A: After July, when I got released to go to work.
Q: So, what you're saying is you did not perform any work whatsoever from [5/9/12] up until [7/31/12], is that your testimony?
A: Yes. *T.48-49.*

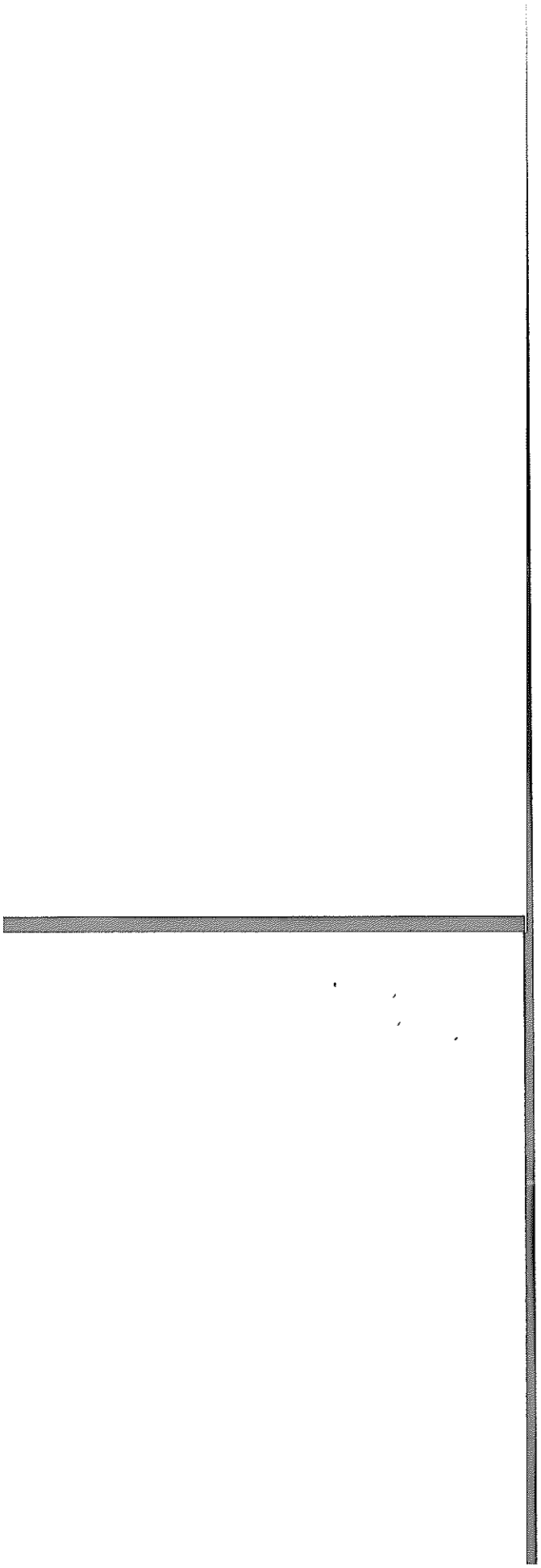
We find that Petitioner tried to justify having given Dr. Templin inaccurate information because he was no longer doing the *exact same* job for the *exact same* employer, even though he continued to work as a laborer. In order to get Petitioner to commit to an answer, Respondent's attorney asked:

Q: So, what you're saying is you did not perform any work whatsoever from [5/9/12] up until [7/31/12], is that your testimony?
A: Yes. *T.49.*

However, Petitioner later admitted that he did continue to work as a part-time police officer during this period. *T.56.* Petitioner also admitted that he owned his own construction firm but testified that, after May 8, 2012, he did not do any of the actual concrete work himself and it was instead done by his son and "a couple of guys that worked for me." *T.35.* Petitioner claimed that he did not get any wages from his company. *T.49.* Petitioner claimed that he would place concrete orders for "other people who were doing projects" because he got better prices. He claimed that "I still ordered the concrete through my company and they just paid the bill." *T.36.* Petitioner also claimed that these homeowners "just paid the cost of the concrete" and "basically hired my guys that worked for me to do the work for them." *T.37.*

The evidence shows that Petitioner ordered concrete from his supplier, Riber Construction, on May 10, 2012; the day after his last day at Respondent and the same day that he first went to Dr. Hutter. *T.56.* Petitioner testified that he ordered the concrete for individual homeowners and that some of his employees were doing the work but "I wasn't paying them" because "they were working for the homeowners, doing the work for them." *T.50.* Petitioner testified:

Q. And you were not receiving any income then or payments from the homeowners then, is



20IWCC0277

that your testimony?
A. Correct. *T.50.*

Immediately after that, Petitioner was shown two checks, which were made out to Petitioner by John Przybysz. One check was dated June 14, 2012, for $2,000.00 (*Rx7b*) and the other was dated June 20, 2012, for $1,500.00 (*Rx7a*). After just having testified that he was not receiving any payments from the homeowners, Petitioner admitted that Mr. Przybysz wrote those two checks to him directly for pouring a driveway in June 2012. *T.53.*

Petitioner, however, maintained that he did not do that work himself. *T.53.* We do not find Petitioner credible since his other testimony regarding these jobs is not credible as explained below. Petitioner testified that he *only purchased* the concrete for homeowners who *only paid* "the cost of the concrete" and those homeowners hired Petitioner's employees directly. Petitioner claimed that he was not receiving any income or payments from the homeowners.

The subpoenaed records (Rx11) from Riber Construction, Petitioner's supplier, indicate that Petitioner was charged for concrete and materials on June 18 and 19, 2012. There are three invoices/orders: 77940, 77941 and 77954. Invoice 77940 indicates that 8 cubic yards of concrete were sold to Petitioner for "Driveway – elk St." For some reason, this invoice is not reflected on the associated "history" report but the other two are. The order sheet for 77941 indicates that Petitioner purchased 1 cubic yard of concrete but on the history report, it reflects that Petitioner was actually charged for 6 bags associated with that order. Perhaps that explains why 77940 is not listed in the history report. In any event, invoice 77954 indicates that it was for 1 cubic yard of concrete for "Curb Elk St. Odell." Those total $1,053.93 ($870.18 and $183.75).

Significantly, according to his checks, John Przybysz lives on Elk St. in Odell. It seems clear that this was the job Petitioner was paid to do by Mr. Przybysz and for which Petitioner bought the concrete from Riber Construction. If the total cost for materials was $1,053.93, Petitioner did not pay the workers himself, and the homeowners only paid the "cost of the concrete," then how does one account for the difference between the $3,500.00 that Petitioner received and the $1,053.93 in costs? We find that Petitioner is not credible with his testimony that he did not receive "any income" or "payments" from the homeowners. It seems clear that Petitioner profited approximately $2,500.00 for that job. Although that does not prove that Petitioner performed the work himself, it does undermine the credibility of his testimony.

The Arbitrator did not let Petitioner's lack of credibility affect her decision regarding accident and causation, but she did use that as a basis to deny temporary total and temporary partial disability benefits when she wrote:

> The evidence showed petitioner was working after the work accident for both Village of Dwight and for his own business, REM. Therefore, the claim for temporary partial disability is denied.

The Commission notes that Petitioner originally claimed temporary total disability benefits. Then, when presented with the evidence that he had still been working for the Village of Dwight, Petitioner's attorney amended the Request for Hearing form to request temporary partial disability instead. The Commission finds that Petitioner's inaccurate testimony, regarding whether he worked at all after his alleged accident and the details regarding the jobs performed via R.E.M. Construction, undermine his credibility about his alleged accident as well.

The Commission finds other aspects of Petitioner's testimony troubling. After extensive chiropractic treatments, Petitioner was released by Dr. Hutter with no restrictions on July 31, 2012. Petitioner claims that this was at his own request because he needed the money. *T.20.* Petitioner then went to work at Lovell Excavating. *T.21.* He claimed that his low back was still bothering him but he didn't take any medications. *T.22.* Petitioner was videotaped on August 2, 2012 and August 8, 2012. The Arbitrator noted, "[t]he videos were unable to open (RX.2, RX.4a, RX4b) but appear to mirror the reports as identified as Respondent's Exhibit 1 and 3)." *Dec. at 4.* Likewise, the Commission was unable to view the surveillance videos. However, the accompanying written reports, which were admitted without objection, indicate that on August 8, 2012:

> claimant appeared to be working for Lovell Excavating Co. He spent approximately six hours working.... He was observed installing two large metal poles at a work site and delivered piping to a private residence. ...
>
> We have obtained approximately seventy-nine minutes of film of the claimant walking, entering/exiting a vehicle, bending at the waist, carrying a shovel, digging, conversing with subjects, maneuvering what appeared to be a large/heavy metal pole, carrying/lifting a five gallon bucket, and utilizing a cellular phone. The claimant appeared to perform these activities in a fluid and unrestricted manner. *Rx3.*

Petitioner did not see Dr. Templin until August 28, 2012, which is when Petitioner gave the inaccurate description of the accident and claimed that he had not worked since the injury. We find that Dr. Templin's 10-pound restrictions are inconsistent with what the surveillance reports indicate Petitioner was capable of doing. Furthermore, even if Petitioner did need such restrictions as of August 28, 2012, the Commission finds that Petitioner has failed to prove that those are related to an alleged work accident at Respondent on May 8, 2012.

Another discrepancy is that Petitioner testified that he was wearing a back brace in the August 2012 surveillance video but that, prior to May 8, 2012, he did not need a back brace while working. *T.23.* On cross-examination, however, he initially testified that he did not remember if he wore a back brace while working for Respondent. *T.47.* He then admitted that he had one "when we were lifting the heavy form" and it could have been the same back brace he was seen wearing in the surveillance video because "I only have one." *T.48.* In other words, Petitioner did, in fact, wear a back brace even before his alleged accident at Respondent.

In summary, there are no contemporaneous medical records to support a work injury on May 8, 2012. Likewise, the initial records do not describe a mechanism of injury to support Petitioner's testimony that an injury occurred while working for Respondent. Petitioner's testimony regarding the timeline of events was inconsistent and confusing. The testimony of Mr. Ferrari was more persuasive that Petitioner worked the entire day with no signs of difficulty on May 9, 2012, and that Petitioner informed Mr. Ferrari of an alleged work accident the day before only after Petitioner was told that his job was ending. Petitioner gave an exaggerated history of the alleged accident to Dr. Templin and inaccurately claimed that he had not worked since his accident. Petitioner's physical abilities, as described by the surveillance reports, are inconsistent with his complaints to Dr. Templin. Petitioner's testimony regarding his income from and activities related to his own business, R.E.M. Construction, is inconsistent with the documentary evidence and not credible. Petitioner also initially claimed temporary total disability benefits even though he had continued to work part-time for the Village of Dwight.

Based on the above and a thorough review of the record as a whole, we find that Petitioner

20IWCC0277

failed to prove that he sustained an accidental injury that arose out of and in the course of his employment with Respondent on May 8, 2012. All other issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator, filed on August 20, 2018, is hereby reversed and all awards vacated.

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

No bond is required by Respondent for the removal of this cause to the Circuit Court because no award was made. 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: MAY 15 2020

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

SE/
O: 4/7/20
49

ıdings to this document.

Vorkers' Compensation or Occupational

'etitioner's employment by Respondent?

ɔ the injury?

nt?
easonable and necessary? Has Respondent
· medical services?

C0277

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

N COMMISSION
)N

Case # **12** WC **23439**
ısolidated cases:

a *Notice of Hearing* was mailed to each

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RICCOLO, TERRY
Employee/Petitioner

Case# **12WC023439**

20IWCC0277

CAPTAIN'S CONCRETE
Employer/Respondent

On 8/20/2018, 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 2.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

6205 HEYL ROYSTER VOELKER & ALLEN
BRAD ANTONACCI
33 N DEARBORN ST 7TH FL
CHICAGO, IL 60602

at arose out of and in the course of

ccident within the time limits stated

causally connected to the claimed

$14,225.03;
bility from May 10, 2012 to July 30,

S

al Union 996 in May, 2012 and that
s also working as a part-time Dwight
n up around the job site; including
arious construction materials he had

kidster", or little utility tractor quit
wner. Both tried lifting the cage on
roke, it was a difficult lift. Petitioner
s it was a dead weight, it was a hard
in in the lower right side of his back,
have spasms and his back tightened

WCC0277

SATION COMMISSION

39

DECISION
IONS OF LAW

017. The parties agree that on May
linois Worker's Compensation or
of employee and employer. They
$7,882.06 and his average weekly

20 I W

STATE OF ILLINOIS)
) SS.
COUNTY OF LA SALLE)

ILLINOIS WORKERS' COMPENSA
ARBITRATION DEC

TERRY RICCOLO
Employee/Petitioner
v.
CAPTAIN'S CONCRETE
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter,
party. The matter was heard by the Honorable **Christine Ory**,
Ottawa on June 29, 2017. After reviewing all of the evidenc
findings on the disputed issues checked below, and attaches thos

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illin
Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. X Did an accident occur that arose out of and in the course
D. ☐ What was the date of the accident?
E. X Was timely notice of the accident given to Respondent?
F. X Is Petitioner's current condition of ill-being causally relat
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 ac
J. X Were the medical services that were provided to Petitio
paid all appropriate charges for all reasonable and neces
K. X What temporary benefits are in dispute?
X 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

20IWCC0277

20IWCC0277

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned **$41,600.00**; the average weekly wage was **$1,268.52**

On the date of accident, Petitioner was **60** years of age, **married** with **1** dependent children.

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

Respondent ***has not paid*** for all appropriate charges for all reasonable and necessary medical services for which they are liable.

To date, Respondent has paid $ **0** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid.

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

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

ORDER

Medical Benefits
Respondent shall pay the $6,559.35, subject to the fee schedule, pursuant to §8 and §8.2 of the Act.

Permanent Disability
Respondent shall pay $695.78 per week for a period of 5 weeks, as provided in §8 (d) 2 of the Act, as petitioner's injuries sustained caused 1% person 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.

Christine M May

Signature of Arbitrator

August 17, 2018

Date

ICArbDec p. 2

AUG 20 2018

were going to have a very busy day
ıd made no mention of being hurt on

ınd made no mention of his back or
l approximately 70 yards of concrete,
ol job was finished that day, May 9,
was finished with him and he needed
ırt his back the day before.

)
gust 28, 2012. Petitioner reported to
l cage that was locked, he strained his
reportedly had not worked since the
ıtion of degeneration of the neck and
therapy was ordered. He was placed

12 after completing physical therapy.
ınmended.
nplin having obtained the MRIs. Dr.
ıe L3-L4 left side causing some mild
ıer significant spondylosis with C4-5
; bilateral foraminal stenosis that was
and minimal right neural foraminal
ınd moderate left neural foraminal
ack intervention; he did recommend
as kept on work restrictions.
doing well. Petitioner did not want
ordered.

WCC0277

ıite. He confirmed he worked eight
on May 9, 2012 that he had to leave
ıry only after he was told by Ferrari

May 8, 2012, only for maintenance

ıs sitting in the truck, stopped, when
ıese injuries at OSF Pontiac and by

ırs testified in behalf of respondent.
ınd small concrete projects. Ferrari
ırade School project that was to last

ınd concrete. and other various tasks.

DISSOLVED

BEFORE THE ILLINOIS WORKERS' COM

Terry Riccolo	)
Petitioner,	)
vs.	) **No. 12 WC**
Captain's Concrete	)
Respondent.	)
	)

ADDENDUM TO ARBITRATO
FINDINGS OF FACTS AND CONC

This matter proceeded to hearing in Ottawa June
8, 2012, petitioner and respondent were operating under
Occupational Diseases Act and that their relationship wa
agree that in the year preceding the injuries, petitioner ea
wage, calculated pursuant to §10, was $1,268.52.

At issue in this hearing is as follows:

1. Whether the petitioner sustained accidental injur
his employment;
2. Whether petitioner provided respondent notice of
in the Act;
3. Whether petitioner's current condition of ill-bei
injury;
4. Whether respondent is liable for medical bills tot
5. Whether petitioner is entitled to temporary partia
2012; and
6. The nature and extent of petitioner's injury.

STATEMENT OF F

Petitioner, Terry Riccolo, Testimony

Petitioner testified he was a member of Laborer
he had been a construction laborer for 30 years. Petitione
police officer. His job for respondent required him to
carrying wood, cleaning up debris and carrying forms.
to lift weighed as much as 50 to 75 pounds.

On May 8, 2012, while working on the job, t
working. Petitioner was working with Paul, responder
the skidster. However, as the hydraulic arm appeared to
had one foot on the bucket and one on the tire as he lift
lift. He felt a tweak and pop in his back. Despite feelir
he continued to work that day. By the evening he start
up pretty good. He put ice on it after dinner that night.

He returned to work the following day. As the day went on, he got real sharp pains in his back. He decided to curtail the day and reported to Paul that he hurt his back the day prior. He left work and went to his chiropractor, Dr. Hutter.

Petitioner had worked with co-worker, Henry, on May 8, 2012, as well as respondent's owner, Paul. On Friday petitioner turned in his hours and was given a workers' compensation form to fill out by Paul. Petitioner filled it out and returned it to Paul.

Dr. Hutter's records reflect petitioner was first seen by him on May 10, 2012. Petitioner confirmed he had received prior treatment from Dr. Hutter. Petitioner confirmed the cervical pain began May 10th or 11th.

On July 31, 2012, Dr. Hutter wrote a letter releasing petitioner to return to work full duty work. Petitioner had asked Dr. Hutter to write the letter so that he could return to the union hall and obtain other work.

Petitioner was working for Lovell Excavating in August, 2012 when surveillance videos were obtained of him. Petitioner noticed his back was painful when he performed certain tasks. He was wearing a back brace, which he never did before May 8, 2012.

The video also shows petitioner helping load his neighbor's Jeep on the side of the road.

On August 28, 2012, petitioner was seen by Dr. Cary Templin of Hinsdale Orthopaedics. He was complaining of neck and cervical pain. Cervical and lumbar MRIs and physical therapy were ordered.

The work petitioner performed for Lovell involved very little lifting; only up to 30 pounds.

Petitioner underwent physical therapy at Champion Physical Therapy beginning on August 31, 2012. He followed up with Dr. Templin on October 8, 2012, after completing physical therapy. He followed up with Dr. Templin on November 2, 2012 and December 17, 2012 after undergoing the MRIs. Dr. Templin discussed injections and possible surgery, which petitioner opted to avoid. Instead, petitioner underwent an FCE. He followed up with Dr. Templin for the final time on April 23, 2013.

Petitioner continued to work part-time as a Dwight Police Officer until 2014 when the job ended. The position with Dwight Police Department involved only patrolling, transporting prisoners, monitoring football and basketball games; mainly sitting and standing. He also continued to do construction labor.

At the time of hearing, petitioner was working for the Illinois Department of Transportation driving a truck; shoveling snow, filling in black top and putting out temporary roadside sign. Petitioner testified his back aches occasionally.

Petitioner was involved in a motor vehicle accident the year before the hearing when an auto ran into petitioner's truck. He aggravated the injury to his cervical spine. He returned for chiropractic treatment and physical therapy.

Petitioner confirmed he owned his own concrete construction business called REM Construction. He confirmed there were concrete jobs performed by REM Construction before and after May 8, 2012. Petitioner did not do any of the work after May 8, 2012 for REM; rather he had two guys and his son do the physical work. Petitioner confirmed a number of orders (identified as Respondent's Exhibit 11) from Riber Construction for concrete and supplies were ordered by petitioner [through REM] as he was a contractor and could get a better priced for them. He claimed he originally was going to do the work, but did not do the work. He only obtained materials for others; usually homeowners.

On cross examination, petitioner confirmed he was hired by Paul Ferrari to work on the Odell Grade School project. According to petitioner the job ended on May 9, [2012] for him.

ded timely notice of the accident to
ns of law:
er told him on May 9, 2012, the day
12. Accordingly, the Arbitrator finds
ccordance with the provisions of the

ndition of ill-being is related to the
law:
ack until reportedly May 10, 2012 or
reported to Dr. Hunter on May 10,
ical pain and severe constant burning,
proved with chiropractic adjustments.
012, he complained of low back and
complaints as petitioner reported he
backwards and that he had not been
e not supported by the evidence.
only a mild disk protrusion at L3-L4
ppears to be degenerative in nature at
ccident. Despite the reported positive
oncluded no lower back intervention

back and cervical strain were caused

IWCC0277

Riber Construction for materials

V

of the Conclusions of Law.

urred that rose out of and in the
Arbitrator makes the following

Paul Ferrari, who confirmed they
2012. Although petitioner did not
etitioner reported to Ferrari on May
Dr. Hutter, D.C. On May 10, 2012
work.

Petitioner confirmed he worked with Paul Ferrari at the
hours on May 8, 2012. He also reiterated that he told Fer
as his back was hurting. He denied he told Ferrari of his
that he was no longer needed on the job.

Petitioner confirmed he was seeing Dr. Hutter be
and adjustment treatments.

The auto accident occurred on April 11, 2016. H
it was rear-ended by a vehicle. Petitioner was treated f
chiropractor, Dr. Smith.

Paul Ferrari Testimony

Paul Ferrari, respondent's owner/foreman for 25
Respondent is in the business of pouring floors, drivew
hired petitioner out of the union hall to work on the Od
from three to five weeks; during April and May, 2012.

Petitioner's job at the project was to break out gra
Ferrari was working with petitioner on May 8, 2012. He
day to petitioner. He acknowledged he and petitioner ren
a leak. They worked until 6:00 P.M. n May 8, 2012 as
the following day. Petitioner did not act as if he was hu
May 8, 2012.

Petitioner worked his regular shift on May 9, 20
neck injury and did not act as if he had been hurt. They po
which was ten concrete truck loads. The Odell Grade S
2012. Ferrari advised petitioner at the end of the day tha
his hours. It was at this time that petitioner advised he h

Hinsdale Orthopaedics/Dr. Cary Templin Records (I

Petitioner was first seen by Dr. Cary Templin or
Dr. Templin that on May 8, 2012, he was lifting a 600-p
back and fell back. He has pain in his neck and back.
accident. He was found to have cervical strain and agg
low back. There was no radiculopathy. MRIs and phys
on restricted work.

Petitioner returned to Dr. Templin on October 8
He was working within restrictions. MRIs were again r

On November 2, 2012, petitioner returned to Dr.
Templin reported the only notable disk protrusion was
lateral recess impingement. The cervical MRI showed
showing moderate central canal stenosis bilateral as we
moderately severe, as well as C5-6 showed severe
narrowing and C6-7 showed moderately severe rig
narrowing. Dr. Templin did not recommend any lo
cervical epidural injections or C4-C7 cervical fusion. H

On December 17, 2012, petitioner reportedly
injections or surgery. A functional capacity evaluation

20IWCC0277

The valid FCE showed petitioner was capable of returning to full-duty heavy work.

On April 23, 2013, petitioner was released to return to work within the FCE restrictions and released from Dr. Templin's care.

Dr. Kevin Hutter Records (PX.2)

Petitioner was first seen by Dr. Hutter, after the claimed May 8, 2012 accident, on May 10, 2012. He had complaints related to his lower back, hip, neck and shoulder. The accident date is listed as May 10, 2012. Chiropractic adjustments were provided. He received chiropractic treatment through September 7, 2012. The records themselves made no mention of disability during this period of time.

On July 11, 2012, Dr. Hutter, D.C. first wrote a note on July 11, 2012 advising petitioner was seen in his office from May 10, 2012 through July 11, 2012 and authorized petitioner off work until further evaluation in two weeks. On July 31, 2012, Dr. Hutter released petitioner to return to work without restrictions.

Champion Fitness Records (PX.3)

Petitioner received physical therapy from August to October, 2012.

Champion Fitness FCE Report (PX.4)

This FCE was included in Hinsdale Orthopaedics Records (PX.1).

Medical Bills (PX.7)

$3,939.35 Champion Fitness Physical Therapy (08/31/2012-10/8/2012)
$589.00 Joliet Radiological (10/30/2012)
$720.00 Hinsdale Orthopaedics (08/28/2012-04/23/2012)
$1,900.00 Dr. Kevin Hunter (06/13/2012-09/04/2012)
$7,076.68 Presence St. Joseph Medical Center (10/24/2012)

Photo Fax Reports and Videos (RX. 1 through 4b)

[The videos were unable to open (RX.2, RX.4a, RX4b) but appear to mirror the reports identified as Respondent's Exhibit 1 and 3.]

These depict the result of surveillance of petitioner from August 2 and August 8, 2012.

Restoration Chiropractic/Dr. Kevin Hutter Records (RX.5)

Petitioner received chiropractic treatment in February to April, 2010, November, 2010, February through April, 2011, as well as November and December, 2011.

Petitioner's Personnel Records from Village of Dwight (RX.6 & Rx.10)

The records include personnel and payroll records for petitioner.

John Przybysz Checks to Petitioner (RX.7a & 7b)

These are two checks; one for $1500 and the other $2000 that petitioner identified as payment for materials ordered by petitioner.

Riber Construction Inc. Records (RX.11)

Records of invoices and payments by petitione
obtained from Riber Construction.

CONCLUSIONS OF

The Arbitrator adopts the Finding of Facts in supp

C. With respect to the issue of whether an accident course of petitioner's employment with respondent, conclusions of law:

Petitioner was working with respondent's own removed the cage to the skidster to check a leak on Ma report his back was hurting the skidster cage was remove 9, 2012 that he had hurt his back the day before. He we indicating he hurt his back at work, neck, shoulder and hi

Based upon the foregoing, the Arbitrator finds pe a result of an accident that arose out of and in the course May 8, 2012.

E. With respect to the issue as to whether petitioner p respondent, the Arbitrator makes the following concl

Paul Ferrari, respondent's owner, confirmed peti after the claimed accident, that he hurt his back on May 8 petitioner provided timely notice of the claimed accident Act.

F. With respect to the issue of whether the petitioner injury, the Arbitrator makes the following conclusion

Petitioner's complaints were centered in his low May 11, 2012, when he claimed his neck pain came on 2012 that the he only had moderate sever dull and aching sharp and aching pain in the lumbar region. His condition

Although when he saw Dr. Templin on August 2 neck pain, the Arbitrator questions the credibility of th injured his back when he lifted a 600-pound cage and working since the May 8, 2012 accident. Both statemen

In addition, Dr. Templin reported the MRI show level; the remaining findings, as reported by Dr. Templi both the cervical and lumbar level and unrelated the wo findings of a disc bulging at the L3-L4 level, Dr. Temp was necessary.

The Arbitrator therefore finds petitioner's mild by the work accident.

J. In support of the Arbitrator's decision with regard to the medical bills incurred, the Arbitrator makes the following conclusions of law:

The Arbitrator awards the following bills that are supported by the medical records:

$3,939.35 Champion Fitness Physical Therapy (08/31/2012-10/8/2012)

$720.00 Hinsdale Orthopaedics (08/28/2012-04/23/2012)

$1,900.00 Dr. Kevin Hunter (06/13/2012-09/04/2012)

The claim for the $589.00 Joliet Radiological and $7,076.68 for Presence St. Joseph Medical Center bills are denied as there were no medical records to support these bills.

K. In support of the Arbitrator's decision with regard to TPD, the Arbitrator makes the following conclusions of law:

The evidence showed petitioner was working after the work accident for both Village of Dwight and for his own business, REM. Therefore, the claim for temporary partial disability is denied.

L. In support of the Arbitrator's decision with regard to the nature and extent of petitioner's injury, the Arbitrator makes the following conclusions of law:

Petitioner sustained a mild back and neck strain.

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:

With regard to subsection (i) of §8.1b (b) the Arbitrator notes that there was no permanent partial disability impairment rating provided. The Arbitrator, therefore, cannot give any weight to this factor.

With regard to (ii) of §8.1b (b) the occupation of the injured employee, the Arbitrator notes petitioner was employed as a construction laborer. As such, he was required to do heavy manual laborer. Therefore, the Arbitrator gives some weight to this factor.

With regard to (iii) of §8.1b (b) the age of the employee at the time of the injury was 60 years of age. Therefore, the Arbitrator gives little weight to this factor.

With regard to (iv) of §8.1b (b) the employee's future earning capacity, the Arbitrator notes petitioner was released to work, and worked, as a construction laborer. The Arbitrator, therefore, gives little weight to this factor.

With regard to (v) of §8.1b (b) evidence of disability corroborated by the treating medical records, the Arbitrator notes the medical records indicate petitioner's condition was degenerative in nature. He was also capable of returning to heaving work per the FCE. Therefore, the Arbitrator gives little weigh 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 1% loss of use of body as a whole pursuant to § 8 (d) 2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARGARITA ARROYO,

Petitioner,

vs.

20IWCC0278

NO: 15 WC 33873

HILTON CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, notice, temporary total disability, medical expenses, and "prospective medical care," and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes a clarification as outlined below.

We strike the last sentence on the last page of the decision under "Remaining issues." We clarify that Petitioner's claim was adjudicated and not "dismissed."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 28, 2018, is hereby affirmed and adopted with the clarification 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.

20IWCC0278

No bond is required by Respondent for the removal of this cause to the Circuit Court because no award was made. 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: MAY 15 2020

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

O: 4/21/20
49

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

ARROYO, MARGARITA
Employee/Petitioner

Case# **15WC033873**

20IWCC0278

HILTON CHICAGO
Employer/Respondent

On 8/28/2018, 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 2.21% 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
NATALIA OLEJARSKA
5440 N CUMBERLAND AVE #150
CHICAGO, IL 60656

1139 NOBLE & ASSOCIATES PC
MICHAEL CHALCRAFT II
387 SHUMAN BLVD SUITE 210E
NAPERVILLE, IL 60563

20IWCC0278

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)

Margarita Arroyo
Employee/Petitioner

v.

Hilton Chicago
Employer/Respondent

Case # **15** WC **33873**

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 **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **May 17, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

20IWCC0278

FINDINGS

20IWCC0278

On the date of accident, **08/02/2015**, 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 **n/a** causally related to the accident.

In the year preceding the injury, Petitioner earned $**32,968.00**; the average weekly wage was $**634.00**.

On the date of accident, Petitioner was **43** 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 $**n/a** for TTD, $**n/a** for TPD, $**n/a** for maintenance, and $**n/a** for other benefits, for a total credit of $**n/a**.

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

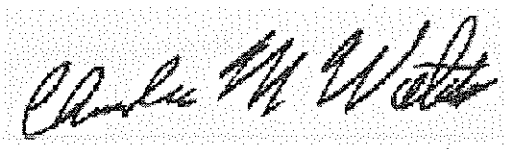
ORDER

Because the Arbitrator finds that the Petitioner did not sustain an accident that arose out of and in the course of employment, benefits are denied. The following disputed issues are therefore moot: [E] notice, [F] causal connection, [J] medical expenses, and [K] prospective medical treatment.

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

August 27, 2018
Date

ICArbDec19(b)

AUG 28 2018

The disputed issues in the present matter are:

- [C] Accident;
- [E] Notice;
- [F] Causal Connection;
- [J] Payment of Reasonable and Necessary Medical Expenses; and
- [K] Prospective Medical.

FINDINGS OF FACT

Petitioner Margarita Arroyo began working for Respondent Hilton Chicago on December 4, 2000. [Tr. 8-12] Petitioner was employed in housekeeping as a room attendant/housekeeper. [Tr. 15] Petitioner testified that her job duties include cleaning, making beds, cleaning bathrooms, dusting and mopping the bathrooms. She pushed a cart with all of the materials and supplies. [Tr. 16] Petitioner was assigned 14 rooms. [Tr. 15-16] Petitioner was assigned to the 23rd floor of the Respondent's hotel. [Tr. 18] She testified that she cleaned the rooms by herself. [Tr. 18] Since leaving the Respondent, Petitioner testified that she worked elsewhere. Specifically she worked for Lyft and DoorDash. She is currently employed. [Tr. 11-12]

Petitioner testified that on an average day there were 320 to 350 people working in housekeeping and each housekeeper room attendant was assigned 14 rooms per day. Petitioner further testified that there were approximately 30 floors at the hotel and five or six housekeepers working on each floor during a shift and a total of 10 to 12 housemen. Petitioner stated that the attendants notified a manager if a room took longer than usual to clean only when there was vomit or human excrement present. Petitioner testified that she called the housekeeping department when she needed assistance, such as when the cart was filled up or high with garbage; housekeeping would then send the houseman who would remove the garbage. [Tr. 54]. Petitioner explained that there were instances where she called the office and no help was forthcoming but in those cases, she took the garbage off the cart and left it in the hallway. [Tr. 55]. Furthermore, Petitioner testified that the procedure for moving a rollaway bed consisted of calling the housekeeping department and the department would either call the houseman directly or they would call dispatch who would then contact the houseman directly. Petitioner testified that this is the procedure Petitioner followed in the over 14 years she worked for Respondent. When she followed this procedure in the past, the rollaway bed was always removed and she never had to move it herself. [Tr. 51]. Petitioner testified that had she released a room with a rollaway bed in it, she would have been sent back by a supervisor to release the room properly as vacant and ready. [Tr. 102].

Petitioner testified that on Sunday, August 2, 2015, she began work at 9:00 a.m. She worked a full shift in addition to two hours of overtime; her shift ended at 7:30 p.m. Around 6:30 p.m., Petitioner testified she began cleaning room 2350. Petitioner testified that the accident occurred at 7:15 p.m. in room 2350. Petitioner described the room as "destroyed, a lot of garbage all over, a lot of linen all over, towels strewn around." [Tr. 21] Prior to cleaning room 2350, Petitioner

recorded a one-minute video on her cell phone of the room. Petitioner took the video because the rooms were above and beyond just the typical dirty and messy, to a disastrous point. This video was played for the Arbitrator and entered into evidence as Petitioner's exhibit 6. Petitioner identified the down, rollaway bed in the video. [Tr. 24-26] This was admitted into evidence without objection.

According to the Petitioner, she called the office a couple of times to have somebody remove a rollaway bed. She later stated that she placed three calls to have the rollaway bed removed. No one came. After cleaning the room, she lifted the bed and felt a pull in her left shoulder area. [Tr. 20] Petitioner described the bed as a twin-size with 2 wheels and 2 legs weighing more than a hundred pounds. Petitioner testified that after she felt the pull in her left shoulder she left her things in her locker as she normally does, turned in her key to punch out and went home. [Tr. 22] Petitioner did not tell anyone about the accident that day. [Tr. 27] . Petitioner testified she wanted to leave because she was hungry and tired, and her kids were waiting for her to come home. Petitioner lifted the bed up and rolled it out of the room herself. Petitioner testified that as she lifted the bed she felt a pull in her left shoulder going down her arm, rating the pain as 8 out of 10. [Tr. 20].

Petitioner first received medical treatment on Monday August 3, 2015 at St. Anthony Clinic where she treated with Dr. Metrou. (PX 1 at 1). Petitioner communicated with a nurse in Spanish and with Dr. Metrou through a tablet translator. Petitioner testified that she advised Dr. Metrou that she developed pain in her left shoulder the previous day while lifting a rollaway bed at work. (TX at 31) The progress note reported the following:

> This patient is here today for pain in the left shoulder area for one day. She works in housekeeping in a hotel and she worked overtime. The pain started while she was at work and continued. It is most bothersome when she reaches out and overhead. She has never had an injury to her shoulder in the past. She denies radicular pain or parethesias of the left hand. (PX 1 at 1-2).

Dr. Metrou's physical examination noted a supraspinatus tendon tender to palpation, a limited range of motion upon extension and a painful arc, and decreased muscle strength in the left shoulder. She further noted a positive Hawkins and empty can test. (PX 1 at 2). Dr. Metrou diagnosed Petitioner with a strain of the rotator cuff tendons of the left shoulder and provided Petitioner with medication for pain and inflammation, and an off work slip for one week. (TX at 32, PX 1).

Petitioner testified that she took Dr. Metrou's note to Human Resources and gave it to Alma Alic on Tuesday, August 4, 2015. (TX at 27-28, 32). Petitioner testified she advised Ms. Alic that she had hurt her left shoulder while lifting a rollaway bed at work. Petitioner testified that she filled out FMLA paperwork at that time because Ms. Alic gave it to her. Petitioner understood the form was necessary so that Respondent would pay her for time off of work.

Petitioner testified that she reported the incident on August 4, 2018, to Alma Alic in Human Resources. [Tr. 27] Petitioner testified that she was given FMLA forms to fill out. Petitioner

testified that she understood the purpose for the FMLA forms was so that she would be paid during her time off work. [Tr. 29-30]

On cross-examination, Petitioner testified that she had a prior workers' compensation injury with the Respondent for her left wrist and that she knows that she is required to report all work-related injuries to the security department, not human resources. [Tr. 44-45] She testified that in the nearly 15 years as a housekeeper she has never before video recorded what a room looked like. [Tr. 45] That the first time she recorded a room's condition was on August 2, 2015, when she first arrived into the room. [Tr. 45] The rollaway bed had not been moved when the video was taken. [Tr.49-50] Petitioner testified that removing a rollaway bed from a room is *not* a part of her job duties. [Tr. 47] She has never removed a rollaway bed before. [Tr. 51] Petitioner testified that the role of a 'House Person' is to remove the rollaway beds, take linen off the carts and garbage. [Tr. 46-47]

On redirect examination, Petitioner testified that she did not report the injury to security because her prior work comp claim in 2011 had a lot of pain and she had to keep working so she wanted to go to her own doctor instead. [Tr. 53-54] Petitioner said that she removed the rollaway bed because she was very tired, hungry and had her children waiting at home. She had to 'release' the room. [Tr. 57]

Petitioner followed up with Dr. Metrou at St. Anthony's on August 10, 2015 and September 28, 2015. Dr. Metrou sent Petitioner for x-rays of her left shoulder and left elbow and diagnosed Petitioner with a left shoulder rotator cuff strain and medial epicondylitis of the left elbow. (PX 1 at 10). Dr. Metrou referred Petitioner to Dr. Sompalli and for physical therapy. Petitioner underwent eight physical therapy sessions at St. Anthony, from August 25, 2018 through September 29, 2015. (PX 1 at 44-57).

Petitioner next treated with Dr. Sompalli at St. Anthony on September 4, 2015, complaining of left shoulder and arm pain. (PX 1 at 12). Petitioner testified she communicated with Dr. Sompalli through a translator and advised him that she hurt her left shoulder lifting a rollaway bed on August 2, 2015. [Tr. 35-36]. The progress note is as follows:

> 43 yo female present for evaluation of L Shoulder pain that started a month ago after work. She states that she was felt the pain was after work and that it was radiating down the arm. She states that she felt hot and had pain on the medial elbow. She also states that she has not any treatment other than NSAIDS. She states that the pain is rated 10/10 at its worst and 7/10 at rest. She denies any numbness tingling or paresthesia. (PX1 at 13).

Dr. Sompalli's physical examination of the left shoulder noted forward flexion 0 to150 degrees, abduction 0 to150 degrees, and no skin erythema, excoriations, or abrasions. (PX 1 at 13). Dr. Sompalli performed an injection to the shoulder and recommended medications and an x-ray of the left shoulder.

Petitioner underwent a left shoulder MRI at St. Anthony's Hospital on October 9, 2015, per Dr. Metrou's referral. (PX 1). The MRI indicated a small partial tear of the supraspinatus tendon and trace effusion, including in the subracromial/subdeltoid bursa. (PX 1 at 39).

On October 8, 2015, Petitioner signed her Application for Adjustment of Claim indicating that "pushing" was the cause of the accident.

On October 14, 2015, Petitioner treated with Dr. Silver at Orthopedic Specialists of the North Shore complaining of left shoulder and arm pain. Petitioner testified that Dr. Silver spoke Spanish. [Tr. 37]. Dr. Silver reported that Petitioner injured her left shoulder lifting a rollaway bed on Sunday August 2, 2015. (PX 2 at 1). Dr. Silver's physical examination noted severe soft tissue swelling and inflammation of the left shoulder. (PX 2 at 1). He further noted that Petitioner was very tender over the rotator cuff insertion anterolaterally, and that her range of motion was limited to 90° forward flexion and 80° of lateral abduction with internal rotation just below the belt line due to pain. The Hawkins and drop arm tests were positive. (PX 2 at 1). Dr. Silver reviewed Petitioner's October 9, 2015 MRI and diagnosed her with a partial thickness tearing of the rotator cuff with rotator cuff impingement due to the work injury. (PX 2 at 2). He recommended medications, creams, physical therapy and arthroscopic surgery for the left shoulder. (PX 2 at 2). Dr. Silver indicated Petitioner was temporarily disabled.

Petitioner underwent physical therapy at La Clinica from October 15, 2015 through April 28, 2016. (PX 5). Therapy consisted of stretches, therapeutic exercises, joint mobilization, and electrical stimulation. Petitioner testified that it helped a little bit, especially with strength and range of motion, but not with the pain. (TX at 41, PX 5).

Petitioner testified that she has continued to follow up with Dr. Silver approximately every eight weeks. Dr. Silver continued to prescribe medications and Petitioner took the medication for inflammation and pain when needed; specifically, Petitioner testified she only takes medications when she cannot tolerate the pain. Petitioner explained that between June 2016 and November 2017 she did not see Dr. Silver as there was no authorization for the visits. Petitioner last saw Dr. Silver on May 11, 2018. Dr. Silver continues to recommend arthroscopic surgery for the left shoulder. (PX 2).

Petitioner testified that since the date of the accident she has not suffered any new injuries and has been careful of her activities so as not to exacerbate her pain. Petitioner testified that the pain in her left shoulder greatly interferes with her ability to perform routine tasks of daily life and impairs her quality of life. Petitioner testified that she has pain when she moves, works or performs chores around the house and rates the pains as 9 out of 10. Petitioner testified that the pain has remained the same since the date of the accident.

Testimony of Lea Nissen:

Lea Nissen testified for the Respondent. Ms. Nissen, the area director of human resources for Chicago, has worked for the Respondent in human resources since September 2011. Ms. Nissen testified that Petitioner never filed a workers' compensation claim with human resources for the August 2, 2015 incident. Petitioner did file for a leave of absence in August 2015 and was provided FMLA paperwork. [Tr. 60-62] Ms. Nissen testified that if someone comes to human resources to report a work-related accident, they are referred to security to complete an accident

report. [Tr. 63] Petitioner was never referred to security for a work-related incident in August 2015. [Tr. 64] Pursuant to the union contract, Petitioner is granted medical leave for 24 months. After she exhausted her leave, she was terminated. [Tr. 66] Every employee is provided an employee handbook as well as a collective bargaining agreement outlining leave requests. This information is provided in every employee's orientation training. [Tr. 67]

On cross-examination, Ms. Nissen testified that the orientation training includes translators. When someone goes to HR for FMLA paperwork the materials are explained to the employees. [Tr. 70-71]

Testimony of George Sous:

George Sous testified for Respondent. Mr. Sous has worked for Respondent for 5 years. At the time of trial, he was the assistant director of housekeeping at Hilton Chicago. He held that position for three years. [Tr. 72-73] When a room has a rollaway bed, the room attendants will clean the room, strip the linens from the rollaway bed and then call a houseman to pick up the rollaway bed. A rollaway bed is very heavy; at least a hundred pounds. [Tr. 76-77] It is the houseman's responsibility to remove the rollaway bed, not the room attendant. [Tr. 78] Housemen, like room attendants, are assigned to floors based on seniority. The houseman assigned to the 23rd and 24th floors is Ibrahim Kabba. Mr. Kabba was the houseman assigned to the 23rd floor in August of 2015. [Tr. 78] When a room attendant has a rollaway bed they call the office or just tell the houseman directly to remove the bed. If the houseman does not pick up the rollaway bed, the room attendants would leave the room in 'vacant/clean status'. They let their supervisor know that they called to have the rollaway bed removed and go on to the next room. Once the rollaway bed is removed the room can be 'released'. It is not the room attendant's responsibility to clear the rollaway bed from the room before clearing the room. Once the rollaway bed is cleared the room status is changed from 'vacant/clean' to 'vacant/ready'. [Tr. 79-80] Mr. Sous testified that if a room attendant is behind in clearing their rooms the procedure is to notify the office and report it. Management will either send additional help or take a room off. [Tr. 81-82] This notification requirement is a part of the union contract. [Tr. 82] If someone is injured at work in the housekeeping department it is policy that it is reported to security. [Tr. 82] The security department then notifies management via email of the status of the team member. [Tr. 83] Mr. Sous could not recall ever being notified that Petitioner was off of work for a work-related injury. [Tr. 83]

Mr. Sous testified that there is no policy that the room attendants are required to video record messy rooms and has never had a room attendant or housemen ever video record a dirty room. [Tr. 83-84]

On cross-examination, Mr. Sous testified that he has never heard of an employee reporting a work-related injury to the HR department. [Tr. 85] Mr. Sous explained that an unsanitary room is a room that is really trashed, lots of garbage, and multiple occupancy. It may require carpet cleaning and a deeper clean to move the desk cabinets and night stands to clean behind them. [Tr.86-87]

Testimony of Ibrahim Kabba:

Respondent called Ibrahim Kabba as its third witness. Mr. Kabba has been working for the Respondent for 13 years. He has been a houseman since 2008. Mr. Kabba has been assigned to the 23rd and 24th floors since 2008. The job of a houseman is to assist the lady[s] and make sure the hallways are cleaned up. [Tr. 88-89] He works with the same room attendants on a daily basis, including Petitioner. [Tr. 90] Mr. Kabba is usually asked directly by the ladies on the 23rd floor for assistance. The Petitioner will ask Mr. Kabba directly for help. Mr. Kabba was not asked by Petitioner on August 2, 2015 to remove a rollaway bed from the 23rd floor. Mr. Kabba could not recall Petitioner ever asking him directly to remove a rollaway bed. [Tr. 92] Mr. Kabba did not receive any calls from dispatch to help Petitioner on August 2, 2015. [Tr. 93] It is not a room attendant's job to remove a rollaway bed and has never seen a room attendant move one. [Tr. 93] It is the houseman's job to remove the rollaway beds. [Tr. 94]

Mr. Kabba said that he has a close relationship with the ladies on the 23rd floor. He starts on the 24th floor and works down. When the 23rd floor room attendants need something they do not call, they just wait for him to come down and ask for help directly. Petitioner did not ask him for assistance on August 2, 2015. [Tr. 97-99]

Rebuttal testimony of Margarita Arroyo:

Petitioner testified on rebuttal that she never received FMLA benefits related to the August 2, 2015 incident. Petitioner testified that she never asked Mr. Kabba for help on August 2, 2015 because you are supposed to call housekeeping. [Tr. 100-101]

CONCLUSIONS OF LAW

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. (Emphasis added) *Martin v. Industrial Commission,* 91 Ill.2d 288, 437 N.E.2d 650 (1982).

Where a Petitioner fails to prove by a preponderance of the evidence that there exists a causal connection between work and the alleged condition of ill-being, compensation must be denied. *Illinois Institute of technology v. Industrial Commission,* 68 Ill.2d 236, 369 N.E.2d 853 (1977).

The mere existence of testimony does not require its acceptance. *Smith v. Industrial Commission,* 98 Ill.2d 20, 455 N.E.2d 86 (1983).

It is not enough that Petitioner was working when the injury was realized. 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).

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).

An employer's liability for benefits cannot be based on guess, speculation or conjecture. *Illinois Bell Telephone v. Industrial Commission*, 265 Ill.App.3d 681, 638 N.E.2d 207 (1994).

Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the witness' demeanor and any external inconsistencies with testimony. Where a claimant's testimony is inconsistent with her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial commission,* 39 Ill.2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill.2d 490 (1972).

In support of the Arbitrator's decision with regard to whether Petitioner sustained accidental injuries that arose out of and in the course of her employment with the Respondent (Issue C), the Arbitrator makes the following conclusions of law and fact:

After weighing the evidence in its entirety, weighing the credibility of the witnesses and their testimony and examining the medical records provided by the Petitioner; the Arbitrator concludes that Petitioner has failed to prove by a preponderance of the evidence, that she sustained an accidental injury arising out of and in the course of her employment with Respondent.

The Arbitrator finds Petitioner's testimony not credible and inconsistent with her actions on and around August 2, 2015. She was impeached by other witnesses and her own medical records do not support her contention that she injured her shoulder moving a bed.

First, the Arbitrator finds that Petitioner's testimony is inconsistent with the history contained in the medical records. Petitioner treated with at St. Anthony's Hospital beginning on August 3, 2015. No reference to moving a rollaway bed was listed in the history. (Px. 1, 1-3) Nowhere in any of the St. Anthony Hospital records does Petitioner state that she injured her left arm moving a rollaway bed. (Id., generally) The Arbitrator takes judicial notice of the filed Application for Adjustment of Claim. Petitioner retained counsel on October 8, 2015. On October 14, 2015, Petitioner presented for the first time to Dr. Ronald Silver with the Orthopedics Specialist of the North Shore. (PX2) On that date, Petitioner first reports to Dr. Silver that she hurt her left shoulder while lifting a rollaway bed. This is 74 days after the alleged incident during which time Petitioner made no record to any physician, orthopedist, or physical therapist as to the actual mechanism of the injury.

Second, Petitioner admitted on cross-examination that moving rollaway beds is not a part of her job. Petitioner has "never ever" moved a rollaway bed before August 2, 2015. She testified that it was the job of the housemen to perform this task. This is consistent with Respondent's witnesses' testimony who testified that they have never seen a room attendant move a rollaway bed. The procedure is for the room attendant to call for assistance and a houseman removes the

bed. Furthermore, Mr. Kabba, the houseman assigned to the 23rd floor, testified that he was not asked by the Petitioner or dispatched to remove a rollaway bed from room 2350. The Arbitrator also notes that Petitioner's testimony regarding why she had to move the rollaway bed is questionable. Petitioner claims that she had to clear the room in order to finish her shift and that is why she moved the bed herself. However, Mr. Sous testified credibly that when a rollaway bed is left in a room, the room attendant simply marks the room as 'vacant/clean' and reports it to their supervisor. Once the bed is removed the room is listed as 'vacant/ready'.

Third, the Arbitrator is highly suspicious of the motivation behind creating a video recording of the room and rollaway bed before sustaining a work-related injury. This material was never turned over to the Respondent to support her claim that a rollaway bed caused her injury. Petitioner testified that she has never video recorded a room before in her nearly 15 years as a room attendant. Yet, the one time that Petitioner recorded a room she alleges that she injured her shoulder. There is no requirement or policy to do this. Mr. Sous testified that he has never heard of a room attendant or houseman record a dirty room.

Thus, Petitioner testified that in her 14 years as a housekeeper for Respondent, she has only once ever moved a rollaway bed and only once taken a video of a messy room. Yet, if she is to be believed, both happened on the same day. This coincidence she testified to makes Petitioner far less credible.

Fourth, Petitioner claims that she reported the rollaway bed injury to human resources instead of security because she wanted to see her own doctor. Petitioner knows that she is required to file a report with security because she did so in her prior 2011 claim with Respondent. Ms. Nissen testified that there was no documentation supporting Petitioner's story. What is confirmed is that Petitioner went to HR and was given FMLA paperwork. Ms. Nissen testified that if someone comes to HR and says that they got hurt at work, they are sent to security. If Petitioner actually reported an injury with the rollaway bed to HR, she would not have been provided FMLA paperwork, she would have been sent to security to fill out an accident report.

Based on the totality of the evidence, the Arbitrator finds that Petitioner has not proven, by a preponderance of the evidence, that her condition of ill-being arose out of and in the course of her employment. There is no corroborating evidence that Petitioner sustained an injury from moving a rollaway bed until October 14, 2015 (74 days later) when Petitioner retained counsel and began treating with Dr. Silver that her history became that she hurt herself moving a rollaway bed.

Remaining issues:

Having found that the Petitioner has not proven an accident, the remaining issues are moot and will not be addressed. The Application for Adjustment of Claim is dismissed on its merits.

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

JERRY MILLER,
Petitioner,
vs.

NO: 17 WC 36143
18 WC 5318

STATE OF ILLINOIS,
GRAHAM CORRECTIONAL CENTER,
Respondent.

20IWCC0279

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 10, 2019 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: MAY 18 2020

D. Douglas McCarthy

Stephen Mathis

L. Elizabeth Coppoletti

DDM/tdm
d: 4/28/20
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MILLER, JERRY
Employee/Petitioner

Case# **17WC036143**

18WC005318

STATE OF IL/GRAHAM CORR CTR
Employer/Respondent

20IWCC0279

On 7/10/2019, 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 2.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

6079 ASSISTANT ATTORNEY GENERAL
BRADLEY DeFREITAS
500 S SECOND ST
SPRINGFIELD, IL 62706

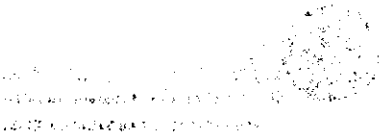
0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUL 10 2019

Brendan O'Rourke, Assistant 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

JERRY MILLER
Employee/Petitioner

v.

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

Case # 17 WC 36143

Consolidated cases: 18 WC 05318

20IWCC0279

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 **Springfield**, on **August 28, 2018**. 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? **(18 WC 05318-10/31/17 injury only)**
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? **(18 WC 05318-10/31/17 injury only)**
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? **(18 WC 05318-10/31/17 injury only)**
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **July 31, 2017**, and **October 31, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner ***did*** sustain accidents that arose out of and in the course of employment.

Timely notice of these accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to these accidents.

In the year preceding the injury, Petitioner earned **$76,921.00**; the average weekly wage was **$1,479.25**.

On the date of accident, Petitioner was **48** 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** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of **$0**.

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

ORDER

Respondent shall pay reasonable and necessary medical services contained in Petitioner's group exhibit 1, as provided in § 8(a) of the Act.

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

Respondent shall pay Petitioner temporary total disability benefits of **$986.17**/week for **17 5/7** weeks, commencing **February 9, 2018,** through **June 13, 2018**, as provided in § 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$790.64**/week for **136.05** weeks, because the injuries sustained caused the **12.5%** loss of the **right and left hands (47.5 weeks** [based on a maximum of 190 weeks of compensation for the hand in repetitive cases]), and the **17.5%** loss of the **right and left arms (88.5 weeks)** 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

7/9/19
Date

JUL 10 2019

FINDINGS OF FACT

Petitioner has been an employee of the Department of Corrections for nearly 26 years. (T.11) He has been a Correctional Officer for 21 of those years, and only recently has been promoted to Correctional Lieutenant. (T.11) He has worked at Jacksonville Correctional Center, Western Illinois Correctional Center, Pittsfield Work Camp, Clayton Work Camp, and Graham Correctional Center. (T.11-12) During his time as a Correctional Officer, he worked the day or afternoon shift, when movement and activity is at its peak. (T.12-13) Petitioner also worked in the segregation units at each of these facilities. (T.13) He estimated that 20% or more of his time was spent in segregation and the other 80% would have been on housing units, wings, galleries and dorms. (T.13)

Petitioner prepared a written job description, which was admitted into evidence without objection. (PX11) The description detailed repetitive and strenuous activities with the upper extremities including strip searches, cuffing and uncuffing inmates, cell extractions, locking and unlocking cells and other doors, chaining and unchaining prisoners, stopping physical altercations, and pushing and pulling large and heavy doors. *Id.* At Arbitration, Petitioner also testified to performing bar rapping and shakedowns. (T.14) Petitioner testified to using chuckholes and Folger Adams keys. (T.17-18, 30) He testified there was no part of his job that did not involve using his hands. (T.14) He testified that when he used his hands over the course of 21 years being a Correctional Officer, he experienced a lot of tingling, paresthesia, and soreness in his elbows. (T.14-15, 29) He stated, "I would always just tend to rub them out and took, you know, generally I took Aleve or Tylenols [sic] or something just for some pain and creams." (T.15). When Petitioner was promoted to Lieutenant in 2014, he was performing virtually the same job duties as a Correctional Officer. (T.15-17) He stated:

A. A lieutenant and correctional officer are basically a lot the same. A correctional officer tends to deal with 50 to 100 inmates. A lieutenant you are assigned to not only the inmates but you are assigned to the staff that is in charge of the inmates. So you go from being in charge of 50 to 100 inmates as an officer to being in charge of 5 to 800 inmates plus 40 officers per se.

Q. Did you still do all the activities you listed with your hands and arms while you were a lieutenant?

A. Yes, sir.

Q. Same frequency?

A. Yes, sir.

Q. Same amount?

A. Yes, sir.

Q. Same shifts.

A. Yes, sir. (T.16-17)

In the course of this weakened condition, on July 21, 2017, Petitioner sustained accidental injuries at work while working on a double shift and dealing with an aggressive and severely mentally ill prisoner who had slammed his head through a glass window. (T.17) The prisoner, who weighed 350+ pounds, jerked Petitioner's arms through the chuckhole, which was simply a small door through which services were rendered for inmates housed in segregation. (T.18-18) He stated:

> I was trying to unrestrain him through the chuckhole which is a small door. At that time he just lunged forward on me dragging both my arms through the chuckhole. I was pinched in behind the cuffs. I couldn't get my hands out. Of course I had several officers there attempting to do something but you can't do anything inside of a chuckhole. (T.17-18)

His account of the accident was supported by five witness reports, which were admitted into evidence as Petitioner's Exhibit 12. (PX12) The reports of C/O Mitchell, Lt. Johnson, and T. Cooper specifically note that both Petitioner's arms and hands in plural were pulled through the chuckhole and injured. *Id.* This injury is the subject of Petitioner's first Application for Adjustment of Claim. (AX2)

The next day, Petitioner reported to Springfield Clinic to see his family physician, Dr. Billington. (PX3, 8/1/17) Initially, Petitioner believed he had only injured his right hand, because it was scraped and bruised. (RX2) The history taken by Dr. Billington less than 24 hours after the accident, however, reads as follows:

> He is here for a work-related injury. He works as a corrections officer and was dealing with a [sic] out of control inmate last night and sustained an injury to his right wrist. Having pain over the dorsal wrist and some swelling today. Also woke up with some pain in his left wrist this morning that is mild in nature and was not bothering him yesterday. Has some superficial excoriations over the dorsal right wrist and is up-to-date on his tetanus. Able to move it without difficulty and doesn't feel any instability or laxity. (PX3, 8/1/17)

When x-rays were negative, Dr. Billington allowed Petitioner to continue working without restrictions. *Id.*; (PX4) Petitioner returned to Dr. Billington on September 28, 2017, for continued upper extremity complaints. (PX3, 9/28/17) He referred Petitioner for electrodiagnostic studies, which were done by Dr. Cecile Becker on October 3, 2017, on the left side only, and showed mild median neuropathy at the left wrist and mild left ulnar neuropathy at the elbow. *Id.*; (PX5, 10/3/17) Dr. Becker referred Petitioner to Springfield Clinic for further testing by Dr. Greatting. (PX5, 11/8/17)

On November 8, 2017, Petitioner was evaluated by Ms. Naughton, Dr. Greatting's certified nurse practitioner. (PX5, 11/8/17) There the history of the injury was taken, describing how Petitioner had both of his arms pulled through the chuckhole by an inmate. *Id.* Petitioner's symptoms had been getting gradually worse. *Id.* Ice wraps, Aleve and ibuprofen at this point were providing only minimal benefit. *Id.* Ms. Naughton's examination showed tenderness to palpation over the left epicondyle, pain with resisted forearm supination and resisted wrist extension, positive Tinel's sign, and positive elbow flexion test. *Id.* Petitioner's wrist examination was normal. *Id.* Ms. Naughton recommended right upper extremity nerve conduction studies, and these were done on November 29, 2017, by Dr. Becker and showed mild median neuropathy at the right wrist and mild ulnar neuropathy at the elbow. *Id.*; (PX5, 11/29/17) Following these tests, Petitioner filed his second Application for Adjustment of Claim (AX2A)

On December 8, 2017, Petitioner was evaluated by Ms. Naughton again. (PX5, 12/8/17) She noted that Petitioner had sustained no new injuries and was trying conservative treatment with no benefit. *Id.* She noted the new EMG and nerve conduction studies showed mild-to-moderate carpal and cubital tunnel syndrome, and recommended further treatment in the form of surgery. *Id.* Petitioner tried to have surgery and testified at Arbitration as follows:

Q. . . . Did you try to get it done through worker's comp?

A. Yes, sir.

Q. Did they deny it?

A. Yes, sir.

Q. Did you try to then get it done through your regular health insurance?

A. Yes, sir.

Q. Did they deny it?

A. Yes, sir.

Q. So, what did you do next?

A. I called you. (T.23)

Having had both his group health insurance deny it because they believed it was a work-related claim and workers' compensation because they believed it was a health-related claim, Petitioner sought advice from an attorney, who referred Petitioner to Dr. Shawn Kutnik, a board-certified orthopedic hand specialist. (T.23-24)

Dr. Kutnik saw Petitioner on January 24, 2018, took the history of the traumatic injury, and also noted that Petitioner had worked for the Illinois Department of Corrections for over 20 years. (PX6, 1/24/18) He further noted that Petitioner's job involved constant hand-intensive work in terms locking and unlocking heavy doors, as well as restraining or directing inmates to route. *Id.* He noted that Petitioner had no comorbid risk factors for the development of bilateral compression neuropathies. *Id.* Dr. Kutnik's examination showed absent sensation in the ulnar nerve distribution on the left, clearly provocative testing at the elbows including Tinel's and elbow flexion compression testing, and positive Tinel's to both wrists with discomfort on Phalen's and Durkin's compression testing but with full range of motion of the fingers. *Id.* He reviewed the electrodiagnostic studies and believed them to be consistent with mild right carpal tunnel and cubital tunnel syndrome. *Id.* He did not have the results on the left upper extremity; however, Petitioner told him the findings were identical. *Id.* Dr. Kutnik's diagnosis was bilateral carpal tunnel syndrome and bilateral ulnar nerve lesions. *Id.* The assessment was bilateral carpal and cubital tunnel syndromes. *Id.*

Dr. Kutnik believed that Petitioner had a 25-year-history of full time hand-intensive work at Respondent's various correctional facilities, and in addition, sustained a clear injury to the arms prior to the onset of severe numbness. *Id.* He noted that while Petitioner had a mildly elevated BMI of 34, Petitioner's contributing factors of his work activities combined with the contemporaneous traumatic injury represented a causal relationship to his underlying carpal and cubital tunnel syndromes. *Id.* Dr. Kutnik recommended surgery. *Id.*

Dr. Kutnik operated on Petitioner's left arm on February 9, 2018, in the form of carpal and cubital tunnel releases with an identical procedure performed on the right on March 23, 2018. (PX7, 2/9/18, 3/23/18) Following surgery, Dr. Kutnik recommended a brief period of physical therapy, which was done at Phoenix Physical Therapy in Vandalia from May 3, 2018, to June 2, 2018. (PX8) On his last note of June 13, 2018, Dr. Kutnik encouraged

Petitioner to finish his physical therapy, advised him he could return to work, and discharged him from care. (PX6, 6/13/18)

Dr. Kutnik also testified by way of deposition. (PX10) He is a board-certified orthopedic surgeon who specializes in hand surgery and has an added certificate in same. (PX10, p.4-5) He testified that Petitioner had objective positive symptoms during clinical examination and electrodiagnostic studies, and in his opinion Petitioner had bilateral carpal and cubital tunnel syndrome. *Id.* at 7. Outside of Petitioner's work activities, the only other risk factor which he possessed was a mildly elevated BMI. *Id.* at 8. He testified that Petitioner's post-operative results were excellent, and Petitioner had significantly less pain with minimal numbness and tingling. *Id.* at 11-13. He reviewed Petitioner's job description (PX11) and knew Petitioner had a very hand-intensive job. *Id.* at 13-14. He also viewed a job description from the Illinois Department of Central Management Services, but testified it didn't give him much information. *Id.* at 15. Specifically, he stated it gave him no amounts of any relation to the physical demands of Petitioner's work. *Id.* at 15. Dr. Kutnik stated it was his opinion that Petitioner's 25 years of work for Respondent's correctional facilities and the traumatic injury of July 31, 2017, when both of his arms were forcibly pulled into a chuckhole, were the cause of his injury and need for treatment including surgery. *Id.* at 16, 19-20.

Respondent had Petitioner examined by Dr. Anthony Sudekum, who reviewed the medical records detailed in his report, which was admitted into evidence. (RX1) Dr. Sudekum acknowledged Petitioner underwent staged bilateral open carpal tunnel and cubital tunnel releases with significant improvement. *Id.* He noted that if Petitioner overused his hands, he experiences some aching and had shooting pain if he bumped the scar area. *Id.* There was also mild tenderness in the right palmar scar and slight lingering intermittent tingling in his bilateral ring and small fingers, which was relieved by repositioning his arms. *Id.* Dr. Sudekum's examination demonstrated no swelling, well-healed surgical incisions, no atrophy, and full range of motion with normal grip and pinch strength. *Id.* Tinel's sign was negative on the right wrist, but still positive on the left wrist. *Id.* Phalen's sign was positive bilaterally over the elbows for some fifth finger numbness, and elbow Tinel's signs were still positive bilaterally. *Id.* Elbow Phalen's test was negative on the right and positive on the left for left fifth finger numbness. *Id.* It is noted that Dr. Sudekum's examination findings correlated with Petitioner's testimony at Arbitration about his remaining symptoms. *Id.* Dr. Sudekum noted that Petitioner was friendly and cooperative during the examination. *Id.*

Dr. Sudekum believed that Petitioner's records indicated some inconsistencies and evolving descriptions of his upper extremity symptoms that were related to the injury. *Id.* He noted that Dr. Billington, Petitioner's family physician, evaluated Petitioner for right wrist pain caused by right wrist trauma during an altercation with an inmate, but did not mention that Petitioner's left wrist pain began shortly thereafter when he woke up the next morning. *Id.* Dr. Sudekum's opinion was that the injury on July 31, 2017, may have served to aggravate Petitioner's mild right carpal tunnel syndrome, but he did not believe it served to cause or aggravate his left carpal tunnel or cubital tunnel syndrome on either side. *Id.* He also believed that Petitioner's treatment with Dr. Kutnik was aggressive and based heavily on the reported subjective symptoms provided by Petitioner. *Id.*

Petitioner testified at Arbitration that despite the improvement from surgery and physical therapy, he continues to have residual symptoms. (T.26) He continues to have aching and tenderness in the palms of his hands, which in turn has reduced his grip strength. (T.26) He also testified to continued tenderness in his elbows,

and if he has a very busy day at work, they "will still be just as sore as before." (T.27) He also testified that he has to be very careful so as not to bump his elbows at work. (T.27) He takes two to four Aleve or Naproxen in the evening, depending on the severity of his symptoms, for relief. (T.27)

Respondent did not request an impairment rating.

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?

Respondent agrees that Petitioner sustained a compensable injury on July 31, 2017, but disputes the October 31, 2017 accident related to repetitive trauma. (AX1) As issues of accident and causal connection in repetitive trauma cases are often inseverably intertwined, the Arbitrator addresses these issues as one. *Edwin Doty v. State of Illinois, Big Muddy River Corr. Ctr.*, 15 I.W.C.C. 0817 (2015).

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. Indus. Commission*, 128 N.E.2d 718, 720 (Ill. 1955); *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (Ill. 1982). 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).

Petitioner's injuries are a hybrid type injury of both traumatic and repetitive origin. Although Petitioner candidly testified that he experienced symptoms of compression neuropathy prior to July 31, 2017, his symptoms were aggravated by that incident to the point where he required significant treatment. (T.14-15, 20-21) The undisputed evidence shows that Petitioner's right and left upper extremities were yanked into the chuckholes all the way up to his elbows, as corroborated by witnesses. (PX12) Petitioner testified that both his arms were pulled through the chuckhole, and 3 of the 5 witness statements corroborate with specificity that his hands *and his arms* were pulled in. (T.17-18; PX12) Although Petitioner initially only believed that his right upper extremity was injured, the very first time Petitioner sought medical care and treatment, which was the very next day following the injury, Petitioner's history was consistent and he complained of left upper extremity pain. (PX3, 8/1/17). Petitioner thereafter underwent diagnostic studies, which were positive for compression neuropathy bilaterally over both the ulnar and median nerves; and was referred to Dr. Kutnik, who diagnosed bilateral carpal and cubital tunnel syndromes. (PX5; PX6) The record is void of any significant contributing factors in the form of non-work-related provocative activities or comorbid bodily risk factors.

Petitioner also credibly testified to performing hand-and-arm intensive repetitive activities for Respondent over the course of 26 years as both a Correctional Officer and Correctional Lieutenant. (T.11-17; PX11) The Commission has found on many occasions that the duties of a Correctional Officer and/or Lieutenant are very similar and both contribute to the development of compression neuropathies. *See e.g. Webb v. SOI/Pinckneyville*

Corr. Ctr., 14 I.W.C.C. 0496 (2014); *Knopp v. SOI/Menard Corr. Ctr.*, 14 I.W.C.C. 0303 (2014) (wherein claimants' duties as officers and lieutenants were deemed injuriously causative or contributory to compression neuropathy); and *Carson Winters v. SOI/Menard Corr. Ctr.*, 17 I.W.C.C. 0629 (2017); *Matthew Mason v. SOI/Pinckneyville Corr. Ctr.*, 17 I.W.C.C. 0630 (2017); *Bryon Lawrence v. Pinckneyville Corr. Ctr.*, 16 I.W.C.C. 0247 (2016) (wherein correctional officer's duties as a wing officer of segregation officer were deemed injuriously causative or contributory to compression neuropathy).

Dr. Kutnik credibly opined that Petitioner's 25 years of work for Respondent's correctional facilities and the traumatic injury of July 31, 2017, when both of his arms were forcibly pulled into a chuckhole, were the cause of his injury and need for treatment including surgery. (PX10, p.16, 19-20) On the other hand, Dr. Sudekum either ignored or was unaware of the fact that both Petitioner's arms and elbows were injured during the undisputed traumatic injury of July 31, 2017, and he offered no credible explanation for Petitioner's development of these conditions. (PX10) Given the irrefutable facts, Dr. Sudekum's opinion that Petitioner's right-sided wrist condition is causally related, but not the conditions in his right elbow and left wrist and elbow, strains credulity. The Arbitrator therefore defers to the opinion of Dr. Kutnik and finds that Petitioner successfully proved that he sustained compensable injuries to his bilateral arms and hands.

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?

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (2001).

Given the above findings as to causal connection, the Arbitrator finds that the medical treatment rendered to Petitioner has been reasonable and necessary in the quest to cure Petitioner of the effects of his work-related injuries. In addition to Dr. Kutnik's testimony establishing the reasonableness and necessity of Petitioner's care and treatment, the Arbitrator notes that Petitioner testified to significant improvement following surgery, although he continues to have some symptoms. (T.26-27; PX10, 16, 19-20) This was corroborated by Dr. Sudekum's own physical examination findings during his evaluation. (RX1) Given this evidence, the Arbitrator is not persuaded by Dr. Sudekum's opinion that Petitioner's care and treatment was aggressive or excessive.

Respondent is therefore ordered to pay the medical expenses contained in Petitioner's group exhibit 1 and shall have credit for any amounts paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

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

The law in Illinois holds that "[a]n employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit." *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill. 1990).

The ability to do light or restricted work does not preclude a finding of temporary total disability. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill., 1990) citing *Ford Motor Co. v. Industrial Comm'n*, 126 Ill.App.3d 739, 743, 467 N.E.2d 1018, 81 Ill.Dec. 896 (1984).

Respondent agreed to Petitioner's claimed period of temporary total disability, but disputed liability for benefits. Given the above findings regarding accident, causal connection, and the reasonableness of Petitioner's care and treatment, Respondent is hereby ordered to pay the stipulated 17 5/7 weeks of temporary total disability benefits, for Petitioner's disability beginning on February 9, 2018, the date of his first surgery, through June 13, 2018, when he was released by Dr. Kutnik. (PX6)

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) 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. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation**: Petitioner continues to serve as a Correctional Lieutenant performing the same intensive activities that caused his injury. (T.26) Given the high likelihood of re-injury and Petitioner's current complaints provoked by his job activities (T.27), the Arbitrator places significant weight on this factor.

(iii) **Age**: Petitioner was 48 years old at the time of his injury. He is young and must live and work with his disability for an extended number of years. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact that Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time), the Arbitrator places greater weight on this factor.

(iv) **Earning Capacity**: There is no direct evidence of reduced earning capacity contained in the record. The Arbitrator gives no weight to this factor.

(v) **Disability**: As a result of his traumatic work accident and his intensive and repetitive job activities, Petitioner sustained a traumatic onset of bilateral carpal tunnel and cubital tunnel syndromes that required surgical intervention at both the median and ulnar nerves bilaterally. (PX3; PX5; PX6) Petitioner testified at Arbitration that despite the improvement from surgery and physical therapy, he continues to have residual symptoms. (T.26) He continues to have aching and tenderness in the palms of his hands, which in turn has reduced his grip strength. (T.26) He also testified to continued tenderness in his elbows, and if he has a very busy day at work, they "will still be just as sore as before." (T.27) He also testified that he has to be very careful so as not to bump his elbows at work. (T.27) He takes two to four Aleve or Naproxen in the evening, depending on the severity of his symptoms, for relief. (T.27)

Petitioner's testimony is entirely consistent with the medical records and the examination findings during the examination of Respondent's IME physician. Based upon the foregoing, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in the 12.5% loss of each hand and the 17.5% loss of each arm.

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

CHERYL REID-MARTINEZ,

Petitioner,

vs. NO: 17 WC 21254

UNITED AIRLINES, INC.,

20IWCC0280

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 (TTD) benefits, permanent partial disability (PPD) benefits, and 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 July 24, 2019 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $1,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: MAY 18 2020

O: 5/6/2020
DDM/pm
052

Stephen J. Mathis

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

DISSENT

I dissent from the Majority's decision and instead find that Petitioner's current condition of ill-being as it relates to her low back is causally related to the July 12, 2016 work accident. I affirm the Arbitrator's Decision with respect to Petitioner's neck injury.

I find that Petitioner's position with respect to causal connection for her low back injury is supported by the record. Petitioner testified credibly that she did not have problems with her back before the accident, she never received any medical care or treatment for her back, and her back complaints started immediately after the July 2016 work accident. Following Petitioner's last visit to the company clinic on September 22, 2016, the next visit to the United Airlines Health Clinic for the low back was June 24, 2017 – nearly a year after the accident. The handwritten record from the company clinic noted the July 2016 date of injury and indicated that Petitioner's back "hurts all the time," and that the pain had become chronic since the in-flight injury. The medical record detailed Petitioner's report of pain which she attributed to the July 2016 accident. The medical record further stated that Petitioner's lower back pain was "off and on." These same complaints, attributed to the same mechanism of injury, with the same intermittent nature were noted again in the June 26, 2017 medical record from United Airlines Health Clinic.

From the time Petitioner stopped treatment with the company clinic in September 2016 to the time she returned in June 2017, Petitioner had returned to her regular duties with Respondent and continued to follow-up with the office of her primary care physician. Visits to her primary care physician on September 20, 2016 and February 27, 2017 noted occasional or intermittent low back pain following the July 2016 fall. By July 18, 2017, when Petitioner consulted with her treating physician, Dr. Wilson, and his physician assistant, Ms. Sullivan, Petitioner's report of pain was now described as sharp, intermittent pain across the low back which had been occurring for the past two months. Dr. Wilson sent Petitioner to physical therapy at Results Physiotherapy. The initial therapy evaluation, dated July 25, 2017, stated that Petitioner had been experiencing low back pain for one year, but that the pain had progressed over the past two months with no MOI – or new injury.

I find that the preponderance of the evidence, including Petitioner's testimony and the medical records, support a finding of causal connection for Petitioner's low back condition. Any significant gap in treatment was at most five months and should not sever causal connection, especially in consideration that the evidence repeatedly and consistently stated that her low back complaints were "off and on" or intermittent. There was also no evidence of any subsequent or intervening injury that could sever causal connection. The only thing that Petitioner and the medical evidence referred to as the onset of Petitioner's low back pain was the July 2016 work-related accident. Furthermore, Petitioner provided unrebutted testimony for any inconsistency alleged in the record.

The Arbitrator had relied, in part, on Respondent's Section 12 examiner, Dr. Mather, who opined that Petitioner sustained a lumbar strain as a result of the July 2016 accident. However, he did not believe Petitioner sustained any aggravation of the spondylolisthesis that he saw on the x-rays he took at the Section 12 examination. The basis for his opinion was that if Petitioner had any aggravation of the spondylolisthesis, she would not be experiencing intermittent pain. Dr. Mather acknowledged, however, that Petitioner had underlying preexisting, degenerative disc disease that was giving her flare-up pain. Petitioner's September 9, 2017 MRI demonstrated mild degenerative disc disease, facet arthropathy, and mild foraminal narrowing from L2 to S1. By Petitioner's last visit with Dr. Wilson on February 6, 2019, she was still complaining of persistent, fluctuating low back pain. Dr. Wilson's diagnoses on this date were chronic bilateral low back pain without sciatica, spondylosis of lumbar region without myelopathy or radiculopathy, and degeneration of the lumbar or lumbosacral disc. Dr. Wilson stated in the medical record that he suspected Petitioner's pain was predominately facet mediated given Petitioner's previous responses to intra-articular facet injections and medial branch blocks. "Unfortunately, she did not seem to have very significant lasting improvement following radiofrequency ablation. It is conceivable that she may have a discogenic component as well given the degenerative changes at L3-4 and L4-5." (PX3).

By both Dr. Mather's and Dr. Wilson's statements, Petitioner may not have aggravated her spondylolisthesis condition, but the MRI of the lumbar spine noted other mild to moderate degenerative disc conditions, facet arthropathy, and foraminal narrowing at various levels. Drs. Mather and Wilson both acknowledged that these degenerative conditions were involved in Petitioner's chronic, flare-up pain. This together with the chain of events, including no prior history of injury, complaints, or treatment for the low back, the inciting event, the change in work status, no subsequent or intervening injury, and the steady progression in treatment recommendations, I find support for a finding of causal connection.

Therefore, I would find that Petitioner's current condition of ill-being as it relates to her low back is causally related to the July 12, 2016 work accident and would award the reasonable, necessary, and causally related medical bills as set forth in Petitioner's Exhibit 5. I would also award the requested TTD benefits from July 24, 2017 through December 15, 2017 as that TTD period is supported by the evidence. I would further modify the Arbitrator's findings for the fifth factor under Section 8.1b of the Act. I would afford the fifth factor greater weight as Petitioner suffered more than a lumbar strain as the result of the July 12, 2016 work accident; she in fact aggravated certain pre-existing conditions which have caused her current low back problems. Petitioner has sought relief by way of physical therapy, injections, and a radiofrequency ablation. She testified that she had to be careful when lifting, bending, or stooping because it was painful. She also had difficulty with long distances and had to take breaks; daily activities also caused pain. Accordingly, I would increase the PPD award to five-percent (5%) loss of use of the person as a whole.

For the foregoing reasons, I respectfully dissent from the Majority's decision.

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

REID-MARTINEZ, CHERYL
Employee/Petitioner

Case# **17WC021254**

UNITED AIRLINES INC
Employer/Respondent

20IWCC0280

On 7/24/2019, 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 2.01% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0560 WIEDNER & McAULIFFE LTD
KAREN E COON
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

19IWCC0280

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

CHERYL REID-MARTINEZ
Employee/Petitioner

v.

UNITED AIRLINES, INC.
Employer/Respondent

Case # **17** WC **21254**

Consolidated cases: _____

19IWCC0280

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 **05-08-2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **07-12-2016**, 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 $**37,803.48**; the average weekly wage was $**726.99**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **1** dependent children.

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

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

Respondent shall be given a credit of $**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 $**6,080.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability payments of $ 436.19 per week for 17.5 weeks, because the injuries sustained caused 3.5% loss of a person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay no temporary total disability benefits on this claim.

Respondent is not responsible for medical treatment after 09-22-2016.

Respondent is not liable for penalties on this matter.

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

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

Signature of Arbitrator

07-23-19
Date

JUL 24 2019

20IWCC0280

FINDINGS OF FACT:

The petitioner is a flight attendant who has been employed with United Airlines for approximately 23 years. (T. 9) She alleges that on July 12, 2016, she suffered injuries while working the beverage cart when the plane hit turbulence. The petitioner testified that "We had an accident where we experienced clear air turbulence, and I fell. I fell on my behind. I went back. I snapped my neck. I hit my head and back. It was a matter of seconds." (T. 11)

The petitioner did not immediately seek medical attention. In fact, she waited over three weeks until she was seen at United's Health Clinic at Newark Airport on August 5, 2016 for back and neck pain. (PX #1) On the initial intake form, the petitioner reported that she fell on the aircraft during turbulence on July 13, 2016. Despite this, it is specifically noted in the records that the patient "doesn't wish to claim OJI", which the arbitrator understands to mean an "on the job injury," further, she stated that the pain fluctuates…sometimes not present and sometimes wakes her up from sleep." (Id.) On examination, a lumbar x-ray was normal while the cervical x-ray showed chronic degenerative and hypertrophic changes at C5-C6 with associated disc space narrowing. She was diagnosed with a neck strain and lumbar contusion. She was given ibuprofen and flexeril. She denied taking any other medications.

At trial, petitioner stated that prior to the occurrence she had "no pain whatsoever," but this testimony is contradicted by the medical records of her primary care Dr. Chatterjee, (Raleigh, NC) which states she was regularly prescribed 800 mg. of ibuprofen at her appointments before the accident. (PX #2)

In any event, petitioner continued to work and did not seek additional medical attention for another seven weeks, when she visited her primary care physician in North Carolina, Dr. Chatterjee, on September 20, 2016 for left lower quadrant (abdominal) pain over the last two weeks. (PX #2) The medical record does mention that the petitioner had fallen at work in July of 2016 and still had "occasional low back pain," and a lumbar x-ray was performed, which was normal. However, the focus of this visit was abdominal (lower quadrant) pain. (PX #2)

Two days later, Petitioner decided to visit United Airlines Health Clinic at Newark Airport on September 22, 2016 for a follow up of her neck and back pain status post fall. (PX #1) The handwritten notes are difficult to decipher. Nevertheless, she reported "2-3 out of 10 back pain," she was re-diagnosed with strains, she denied paresthesia and there was no radiculopathy. Petitioner was prescribed meloxicam, a medication usually given for arthritis. Physical therapy was not prescribed, but to be considered in the future. (PX #1)

On February 27, 2017, petitioner saw Dr. Benu Chatterjee, who was monitoring her abdominal (fibroids) condition and vitamin D deficiency. Petitioner mentioned that she still had

low back pain from the fall at work. She received no medical attention from Dr. Chatterjee for the lumbar pain and he referred her to Raleigh Orthopedic Clinic. Petitioner never followed up.

Petitioner continued to work and sought no additional medical care until June 24, 2017 with a chief complaint of "I have back pain" and rated her pain as "2 out of 10" then later "3-4." (PX #1) The pain was "on and off" and she denied any radiculopathy or numbness/tingling. This treatment date is remarkable because petitioner wished to file an on-the job-injury report and as a result, a case number was assigned to the claim "#EWR-0150005548." Additionally, a TCHS A1 Encounter Form was filled out. Petitioner reported she fell a year ago and had been working ever since but had back pain off and on. She was directed to take naproxen and diagnosed with a lumbar contusion or strain.

The arbitrator notes a nine-month treatment gap from September 22, 2016 to June 24, 2017.

Two days later, on June 26, 2017, petitioner returned to UA's Newark clinic and was provided work restrictions at that time, which limited her from lifting, standing, walking, twisting, turning or squatting due to her diagnosis of a lumbar sprain. (PX #1) Nevertheless, petitioner continued to work full duty. The petitioner was directed to perform stretches and return to the clinic on June 27, 2017 for reevaluation. Additionally, she was prescribed physical therapy three times a week for two weeks. While there is a note that the petitioner missed her follow-up appointment on June 27, 2017, she did undergo yet another x-ray of the lumbar spine which showed mild to moderate lower lumbar spondylosis and lumbar facet joint degenerative changes. There was no compression, deformity or significant disc height reduction except for mild disc height reduction at L3-L4 and minimal anterolisthesis at L4-L5. (Id.)

On July 13, 2017, the petitioner was seen by Dr. Chatterjee for what he described as chronic lumbar spondylosis and lumbar degenerative disc disease on July 13, 2017. (PX #2) She was given cyclobenzaprine (muscle relaxant) and a referred to Cary Orthopedics in Cary, North Carolina. (Id.) Petitioner never treated with Cary.

Instead, on July 17, 2017, the petitioner chose Piedmont Spine Specialists, Marie Sullivan (PA) (PX #3) There petitioner gave a two-month history of sharp intermittent pain across her low back. She also denied previous similar episodes and denied any injury which precipitated her symptoms She denied radiation of the pain into her lower extremities and denied any weakness or paresthesia. On examination, she had decreased range of motion with extension, but her neurological exam was normal. The doctor recommended conservative care including physical therapy and over-the-counter ibuprofen (800 mg) as needed. (Id.) The arbitrator notes that the ibuprofen dosage is equal to amount she was prescribed before the accident.

On July 18, 2017, Dr. Jon Wilson took the petitioner off work.

On July 21, 2017, petitioner filed an application for adjustment of claim with The Illinois Workers' Compensation Commission and stated that the accident occurred in Chicago and she had never previously filed an application with the agency. In fact, petitioner had previously filed a tinnitus claim.

Pursuant to Dr. Sullivan's prescription, petitioner underwent physical therapy at Results Physiotherapy in Raleigh, NC from July 25, 2017 through her date of discharge on November 20, 2017. (PX #4) At each visit, the notes indicate that the petitioner had had experienced low back pain for one year that "she does not believe is associated with the fall that occurred at the onset of pain". She also stated that the low back pain had progressed over the last two months with no specific MOI (mechanism of injury). On intake, petitioner reported no difficulty performing her usual work, housework or school activities on the intake form, but did have difficulty with heavy lifting. (PX #4) The arbitrator notes that there is no indication in these records that this treatment is employment related. (Id.) Further, on November 20, 2017, the petitioner was discharged from physical therapy for noncompliance. She quit showing up for appointments and did not perform her home exercise program. (Id.)

A lumbar MRI was performed on September 9, 2017 and reportedly showed a mild bulge at L2-3 with no stenosis. A mild bulge and left foraminal annular tear at L3-4 with no stenosis. Finally, mild and minimal bulges at L4-5 and L5-S1 with no stenosis. The overally impression was mild degenerative disc disease. Despite the above, a trial of lumbar zygapophyseal joint injections was recommended in addition to physical therapy. (PX #3)

The petitioner underwent bilateral L3-4 and L4-5 zygapophyseal joint injections performed November 7, 2017. Ten days later, the petitioner reported 75% pain relief since the injections and the petitioner was released to return to work effective December 1, 2017. (PX #3)

On February 19, 2018, respondent obtained a Section 12 exam (IME) with Dr. Steven Mather in Chicago, Illinois. (RX #1) Dr. Mather found that the petitioner may have sustained cervical and lumbar strains as a result of the activities on July 13, 2016, however, these contusions or sprains resolved within one-month post-injury. Relative to the contusion, she did not require further diagnostic testing or treatment and could return to work full time without restrictions as a flight attendant. Dr. Mather acknowledged that she had underlying preexisting lumbar degenerative disc disease that resulted in occasional flare-ups of pain. If the contusion at work in July 2016 had resulted in any aggravation of her spondylolisthesis, the pain would not have been absent on different occasions as related by the claimant. Additionally, the spondylolisthesis was so minor that she did not require further treatment. Dr. Mather has also indicated that facet joint injections have never been shown to be of use in evidenced-based medicine. As such, they are not medically necessary and fall outside the American Pain Society Guidelines of 2009. (RX #1)

The petitioner was seen by Dr. Jon Jay Wilson on March 13, 2018 for repeat bilateral L3-L4 and L4-L5 zygapophysial joint injections. (PX #3) When the petitioner was seen in follow up on April 25, 2018, she reported 75% relief from the injections. She rated her very mild low back pain at 1-2/10. (Id.)

The petitioner returned on May 18, 2018 with increased back pain, although her injections were only two months prior. Her pain was now interfering with her work as a flight attendant. She continued to deny radiation into her lower extremities or any weakness, paresthesia or gait disturbance. The physician assistant recommended diagnostic bilateral L3-L4 and L4-L5 medial branch blocks. It appears these were denied by her group insurance (Aetna) based on a utilization review and when the petitioner followed up on June 29, 2018, it was noted that a peer-to-peer consultation had been conducted and that the repeat injections had been denied as they exceeded the allowed limit of two injections to determine the source of pain. However, the doctor noted that the coverage would allow for radio frequency ablation at that point. As she had completed extensive physical therapy as well as oral steroids and injections, the physician assistant recommended a bilateral L2-L3 and L4 medial branch radio frequency neurotomy to provide longer lasting relief and improved function.

On August 20, 2018, the petitioner returned to Dr. Wilson to discuss the procedure. (PX #3) Petitioner had been approved radiofrequency ablation, but was somewhat hesitant to pursue it and requested to discuss alternative procedures. (PX #3) She continued to report axial low back pain which fluctuated in intensity and would become severe at times. She reported that it was constant and aching and woke her from her sleep. Dr. Wilson discussed alternative treatment consisting of core strengthening exercises and a trial of different anti-inflammatory medication. She was provided with a trial of meloxicam 15mg and was instructed to discontinue ibuprofen. She returned on September 19, 2018 to again discuss treatment options and Dr. Wilson gave her a trial of celebrex.

The petitioner underwent a left radiofrequency ablation neurotomy at L2, L3 and L4 on October 2, 2018. (PX #3) The right side was done on October 9, 2018. She subsequently followed up with her provider on November 21, 2018. While she had temporary improvement from the neurotomy, she complained of persistent pain in the low back, but no longer had pain radiating to the left hip. The doctor provided her with a new spine core strengthening exercise handout. The petitioner was also interested in physical therapy and the doctor provided a trial of celebrex. If her symptoms failed to improve, they would consider a lumbar epidural steroid injection.

The arbitrator notes that the records do no support any complaints of pain radiating to the left hip.

20IWCC0280

The petitioner had her final visit with Dr. Wilson on February 6, 2019. She had fluctuating persistent axial low back pain due to mild degenerative disc disease and facet arthropathy primarily at L3-L4 and L4-L5. The RFA had helped only very temporarily. She continued to work her regular duties as a flight attendant and was anticipating relocating to London next month. On exam, she had functional range of motion without any significant discomfort at this time. Manual muscle testing was 5/5 and sensory exam was intact. Conservative treatment was recommended.

The arbitrator notes that the Piedmont Spine/Duke University Health System records (PX #3) do not contain a history of work accident nor a causal connection statement in favor of the petitioner for the same.

CONCLUSIONS OF LAW:

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

The petitioner testified that she suffered injuries when she fell while working on an overnight flight when the plane hit turbulence. (T. 11) It was her testimony that she has never had any care or treatment for her head, neck or back before July 12, 2019. (T. 10) The medical records of the United Airlines Health Clinic when she was initially seen on August 5, 2016 also reflect that the petitioner fell on an aircraft during turbulence. Based on the petitioner's unrebutted testimony, and the corroborating medical records reflecting a consistent history of a fall during turbulence presented at the time of her first seeking treatment on August 5, 2016, the arbitrator finds that the petitioner suffered a compensable work-related accident occurring on July 12, 2016 during turbulence on a flight.

(E) Was timely notice of the accident given to respondent?

The arbitrator notes the parties' Request for Hearing form reflects that the petitioner notified her purser of the incident on the date of the occurrence. The petitioner gave several accounts of her providing notice to her employer. She testified that she told her purser about the accident within 15 minutes of the accident. (T. 13) The petitioner also testified that the purser, Mr. Prendergast, created a report and gave the petitioner a copy of the report that he filed. (T. 13) The petitioner testified that she also submitted a written report with United Airlines within 48 hours of the occurrence. (T. 12) It is unknown whether this report referenced any injury sustained by the petitioner in turbulence.

The petitioner testified that, pursuant to her union contract, she was to provide notice of work accidents to her supervisor. (T. 45) The petitioner testified that her supervisor at United was Ngozi Lush. (T. 32) While the petitioner testified that this supervisor was aware of the fact that she was off work beginning July 13, 2017 through December 16, 2017, this would not be sufficient notice as required within 45 days under the Act. (T. 32) In addition, this would not necessarily serve to provide notice to the employer that the petitioner was off work for the accident in 2016.

The petitioner's testimony was that she called and filed an 'irregular operations report' online. (T. 48) The petitioner subsequently testified that she filed a report two days later (T. 50) through a portal on Flying Together. It is unclear what this entails and if it provides information to her employer of her injury at work. She also testified that she sent Ngozi Lush an email when she got to Newark. No information was provided as to the contents of this email. She did not introduce a copy of any report, nor did she have a copy of the email allegedly sent to her supervisor. (T. 50)

The petitioner testified and the medical records reflect, that the petitioner declined to declare an on-the-job injury when the petitioner was seen at United Health Clinics for her first medical treatment on August 5, 2016. (T. 17) The petitioner testified that she did this because she would not be able to work and would not receive salary. The petitioner, however, was not authorized off work or provided any work restrictions until over a year after the occurrence. As such, these considerations are not relevant. It was not until June 24, 2017 that the petitioner finally reported an on-the-job injury to the United Airlines Clinic.

The arbitrator cannot determine whether proper notice was provided to United Airlines. While certainly they were aware that there was an issue of turbulence on the flight on July 12, 2016, there is no evidence that United was made aware that the petitioner suffered an injury in that occurrence. The Request for Hearing form indicates the petitioner's notice of her accident was given to her purser on the date of the occurrence. It is questionable whether such notice would be valid under Section 6(c). She testified that she informed Ngozi Lush a month or two later. (T. 54-55) The arbitrator therefore finds, more likely than not, the petitioner proved proper notice of was provided to the employer.

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

Although the arbitrator finds the petitioner has substantiated a fall during turbulence on July 12, 2016, following the work accident, the petitioner did not seek any medical treatment for three weeks. At the time she was seen, August 5, 2016, she was diagnosed with a neck strain and lumbar contusion. She also saw her primary care physician, Dr. Chatterjee, seven weeks later on September 20, 2016. While she did report the work accident, this visit was for a number

of other unrelated issues in addition to low back pain. The petitioner was seen once more at United Airlines Health Clinic in Newark Airport on September 22, 2016. At this visit, she was diagnosed with neck and back strains and was given meloxicam, an arthritis medication.

The remaining tendered medical records do not appear to be related to the work accident. When the petitioner began treating with Piedmont Spine Specialists on July 17, 2017, she did not report the work accident or even symptoms beginning around the time of the alleged work accident. She instead reported a two-month history of sharp intermittent pain across her low back. She specifically denied any similar episodes and denied any injury which precipitated her symptoms. The petitioner testified also that this was correct. (T. 51-52)

The Results Physiotherapy records also fail to reflect symptoms related to the work accident. Instead, these records indicate at each and every visit that the petitioner did not believe her condition was associated with the prior fall. She instead again reported, consistent with her reports to Piedmont Spine, that she had back pain which had progressed over the last two months with no specific MOI (mechanism of injury). The arbitrator also notes that the initial patient medical history form signed by the petitioner answers a question as to whether the injury is work-related in the negative.

There is no indication in any of the medical records from Results Physiotherapy or Piedmont Spine Specialists that the petitioner's condition of ill-being for which they were providing treatment is causally related to the accident at work in July 2016.

The only medical opinion addressing causation for the petitioner's treatment in 2017 and 2018 which was introduced into evidence is that of Dr. Steven Mather. (RX #1) The respondent introduced into evidence the IME report which reflects the treatment is not causally related to the employment. Dr. Mather found that any contusions or sprains from the work-related fall would have resolved within a month post-injury. The petitioner had underlying lumbar degenerative disc disease, including spondylolisthesis, which was so minor she did not require further treatment. He noted if the contusion or sprain had resulted in any aggravation of her spondylolisthesis, the pain would not have been absent on different occasions as was related by the petitioner.

The arbitrator finds that the petitioner has failed to prove that her current condition of ill-being at the time of trial was causally related to the work accident of July 12, 2016. There is no medical evidence to support such an allegation since there are significant gaps in medical treatment. Likewise, petitioner's own statements to her doctors' indicate that her current condition of ill-being is unrelated to the turbulent fall. The weight of the evidence supports new symptoms two months prior initially treating with with Piedmont Spine on July 17, 2017. This is a full year after the work accident. The arbitrator finds that the petitioner's contusions and sprains sustained in the fall during turbulence on July 12, 2016 resolved shortly thereafter and

the medical treatment in 2017 and 2018 was unrelated to this occurrence. Her condition of ill-being at the time of trial is unrelated to the work accident in 2016.

(J) Were the medical services that were provided to petitioner reasonable and necessary? Has respondent paid all appropriate charges for all reasonable and necessary medical services?

Based on the above determination on the issue of causation, the respondent is liable only for the initial medical treatment rendered in 2016. The treatment in 2017 and 2018 is not causally related to the work accident. The arbitrator notes that the outstanding submitted medical bills are for treatment after the petitioner reached maximum medical improvement from any strains or contusions because of the work-related injury. The remaining medical treatment was unrelated to the work related injury, and as such, the respondent has already paid all reasonable and necessary medical services related to the work accident.

(K) What temporary total disability benefits are in dispute?

The petitioner alleges an entitlement TTD benefits beginning July 18, 2017 and continuing through December 16, 2017. The claimed period of TTD starts over a year after the work accident. As is discussed above, the arbitrator has found the petitioner's condition of ill-being related to the work accident reached maximum medical improvement well prior to that date. In contrast, the petitioner reported to her physical therapist on July 25, 2017 that she had "no difficulty performing her usual work, housework or school activities." (PX #4) She had no difficulty bending or stooping. (Id.) As such, no TTD benefits are awarded on the claim.

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

The arbitrator finds that the petitioner suffered a lumbar and cervical strain as a result of the fall, which required two medical visits and no lost time from work. The arbitrator notes that with regard to subsection (i) of §8.1b(b), there was no AMA impairment rating introduced. With respect to the second (ii) and third factors (iii), the petitioner is a flight attendant whose job involves a number of physical functions, including lifting luggage and items into overhead bins, and pushing carts loaded with food and beverages. The petitioner was 50 years old at the time of the occurrence. The arbitrator therefore affords some weight to these factors. There was no evidence of her future earning capacity (iv) introduced; therefore, this is not considered. With respect to the fifth factor (v) of evidence of disability corroborated by the treating medical records, the arbitrator notes that the petitioner's condition of ill-being at the time of the trial was

unrelated to the work accident. Therefore, only minimal weight can be afforded this factor. Having considered the foregoing, the arbitrator estimates a partial disablement to the extent of 3.5% loss of use of the person-as-a-whole.

(M) Should penalties or fees be imposed upon respondent?

This claim involves disputed issues of fact. The petitioner did not initially report the work accident and had only very minimal treatment for the work related treatment. Petitioner was never a surgical candidate. In fact, she did not undergo physical therapy until a year after the occurrence. The lumbar MRI was not prescribed for an extended period of time because she had no radicular complaints. Likewise, for extended time periods, petitioner did not actively pursue medical treatment. She was discharged from physical therapy for non-compliance. She gave contradictory information to her treaters. At times, she sought treatment only when it was convenient (e.g. Newark). Additionally, petitioner produced no medical opinion that her current condition is causally related to the employment accident. In contrast, the only medical opinion in the record regarding causation is respondent's IME with Dr. Mather, who stated her condition is <u>not</u> work related. As such it was reasonable for respondent to rely upon it. As such, there is no basis for an award of penalties or attorneys' fees.

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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Roger Morrison,

Petitioner,

vs. NO: 13 WC 33757

John Boos & Company,

Respondent.

20IWCC0281

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, notice, temporary total disability, medical expenses, permanent partial disability, §16 penalties/attorney fees, and other-evidentiary issues, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 5, 2019 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.

20IWCC0281

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: MAY 18 2020
o-5/5/20
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MORRISON, ROGER
Employee/Petitioner

Case# **13WC033757**

JOHN BOOS & CO
Employer/Respondent

20IWCC0281

On 11/5/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% 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
CHRISTOPHER MOSE
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

1337 KNELL LAW LLC
LLIR LMERI
504 FAYETTE ST
PEORIA, IL 61603

20IWCC0281

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

Roger Morrison
Employee/Petitioner

v.

John Boos & Co.
Employer/Respondent

Case # 13 WC 33757

Consolidated cases: n/a

20IWCC0281

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 Mt. Vernon, on September 5, 2019. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On May 17, 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 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 $35,489.48; the average weekly wage was $682.49.

On the date of accident, Petitioner was 57 years of age, single 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 $41,176.61 paid under Section 8(j) of the Act.

ORDER

Based upon the Conclusion 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

November 2, 2019
Date

NOV - 5 2019

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained a repetitive trauma injury arising out of and in the course of his employment by Respondent. The Application alleged Petitioner sustained an injury to his "Upper back and neck, low back" as a result of "Repetitive lifting" which manifested itself on May 20, 2013 (Arbitrator's Exhibit 2). Petitioner's counsel also filed a Petition for Section 16 Attorneys' Fees. Respondent disputed liability on the basis of accident, notice and causal relationship (Arbitrator's Exhibit 1). At trial, Petitioner's counsel made an oral motion to amend the date of accident (manifestation) alleged in the Application to May 17, 2013. Respondent's counsel had no objection and the motion was granted by the Arbitrator. The date of accident (manifestation) was changed on the Application to May 17, 2013 (Arbitrator's Exhibit 2).

Petitioner began working for Respondent in 2001 and was a hot press operator. Respondent was in the business of making butcher block table tops. As a hot press operator, Petitioner would take pieces of wood and fuse them together in a hot press to make butcher block table tops. Petitioner first pulled a wagon which was loaded with pieces of wood, known as rails, which were about one and one-half inches wide, up to the hot press. Petitioner then took them off the rails, one at a time, and ran them through glue rollers. Once the rails had gone through the glue rollers, Petitioner would have to push them into the hot press. The hot press would fuse the pieces of wood into a butcher block table top which would come out of the other end of the hot press. When the finished table top came out of the hot press, Petitioner would load the completed tabletop onto another wagon.

An airlift was used to assist Petitioner in lifting/moving the completed butcher block. Petitioner was not required to actually lift the butcher block himself. Further, Petitioner had the assistance of another employee to help him perform his job. At trial, Petitioner confirmed there was another employee at his workstation.

Petitioner testified the tabletops were approximately one and one-half inches thick, 30 to 36 inches wide and 24 inches long, but they could vary in size, up to 50 inches wide and 50 inches long. Petitioner did not know how much the finished tabletops weighed or how heavy the wagon full of wood was; however, he said it typically required two people to push/pull the wagon.

Petitioner testified the process of pushing the rails into the hot press required bending/twisting, but did not require a lot of exertion. The process of pulling the tabletop out of the hot press also required little exertion except on the occasions when a tabletop would get wedged in the hot press. When this occurred, Petitioner would have to pull on the tabletop to remove it from the hot press.

At trial, Petitioner did not testify as to how he injured either his neck or low back at work. Petitioner did state that he had requested assistance in pulling the wagon because his back was hurting, but he could not recall when that occurred. Petitioner did state that he had not injured his back, but thought he had injured his hip.

In regard to his neck, Petitioner testified he had not injured his neck at work. Further, Petitioner said nothing he did at work aggravated or caused him to have neck symptoms.

As noted herein, the Amended Application alleged that Petitioner's repetitive trauma injury manifested itself on May 17, 2013. At trial, Petitioner could not provide any information as to how or why the injury manifested itself on that date.

Petitioner testified he told Shawn Hammond, his foreman, that he had sustained a work-related injury; however, he could not recall when he had this conversation with Hammond. On cross-examination, Petitioner said he had informed Hammond his back hurt after pulling a load of wood, but he never told Hammond he had sustained a work-related injury.

Petitioner testified that in June, 2013, he told Rayna Bissey, Respondent's HR Director, that he was going to undergo surgery, but he did not recall if he informed her that it was because of a work-related injury. Petitioner also stated he informed Jacob Emmerich, the Plant Supervisor, that his back was hurting, but did not inform him that it was because of a work-related accident.

Claudia Moran, Petitioner's girlfriend testified for Petitioner at trial. Moran knew very little about the details of Petitioner's claim, only that surgery had been recommended.

Margie Herr and her husband, William Herr, testified for Respondent at trial. They are both employed by Respondent and know Petitioner. They both testified they had a conversation with Petitioner sometime in November, 2013, at the bar at the American Legion and Petitioner informed them that he had a back condition, but that it was not work-related. They both testified Moran was not present during the conversation with Petitioner.

Tim Idleman testified for Respondent at trial. Idleman was Respondent's Quality/Safety Manager and dealt with work-related injuries sustained by Respondent's employees. He stated there was no report that Petitioner that he had sustained a work-related injury.

Jacob Emmerich testified for Respondent at trial. Emmerich was Petitioner's supervisor in 2013. He stated he did not recall Petitioner complaining of back pain or reporting a work-related injury to him in 2013.

Rayna Bissey, Respondent's HR Director testified for Respondent at trial. Part of Bissey's duties was dealing with workers' compensation claims. Bissey stated that Petitioner did not report having sustained a work-related injury in May/June, 2013. The first time she became aware of the fact Petitioner was claiming to have sustained a work-related injury was in October, 2013, which she received notice Petitioner had filed an Application for Adjustment of Claim.

Bissey also dealt with FMLA claims and stated that sometime in June/July, 2013, she had a conversation with Petitioner and he informed her that he needed to be off work because of a back problem. Petitioner did not inform Bissey his back problem was work-related so she provided him with FMLA paperwork.

Bissey testified Petitioner's employment was terminated in August, 2013, because he had used all of his available FMLA leave. She also stated Petitioner had filed workers' compensation claims with Respondent in the past as well as an FMLA claim because of back issues.

Medical records regarding treatment Petitioner received for back symptoms prior to the alleged date of manifestation were received into evidence. Petitioner was previously treated at the Bonutti Clinic from April 11, 2007, through July 16, 2007, for left hip, back and leg pain. An MRI performed on June 13, 2007, revealed disc protrusions and osteophyte complexes at multiple levels of the lumbar spine. On July 5, 2007, Petitioner underwent an epidural steroid injection at L5-S1 (Petitioner's Exhibit 6).

Petitioner was seen in the ER of St. Anthony's Hospital on August 12, 2010, because of low back pain. At that time, Petitioner gave a history that he fell in his bathtub and struck his back on a faucet. Petitioner was diagnosed with a small bruise and discharged (Respondent's Exhibit 16).

Petitioner was again seen in the ER of St. Anthony's Hospital on December 6, 2011, for chronic back pain and a number of other health issues. Petitioner stated his chronic back pain was "long standing" and worse at night time. He was diagnosed with osteoarthritis of the spine. X-rays were taken of the lumbar spine which revealed disc degenerative changes at multiple levels (Petitioner's Exhibit 7; Respondent's Exhibit 17).

On February 29, 2012, Petitioner was evaluated by Dr. Jeffrey Jenson, primarily for leg and arm problems. He was noted Petitioner had a history of cancer of the head and neck (Petitioner's Exhibit 8).

From March 9, 2012, through October 1, 2012, Petitioner was treated by Dr. Lawrence Leventhal, an orthopedic surgeon, for low back and a number of other orthopedic symptoms. When seen on March 9, 2012, Petitioner advised the onset of his lumbar spine problems "began years ago" and was gradual in onset and he had experienced a recent increase in pain which was not due to any trauma. There was no reference to Petitioner's work activities and the record noted that "...etiology not entirely clear." (Petitioner's Exhibit 7).

Dr. Leventhal ordered an MRI scan which was performed on April 2, 2012. According to the radiologist, there was disc degeneration at multiple levels and a mild disc herniation at L5-S1 (Petitioner's Exhibit 7).

Dr. Leventhal last saw Petitioner on October 1, 2012, and ordered an x-ray of the lumbar spine. He noted it revealed degenerative discs and arthritis in the lumbar spine (Petitioner's Exhibit 7).

On May 13, 2013, Petitioner was seen by Dr. Jenson for neck and low back pain as well as a number of other health issues. Dr. Jenson ordered an MRI scans of both the cervical and lumbar spine (Petitioner's Exhibit 8).

MRI scans of Petitioner's cervical and lumbar spine were performed on May 17, 2013 (the date of manifestation alleged in the Amended Application). According to the radiologist, the MRI of Petitioner's cervical spine revealed multilevel disc degeneration and cord impingement, in

particular, at C4-C5, C5-C6 and C6-C7. According to the radiologist, the MRI of Petitioner's lumbar spine revealed chronic degenerative changes at multiple levels and a mild anteriolisthesis at L5-S1 (Petitioner's Exhibit 8).

Petitioner was subsequently treated by Dr. Arash Farahvar, a neurosurgeon, who initially saw Petitioner on July 10, 2013. It was noted Petitioner was experiencing neck pain with radiculopathy and Petitioner had back pain for the preceding five years, which was getting worse. There was no reference to Petitioner's job or work activities (Petitioner's Exhibit 10).

Dr. Farahvar performed surgery on July 16, 2013. The procedure consisted of laminectomies and foraminotomies with screw/rod fixation and bone grafting at C4-C5, C5-C6 and C6-C7 (Petitioner's Exhibit 10).

Dr. Farahvar continued to treat Petitioner following surgery. When he saw Petitioner on October 4, 2013, he noted Petitioner had a grade 1 spondylolisthesis in the low back and did not recommend Petitioner return to a job that required lifting anything greater than five to 15 pounds (Petitioner's Exhibit 10).

Dr. Farahvar saw Petitioner on December 19, 2013, and noted the grade 1 spondylolisthesis was chronic and degenerative and would not allow Petitioner to return to work. Again, there was no reference to Petitioner's job or work activities (Petitioner's Exhibit 10).

Dr. Farahvar again saw Petitioner on January 29, 2014, and noted Petitioner would not be able to return to work as a "butcher" because it required him to do heavy lifting. He restated his opinion Petitioner was limited to lifting five to 15 pounds because anything greater than that would likely exacerbate his problems, perhaps making it worse to where further surgery might be required (Petitioner's Exhibit 10).

At the direction of his attorney, Petitioner was examined by Dr. Jeffrey Coe, an occupational medicine specialist, on April 9, 2014. When examined by Dr. Coe, Petitioner advised him that he worked as a hot press operator and was required to move large pieces of wood in and out of the press were they were fused, and the parts weighed up to 300 pounds once totally assembled. Petitioner stated he had to continually lift, twist, load/unload and, many times, push/pull blocks of wood that got stuck in the press. Petitioner said this was particularly stressful to his upper and lower back (Petitioner's Exhibit 1; Deposition Exhibit 2).

Dr. Coe reviewed medical records provided to him by Petitioner's counsel and Petitioner complained of pain referable to both the neck and lower back. Dr. Coe opined Petitioner sustained repetitive strain injuries to his upper and lower back has a result of his job duties for Respondent which he opined aggravated and accelerated the degenerative disc disease and osteoarthritis in the cervical and lumbar spine. He also opined the cervical spine surgery was reasonable and necessary and Petitioner would also require a decompression and fusion at L5-S1. He also noted Petitioner was unable to work in any capacity at the time of his examination (Petitioner's Exhibit 1; Deposition Exhibit 2).

At the direction of Respondent, Petitioner was examined by Dr. Michael Chabot, an orthopedic surgeon, on April 28, 2014. In connection with his examination of Petitioner, Dr. Chabot reviewed an extensive amount of medical records and diagnostic studies provided to him by Respondent. At that time, Petitioner complained primarily of lower lumbar back pain which he attributed to loading/unloading tabletops while working for Respondent. Petitioner stated his symptoms started sometime before May 20, 2013, but he could not provide a specific injury (Respondent's Exhibit 12).

Dr. Chabot reviewed a job description provided to him by Respondent which included the lifting requirements. He also reviewed the report of Petitioner's Section 12 examiner, Dr. Coe. Dr. Chabot opined Petitioner had a history of chronic back pain with radiculopathy, a history of cervical and lumbar spinal stenosis, cervical disc degeneration, neck pain and a grade 1 spondylolisthesis of L5 on S1. In regard to causality, Dr. Chabot opined that Petitioner's work duties did not aggravate or exacerbate his pre-existing degenerative condition in the cervical and lumbar spine. This was based, in part, on his review of the medical records and that Petitioner's chronic degenerative condition would have progressed regardless of what activities he performed (Respondent's Exhibit 12).

Petitioner subsequently sought treatment from Dr. Farahvar for his lumbar spine condition. On August 20, 2014, Dr. Farahvar performed a decompressive laminectomy and fusion at L5-S1 with metal hardware and bone graft (Petitioner's Exhibit 10).

Following surgery, Petitioner remained under Dr. Farahvar's care. When seen on July 24, 2015, x-rays confirmed the lumbar spine was stable, but that a CT scan should be performed to ensure the fusion was solid (Petitioner's Exhibit 10).

Petitioner was seen in the ER of St. Anthony's Hospital on August 15, 2015. At that time, Petitioner advised he had moved a couch because his wallet fell behind it and he had strained his back. Petitioner was diagnosed with chronic back pain and directed to see his family physician (Petitioner's Exhibit 13).

Petitioner was again seen at St. Anthony's Hospital on August 27, 2015, because of low back pain. At that time, Petitioner underwent an epidural steroid injection at L4-L5. Petitioner subsequently underwent a second epidural steroid injection at L4-L5 on November 11, 2015 (Petitioner's Exhibit 13).

Dr. Farahvar prepared a medical report dated February 11, 2016, in which he noted Petitioner was discharged from his care at that time. He opined Petitioner could not lift anything greater than 10 or 15 pounds and has regular job usually required him to lift over 150 to 350 pounds. He noted that, because of the fusion surgeries, the restriction he imposed was permanent (Petitioner's Exhibit 10).

At the direction of Petitioner's counsel, Petitioner was evaluated by June Blaine, a vocational rehabilitation/employment expert on April 13, 2016. In connection with her evaluation of Petitioner, Blaine reviewed medical records provided to her by Petitioner's counsel. Blaine

reviewed Petitioner's education and work background and administered various tests to him. She opined Petitioner was not employable (Petitioner's Exhibit 3; Deposition Exhibit 2).

Dr. Farahvar was deposed on March 7, 2018, and his deposition testimony was received into evidence at trial. In regard to his diagnosis and treatment of Petitioner's cervical and lumbar spine conditions, Dr. Farahvar's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. In regard to Petitioner's job, Dr. Farahvar testified he was required to repetitively lift objects that were heavy and he opined that this could cause cervical degeneration and deterioration of the joints (Petitioner's Exhibit 2; pp 16, 24).

Dr. Farahvar did not have specific information as to Petitioner's job, but thought he worked in the "butcher industry." Petitioner's counsel asked Dr. Farahvar a hypothetical question which purportedly described the duties of a hot press operator and provided him with a job description. Dr. Farahvar testified the activities described therein could have contributed to the condition in both the cervical and lumbar spine (Petitioner's Exhibit 2; pp 31-35).

On cross-examination, Dr. Farahvar agreed he had no specific information as to exactly what Petitioner's job duties were until the day he was deposed. He also agreed Petitioner never informed him that he thought his back pain was the result of his work activities and he had no information as to what prior medical treatment Petitioner had prior to his seeing him for the first time in 2013 (Petitioner's Exhibit 2; pp 41-46).

Dr. Coe was deposed on September 14, 2018, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Coe's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Dr. Coe testified Petitioner informed him that his job required a significant amount of heavy lifting of parts which weighed up to 300 pounds and that he did a significant amount of lifting, twisting, loading, pushing of parts/carts, forcefully removing parts stuck in the hot press, etc. Based on the preceding, Dr. Coe opined Petitioner's work aggravated the pre-existing degenerative disc disease and arthritis in Petitioner's cervical and lumbar spine (Petitioner's Exhibit 1; pp 15-16, 39-41).

On cross-examination, Dr. Coe agreed that in the medical records he reviewed for treatment received by Petitioner from 2007 to 2016, there was no reference to Petitioner having pain while he was doing his job. He also stated that Petitioner's symptoms manifested themselves sometime in late December, 2011 (Petitioner's Exhibit 1; pp 61-64).

Dr. Chabot was deposed on March 8, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Chabot's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Dr. Chabot testified Petitioner informed him that the symptoms started sometime prior to May 20, 2013, but could not give a specific date. In his review of the medical records, Dr. Chabot noted Petitioner did not communicate to any of his treating physicians anything regarding his work activities or a work injury. Dr. Chabot stated Petitioner's cervical and lumbar conditions were not related to his job activities; but the result of chronic degenerative changes (Respondent's Exhibit 13; pp 7-8, 22, 31-32).

June Blaine was deposed on May 23, 2019, and her deposition testimony was received into evidence at trial. Her deposition testimony was consistent with reports and she reaffirmed her opinion that Petitioner was not employable (Petitioner's Exhibit 3).

At trial, Petitioner testified he has not worked since May, 2013. He continues to have low back pain which he rated as a 5 to 6/10. Petitioner stated his ability to lift, sit and stand is extremely limited.

Conclusion of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner did not sustain a repetitive trauma injury arising out of and in the course of his employment by Respondent and his current condition of ill-being is not causally related to his work activities.

In support of this conclusion the Arbitrator notes the following:

At trial, Petitioner did not testify as to how he injured his neck or low back while at work. Petitioner did state that he had requested assistance in pulling the wagon of rails because his back was hurting, but did not report that he had injured his back.

Petitioner also testified he did not injure his neck at work and nothing he did at work either aggravated or caused him to have neck symptoms.

When Petitioner testified about his job duties, he agreed he usually had the assistance of another employee and an airlift to lift/move the completed butcher block tabletops. Petitioner described the sizes of the completed tabletops, but did not know how much they weighed.

Margie Herr and William Herr testified that in a conversation with Petitioner in November, 2013, Petitioner informed him he had a back condition which was not work-related.

Rayna Bissey, Respondent's HR Director, testified that shortly before Petitioner underwent the cervical fusion surgery, he met with her and informed her he was going to be off work because of a back problem, but did not advise her that it was work-related.

Petitioner had a long history of chronic back problems which required medical treatment and diagnostic studies as early as 2007.

There was no reference in any of the medical records of Petitioner's treating physicians actions of Petitioner's specific work activities or that Petitioner attributed this cervical/lumbar complaints to his work activities.

The physician who performed the surgeries, Dr. Farahvar, had little or no information as to Petitioner's occupation and apparently thought Petitioner worked as a butcher. It was not until he was deposed that he became aware of what Petitioner's job was. Dr. Farahvar's opinion as to

causality was based on the rather limited information provided to him by Petitioner's counsel at the time he was deposed.

Petitioner's Section 12 examiner, Dr. Coe, opined Petitioner's cervical and lumbar spine conditions were related to his work activities; however, this was based, to a large extent, on his understanding that Petitioner's job was more physically demanding than what it actually was.

Respondent's Section 12 examiner, Dr. Chabot, accurately noted the long history of prior chronic back symptoms which required medical treatment and long standing degenerative changes in the cervical and lumbar spine and the lack of any reference whatsoever in the medical treatment records to Petitioner's work activities.

In regard to disputed issues (E), (J), (K), (L) and (M) 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 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

Bahaa M. Hammood,

Petitioner,

vs. NO: 14 WC 31813

Evans Delivery Company, Inc.,

Respondent.

20IWCC0282

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 employment relationship, accident, medical expenses, prospective medical treatment, temporary total disability, and penalties, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 16, 2018, is hereby affirmed and adopted.

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

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.

MAY 18 2020

DATED:

d: 3/24/20
TJT/jds
51

Maria Elena Portela

Maria E. Portela

Kathryn A. Doerries

Kathryn A. Doerries

SASOOUWIOS

DISSENT

I respectfully dissent from the opinion of the majority and would reverse the Decision of the Arbitrator in its entirety. After carefully considering the totality of the evidence, I believe Petitioner met his burden of proving by a preponderance of the evidence the existence of an employer – employee relationship when the January 4, 2014, work accident occurred.

Petitioner was a 32-year-old truck driver on the date of accident. Petitioner began working for Respondent as a truck driver in July 2011 and primarily drove longer hauls. In 2012, Petitioner incorporated a business named Tala Transportation in order to purchase his own truck. Petitioner testified that his sole reason for creating Tala Transportation was to qualify for a loan to purchase the truck. After purchasing the truck in 2013, the parties executed an Equipment and Hauling Agreement (the "Agreement"). (PX 12). The Agreement conformed with the norms of standard trucking industry agreements and provided Respondent the exclusive possession, use, and control of Petitioner's truck pursuant to the relevant U.S. Department of Transportation regulations. On the date of accident, Petitioner was on his way to pick up a load in Iowa when his truck slid off an icy road. Petitioner was hospitalized for several days and underwent a cervical fusion surgery. Due to his chronic complaints of significant pain, Petitioner eventually underwent a spinal cord stimulator trial; however, this was unsuccessful. Petitioner testified that he continues to take morphine every 12 hours to control his pain. He has been unable to work since the date of accident.

Navigating the nuances of each employment relationship to determine whether an employer – employee relationship existed on the date of accident is a very difficult and fact-intensive endeavor. The Illinois Supreme Court has identified several factors to consider when determining the employment relationship between the parties. These factors include, but are not limited to:

> "1) whether the employer controls the manner in which the worker performs the work; 2) whether the employer dictates the worker's schedule; 3) whether the employer compensates the worker on an hourly basis; 4) whether the employer withholds income and social security taxes from the worker's taxes; 5) whether the employer can discharge the worker at will; and, 6) whether the employer supplies the worker with materials and equipment."

Steel & Mach. Transp., Inc. v. Ill. Workers' Comp. Comm'n, 2015 IL App (1st) 133985WC, ¶ 31. Illinois courts also consider the nature of the work performed by the employee in relation to the employer's general business. *Id.* While no single factor is determinative of the outcome, the right to control the work and the nature of the work are the two most important factors.

The majority agrees with the Arbitrator's conclusion that Petitioner was not an employee of Respondent when his accident occurred. I strongly disagree with the majority's denial of benefits in light of the credible evidence. In *Steel & Mach. Transp.*, the Illinois Appellate Court affirmed the Commission's finding that an employer – employee relationship existed when presented with facts very similar to those in this current case. The court examined the provisions of a contract almost identical to those found in the Agreement executed by the parties in this matter. The court agreed with the Commission's determination that while the claimant in *Steel & Mach.*

20IWCC0282

Transp. owned the tractor-trailer he used to transport loads for the respondent, "...claimant's ownership was in name only and the control the respondent had over the equipment is indicative of an employment relationship." 2015 IL App (1st) 133985WC at ¶ 33. The court further wrote that while language granting a respondent "exclusive possession, control and use for the duration..." of an agreement might be necessary pursuant to federal regulations, the fact remains that the respondent had the right to control the claimant's activities and equipment. *Id.* It is also indisputable that while the Agreement included provisions allowing Petitioner to carry loads for other carriers, he had to jump through numerous hoops to exercise this alleged freedom. Primarily, he had to first comply with limitations pursuant to relevant federal statutes and had to obtain prior written approval from Respondent. Thus, even the provisions purportedly limiting Respondent's level of exclusive control provided limited freedom for Petitioner that was still subject to Respondent's prior approval.

Similar to most cases involving disputes regarding the existence of an employment relationship, there are certainly some elements of an independent contractor relationship between Petitioner and Respondent. However, in my opinion, the two most important factors in determining whether an employment relationship existed on the date of accident clearly point to the existence of such a relationship. No evidence negates the nearly exclusive level of control Respondent exercised over both Petitioner and his equipment. I believe this level of control clearly points to the existence of an employment relationship between the parties on the date of accident. It is also undisputed that Respondent's business was transporting goods between sellers and buyers. Likewise, Petitioner's job was transporting those goods to Respondent's customers. Thus, the nature of the work performed by Petitioner in relation to the general business of Respondent also points to the existence of an employment relationship.

For the forgoing reasons, I would reverse the Decision of the Arbitrator in its entirety. Petitioner clearly met his burden of proving the existence of an employer – employee relationship on January 4, 2014.

Thomas J. Tyrrell

Subscribe

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAMMOOD, BAHAA M
Employee/Petitioner

Case# **14WC031813**

EVANS DELIVERY COMPANY, INC
Employer/Respondent

20IWCC0282

On 8/16/2018, 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 2.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1609 BOTTO GILBERT LANCASTER PC
ALEX C WIMMER
970 MCHENRY AVE
CRYSTAL LAKE, IL 60014

1401 SCOPELITIS GARVIN LIGHT HANSON
GERALD F COOPER JR
30 W MONROE ST STE 600
CHICAGO, IL 60603

S8S03LH108

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)

BAHAA M. HAMMOOD,
Employee/Petitioner

v.

EVANS DELIVERY,
Employer/Respondent

Case # **14** WC **31813**

Consolidated cases:

20IWCC0282

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 M. Harris**, Arbitrator of the Commission, in the city of **Chicago** on **05-24-18 and 6-18-18.** 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 **01-04-14**, Respondent ***was not*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did not*** exist between Petitioner and Respondent.

ORDER:

Petitioner failed to prove that an Employer-Employee relationship existed bewtween himself and Respondent on January 4, 2014. Therefore, his 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.

Robert M. Harris

Signature of Arbitrator

August 16, 2018
Date

AUG 16 2018

4844-2704-8813, v. 1

MEMORANDUM DECISION OF ARBITRATOR
Bahaa Hammood – 14 WC 31813

STATEMENT OF FACTS

The case was tried pursuant to Section 19(b) of the Act in Chicago on May 24, 2018 and proofs were closed on June 18 by agreement of the parties and upon submission of the completed Transcript of Proceedings on Arbitration which was accordingly made available to the Arbitrator and to the parties for use in drafting their Proposed Decisions.

Petitioner asserts and argues he is an "employee" as defined under the Act and therefore entitled to benefits. Respondent asserts and argues Petitioner is an "independent contractor" (or "owner-operator") hauling for Respondent as defined under the Act and case law and therefore is not entitled to any benefits under the Act. Therefore, "Employer-Employee" relationship is the threshold disputed issue presented in this claim.

On January 4, 2014 Bahaa Hammood ("Petitioner") was driving his own tractor trailer truck for Evans Delivery Company, Inc. ("Respondent") when icy roads caused him to lose control of the vehicle resulting in the vehicle crashing and causing Petitioner serious and immediate injury.

Respondent was immediately informed of the accident. Petitioner was initially brought to the emergency room at Genesis Medical Center where he was stabilized and then transported to Advocate Christ Hospital. (PX. 4). Petitioner was seen at the hospital and diagnosed with an unstable fracture of the cervical spine. (PX. 1, PX. 2). Petitioner underwent surgery by Dr. Leslie Schafer including a fusion of C3-C7 with allograft and instrumentation. (PX. 1). Petitioner's post-operative diagnosis was complex cervical fracture with cervical instability and locked facets with cervical subluxation. (Px. 1). Petitioner remained in the hospital until January 14, 2014 when he was discharged. (Px. 1). Petitioner continued to follow up with his physicians and physical therapy. Petitioner saw Dr. Mirkovic from Orthopedic Spine Specialists in December of 2014 who recommended allowing the fusion time to heal and to continue pain management. (PX. 5). Throughout 2015 and 2016 Petitioner continued to undergo pain management and continued to follow up with physicians. Petitioner saw Dr. Espinosa of Neurological Surgery & Spine Surgery in July and August of 2016. (Px. 3). Dr. Espinosa recommended pain management and opined a future removal of instrumentation may be helpful. Petitioner continues to undergo pain

management and is prescribed daily morphine to deal with his pain. During the entirety of his treatments his doctors have instructed him not to return to work.

During the trial of this matter the majority of the testimony and evidence was related to the Respondent's business and Petitioner's role in that business due to the fact that the primary issue the parties are disputing in this case is whether Petitioner was an independent contractor or an employee and therefore subject to the Workers' Compensation Act.

Petitioner testified he had worked for Respondent since 2011. (Tr., p. 13). Petitioner testified when he first started working for Respondent he did not own his own truck and drove one of Respondent's trucks and he signed a "Driver Contract." (Tr., p. 13). At that time, he had a contract with Respondent to drive a truck and pick up and deliver loads. (Tr., pp. 13-14). Petitioner was paid approximately one-third of how much the load cost. (Tr., p. 14). Eventually, in 2012, Petitioner created his own corporation so he could obtain a Tax ID number and purchase his own (Tr. p. 16). Petitioner testified his brother was part of the corporation so that he could be approved for the loan to buy the truck. (Tr. p. 16). After he purchased the truck Petitioner signed a new contract with Respondent titled "Equipment and Hauling Agreement" ("Contract"; PX. 12).

After purchasing the truck and signing the Contract Petitioner testified that the only part of his relationship with Respondent that changed was that he was paid a higher percentage of the load payment. (Tr. pp.16-17). The contract indicates Petitioner's corporation, Tala Corporation, but the signature on pages 11, 12, 16, 17, 19, 21, and 22 do not reference Tala Corporation and are only signed by Bahaa Hammood as the contractor to this Agreement. (PX 12, pp. 11-22). However, on page 23 of the contract, titled Exhibit F, Request for Voluntary Weekly Deduction for Non-Interest-Bearing Maintenance Account, Tala Corporation appears on the signature line. (PX 12, p. 23). This does not serve to expedite clarity of this issue.

Petitioner further testified about his day to day relationship with Respondent. Petitioner testified Respondent provided for him all of the loads that needed to be picked up and delivered. (Tr., p. 20). Respondent provided Petitioner with a parking space for his truck free of charge. (Tr., p. 32). Petitioner further stated that they provided a fuel card to pay for fuel. (Tr., p. 21). Respondent also provided the necessary Federal Department of Transportation certifications ("DOT") registration number, and stickers for Petitioner's truck. (Tr., pp. 21, 24-25,). No stickers or licenses were under Tala Corporation's name or Petitioner's name. (Tr., pp. 21-22). Respondent further provided Petitioner's truck with a license plate and a SCAT number which pursuant to

Evans' own agreement allowed/gave Petitioner access to the railyards where he picked up the loads to deliver to Respondent's clients. (Tr., p. 27).

Petitioner testified that he had no customers of his own and no direct contact with Respondent's customers. (Tr., pp. 25-26). This testimony was later in part contradicted. Petitioner testified that he would not be able to sublease his truck or use it for other employers because the truck was operating under Respondent's DOT registration and license plates. (Tr., p. 29). Petitioner testified the only way he would be able to work for another company hauling loads would be to stop working for Respondent. (Tr., p. 29).

Petitioner testified that each morning he would be told by a dispatcher where "to go" either via-email or a paper would be placed in his mailbox at the terminal. (Tr., p. 32). This testimony is misleading and was subject to conflicting testimony and evidence.

Petitioner testified once he had the dispatch he would go to complete the job. Petitioner was asked if he was able to reject a load. (Tr., p. 33). Petitioner responded, "Reject a load? You can reject a load, but there's ---some side effects if you reject a load, like punishment." (Tr., pp. 33-34). This testimony is found to be misleading and disingenuous. Petitioner testified that in 2013 he attempted to ask for a different load from the terminal manager Dan Leon. (Tr., p. 35). Petitioner refused to pick up a load that Dan Leon requested he pick up in Indianapolis. (Tr., pg. 35). At that time, Petitioner testified that Dan Leon told him he was fired and did not send him dispatches for a week. This testimony is also found to lack credibility. Leon disputed Petitioner's version of this alleged incident and denied Petitioner was fired; no paperwork was produced that Petitioner was fired. (Tr. 149-150).

Petitioner's Exhibit 15 is titled "The Evans Network of Companies" but is in essence the Evans Company Manual. It contains the History, Credo, Mission Statement, Safety Regulations and General Policies that apply to all drivers. (PX.15). The company manual spells out the rules and regulations that drivers are expected to follow in order to be in compliance with the current DOT. Laws. The manual also outlines specific numerous policies designed by Evans Company; for example, "if a container or trailer were stolen due to your negligence, it will automatically cost you a $1,000.00 from your escrow but may also affect your employment." (PX. 15, p. 7).

Respondent presented the testimony of Dan Leon, Terminal Manager for All Points Transportation, which is under the umbrella corporation of Evans Delivery. (Tr., p. 140). Leon

testified he was an agent of Evans who was fully authorized by Evans to sign the Equipment and Hauling Agreement (PX 12).

Leon testified that in his managing capacity, his duties included contact with all Evans customers, to cater to the wishes or particular requirements of said customers, and that he made sure the customers' needs were relayed to the drivers so that the customers remained satisfied. (Tr., pp. 171-172). Leon testified that at the time of Petitioner's accident, he managed somewhere between ten to twenty trucks and his duties and responsibilities encompassed keeping every driver busy delivering the client's loads. (Tr., p. 162). Leon testified that each driver was free to choose whether he would work on any particular day with no repercussions, but he would not give work to drivers who refused loads. (Tr., p. 163). Leon confirmed Evans' logo was on Petitioner's truck and Petitioner's DOT number was obtained by Respondent. (Tr., p. 174). The SCAT code was obtained and controlled by Respondent and that it allowed Petitioner to enter the railyards. (Tr., pp. 174-75). The SCAT code "is our company code" and it's this code that tells the railyards that Petitioner "he's running under our authority." (Tr., p. 176).

Petitioner testified he started a corporation by the name of TALA in 2012, when he was working for Respondent (TR. 14-15). Counsel for Petitioner asked, "And for what purpose did you start the corporation?" Petitioner answered, "To buy a truck" (TR. 15). Petitioner testified that after he purchased his truck, his relationship with Respondent "changed", in that now he was compensated by "Just the pay percentage." (TR. 16).

Petitioner determined that the best way to buy a semi-tractor was through a truck dealer. Petitioner selected a truck dealer. The dealer provided the information about where loans could be secured. Petitioner needed his brother to co-sign the loan, and the loan was secured, for TALA Transportation. (TR. 15-16). Petitioner made all decisions.

Petitioner testified he bought his truck from a dealer. Petitioner financed the truck with a loan from CALFUND. Petitioner chose to use a dealer as opposed to a motor carrier company or another driver. Petitioner's brother was also an officer of TALA Corporation (TR. 15) Petitioner testified that his brother received no income from TALA Corporation. His brother received no benefits or insurance. Counsel for Petitioner asked, "Why did he enter into this business as TALA and include his brother. Petitioner testified, "I was going to buy a truck and I had to be qualified for a loan, and I don't have good credit. That is why I needed a co-signer. That is why I brought him in the company" (TR. 16).

Respondent was not involved with the selection of, and financing, of the tractor.

Petitioner testified he signed a contract with Respondent on September 3, 2013 after he purchased the truck (Tr. pp. 17-18; PX 12).

Petitioner testified that he chose the truck driver career to get into the industry to make more money. Petitioner was asked if he had to make a lot of decisions to get into the industry and progress and become successful.

Q. "So your hope was to get into the industry and advance yourself, and make more money – correct?"

A. "Yeah, I chose that career." (Tr. p. 62)

Q. "Now, as far as implementing that plan [driving a truck in the trucking industry], then tell us how you did that. Give us a couple of specific examples".

A. "I got my CDL and I started looking for a job".

"CDL" is the Commercial Drivers License.

Petitioner testified that he originally had a regular drivers' license. Petitioner decided to get the CDL. To do so he had to attend a truck driving school. Petitioner researched and selected the truck driving school. Respondent did not select the school. Petitioner chose the Blue Horizon Trucking School (Tr. p. 63). Petitioner did not remember the exact amount, but he paid the tuition (Tr. p. 63). Petitioner took a one month course to get the CDL. When asked if he passed the test he stated, "I have my CDL." (Tr. p. 64)

Petitioner was referred to Respondents but by whom is unknown.

After Petitioner obtained his CDL, he sought further training. This included a hazardous materials endorsement (Tr. p. 83).

Petitioner also secured a tanker endorsement (Tr. p. 83). Petitioner had to take a separate test to get his hazardous materials endorsement (Tr. p. 83). This test is a written test. Petitioner obtained the tanker endorsement because he wanted to be able to drive a tanker (Tr. p. 84). Respondent did not pay for the truck driving school. Respondent did not pay for any part of securing a CDL, nor the tanker or hazardous materials endorsement.

Petitioner testified on cross examination that Evans had nothing to do with buying the tractor. Petitioner was not required to make any modifications to the equipment. Petitioner was asked:

Q. "Modifications".

A. "Well, I'm sorry."

Q. "Changing it, fixing it, repairing it, when you first got it".

A. "The truck?"

Q. "Yes"

A. "Yes". (Tr. pp. 88-90).

Method of Payment

Petitioner was paid 70% of each load delivered. (Tr. pp. 109). Petitioner was not paid hourly.

No Taxes Withheld

Petitioner had no income tax or social security taxes withheld. (Tr. pp. 110-111). Petitioner filed a tax return for his Subchapter S Corporation TALA.

Equipment and Hauling Agreement

Petitioner entered into the Contract on behalf of TALA Transportation on September 3, 2013. (PX 12; Tr. p. 17)

Leon executed the contract on Respondent's behalf. Petitioner signed for TALA. The parties to the contract were TALA Transportation and Evans Delivery Company, Inc. The contract indicates TALA was the "independent contractor" of Evans Delivery. Evans Delivery was an authorized for-hire interstate motor carrier registered with the Federal Motor Carriers Safety Administration (FMCSA), and the DOT ("Carrier"). TALA ("Contractor") leased his equipment to Carrier. This specific vehicle that was leased is reflected in Exhibit A of the PX 12.. This specific unit was a blue 2006 Freightliner. TALA agreed to provide professional truck driver services. The Agreement further read:

> "Although carrier shall use reasonable efforts to make shipments available to contractor for transportation during the term in this Agreement, contractor acknowledges and agrees that carrier does not guarantee any specific number of shipments, or amount of revenue to contractor during the term of this Agreement.
>
> **Contractor may refuse any specific shipment offered by the carrier."**

"The parties agree that carrier, separate and distinct of providing motor carrier freight transportation services to the public is subject to the requirements of carriers' customers and to

regulation by the federal government acting through DOT, and by various other federal, state and foreign authorities." (PX 12)

The Contract was valid for a 12-month period. It was agreed between Contractor and Carrier, "Either party may terminate the Agreement immediately, by giving 5 days' written notice to that affect to the other party personally, by mail or fax at the number or address identified at the end of this Agreement. (PX 12). As a result, the parties have a mutual right to terminate the contract.

Under the Contract, TALA (Petitioner) was paid a percentage of the revenue (70%; Exhibit 12, p. 1). TALA (on behalf of Petitioner) agreed to perform all non-driving activities, such as conducting pre and post trip inspections of the equipment, waiting to load or unload (detention), loading or unloading if required, fueling, repairing and maintaining the equipment, hooking and unhooking empty trailers, preparing log books and other paperwork, and other activities and services. These items were all covered under the 70% payment.

In the Contract the parties called each other "contractor" and "carrier" as required by Title 49 Code of Federal Regulations Part 76.

The exclusive position and responsibility provisions of the Contract contain the following, taken from 49 CFR, Section 376.12(c)(1):

> "This subparagraph is set forth solely to conform with DOT Regulations and shall not be used for any other purposes, including any attempt to classify contractor as an employee of carrier. Nothing in the provisions required by 49 CFR, Section 376.12(c)(1) is intended to effect whether contractor, its drivers or independent contractor or employee of carrier.
>
> As provided by 49 CFR, Section 376.12(c)(4) "an independent contractor relationship may exist when a carrier complies with 49 USC, Section 14102, and attendant administrative requirements." (Resp. Ex. 9).

Contractor (Petitioner) had the right under the Contract to freely substitute a different vehicle for the one constituting the equipment, if each of the requirements set forth in Section 7 was met.

Contractor (Petitioner) attempted to show that there could be no subleases. The Contract, paragraph 8, states that contractor is not prohibited from providing transportation services to other common or contract carriers, or any other persons or entities provided the contractor complies with

the Trip Lease Requirement set forth under federal law and 49 CFR, Section 376.12(c)(2), and completes a Trip Lease Information Sheet. This must be done with Carrier approval.

When hauling containers, for security purposes and to meet customer requirements when contractor picks up a container, seals shall have to be placed on the doors and seal numbers recorded on all shipping documents. The customer verifies the seals number and integrity.

Petitioner provided a semi-tractor. Counsel asked what Respondent provided and Petitioner stated only "loads and the insurance." Respondent secured the license plates. Petitioner was asked about pre-trip inspections. Petitioner was required to do a pre-trip inspection. Petitioner had Evans logos (placards) on the side of the driver door of the truck. Petitioner had to keep log books. Evans also provided the DOT number for the placard on the side of the truck (Tr. p. 23).

The Arbitrator asked how Petitioner knew why a DOT number was needed for the truck (Tr. pp. 23-25). These are all required by DOT. Petitioner stated, "Well, the truck is a commercial truck and you need a DOT number." Petitioner admitted that the DOT makes the regulations – not Respondent Evans. (Tr. pp. 79-80)

Petitioner stated that he delivered to Evans' customers. Petitioner did not have any customers. On direct, Petitioner stated that he had no contact with the customers, but he dropped off all of their loads (Tr. p. 25).

Petitioner picked up the loads from the railyards and brought them to the customers' location, or from the customer to the railyard (Tr. pp. 26-27). Petitioner testified as to how he got into a railyard. Since this was a secure location, there was a code given out (Tr. p. 27).

Petitioner testified that he parked his truck at Evans yard. (Tr. p. 31). Petitioner deducted the $1,200.00 cost of the parking in his Corporate Income Tax Return. (PX 11).

Petitioner testified he would be informed by either e-mail or paperwork at All Points. There were 3 or 4 dispatchers working at the same time. You work with one dispatcher.

Right to control/Forced Dispatch

Q. "Were you allowed to reject a load?

A. "Reject a load? You can reject a load, but there is some side affect if you reject a load, like punishment".

Q. "So did you ever reject a load?"

A. "Not reject a load, but I asked for a different load, like usually they give you options for loads." (Tr. p. 33)

Q. "So did you ever reject a load?

A. No, not reject a load, but I asked for a different load, like *usually they give you options for loads.*

The Arbitrator asked counsel to clarify. Counsel for Petitioner attempted to do so, Q. "So, when you say it sounds to me like you could try to get a different load?

A. "Yes"

Q. "Ok, the answer was yes".

Q. "Ok, and did that have something to do with the load or with the destination, what exactly?"

A. "With the destinations. Sometimes the dispatcher would accommodate you."

Q. "So you say yes?"

A. "Yes." (Tr. pp. 34-35)

Petitioner readily admitted that there was no forced dispatch. Petitioner testified, *"usually they give you options for loads."* Petitioner, at great length, testified how he negotiated the loads with the dispatcher(s); e.g., easy load v. hard load.

In 2013 Petitioner stated that he did a favor for the dispatcher, Dan Leon. There is confusion as to what, if anything, transpired. Petitioner was asked to pick up a load from Indy and bring it back home. A dispute arose over whether this was a "different load" or a "return load". When asked if there was any other time that he ever did not have work from Evans, Petitioner answered no.

That alleged incident was the only single exception to this process. There were no other such incidents.

Counsel for Petitioner stated:

Q.: *"Did you have deliveries every single day, that was a regular date of work?"*

A. "Yes".

Petitioner denied that he had any contact with customers. However, at page 40:

Q. "But when you delivered the load, who did you, who was there. . . was somebody there to receive the load?"

A. "The customer?"

Q. "Yeah"

A. "Ok".

Q. "So, did you have some contact with the customer?"

A. "You only have the paperwork. You give them the paperwork and they unload you" (Tr. pp. 39-41).

Q. "Customer requirements that you had to comply with different customers?

A. "Yes. *Some customers may have - - all customers - - all customers they have them on the rolls to pick up or deliver the loads".* (Tr. p. 41).

Petitioner's testimony indicates confusion - or obfuscation - as to what DOT requires, what Evans requires and what is a customer requirement. For instance, pre-trip inspections are required by the DOT, placards are required by the DOT, log books are required by the DOT (Tr. p. 42).

Petitioner received disability and medical benefits from OneBeacon Insurance (Tr. p. 53). Petitioner testified he made the decision to purchase this insurance. Petitioner testified he did not remember if there was a drug and alcohol program (TR. 57-59). Petitioner testified he was required to go to safety meetings (Tr. pp. 59-60).

Petitioner testified he did not buy the tractor in his own name. Petitioner testified it was in the name of TALA. TALA also paid Petitioner. Petitioner signed an Equipment Lease in September of 2013 (Tr. p. 72). Petitioner oddly and inexplicably testified he had never been paid by TALA.

Q. "You were never paid by TALA?"

A. "TALA belongs to me, so how am I going to get paid with TALA? TALA is out of business." (Tr.. pp. 71-78) The 1099s indicate Petitioner worked for 2 other companies that year, and received 1099s from all three. (PX 10, RX 10).

DOT Requirements

Q. "Throughout this, your testimony, you mention the different things that Evans insisted that you do. I would like ask you if you were distinguishing between what the DOT makes a company do and what Evans makes a company do. So when you say you have to, you know, you have get your medical card, or something like that, and Evans is the one that makes you do it, there are a lot of DOT regulations. That was the reason for you doing these things, correct?"

A. "Yes".

Insurance

Petitioner chose an occupational accident policy.

Q. "Now, how about - - you also chose occupational accident insurance correct?"

A. "Yes"

Q. "And the choice was workers' compensation, occupational accident, or some third kind of insurance".

Later, Petitioner contradicted himself and stated he did not choose the occupational accident insurance.

Right to Control

Petitioner testified sometimes he was given a map.

Q. "And generally speaking of, you determine where you are going to drive?"

A. "Ok."

Q. "You're driving a truck, you are not driving a car, *you could go anywhere you want"* (TR. 93-94).

Petitioner did not wear a company hat, he was never told to wear a company uniform or company shirt (TR. 96-97). Respondent did not give Petitioner a company I.D. (TR. 97). Respondent had no personal appearance requirements. (TR. 97-98). Respondent did not have a policy regarding, long hair, shaved, head tattoos, beard/mustaches. (TR. 97). Respondent did tell Petitioner how to dress. (TR. 98).

Q. "Isn't it ok - - isn't it true that as far as you deciding when to take a load that you could discuss different loads with the dispatch?"

A. "W*hen they call you for the dispatch for tomorrow, they tell you we have 1, 2, 3, like load 1, 2, 3, and then you choose*". You choose, *you pick one, yes*.". . .

Q. "How do you determine which of the 3 loads to take?"

A. "It's easy."

Q. "Why is it easy, which one is easy? Why is it easy?" The Petitioner testified that he would pick the easiest load. In a colloquy with counsel for Respondent, he described that anybody would take easy work over hard work. The Petitioner was asked by the Arbitrator, "what we need to understand what you mean when you say it is easy or hard, let us understand."

A. "Like maybe more distance, far away, like 600, 700 miles."

Q. by Arbitrator: "So that's harder? So that would be hard?"

A. "Yeah"

Q. "And what would be easy, 50 miles, 100 miles, 200 miles?" (Tr. p. 100) Petitioner later changed his testimony. Question: "What is it, easy or hard?" Answer: "It's work." Question: "It's easy or hard, which?" Answer: "It's work." Question: "Is it easy work or hard work?" Answer: "It's work". (Tr. pp. 101-102)

Forced Dispatch (Tr. p. 103)

Petitioner testified he never took a vacation (Tr. p. 103). That is his choice. An employee would take regularly scheduled vacations (Tr. p. 104)

Petitioner chose which days of the 7 days week he worked. "A day off, that's a weekend, I don't work on the weekends".

Petitioner was asked if he was able to take off days, he stated, "What is the big deal with that? If you have an emergency and you need to take a day off, you have to take a day off."

Q. "Right, and was there any negative reaction by Evans or by something else like that when you take a day off yes?"

A. "No".

Petitioner testified (Tr. p. 105) that *loads were always available.* They were specifically always *available* to Petitioner. (Tr. p. 108)

Petitioner chose his breaks and where he took them.

Q. "So if you were there because the DOT says you have to take your break, you still have a choice in where to go for that break?"

A. "Ok"

Q. "Correct?"

A. "Yes". (Tr. p. 105)

Petitioner was off work for five or six days but was never fired. (Tr. p.112) Petitioner does all of the maintenance for the tractor. (TR. 115) Petitioner denied choosing occupational accident insurance. (Tr. p.115) Petitioner did not remember whether or not he had paid $1,250.00 for parking. (Tr. p. 117) He got his own pre-pass. Petitioner admitted "they send you in the order for loads you want, you chose right?" "Yes".

Petitioner admitted that he bought his own truck stating:

A. "No, nothing changed by the rules, but requirements - - but the only thing is changed *is that I went from 30% to 70%*"

Q. "So you can make more money if you had your own truck?"

A. "Yes". (Tr. p. 128)

Petitioner stated, though he had specifically denied before that, "his engine broke down, and he had to sell it at an auction." (TR. 130)

Q. "And it was then after that truck broke down you went and bought a truck?

Answer: "Yes" (Tr. p. 132)

Petitioner, while he was off for the 5-6 days, did not return to the yard and take his personal belongings out of the tractor. The tractor was in the yard at all times. Petitioner did not turn in Evans' property to them. Petitioner stated that when he came back and got in his truck it was exactly the same as when he left it. (Tr. pp. 139-140) Petitioner had deducted the cost of the parking ($1,200.00) on his corporate income tax return.

Leon testified to the operations in general and regarding customer expectations.

Customer Expectations (Tr. p. 142)
The customer expectations included:

1. Follow DOT rules.
2. Customer compliance standards of their own, such as on time performance, pay per work performance, communication, EDI.

Leon testified, "Our scheduling team will prepare the work orders, set up a load board that goes into our dispatch office. Our dispatchers will call all of our contractors up and see who can take which load and cover all of the loads that we have for the next day." (Tr. p. 142)

Drivers accept or reject the loads. (Tr. p. 144)

Right of Refusal

Q. "Could you please explain Forced Dispatch/Right of Refusal as you understand it."

A. "Where we don't give them options and we just tell them where they are going and what they are doing for the day".

Respondent does not use this system. Rather, Respondent's system is called "Right of Refusal".

Leon testified, "It is the driver's – their, they have the option of taking work, rejecting work, negotiating work, taking off. They don't have a set amount of days, vacation time, sick days

or anything like that. Either dispatchers give them options to choose from and it is their choice whether they take the load or they may reject all 3 options, then they don't work for the next day, we'll have to do some switching around."

Q. "And so, is there any kind of forced dispatch system there?"

A. "No, not even with our in-house drivers."

Leon testified regarding load selection. Leone testified Respondent often called drivers with 2, 3, 4 or 5 loads, depending on the flow of business. The drivers had load selection.

Q. "Is it common for a driver to not take one of the options off of the day?"

A. "Absolutely"

Q. "What are some of the reasons that they would do it?"

A. "They don't like what it pays, they don't like where it goes, they don't like how long it goes, they don't like the weight, how long the wait is, it could be anything." (Tr. p. 147)

Leon stated that there was a back and forth, give and take to the dispatch process. (Tr. p. 147)

Business Environment – Mutual Right to Terminate the Contract

Leon was specifically asked if he fired Petitioner. (Tr. p. 149) Leon testified if he had actually fired him he would have to fill out a corporate form. Leon testified he did not recall any such incident. (Tr. pp. 50-151) "There really is no process, they just wouldn't work." (Tr. p. 151) Leon testified that he was aware of the mutual power to terminate the contract, but he had not done so with Petitioner. The Arbitrator asked the question about what procedure would have to be followed if someone was fired. (Tr. pp. 160-161) It was an extensive process, with a lot of paperwork. Evans took no steps, nor did Leon on the part of Evans regarding firing Petitioner.

Petitioner would have contact with customers at warehouses. (Tr. p.162)

Accident Insurance Selection (Tr. p. 178)

> "Contractor shall adhere to and perform with respect to each shipment offer by the carrier under this Agreement, all service standards and other requirements of carrier's customers that may reasonably be adhered to, performed without violating applicable law or other carrier policies and procedures, or engaging the public. Contractor's driver and/or other priority being transported."

The contract between the parties contains specific provisions regarding liability, indemnity and hold harmless language.

The contractor agreed to defend, indemnify and hold harmless carrier and carrier's affiliates for injury to persons, property. (See also, Exhibit E - Insurance and Allocation Liability).

The carrier was obligated to provide public liability, property damage and cargo insurance. (PX 12, p. 5, para. 15)

Petitioner is also responsible for fuel and mileage tax reporting. He can do this on his own, or have the company perform for him. The operating expenses are found in PX 12, p. 7, para 19(a).

> "Contractor shall, at contractor's expense, provide the Equipment in a full road worthy condition, including the necessary licenses, permits, cap cards, state based plates, shall furnish all lubricants, fuels, tires (including changing or repairing tires) and other parts, supplies, equipment and repairs necessary or required for the safe and efficient operation and maintenance of the equipment. Contractor shall pay all expenses incident to the operation of the Equipment, including, but not limited to, empty mileage, lumper expenses, highway use taxes, weight taxes, state property, and all of the other costs contained in Section 19(a) of the Agreement.
>
> The contractor shall also equip and maintain the Equipment in safe condition and in complete compliance with all laws and regulations of the states in which the contractor operates in the DOT."

Pursuant to Section 12(a), the contractor, at page 8, paragraph 15(a), "It is expressly understood and agreed the contractor is an independent contractor for the Equipment and driver services provided pursuant to this Agreement. Contractor agrees, not subject to the limitations of Section 14 of this Agreement, to defend, indemnify and hold carrier harmless for any claim, suits or actions, including reasonable attorney's fees in protecting carrier's interest brought by employees in a union to the public, state or federal agencies, arising out of the operation of the Equipment or the providing of driver services under this Agreement.

Selection of Equipment, maintenance and routes subject only to all applicable laws and safety considerations "shall be the sole responsibility of the contractor to select Purchase or Lease and finance the Equipment, to decide when, where or how maintenance and repairs are to be performed on the Equipment, select all routes and decide all meal, rest and refueling stops, provided that to meet carrier's customers' demand contractor agrees to make timely and safe

deliveries of all loads, also agrees to notify carrier when delivery has been made, or when delivery will be delayed for any reason."

Exhibit A, Pg. A-1 involves the vehicle receipt. On September 3, 2013 TALA Transportation submitted the tractor to an inspection. The semi-tractor was examined. This involved checking the body, brakes, cooling system, drive line, emergency equipment engine, all exhaust, fuel system, glass, horn, leaks, lights, mud flap, reflectors, speedometer, spring, steering, tire, wheels and wipers. This maintenance was all Petitioner's responsibility.

Exhibit B Contractor Compensation Rights

Much testimony was elicited by Petitioner about who's signature was on the Freight Hauling Agreement. However, Petitioner initialed each of the spaces where indicated. Petitioner's signature was on the contract. Petitioner signed off on various deductions (Exhibit C)

Exhibit D-1 of Respondent's Exhibit 12 involves Contractor Election Form. Petitioner initialed that he was going to obtain his or her own plates for contractor's equipment.

In Exhibit D, pg. 1 it is apparent that Petitioner, when given two choices, option one regarding fuel and mileage tax reporting, Petitioner originally selected that option, but then crossed it out and took option 2, which states that the carrier would perform all fuel and mileage tax reporting services.

Exhibit E Insurance and Allocation of Liability

Petitioner selected occupational accident insurance (Tr. p.155) Petitioner changed his mind about which of the insurances he would take. (Tr. p.158) Petitioner admitted his signature is on the Lease Agreement. (Tr. p. 124) Petitioner admitted the Lease required him to get workers' compensation or occupational accidental insurance. (Tr. p. 128)

Petitioner was to maintain, at his sole cost and expense, either workers' compensation, occupational accident or other insurance. (Section 2(a)(1) workers' compensation, occupational accident insurance, a substitute policy). Petitioner was given a choice of three options. He was to select one. The first one was a workers' compensation insurance policy covering himself and any of his drivers. The second choice is to substitute trucker' occupational accident insurance policy. Lastly, a substitute policy provided by the carrier.

Under the Certificate of Insurance Exhibit E-3 (p. 22) Petitioner had a choice whether or not to have occupational accident insurance and he chose yes. Petitioner also had to choose

physical damage insurance on the Equipment or provide it himself. Petitioner checked "yes" to select that the carrier should provide it, and non-liability/bobtail insurance.

Petitioner chose a substitute truckers' occupational accident insurance policy. As a result of his accident, this policy paid medical benefits of $157,573.68 and disability benefits of $28,742.58. Total benefits of $186,316.26 were paid.

In the Freight Hauling Agreement, Petitioner had three choices to choose from for workers' compensation, occupational accident insurance.

Leon testified if he had no drivers he could broker the freight to other companies and they would provide the transportation services. (Tr. p. 178)

The Arbitrator stated, "Oh I see. Ok, so Evans does not have regular employees who drive the truck on your payroll, like regular workers?"

A. "No"

Q. "Ok, so whoever wants to drive the truck for you were considered an independent contractor, subcontractor, whatever you want to call it, ok."

A. "I am actually a leased on to them, those trucks are leased on to Evans, also the Lease Agreement is filled out and then the driver fills out a Lease Agreement which they have created."

Q. "I see - - -" (Tr. p. 182)

Dispatchers work for Leon's corporation, which was D&N Transportation. It is now D&L Transportation. (Tr. p.184)

You can broker out to other companies. (Tr. p.185) The last paperwork step comes when Petitioner accepts one of the choices. (Tr. p.187).

Petitioner's trial testimony indicated credibility problems. Petitioner had no trouble answering questions posed by his attorney during direct. Immediately upon beginning cross examination Petitioner began to be uncooperative. At the very first question from Respondent, Petitioner answered, "I'm sorry; I don't understand your question."

Question: "Now at the time you started driving, did you have the truck at that time?"

Answer: "Did I have a truck?"

Question: "Yes"

Answer: "For me?"

Question: "For you"

Answer: "No"

Question: "And this is where this TALA comes in?"

Answer: "No"

Question: "What does incorporated mean?"

The Arbitrator asked. . . "Were you allowed to drive the best way that you thought to go to the customer?"

Answer: "Yes".

Question: "Which yes?'

Answer: "The best way".

Question: "The best way you thought?"

Answer: "Yeah, no, the best way to go. It is going to be safety for your truck and your load." Petitioner contradicted himself several lines later when he stated he would ask dispatch. (Tr. p. 94)

Petitioner denied knowing about a business called Mr. T-Shirt:

Q. "What about Mr. T-Shirt?

A. "I don't know nothing."

Q. "Well you know enough to go there and open the store, stand out in front of it, so you must know something about it."

A. "I know it's my friend."

Q. "And you go there?"

A. "Yeah, I go there."

Q. "Alright, on a daily basis?"

A. "No". (Tr. p. 123)

Q. "Do you remember any event that took place during the course of your contract with Evans, when words were exchanged between you and Mr. Leon, and do you understand what I am saying?" (Tr. p. 133)

A: "No"

Q. "Ok, do you remember Mr. Leon ever telling you that you were fired?"

A. "Yes, that was when I had the argument with him about the load to Indianapolis, and I stayed home for a week." (Tr. p. 134) Petitioner then reduced to 5 days or 6 days that he was off. (Tr. p. 135)

Petitioner stated that he did not remember ever receiving a letter telling him that his services were no longer needed.

CONCLUSIONS OF LAW

In support of the Arbitrator's decision relating disputed issues (A) and (B), Whether Respondent was operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act; and, Whether there was an employer-employee relationship between Petitioner and Respondent, the Arbitrator finds and concludes the following:

The Arbitrator finds and concludes Petitioner has failed to prove an employer-employee relationship existed between himself and Respondent on January 4, 2014, for the reasons set forth below. The preponderance of the credible evidence indicates Petitioner was an independent contractor and not a statutory employee. Petitioner's claim for compensation under the Act is therefore denied.

Initially, and of singular significance in this case, the Arbitrator finds and concludes Petitioner was not credible. Petitioner's demeanor at trial lacked credibility. Many of his answers to valid and legitimate questions appeared intentionally deceptive, incomplete and disingenuous. Petitioner's apparent inability or perhaps unwillingness to be forthright indicates a clear lack of credibility. Petitioner's demeanor was uncooperative and appeared deceptive, if not confrontational. Petitioner avoided providing simple, direct answers and would claim he did not understand a question obviously to avoid providing simple and direct answers, even to those the Arbitrator asked. Petitioner contradicted and undermined his own testimony numerous times throughout the trial.

In disputed cases such as this which are intensely fact-specific in outcome determination, and where many of the facts necessary to obtain and consider resolving an issue come directly - and only - from Petitioner's trial testimony, Petitioner's credibility then becomes paramount. Had Petitioner indicated a claim there was some genuine degree of a language barrier, perhaps that

claim would have engendered some sympathy, but he never did. Under these circumstances, the Arbitrator is not inclined to offer Petitioner the benefit of any doubt, and many doubts there are in his testimony regarding the disputed facts of this case. Therefore, the Arbitrator resolves all such conflicting testimony and facts against Petitioner.

The Arbitrator carefully observed Petitioner during the course of the long trial day. This period of observation also guided the assessment of Petitioner's credibility. Petitioner sustained a serious injury, a C4-C5 fracture that required urgent anterior spinal cord decompression, corpectomy and fusion from C3-C5 with posterior stabilization from C3 to C7. Further treatment was prescribed. However, inexplicably, Petitioner exhibited and expressed **no** sign or trace of any pain or discomfort during the course of the entire long trial day. This adds to the conclusion pointing to a lack of credibility.

Further, Petitioner testified that he was taking Morphine for is pain. (Tr. p. 51). However, Petitioner testified he "specifically abstained from taking Morphine today..." (Tr. p. 52). Therefore, Petitioner testified he agreed he was "not under the influence of any drugs today." (Tr. p. 52). But that testimony actually attacks his credibility. As noted above, Petitioner exhibited and expressed no sign or trace of any pain or discomfort during the course of the entire long trial day. But since he was not taking his usual Morphine painkiller that day, you would expect Petitioner to ***especially*** exhibit signs of pain and discomfort and complain – yet he did not.

Further, as discussed in more detail below, the Arbitrator finds and concludes the evidence leads to the conclusion Petitioner understood each of the many documents he signed which either directly and explicitly or indirectly and implicitly indicate his legal status as an owner-operator/independent contractor.

Again, Petitioner never raised a real or potential language barrier issue at any time, nor did he claim he did not understand any of the many documents he signed that are in evidence (e.g., PX 10, PX 12 "Equipment and Hauling Agreement"). These documents clearly indicate that Petitioner was considered, labeled and identified as an "independent contractor", "contractor" or "owner". Petitioner never asserted or claimed he did not understand the meaning of these clearly expressed terms. Nor does the evidence in the record indicate that Petitioner ever protested, asserted or claimed to anyone, including Respondent, that he was not, in fact, an "independent contractor" or "owner operator" but rather he was an "employee." **In summary, there is no evidence Petitioner did not agree he was an independent contractor prior to his accident**. Petitioner's pre-accident

actions point to the conclusion he was and indeed wanted to be considered and treated as an independent contractor (forming a corporation, buying his own truck, etc.) In short, Petitioner did not claim he was an employee until after he sustained his motor vehicle accident. Only then does he assert he is a statutory employee seeking workers' compensation benefits.

But even if we assume Petitioner did not understand the many documents he signed, that is still not a defense. Even if Petitioner did not even read what he signed, that is still not a defense. A person may not avoid legal consequences of an executed contract on the ground that the signing was done without knowledge of its contents. *State Bank of Geneva v. Sorenson*, 167 Ill. App. 3rd 674, 681 (1988).

Further, the Arbitrator does not believe and places no weight or credibility on any claim that any fraud, force, coercion or intimidation was applied when he signed any document.

Connected with the above, the Supreme Court in *Wenholdt* and *Roberson*, among other cases, has held that "a contractual agreement is a factor to consider in determining a party's status" although that factor alone does not as a matter of law determine an individual's employment. "In a close case, however, the contract's designation of a person as an independent contractor **may tip the balance by establishing the parties' intent."** Here, the intent of the parties was clear and unambiguous (as similarly noted in other documents) that Petitioner was an "independent contractor." Here, accordingly, the Arbitrator specifically finds and concludes that labeling Petitioner an "independent contractor" was not a "sham label" and therefore the lease/"Equipment and Hauling Agreement" PX 12 (where Petitioner agreed he was an "Independent Contractor" under the S Corporation name "TALA Transportation") as well as other documents such as PX 10, "Driver Information" (where Petitioner signed the document indicating he agreed and certified "I am an independent contractor paid by a 1099 tax form not as a W-2 employee") **are valid indicators of the true intent of the parties as to their voluntary and knowing contractual relationship.**

The Supreme Court has also heralded the "...widespread policy of permitting competent parties to contractually allocate business risks as they see fit." *McClure Engineering Associates, Inc. v. Reuben H. Donnelley Corp.* (1983), 95 Ill. 2d 68, 72. Where the parties, as in this case, enter into a valid contract, stating that Petitioner is an "owner-contractor" and the Carrier shall have exclusive possession, use and control of the equipment **solely** for purposes of compliance under Federal DOT regulations, and this shall **not** be used for any other purposes, including an

attempt to classify Contractor as an employee (which is precisely what was attempted here), **there is no reason to refuse to respect the specific contractual relationship the parties agreed to and there is no reason to refuse to declare that the parties are governed by it.** The Arbitrator has been presented no reason to disturb or dispute this specific intent of the parties and the consequences and effects of this intent.

It is the province of the Commission to determine whether a claim is supported by a preponderance of the evidence and to judge the credibility of witnesses and resolve conflicts in their testimony. Where, as is present in this case, the evidence consists of contradictory testimony of the Petitioner and Respondent's witness, the Commission must determine, in view of the other facts and circumstances in the case, where the preponderance of the evidence lies. Here, the Arbitrator finds and concludes that Petitioner has not met the burden of proof to prove his claim by a preponderance of the credible evidence.

Petitioner must be able to prove that he is an "employee" of Respondent. That is and remains Petitioner's burden of proof. It is the threshold issue in this claim.

The Supreme Court has held "...**an employee is at <u>all times</u> subject to the control <u>and</u> supervision of his employer, whereas an independent contractor represents the will of the owner only as to the result and not as to the means by which it was accomplished."** *Bauer v. Ind. Comm'n*, 51 Ill. 2d 169, 172 (1972). That is the case here. There is no evidence Petitioner, as an owner-operator trucker, was subject **at all times to both the control and supervision** of Respondent. In fact, even Petitioner does not argue that he was.

The Arbitrator emphasizes that Petitioner was <u>not</u> given specific instructions or orders as to how to perform his basic job duties, <u>nor</u> did any agent of Respondent personally supervise Petitioner's work or direct him specifically how to accomplish this task.

Our Supreme Court has addressed the difficult and contentious issue of employer-employee relationship in several key decisions.

In *Roberson v. the Industrial Commission (P.I. & I Motor Express)*, 225 Ill.2d 159 (2007), the Supreme Court noted that:

> "An employment relationship is a prerequisite for an award of benefits under the Act, and the question of whether a person is an employee remains "one of the most vexing * * * in the law of compensation." <u>O'Brien v. Industrial Comm'n</u>, 48 Ill.2d 304, 307, 269 N.E.2d 471 (1971). The difficulty arises not from the complexity of the applicable legal rules, but from the fact-specific nature of the inquiry. No rule

has been, or could be, adopted to govern all cases in this area. Henry v. Industrial Comm'n, 412 Ill. 279, 282, 106 N.D.2d 185 (952).

No single factor is determinative, and the significance of these factors will change depending on the work involved. Luby v. Industrial Comm'n, 82 Ill.2d 353, 358-59, 45 Ill.Dec. 88, 412 N.E.2d 439(1980). The determination rests on the totality of the circumstances."

"Nevertheless, whether the purported employer has the right to control the actions of the employee is the single most important factor."

In the present case, the facts, taken together, are supportive of a finding and conclusion that Petitioner is an independent contractor and not a statutory employee.

The Supreme Court in *Roberson* listed the most significant indices of employment for courts to examine when determining whether a Petitioner is an employee or independent contractor. *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159 (2007).

The factors to consider are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer compensates the person on an hourly basis; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer my discharge the person at will; (6) whether the employer supplies the person with materials and equipment; and (7) the nature of the work performed by the alleged employee in relation to the general business of the employer. Finally, the label the parties place on their relationship is also a consideration, although it is considered a factor, of "lesser weight." (*Id.* at 175; Ware v. Industrial Comm'n, 318 Ill. App. 3d 1117, 1122 (2000); *Steel & Mach. Transp., Inc. v. Illinois Workers' Comp. Comm'n*, 2015 IL App (1st) 133985WC (2015)). The significance of these factors rests on the totality of the circumstances, and no single factor is determinative. (*Roberson*, 225 Ill. 2d at 175, *Steel & Mach. Transp., Inc. v. Illinois Workers' Comp. Comm'n*, 2015 IL App (1st) 133985WC (2015)).

Although no single factor is determinative, when determining whether a Petitioner is an employee or an independent contractor, the trier of fact evaluates the level of control that Respondent exerts upon **Petitioner's manner to perform the work in question**. In this case, Respondent had complete control of clients who supplied the business (loads) for driver's distribution: (Tr., pp.. 170-72). Respondent had complete control of dispatchers. (Tr., pp. 170, 183.) Respondent had control of load destination and drivers were given three options at the start

of each day Petitioner. (Tr., p.164). Furthermore, Respondent controlled the D.O.T. number, license plate registration and code which gives drivers access to the railyards where the trucks are loaded.

However, none of the above address the primary issue of whether (and how) Respondent actually controlled the manner in which Petitioner actually performed his work or even had the right to do so, if not actually exercised.

Other factors are relevant:

Carrier required Petitioner to submit to mandatory drug test. (Tr., g. 59);

Carrier required Petitioner to attend mandatory safety training. (Tr., pp. 59-60);

Carrier did not allow Petitioner to have passengers in his own truck without prior approval (PX 15, p. 35. Tr., p. 60);

Carrier did not allow Petitioner to have pets in his own truck. (Tr., p. 60);

Carrier required Petitioner to obtain Workers' Compensation/ Occupational Accident Insurance. (PX.12);

However, again, none of these factors addresses Respondent's right to control the manner in which Petitioner performs his work.

Respondent's policy regarding alcohol and drugs, while intrusive (but to which Petitioner voluntarily consented) again does **not** address Respondent's right to control the manner in which Petitioner performs his work:

> "When [Respondent] has a reason to believe that an **independent contractor** is in violation of the Policy, the **independent contractor** may be asked to submit immediately to search of his or her person and/or to make his or her lock, lunch box, brief case, purse, packages, personal belongings, desk, vehicles or any other receptacle he or she uses or has access to available for inspection... Entry onto company premises, including parking lots, constitutes consent to search and inspection. Refusal to consent to search or inspection shall be considered grounds for which **an independent contractor** may be disciplined, up to including discharge." (PX.15, p. 26).

Again, none of the above address the primary issue of whether (and how) Respondent actually controlled the manner in which Petitioner actually performed his work or even had the right to do so, if not actually exercised.

Respondent testified that each driver was free to refuse any load at any time. (Tr., p. 145). Petitioner described in detail how Respondent allegedly retaliated against him when he refused a load but the Arbitrator does not assign credibility to this testimony. Further, while the dispatcher

prepared the orders and presented all three choices to the drivers based upon the needs of the clients and on how to best serve Respondent, (Tr., pp..164-66), this is not an argument that addresses Respondent's right to control the manner in which Petitioner performs his work.

Recently the Appellate Court in *Salvador Esquinca v. The Illinois Workers' Compensation Commission,* (First Dist., 2016) included an encapsulation of the *Roberson* list of relevant factors to consider.

The Appellate Court listed 7 indices of employment. They are with comments:

1. ***Whether the employer may control (has the "right to control") the manner in which the person performs the work.*** Right to Control: No Forced Dispatch System. Right of Refusal system. (Hard/Easy). Petitioner chooses his own loads out of an assortment of possible loads (takes 1 of 3);
2. ***Whether the employer dictates the person's schedule.*** No. Petitioner chooses when he works and he chooses the load from a group of choices. Petitioner does not leave until he negotiates a load he chooses;
3. ***Whether the employer compensates the person on an hourly basis.*** No. Petitioner is paid 70% of the load;
4. ***Whether the employer withheld income and social security taxes from the person's compensation.*** No. Petitioner is paid with a 1099. This was Petitioner's own voluntary choice. Petitioner voluntarily incorporated TALA as a Subchapter S Corporation;
5. ***Whether the employer may discharge the person at will.*** Petitioner and Respondent have a mutual right to end the contract. No such termination occurred;
6. ***Whether the employer supplies the person with materials and equipment.*** No. Petitioner provides the equipment (a tractor, semi-truck). Petitioner also provides all else needed to do his job (fuel, oil, etc.). **Therefore, any very significant, Respondent did not furnish the primary equipment (the truck) used to perform the work**; and
7. The Appellate Court also has acknowledged the **Relative Nature of the Work Test**. Dan Leone, who testified on behalf of Respondent, testified that he was engaged in providing Motor Carrier Freight Transportation Services. Leone explained he could operate as a broker. Further, Leone explained that he was the employer of the dispatchers at the motor carrier. Evans did not fire him. **Further, in *Esquinca,* the Court held that Petitioner was an independent contractor - even though Respondent was "a transportation company engaged in the business of warehousing, yard storage, truck brokering, and intermodal freight transport by rail and trucking." Significantly, there, as in this case, Petitioner owned his own truck and delivered loads for the employer.**

The Arbitrator finds Respondent had little, if any, actual or contractual right to control Petitioner's **actual work activity**, that is, the **manner in which he *performed his work for***

Respondent. The Transcript is replete with testimony from the parties that no one dictates the schedule and Contractors are free to choose. **But beyond this, there is no evidence that Respondent had either the right to control or exercised any actual control over the manner in which Petitioner performed his actual primary and functional job duties – that is, delivering his loads and driving his truck. Petitioner drove his truck to and from his load destinations without any interference, command or control exerted by or from Respondent. Petitioner did his job, drove his truck, and did it his own way. Respondent did not control, supervise or oversee the manner in which Petitioner did this job.**

Petitioner presented a desire to be more successful – and make more money. Every act he performed was directed to that goal. His original decision, obviously, was to knowingly and willingly become an independent contractor truck driver and not an employee truck driver; **you do not buy a semi-tractor, incorporate, file 1099s, etc., to become an employee.**

The Arbitrator notes Petitioner fails to present a case that rose to anywhere near the level of proof that was contained in *Roberson* and especially not so as seen in the newest case, *Esquinca*.

The preponderance of the credible evidence in this case indicates that Petitioner negotiated each load and chose from a number of available loads options.

Petitioner testified that he was allowed to turn down loads and chose his own loads. He did this through a negotiation with the dispatcher as to whether to take "easy" or "hard" loads. Petitioner could make himself unavailable if he chose. Petitioner could take off for a vacation, illness, injury or family emergency. Petitioner also testified that if he turned down a load he would get follow-up options (usually 2-6 options). Petitioner was responsible for going to the railyard and he, alone determined whether the chassis the containers were usable. He negotiated each and every load. Petitioner did not go under dispatch until he had selected his load.

The Contract states Respondent was required by Federal law to include the exclusivity provision in the Agreement. In fact, the Contract explicitly states that this provision was included "solely to conform with" Federal regulation and shall not be used for any other purposes."

In *Roberson*, our Supreme Court stated that a trucking company's compliance with such Federal regulations, standing alone, does not compel a finding of an employment relationship (*Roberson* at 177 to 179).

Therefore, compliance with Federal regulations is "merely a factor that may be considered in a common law analysis of whether a driver is an employee of the trucking company (*Roberson* at 178).

Petitioner in this case failed to present evidence that rose to anywhere near the level of proof in support of the finding of employee status in the *Roberson, Labuez, Steel Machinery,* nor *Esqiunca*. The *Esquinca* case is very similar to this case, which the Appellate Court found 5-0 in favor of a finding of independent contractor status.

To summarize, under the indices discussed by our Supreme Court, the Petitioner fails in his burden of proof on each count:

- Respondent did not control, nor did it have the right to control the manner in which the owner-operator performed the work;
- Petitioner testified that he was a skilled owner-operator and a specialized niche in the transportation industry, he controlled his own work;
- Petitioner is free to construct his own schedule;
- Petitioner could take his tractor out of service;
- There was no forced dispatch;
- Petitioner could refuse loads without consequence, and he did so;
- Respondent did not withhold income and social security taxes from the settlement; and,
- Petitioner advised Respondent and the Internal Revenue Service that he was a Subchapter S Corporation.

Petitioner had the total control of selecting and delivering the load (routes, breaks, fuel). There was considerable testimony regarding the fact Petitioner was given a choice between what he considered to be "easy" and "hard" work. Leone stated that he often had between 2 and 5 opportunities to select a load. Petitioner testified that he had never been refused a load.

In summary, applying the stands set forth in *Roberson* and subsequent cases, the Arbitrator finds and concludes there is sufficient evidence in the record to support the finding and conclusion Petitioner was an owner-operator, independent contractor at the time of his accident. **As indicated in *Esquinca***, regarding the most important factor, sufficient evidence shows Respondent did **not** have the right to control - nor did it exercise such control – Petitioner's work performance or work-related activities **to any notable degree.**

Therefore, Petitioner's claim for compensation is denied.

20IWCC0282

Robert M. Harris

Robert M. Harris, Arbitrator

Dated: August 16, 2018

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Amollie Gale,
Petitioner,

vs.

M&K Auto Sales,
Respondent.

20IWCC0283
NO: 17 WC 9257

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical, temporary disability and 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 August 19, 2019, 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 $41,200.00. 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: MAY 18 2020
o4/2/20
DLS/rm
046

Barbara N. Flores

Marc Parker

Dissent in Part and Concurrence in Part

I respectfully dissent in part from, and concur in part with, the Decision of the Majority. The Majority affirmed and adopted the Decision of the Arbitrator who found Petitioner sustained

CANCELLED

his burden of proving that a stipulated accident caused conditions of ill-being of his right eye as well as a concussion and post-concussion syndrome. He awarded Petitioner 24&1/7 weeks of temporary total disability benefits, $26,055.62 in medical expenses, and 49.3 weeks of permanent partial disability benefits representing loss of 15% of the right eye and 5% of the person-as-a-whole. I would have affirmed the portion of the Decision and Award of the Arbitrator regarding Petitioner's eye condition. However, I would have reversed the Decision of the Arbitrator regarding finding causation of his alleged concussion and post-concussion syndrome and vacated the awards associated with those conditions. Therefore, I dissent from the Decision of the Majority affirming the Arbitrator to find causation of the concussion and post-concussion syndrome and concur with the Decision of the Majority in finding causation of the eye condition.

Petitioner sustained a stipulated accident on February 7, 2017 when a hydraulic hose detached while he was detailing cars and struck him in the right side of his face. On that date, Petitioner presented to a hospital Emergency Department with 10/10 right-eye pain after an air hose blew up into his eye at work about 30 minutes earlier that day. He reported he could only see lightness/darkness/shade out of the eye and had severe photophobia. He denied any other injuries and had no other complaints. Petitioner was provided eye drops and discharged to the office of Dr. Yates, an eye doctor.

Petitioner was treated for his eye condition and saw Dr. Yazdi on March 21, 2017 for initial evaluation for the chief complaint of concussion post-concussion syndrome. Petitioner was referred to Dr. Yazdi by his lawyer. This was the first time Petitioner presented with such complaints to any treater. He reported the work accident and that the force knocked him into a car. He was taken to an emergency department and immediately sent to an eye doctor. "He was diagnosed with a bruised retina, inflammation/swelling in the back of the eye, and leakage of vitreous fluid. Currently, Petitioner complained of 7-9/10 pain in the eye, and constant 7-9/10 headaches that could reach 10/10, involving the entire right side of his head and face. On SCAT testing, he got an orientation question incorrect and "immediate recall was 4/5, 5/5, 4/5. Delayed recall was 1/5. He could not repeat four digit numbers backwards" and was able to recite only eight months backwards correctly.

Petitioner reported he had difficulty reading because of blurry/double vision, dizziness, and short-term memory issues. His headache and dizziness worsened with bending. Dr. Yazi noted that the CT of March 14, 2017 showed no acute injuries. Dr. Yazdi noted that Petitioner was asymptomatic prior to the accident and opined that the accident caused both his eye injury and concussion with post-concussion symptoms as well. He could not yet send him for cognitive therapy because it required reading/writing which he was unable to do at the time.

The Arbitrator found that Petitioner proved that in the stipulated accident he sustained a concussion with associated post-concussion syndrome. He found unpersuasive that the initial reports did not mention concussion/post-concussion symptoms because of the acute eye injury and the fact that he was being seen by eye doctors. In this context, the Arbitrator noted that "the Quantum Vision Centers records prepared by Dr. Yates and Dr. Desai are electronic and only require a 'chief complaint.' Both of these doctors are eye specialists and it is common for specialists not to list symptoms outside their specialty." The Arbitrator also wrote that the diagnoses of concussion/post-concussion syndrome were foreseeable noting "anyone who has taken a hydraulic hose off even a small compressor understands the forces involved."

Unlike the Arbitrator, and through its affirmation the Majority, I find troubling the fact that Petitioner first mentioned any symptoms other than eye symptoms six weeks after the accident and to a doctor he was referred to by his lawyer. In addition, Dr. Yazdi's records indicate that he spoke to Petitioner's eye doctors who reported that the injuries Petitioner sustained to his eye should not have affected his sight. This notation puts Petitioner's credibility into question because he continually reported severe issues with his eyesight throughout his treatment. Finally, I believe it

SCINCC0583

20IWCC0283

was inappropriate for the Arbitrator to rely on his interpretation of treaters' record-keeping procedures and his assertion that it was "common for specialists not to list symptoms outside their specialty." I do not even know if that assumption has any merit. In addition, I also think it was problematic for the Arbitrator to rely on his interpretation that the force involved in taking a hydraulic hose off a compressor was common knowledge. I do not believe that is a fact that can be judicially noticed and therefore it was improper for the Arbitrator or the Majority to consider that factor under §1.1 (e) of the Act. Therefore, in looking at the entire record I would have found Petitioner did not sustain his burden of proving that his alleged concussion and post-concussion syndrome were causally related to his work accident.

For the reasons stated above, I would have affirmed the portion of the Decision of the Arbitrator and award regarding Petitioner's eye condition. However, I would have reversed the Decision of the Arbitrator regarding finding causation of his alleged concussion and post-concussion syndrome and vacated the award associated with those conditions. Therefore, I concur with the Decision of the Majority in finding causation of the eye condition and respectfully dissent from the Decision of the Majority affirming the Arbitrator to find causation of the alleged concussion and post-concussion syndrome.

O-4/2/20
DLS/dw
46

Deborah L. Simpson

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0283

GALE, AMOLLIE
Employee/Petitioner

Case# **17WC009257**

M&K AUTO SALES
Employer/Respondent

On 8/19/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.89% 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:

5341 BROWN & BROWN
DAVID J JEROME
5440 N ILLINOIS SUITE 101
FAIRVIEW HEIGHT, IL 62208

0283 JELIFFE FERRELL DOERGE & PHELP
KELLY PHELPS
108 E WALNUT ST
HARRISBURG, IL 62964

20IWCC0283

20IWCC0283

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

Amollie Gale
Employee/Petitioner

v.

M&K Auto Sales
Employer/Respondent

Case # **17** WC **9257**

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 **Collinsville**, on **1/22/19**. 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 _____

20IWCC0283

FINDINGS

On **2/7/17**, 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 $**19,785.00**; the average weekly wage was $**380.48**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **no** dependent children.

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

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

Respondent shall be given a credit of $**1,228.86** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**1,228.86**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $26,055.62, as set forth in Petitioner's exhibit 6, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $2,319.16 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 $253.00/week for 24 1/7 weeks, commencing 2/7/17 through 7/25/17, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $1,228.86 for temporary total disability benefits that have been paid.

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, the Respondent shall pay Petitioner permanent partial disability benefits of $253.00/week for 49.3 weeks, because the injuries sustained caused the 5% loss of the person as a whole, as provided in Section 8(d)2 of the Act (25 weeks), and 15% loss of the right eye, as provided in Section 8(e) of the Act (24.3 weeks).

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.

Michael K. Nowak, Arbitrator

8/14/19
Date

ICArbDec p. 2

AUG 19 2019

20IWCC0283

FINDINGS OF FACT

On 2/7/17, Petitioner was a 48 year old full time worker for M & K Auto Sales. The Parties stipulated that Petitioner sustained accidental injuries arising out of and in the course of his employment when a hydraulic air hose blew apart and struck him on the right side of his face and his right eye. Petitioner felt immediate pain in his face, (TTr p. 12). Petitioner's supervisor came running to the Petitioner and the Petitioner described the accident to him. The Supervisor then drove the Petitioner to Gateway Regional Hospital that same day, (TTr pp. 12-13).

Petitioner arrived at the hospital at approximately 1:45 p.m. Personnel noted he was uncomfortable, anxious, and fearful. While he denied any other complaints at that time, he complained of significant photophobia and loss of vision in his right eye secondary to the accident. Petitioner stated he could not see anything out of his right eye, just lightness and darkness. Gateway Regional Hospital "directly" referred the Petitioner to Dr. David Yates at Quantum Vision Centers. They also referred the Petitioner to his personal doctor, Dr. Ajao, (TTr pp. 52-66).

Dr. Yates saw the Petitioner on 2/7/17, the date of the injury, and Petitioner consistently described the accident, (Pex 2). Dr. Yates' records were created electronically and only a "chief complaint" is listed. Dr. Yates is an eye specialist and found the Petitioner was suffering from "traumatic commotio retinae" in the complaints section, (Pex 2). Petitioner testified that he told Dr. Yates about headaches, dizziness, and neck pain, (TTr p. 14), but he also thought he had seen Dr. Yates a couple of days after the accident.

Dr. Yates referred Petitioner to Dr. Ankit Desai, also at Quantum Vision Centers, (Pex 2). Dr. Desai saw the Petitioner for the first time on 2/8/17. Dr. Desai's records appear on the same electronic form as do the records of Dr. Yates. Dr. Desai also placed his diagnosis of "traumatic commotio retinae" in the "chief complaint" electronic field. Dr. Desai saw the Petitioner once again on 3/8/17 for a four week follow up and Petitioner had continued complaints of blurry vision, (Pex 2). Dr. Desai maintained his diagnosis of "traumatic commotio retinae," told the Petitioner to return in 10 to 12 weeks for follow up, and told the Petitioner he could return to work on 3/14/17. Dr. Desai kept the Petitioner off work from 2/8/17 through 3/13/17, (Pex 2).

Petitioner testified that his neck pain (TTr p. 21) and his dizziness (TTr pp. 23-24) got bad about three to four days after the accident. His facial pain began immediately, (TTr p. 22). When Dr. Desai released him to return to work on 3/14/17, he could not do it. He was still in too much pain, (TTr pp. 24-25). Petitioner then obtained a lawyer to obtain additional medical treatment, (TTr p. 25). His attorney referred him to Dr. Joseph Yazdi, (TTr p. 25).

Dr. Yazdi saw Petitioner for the first time a week later on 3/21/17, (Pex 4). Dr. Yazdi recorded all of Petitioner's complaints including headaches, right eye pain and light sensitivity, double/blurry vision, dizziness, and right sided neck pain, (Pex 4). Dr. Yazdi diagnosed Petitioner with a concussion and post-concussion syndrome, headache, and eye pain, (Pex 5). Dr. Yazdi found the 2/7/17 accident caused the injuries resulting in these diagnoses.

When Dr. Yazdi saw Petitioner again on 4/13/17, Petitioner continued complaining of headaches and vision difficulties. Dr. Yazdi prescribed Gabapentin at the 3/21/17 visit but eventually told Petitioner to stop this

medication because it was causing swelling, (Pex 4). Due to the persistence of Petitioner's symptoms, Dr. Yazdi referred Petitioner to Dr. B. Wayne Dudney, a retinal specialist.

Dr. Dudney saw Petitioner on 4/21/17 and performed laser surgery on that date to repair a small operculated retinal tear. His diagnosis was acute vitreous detachment of the right eye, (Pex 3). Petitioner followed up with Dr. Dudney on 4/28/17. Petitioner was still symptomatic but he was improved and Dr. Dudney released him from his care, (Pex 3). Dr. Dudney spoke with Dr. Yazdi and said this tear was small and was probably not the reason for the Petitioner's vision difficulties, (Pex 4).

Dr. Yazdi continued to treat Petitioner, seeing him on four more occasions with noted improvement. Petitioner was playing memory games with his wife, (Pex 4). Dr. Yazdi also placed Petitioner into physical therapy at Phoenix Physical Therapy, (Pex 5). Petitioner last saw Dr. Yazdi on 7/25/17. Petitioner continued to have symptoms but felt he did not have sufficient physical or mental limitations to prevent him from returning to work. Dr. Yazdi released Petitioner to return to work with no restrictions; additional appointments were to be scheduled as needed, (Pex 4).

Petitioner attempted to return to work with the Respondent but was told his place had been filled. He assumed that meant he was fired, (TTr p. 25).

Petitioner testified that he continues to have headaches, (TTr p. 22), eye and face pain when he bends over, (TTr pp. 22-23), and dizziness when he bends over, (TTr pp. 23-24) but all of these symptoms were improved due to Dr. Yazdi's treatment.

Petitioner now works at American Auto Auction and details cars on the weekends. American Auto Auction knows about his condition and only requires him to inspect cars from below for frame damage, (TTr pp. 28-29). Weekend detailing allows Petitioner to work at his own pace. His symptoms increase when he is bending over, (TTr p. 29). His right eye continues to be blurry and sensitive to light which causes him difficulties reading, (TTr pp. 29-30). Petitioner's right eye is still light sensitive and he has to ask to take breaks when the lights are bright or he looks up for too long. This happens a couple of times per day, (TTr p. 42). Headaches have forced Petitioner to take about three days off in the three months he has been working for American Auto Auction, (TTr pp. 43-44). Petitioner also continues to get facial pain when it is cold and his neck stiffens up sometimes when he is at work. He pushes through because he needs the job, (TTr pp. 44-45). He uses Tylenol for these problems, (TTr pp. 45-46).

CONCLUSIONS

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

In order for an accidental injury to be compensable under the Act, a claimant must show that his injuries both "arose out of" and were "in the course of" his employment. ***Caterpillar Tractor Co. v. Industrial Comm'n,*** 129 Ill.2d 52, 57, 133 Ill.Dec. 454, 541 N.E.2d 665, 667 (1989). "In the course of" employment refers to the time, place, and circumstances under which the accident occurred. ***Knox County YMCA v. Industrial Comm'n***, 311 Ill.App.3d at 884, 244 Ill.Dec 286, 725 N.E.2d 762. "Arising out of" one's employment requires an injury's origin to be in some risk connected with, or incidental to, the employment so as to create a causal connection between the

employment and the accidental injury. ***Nabisco Brands, Inc. v. Industrial Comm'n***, 266 Ill.App.3d 1103, 1106, 204 Ill.Dec. 354, 641 N.E.2d 578, 581 (1994). A risk is incidental to employment where it belongs to or is connected with what an employee has to do in fulfilling his duties. ***Sisbro, Inc. v. Industrial Comm'n***, 207 Ill.2d 193, 278 Ill.Dec. 70, 797 N.E.2d 665, 672 (2003), citing ***Caterpillar Tractor Co.***

Respondent admits the Petitioner injured his eye as a result of his 2/7/17 accident but disputes the Petitioner's concussion, post-concussion syndrome, and headaches Dr. Yazdi diagnosed and treated. Part of that treatment included the referral to Dr. Dudney who performed laser surgery on the Petitioner for the small tear in his retina. The diagnoses and opinions on causation by Dr. Yazdi are without contradiction or rebuttal by any evidence presented by the Respondent. Respondent does not dispute the reasonableness and necessity of the treatments or the amounts charged for the medical by Dr. Yazdi and Dr. Dudney or the period of incapacity from 3/14/17 through 7/25/17, (TTr p. 4). Respondent only disputes causation. These diagnoses are foreseeable given the nature of the accident. Anyone who has taken a hydraulic hose off even a small air compressor understands the forces involved.

Petitioner testified as to his treatment and the on-going symptoms that are directly related to the injuries he sustained in the undisputed work accident of 2/7/17. On cross examination, Respondent pointed out that the records from Gateway Regional Hospital, Dr. Yates, and Dr. Desai do not mention injuries other than those to the eye. Petitioner testified that he told these providers about all of his symptoms. Petitioner testified that some of his symptoms, like neck pain and dizziness, began after he first saw these providers. Respondent presented no evidence to contradict Petitioner's testimony. Moreover, the absence of other complaints in these medical records is reasonable. The Gateway Regional Hospital emergency room records clearly concentrated on Petitioner's report of near blindness in his right eye. He was first seen after 2:00 p.m. on the day of the injury and was already at Dr. Yates' office by 3:15 p.m. The Quantum Vision Centers records prepared by Dr. Yates and Dr. Desai are electronic and only require a "chief complaint." Both of these doctors are eye specialists and it is common for specialists not to list symptoms outside their specialty.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner's testimony is credible and Petitioner has met his burden of establishing that his eye problems and his concussion and post-concussion symptoms of headaches, neck pain, face pain, and dizziness, etc. are causally related to the 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?

Employers are liable to provide medical care under Section 8(a) of the Workers' Compensation Act. Their liability extends only to the amount paid and accepted by the medical providers or to the negotiated rate pursuant to the fee schedule. ***Tower Automotive v. IWCC***, 407 Ill.App.3d 427, 943 N.E.2d 153, 943 Ill.Dec. 863 (2011).

Respondent accepted the Petitioner's eye injury as compensable through the treatment by Dr. Desai and paid medical expenses from 2/7/17 through 3/13/17 but denied Dr. Yazdi's diagnoses of concussion and post-concussion syndrome. The Arbitrator found these diagnoses and off work status to be uncontradicted and caused by the 2/7/17 accident.

Petitioner placed medical bills totaling $26,055.62 into evidence. (Pex 6) Respondent is hereby ordered to pay medical bills pursuant to the Medical Fee Schedule. Respondent is provided with a credit for medical bills that have been paid.

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

Respondent accepted the Petitioner's eye injury as compensable through the treatment by Dr. Desai and paid temporary total disability benefits from 2/8/17 through 3/13/17 but Respondent denied Dr. Yazdi's diagnoses of concussion and post-concussion syndrome. The Arbitrator found these diagnoses and off work status to be uncontradicted and caused by the 2/7/17 accident.

Dr. Yazdi took the Petitioner off work until 7/25/17. This represents 19 weeks from the date Dr. Desai returned Petitioner to work.

Respondent shall pay Petitioner temporary total disability benefits of $253.00/week for 24 1/7 weeks, commencing 2/7/17 through 7/25/17, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $1,228.86 for temporary total disability benefits that have been paid.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §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. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an impairment rating. 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 serve as an auto detailer and car frame inspector. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 48 years old at the time of his injury. Because of the increased length of time for which Petitioner must live and work with his disability The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no direct evidence of reduced earning capacity contained in the record. The Arbitrator therefore gives *no* 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. Petitioner sustained a concussion and developed post-concussion syndrome. Petitioner continues to suffer from headaches, blurry and light sensitive vision, face and neck pain, and dizziness due to his injury. Petitioner had no such problems prior to his undisputed accident.

Petitioner's complaints are corroborated by his medical records. 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 15% loss of use of the right eye (24.3 Weeks) pursuant to §8(e) of the Act and 5% loss of use of the person as a whole (25 weeks) pursuant to §8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Angela Ousley,
Petitioner,

20IWCC0284

vs.

NO: 09 WC 9471

SIU School of Medicine,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 22, 2019, 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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: MAY 18 2020
o4/2/20
DLS/rm
046

Barbara N. Flores

Marc Parker

DISSENT

I respectfully dissent from the Decisions of the Majority. The Majority affirmed and adopted the Decisions of the Arbitrator who found Petitioner sustained her burden of proving she suffered repetitive

ABS03W10S

trauma accidents resulting in conditions of ill-being of her hands/wrists bilaterally, her right arm, and right shoulder. I would have found that Petitioner did not sustain her burden of proving she sustained work related repetitive trauma accidents or that her conditions of ill-being were causally related to her work activities, reversed the Decision of the Arbitrator, and denied compensation.

Petitioner filed three separate Applications for Adjustment of Claims. They all alleged the same mechanism of injury and the same injuries to her hands and wrists, right arm, and right shoulder. The only difference was the alleged manifestation dates. The claims were consolidated and arbitrated together. The Arbitrator found all of Petitioner's claims compensable. In 09 WC 9471, he awarded Petitioner 65 weeks of temporary total disability ("TTD"), medical expenses identified in PX29, and 76.875 weeks of permanent partial disability ("PPD") representing loss of 20% of the right hand and 17.5% of the left hand (carpal tunnel syndrome ("CTS")). In 09 WC 9472, the Arbitrator awarded Petitioner 44&6/7 weeks of TTD, medical expenses identified in PX31, and 37.5 weeks of PPD representing loss of 7.5% of the person-as-a-whole (right shoulder). In 09 WC 9473 the Arbitrator awarded Petitioner medical expenses identified in PX30 and 31.625 weeks of PPD representing loss of 12.5% of the right arm (cubital tunnel syndrome ("CUTS")). The Arbitrator also awarded out-of-pocket expenses of $456.00 combined in the three claims. In total the Arbitrator awarded Petitioner 109&6/7 weeks of TTD, 146 weeks of PPD, as well as medical expenses. While the Arbitrator and Majority issued three separate decisions, in the interests of clarity, I am issuing a single dissent which will be issued for each Majority decision.

Petitioner testified she began working for Respondent in 2005 as a medical assistant. She worked from 8 to 4:30, five days a week, with a one-hour lunch break. When patients checked in for their appointments, she would type in their weight, blood pressure, reason for appointment, doctor's notes, *etc.* She used a keyboard and mouse. She was right-handed and operated the mouse with her right hand. Her keyboard was on top of her desk. She guessed her hands were "in an upward position" if she were sitting down low. Her chair was "lower than normal" and her hands were in a slightly elevated position. She would type between two and five hours a day.

Petitioner testified she also cleaned examination rooms using both hands. She had to clean rooms between patients and on Tuesday afternoons because they did not have patients at that time. She was also required to push patients in wheelchairs, put records in files, and carried medical records on a daily basis. She also stocked supplies. Three job descriptions were submitted into evidence and identified as PX25, PX26, and PX27. Petitioner testified that they all accurately describes her job activities. PX25, did not indicate who prepared it, and the record strongly suggests it was prepared by Petitioner. It described Petitioner's job as medical assistant included occasional (1/4 – 2&1/2 hours a day) bending/stopping, kneeling, squatting, and crouching. It also required frequent (1&1/2 – 5&1/2 hours) reaching above shoulder height and data entry/keystroking and repetitive firm grasping with both hands.

PX 26 and PX27 were official job descriptions for different time periods of Petitioner's employment but are essentially identical. They were prepared by Respondent and signed and acknowledged by Petitioner. Her job was deemed 70% clinical, involving answering patient questions, preparing orders for tests, escorting patients to exam rooms/taking vitals, performing procedures, including assisting in minor surgeries as directed by doctors, maintaining and stocking exam rooms, collecting/bagging soiled linen, reporting malfunctioning equipment, maintaining patient records, attending meetings, and going off-campus when necessary. 30% of the job was deemed clerical, involving answering phones, generating labels, pulling records, *etc.*, updating appointment lists, greeting patients, and preparing mailings to new patients. 51% or more of her time was spent reading, speaking, "close visual acuity," hearing, and gross/fine hand manipulation. She spent ¼ to ½ of her time writing, stooping, sitting, standing, and walking.

AD8031

Petitioner's CTS/CUTS surgeon, Dr. Neumeister, testified by deposition. He was asked a hypothetical question assuming the job description he was shown (PX25). He was also to assume that Petitioner started working for Respondent full-time on November 21, 2005, she used keyboard on top of her desk, and her wrists would be slightly to moderately hyperextended. She typed two-five hours a day. Dr. Neumeister was also supposed to assume that Petitioner's job also included "firm grasping on a repetitive basis," and she would carry 10-15 pounds occasionally. She had to stock items on shelves and push patients in wheelchairs. He was also to assume that she experienced numbness/tingling while performing these tasks. Dr. Neumeister answered: "if she developed those symptoms while she was doing those activities, then" he would say that the aggravated her bilateral CTS, even though he did not know the precise cause of her CTS.

On cross examination, Dr. Neumeister testified that his notes do not indicate that he discussed Petitioner's job duties with her when he first saw her. He was not sure that he was the one that told her that her symptoms could be related to her job activities. He uses the terms aggravation and exacerbation interchangeably. He reiterated that he believes that if a patient has symptoms with an activity that activity aggravates the patient's condition. He would believe that if she had symptoms typing an hour a day, he would deem that activity to aggravate her condition.

Dr. Neumeister also testified that people are built differently and different people had different tendency to develop CTS with similar activity. If 85% of Petitioner's time was devoted to cleaning instruments, stocking exam rooms, ordering supplies, checking in patients, and escorting patients, those activities would aggravate her condition if she felt symptoms performing those activities.

Dr. Williams also testified by deposition. He was retained by the State of Illinois to perform a Section 12 medical examination on Petitioner. Petitioner reported that she last worked on January 28, 2013 as a medical assistant in neurology. Dr. Williams was provided a job description (PX26) with which Petitioner had no problem. Dr. Williams noted that Petitioner had last seen Dr. Neumeister in 2012 and he referred her to a rheumatologist for a diagnosis of rheumatoid arthritis. She had actually been diagnosed with the condition at least from 2010. Petitioner described to Dr. Williams her workstation, demonstrated how she typed, and reported she typed two hours a day. Dr. Williams thought significant the fact that despite two bilateral CTS releases and a right-sided CUTS surgery, she still had symptoms in her hands, wrists, and right elbow. She also currently reported weakness in the arms, right worse than left.

Besides his clinical examination of Petitioner, Dr. Williams also reviewed her medical records. He noted her co-morbidity factors for CTS/CUTS included her rheumatoid arthritis, her gender (female), her age (40), increased BMI, smoking for 20 years, and prior repair of her median nerve in 1999. Dr. Williams opined that Petitioner's CTS and CUTS were not related to her job activities, based on the job description, the ergonomics of the workstation that she described, as well as the manner she typed, per her demonstration. Petitioner even told him that she did not obviously rest her wrists, forearms, or elbows on the tables. Dr. Williams also cited her co-morbid factors, which represented a more likely cause of her current conditions. He believed Petitioner was at maximum medical improvement at the time of his examination.

On cross examination, agreed that CTS is generally caused by compression of the median nerve in the wrist and that "posture repetition and force can place pressure on the median nerve depending on how the activity is done, how prolonged the activity is, and how long or continuous it's done." Dr. Williams also agreed that in the past, he testified that "it's important to know whether the activity is being done, a sole activity at a cycle of time of less than 30 seconds and/or is done for greater that 50% of the shift." However, that does not necessarily mean that he would change his opinion if Petitioner were typing at her workstation for more than 50% of her workday; it would depend on the ergonomics of her workstation and whether the typing were constant without breaks.

20IWCC0284

However, Dr. Williams noted that Petitioner never indicted that she was uncomfortable at her workstation and she stated that she did not rest her wrists or arms on a table. In her demonstration of typing, she did not have her wrists in a flexed or hyperflexed position. Dr. Williams agreed that he did not see Petitioner's workstation.

Petitioner's shoulder surgeon, Dr. Hansen, did not make any opinion regarding causation of her shoulder condition in any of his treatment notes. However, upon query from Petitioner's lawyer, he issued a checklist and offered a one-sentence opinion indicating her work activities may have aggravated her shoulder condition.

In finding Petitioner proved accidents/causation to all her conditions of ill-being, the Arbitrator found her to be a credible witness. He based his opinions "on the testimony of Petitioner, her job description, and the opinions of Dr. Neumeister and Dr. Hansen, who the Arbitrator found more persuasive than Dr. Williams." In that regard he stressed that Dr. Williams did not opine about Petitioner's shoulder condition. The Arbitrator also noted that "reaching above shoulder level and entering data/keystroke are activities which are marked as frequently, meaning 2.5 to 5.5 hours. It is also stated that claimant uses hands for repetitive tasks such as firm grasping with both hands." Respondent argues there was no credible evidence that Petitioner sustained any repetitive trauma accident/injuries and questioned the dates of manifestation that she cited.

In my opinion, Petitioner did not sustain her burden of proving either repetitive trauma accidents or that her work activities contributed to her conditions of ill-being. The official job descriptions prepared by Respondent and signed by Petitioner, do not establish that her job involved any forceful gripping/grasping or vibration, and do not note keyboarding of more than 2.5 to 5.5 hours a day. These job descriptions really seem to show a diverse collection of activities which strongly militate against proof of repetitive trauma accidents/injuries. In fact, even Petitioner's testimony suggests that she had various job activities and that she did not perform any particular function repetitively or continuously.

In addition, I disagree with the analysis of the Arbitrator, and through its affirmation the Majority, regarding the relative persuasiveness of the opinions of Dr. Williams versus Dr. Neumeister and Dr. Hansen. Dr. Hansen's "checklist," almost certainly prepared by Petitioner's lawyer, and his one-sentence opinion letter on causation of CUTS and shoulder impingement, provide absolutely no explanation and was not persuasive at all and do not identify any specific offending job activity. In addition, Dr. Neumeister's opinions seemed based entirely on his belief that whenever a patient has symptoms with an activity, that activity necessarily permanently aggravates the patient's condition of ill-being whatever the activity and whatever the condition. I do not believe that Dr. Neumeister's premise is correct.

On the other hand, in my opinion Dr. Williams was quite persuasive. He relied on the official job descriptions, which appear much more reliable that the one likely prepared by Petitioner. In addition, Dr. Williams noted that Petitioner specifically related that she did not have issues with her workspace, contradicting her unpersuasive testimony that the chair was a little low compared to the keyboard, and she demonstrated the way she keyboarded, which Dr. Williams did not find at all problematic. Finally, Dr. Williams explained that Petitioner had significant co-morbidity factors, most notably Petitioner's rheumatoid arthritis which actually itself could be the cause of all of Petitioner's conditions of ill-being. Her rheumatoid arthritis alone could certainly help explain the recurrence of CTS in both hands/wrists after bilateral CTS release surgeries, as well as her diffuse joint issues including her hands, wrists, elbow, and shoulder.

For the reasons stated above I would have found that Petitioner did not sustain her burden of proving she sustained work related repetitive trauma accidents or that her conditions of ill-being were

20IWCC0284

causally related to her work activities, reversed the Decision of the Arbitrator, and denied compensation. Therefore, I respectfully dissent from the Decision of the Majority.

O-4/2/20
DLS/dw
46

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0284

OUSLEY, ANGELA
Employee/Petitioner

Case# **09WC009471**

09WC009472
09WC009473

SIU SCHOOL OF MEDICINE
Employer/Respondent

On 7/22/2019, 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 2.01% 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:

0334 KANOSKI BRESNEY
THOMAS R EWICK
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

4993 ASSISTANT ATTORNEY GENERAL
CHELSEA T GRUBB
500 S SECOND ST
SPRINGFIELD, IL 62706

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

0504 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CchampaIGN, IL 61825

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

JUL 22 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20IWCC0284

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

Angela Ousley
Employee/Petitioner

v.

SIU School of Medicine
Employer/Respondent

Case # **09** WC **09471**

Consolidated cases: 09 WC 09472 and 09 WC 09473

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 **Springfield**, on **November 9, 2018**. 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 _____

20IWCC0284

FINDINGS

On **8/13/07**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$21,079.76**; the average weekly wage was **$405.38**.

On the date of accident, Petitioner was **33** 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 **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

ORDER

Respondent is ordered to pay the medical expenses listed in Petitioner's Exhibit No. 29, as provided in Sections 8(a) and 8.2 of the Act. Respondent is ordered to reimburse the Petitioner's out-of-pocket expenses for related, reasonable and necessary medical services in the amount of $276.00. Respondent shall be given a credit for medical bills that have been paid by its group health insurer, and Respondent shall hold Petitioner harmless for 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 $290.00 per week for 65 weeks, commencing November 28, 2007 through January 2, 2008, January 25, 2008 through February 24, 2008, June 29, 2009 through May 6, 2010, and April 6, 2012 through June 20, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $290.00 per week for 76.875 weeks, because the injuries sustained caused the 17.5% loss of use of the left hand and the 20% loss of use of the right hand, as provided in Section 8(e)(9) of the Act.

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

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

Signature of Arbitrator

7/19/19
Date

ICArbDec p. 2

JUL 22 2019

20IWCC0284

FINDINGS OF FACT

Petitioner has filed three Applications for Adjustment of Claim. In 09 WC 09473, Petitioner alleges she sustained bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome and injuries to her right rotator cuff and the person as a whole through repetitive trauma with a date of accident of December 3, 2006. (AX 4) In 09 WC 09471, Petitioner alleges the same injuries through repetitive trauma with an injury date of August 13, 2007 (AX 5), and in 09 WC 09472, Petitioner alleges the same injuries through repetitive trauma with a date of accident of January 27, 2009 (AX 6) In all three cases, the disputed issues are accident, causal connection, medical expenses, temporary total disability, and the nature and extent of the injuries. (AX 1; AX 2; AX 3)

Petitioner testified she is 44 years old and right-hand dominant. She has been on social security disability since April 2014 for congestive heart failure. On November 21, 2005, she started working for Respondent, Southern Illinois University School of Medicine as a medical assistant. She worked 5 days each week, Monday through Friday, from 8:00 a.m. to 4:30 p.m. with a 1-hour lunch break. She described her job duties. She noted that she was required to type on a computer when she put in a patient's information after the patient checked in for his or her appointment. She used a standard keyboard which sat on a desk. As she typed, her hands were in an upward position because she was sitting low due to the setup of her work station and the chair was lower than normal. The computer had a mouse which she controlled with her right hand. The amount of typing each shift varied, but it could be between 2 and 5 hours. Petitioner also had to clean rooms. Between each patient, she wiped the examining room down. Sometimes she had to push patients in wheelchairs. She also had to carry medical records and patients charts on a daily basis. Petitioner was also required to stock the exam rooms with supplies such as band-aids, alcohol pads, tongue compressors, pens, papers and Q-tips.

Petitioner noted on cross-examination that when the patients checked in, she took their information orally and then input it into the computer. There were about 100 patients on Thursdays and about 50 to 75 patients on the other days. It took about 2 to 4 minutes for each patient.

Petitioner testified that Petitioner's Exhibit Nos. 25, 26 and 27 are job descriptions which fairly and accurately depict her job duties. Petitioner's Exhibit No. 25 is a form completed by Petitioner's supervisor on November 18, 2008 listing the physical demands of Petitioner's job as a medical assistant. Reaching above shoulder level and entering data/keystroke are activities which are marked as frequently, meaning 2.5 to 5.5 hours. It is also noted that claimant uses her hands for repetitive tasks such as firm grasping with both hands. (PX 25)

Petitioner's Exhibit Nos. 26 and 27 are "position descriptions" for a medical assistant in the Neurology Department of Respondent, effective November 22, 2010 and May 17, 2010 respectively, which are signed by Petitioner and her supervisor. They state 70% of the job duties are clerical, which includes answering patient phone calls, giving patient written orders, escorting patients to exam rooms, taking blood pressure, weight and height information and recording the information into electronic health records, completing a review of systems checklist, maintaining clean, orderly and well supplied examination rooms and doctor work rooms, stocking the utility, supply and laundry rooms, collecting and bagging soiled linens, maintaining patient electronic health records, and attending staff meetings. (PX 26; PX 27) The descriptions note 30% of the job duties are clerical, involving answering telephone calls, preparing clinic by generating encounter labels, pulling new patient records, printing and distributing clinic schedules, updating appointment lists, greeting all arriving patients for

20 IWCC0284

appointments, updating demographic and insurance information in the computer, and preparing mailings to new patients. (PX 26: PX 27)

Petitioner testified that prior to working for Respondent, she did not have any problems with her hands, elbows or shoulders. She had never had any treatment for those body parts prior to working for Respondent. However, during the course of her employment with Respondent, she started to notice her right shoulder would get achy. Her fingers would get tingly and numb.

On December 3, 2006, Petitioner presented to the emergency room of St. John's Hospital. The triage note indicated Petitioner complained of right shoulder and right arm pain. She complained of shoulder tenderness on a patient diagram. She was prescribed Vicodin and Toradol. (PX 20)

On February 24, 2007, Petitioner presented to Dr. Glennon Paul with complaints of pain in her right shoulder on elevation and raising it behind her back as well as numbness and pain down the side of her arm. Dr. Paul diagnosed rotator cuff tendonitis and biceps tendonitis. He performed a steroid injection into the rotator cuff and biceps tendon. (PX 9)

On August 13, 2007, Petitioner presented to Dr. Paul with pain down her right arm, noting it occurred all day long. It started in her wrist and went all the way up into the shoulder. Dr. Paul suspected carpal tunnel syndrome. (PX 9) She testified that Dr. Glennon Paul, recommended an EMG.

On August 16, 2007, Petitioner had an EMG of her right upper extremity. Dr. Acharya, who performed the study, noted that his clinical examination showed positive Tinel's and Phalen's signs. The study showed severe right carpal tunnel syndrome. (PX 2)

After the EMG, Dr. Paul referred her to Dr. Michael Neumeister. (PX 9)

On September 5, 2007, Petitioner presented to Dr. Neumeister, indicating that over the last 9 to 10 months she had developed right shoulder pain and numbness and tingling in her right hand. She stated that she had two shoulder injections with some relief of shoulder pain but continued to have numbness and pain in the distribution of the right median nerve. It was also noted that her left median nerve had been repaired secondary to a laceration some years ago and she was having some mild paresthesias in that nerve as well. The Tinel's and Phalen's tests were positive. Dr. Neumeister diagnosed carpal tunnel syndrome. He recommended splinting and referred her to hand therapy. (PX 3)

On September 24, 2007, Dr. Neumeister noted that she was worse despite splinting and recommended surgery. (PX 3)

On November 21, 2007, Dr. Paul performed an injection into the rotator cuff and biceps tendon. He ordered an MRI of the shoulder. (PX 9) An MRI of the right shoulder was performed on November 26, 2007. The impression of the radiologist was mild tendonitis involving the supraspinatus. (PX 10)

On November 28, 2007, Dr. Neumeister operated performing a right carpal tunnel release. The post-operative diagnosis was right carpal tunnel syndrome. (PX 11)

20 IWCC0284

Following surgery, Petitioner was taken off of work by Dr. Neumeister, who on December 27, 2007 returned her to work on January 3, 2008. (PX 3)

On January 25, 2008, Dr. Neumeister operated on Petitioner's left wrist. He noted in the operative report that Petitioner had a previous median nerve injury and now had a large neuroma were the median nerve had been repaired in the past. He noted that she had since developed symptoms of carpal tunnel syndrome, including pain and paresthesias in her fingertips. Dr. Neumeister performed a left open carpal tunnel release and median nerve neurolysis. His post-operative diagnoses were left carpal tunnel syndrome and previous median nerve injury. (PX 12)

Following her surgery, Dr. Neumeister returned Petitioner to work on February 25, 2008 with no restrictions. (PX 3)

An EMG/nerve conduction study of the right upper extremity performed on February 7, 2008 evidenced right ulnar neuropathy in the right elbow. (PX 2)

On February 28, 2008, Petitioner presented to Dr. Thomas Hansen upon referral from Dr. Neumeister for evaluation of her shoulder. She noted that she had 4 or 5 injections with only temporary relief and had tried physical therapy. She complained of pain with overhead activities and pain at night. Dr. Hansen diagnosed right shoulder impingement syndrome and AC arthritis. He offered a cortisone injection, which Petitioner declined, and referred her for physical therapy. He also diagnosed cubital tunnel syndrome. (PX 2; PX 3) On May 22, 2008, Dr. Hansen recommended surgery. (PX 4; PX 5)

On August 8, 2008, Dr. Hansen performed a right shoulder arthroscopy with subacromial decompression and distal clavicle excision. He observed no tears but found a spur in the subacromial space, which he shaved. His post-operative diagnosis was right shoulder impingement. (PX 13)

Following surgery, Dr. Hansen kept Petitioner off of work and referred her to physical therapy. (PX 4)

On December 12, 2008, Dr. Hansen performed a right cubital tunnel release. His post operative diagnosis was right cubital tunnel syndrome. (PX 14)

Petitioner participated in physical therapy at St. John's Hospital between January 6, 2009 and February 12, 2009 for her right elbow. (PX 21)

On January 27, 2009, Dr. Hansen filled out a questionnaire in which he marked yes in response to the questions which asked whether Petitioner's bilateral carpal tunnel syndrome and the right shoulder problem which necessitated surgery was caused or aggravated by her work as a medical assistant. He also indicated she was not currently capable of working and further noted his treatment had been reasonable and necessary to cure and relieve the effects of her work-related difficulties. (PX 23)

On June 18, 2009, Petitioner presented to Dr. Hansen, and he recorded that she wanted to go back to work. He returned her to work on June 18, 2009 with no restrictions and released her on an as needed basis. (PX 3)

On June 29, 2009, Petitioner presented to Dr. Neumeister. He noted that she was trying to obtain a new position as a medical assistant in the Mohs lab, which would require her to slice with a blade and handle fine patient specimens on slides. She was worried that due to numbness in her fingers she would not be safe in terms of being able to protect the specimens or herself from injury. Dr. Neumeister indicated he looked at a job description and explained to her that she would not be an adequate candidate for this type of work. He referred her to hand therapy and released on an as needed basis. (PX 3)

On July 1, 2009, Dr. Neumeister noted that he had been contacted by Respondent's human resources about where Petitioner could be placed. He noted that Petitioner was able to do a significant amount with her right hand, but he believed fine manipulation with her left hand and fingers would be difficult. Also, because of the numbness and tingling of the fingers, he though the use of sharp objects would not be in her best interest. He did think she could do essential nursing chores, such as blood pressure measurements, lifting, rooming patients and general patient care. Dr. Neumeister noted her position as a medical assistant in the Neurology department fit his recommendations but had been filled while she was off of work. (PX 3)

At trial, Petitioner testified that while Dr. Hansen had returned her to work with no restrictions on June 18, 2009, her medical assistant position in the neurology department had been filled. Prior to going back to work for Respondent, she had a Functional Capacity Evaluation (FCE) on May 6, 2010. She demonstrated the abilities to perform the physical demands of a medical assistant. (PX 15, p. 3)

Petitioner testified that when she went back to work for Respondent in the middle of 2010, her hours remained the same, but her job duties changed in that she became a medical assistant in the dermatology department. In that department, she worked in the lab putting skin cell samples on little dish boards or slides. She used a little scalpel to break down the sample. She put the slides in a microscope. This job did not involve typing but involved fine manipulation with her fingers.

On December 28, 2011 Dr. Hansen wrote a letter to Petitioner's attorney stating he had reviewed records pertaining to his care of Petitioner, and based on those records, he believed her cubital tunnel syndrome may have been aggravated by her work activity as a medical assistant with Respondent. (PX 24)

On March 12, 2012, Petitioner returned to Dr. Neumeister with complaints of numbness and tingling in both hands involving the fingers. On physical examination, she had a positive provocative compression of the bilateral carpal tunnels and mildly positive over the cubital tunnels. Dr. Neumeister ordered nerve conduction studies. (PX 7)

On March 31, 2012, Petitioner had an EMG/nerve conduction study, which showed bilateral mild to moderate carpal tunnel syndrome. (PX 6)

On April 6, 2012, Dr. Neumeister performed a right open carpal tunnel release. His post-operative diagnosis was recurrent right carpal tunnel syndrome. (PX 16) On May 8, 2012, Dr. Neumeister performed a left open carpal tunnel release, and the post-operative diagnosis was recurrence of left carpal tunnel syndrome. (PX 17) Following the surgeries, Petitioner participated in hand therapy. (PX 7) She was released as of 6/21/12

On November 19, 2012, Petitioner presented to Dr. Neumeister for reevaluation of the carpal tunnel syndrome. She had some spasm of her thenar eminence. (PX 7)

On February 12, 2013, Petitioner presented to Dr. Ana Tumyan, a Rheumatologist at SIU, upon referral from Dr. Neumeister for evaluation of pain in both hands, especially in the MCP and PIP joints as well as the wrists. She was diagnosed with joint pain. During her treatment with Dr. Tumyan and the Rheumatology Department, Petitioner was diagnosed with rheumatoid arthritis and prescribed anti-inflammatories. (PX 8; PX 22)

Petitioner testified that her right elbow is currently fine, but she does have an aching sensation with certain activities. With respect to her right shoulder, she has pain with lifting her arm up and has stiffness at night and during the day. Around the house, she has to use her right arm to wash dishes, cleaning and reaching into cabinets. With respect to her hands, she still has some numbness and tingling in the tips of her fingers about 7 or 8 times in a month. She takes Tylenol twice a day every day.

Dr. Neumeister testified by way of evidence deposition, which is marked as Petitioner's Exhibit No. 1. He is board certified in plastic surgery with an added certificate in hand surgery. 60 to 70% of his practice is devoted to hand surgery. (PX 1, pp. 6) He noted that having one's hand in a flexed or extended position can place pressure on the median nerve in the wrist. (PX 1, pp. 12-13) He testified that Petitioner had an EMG on February 7, 2008, roughly two and a half months after the surgery on her right wrist, and it right showed cubital tunnel syndrome as well as some residual changes from the first surgery. (PX 1, pp. 19-20)

Dr. Neumeister reviewed Petitioner's Exhibit No. 25. He was asked to assume the following facts to be true. Petitioner started working for Respondent as a medical assistant on November 21, 2005 and worked 8 to 4:30 Monday through Friday with a one hour lunch. She used a keyboard that was on top of her desk and while she typed her wrists would be slightly to moderately hyper extended. He was told she typed between 2.5 to 5.5 hours a day entering data and that while typing she started to notice some numbness and tingling in her fingers and pain in her writs. He was informed that her other job duties, pursuant to Petitioner's Exhibit No. 25, included firm grasping on a repetitive basis and she would lift 10 to 15 pounds from time to time, which mainly meant carrying medical records. She noticed symptoms in her hands and wrists, including numbness and tingling, while carrying records. He was also told that she had to stock items including lien on a shelf and push patients in a wheelchair. (PX 1, pp. 22-23) The Dr. was asked if her job as a medical assistant could have either caused or contributed to the development of her bi-lateral carpal tunnel syndrome. He testified that if she developed symptoms while doing those activities then her job aggravated her condition. He also stated his treatment was reasonable and necessary for those conditions. (PX 1, pp. 23-24)

Dr. Neumeister noted that Petitioner returned to him on March 12, 2012 with complaints involving multiple joint, including the knuckles in her fingers. She also had complaints of numbness and tingling in both hands. An EMG confirmed bilateral carpal tunnel surgery and he operated again on both wrists for the carpal tunnel syndrome. Dr. Neumeister testified that the recurrence of the carpal tunnel syndrome probably relates to the first two surgeries because of the scar tissue from those surgeries around the nerve. (PX 1, pp. 24-28) Dr. Neumeister noted that even if Petitioner had not gone back to work, she could have developed the recurrence of the carpal tunnel syndrome. (PX 1, p. 29) He noted the 2012 surgeries were reasonable and necessary. (PX 1, p. 30)

On cross-examination, Dr. Neumeister was asked about the causative factors for developing carpal tunnel syndrome. He noted there are various vascular disorders, infections, trauma, inflammation, and congenital

abnormalities which can contribute to it. He noted Petitioner's carpal tunnel syndrome could have developed in an idiopathic manner, which is the most common cause of carpal tunnel syndrome. Smoking can aggravate carpal tunnel syndrome. (PX 1, pp. 37-41)

Respondent's Exhibit No. 5 is an employee's notice of injury completed on December 14, 2010. Petitioner marked shoulder, hands and elbow. She listed a date of injury of December 1, 2006. She noted her pain started at work. (RX 5)

Respondent retained Dr. James Williams to perform a Section 12 examination. Dr. Williams testified by way of evidence deposition which is marked as Respondent's Exhibit No. 18. Dr. Williams is board certified in orthopedic surgery. He examined Petitioner on April 29, 2015. He stated Petitioner has co-morbidities associated with carpal or cubital tunnel syndrome including rheumatoid arthritis, increased body mass, a previous median nerve repair in 1999, smoking, sex and age. He diagnosed status post two left carpal tunnel surgeries, status post two right carpal tunnel releases, and status right elbow cubital tunnel release. Dr. Williams did not believe Petitioner's work duties were related to these conditions. He thought they were more likely idiopathic or related to her rheumatoid arthritis, increased body mass index and smoking. (RX 18, pp. 5-13)

On cross-examination, Dr. Williams noted he did not address Petitioner's right shoulder. He offered no opinions on the right shoulder. As of the date of his deposition, August 20, 2015, he had performed 75 to 100 independent medical examinations. 80 to 90 percent are done at the request of the employer.

CONCLUSIONS

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

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

The Arbitrator finds Petitioner to be a credible witness and notes she appeared candid and forthright in her testimony and demeanor at trial.

All three Applications for Adjustment of Claim allege the same injuries and body parts and allege repetitive trauma as the cause of the injuries. (AX4; AX 5; AX 6) Similarly, all three Requests for Hearing are identical in the disputed issues with the only difference being the dates of accident and Petitioner's age. (AX 1; AX 2; AX 3)

The Arbitrator finds the manifestation date, for the cubital tunnel syndrome to December 3, 2006. On that day, she was seen at St. John's emergency room and complained of right arm pain in addition to right shoulder pain. (PX 20) When she was asked in 2010 by Respondent to complete an injury report, she listed her elbow along with the hands and shoulder in Respondent's Exhibit No. 5 and noted it began December 1, 2006. (RX 5)

The Arbitrator finds the manifestation date for the carpal tunnel syndrome to be August 13, 2007, the date she presented to Dr. Paul noting pain down her arm all day long from her wrists to her shoulder. Dr. Paul suspected carpal tunnel syndrome. (PX 9)

The Arbitrator finds the manifestation date for the right shoulder to be January 27, 2009. On that date, Dr. Hansen completed a questionnaire in which he indicated he thought the bilateral carpal tunnel syndrome and the right shoulder condition which necessitated surgery were related to Petitioner's work as a medical assistant. (PX 23)

The Arbitrator finds Petitioner has proven she sustained three accidents on the above-referenced dates which arose out of and in the course of her employment and that her conditions of ill-being, right cubital tunnel syndrome, the right shoulder requiring surgery, and the bilateral carpal tunnel syndrome requiring two surgeries on each wrist, are causally related to said accidents. The Arbitrator bases his opinions on the testimony of Petitioner, her job description, and the opinions of Dr. Neumeister and Dr. Hansen, who the Arbitrator found more persuasive than Dr. Williams.

Petitioner's testimony concerning her job was not contradicted at trial. It showed her work as a medical assistant was repetitive and hand intensive. She testified that as she typed her hands would be in an upward extended position because she was sitting low due to the positioning of her chair. There were about 100 patients on Thursdays and about 50 to 75 patients on the other days whom she would enter information for in the computer. It took about 2 to 4 minutes for each patient. She also had to use her hands to clean rooms, stock rooms, push patients in wheelchairs, and carrying patient charts. Petitioner's Exhibit No. 25 is a form completed by Petitioner's supervisor on November 18, 2008 listing the physical demands of Petitioner's job as a medical assistant. Reaching above shoulder level and entering data/keystroke are activities which are marked as frequently, meaning 2.5 to 5.5 hours. It is also noted that claimant uses hands for repetitive tasks such as firm grasping with both hands. (PX 25)

Dr. Neumeister testified having one's hand in a flexed or extended position can place pressure on the median nerve in the wrist. (PX 1, pp. 12-13) Dr. Neumeister reviewed Petitioner's Exhibit No. 25 and considered a hypothetical regarding Petitioner's job as a medical assistant in the Neurology Department. He testified that if she developed symptoms while doing those activities then her job aggravated her bilateral carpal tunnel syndrome. He also stated his treatment was reasonable and necessary for those conditions. (PX 1, pp. 23-24) Dr. Neumeister testified that the recurrence of the carpal tunnel syndrome in 2012 probably relates to the first two surgeries because of the scar tissue from those surgeries around the nerve. (PX 1, pp. 24-28) Dr. Neumeister noted that even if Petitioner had not gone back to work, she could have developed the recurrence of the carpal tunnel syndrome. (PX 1, p. 29) He noted the 2012 surgeries were reasonable and necessary. (PX 1, p. 30)

Petitioner testified that when she went back to work for Respondent in the middle of 2010, her hours remained the same, but her job duties changed in that she became a medical assistant in the dermatology department. In that department, she worked in the lab putting skin cell samples on little dish boards or slides. She used a little scalpel to break down the sample. She put the slides in a microscope. This job did not involve typing but involved fine manipulation with her fingers. Although Dr. Neumeister testified that 2012 surgeries for the carpal tunnel recurrence probably related to the first two surgeries and that she could have developed a recurrence even if she did not go back to work, it is noteworthy that her job in the Dermatology Department was still hand intensive and involved fine manipulation with her fingers and hands.

On January 27, 2009, Dr. Hansen filled out a questionnaire in which he marked yes in response to the questions which asked whether Petitioner's bilateral carpal tunnel syndrome and the right shoulder problem which necessitated surgery was caused or aggravated by her work as a medical assistant. He also noted his treatment had been reasonable and necessary to cure and relieve the effects of her work-related difficulties. (PX 23) On December 28, 2011 Dr. Hansen wrote a letter to Petitioner's attorney stating he had reviewed the records pertaining to his care of Petitioner, and based on those records, he believed her cubital tunnel syndrome may have been aggravated by her work activity as a medical assistant with Respondent. (PX 24)

The Arbitrator finds the opinions of Dr. Neumeister and Dr. Hansen more persuasive than those of Dr. Williams. Dr. Williams did not offer any opinions on Petitioner's right shoulder. With respect to the cubital and carpal tunnel syndrome, he was quick to point out that her rheumatoid arthritis, increased body mass index and smoking may have contributed but dismissed the notion that her work could have contributed.

An accidental injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665 (2003).

For all of the foregoing reasons, the Arbitrator finds Petitioner has proven by a preponderance of the evidence that she sustained three accidents which arose out of and in the course of her employment by Respondent and that her conditions of ill-being with respect to the right elbow, bilateral hands, and the right shoulder, are causally related to her accidents.

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 adopts his findings of fact and conclusions of law above and incorporates them herein by this reference.

Petitioner's medical bills relating to her cubital tunnel syndrome are contained in Petitioner's Exhibit No. 30. Petitioner's medical bills relating to her carpal tunnel syndrome are contained in Petitioner's Exhibit No. 29, and her medical bills relating to her right shoulder are contained in Petitioner's Exhibit No. 31.

The Arbitrator finds the medical services rendered to Petitioner for her right cubital tunnel syndrome have been reasonable and necessary as a result of the December 3, 2006 work accident. Respondent is ordered to pay the medical expenses listed in Petitioner's Exhibit No. 30, as provided in Sections 8(a) and 8.2 of the Act. Respondent is ordered to reimburse the Petitioner's out-of-pocket expenses for related, reasonable and necessary medical services in the amount of $75.00. Respondent shall be given a credit for medical bills that have been paid by its group health insurer, and Respondent shall hold Petitioner harmless for any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

The Arbitrator finds the medical services rendered to Petitioner for her bilateral carpal tunnel syndrome have been reasonable and necessary as a result of the August 13, 2007 work accident. Respondent is ordered to pay the medical expenses listed in Petitioner's Exhibit No. 29, as provided in Sections 8(a) and 8.2 of the Act. Respondent is ordered to reimburse the Petitioner's out-of-pocket expenses for related, reasonable and necessary medical services in the amount of $276.00. Respondent shall be given a credit for medical bills that have been

paid by its group health insurer, and Respondent shall hold Petitioner harmless for any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

The Arbitrator finds the medical services rendered to Petitioner for her right shoulder have been reasonable and necessary as a result of the January 27, 2009 work accident. Respondent is ordered to pay the medical expenses listed in Petitioner's Exhibit No. 31, as provided in Sections 8(a) and 8.2 of the Act. Respondent is ordered to reimburse the Petitioner's out-of-pocket expenses for related, reasonable and necessary medical services in the amount of $105.00. Respondent shall be given a credit for medical bills that have been paid by its group health insurer, and Respondent shall hold Petitioner harmless for 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?

Following the November 28, 2007 surgery, Petitioner was taken off of work by Dr. Neumeister, who on December 27, 2007 issued a return to work slip returning her to work on January 3, 2008. (PX 3; PX 19) Following her January 25, 2008 surgery, Dr. Neumeister returned Petitioner to work on February 25, 2008 with no restrictions. (PX 3; PX 19) Following the August 8, 2008 right shoulder surgery, Dr. Hansen kept Petitioner off of work. (PX 4; PX 19) Dr. Hansen also kept her off of work following the December 12, 2008 right cubital tunnel release. (PX 19) On June 18, 2009, Dr. Hansen returned her to work with no restrictions. (PX 19)

On June 29, 2009, Dr. Neumeister noted that Petitioner was trying to obtain a new position as a medical assistant in the lab, which would require her to slice with a blade and handle fine patient specimens on slides. Dr. Neumeister indicated he looked at a job description and explained to her that she would not be an adequate candidate for this type of work. (PX 3) Dr. Neumeister signed a work status slip which stated Petitioner was unable to perform the job in dermatology department. (PX 19) Petitioner testified that while Dr. Hansen had returned her to work with no restrictions on June 18, 2009, her medical assistant position in the neurology department had been filled. Prior to going back to work for Respondent as a medical assistant in the dermatology department, she had a Functional Capacity Evaluation (FCE) on May 6, 2010. The FCE noted she demonstrated the abilities to perform the physical demands of a medical assistant. (PX 15, p. 3)

Following the April 6, 2012 right open carpal tunnel release, Dr. Neumeister kept Petitioner off of work. On April 18, 2012, he issued a work status slip returning her to left-handed work only until reevaluated in 3 weeks. Following the May 8, 2012 left open carpal tunnel release, Dr. Neumeister kept her off of work. On June 20, 2012, he returned her to work on June 25, 2012. (PX 7)

Given the Arbitrator's finding with respect to causation and the right shoulder and elbow, the Arbitrator orders Respondent to pay Petitioner temporary total disability benefits of $299.67 per week (the minimum TTD rate for the January 27, 2009 injury) for 44 and 6/7 weeks, commencing August 8, 2008 (the right shoulder surgery) through June 18, 2009 (the day Dr. Hansen released Petitioner back to work), as provided in Section 8(b) of the Act.

At the time of her right cubital tunnel surgery on December 12, 2008, Petitioner was already being kept off of work for her right shoulder (PX 4; PX 19) so no TTD is ordered for the right cubital tunnel claim.

Given the Arbitrator's finding with respect to causation and the carpal tunnel syndrome, the Arbitrator orders Respondent to pay Petitioner temporary total disability benefits of $290.00 per week for 65 weeks, commencing November 28, 2007 through January 2, 2008, January 25, 2008 through February 24, 2008, June 29, 2009 through May 6, 2010, and April 6, 2012 through June 20, 2012, as provided in Section 8(b) of the Act.

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

For her bilateral carpal tunnel syndrome, which was diagnosed by electrical studies as severe, Petitioner underwent 4 surgeries. On November 28, 2007, Dr. Neumeister performed a right carpal tunnel release. (PX 11) On January 25, 2008, Dr. Neumeister did a left open carpal tunnel release and median nerve neurolysis. (PX 12) On April 6, 2012, Dr. Neumeister performed a right open carpal tunnel release, and on May 8, 2012, he performed a left open carpal tunnel release. (PX 16; PX 17)

On August 8, 2008, Dr. Hansen performed a right shoulder arthroscopy with subacromial decompression and distal clavicle excision. He observed no tears but found a spur in the subacromial space, which he shaved. His post-operative diagnosis was right shoulder impingement. (PX 13) On December 12, 2008, Dr. Hansen performed a right cubital tunnel release. His post operative diagnosis was right cubital tunnel syndrome. (PX 14)

Petitioner testified that her right elbow is currently fine, but she does have an aching sensation with certain activities. With respect to her right shoulder, she has pain with lifting her arm up and has stiffness at night and during the day. Around the house, she has to use her right arm to wash dishes, cleaning and reaching into cabinets. With respect to her hands, she still has some numbness and tingling in the tips of her fingers about 7 or 8 times in a month. She takes Tylenol twice a day every day.

Based upon the above, the Arbitrator awards Petitioner 7.5% loss of the whole person for the right shoulder injury, 12.5% loss of the right arm for the cubital tunnel syndrome, and 17.5% loss of the left and 20% loss of the right hand for the bilateral carpal tunnel syndrome.

Bibliography

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 SANGAMON)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Angela Ousley,
Petitioner,

20IWCC0285

vs.

NO: 09 WC 9472

SIU School of Medicine,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 22, 2019, 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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: MAY 18 2020
o4/2/20
DLS/rm
046

Barbara N. Flores

Marc Parker

DISSENT

I respectfully dissent from the Decisions of the Majority. The Majority affirmed and adopted the Decisions of the Arbitrator who found Petitioner sustained her burden of proving she suffered repetitive

trauma accidents resulting in conditions of ill-being of her hands/wrists bilaterally, her right arm, and right shoulder. I would have found that Petitioner did not sustain her burden of proving she sustained work related repetitive trauma accidents or that her conditions of ill-being were causally related to her work activities, reversed the Decision of the Arbitrator, and denied compensation.

Petitioner filed three separate Applications for Adjustment of Claims. They all alleged the same mechanism of injury and the same injuries to her hands and wrists, right arm, and right shoulder. The only difference was the alleged manifestation dates. The claims were consolidated and arbitrated together. The Arbitrator found all of Petitioner's claims compensable. In 09 WC 9471, he awarded Petitioner 65 weeks of temporary total disability ("TTD"), medical expenses identified in PX29, and 76.875 weeks of permanent partial disability ("PPD") representing loss of 20% of the right hand and 17.5% of the left hand (carpal tunnel syndrome ("CTS")). In 09 WC 9472, the Arbitrator awarded Petitioner 44&6/7 weeks of TTD, medical expenses identified in PX31, and 37.5 weeks of PPD representing loss of 7.5% of the person-as-a-whole (right shoulder). In 09 WC 9473 the Arbitrator awarded Petitioner medical expenses identified in PX30 and 31.625 weeks of PPD representing loss of 12.5% of the right arm (cubital tunnel syndrome ("CUTS")). The Arbitrator also awarded out-of-pocket expenses of $456.00 combined in the three claims. In total the Arbitrator awarded Petitioner 109&6/7 weeks of TTD, 146 weeks of PPD, as well as medical expenses. While the Arbitrator and Majority issued three separate decisions, in the interests of clarity, I am issuing a single dissent which will be issued for each Majority decision.

Petitioner testified she began working for Respondent in 2005 as a medical assistant. She worked from 8 to 4:30, five days a week, with a one-hour lunch break. When patients checked in for their appointments, she would type in their weight, blood pressure, reason for appointment, doctor's notes, *etc.* She used a keyboard and mouse. She was right-handed and operated the mouse with her right hand. Her keyboard was on top of her desk. She guessed her hands were "in an upward position" if she were sitting down low. Her chair was "lower than normal" and her hands were in a slightly elevated position. She would type between two and five hours a day.

Petitioner testified she also cleaned examination rooms using both hands. She had to clean rooms between patients and on Tuesday afternoons because they did not have patients at that time. She was also required to push patients in wheelchairs, put records in files, and carried medical records on a daily basis. She also stocked supplies. Three job descriptions were submitted into evidence and identified as PX25, PX26, and PX27. Petitioner testified that they all accurately describes her job activities. PX25, did not indicate who prepared it, and the record strongly suggests it was prepared by Petitioner. It described Petitioner's job as medical assistant included occasional (1/4 – 2&1/2 hours a day) bending/stopping, kneeling, squatting, and crouching. It also required frequent (1&1/2 – 5&1/2 hours) reaching above shoulder height and data entry/keystroking and repetitive firm grasping with both hands.

PX 26 and PX27 were official job descriptions for different time periods of Petitioner's employment but are essentially identical. They were prepared by Respondent and signed and acknowledged by Petitioner. Her job was deemed 70% clinical, involving answering patient questions, preparing orders for tests, escorting patients to exam rooms/taking vitals, performing procedures, including assisting in minor surgeries as directed by doctors, maintaining and stocking exam rooms, collecting/bagging soiled linen, reporting malfunctioning equipment, maintaining patient records, attending meetings, and going off-campus when necessary. 30% of the job was deemed clerical, involving answering phones, generating labels, pulling records, *etc.*, updating appointment lists, greeting patients, and preparing mailings to new patients. 51% or more of her time was spent reading, speaking, "close visual acuity," hearing, and gross/fine hand manipulation. She spent ¼ to ½ of her time writing, stooping, sitting, standing, and walking.

Footnotes

20IWCC0285

Petitioner's CTS/CUTS surgeon, Dr. Neumeister, testified by deposition. He was asked a hypothetical question assuming the job description he was shown (PX25). He was also to assume that Petitioner started working for Respondent full-time on November 21, 2005, she used keyboard on top of her desk, and her wrists would be slightly to moderately hyperextended. She typed two-five hours a day. Dr. Neumeister was also supposed to assume that Petitioner's job also included "firm grasping on a repetitive basis," and she would carry 10-15 pounds occasionally. She had to stock items on shelves and push patients in wheelchairs. He was also to assume that she experienced numbness/tingling while performing these tasks. Dr. Neumeister answered: "if she developed those symptoms while she was doing those activities, then" he would say that the aggravated her bilateral CTS, even though he did not know the precise cause of her CTS.

On cross examination, Dr. Neumeister testified that his notes do not indicate that he discussed Petitioner's job duties with her when he first saw her. He was not sure that he was the one that told her that her symptoms could be related to her job activities. He uses the terms aggravation and exacerbation interchangeably. He reiterated that he believes that if a patient has symptoms with an activity that activity aggravates the patient's condition. He would believe that if she had symptoms typing an hour a day, he would deem that activity to aggravate her condition.

Dr. Neumeister also testified that people are built differently and different people had different tendency to develop CTS with similar activity. If 85% of Petitioner's time was devoted to cleaning instruments, stocking exam rooms, ordering supplies, checking in patients, and escorting patients, those activities would aggravate her condition if she felt symptoms performing those activities.

Dr. Williams also testified by deposition. He was retained by the State of Illinois to perform a Section 12 medical examination on Petitioner. Petitioner reported that she last worked on January 28, 2013 as a medical assistant in neurology. Dr. Williams was provided a job description (PX26) with which Petitioner had no problem. Dr. Williams noted that Petitioner had last seen Dr. Neumeister in 2012 and he referred her to a rheumatologist for a diagnosis of rheumatoid arthritis. She had actually been diagnosed with the condition at least from 2010. Petitioner described to Dr. Williams her workstation, demonstrated how she typed, and reported she typed two hours a day. Dr. Williams thought significant the fact that despite two bilateral CTS releases and a right-sided CUTS surgery, she still had symptoms in her hands, wrists, and right elbow. She also currently reported weakness in the arms, right worse than left.

Besides his clinical examination of Petitioner, Dr. Williams also reviewed her medical records. He noted her co-morbidity factors for CTS/CUTS included her rheumatoid arthritis, her gender (female), her age (40), increased BMI, smoking for 20 years, and prior repair of her median nerve in 1999. Dr. Williams opined that Petitioner's CTS and CUTS were not related to her job activities, based on the job description, the ergonomics of the workstation that she described, as well as the manner she typed, per her demonstration. Petitioner even told him that she did not obviously rest her wrists, forearms, or elbows on the tables. Dr. Williams also cited her co-morbid factors, which represented a more likely cause of her current conditions. He believed Petitioner was at maximum medical improvement at the time of his examination.

On cross examination, agreed that CTS is generally caused by compression of the median nerve in the wrist and that "posture repetition and force can place pressure on the median nerve depending on how the activity is done, how prolonged the activity is, and how long or continuous it's done." Dr. Williams also agreed that in the past, he testified that "it's important to know whether the activity is being done, a sole activity at a cycle of time of less than 30 seconds and/or is done for greater that 50% of the shift." However, that does not necessarily mean that he would change his opinion if Petitioner were typing at her workstation for more than 50% of her workday; it would depend on the ergonomics of her workstation and whether the typing were constant without breaks.

20IWCC0285

However, Dr. Williams noted that Petitioner never indicted that she was uncomfortable at her workstation and she stated that she did not rest her wrists or arms on a table. In her demonstration of typing, she did not have her wrists in a flexed or hyperflexed position. Dr. Williams agreed that he did not see Petitioner's workstation.

Petitioner's shoulder surgeon, Dr. Hansen, did not make any opinion regarding causation of her shoulder condition in any of his treatment notes. However, upon query from Petitioner's lawyer, he issued a checklist and offered a one-sentence opinion indicating her work activities may have aggravated her shoulder condition.

In finding Petitioner proved accidents/causation to all her conditions of ill-being, the Arbitrator found her to be a credible witness. He based his opinions "on the testimony of Petitioner, her job description, and the opinions of Dr. Neumeister and Dr. Hansen, who the Arbitrator found more persuasive than Dr. Williams." In that regard he stressed that Dr. Williams did not opine about Petitioner's shoulder condition. The Arbitrator also noted that "reaching above shoulder level and entering data/keystroke are activities which are marked as frequently, meaning 2.5 to 5.5 hours. It is also stated that claimant uses hands for repetitive tasks such as firm grasping with both hands." Respondent argues there was no credible evidence that Petitioner sustained any repetitive trauma accident/injuries and questioned the dates of manifestation that she cited.

In my opinion, Petitioner did not sustain her burden of proving either repetitive trauma accidents or that her work activities contributed to her conditions of ill-being. The official job descriptions prepared by Respondent and signed by Petitioner, do not establish that her job involved any forceful gripping/grasping or vibration, and do not note keyboarding of more than 2.5 to 5.5 hours a day. These job descriptions really seem to show a diverse collection of activities which strongly militate against proof of repetitive trauma accidents/injuries. In fact, even Petitioner's testimony suggests that she had various job activities and that she did not perform any particular function repetitively or continuously.

In addition, I disagree with the analysis of the Arbitrator, and through its affirmation the Majority, regarding the relative persuasiveness of the opinions of Dr. Williams versus Dr. Neumeister and Dr. Hansen. Dr. Hansen's "checklist," almost certainly prepared by Petitioner's lawyer, and his one-sentence opinion letter on causation of CUTS and shoulder impingement, provide absolutely no explanation and was not persuasive at all and do not identify any specific offending job activity. In addition, Dr. Neumeister's opinions seemed based entirely on his belief that whenever a patient has symptoms with an activity, that activity necessarily permanently aggravates the patient's condition of ill-being whatever the activity and whatever the condition. I do not believe that Dr. Neumeister's premise is correct.

On the other hand, in my opinion Dr. Williams was quite persuasive. He relied on the official job descriptions, which appear much more reliable that the one likely prepared by Petitioner. In addition, Dr. Williams noted that Petitioner specifically related that she did not have issues with her workspace, contradicting her unpersuasive testimony that the chair was a little low compared to the keyboard, and she demonstrated the way she keyboarded, which Dr. Williams did not find at all problematic. Finally, Dr. Williams explained that Petitioner had significant co-morbidity factors, most notably Petitioner's rheumatoid arthritis which actually itself could be the cause of all of Petitioner's conditions of ill-being. Her rheumatoid arthritis alone could certainly help explain the recurrence of CTS in both hands/wrists after bilateral CTS release surgeries, as well as her diffuse joint issues including her hands, wrists, elbow, and shoulder.

For the reasons stated above I would have found that Petitioner did not sustain her burden of proving she sustained work related repetitive trauma accidents or that her conditions of ill-being were

Abstracts

causally related to her work activities, reversed the Decision of the Arbitrator, and denied compensation. Therefore, I respectfully dissent from the Decision of the Majority.

O-4/2/20
DLS/dw
46

Deborah L. Simpson

FIRST DRAFT

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20 IWCC0285

OUSLEY, ANGELA
Employee/Petitioner

Case# **09WC009472**

09WC009471
09WC009473

SIU SCHOOL OF MEDICINE
Employer/Respondent

On 7/22/2019, 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 2.01% 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:

0834 KANOSKI BRESNEY
THOMAS R EWICK
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

4993 ASSISTANT ATTORNEY GENERAL
CHELSEA T GRUBB
500 S SECOND ST
SPRINGFIELD, IL 62706

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

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

JUL 22 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20IWCC0285

20 I W C C 0 2 8 5

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

Angela Ousley
Employee/Petitioner

v.

SIU School of Medince
Employer/Respondent

Case # **09** WC **09472**

Consolidated cases: 09 WC 09471 and 09 WC 09473

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 **Springfield**, on **11/9/18**. 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 _____

20IWCC0285

FINDINGS

On **1/27/09**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$21,079.76**; the average weekly wage was **$405.38**.

On the date of accident, Petitioner was **34** 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 **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

ORDER

Respondent is ordered to pay the medical expenses listed in Petitioner's Exhibit No. 31, as provided in Sections 8(a) and 8.2 of the Act. Respondent is ordered to reimburse the Petitioner's out-of-pocket expenses for related, reasonable and necessary medical services in the amount of $105.00. Respondent shall be given a credit for medical bills that have been paid by its group health insurer, and Respondent shall hold Petitioner harmless for 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 $299.67 per week for 44 and 6/7 weeks, commencing August 8, 2008 through June 18, 2009, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $299.67 per week for 37.5 weeks, because the injuries sustained cased the 7.5% loss of the person as a whole, as provided in Section 8(d)(2) of the Act.

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

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

Signature of Arbitrator

7/18/19
Date

ICArbDec p. 2

JUL 22 2019

20 IWCC0285

FINDINGS OF FACT

Petitioner has filed three Applications for Adjustment of Claim. In 09 WC 09473, Petitioner alleges she sustained bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome and injuries to her right rotator cuff and the person as a whole through repetitive trauma with a date of accident of December 3, 2006. (AX 4) In 09 WC 09471, Petitioner alleges the same injuries through repetitive trauma with an injury date of August 13, 2007 (AX 5), and in 09 WC 09472, Petitioner alleges the same injuries through repetitive trauma with a date of accident of January 27, 2009 (AX 6) In all three cases, the disputed issues are accident, causal connection, medical expenses, temporary total disability, and the nature and extent of the injuries. (AX 1; AX 2; AX 3)

Petitioner testified she is 44 years old and right-hand dominant. She has been on social security disability since April 2014 for congestive heart failure. On November 21, 2005, she started working for Respondent, Southern Illinois University School of Medicine as a medical assistant. She worked 5 days each week, Monday through Friday, from 8:00 a.m. to 4:30 p.m. with a 1-hour lunch break. She described her job duties. She noted that she was required to type on a computer when she put in a patient's information after the patient checked in for his or her appointment. She used a standard keyboard which sat on a desk. As she typed, her hands were in an upward position because she was sitting low due to the setup of her work station and the chair was lower than normal. The computer had a mouse which she controlled with her right hand. The amount of typing each shift varied, but it could be between 2 and 5 hours. Petitioner also had to clean rooms. Between each patient, she wiped the examining room down. Sometimes she had to push patients in wheelchairs. She also had to carry medical records and patients charts on a daily basis. Petitioner was also required to stock the exam rooms with supplies such as band-aids, alcohol pads, tongue compressors, pens, papers and Q-tips.

Petitioner noted on cross-examination that when the patients checked in, she took their information orally and then input it into the computer. There were about 100 patients on Thursdays and about 50 to 75 patients on the other days. It took about 2 to 4 minutes for each patient.

Petitioner testified that Petitioner's Exhibit Nos. 25, 26 and 27 are job descriptions which fairly and accurately depict her job duties. Petitioner's Exhibit No. 25 is a form completed by Petitioner's supervisor on November 18, 2008 listing the physical demands of Petitioner's job as a medical assistant. Reaching above shoulder level and entering data/keystroke are activities which are marked as frequently, meaning 2.5 to 5.5 hours. It is also noted that claimant uses her hands for repetitive tasks such as firm grasping with both hands. (PX 25)

Petitioner's Exhibit Nos. 26 and 27 are "position descriptions" for a medical assistant in the Neurology Department of Respondent, effective November 22, 2010 and May 17, 2010 respectively, which are signed by Petitioner and her supervisor. They state 70% of the job duties are clerical, which includes answering patient phone calls, giving patient written orders, escorting patients to exam rooms, taking blood pressure, weight and height information and recording the information into electronic health records, completing a review of systems checklist, maintaining clean, orderly and well supplied examination rooms and doctor work rooms, stocking the utility, supply and laundry rooms, collecting and bagging soiled linens, maintaining patient electronic health records, and attending staff meetings. (PX 26; PX 27) The descriptions note 30% of the job duties are clerical, involving answering telephone calls, preparing clinic by generating encounter labels, pulling new patient records,

printing and distributing clinic schedules, updating appointment lists, greeting all arriving patients for appointments, updating demographic and insurance information in the computer, and preparing mailings to new patients. (PX 26: PX 27)

Petitioner testified that prior to working for Respondent, she did not have any problems with her hands, elbows or shoulders. She had never had any treatment for those body parts prior to working for Respondent. However, during the course of her employment with Respondent, she started to notice her right shoulder would get achy. Her fingers would get tingly and numb.

On December 3, 2006, Petitioner presented to the emergency room of St. John's Hospital. The triage note indicated Petitioner complained of right shoulder and right arm pain. She complained of shoulder tenderness on a patient diagram. She was prescribed Vicodin and Toradol. (PX 20)

On February 24, 2007, Petitioner presented to Dr. Glennon Paul with complaints of pain in her right shoulder on elevation and raising it behind her back as well as numbness and pain down the side of her arm. Dr. Paul diagnosed rotator cuff tendonitis and biceps tendonitis. He performed a steroid injection into the rotator cuff and biceps tendon. (PX 9)

On August 13, 2007, Petitioner presented to Dr. Paul with pain down her right arm, noting it occurred all day long. It started in her wrist and went all the way up into the shoulder. Dr. Paul suspected carpal tunnel syndrome. (PX 9) She testified that Dr. Glennon Paul, recommended an EMG.

On August 16, 2007, Petitioner had an EMG of her right upper extremity. Dr. Acharya, who performed the study, noted that his clinical examination showed positive Tinel's and Phalen's signs. The study showed severe right carpal tunnel syndrome. (PX 2)

After the EMG, Dr. Paul referred her to Dr. Michael Neumeister. (PX 9)

On September 5, 2007, Petitioner presented to Dr. Neumeister, indicating that over the last 9 to 10 months she had developed right shoulder pain and numbness and tingling in her right hand. She stated that she had two shoulder injections with some relief of shoulder pain but continued to have numbness and pain in the distribution of the right median nerve. It was also noted that her left median nerve had been repaired secondary to a laceration some years ago and she was having some mild paresthesias in that nerve as well. The Tinel's and Phalen's tests were positive. Dr. Neumeister diagnosed carpal tunnel syndrome. He recommended splinting and referred her to hand therapy. (PX 3)

On September 24, 2007, Dr. Neumeister noted that she was worse despite splinting and recommended surgery. (PX 3)

On November 21, 2007, Dr. Paul performed an injection into the rotator cuff and biceps tendon. He ordered an MRI of the shoulder. (PX 9) An MRI of the right shoulder was performed on November 26, 2007. The impression of the radiologist was mild tendonitis involving the supraspinatus. (PX 10)

On November 28, 2007, Dr. Neumeister operated performing a right carpal tunnel release. The post-operative diagnosis was right carpal tunnel syndrome. (PX 11)

Following surgery, Petitioner was taken off of work by Dr. Neumeister, who on December 27, 2007 returned her to work on January 3, 2008. (PX 3)

On January 25, 2008, Dr. Neumeister operated on Petitioner's left wrist. He noted in the operative report that Petitioner had a previous median nerve injury and now had a large neuroma were the median nerve had been repaired in the past. He noted that she had since developed symptoms of carpal tunnel syndrome, including pain and paresthesias in her fingertips. Dr. Neumeister performed a left open carpal tunnel release and median nerve neurolysis. His post-operative diagnoses were left carpal tunnel syndrome and previous median nerve injury. (PX 12)

Following her surgery, Dr. Neumeister returned Petitioner to work on February 25, 2008 with no restrictions. (PX 3)

An EMG/nerve conduction study of the right upper extremity performed on February 7, 2008 evidenced right ulnar neuropathy in the right elbow. (PX 2)

On February 28, 2008, Petitioner presented to Dr. Thomas Hansen upon referral from Dr. Neumeister for evaluation of her shoulder. She noted that she had 4 or 5 injections with only temporary relief and had tried physical therapy. She complained of pain with overhead activities and pain at night. Dr. Hansen diagnosed right shoulder impingement syndrome and AC arthritis. He offered a cortisone injection, which Petitioner declined, and referred her for physical therapy. He also diagnosed cubital tunnel syndrome. (PX 2; PX 3) On May 22, 2008, Dr. Hansen recommended surgery. (PX 4; PX 5)

On August 8, 2008, Dr. Hansen performed a right shoulder arthroscopy with subacromial decompression and distal clavicle excision. He observed no tears but found a spur in the subacromial space, which he shaved. His post-operative diagnosis was right shoulder impingement. (PX 13)

Following surgery, Dr. Hansen kept Petitioner off of work and referred her to physical therapy. (PX 4)

On December 12, 2008, Dr. Hansen performed a right cubital tunnel release. His post operative diagnosis was right cubital tunnel syndrome. (PX 14)

Petitioner participated in physical therapy at St. John's Hospital between January 6, 2009 and February 12, 2009 for her right elbow. (PX 21)

On January 27, 2009, Dr. Hansen filled out a questionnaire in which he marked yes in response to the questions which asked whether Petitioner's bilateral carpal tunnel syndrome and the right shoulder problem which necessitated surgery was caused or aggravated by her work as a medical assistant. He also indicated she was not currently capable of working and further noted his treatment had been reasonable and necessary to cure and relieve the effects of her work-related difficulties. (PX 23)

On June 18, 2009, Petitioner presented to Dr. Hansen, and he recorded that she wanted to go back to work. He returned her to work on June 18, 2009 with no restrictions and released her on an as needed basis. (PX 3)

20IWCC0285

On June 29, 2009, Petitioner presented to Dr. Neumeister. He noted that she was trying to obtain a new position as a medical assistant in the Mohs lab, which would require her to slice with a blade and handle fine patient specimens on slides. She was worried that due to numbness in her fingers she would not be safe in terms of being able to protect the specimens or herself from injury. Dr. Neumeister indicated he looked at a job description and explained to her that she would not be an adequate candidate for this type of work. He referred her to hand therapy and released on an as needed basis. (PX 3)

On July 1, 2009, Dr. Neumeister noted that he had been contacted by Respondent's human resources about where Petitioner could be placed. He noted that Petitioner was able to do a significant amount with her right hand, but he believed fine manipulation with her left hand and fingers would be difficult. Also, because of the numbness and tingling of the fingers, he though the use of sharp objects would not be in her best interest. He did think she could do essential nursing chores, such as blood pressure measurements, lifting, rooming patients and general patient care. Dr. Neumeister noted her position as a medical assistant in the Neurology department fit his recommendations but had been filled while she was off of work. (PX 3)

At trial, Petitioner testified that while Dr. Hansen had returned her to work with no restrictions on June 18, 2009, her medical assistant position in the neurology department had been filled. Prior to going back to work for Respondent, she had a Functional Capacity Evaluation (FCE) on May 6, 2010. She demonstrated the abilities to perform the physical demands of a medical assistant. (PX 15, p. 3)

Petitioner testified that when she went back to work for Respondent in the middle of 2010, her hours remained the same, but her job duties changed in that she became a medical assistant in the dermatology department. In that department, she worked in the lab putting skin cell samples on little dish boards or slides. She used a little scalpel to break down the sample. She put the slides in a microscope. This job did not involve typing but involved fine manipulation with her fingers.

On December 28, 2011 Dr. Hansen wrote a letter to Petitioner's attorney stating he had reviewed records pertaining to his care of Petitioner, and based on those records, he believed her cubital tunnel syndrome may have been aggravated by her work activity as a medical assistant with Respondent. (PX 24)

On March 12, 2012, Petitioner returned to Dr. Neumeister with complaints of numbness and tingling in both hands involving the fingers. On physical examination, she had a positive provocative compression of the bilateral carpal tunnels and mildly positive over the cubital tunnels. Dr. Neumeister ordered nerve conduction studies. (PX 7)

On March 31, 2012, Petitioner had an EMG/nerve conduction study, which showed bilateral mild to moderate carpal tunnel syndrome. (PX 6)

On April 6, 2012, Dr. Neumeister performed a right open carpal tunnel release. His post-operative diagnosis was recurrent right carpal tunnel syndrome. (PX 16) On May 8, 2012, Dr. Neumeister performed a left open carpal tunnel release, and the post-operative diagnosis was recurrence of left carpal tunnel syndrome. (PX 17) Following the surgeries, Petitioner participated in hand therapy. (PX 7) She was released as of 6/21/12

On November 19, 2012, Petitioner presented to Dr. Neumeister for reevaluation of the carpal tunnel syndrome. She had some spasm of her thenar eminence. (PX 7)

On February 12, 2013, Petitioner presented to Dr. Ana Tumyan, a Rheumatologist at SIU, upon referral from Dr. Neumeister for evaluation of pain in both hands, especially in the MCP and PIP joints as well as the wrists. She was diagnosed with joint pain. During her treatment with Dr. Tumyan and the Rheumatology Department, Petitioner was diagnosed with rheumatoid arthritis and prescribed anti-inflammatories. (PX 8; PX 22)

Petitioner testified that her right elbow is currently fine, but she does have an aching sensation with certain activities. With respect to her right shoulder, she has pain with lifting her arm up and has stiffness at night and during the day. Around the house, she has to use her right arm to wash dishes, cleaning and reaching into cabinets. With respect to her hands, she still has some numbness and tingling in the tips of her fingers about 7 or 8 times in a month. She takes Tylenol twice a day every day.

Dr. Neumeister testified by way of evidence deposition, which is marked as Petitioner's Exhibit No. 1. He is board certified in plastic surgery with an added certificate in hand surgery. 60 to 70% of his practice is devoted to hand surgery. (PX 1, pp. 6) He noted that having one's hand in a flexed or extended position can place pressure on the median nerve in the wrist. (PX 1, pp. 12-13) He testified that Petitioner had an EMG on February 7, 2008, roughly two and a half months after the surgery on her right wrist, and it right showed cubital tunnel syndrome as well as some residual changes from the first surgery. (PX 1, pp. 19-20)

Dr. Neumeister reviewed Petitioner's Exhibit No. 25. He was asked to assume the following facts to be true. Petitioner started working for Respondent as a medical assistant on November 21, 2005 and worked 8 to 4:30 Monday through Friday with a one hour lunch. She used a keyboard that was on top of her desk and while she typed her wrists would be slightly to moderately hyper extended. He was told she typed between 2.5 to 5.5 hours a day entering data and that while typing she started to notice some numbness and tingling in her fingers and pain in her writs. He was informed that her other job duties, pursuant to Petitioner's Exhibit No. 25, included firm grasping on a repetitive basis and she would lift 10 to 15 pounds from time to time, which mainly meant carrying medical records. She noticed symptoms in her hands and wrists, including numbness and tingling, while carrying records. He was also told that she had to stock items including lien on a shelf and push patients in a wheelchair. (PX 1, pp. 22-23) The Dr. was asked if her job as a medical assistant could have either caused or contributed to the development of her bi-lateral carpal tunnel syndrome. He testified that if she developed symptoms while doing those activities then her job aggravated her condition. He also stated his treatment was reasonable and necessary for those conditions. (PX 1, pp. 23-24)

Dr. Neumeister noted that Petitioner returned to him on March 12, 2012 with complaints involving multiple joint, including the knuckles in her fingers. She also had complaints of numbness and tingling in both hands. An EMG confirmed bilateral carpal tunnel surgery and he operated again on both wrists for the carpal tunnel syndrome. Dr. Neumeister testified that the recurrence of the carpal tunnel syndrome probably relates to the first two surgeries because of the scar tissue from those surgeries around the nerve. (PX 1, pp. 24-28) Dr. Neumeister noted that even if Petitioner had not gone back to work, she could have developed the recurrence of

the carpal tunnel syndrome. (PX 1, p. 29) He noted the 2012 surgeries were reasonable and necessary. (PX 1, p. 30)

On cross-examination, Dr. Neumeister was asked about the causative factors for developing carpal tunnel syndrome. He noted there are various vascular disorders, infections, trauma, inflammation, and congenital abnormalities which can contribute to it. He noted Petitioner's carpal tunnel syndrome could have developed in an idiopathic manner, which is the most common cause of carpal tunnel syndrome. Smoking can aggravate carpal tunnel syndrome. (PX 1, pp. 37-41)

Respondent's Exhibit No. 5 is an employee's notice of injury completed on December 14, 2010. Petitioner marked shoulder, hands and elbow. She listed a date of injury of December 1, 2006. She noted her pain started at work. (RX 5)

Respondent retained Dr. James Williams to perform a Section 12 examination. Dr. Williams testified by way of evidence deposition which is marked as Respondent's Exhibit No. 18. Dr. Williams is board certified in orthopedic surgery. He examined Petitioner on April 29, 2015. He stated Petitioner has co-morbidities associated with carpal or cubital tunnel syndrome including rheumatoid arthritis, increased body mass, a previous median nerve repair in 1999, smoking, sex and age. He diagnosed status post two left carpal tunnel surgeries, status post two right carpal tunnel releases, and status right elbow cubital tunnel release. Dr. Williams did not believe Petitioner's work duties were related to these conditions. He thought they were more likely idiopathic or related to her rheumatoid arthritis, increased body mass index and smoking. (RX 18, pp. 5-13)

On cross-examination, Dr. Williams noted he did not address Petitioner's right shoulder. He offered no opinions on the right shoulder. As of the date of his deposition, August 20, 2015, he had performed 75 to 100 independent medical examinations. 80 to 90 percent are done at the request of the employer.

CONCLUSIONS

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

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

The Arbitrator finds Petitioner to be a credible witness and notes she appeared candid and forthright in her testimony and demeanor at trial.

All three Applications for Adjustment of Claim allege the same injuries and body parts and allege repetitive trauma as the cause of the injuries. (AX4; AX 5; AX 6) Similarly, all three Requests for Hearing are identical in the disputed issues with the only difference being the dates of accident and Petitioner's age. (AX 1; AX 2; AX 3)

The Arbitrator finds the manifestation date, for the cubital tunnel syndrome to December 3, 2006. On that day, she was seen at St. John's emergency room and complained of right arm pain in addition to right shoulder pain. (PX 20) When she was asked in 2010 by Respondent to complete an injury report, she listed her elbow along with the hands and shoulder in Respondent's Exhibit No. 5 and noted it began December 1, 2006. (RX 5)

The Arbitrator finds the manifestation date for the carpal tunnel syndrome to be August 13, 2007, the date she presented to Dr. Paul noting pain down her arm all day long from her wrists to her shoulder. Dr. Paul suspected carpal tunnel syndrome. (PX 9)

The Arbitrator finds the manifestation date for the right shoulder to be January 27, 2009. On that date, Dr. Hansen completed a questionnaire in which he indicated he thought the bilateral carpal tunnel syndrome and the right shoulder condition which necessitated surgery were related to Petitioner's work as a medical assistant. (PX 23)

The Arbitrator finds Petitioner has proven she sustained three accidents on the above-referenced dates which arose out of and in the course of her employment and that her conditions of ill-being, right cubital tunnel syndrome, the right shoulder requiring surgery, and the bilateral carpal tunnel syndrome requiring two surgeries on each wrist, are causally related to said accidents. The Arbitrator bases his opinions on the testimony of Petitioner, her job description, and the opinions of Dr. Neumeister and Dr. Hansen, who the Arbitrator found more persuasive than Dr. Williams.

Petitioner's testimony concerning her job was not contradicted at trial. It showed her work as a medical assistant was repetitive and hand intensive. She testified that as she typed her hands would be in an upward extended position because she was sitting low due to the positioning of her chair. There were about 100 patients on Thursdays and about 50 to 75 patients on the other days whom she would enter information for in the computer. It took about 2 to 4 minutes for each patient. She also had to use her hands to clean rooms, stock rooms, push patients in wheelchairs, and carrying patient charts. Petitioner's Exhibit No. 25 is a form completed by Petitioner's supervisor on November 18, 2008 listing the physical demands of Petitioner's job as a medical assistant. Reaching above shoulder level and entering data/keystroke are activities which are marked as frequently, meaning 2.5 to 5.5 hours. It is also noted that claimant uses hands for repetitive tasks such as firm grasping with both hands. (PX 25)

Dr. Neumeister testified having one's hand in a flexed or extended position can place pressure on the median nerve in the wrist. (PX 1, pp. 12-13) Dr. Neumeister reviewed Petitioner's Exhibit No. 25 and considered a hypothetical regarding Petitioner's job as a medical assistant in the Neurology Department. He testified that if she developed symptoms while doing those activities then her job aggravated her bilateral carpal tunnel syndrome. He also stated his treatment was reasonable and necessary for those conditions. (PX 1, pp. 23-24) Dr. Neumeister testified that the recurrence of the carpal tunnel syndrome in 2012 probably relates to the first two surgeries because of the scar tissue from those surgeries around the nerve. (PX 1, pp. 24-28) Dr. Neumeister noted that even if Petitioner had not gone back to work, she could have developed the recurrence of the carpal tunnel syndrome. (PX 1, p. 29) He noted the 2012 surgeries were reasonable and necessary. (PX 1, p. 30)

Petitioner testified that when she went back to work for Respondent in the middle of 2010, her hours remained the same, but her job duties changed in that she became a medical assistant in the dermatology department. In that department, she worked in the lab putting skin cell samples on little dish boards or slides. She used a little scalpel to break down the sample. She put the slides in a microscope. This job did not involve typing but involved fine manipulation with her fingers. Although Dr. Neumeister testified that 2012 surgeries for

the carpal tunnel recurrence probably related to the first two surgeries and that she could have developed a recurrence even if she did not go back to work, it is noteworthy that her job in the Dermatology Department was still hand intensive and involved fine manipulation with her fingers and hands.

On January 27, 2009, Dr. Hansen filled out a questionnaire in which he marked yes in response to the questions which asked whether Petitioner's bilateral carpal tunnel syndrome and the right shoulder problem which necessitated surgery was caused or aggravated by her work as a medical assistant. He also noted his treatment had been reasonable and necessary to cure and relieve the effects of her work-related difficulties. (PX 23) On December 28, 2011 Dr. Hansen wrote a letter to Petitioner's attorney stating he had reviewed the records pertaining to his care of Petitioner, and based on those records, he believed her cubital tunnel syndrome may have been aggravated by her work activity as a medical assistant with Respondent. (PX 24)

The Arbitrator finds the opinions of Dr. Neumeister and Dr. Hansen more persuasive than those of Dr. Williams. Dr. Williams did not offer any opinions on Petitioner's right shoulder. With respect to the cubital and carpal tunnel syndrome, he was quick to point out that her rheumatoid arthritis, increased body mass index and smoking may have contributed but dismissed the notion that her work could have contributed.

An accidental injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665 (2003).

For all of the foregoing reasons, the Arbitrator finds Petitioner has proven by a preponderance of the evidence that she sustained three accidents which arose out of and in the course of her employment by Respondent and that her conditions of ill-being with respect to the right elbow, bilateral hands, and the right shoulder, are causally related to her accidents.

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 adopts his findings of fact and conclusions of law above and incorporates them herein by this reference.

Petitioner's medical bills relating to her cubital tunnel syndrome are contained in Petitioner's Exhibit No. 30. Petitioner's medical bills relating to her carpal tunnel syndrome are contained in Petitioner's Exhibit No. 29, and her medical bills relating to her right shoulder are contained in Petitioner's Exhibit No. 31.

The Arbitrator finds the medical services rendered to Petitioner for her right cubital tunnel syndrome have been reasonable and necessary as a result of the December 3, 2006 work accident. Respondent is ordered to pay the medical expenses listed in Petitioner's Exhibit No. 30, as provided in Sections 8(a) and 8.2 of the Act. Respondent is ordered to reimburse the Petitioner's out-of-pocket expenses for related, reasonable and necessary medical services in the amount of $75.00. Respondent shall be given a credit for medical bills that have been paid by its group health insurer, and Respondent shall hold Petitioner harmless for any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

The Arbitrator finds the medical services rendered to Petitioner for her bilateral carpal tunnel syndrome have been reasonable and necessary as a result of the August 13, 2007 work accident. Respondent is ordered to pay the medical expenses listed in Petitioner's Exhibit No. 29, as provided in Sections 8(a) and 8.2 of the Act. Respondent is ordered to reimburse the Petitioner's out-of-pocket expenses for related, reasonable and necessary medical services in the amount of $276.00. Respondent shall be given a credit for medical bills that have been paid by its group health insurer, and Respondent shall hold Petitioner harmless for any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

The Arbitrator finds the medical services rendered to Petitioner for her right shoulder have been reasonable and necessary as a result of the January 27, 2009 work accident. Respondent is ordered to pay the medical expenses listed in Petitioner's Exhibit No. 31, as provided in Sections 8(a) and 8.2 of the Act. Respondent is ordered to reimburse the Petitioner's out-of-pocket expenses for related, reasonable and necessary medical services in the amount of $105.00. Respondent shall be given a credit for medical bills that have been paid by its group health insurer, and Respondent shall hold Petitioner harmless for 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?

Following the November 28, 2007 surgery, Petitioner was taken off of work by Dr. Neumeister, who on December 27, 2007 issued a return to work slip returning her to work on January 3, 2008. (PX 3; PX 19) Following her January 25, 2008 surgery, Dr. Neumeister returned Petitioner to work on February 25, 2008 with no restrictions. (PX 3; PX 19) Following the August 8, 2008 right shoulder surgery, Dr. Hansen kept Petitioner off of work. (PX 4; PX 19) Dr. Hansen also kept her off of work following the December 12, 2008 right cubital tunnel release. (PX 19) On June 18, 2009, Dr. Hansen returned her to work with no restrictions. (PX 19)

On June 29, 2009, Dr. Neumeister noted that Petitioner was trying to obtain a new position as a medical assistant in the lab, which would require her to slice with a blade and handle fine patient specimens on slides. Dr. Neumeister indicated he looked at a job description and explained to her that she would not be an adequate candidate for this type of work. (PX 3) Dr. Neumeister signed a work status slip which stated Petitioner was unable to perform the job in dermatology department. (PX 19) Petitioner testified that while Dr. Hansen had returned her to work with no restrictions on June 18, 2009, her medical assistant position in the neurology department had been filled. Prior to going back to work for Respondent as a medical assistant in the dermatology department, she had a Functional Capacity Evaluation (FCE) on May 6, 2010. The FCE noted she demonstrated the abilities to perform the physical demands of a medical assistant. (PX 15, p. 3)

Following the April 6, 2012 right open carpal tunnel release, Dr. Neumeister kept Petitioner off of work. On April 18, 2012, he issued a work status slip returning her to left-handed work only until reevaluated in 3 weeks. Following the May 8, 2012 left open carpal tunnel release, Dr. Neumeister kept her off of work. On June 20, 2012, he returned her to work on June 25, 2012. (PX 7)

Given the Arbitrator's finding with respect to causation and the right shoulder and elbow, the Arbitrator orders Respondent to pay Petitioner temporary total disability benefits of $299.67 per week (the minimum TTD rate for the January 27, 2009 injury) for 44 and 6/7 weeks, commencing August 8, 2008 (the right shoulder

surgery) through June 18, 2009 (the day Dr. Hansen released Petitioner back to work), as provided in Section 8(b) of the Act.

At the time of her right cubital tunnel surgery on December 12, 2008, Petitioner was already being kept off of work for her right shoulder (PX 4; PX 19) so no TTD is ordered for the right cubital tunnel claim.

Given the Arbitrator's finding with respect to causation and the carpal tunnel syndrome, the Arbitrator orders Respondent to pay Petitioner temporary total disability benefits of $290.00 per week for 65 weeks, commencing November 28, 2007 through January 2, 2008, January 25, 2008 through February 24, 2008, June 29, 2009 through May 6, 2010, and April 6, 2012 through June 20, 2012, as provided in Section 8(b) of the Act.

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

For her bilateral carpal tunnel syndrome, which was diagnosed by electrical studies as severe, Petitioner underwent 4 surgeries. On November 28, 2007, Dr. Neumeister performed a right carpal tunnel release. (PX 11) On January 25, 2008, Dr. Neumeister did a left open carpal tunnel release and median nerve neurolysis. (PX 12) On April 6, 2012, Dr. Neumeister performed a right open carpal tunnel release, and on May 8, 2012, he performed a left open carpal tunnel release. (PX 16; PX 17)

On August 8, 2008, Dr. Hansen performed a right shoulder arthroscopy with subacromial decompression and distal clavicle excision. He observed no tears but found a spur in the subacromial space, which he shaved. His post-operative diagnosis was right shoulder impingement. (PX 13) On December 12, 2008, Dr. Hansen performed a right cubital tunnel release. His post operative diagnosis was right cubital tunnel syndrome. (PX 14)

Petitioner testified that her right elbow is currently fine, but she does have an aching sensation with certain activities. With respect to her right shoulder, she has pain with lifting her arm up and has stiffness at night and during the day. Around the house, she has to use her right arm to wash dishes, cleaning and reaching into cabinets. With respect to her hands, she still has some numbness and tingling in the tips of her fingers about 7 or 8 times in a month. She takes Tylenol twice a day every day.

Based upon the above, the Arbitrator awards Petitioner 7.5% loss of the whole person for the right shoulder injury, 12.5% loss of the right arm for the cubital tunnel syndrome, and 17.5% loss of the left and 20% loss of the right hand for the bilateral carpal tunnel syndrome.

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 SANGAMON)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Angela Ousley,
Petitioner,

20IWCC0286

vs.

NO: 09 WC 9473

SIU School of Medicine,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 22, 2019, 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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: MAY 18 2020
o4/2/20
DLS/rm
046

Barbara N. Flores

Marc Parker

DISSENT

I respectfully dissent from the Decisions of the Majority. The Majority affirmed and adopted the Decisions of the Arbitrator who found Petitioner sustained her burden of proving she suffered repetitive

20IWCC0286

trauma accidents resulting in conditions of ill-being of her hands/wrists bilaterally, her right arm, and right shoulder. I would have found that Petitioner did not sustain her burden of proving she sustained work related repetitive trauma accidents or that her conditions of ill-being were causally related to her work activities, reversed the Decision of the Arbitrator, and denied compensation.

Petitioner filed three separate Applications for Adjustment of Claims. They all alleged the same mechanism of injury and the same injuries to her hands and wrists, right arm, and right shoulder. The only difference was the alleged manifestation dates. The claims were consolidated and arbitrated together. The Arbitrator found all of Petitioner's claims compensable. In 09 WC 9471, he awarded Petitioner 65 weeks of temporary total disability ("TTD"), medical expenses identified in PX29, and 76.875 weeks of permanent partial disability ("PPD") representing loss of 20% of the right hand and 17.5% of the left hand (carpal tunnel syndrome ("CTS")). In 09 WC 9472, the Arbitrator awarded Petitioner 44&6/7 weeks of TTD, medical expenses identified in PX31, and 37.5 weeks of PPD representing loss of 7.5% of the person-as-a-whole (right shoulder). In 09 WC 9473 the Arbitrator awarded Petitioner medical expenses identified in PX30 and 31.625 weeks of PPD representing loss of 12.5% of the right arm (cubital tunnel syndrome ("CUTS")). The Arbitrator also awarded out-of-pocket expenses of $456.00 combined in the three claims. In total the Arbitrator awarded Petitioner 109&6/7 weeks of TTD, 146 weeks of PPD, as well as medical expenses. While the Arbitrator and Majority issued three separate decisions, in the interests of clarity, I am issuing a single dissent which will be issued for each Majority decision.

Petitioner testified she began working for Respondent in 2005 as a medical assistant. She worked from 8 to 4:30, five days a week, with a one-hour lunch break. When patients checked in for their appointments, she would type in their weight, blood pressure, reason for appointment, doctor's notes, *etc.* She used a keyboard and mouse. She was right-handed and operated the mouse with her right hand. Her keyboard was on top of her desk. She guessed her hands were "in an upward position" if she were sitting down low. Her chair was "lower than normal" and her hands were in a slightly elevated position. She would type between two and five hours a day.

Petitioner testified she also cleaned examination rooms using both hands. She had to clean rooms between patients and on Tuesday afternoons because they did not have patients at that time. She was also required to push patients in wheelchairs, put records in files, and carried medical records on a daily basis. She also stocked supplies. Three job descriptions were submitted into evidence and identified as PX25, PX26, and PX27. Petitioner testified that they all accurately describes her job activities. PX25, did not indicate who prepared it, and the record strongly suggests it was prepared by Petitioner. It described Petitioner's job as medical assistant included occasional (1/4 – 2&1/2 hours a day) bending/stopping, kneeling, squatting, and crouching. It also required frequent (1&1/2 – 5&1/2 hours) reaching above shoulder height and data entry/keystroking and repetitive firm grasping with both hands.

PX 26 and PX27 were official job descriptions for different time periods of Petitioner's employment but are essentially identical. They were prepared by Respondent and signed and acknowledged by Petitioner. Her job was deemed 70% clinical, involving answering patient questions, preparing orders for tests, escorting patients to exam rooms/taking vitals, performing procedures, including assisting in minor surgeries as directed by doctors, maintaining and stocking exam rooms, collecting/bagging soiled linen, reporting malfunctioning equipment, maintaining patient records, attending meetings, and going off-campus when necessary. 30% of the job was deemed clerical, involving answering phones, generating labels, pulling records, *etc.*, updating appointment lists, greeting patients, and preparing mailings to new patients. 51% or more of her time was spent reading, speaking, "close visual acuity," hearing, and gross/fine hand manipulation. She spent ¼ to ½ of her time writing, stooping, sitting, standing, and walking.

20IWCC0286

Petitioner's CTS/CUTS surgeon, Dr. Neumeister, testified by deposition. He was asked a hypothetical question assuming the job description he was shown (PX25). He was also to assume that Petitioner started working for Respondent full-time on November 21, 2005, she used keyboard on top of her desk, and her wrists would be slightly to moderately hyperextended. She typed two-five hours a day. Dr. Neumeister was also supposed to assume that Petitioner's job also included "firm grasping on a repetitive basis," and she would carry 10-15 pounds occasionally. She had to stock items on shelves and push patients in wheelchairs. He was also to assume that she experienced numbness/tingling while performing these tasks. Dr. Neumeister answered: "if she developed those symptoms while she was doing those activities, then" he would say that the aggravated her bilateral CTS, even though he did not know the precise cause of her CTS.

On cross examination, Dr. Neumeister testified that his notes do not indicate that he discussed Petitioner's job duties with her when he first saw her. He was not sure that he was the one that told her that her symptoms could be related to her job activities. He uses the terms aggravation and exacerbation interchangeably. He reiterated that he believes that if a patient has symptoms with an activity that activity aggravates the patient's condition. He would believe that if she had symptoms typing an hour a day, he would deem that activity to aggravate her condition.

Dr. Neumeister also testified that people are built differently and different people had different tendency to develop CTS with similar activity. If 85% of Petitioner's time was devoted to cleaning instruments, stocking exam rooms, ordering supplies, checking in patients, and escorting patients, those activities would aggravate her condition if she felt symptoms performing those activities.

Dr. Williams also testified by deposition. He was retained by the State of Illinois to perform a Section 12 medical examination on Petitioner. Petitioner reported that she last worked on January 28, 2013 as a medical assistant in neurology. Dr. Williams was provided a job description (PX26) with which Petitioner had no problem. Dr. Williams noted that Petitioner had last seen Dr. Neumeister in 2012 and he referred her to a rheumatologist for a diagnosis of rheumatoid arthritis. She had actually been diagnosed with the condition at least from 2010. Petitioner described to Dr. Williams her workstation, demonstrated how she typed, and reported she typed two hours a day. Dr. Williams thought significant the fact that despite two bilateral CTS releases and a right-sided CUTS surgery, she still had symptoms in her hands, wrists, and right elbow. She also currently reported weakness in the arms, right worse than left.

Besides his clinical examination of Petitioner, Dr. Williams also reviewed her medical records. He noted her co-morbidity factors for CTS/CUTS included her rheumatoid arthritis, her gender (female), her age (40), increased BMI, smoking for 20 years, and prior repair of her median nerve in 1999. Dr. Williams opined that Petitioner's CTS and CUTS were not related to her job activities, based on the job description, the ergonomics of the workstation that she described, as well as the manner she typed, per her demonstration. Petitioner even told him that she did not obviously rest her wrists, forearms, or elbows on the tables. Dr. Williams also cited her co-morbid factors, which represented a more likely cause of her current conditions. He believed Petitioner was at maximum medical improvement at the time of his examination.

On cross examination, agreed that CTS is generally caused by compression of the median nerve in the wrist and that "posture repetition and force can place pressure on the median nerve depending on how the activity is done, how prolonged the activity is, and how long or continuous it's done." Dr. Williams also agreed that in the past, he testified that "it's important to know whether the activity is being done, a sole activity at a cycle of time of less than 30 seconds and/or is done for greater that 50% of the shift." However, that does not necessarily mean that he would change his opinion if Petitioner were typing at her workstation for more than 50% of her workday; it would depend on the ergonomics of her workstation and whether the typing were constant without breaks.

20IWCC0286

However, Dr. Williams noted that Petitioner never indicted that she was uncomfortable at her workstation and she stated that she did not rest her wrists or arms on a table. In her demonstration of typing, she did not have her wrists in a flexed or hyperflexed position. Dr. Williams agreed that he did not see Petitioner's workstation.

Petitioner's shoulder surgeon, Dr. Hansen, did not make any opinion regarding causation of her shoulder condition in any of his treatment notes. However, upon query from Petitioner's lawyer, he issued a checklist and offered a one-sentence opinion indicating her work activities may have aggravated her shoulder condition.

In finding Petitioner proved accidents/causation to all her conditions of ill-being, the Arbitrator found her to be a credible witness. He based his opinions "on the testimony of Petitioner, her job description, and the opinions of Dr. Neumeister and Dr. Hansen, who the Arbitrator found more persuasive than Dr. Williams." In that regard he stressed that Dr. Williams did not opine about Petitioner's shoulder condition. The Arbitrator also noted that "reaching above shoulder level and entering data/keystroke are activities which are marked as frequently, meaning 2.5 to 5.5 hours. It is also stated that claimant uses hands for repetitive tasks such as firm grasping with both hands." Respondent argues there was no credible evidence that Petitioner sustained any repetitive trauma accident/injuries and questioned the dates of manifestation that she cited.

In my opinion, Petitioner did not sustain her burden of proving either repetitive trauma accidents or that her work activities contributed to her conditions of ill-being. The official job descriptions prepared by Respondent and signed by Petitioner, do not establish that her job involved any forceful gripping/grasping or vibration, and do not note keyboarding of more than 2.5 to 5.5 hours a day. These job descriptions really seem to show a diverse collection of activities which strongly militate against proof of repetitive trauma accidents/injuries. In fact, even Petitioner's testimony suggests that she had various job activities and that she did not perform any particular function repetitively or continuously.

In addition, I disagree with the analysis of the Arbitrator, and through its affirmation the Majority, regarding the relative persuasiveness of the opinions of Dr. Williams versus Dr. Neumeister and Dr. Hansen. Dr. Hansen's "checklist," almost certainly prepared by Petitioner's lawyer, and his one-sentence opinion letter on causation of CUTS and shoulder impingement, provide absolutely no explanation and was not persuasive at all and do not identify any specific offending job activity. In addition, Dr. Neumeister's opinions seemed based entirely on his belief that whenever a patient has symptoms with an activity, that activity necessarily permanently aggravates the patient's condition of ill-being whatever the activity and whatever the condition. I do not believe that Dr. Neumeister's premise is correct.

On the other hand, in my opinion Dr. Williams was quite persuasive. He relied on the official job descriptions, which appear much more reliable that the one likely prepared by Petitioner. In addition, Dr. Williams noted that Petitioner specifically related that she did not have issues with her workspace, contradicting her unpersuasive testimony that the chair was a little low compared to the keyboard, and she demonstrated the way she keyboarded, which Dr. Williams did not find at all problematic. Finally, Dr. Williams explained that Petitioner had significant co-morbidity factors, most notably Petitioner's rheumatoid arthritis which actually itself could be the cause of all of Petitioner's conditions of ill-being. Her rheumatoid arthritis alone could certainly help explain the recurrence of CTS in both hands/wrists after bilateral CTS release surgeries, as well as her diffuse joint issues including her hands, wrists, elbow, and shoulder.

For the reasons stated above I would have found that Petitioner did not sustain her burden of proving she sustained work related repetitive trauma accidents or that her conditions of ill-being were

20IWCC0286
20IWCC0286

causally related to her work activities, reversed the Decision of the Arbitrator, and denied compensation. Therefore, I respectfully dissent from the Decision of the Majority.

O-4/2/20
DLS/dw
46

Deborah L. Simpson

Deborah L. Simpson

Bibliography

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0286

OUSLEY, ANGELA
Employee/Petitioner

Case# **09WC009473**

09WC009471
09WC009472

SIU SCHOOL OF MEDICINE
Employer/Respondent

On 7/22/2019, 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 2.01% 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:

0834 KANOSKI BRESNEY
THOMAS R EWICK
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

4993 ASSISTANT ATTORNEY GENERAL
CHELSEA T GRUBB
500 S SECOND ST 13TH FL
SPRINGFIELD, IL 62706

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

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

JUL 22 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20IWCC0286

20 IWCC0286

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

Angela Ousley
Employee/Petitioner

v.

SIU School of Medicine
Employer/Respondent

Case # **09** WC **09473**

Consolidated cases: 09 WC 09471 and 09 WC 09472

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 **Springfield**, on **11/9/18**. 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 _____

20IWCC0286

FINDINGS

On **12/3/06**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**21,079.76**; the average weekly wage was $**405.38**.

On the date of accident, Petitioner was **32** 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 $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

ORDER

Respondent is ordered to pay the medical expenses listed in Petitioner's Exhibit No. 30, as provided in Sections 8(a) and 8.2 of the Act. Respondent is ordered to reimburse the Petitioner's out-of-pocket expenses for related, reasonable and necessary medical services in the amount of $75.00. Respondent shall be given a credit for medical bills that have been paid by its group health insurer, and Respondent shall hold Petitioner harmless for any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $251.32 per week for 31.625 weeks, because the injuries sustained caused the 12.5% loss of use of the right arm, as provided in Section 8(e)(10) of the Act.

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

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

Signature of Arbitrator

7/18/19
Date

JUL 22 2019

20IWCC0286

FINDINGS OF FACT

Petitioner has filed three Applications for Adjustment of Claim. In 09 WC 09473, Petitioner alleges she sustained bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome and injuries to her right rotator cuff and the person as a whole through repetitive trauma with a date of accident of December 3, 2006. (AX 4) In 09 WC 09471, Petitioner alleges the same injuries through repetitive trauma with an injury date of August 13, 2007 (AX 5), and in 09 WC 09472, Petitioner alleges the same injuries through repetitive trauma with a date of accident of January 27, 2009 (AX 6) In all three cases, the disputed issues are accident, causal connection, medical expenses, temporary total disability, and the nature and extent of the injuries. (AX 1; AX 2; AX 3)

Petitioner testified she is 44 years old and right-hand dominant. She has been on social security disability since April 2014 for congestive heart failure. On November 21, 2005, she started working for Respondent, Southern Illinois University School of Medicine as a medical assistant. She worked 5 days each week, Monday through Friday, from 8:00 a.m. to 4:30 p.m. with a 1-hour lunch break. She described her job duties. She noted that she was required to type on a computer when she put in a patient's information after the patient checked in for his or her appointment. She used a standard keyboard which sat on a desk. As she typed, her hands were in an upward position because she was sitting low due to the setup of her work station and the chair was lower than normal. The computer had a mouse which she controlled with her right hand. The amount of typing each shift varied, but it could be between 2 and 5 hours. Petitioner also had to clean rooms. Between each patient, she wiped the examining room down. Sometimes she had to push patients in wheelchairs. She also had to carry medical records and patients charts on a daily basis. Petitioner was also required to stock the exam rooms with supplies such as band-aids, alcohol pads, tongue compressors, pens, papers and Q-tips.

Petitioner noted on cross-examination that when the patients checked in, she took their information orally and then input it into the computer. There were about 100 patients on Thursdays and about 50 to 75 patients on the other days. It took about 2 to 4 minutes for each patient.

Petitioner testified that Petitioner's Exhibit Nos. 25, 26 and 27 are job descriptions which fairly and accurately depict her job duties. Petitioner's Exhibit No. 25 is a form completed by Petitioner's supervisor on November 18, 2008 listing the physical demands of Petitioner's job as a medical assistant. Reaching above shoulder level and entering data/keystroke are activities which are marked as frequently, meaning 2.5 to 5.5 hours. It is also noted that claimant uses her hands for repetitive tasks such as firm grasping with both hands. (PX 25)

Petitioner's Exhibit Nos. 26 and 27 are "position descriptions" for a medical assistant in the Neurology Department of Respondent, effective November 22, 2010 and May 17, 2010 respectively, which are signed by Petitioner and her supervisor. They state 70% of the job duties are clerical, which includes answering patient phone calls, giving patient written orders, escorting patients to exam rooms, taking blood pressure, weight and height information and recording the information into electronic health records, completing a review of systems checklist, maintaining clean, orderly and well supplied examination rooms and doctor work rooms, stocking the utility, supply and laundry rooms, collecting and bagging soiled linens, maintaining patient electronic health records, and attending staff meetings. (PX 26; PX 27) The descriptions note 30% of the job duties are clerical, involving answering telephone calls, preparing clinic by generating encounter labels, pulling new patient records,

20IWCC0286

printing and distributing clinic schedules, updating appointment lists, greeting all arriving patients for appointments, updating demographic and insurance information in the computer, and preparing mailings to new patients. (PX 26: PX 27)

Petitioner testified that prior to working for Respondent, she did not have any problems with her hands, elbows or shoulders. She had never had any treatment for those body parts prior to working for Respondent. However, during the course of her employment with Respondent, she started to notice her right shoulder would get achy. Her fingers would get tingly and numb.

On December 3, 2006, Petitioner presented to the emergency room of St. John's Hospital. The triage note indicated Petitioner complained of right shoulder and right arm pain. She complained of shoulder tenderness on a patient diagram. She was prescribed Vicodin and Toradol. (PX 20)

On February 24, 2007, Petitioner presented to Dr. Glennon Paul with complaints of pain in her right shoulder on elevation and raising it behind her back as well as numbness and pain down the side of her arm. Dr. Paul diagnosed rotator cuff tendonitis and biceps tendonitis. He performed a steroid injection into the rotator cuff and biceps tendon. (PX 9)

On August 13, 2007, Petitioner presented to Dr. Paul with pain down her right arm, noting it occurred all day long. It started in her wrist and went all the way up into the shoulder. Dr. Paul suspected carpal tunnel syndrome. (PX 9) She testified that Dr. Glennon Paul, recommended an EMG.

On August 16, 2007, Petitioner had an EMG of her right upper extremity. Dr. Acharya, who performed the study, noted that his clinical examination showed positive Tinel's and Phalen's signs. The study showed severe right carpal tunnel syndrome. (PX 2)

After the EMG, Dr. Paul referred her to Dr. Michael Neumeister. (PX 9)

On September 5, 2007, Petitioner presented to Dr. Neumeister, indicating that over the last 9 to 10 months she had developed right shoulder pain and numbness and tingling in her right hand. She stated that she had two shoulder injections with some relief of shoulder pain but continued to have numbness and pain in the distribution of the right median nerve. It was also noted that her left median nerve had been repaired secondary to a laceration some years ago and she was having some mild paresthesias in that nerve as well. The Tinel's and Phalen's tests were positive. Dr. Neumeister diagnosed carpal tunnel syndrome. He recommended splinting and referred her to hand therapy. (PX 3)

On September 24, 2007, Dr. Neumeister noted that she was worse despite splinting and recommended surgery. (PX 3)

On November 21, 2007, Dr. Paul performed an injection into the rotator cuff and biceps tendon. He ordered an MRI of the shoulder. (PX 9) An MRI of the right shoulder was performed on November 26, 2007. The impression of the radiologist was mild tendonitis involving the supraspinatus. (PX 10)

On November 28, 2007, Dr. Neumeister operated performing a right carpal tunnel release. The post-operative diagnosis was right carpal tunnel syndrome. (PX 11)

Following surgery, Petitioner was taken off of work by Dr. Neumeister, who on December 27, 2007 returned her to work on January 3, 2008. (PX 3)

On January 25, 2008, Dr. Neumeister operated on Petitioner's left wrist. He noted in the operative report that Petitioner had a previous median nerve injury and now had a large neuroma were the median nerve had been repaired in the past. He noted that she had since developed symptoms of carpal tunnel syndrome, including pain and paresthesias in her fingertips. Dr. Neumeister performed a left open carpal tunnel release and median nerve neurolysis. His post-operative diagnoses were left carpal tunnel syndrome and previous median nerve injury. (PX 12)

Following her surgery, Dr. Neumeister returned Petitioner to work on February 25, 2008 with no restrictions. (PX 3)

An EMG/nerve conduction study of the right upper extremity performed on February 7, 2008 evidenced right ulnar neuropathy in the right elbow. (PX 2)

On February 28, 2008, Petitioner presented to Dr. Thomas Hansen upon referral from Dr. Neumeister for evaluation of her shoulder. She noted that she had 4 or 5 injections with only temporary relief and had tried physical therapy. She complained of pain with overhead activities and pain at night. Dr. Hansen diagnosed right shoulder impingement syndrome and AC arthritis. He offered a cortisone injection, which Petitioner declined, and referred her for physical therapy. He also diagnosed cubital tunnel syndrome. (PX 2; PX 3) On May 22, 2008, Dr. Hansen recommended surgery. (PX 4; PX 5)

On August 8, 2008, Dr. Hansen performed a right shoulder arthroscopy with subacromial decompression and distal clavicle excision. He observed no tears but found a spur in the subacromial space, which he shaved. His post-operative diagnosis was right shoulder impingement. (PX 13)

Following surgery, Dr. Hansen kept Petitioner off of work and referred her to physical therapy. (PX 4)

On December 12, 2008, Dr. Hansen performed a right cubital tunnel release. His post operative diagnosis was right cubital tunnel syndrome. (PX 14)

Petitioner participated in physical therapy at St. John's Hospital between January 6, 2009 and February 12, 2009 for her right elbow. (PX 21)

On January 27, 2009, Dr. Hansen filled out a questionnaire in which he marked yes in response to the questions which asked whether Petitioner's bilateral carpal tunnel syndrome and the right shoulder problem which necessitated surgery was caused or aggravated by her work as a medical assistant. He also indicated she was not currently capable of working and further noted his treatment had been reasonable and necessary to cure and relieve the effects of her work-related difficulties. (PX 23)

On June 18, 2009, Petitioner presented to Dr. Hansen, and he recorded that she wanted to go back to work. He returned her to work on June 18, 2009 with no restrictions and released her on an as needed basis. (PX 3)

On June 29, 2009, Petitioner presented to Dr. Neumeister. He noted that she was trying to obtain a new position as a medical assistant in the Mohs lab, which would require her to slice with a blade and handle fine patient specimens on slides. She was worried that due to numbness in her fingers she would not be safe in terms of being able to protect the specimens or herself from injury. Dr. Neumeister indicated he looked at a job description and explained to her that she would not be an adequate candidate for this type of work. He referred her to hand therapy and released on an as needed basis. (PX 3)

On July 1, 2009, Dr. Neumeister noted that he had been contacted by Respondent's human resources about where Petitioner could be placed. He noted that Petitioner was able to do a significant amount with her right hand, but he believed fine manipulation with her left hand and fingers would be difficult. Also, because of the numbness and tingling of the fingers, he though the use of sharp objects would not be in her best interest. He did think she could do essential nursing chores, such as blood pressure measurements, lifting, rooming patients and general patient care. Dr. Neumeister noted her position as a medical assistant in the Neurology department fit his recommendations but had been filled while she was off of work. (PX 3)

At trial, Petitioner testified that while Dr. Hansen had returned her to work with no restrictions on June 18, 2009, her medical assistant position in the neurology department had been filled. Prior to going back to work for Respondent, she had a Functional Capacity Evaluation (FCE) on May 6, 2010. She demonstrated the abilities to perform the physical demands of a medical assistant. (PX 15, p. 3)

Petitioner testified that when she went back to work for Respondent in the middle of 2010, her hours remained the same, but her job duties changed in that she became a medical assistant in the dermatology department. In that department, she worked in the lab putting skin cell samples on little dish boards or slides. She used a little scalpel to break down the sample. She put the slides in a microscope. This job did not involve typing but involved fine manipulation with her fingers.

On December 28, 2011 Dr. Hansen wrote a letter to Petitioner's attorney stating he had reviewed records pertaining to his care of Petitioner, and based on those records, he believed her cubital tunnel syndrome may have been aggravated by her work activity as a medical assistant with Respondent. (PX 24)

On March 12, 2012, Petitioner returned to Dr. Neumeister with complaints of numbness and tingling in both hands involving the fingers. On physical examination, she had a positive provocative compression of the bilateral carpal tunnels and mildly positive over the cubital tunnels. Dr. Neumeister ordered nerve conduction studies. (PX 7)

On March 31, 2012, Petitioner had an EMG/nerve conduction study, which showed bilateral mild to moderate carpal tunnel syndrome. (PX 6)

On April 6, 2012, Dr. Neumeister performed a right open carpal tunnel release. His post-operative diagnosis was recurrent right carpal tunnel syndrome. (PX 16) On May 8, 2012, Dr. Neumeister performed a left open carpal tunnel release, and the post-operative diagnosis was recurrence of left carpal tunnel syndrome. (PX 17) Following the surgeries, Petitioner participated in hand therapy. (PX 7) She was released as of 6/21/12

On November 19, 2012, Petitioner presented to Dr. Neumeister for reevaluation of the carpal tunnel syndrome. She had some spasm of her thenar eminence. (PX 7)

On February 12, 2013, Petitioner presented to Dr. Ana Tumyan, a Rheumatologist at SIU, upon referral from Dr. Neumeister for evaluation of pain in both hands, especially in the MCP and PIP joints as well as the wrists. She was diagnosed with joint pain. During her treatment with Dr. Tumyan and the Rheumatology Department, Petitioner was diagnosed with rheumatoid arthritis and prescribed anti-inflammatories. (PX 8; PX 22)

Petitioner testified that her right elbow is currently fine, but she does have an aching sensation with certain activities. With respect to her right shoulder, she has pain with lifting her arm up and has stiffness at night and during the day. Around the house, she has to use her right arm to wash dishes, cleaning and reaching into cabinets. With respect to her hands, she still has some numbness and tingling in the tips of her fingers about 7 or 8 times in a month. She takes Tylenol twice a day every day.

Dr. Neumeister testified by way of evidence deposition, which is marked as Petitioner's Exhibit No. 1. He is board certified in plastic surgery with an added certificate in hand surgery. 60 to 70% of his practice is devoted to hand surgery. (PX 1, pp. 6) He noted that having one's hand in a flexed or extended position can place pressure on the median nerve in the wrist. (PX 1, pp. 12-13) He testified that Petitioner had an EMG on February 7, 2008, roughly two and a half months after the surgery on her right wrist, and it right showed cubital tunnel syndrome as well as some residual changes from the first surgery. (PX 1, pp. 19-20)

Dr. Neumeister reviewed Petitioner's Exhibit No. 25. He was asked to assume the following facts to be true. Petitioner started working for Respondent as a medical assistant on November 21, 2005 and worked 8 to 4:30 Monday through Friday with a one hour lunch. She used a keyboard that was on top of her desk and while she typed her wrists would be slightly to moderately hyper extended. He was told she typed between 2.5 to 5.5 hours a day entering data and that while typing she started to notice some numbness and tingling in her fingers and pain in her writs. He was informed that her other job duties, pursuant to Petitioner's Exhibit No. 25, included firm grasping on a repetitive basis and she would lift 10 to 15 pounds from time to time, which mainly meant carrying medical records. She noticed symptoms in her hands and wrists, including numbness and tingling, while carrying records. He was also told that she had to stock items including lien on a shelf and push patients in a wheelchair. (PX 1, pp. 22-23) The Dr. was asked if her job as a medical assistant could have either caused or contributed to the development of her bi-lateral carpal tunnel syndrome. He testified that if she developed symptoms while doing those activities then her job aggravated her condition. He also stated his treatment was reasonable and necessary for those conditions. (PX 1, pp. 23-24)

Dr. Neumeister noted that Petitioner returned to him on March 12, 2012 with complaints involving multiple joint, including the knuckles in her fingers. She also had complaints of numbness and tingling in both hands. An EMG confirmed bilateral carpal tunnel surgery and he operated again on both wrists for the carpal tunnel syndrome. Dr. Neumeister testified that the recurrence of the carpal tunnel syndrome probably relates to the first two surgeries because of the scar tissue from those surgeries around the nerve. (PX 1, pp. 24-28) Dr. Neumeister noted that even if Petitioner had not gone back to work, she could have developed the recurrence of

the carpal tunnel syndrome. (PX 1, p. 29) He noted the 2012 surgeries were reasonable and necessary. (PX 1, p. 30)

On cross-examination, Dr. Neumeister was asked about the causative factors for developing carpal tunnel syndrome. He noted there are various vascular disorders, infections, trauma, inflammation, and congenital abnormalities which can contribute to it. He noted Petitioner's carpal tunnel syndrome could have developed in an idiopathic manner, which is the most common cause of carpal tunnel syndrome. Smoking can aggravate carpal tunnel syndrome. (PX 1, pp. 37-41)

Respondent's Exhibit No. 5 is an employee's notice of injury completed on December 14, 2010. Petitioner marked shoulder, hands and elbow. She listed a date of injury of December 1, 2006. She noted her pain started at work. (RX 5)

Respondent retained Dr. James Williams to perform a Section 12 examination. Dr. Williams testified by way of evidence deposition which is marked as Respondent's Exhibit No. 18. Dr. Williams is board certified in orthopedic surgery. He examined Petitioner on April 29, 2015. He stated Petitioner has co-morbidities associated with carpal or cubital tunnel syndrome including rheumatoid arthritis, increased body mass, a previous median nerve repair in 1999, smoking, sex and age. He diagnosed status post two left carpal tunnel surgeries, status post two right carpal tunnel releases, and status right elbow cubital tunnel release. Dr. Williams did not believe Petitioner's work duties were related to these conditions. He thought they were more likely idiopathic or related to her rheumatoid arthritis, increased body mass index and smoking. (RX 18, pp. 5-13)

On cross-examination, Dr. Williams noted he did not address Petitioner's right shoulder. He offered no opinions on the right shoulder. As of the date of his deposition, August 20, 2015, he had performed 75 to 100 independent medical examinations. 80 to 90 percent are done at the request of the employer.

CONCLUSIONS

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

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

The Arbitrator finds Petitioner to be a credible witness and notes she appeared candid and forthright in her testimony and demeanor at trial.

All three Applications for Adjustment of Claim allege the same injuries and body parts and allege repetitive trauma as the cause of the injuries. (AX4; AX 5; AX 6) Similarly, all three Requests for Hearing are identical in the disputed issues with the only difference being the dates of accident and Petitioner's age. (AX 1; AX 2; AX 3)

The Arbitrator finds the manifestation date, for the cubital tunnel syndrome to December 3, 2006. On that day, she was seen at St. John's emergency room and complained of right arm pain in addition to right shoulder pain. (PX 20) When she was asked in 2010 by Respondent to complete an injury report, she listed her elbow along with the hands and shoulder in Respondent's Exhibit No. 5 and noted it began December 1, 2006. (RX 5)

20IWCC0286

The Arbitrator finds the manifestation date for the carpal tunnel syndrome to be August 13, 2007, the date she presented to Dr. Paul noting pain down her arm all day long from her wrists to her shoulder. Dr. Paul suspected carpal tunnel syndrome. (PX 9)

The Arbitrator finds the manifestation date for the right shoulder to be January 27, 2009. On that date, Dr. Hansen completed a questionnaire in which he indicated he thought the bilateral carpal tunnel syndrome and the right shoulder condition which necessitated surgery were related to Petitioner's work as a medical assistant. (PX 23)

The Arbitrator finds Petitioner has proven she sustained three accidents on the above-referenced dates which arose out of and in the course of her employment and that her conditions of ill-being, right cubital tunnel syndrome, the right shoulder requiring surgery, and the bilateral carpal tunnel syndrome requiring two surgeries on each wrist, are causally related to said accidents. The Arbitrator bases his opinions on the testimony of Petitioner, her job description, and the opinions of Dr. Neumeister and Dr. Hansen, who the Arbitrator found more persuasive than Dr. Williams.

Petitioner's testimony concerning her job was not contradicted at trial. It showed her work as a medical assistant was repetitive and hand intensive. She testified that as she typed her hands would be in an upward extended position because she was sitting low due to the positioning of her chair. There were about 100 patients on Thursdays and about 50 to 75 patients on the other days whom she would enter information for in the computer. It took about 2 to 4 minutes for each patient. She also had to use her hands to clean rooms, stock rooms, push patients in wheelchairs, and carrying patient charts. Petitioner's Exhibit No. 25 is a form completed by Petitioner's supervisor on November 18, 2008 listing the physical demands of Petitioner's job as a medical assistant. Reaching above shoulder level and entering data/keystroke are activities which are marked as frequently, meaning 2.5 to 5.5 hours. It is also noted that claimant uses hands for repetitive tasks such as firm grasping with both hands. (PX 25)

Dr. Neumeister testified having one's hand in a flexed or extended position can place pressure on the median nerve in the wrist. (PX 1, pp. 12-13) Dr. Neumeister reviewed Petitioner's Exhibit No. 25 and considered a hypothetical regarding Petitioner's job as a medical assistant in the Neurology Department. He testified that if she developed symptoms while doing those activities then her job aggravated her bilateral carpal tunnel syndrome. He also stated his treatment was reasonable and necessary for those conditions. (PX 1, pp. 23-24) Dr. Neumeister testified that the recurrence of the carpal tunnel syndrome in 2012 probably relates to the first two surgeries because of the scar tissue from those surgeries around the nerve. (PX 1, pp. 24-28) Dr. Neumeister noted that even if Petitioner had not gone back to work, she could have developed the recurrence of the carpal tunnel syndrome. (PX 1, p. 29) He noted the 2012 surgeries were reasonable and necessary. (PX 1, p. 30)

Petitioner testified that when she went back to work for Respondent in the middle of 2010, her hours remained the same, but her job duties changed in that she became a medical assistant in the dermatology department. In that department, she worked in the lab putting skin cell samples on little dish boards or slides. She used a little scalpel to break down the sample. She put the slides in a microscope. This job did not involve typing but involved fine manipulation with her fingers. Although Dr. Neumeister testified that 2012 surgeries for

the carpal tunnel recurrence probably related to the first two surgeries and that she could have developed a recurrence even if she did not go back to work, it is noteworthy that her job in the Dermatology Department was still hand intensive and involved fine manipulation with her fingers and hands.

On January 27, 2009, Dr. Hansen filled out a questionnaire in which he marked yes in response to the questions which asked whether Petitioner's bilateral carpal tunnel syndrome and the right shoulder problem which necessitated surgery was caused or aggravated by her work as a medical assistant. He also noted his treatment had been reasonable and necessary to cure and relieve the effects of her work-related difficulties. (PX 23) On December 28, 2011 Dr. Hansen wrote a letter to Petitioner's attorney stating he had reviewed the records pertaining to his care of Petitioner, and based on those records, he believed her cubital tunnel syndrome may have been aggravated by her work activity as a medical assistant with Respondent. (PX 24)

The Arbitrator finds the opinions of Dr. Neumeister and Dr. Hansen more persuasive than those of Dr. Williams. Dr. Williams did not offer any opinions on Petitioner's right shoulder. With respect to the cubital and carpal tunnel syndrome, he was quick to point out that her rheumatoid arthritis, increased body mass index and smoking may have contributed but dismissed the notion that her work could have contributed.

An accidental injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665 (2003).

For all of the foregoing reasons, the Arbitrator finds Petitioner has proven by a preponderance of the evidence that she sustained three accidents which arose out of and in the course of her employment by Respondent and that her conditions of ill-being with respect to the right elbow, bilateral hands, and the right shoulder, are causally related to her accidents.

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 adopts his findings of fact and conclusions of law above and incorporates them herein by this reference.

Petitioner's medical bills relating to her cubital tunnel syndrome are contained in Petitioner's Exhibit No. 30. Petitioner's medical bills relating to her carpal tunnel syndrome are contained in Petitioner's Exhibit No. 29, and her medical bills relating to her right shoulder are contained in Petitioner's Exhibit No. 31.

The Arbitrator finds the medical services rendered to Petitioner for her right cubital tunnel syndrome have been reasonable and necessary as a result of the December 3, 2006 work accident. Respondent is ordered to pay the medical expenses listed in Petitioner's Exhibit No. 30, as provided in Sections 8(a) and 8.2 of the Act. Respondent is ordered to reimburse the Petitioner's out-of-pocket expenses for related, reasonable and necessary medical services in the amount of $75.00. Respondent shall be given a credit for medical bills that have been paid by its group health insurer, and Respondent shall hold Petitioner harmless for any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

20IWCC0286

The Arbitrator finds the medical services rendered to Petitioner for her bilateral carpal tunnel syndrome have been reasonable and necessary as a result of the August 13, 2007 work accident. Respondent is ordered to pay the medical expenses listed in Petitioner's Exhibit No. 29, as provided in Sections 8(a) and 8.2 of the Act. Respondent is ordered to reimburse the Petitioner's out-of-pocket expenses for related, reasonable and necessary medical services in the amount of $276.00. Respondent shall be given a credit for medical bills that have been paid by its group health insurer, and Respondent shall hold Petitioner harmless for any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

The Arbitrator finds the medical services rendered to Petitioner for her right shoulder have been reasonable and necessary as a result of the January 27, 2009 work accident. Respondent is ordered to pay the medical expenses listed in Petitioner's Exhibit No. 31, as provided in Sections 8(a) and 8.2 of the Act. Respondent is ordered to reimburse the Petitioner's out-of-pocket expenses for related, reasonable and necessary medical services in the amount of $105.00. Respondent shall be given a credit for medical bills that have been paid by its group health insurer, and Respondent shall hold Petitioner harmless for 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?

Following the November 28, 2007 surgery, Petitioner was taken off of work by Dr. Neumeister, who on December 27, 2007 issued a return to work slip returning her to work on January 3, 2008. (PX 3; PX 19) Following her January 25, 2008 surgery, Dr. Neumeister returned Petitioner to work on February 25, 2008 with no restrictions. (PX 3; PX 19) Following the August 8, 2008 right shoulder surgery, Dr. Hansen kept Petitioner off of work. (PX 4; PX 19) Dr. Hansen also kept her off of work following the December 12, 2008 right cubital tunnel release. (PX 19) On June 18, 2009, Dr. Hansen returned her to work with no restrictions. (PX 19)

On June 29, 2009, Dr. Neumeister noted that Petitioner was trying to obtain a new position as a medical assistant in the lab, which would require her to slice with a blade and handle fine patient specimens on slides. Dr. Neumeister indicated he looked at a job description and explained to her that she would not be an adequate candidate for this type of work. (PX 3) Dr. Neumeister signed a work status slip which stated Petitioner was unable to perform the job in dermatology department. (PX 19) Petitioner testified that while Dr. Hansen had returned her to work with no restrictions on June 18, 2009, her medical assistant position in the neurology department had been filled. Prior to going back to work for Respondent as a medical assistant in the dermatology department, she had a Functional Capacity Evaluation (FCE) on May 6, 2010. The FCE noted she demonstrated the abilities to perform the physical demands of a medical assistant. (PX 15, p. 3)

Following the April 6, 2012 right open carpal tunnel release, Dr. Neumeister kept Petitioner off of work. On April 18, 2012, he issued a work status slip returning her to left-handed work only until reevaluated in 3 weeks. Following the May 8, 2012 left open carpal tunnel release, Dr. Neumeister kept her off of work. On June 20, 2012, he returned her to work on June 25, 2012. (PX 7)

Given the Arbitrator's finding with respect to causation and the right shoulder and elbow, the Arbitrator orders Respondent to pay Petitioner temporary total disability benefits of $299.67 per week (the minimum TTD rate for the January 27, 2009 injury) for 44 and 6/7 weeks, commencing August 8, 2008 (the right shoulder

surgery) through June 18, 2009 (the day Dr. Hansen released Petitioner back to work), as provided in Section 8(b) of the Act.

At the time of her right cubital tunnel surgery on December 12, 2008, Petitioner was already being kept off of work for her right shoulder (PX 4; PX 19) so no TTD is ordered for the right cubital tunnel claim.

Given the Arbitrator's finding with respect to causation and the carpal tunnel syndrome, the Arbitrator orders Respondent to pay Petitioner temporary total disability benefits of $290.00 per week for 65 weeks, commencing November 28, 2007 through January 2, 2008, January 25, 2008 through February 24, 2008, June 29, 2009 through May 6, 2010, and April 6, 2012 through June 20, 2012, as provided in Section 8(b) of the Act.

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

For her bilateral carpal tunnel syndrome, which was diagnosed by electrical studies as severe, Petitioner underwent 4 surgeries. On November 28, 2007, Dr. Neumeister performed a right carpal tunnel release. (PX 11) On January 25, 2008, Dr. Neumeister did a left open carpal tunnel release and median nerve neurolysis. (PX 12) On April 6, 2012, Dr. Neumeister performed a right open carpal tunnel release, and on May 8, 2012, he performed a left open carpal tunnel release. (PX 16; PX 17)

On August 8, 2008, Dr. Hansen performed a right shoulder arthroscopy with subacromial decompression and distal clavicle excision. He observed no tears but found a spur in the subacromial space, which he shaved. His post-operative diagnosis was right shoulder impingement. (PX 13) On December 12, 2008, Dr. Hansen performed a right cubital tunnel release. His post operative diagnosis was right cubital tunnel syndrome. (PX 14)

Petitioner testified that her right elbow is currently fine, but she does have an aching sensation with certain activities. With respect to her right shoulder, she has pain with lifting her arm up and has stiffness at night and during the day. Around the house, she has to use her right arm to wash dishes, cleaning and reaching into cabinets. With respect to her hands, she still has some numbness and tingling in the tips of her fingers about 7 or 8 times in a month. She takes Tylenol twice a day every day.

Based upon the above, the Arbitrator awards Petitioner 7.5% loss of the whole person for the right shoulder injury, 12.5% loss of the right arm for the cubital tunnel syndrome, and 17.5% loss of the left and 20% loss of the right hand for the bilateral carpal tunnel syndrome.

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)
☐ Modify	☐ PTD/Fatal denied
	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kelli Leach, deceased, by Joy Carroll, surviving sister,

Petitioner,

vs. NO: 15 WC 28851

Northern Clearing, Inc.,

Respondent.

20IWCC0288

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 jurisdiction, causal connection, temporary total disability, medical expenses, and prospective medical treatment, 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 September 3, 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.

SOIACC0588

20IWCC0288

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 $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: MAY 19 2020
d: 05/07/20
BNF/mw
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

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

LEACH, KELLI
Employee/Petitioner

Case# **15WC028851**

NORTHERN CLEARING INC
Employer/Respondent

20IWCC0288

On 6/5/2018, 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 2.07% 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:

0564 WILIAMS & SWEE LTD
DIRK A MAY
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

1454 THOMAS & ASSOCIATES
BOB HOFFMAN
500 W MADISON ST SUITE 2900
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Kelli Leach
Employee/Petitioner

v.

Northern Clearing, Inc.
Employer/Respondent

Case # **15** WC **28851**

Consolidated cases: **N/A**

20IWCC0288

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 **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Bloomington**, on **April 23, 2018**. 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 _____

20IWCC0288

FINDINGS

On the date of accident, **July 29, 2015,** 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.

Per the stipulation of the parties, in the year preceding the injury, Petitioner earned **$79,215.76**; the average weekly wage was **$1,523.38**.

On the date of accident, Petitioner was **49** 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 **$94,881.26** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$94,881.26.**

Respondent shall be given a credit of **$IF ANY** in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

As Petitioner has failed to prove that her current condition of ill-being is causally related to the accident of July 29, 2015, Petitioner's request for prospective medical treatment as recommended by Dr. Benyamin is denied.

Respondent shall pay for medical services **rendered up to and including April 19, 2017** as provided in Sections 8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses **for treatment rendered up to and including April 19, 2017** directly to Petitioner. Respondent shall pay any unpaid, related medical expenses **for treatment rendered up to and including April 19, 2017** according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner. Respondent is entitled to a credit for all benefits paid through group insurance under Section 8(j) of the Act.

Respondent shall be given a credit of **$94,881.26** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$94,881.26.**

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.

Melinda M. Price Gillman
Signature of Arbitrator

6/1/18
Date

ICArbDec19(b)

JUN 5 – 2018

20IWCC0288

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Kelli Leach
Employee/Petitioner

Case # **15** WC **28851**

v.

Consolidated cases: **N/A**

Northern Clearing, Inc.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

At the time of arbitration, Petitioner testified that she was in a motor vehicle accident on July 29, 2015 while working for Respondent. Petitioner testified that she collided with another vehicle that had run a red light and that she declined medical treatment at the accident scene. She did testify, however, that her entire body was sore after the accident. She testified that she returned to work the next day and that, because she was so sore, she had to ask someone for help while hooking up a trailer.

Petitioner testified that she did not seek medical treatment until August 10th at Medivac[1] and that she next sought treatment on August 11th at Bromenn Medical Center. Petitioner testified that she then sought treatment at Occupational Health after which she was seen by her primary care physician, Dr. Houghton, in September. She testified that Dr. Houghton referred her to Dr. Benyamin in February of 2016 and that the treatment she received included physical therapy, injections and medications.

Petitioner testified that she was still off work because she still has problems, including uncontrollable shaking and chronic pain down the right leg as well as sometimes the left leg. As to her abilities to lift at this point, Petitioner testified that she was not able to lift very much and that when she bends over, she finds herself having difficulty breathing. She testified that she notices pain in the right buttocks area. She testified that as to standing and walking, she notices that cannot wear shoes and that pressure bothers her feet.

When asked whether Respondent had work within the restrictions given by her doctor, Petitioner responded that she was not sure. She testified that the one time that she asked, she was told that they did not have work available.

Petitioner testified that she has pain in the low back area and that sometimes she had to lie down. She testified that she has low back pain every day and that she also has pain down her leg every day. She testified that she is currently using pain medications, heat and ice and staying off her feet. She testified that

[1] The Arbitrator notes that no corresponding medical records were entered into evidence documenting such treatment.

she uses ice and heat on her low back every day. When asked if she would undergo the treatment recommended by Dr. Benyamin, Petitioner responded affirmatively.

Petitioner testified that she had problems with her low back before in 1999 and that she underwent a fusion from L4 to S1. She testified that after that surgery, she returned to work in late 2003 or early 2004. She denied having undergone any active treatment for her low back after 2004 and before the accident at issue in July of 2015.

On cross examination, Petitioner agreed that Dr. Houghton initially referred her to Dr. Sureka and that she treated with him from the end of September of 2015 to January of 2016. Petitioner admitted that she chose to see Dr. Benyamin.

On cross examination, Petitioner testified that she spoke with her employer one time on August 20, 2015 about work restrictions. She denied having had any contact with Respondent since then. She testified that her job with Respondent was a temporary job, that she was a Teamster and that the job was supposed to end in October of 2015.

The transcript of the deposition of Dr. Rasmin Benyamin taken on January 24, 2018 was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. Dr. Benyamin testified that he is board-certified in anesthesiology and is also board-certified by the American Board of Pain Medicine and the American Board of Interventional Pain. He testified that his practice specialty is that of pain management. (PX1).

Dr. Benyamin testified that he first saw Petitioner on February 18, 2016 as a self-referral and that she had been referred to him a year before. He testified that he thought that Petitioner was in Texas and then came back and stated that she was involved in a motor vehicle accident the prior year while she was driving her work truck, that she said she was driving about 20 MPH and that a lady ran a red light going about 55 MPH. He testified that Petitioner stated that both of her knees hit the dash but that she was not having pain at the time of the accident, which was why she did not go the emergency room for an evaluation. He testified that Petitioner's pain started about nine days after the accident and that she ended up going to the emergency room and was given pain medication and referred to Dr. Sureka for a consultation. He testified that Petitioner stated that she had six weeks of physical therapy without any relief and that following that, she ended up having an MRI and a bone scan. He testified that on physical examination, Petitioner had a positive Fortin finger test on the right side which was a sign of sacroiliac pain, that she had a positive shear on the right side and that she had tenderness over the right piriformis muscle. He testified that his initial thought was that it was sacroiliac pain, +/-piriformis, until proven otherwise. He testified that he reviewed the MRI of August 2015 himself and did not see any positive findings. (PX1).

Dr. Benyamin testified that he also reviewed the MRI from June 2016 as well and that there was nothing there to explain Petitioner's pain. He testified that Petitioner had a very small disc bulge above her fusion levels, but there was no nerve impingement to explain her symptoms. He testified that Petitioner's symptoms were on one side (*i.e.*, the right). He testified that the MRI of the pelvis was negative. He testified that he reviewed the EMG that was performed by Dr. Jhee and that it mentioned chronic right S1 radiculopathy that he attributed to previous injuries and that he also suggested that Petitioner might be suffering from a sacroiliac pain problem. He testified that SI joint pain was usually a result of spraining of the ligaments and that the gold standard in diagnosing the sacroiliac joint was doing a diagnostic intraarticular joint injection. He testified that he recommended a diagnostic sacroiliac injection as well as a separate piriformis injection on the right side. (PX1).

Dr. Benyamin testified that when Petitioner came back after the sacroiliac joint injection, she stated that she had minimal relief of approximately 10%. He testified that Petitioner had significant relief after the piriformis injection performed on October 18th which suggested to him that the piriformis muscle was

probably one of the sources of the pain. He testified that based on the one diagnostic block he did not have a diagnosis as to the SI joint. He testified that there were false positives and false negatives, and that this was one of the reasons that at some point in the future he wanted to repeat it. (PX1).

Dr. Benyamin testified that physical therapy was typically used to treat the sacroiliac joint as was the use of a sacroiliac brace or belt. He testified that as for the piriformis, treatment could include an ultrasound and a Botox injection as well as physical therapy. He testified that he did not take Petitioner off work and that this was done through Dr. Houghton, Petitioner's primary care physician. He testified that the last office visit took place on May 9, 2017 and that Petitioner had developed some new radicular symptoms on the right side as well as a little bit of decreased sensation in the right and left side. He testified that without treatment, Petitioner's prognosis was that of flare-ups and symptoms that were not going to go away. When asked of the prognosis if Petitioner had physical therapy, heat, ultrasound, brace and Botox, Dr. Benyamin responded that it was hard to predict. (PX1).

Dr. Benyamin testified that it was never determined whether Petitioner was at maximum medical improvement and that when he last saw her, their recommendation was to get another MRI of the lumbar spine because of the new symptoms. He testified that in the previous images there were no problems with the fusion that he noted, but that there was always a risk of having an event above the fusion. (PX1).

On cross examination, Dr. Benyamin agreed that he did not consult with any of Petitioner's prior treating physicians. He agreed that except for the MRI films that he had testified to, he did not review any prior medical records from any of the prior treaters. He testified that there was an original referral made by a primary care doctor, Dr. Pilcher, sometime in 2015. He testified that he thought the reason for the referral was the accident, but he was not sure. (PX1).

On cross examination, Dr. Benyamin testified that he knew that Petitioner had had a fusion many years ago but did not recall how many. He testified that Petitioner did not report to him that after that fusion, she continued to have low back pain and radicular complaints. He testified that he took Petitioner's word that her knee hit the dash during the accident and that if the knee hit the dash when the foot was on the pedal, then one could possibly have a sacroiliac ligament sprain and possibly also a piriformis muscle strain. (PX1).

On cross examination, Dr. Benyamin agreed that the fusion that Petitioner had back in 1999 was in the L5-S1, L4-L5 region. He agreed that when one fused levels, it solidified that portion of the spine and put more pressure on the levels above and below it. He agreed that the fusion could cause irritation of the L5 and S1 nerve roots. He testified that it was reasonable that, based on the EMG, the S1 radiculopathy probably was residual from Petitioner's previous injury that ended up with a fusion. (PX1).

On cross examination, Dr. Benyamin testified that as of the last time that he saw Petitioner, he was recommending physical therapy for the piriformis. He testified that this was also the case for the sacroiliac joint, but that there was also a minimally invasive sacroiliac fusion that could be entertained. He agreed that since he did not review any prior medical records, he did not know what sort of physical therapy Petitioner had had prior to seeing him. (PX1).

On redirect, Dr. Benyamin testified that an MRI would not pick up a piriformis muscle strain because most of the time the strain was in the deeper fibers of the muscle and that the testing was not sensitive to pick those up. (PX1).

The medical records of Bloomington Primary Care/Dr. Adam Houghton were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner was seen on June 7, 2016, at which time it was noted that she was being seen in follow-up. It was noted that Petitioner stated that the Sertraline had started to work okay, that her mother had passed away on April 20th and had been

very difficult for her, and that she had some increased lower back and hip pain. It was noted that it was worse when Petitioner slept on her side, that she could no longer sleep on her back and that she had had some, but not often, right posterior knee pain at times. It was noted that Petitioner needed a new form filled out for restrictions at work, that injections through Dr. Benyamin were not approved by insurance, that she had not had physical therapy and that she was asking about an MRI. The assessment was noted to be that of (1) depression; (2) anxiety; (3) insomnia; (4) bulging lumbar disc; (5) hip pain; (6) overweight. It was noted that Petitioner was to continue symptomatic treatment, that she had done physical therapy, that she was to keep her appointments with Dr. Benyamin, that they would work on authorization for the MRI and that her form for work restrictions was completed. At the time of the April 19, 2016 visit, it was noted that Petitioner was doing well with Zoloft and wanted a refill, that she was concerned with her lips turning a bluish color, that Gabapentin helped, that she was complaining of left hip pain and that she went to Florida to get her car the prior weekend. It was noted that Petitioner recently came back from Florida, that she had to "reduce" some testing for work, that she was downgraded to a Class C license and that she was hoping to be able to get a higher class license when her pain and other issues were improving. It was noted that Petitioner had been using more pain medication lately due to her recent illness, that she saw Dr. Benyamin for this, that they had initially planned an epidural injection which was denied and that another form needed to be completed for work restrictions. The assessment was noted to be that of (1) bulging lumbar disc; (2) anxiety; (3) depression; (4) pneumonia; (5) overweight; (6) insomnia. It was noted that a form was filled out for work restrictions, that Petitioner was to see Dr. Benyamin, that they were working on injection approval and that Petitioner was taking various medications. (PX2).

The records of Bloomington Primary Care reflect that Petitioner was seen on March 21, 2016, at which time it was noted that she had a history of bulging lumbar disc as well as depression, anxiety and tobacco use who came in complaining of a several-day history of cough productive of sputum, right lower rib cage pain and tenderness along with fever, chills and body aches. The assessment was noted to be that of pneumonia. Petitioner was prescribed an antibiotic. At the time of the March 1, 2016 visit, it was noted that Petitioner was seen in follow-up. It was noted that Petitioner had been having continued bilateral hip pain, that she had seen Dr. Benyamin and felt like it was very helpful and that they were working on approval for treatment through her insurance. It was noted that Petitioner had had some episodes of leg and foot numbness that were starting to improve, that she stated that she was having a lot of pain the day before but was better on that date and that her back overall was getting a little better as well. It was noted that Petitioner needed a note for restrictions at work and that she was also planning on contacting her union rep for coverage issues. It was noted that Petitioner had had a lot of increased anxiety and depression lately, that she had never been on medication for it specifically in the past, that she had used Diazepam for insomnia in the past and that she felt like her pain and health issues over the past year had been a large trigger. The assessment was noted to be that of (1) bulging lumbar disc; (2) anxiety; (3) depression; (4) insomnia. Petitioner was prescribed medications and instructed to keep her appointments with Dr. Benyamin. It was noted that Petitioner was given a note for work restrictions. (PX2).

The records of Bloomington Primary Care reflect that Petitioner was seen on December 2, 2015, at which time it was noted that she was seen in follow-up for back pain. It was noted that Petitioner had been seeing a back specialist in Peoria, Dr. Sureka, and had been doing physical therapy with some improvement. It was noted that Petitioner felt like she was not yet back to baseline but having good improvement, but that she had not been happy with her back doctor and that she felt like he was not receptive and too busy. It was noted that Petitioner had been taking Gabapentin with moderate relief and was no longer taking Norco or other pain medications. It was noted that Petitioner had been having some insomnia issues and that she had a history of methamphetamine abuse. The assessment was noted to be that of (1) bulging lumbar disc; (2) insomnia. It was noted that Petitioner was to continue Gabapentin as it had been helpful and that she was to avoid further narcotics as able. It was noted that Petitioner was recommended to contact her attorney to see if switching to a different back specialist would be covered by workers' compensation. It was noted that the bone scan results were also discussed, that there was no compression fracture and that Petitioner

appeared to have degenerative changes noted. At the time of the November 6, 2015 visit, it was noted that Petitioner was seen for a Pap and breast exam. It was noted that Petitioner had been doing well with physical therapy, that her back pain was improving, that she had a follow-up appointment with her shoulder and back doctor the next week and that she wanted to wait another two weeks to make a new office visit to discuss her workers' compensation injuries. The assessment was noted to be that of (1) normal pelvic exam; (2) screening for malignant neoplasm of cervix; (3) encounter for screening for malignant neoplasm of cervix. It was noted that Petitioner was to follow-up after her other specialist appointments as needed. (PX2).

The records of Bloomington Primary Care reflect that Petitioner was seen on September 22, 2015, at which time it was noted that she was seen in follow-up on urinary incontinence and low back pain. It was noted that Petitioner stated that it started after a motor vehicle collision on July 29, 2015, that she went to the emergency room at that time and that she had worsening symptoms. It was noted that Petitioner was now having urinary incontinence and low back pain. It was noted that Petitioner stated that the other driver ran a red light, that her vehicle struck the other driver's side and that her airbag did not deploy, but that her seatbelt became unclipped. It was noted that Petitioner had a history of L4/L5 fusion, that she had had a follow-up ER visit with an MRI showing intact hardware with minor L3-L4 disc bulge and that she had been trying to be referred to orthopedic surgery in Peoria. The assessment was noted to be that of (1) low back pain; (2) bulging lumbar disc. It was noted that Petitioner was to be referred to orthopedic surgery. It was noted that it was unclear to Dr. Houghton whether the radiologically mild disc bulge was related to her persistent and worsening symptoms and that he believed it had been exacerbated by the recent motor vehicle collision. It was noted that Petitioner was taking Diazepam and Norco for pain and muscle spasm and that a note was written for work. (PX2).

Included within the medical records of Bloomington Primary Care was an interpretive report for an MRI of the lumbar spine performed on June 17, 2016 at Ft. Jesse Imaging Center, which was interpreted as revealing essentially stable MRI appearance of the lumbar spine since the previous study of August 21, 2015; satisfactory and solid instrumented fusion from L4-S1; there is no disc herniation or neural impingement. Also included within the medical records of Bloomington Primary Care was an interpretive report for an MRI of the pelvis performed on June 17, 2016 at Ft. Jesse Imaging Center, which was interpreted as revealing essentially negative MRI exam of the pelvis; no acute pelvic bony abnormality; no abnormal adnexal or other pelvic mass identified. (PX2).

The records of Bloomington Primary Care reflect that Petitioner was seen on October 12, 2017, at which time she was seen for a possible upper respiratory infection, among other issues. It was noted that Petitioner's back pain was stable with medication and that she needed a refill of Norco. It was noted that Petitioner was planning on going to Florida for a few months that winter and that her anxiety and depression had been stable. The assessment was noted to be that of (1) sinusitis; (2) bulging lumbar disc; (3) tobacco use; (4) anxiety; (5) depression. Petitioner's Norco was refilled at that time. At the time of the September 20, 2017 visit, it was noted that Petitioner forgot her Social Security paperwork at home, that she had been having some swollen nodes of the neck and wanted to have them checked, that she had had increased stress recently, that she had had some lower abdominal/groin discomfort that radiated to her back and that she was looking into other insurance plans, specifically Medicaid. The assessment was noted to be that of (1) bulging lumbar disc; (2) anxiety; (3) depression; (4) overweight; (5) dyslipidemia; (6) tobacco use; (7) insomnia. It was noted that Petitioner was to continue her symptomatic treatment, that she was working on a possible disability claim and that she was to check with the front desk about insurance plans. (PX2).

The records of Bloomington Primary Care reflect that Petitioner was seen on July 17, 2017, at which time it was noted that she was seen in follow-up and was still having some ankle pain. It was noted that the x-ray showed no fracture or arthritis and that it was likely related to her low back and radicular pain. It was noted that Petitioner also had some burning in her feet lately and had tried Gabapentin and Lyrica in the past without good effect. It was noted that Petitioner's anxiety and depression had been stable

on Sertraline. It was noted that Petitioner needed a refill on Norco, that she was no longer on disability and that she stated that she was having difficulty affording over-the-counter medications. The assessment was noted to be that of (1) bulging lumbar disc; (2) anxiety; (3) depression; (4) insomnia; (5) tobacco use; (6) overweight. Petitioner was instructed to continue with her symptomatic treatment, was given a refill of Norco and was instructed to continue working with Dr. Benyamin on a repeat MRI. At the time of the June 22, 2017 visit, it was noted that Petitioner was working with Dr. Benyamin's office for an MRI, that she was working with a disability lawyer and was recently denied and that she was having a rash she related to the Gabapentin. It was noted that Petitioner was also having right ankle pain which was worsening, that there was popping and clicking with range of motion and that there was no new injury. The assessment was noted to be that of (1) bulging lumbar disc; (2) right ankle pain, unspecified chronicity; (3) anxiety; (4) depression; (5) insomnia. Petitioner was instructed to keep her appointments with Dr. Benyamin and stop the Gabapentin. Petitioner was given a refill of Norco. (PX2).

The records of Bloomington Primary Care reflect that Petitioner was seen on June 6, 2017, at which time it was noted that she was seen in follow-up for low back pain. It was noted that Petitioner had a rash from Lyrica and did not tolerate it. It was noted that Petitioner had been taking Gabapentin but that the tablets had been causing more nausea, vomiting and heartburn/reflux issues, and that she had some hip pain from sitting in a chair the day before at a friend's mother's funeral. The assessment was noted to be that of bulging lumbar disc. Petitioner was given a refill of Norco to use only for breakthrough pain. It was noted that Petitioner stated that she did not have a pain contract with Dr. Benyamin and that his office was still working on MRI approval. At the time of the May 11, 2017 visit, it was noted that Petitioner had a back pain flare-up on April 25th and that she was coughing into her nose. It was noted that Petitioner stated that her back "locked up" and that she almost went to the emergency room. It was noted that Petitioner had been having some burning feet lately, that she was seeing Dr. Benyamin and that she saw a workers' compensation physician in Springfield who recommended full duty. The assessment was noted to be that of (1) bulging lumbar disc; (2) overweight; (3) anxiety; (4) depression; (5) tobacco use; (6) vaginal bleeding. Petitioner was instructed to keep her appointments with Dr. Benyamin and to continue Lyrica. (PX2).

The records of Bloomington Primary Care reflect that Petitioner was seen on March 30, 2017, at which time it was noted that her pain had been stable, that she was seeing Dr. Benyamin and that she felt like the medication was helpful. It was noted that they were considering another injection, that her cold feet had been improving and that she still had some slight headache. The assessment was noted to be that of (1) bulging lumbar disc; (2); overweight; (3) tobacco use; (4) anxiety; (5) depression. It was noted that Petitioner was to keep her appointments with Dr. Benyamin and continue Lyrica. At the time of the February 16, 2017 visit, it was noted that Petitioner's back pain had been stable but started moving to her left hip, that she was no longer taking Gabapentin, that she had been meeting with her attorney and that she was still working on getting old records from Florida, which was over 15 years ago. It was noted that Petitioner had been seen in Dr. Benyamin's office the day before, that her Lyrica was increased and that they had some concern for possible peripheral vascular issues. The assessment was noted to be that of (1) bulging lumbar disc; (2) overweight; (3) tobacco use; (4) anxiety; (5) depression; (6) insomnia; (7) dyslipidemia; (8) cold extremities. Petitioner was instructed to keep her appointments with Dr. Benyamin and to continue symptomatic treatment. (PX2).

The records of Bloomington Primary Care reflect that Petitioner was seen on January 12, 2017, at which time it was noted that she was seen in follow-up for low back pain. It was noted that Petitioner had had previous injections with Dr. Benyamin, that she had another appointment scheduled with him on January 19th and that she had been having right low back pain as well as some left low back pain. It was noted that Petitioner was getting pain in her left hip/buttock as well as leg at times and that the right leg pain went down her leg to her foot as well. It was noted that Petitioner had tried Lyrica in the past but felt like it made her symptoms worse at the time and that she was still unable to work. The assessment was noted to be that of (1) bulging lumbar disc; (2) overweight. Petitioner was instructed to stop Gabapentin

and start Lyrica. Petitioner was also instructed to keep her appointment with Dr. Benyamin. At the time of the December 15, 2016 visit, it was noted that Dr. Houghton had filled out a previous work release with restrictions, though it was not available with her position. It was noted that Petitioner had not been working, that she was still having low back pain more on the right side, that she had had injections with Dr. Benyamin and that she had no numbness, tingling or weakness. The assessment was noted to be that of (1) bulging lumbar disc; (2) insomnia; (3) anxiety; (4) depression; (5) tobacco use; (6) dyslipidemia; (7) overweight. Petitioner was instructed to keep her appointment with Dr. Benyamin and to continue symptomatic treatment. It was noted that a form was filled out for work. (PX2).

The records of Bloomington Primary Care reflect that Petitioner was seen on November 10, 2016, at which time it was noted that she had had two injections with Dr. Benyamin, that she had increased menstruation after the injection and that she also had a sore spot on her nose with a blister and was not sure whether they were related to her injections. It was noted that Petitioner had had increased low back pain after about four hours at work and that she needed paperwork filled out again. The assessment was noted to be that of (1) bulging lumbar disc; (2) anxiety; (3) depression; (4) thrush. Petitioner was instructed to keep her appointments with Dr. Benyamin and to continue symptomatic treatment. It was noted that a form was filled out for work. It was also noted that Gabapentin helped with the pain. At the time of the September 27, 2016 visit, it was noted that Petitioner had had an injection one week ago with Dr. Benyamin, that it felt like it helped for the first two days, that she had tried to be more active and was trying to clean her house and that she started to have pain on September 22nd. It was noted that Petitioner had been having difficulty sleeping lately, that she had been having low back pain since the injection and that they were considering a different type of injection if it did not help. The assessment was noted to be that of (1) bulging lumbar disc; (2) insomnia; (3) cough; (4) tobacco use; (5) anxiety; (6) depression. Petitioner was instructed to keep her appointments with Dr. Benyamin and to continue symptomatic treatment. (PX2).

The records of Bloomington Primary Care reflect that Petitioner was seen on August 16, 2016, at which time it was noted that she had tried taking her dog out and tried to ride a kayak with good back support with her friends and that she was very sore for the next two days on her back. It was noted that Petitioner had pain when lying on her side for three days following that and that she had some increased numbness in her legs. It was noted that Petitioner also had been trying to do some painting in the house, that she had to double her Gabapentin dose in the morning at times and that she described it as a nagging pain. The assessment was noted to be that of (1) bulging lumbar disc; (2) anxiety; (3) depression; (4) overweight; (5) insomnia. Petitioner was recommended to continue Norco and Gabapentin. It was noted that Petitioner had an upcoming appointment with an orthopedic surgeon in Springfield and that she was to continue symptomatic treatment. At the time of the July 12, 2016 visit, it was noted that the MRI of the lumbar spine and pelvis were essentially unchanged from the last MRI and that she had not seen Dr. Benyamin for the past two months. It was noted that Petitioner was getting close to needing a refill on Norco and that she was doing well with Gabapentin. The assessment was noted to be that of (1) bulging lumbar disc; (2) anxiety; (3) depression; (4) overweight. Petitioner was instructed to continue symptomatic treatment and check with Dr. Benyamin's office about Norco refills. (PX2).

Included with the records of Bloomington Primary Care was a "To Whom It May Concern" letter date April 19, 2018, indicating that due to her chronic back pain, Petitioner's work restriction recommendations included stand/walk, bend, squat, climb for no more than 1/3 hours per day; knee and overhead work no more than 3-5 hours per day; sit and driving no more than 6-8 hours per day; all other hand and arm tasks 8-12 hours per day; no lifting over 30 pounds; take breaks when needed. The records reflect that Petitioner was seen on April 10, 2018, at which time it was noted that she was seen for follow-up. It was noted that Petitioner had been doing okay lately from an anxiety and depression standpoint, that she had been having more shakiness with exercise, that she had had three episodes of stool incontinence when she did not make it back in time after a walk and that she had had burning in her legs when she worked over her head. It was noted that Petitioner had numbness of her hands in the morning and that she had feet

numbness when she wore tight shoes. It was noted that Petitioner had a recent court date and that Dr. Benyamin came which was helpful, and that she had another court date on April 23rd and was hoping to get approval to go back to see Dr. Benyamin. The assessment was noted to be that of (1) bulging lumbar disc; (2) insomnia; (3) anxiety; (4) depression; (5) overweight; (6) tobacco use; (7) dyslipidemia. It was noted that Petitioner's Norco was refilled and that they could consider a repeat MRI as needed. (PX2).

The medical records of Advocate Bromenn Medical Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner underwent physical therapy for the timeframe of October 8, 2015 through December 22, 2015. At the time of the Discharge Summary on December 22, 2015, it was noted that Petitioner had intermittent right anterior and posterior shoulder pain, today 0/10, and that she only experienced pain every 1-2 days and more nagging soreness after overdoing it with activities. It was noted that Petitioner experienced intermittent sharpness with reaching overhead tasks, that she reported that her back pain was more painful than the right shoulder pain and that she had constant low back pain, today 6-7/10. It was also noted that Petitioner had intermittent pain into the right calf, intermittent tingling into the top of the right foot and that she used a home TENS unit daily for back pain. It was noted that Petitioner was ready to continue with a home exercise program for right shoulder strengthening and that she was recommended to continue with back stretches and core strengthening per tolerance. It was noted that Petitioner's back pain still persisted and was most limiting at that time, and that she was recommended to follow-up with the doctor to address persistent back pain with intermittent radiating symptoms. At the time of the Reevaluation on November 3, 2015, it was noted that Petitioner reported that she was about 45% better from the initial evaluation and that she stated that her back was more painful than the right shoulder. It was noted that Petitioner rated her low back pain at 5/10 with intermittent radiation down to the right calf and that the pain increased with activities like walking and standing for long periods of time. It was noted that Petitioner rated her pain in the right shoulder at 3/10 and that the pain increased with certain movements. (PX3).

The records of Advocate Bromenn Medical Center reflect that Petitioner was seen for a Reevaluation on October 15, 2015, at which time it was noted that she stated that her right shoulder was aggravated at the last physical therapy visit from the prone press-ups and that she stated that her shoulder had been sore since the motor vehicle accident. At the time of the Initial Evaluation on October 8, 2015, it was noted that she was involved in a motor vehicle accident where she hit another vehicle when the other driver ran a red light, that the pain occurred two days after the accident and started getting worse, that the pain was worse towards the end of the day and radiated to the anterior bilateral thigh with numbness and tingling on the lateral aspect of the right foot and that the pain was constant, worse when she moved around and better when she sat and relaxed. (PX3).

The records of Advocate Bromenn Medical Center reflect that Petitioner underwent a nuclear medicine bone scan on November 20, 2015, which was interpreted as revealing subtle mild asymmetric focal uptake at right posterior lateral aspect of L5 only seen on SPECT images; finding is non-specific and could represent mild degenerative facet change. The Clinical Indication was noted to be that of low back pain; evaluate for facet arthropathy; history of MVA; history of lumbar fusion surgery in 1999. The records reflect that Petitioner underwent an MRI of the lumbar spine on August 21, 2015, which was interpreted as revealing satisfactory posterior instrumented fusion at L4-L5 and L5-S1 level; very minor disc bulge at L3-L4 level. The Clinical Indication was noted to be that of urinary incontinence; low back pain; right leg pain; history of contrast reaction. (PX3).

The records of Advocate Bromenn Medical Center reflect that Petitioner was seen on August 21, 2015 in the emergency room, at which time it was noted that she was involved in a motor vehicle accident on July 29th, that she reported that she was driving a company truck for work, that she was not immediately evaluated because she refused treatment at the time of the accident and that she was seen in the emergency department on August 11th and had x-rays of the lumbar spine, which were unremarkable. It was noted that Petitioner was referred as an outpatient but reported that she could not get into any physician because of

her insurance problems. It was noted that Petitioner reported that she started having incontinence over the last two weeks and reported that she was leaking urine especially when she coughed, that she was concerned that she had lumbar spine pathology and that she reported some weakness to both lower extremities. It was noted that Petitioner reported that she was told by the emergency room administration to come to the emergency department and receive an MRI of her lumbar back. It was noted that cauda equine was not suspected and that the diagnosis included pelvic floor weakening, perimenopausal symptoms versus lumbar pathology. It was noted that Petitioner was told to follow-up with Community Health Clinic for vaginal bleeding and urinary incontinence. (PX3).

The records of Advocate Bromenn Medical Center reflect that Petitioner was seen in the emergency room on August 11, 2015, at which time it was noted that she was in a minor motor vehicle collision two weeks ago and did not seek medical care after the car accident because she had no pain at the time of the accident. It was noted that over the last few weeks she had developing worsening right low back pain with a muscle that was tight and spasms, as well as some radiating numbness and tingling that went down to her foot on the right side off and on. It was noted that there was no weakness or numbness of the lower extremities, that she had no difficulty with urination or bowel movements and that the back pain was a constant ache worse with movement and improved with rest. It was noted that the history and physical examination were consistent with symptoms of low back strain, muscle spasm and possible mild sciatica. Petitioner was instructed to take Norco and Ibuprofen for pain and to take Valium for any muscle spasms or difficulty sleeping. Petitioner was instructed to see her primary care physician within one week and consider follow-up with the back specialist referral provided. Petitioner underwent x-rays of the lumbar spine on August 11, 2015, which were interpreted as revealing no fracture and post-operative changes. (PX3).

The Prescription List was entered into evidence at the time of arbitration as Petitioner's Exhibit 4.

The medical records of Advocate Occupational Health were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner was seen on August 14, 2015, at which time it was noted that she stated that she was in a car accident while working on July 29, 2015, that she was having pain in her middle and lower back and in her neck and that her pain was 8/10. It was noted that Petitioner stated that the pain radiated from her back down her right leg and numbed her foot, that she described the pain as burning and sharp pains and that she was seen in the emergency department and had x-rays taken. It was noted that Petitioner's primary problem was a strain located in the lower lumbar region, that she described it as "awful" and that she considered it to be severe. It was noted that it had been 16 days since the onset of the strain, that Petitioner stated that it seemed to be constant, that she noticed that it was made worse by movement, prolonged standing, or prolonged sitting and that it was improved with pain medicine. It was noted that Petitioner also noted that it was accompanied by decreased range of motion, stiffness and sciatica and that she felt it was not improving. It was noted that Petitioner's second problem was that of inflammation located in the left medial knee, that she considered it to be unusual, that it had been 16 days since the onset of the inflammation and that it seemed to be following no particular pattern. The diagnosis was noted to be that of (1) thoracic spine strain; (2) cervical spine strain; (3) lumbosacral sprain; (4) lumbar spine sciatica, right; (5) left knee contusion. Petitioner was instructed to continue Norco and Diazepam and was given a prescription for Nabumetone. It was noted that Petitioner's recommended work status was restricted duty and was effective as of August 14, 2015. (PX5).

The medical records of Millenium Pain Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The records reflect that Petitioner was seen on April 11, 2017, at which time it was noted that she was seen in follow-up on a recent increase of Lyrica and that she was breaking out into a rash on her face and arms. It was noted that the medication was providing her with 50% relief, that she complained more of low back pain/buttock pain down to the knee when active and that the right was worse than the left but present on both sides. The impression was noted to be that of (1) lumbar post-laminectomy syndrome; (2) lumbosacral fusion of spine L4-5, L5-S1; (3) radiculopathy, S1 distribution; (4) sacroiliitis;

(5) myalgia – right piriformis tenderness. Petitioner's medications were refilled. It was noted that approval would be sought for bilateral SI joint injections. At the time of the May 9, 2017 visit, it was noted that Petitioner presented with increased low back pain. It was noted that Petitioner stated that recently she bent over and felt sharp pain in her lower back where she felt that she would be paralyzed and that she felt metal in her back and thought she would need to go to the hospital. It was noted that the episode lasted for at least two minutes and that ever since, her pain had increased. It was noted that Petitioner noticed increased burning in her feet with prolonged periods of time standing as well and that she was back to full duty per the workers' compensation physician. The impression was noted to be that of (1) lumbar post-laminectomy syndrome; (2) lumbosacral fusion of spine L4-5, L5-S1; (3) radiculopathy, S1 distribution; (4) sacroiliitis; (5) myalgia - right piriformis tenderness. It was noted that the injections had been denied and that a new, intense pain had developed with radicular symptoms and decrease in strength in the right leg. It was noted that Petitioner's radicular symptoms did not correlate as she had decreased sensation in the left thigh medially and laterally and decreased sensation in the right calf medially and laterally, and that a new lumbar MRI was recommended to evaluate the new source of pain, decreased strength and radiculopathy. (PX6).

The records of Millenium Pain Center reflect that Petitioner was seen on March 24, 2016, at which time it was noted that she was being seen to review the recent EMG. It was noted that the pain was on the right side of the lower back radiating down the leg back of the leg to the ankle then going to the top of the foot, that she stated that the back pain was constant and that the leg pain came and went and that standing was the most comfortable position. The impression was noted to be that of (1) lumbar post-laminectomy syndrome; (2) lumbosacral fusion of spine L4-5, L5-S1; (3) radiculopathy, S1 distribution; (4) sacroiliitis; (5) myalgia - right piriformis tenderness. It was noted that Dr. Jhee stated that he wondered if Petitioner suffered from right sacroiliac joint dysfunction which caused the right lower extremity symptoms. It was noted that a discussion was had as to the position of her body during the accident (right knee hitting the dash at the time of impact) which correlated with both the EMG findings and her signs and symptoms (positive right Fortin finger, right POSH, positive right Yo-Yo 1 sonometer). It was noted that Petitioner would be scheduled for a right SI joint injection and that she should consider a sacroiliac brace in the future to help with pelvic stabilization. At the time of the July 28, 2016 visit, it was noted that Petitioner was in a car accident in 2015 when her pain started, that she stated that the pain was in both sides of her lower back, right greater than left, and that she stated that the pain felt like the worst pain was in the lower back and hip area. The impression was noted to be that of (1) lumbar post-laminectomy syndrome; (2) lumbosacral fusion of spine L4-5, L5-S1; (3) radiculopathy, S1 distribution; (4) sacroiliitis; (5) myalgia - right piriformis tenderness. It was noted that nurse practitioner Elizabeth Madlem believed that Petitioner had SI dysfunction in both SI joints, right worse than left, and that she believed that she would benefit from a bilateral SI joint injection to help treat her pain in the low back/SI region. (PX6).

The records of Millenium Pain Center reflect that Petitioner was seen on September 20, 2016, at which time it was noted that she presented for a right SI joint injection. The impression was noted to be that of (1) lumbar post-laminectomy syndrome; (2) lumbosacral fusion of spine L4-5, L5-S1; (3) radiculopathy, S1 distribution; (4) sacroiliitis; (5) myalgia - right piriformis tenderness. At the time of the September 27, 2016 visit, it was noted that Petitioner stated that she only received about 10% relief from the injection and that she was also suffering from an upper respiratory infection and felt awful. The impression was noted to be that of (1) lumbar post-laminectomy syndrome; (2) lumbosacral fusion of spine L4-5, L5-S1; (3) radiculopathy, S1 distribution; (4) sacroiliitis; (5) myalgia - right piriformis tenderness. It was noted that Petitioner wanted to hold off on scheduling any more injections until she was feeling better. It was noted that the next step was a right piriformis injection "to see if this is the cause of her pain." At the time of the October 18, 2016 visit, it was noted that Petitioner presented for a right piriformis injection to determine the source of her pain. It was noted that Petitioner received minimal relief from the SI joint injection but still continued to have right buttock pain. The impression was noted to be that of (1) lumbar post-laminectomy syndrome; (2) lumbosacral fusion of spine L4-5, L5-S1; (3) radiculopathy, S1 distribution; (4) sacroiliitis; (5) myalgia - right piriformis tenderness. At the time of the October 31, 2016

visit, it was noted that Petitioner stated that the injection helped her nerve pain and since then she had decreased her Gabapentin. It was noted that Petitioner stated that she had some burning sensation and that she was having 5/10 pain, possibly from overdoing her activity the past weekend. The impression was noted to be that of (1) lumbar post-laminectomy syndrome; (2) lumbosacral fusion of spine L4-5, L5-S1; (3) radiculopathy, S1 distribution; (4) sacroiliitis; (5) myalgia - right piriformis tenderness. It was noted that Petitioner was doing well status post right piriformis injection, that she still had some burning sensations and that Gabapentin helped, but that she was not taking it consistently. (PX6).

The records of Millenium Pain Center reflect that Petitioner was seen on January 25, 2017, at which time it was noted that she stated that the piriformis injection helped significantly for her pain but that she was experiencing a cold sensation in her toes. It was noted that Petitioner had discontinued Gabapentin and was now on Lyrica with good relief, that she noted that her entire right foot got cold below the ankle at times and that her left toes were all cold, and that she had blood work and venous and arterial dopplers completed by her primary care physician that all came back fine. The impression was noted to be that of (1) lumbar post-laminectomy syndrome; (2) lumbosacral fusion of spine L4-5, L5-S1; (3) radiculopathy, S1 distribution; (4) sacroiliitis; (5) myalgia - right piriformis tenderness. It was noted that Dr. Benyamin was unsure what could be causing the cool toes and that they would increase Lyrica and review the arterial and venous ultrasounds. It was noted that if the Lyrica did not improve the symptoms, they may consider CRPS and a lumbar sympathetic block. At the time of the February 15, 2017 visit, it was noted that Petitioner was currently taking Lyrica which provided her with moderate relief and that she stated that her feet were still cold as the day progressed, but that the pain was better. The impression was noted to be that of (1) lumbar post-laminectomy syndrome; (2) lumbosacral fusion of spine L4-5, L5-S1; (3) radiculopathy, S1 distribution; (4) sacroiliitis; (5) myalgia - right piriformis tenderness. It was noted that Lyrica helped more with pain and pain in the legs and hips and that they would increase the dose for one month. It was noted that Petitioner had carotid artery disease and that the scans did not do arterial leg studies and that if the foot coldness continued, Petitioner was urged to address arterial leg studies with her primary care physician as it could be a cause to rule out for the cold toes. It was further noted that Petitioner was not interested in repeating injections at that time and that she had some stress incontinence when she was coughing or laughing. Petitioner was advised to follow-up with her primary care physician about it if it continued to bother her. (PX6).

The records of Millenium Pain Center reflect that Petitioner was seen on March 15, 2017, at which time it was noted that the cold sensation in her toes had improved but that she did experience a rash with the increase in Lyrica. It was noted that Petitioner had followed-up with her primary care physician regarding arterial leg studies, that she had a free screening and that she stated that she had no blockages. It was noted that Petitioner thought that the Lyrica was helping the foot pain and that she was not noting coldness as much, but was wondering if it was time to consider another SI injection. The impression was noted to be that of (1) lumbar post-laminectomy syndrome; (2) lumbosacral fusion of spine L4-5, L5-S1; (3) radiculopathy, S1 distribution; (4) sacroiliitis; (5) myalgia - right piriformis tenderness. It was noted that nurse practitioner Madlem would discuss with Dr. Benyamin if they repeated a SI injection versus a sympathetic block as the toes and foot pain had improved. (PX6).

Included within the records of Millenium Pain Center was a Treatment Report dated September 20, 2016, which noted that Petitioner underwent a right sacroiliac joint injection on that date. The pre- and post-diagnosis was noted to be that of low back pain and sacroiliac joint pain. The Treatment Report dated October 18, 2016 noted that Petitioner underwent a right piriformis injection on that date. The pre- and post-diagnosis was noted to be that of spasm of muscle. (PX6).

The records of Millenium Pain Center reflect that Petitioner was seen for a Consultation on February 18, 2016, at which time it was noted that she had complaints of right leg and foot pain that started after she was involved in a motor vehicle accident while driving her work truck. It was noted that Petitioner stated that she was driving about 20 MPH and that a lady ran a red light going about 55 MPH when the

patient hit her car. It was noted that Petitioner stated that they hit so hard that both of her knees hit the dash along with the moving the brush guard completely over to the right side of the grill. It was noted that Petitioner stated that she was not having pain at the time of the accident so she did not go to the emergency room for an evaluation, that she stated that her pain started about nine days after the accident and that she ended up going to the emergency room and was given pain medications to control her pain. It was noted that Petitioner stated that she was then referred to Dr. Sureka for a consult on her back and leg pain and was ordered to have physical therapy for six weeks with no relief, and then had an MRI and bone scan. It was noted that Petitioner stated that at her last appointment she was offered an injection but at the same time, he told her nothing was wrong with her. It was noted that Petitioner stated that she used her TENS unit and that it helped and that she had only been taking Neurontin for her radiating pain in her right leg into the foot and had not noticed relief from the medication. It was noted that her primary care physician sent notes stating that she had methamphetamine abuse but that Petitioner stated that she only used it occasionally. It was noted that Petitioner stated that the pain was in the right low back down the back of the leg into the right ankle and into the top of the right foot with numbness and tingling and that she stated that the pain that radiated down her leg came and went, but that she had constant pain in the right low back and into the buttocks. The impression was noted to be that of (1) lumbar post-laminectomy syndrome; (2) lumbosacral fusion of spine L4-5, L5-S1; (3) radiculopathy, S1 distribution; (4) sacroiliitis; (5) myalgia - right piriformis tenderness. It was noted that the MRI showed no evidence of nerve impingement, that Petitioner had signs and symptoms of sacroiliac joint dysfunction and that she had questionable pain coming from the piriformis. It was noted that during the accident, Petitioner's right kneecap hit the dashboard while her right foot remained on the brake and that based on this position, it was prudent that the piriformis symptoms could be caused by the accident. It was noted that in order to diagnose the SI/piriformis origin of her hip/buttock pain, they would need to perform a diagnostic injection under fluoroscopy. It was noted that Petitioner's questionable SI radiculopathy could be explained by the punitive sacroiliac pathway and/or piriformis muscle irritating the sciatic nerve, and that an EMG of the bilateral lower extremities could be of help in determining the diagnosis. It was further noted that consideration of an MRI of the pelvis with attention to the right piriformis muscle and SI joint may be helpful to diagnose the source of pain and would be considered in the future if diagnostic injections were negative. It was also noted that a review of the opioid policy was had and that Petitioner could not obtain medications from other sources and must refrain from illegal drugs. (PX6).

The Traffic Crash Report was entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 8.

The transcript of the deposition of Dr. Timothy VanFleet taken on March 21, 2018 was entered into evidence at the time of arbitration as Respondent's Exhibit 1. Dr. VanFleet testified that he is board-certified in orthopedic surgery and that his subspecialty is spinal surgery. (RX1).

Dr. VanFleet testified that he examined Petitioner on April 19, 2017. He testified that he reviewed various medical records in conjunction with the IME, including those from Bromenn, Dr. Sureka, Dr. Rahman, Dr. Benyamin, Dr. Houghton and Dr. Seibly. He testified that Petitioner gave a history that the injury was on July 29, 2015 and that she was driving a pick-up truck as part of her duties while under the employment of Northern Clearing. He testified that Petitioner's description was that she was a restrained driver in the pick-up truck and was stopped at an intersection, that when the light changed she proceeded into the intersection and that another car moved through the red light, causing her to strike the vehicle on the left side of that car that was running the red light. He testified that Petitioner noted that she had her foot on the brake as she was able to see the car in front of her, that she stopped with her foot on the brake and that subsequently, her left knee hit the dash. He further testified that Petitioner did not seek treatment until August 11th. (RX1).

Dr. VanFleet testified that Petitioner did not mention to him whether she had any prior injuries, but that she mentioned that she had had a prior surgery to her lumbar spine. He testified that it was an L4-5

and L5-S1 spinal fusion. He testified that Petitioner reported that it was a work-related type injury that resulted in the surgery at that time while she was in Florida back in 1999 and that she noted that she was able to return to work but had had some intermittent low back pain since that time but was able to function without restrictions leading up to the motor vehicle accident. He testified that in addition to reviewing the medical records as identified in his report, he also looked at lumbar radiographs from August 10, 2015 which showed a pedicle screw construct L4-5 and S1 with interbody spacers at L4-5 and L5-S1 representing a solid fusion. He testified that the findings on the x-rays were the result of the 1999 surgery. He testified that he also reviewed two lumbar MRIs, both of which demonstrated good positioning of the screws and evidence of fusion across the disc space and no evidence of any focal neurologic compression. He testified that the L3-4 disc space demonstrated no evidence of any protrusion or focal neurologic compression at that time. He testified that the MRIs did not reveal anything that he considered to be a recent injury. (RX1).

Dr. VanFleet testified that as to the examination, Petitioner reported persistent pain across the back and down into the legs bilaterally, right greater than left, as well as some incontinence and cold toes. He testified that on physical examination, Petitioner had superficial tenderness to palpation diffusely across the lumbar spine which was a non-organic finding, pain with similar truncal rotation which was considered a Waddell's sign, pain with compression of the head and shoulders which was a Waddell sign, some difficulty with extension having blurted out that it was going to hurt for the rest of the day and symmetric range of motion in the hips and knees, symmetric reflexes, symmetric strength testing and no clonus or tension signs. When asked what he meant by non-organic pain, Dr. VanFleet responded that it meant that there was "perhaps a little bit of acting" involved with the physical examination and that there was a portrayal or a sense to portray symptoms that were exaggerated. He testified that the significance of Waddell's signs was that there was nothing in particular about having Waddell's signs that indicated that there was a specific diagnosis involved and that the signs, when present and in the presence of other mitigating factors such as secondary gain issues, the physical examination was to be taken with some degree of consternation meaning that there may be some underlying misinformation being obtained. He testified that the only thing objective as far as the physical examination was the presence of the non-organic pain manifestations as well as the scar. (RX1).

Dr. VanFleet testified that the scarring that he saw was related to the 1999 surgery as opposed to this work accident. He testified that his diagnosis was that of non-specific low back pain. He testified that he did not feel that Petitioner had sacroiliitis due to piriformis and that he did not note any hip problems in Petitioner. He testified that Petitioner had good range of motion in her hips and knees. He testified that he felt that no further treatment was necessary with regard to the accident of July 29, 2015 and that he felt that no restrictions were necessary as a result of the accident. He testified that he opined that Petitioner had reached maximum medical improvement and that there were no complaints present that day that would have been related to the July 29, 2015 accident. He further testified that he felt that no additional treatment would be necessary, that Petitioner did not need any form of spinal injections and that no additional physical therapy would be appropriate. (RX1).

On cross examination, Dr. VanFleet testified that he saw the prior IME report of Dr. Rahman, who related the low back pain and condition to the injury. He testified that he disagreed with that opinion and that if he saw Petitioner at the same time that Dr. Rahman saw her, he would have said that there was no need for an injection. He agreed that it was his opinion that Petitioner's pain should have stopped by the time that he saw her. He testified that low back pain was to be expected after a motor vehicle accident, but that it was not sufficient to cause the low back pain that had lasted for two years. He testified that a muscle strain could be sufficient to cause low back pain and when asked if there were tears in the ligaments and whether that would be sufficient to cause low back pain, he responded that it depended on which ligaments were involved. He testified that the supraspinous, the interspinous, the interior longitudinal and the posterior longitudinal ligaments, if sprained or torn, would certainly be associated with pain in the back. (RX1).

On cross examination, Dr. VanFleet testified that as to a muscle injury, it could be anywhere from a stretch of the muscle which was a mild tear to a complete transection of the muscle belly and that any of those could be painful. He testified that in the instance of a motor vehicle accident, sometimes the muscles were stretched and that the fascial linings of the muscle were stretched and injured as well, and that inflammation would set into those structures which could create stiffness as well as swelling and pain. (RX1).

On cross examination, Dr. VanFleet testified that for a soft tissue injury like Petitioner's, it was going to resolve in 6-12 weeks based on his experience. He testified that it was unusual for people to have nagging pain that did not resolve in 6-12 weeks, but that certainly there were certain instances where patients would not improve and that he had to evaluate the situation for specific indicators as to why they were not getting better. He agreed that he thought that there was symptom exaggeration in this case. When asked if he believed that Petitioner was consciously aware of this exaggeration, Dr. VanFleet responded that he thought that there was conscious awareness on behalf of the participant who displayed and manifested those types of findings because it was a ubiquitous finding amongst people with secondary gain involvement. (RX1).

On cross examination, Dr. VanFleet agreed that everyone was different in terms of the way that they responded to pain and how they reacted to it. He testified that he tried to reassure people who had chronic pain syndromes after they had been worked up thoroughly that there was not anything further that needed to be done for them to improve their situation because you could not fix everyone's pain. He testified that some people had pain because they had chronic pain conditions and that some people had pain because they had secondary gain issues. (RX1).

On redirect, Dr. VanFleet testified that the fact that Petitioner did not seek treatment for approximately two weeks after the motor vehicle accident was significant to him because if it took that long to seek treatment, generally speaking, if one was going to have pain after a motor vehicle accident it would be upon the person within the first several days. He testified that if it took several weeks to develop dysfunction, it was either not a significant amount of pain at the time of the injury or immediately thereafter, or there was something else going on. (RX1).

On redirect, Dr. VanFleet testified that Petitioner had no identifiable structural ligamentous damage to her spine resulting in instability based on the physical examination performed. He testified that he did not see any indication that Petitioner had any muscle injuries. When asked if there had been any muscular injury and whether he would expect there to be atrophy after two years, Dr. VanFleet responded that that was not necessarily the case and that if Petitioner had a muscle injury like a sprain, he would not expect to see atrophy from muscle damage. He testified that the pain that Petitioner was complaining of now could very well be related to the back surgery that she had in 1999. (RX1).

On further cross examination, Dr. VanFleet testified that his examination of Petitioner was approximately 15 minutes in length. He testified that he did not believe that Petitioner needed any restrictions at all regardless of the accident. (RX1).

On further redirect, Dr. VanFleet testified that he spent approximately 15 minutes with Petitioner and that it did not include his review of the medical records. He testified that he typically talked to the individual and did a physical examination. He testified that the exam that he gave Petitioner would not have been any different if she had come to him for treatment. (RX1).

CONCLUSIONS OF LAW

The parties stipulated at the time of hearing that on July 29, 2015, Petitioner sustained an accident that arose out of and in the course of her employment with Respondent. (AX1).

With respect to disputed issues (F) pertaining to causation, the Arbitrator finds that Petitioner has failed to prove that her current condition of ill-being is causally related to the accident of July 29, 2015.

In so concluding, the Arbitrator finds the opinions of Dr. VanFleet to be more persuasive than those of Dr. Benyamin, particularly in light of Dr. VanFleet's physical examination findings including superficial tenderness to palpation diffusely across the lumbar spine which was a non-organic finding, pain with similar truncal rotation which was considered a Waddell's sign and pain with compression of the head and shoulders which was a Waddell sign. (RX1). These concerning physical examination findings, when considered in conjunction with the inconsistencies in the histories of accident as given to multiple providers[2] and the multiple gaps in treatment[3] cause the Arbitrator to place little evidentiary weight on Petitioner's testimony, including her subjective complaints upon which Dr. Benyamin's current treatment recommendations appear to be placed in light of the results of the diagnostic testing performed.

In accordance with the opinions of Dr. VanFleet, the Arbitrator finds that Petitioner reached maximum medical improvement for the soft tissue injuries sustained in the July 29, 2015 accident as of the date of the IME with Dr. VanFleet, *i.e.,* April 19, 2017. Related thereto, the Arbitrator further finds that any treatment Petitioner received after April 19, 2017 was not reasonable, necessary or causally related to the underlying accident of July 29, 2015. Furthermore, the Arbitrator finds that no additional treatment is necessary for the injuries Petitioner sustained in the accident of July 29, 2015 and that, as of April 19, 2017, Petitioner was able to return to work in a full duty capacity without any restrictions.

With respect to disputed issue (J) pertaining to reasonable and necessary medical services, the Arbitrator finds that Petitioner's care and treatment up to and including April 19, 2017 – *i.e.,* the date of the Section 12 examination by Dr. VanFleet -- was reasonable, necessary and causally related to the work accident of July 29, 2015. As a result thereof, Respondent shall pay all reasonable and necessary medical services as contained in Petitioner's Exhibit 8, **for medical services rendered up to and including April 19, 2017** as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit for all 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 disputed issue (K) pertaining to prospective medical treatment, in light of the Arbitrator's finding that Petitioner has failed to prove that her current condition of ill-being is causally related to the accident of July 29, 2015, Petitioner's request for prospective medical treatment as recommended by Dr. Benyamin is hereby denied.

---

[2] The Arbitrator notes that Petitioner told Dr. Benyamin that she hit both knees on the dash and that her pain started nine days later (PX1); that Petitioner told the physical therapist on October 8, 2015 that her pain occurred two days after the accident and started to get worse (PX3); that Petitioner told Dr. Jhee that she hit her right knee on the dash at the time of the accident (PX6); and that Petitioner told Dr. VanFleet that she hit her left knee on the dash (RX1).

[3] The Arbitrator notes that the first documented post-accident date of treatment was that of August 11, 2015 – which was nearly two weeks after the accident at issue – was at Bromenn Medical Center, after which Petitioner was not seen again until September 22, 2015 by her primary care physician, Dr. Houghton (PX3; PX2); and that Petitioner was seen by Dr. Houghton on October 12, 2017 – at which time it was noted that she was going to Florida for a few months - and was not re-evaluated by him again until April 10, 2018. (PX2).

With respect to disputed issue (L) pertaining to temporary total disability benefits, the Arbitrator notes that Petitioner seeks temporary total disability benefits for the timeframe of May 28, 2017 through April 23, 2018. (AX1).

In light of the Arbitrator's findings that (1) Petitioner has failed to prove that her current condition of ill-being is causally related to the accident of July 29, 2015 and that (2) as of April 19, 2017, Petitioner was able to return to work in a full duty capacity without any restrictions, Petitioner's request for the additional temporary total disability benefits 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.

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)
☐ Modify	☐ PTD/Fatal denied
☒ Other Vacate Contract Approval	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Cowger,
Petitioner,

vs. No. 19 WC 09703

CPC Logistics, Inc.,
Respondent.

20IWCC0289

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after reviewing the settlement documents, and being advised of the facts and law, vacates the Arbitrator's approval of the settlement in this matter.

Petitioner was injured in a July 27, 2017 work accident, which was disputed by Respondent as reflected in a settlement contract submitted to the Commission and assigned to an Arbitrator for consideration. The settlement contract included an "Absentee Affidavit" from the Petitioner, who was *pro se* at the time, asserting various facts. The settlement documents purported to settle Petitioner's disputed claim for $100.00. The Arbitrator approved the settlement contract on April 3, 2019. On April 22, 2019, an attorney filed a Petition for Review on Petitioner's behalf seeking rescission of the Arbitrator's approval of the settlement contract and seeking review of all issues related to Petitioner's claim. Briefs were filed by both parties' counsel related to the Petition for Review followed by oral arguments.

20IWCC0289

The threshold issue is whether the settlement contract was properly executed such that its approval by the Arbitrator should be upheld. The Commission finds that the "Settlement Contract Lump Sum Petition and Order" was not properly executed and, therefore, vacates the Arbitrator's approval of the contract. Section 9070.10 of the Commission's rules address "Settlement Contracts." 50 Ill. Adm. Code 9070.10 (2016). Subsection (b) indicates that "Settlement Contract forms shall be completed in full and accompanied by an appropriate signed physician's report concerning the nature and extent and probable duration of the disability resulting from the alleged accident." *Id.*

Upon review of the settlement contract as submitted, the Commission finds that it is not completed in full. Moreover, the settlement contract and accompanying documents reflect numerous inconsistencies including whether disputed medical bills have or have not been paid by Respondent. Therefore, the Arbitrator's approval of the settlement is vacated.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's approval of the Settlement Contract Lump Sum Petition and Order in this matter is hereby vacated as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that, pursuant to Section 9070.40(d) of the Rules, no settlement contract in this matter may be approved by any Arbitrator and any additional Settlement Contract must be presented to Commissioner Marc Parker for consideration and possible approval.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: MAY 20 2020

Marc Parker

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

o-05/07/20
mp-dak
68

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Gricelda Vasquez,
Petitioner,

vs. No. 18 WC 05413

20IWCC0290

Wal-Mart, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, prospective medical care, temporary disability, evidentiary issues, and penalties and attorney's fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner, a 29-year-old forklift driver/unloader, testified that on December 9, 2017, she felt a pop in her left wrist when she pulled a rope to open an overhead dock door. Petitioner was diagnosed with a TFCC tear and Chronic Regional Pain Syndrome of her left arm. On June 8, 2018, Dr. Dahlberg recommended a dorsal column stimulator. However, Petitioner's orthopedic physician, Dr. Robin Borchardt, did not believe Petitioner had met the criteria of CRPS, and recommended Petitioner be evaluated by a University pain management specialist, in order to confirm her diagnosis and consider treatment not available in Rockford.

SOLACC0586

20IWCC0290

The Arbitrator found a causal connection between Petitioner's condition of ill-being and her accident at work, but questioned its severity based on some surveillance footage. The Commission affirms the Arbitrator's finding, and further finds that other treatment is appropriate as ordered by Petitioner's treating physician, Dr. Borchardt.

Dr. Borchardt recommended that Petitioner obtain a second opinion and treatment from a University pain management specialist outside the Rockford area. Respondent offered no medical expert's opinion to dispute the reasonableness and necessity of any recommended treatment. While the Arbitrator reasonably questioned the severity of Petitioner's reported symptomology, and he was not persuaded that Petitioner needed a spinal cord stimulator as requested, the foregoing does not equate to the conclusion that Petitioner does not need, or should not receive, further treatment.

The Arbitrator found "a causal relationship between the Petitioner's accident and her conditions of ill-being but questions the severity of those conditions. The recommendations for the treatment being sought is denied as not being reasonable and necessary to treat the conditions *as they exist at the present time*." Arb. Dec. at 5 (Emphasis added). The record contains a recommendation for treatment by Dr. Borchardt. Specifically, that Petitioner, "needs an evaluation by a University pain management specialist to confirm her diagnosis and also offer treatments that are not available in Rockford." PX1.5 (4/11/18 note).

The Commission agrees with the Arbitrator that there is insufficient evidence to justify the award of a spinal cord stimulator given the unreliability of Petitioner's reported symptoms given the video surveillance. However, the Commission finds that the uncontroverted recommendation for further evaluation by Dr. Borchardt is appropriate to confirm Petitioner's diagnosis and then determine the best treatment plan. The foregoing is particularly persuasive given the lack of a contrary physician's opinion, and Dr. Borchardt's indication that certain treatments may not be available to Petitioner within her geographical area. The Commission declines to award the spinal cord stimulator, but also declines to generate a medical opinion regarding Petitioner's correct diagnosis and treatment plan where the evidence suggests they have not yet been obtained. The uncontroverted medical opinion of Dr. Borchardt indicates that Petitioner's true condition of ill-being and the appropriate plan of care may be determined upon further evaluation.

Thus, the Commission finds Dr. Borchardt's recommendation reasonable and necessary to alleviate Petitioner of the effects of her injury at work, and awards the recommended prospective medical treatment including evaluation by a University pain management specialist to confirm her diagnosis and for a treatment plan that may include treatments that are not available in the Rockford area.

In addition, the Commission agrees with the Arbitrator that Petitioner failed to prove she could not work as of the date of the July 2018 surveillance video. However, that video was taken on July 5, 2018, not July 2, 2018. Accordingly, the Commission modifies the Arbitrator's TTD award to 16-1/7 weeks, for the period from March 14, 2018 through July 4, 2018.

20 IWCC0290

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 27, 2018, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is modified, and Respondent shall pay Petitioner temporary total disability benefits of $330.00/week for 16-1/7 weeks, commencing on March 14, 2018 through July 4, 2018, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for Petitioner to obtain an evaluation by a University pain management specialist for her left hand and arm condition and for a treatment plan that may include treatments that are not available in the Rockford area, as recommended by Dr. Borchardt.

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 shall 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.

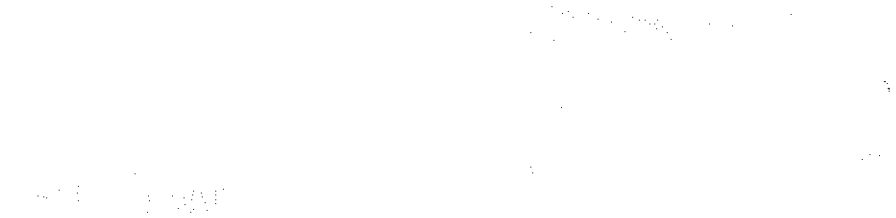
Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 2 0 2020

Marc Parker

Barbara N. Flores

o-04/16/20
mp/mcp
68



Sommaire

20IWCC0290

DISSENT IN PART AND CONCURENCE IN PART

I respectfully dissent in part from, and concur in part with, the Decision of the Majority. The Majority modified the Decision of the Arbitrator who found that Petitioner sustained her burden of proving her condition of ill-being of her left hand/arm was causally related to a stipulated work accident on December 9, 2017. The Arbitrator awarded Petitioner 15&4/7 weeks of TTD and all medical expenses incurred to date. He also denied prospective treatment, Petitioner's request for the imposition of penalties and fees, and awarded Respondent credit of $19,627.14. The Majority modified the Decision of the Arbitrator to order prospective evaluation and treatment outside of the Rockford area recommended by Dr. Borchardt and to increase TTD by three days. I would have affirmed the Decision of the Arbitrator except to increase the TTD award based on the date of surveillance video. Therefore, I concur with the Majority on the issues of causation, the award of current medical expenses, and modification of the TTD award. However, I dissent from the Decision of the Majority awarding prospective medical treatment.

The Arbitrator noted that the surveillance video showed Petitioner using her left hand and arm to open doors, carry groceries, and lifting her child over her head. She exhibited no apparent pain or infirmity in performing these functions. The Arbitrator concluded that the video showed that Petitioner was capable of working at the time the video was taken and terminated TTD as of that date. He also used the video to deny Petitioner's request for prospective treatment. It is noteworthy that at the time the video was taken, Petitioner complained to her treating physical therapist of 10/10 pain and the complete inability to use her left hand and arm. Therefore, the video clearly casts serious doubt on Petitioner's credibility. I find incongruous the Majority's acceptance of the video and its depiction of Petitioner's lack of infirmity to find that Petitioner was capable of working but at the same time discounts the video by awarding prospective medical treatment. I agree with the Arbitrator that the video establishes that Petitioner did not sustain her burden of proving that she is entitled to prospective treatment for her work-related injury.

For the reasons stated above, I would have affirmed the Decision of the Arbitrator except to increase the TTD award based on the date of surveillance video. Therefore, I concur with the Majority on the issues of causation, the award of current medical expenses, and modification of the TTD award. However, I respectfully dissent from the Decision of the Majority awarding prospective medical treatment.

Deborah L. Simpson

Deborah L. Simpson

SO LACC0580

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

VASQUEZ, GRICELDA
Employee/Petitioner

Case# **18WC005413**

20IWCC0290

WAL-MART INC
Employer/Respondent.

On 9/27/2018, 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 2.32% 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:

0021 REESE & REESE
TODD S REESE
979 N MAIN ST
ROCKFORD, IL 61103

5074 QUINTAROS ET AL
JULIE M SCHUM
233 S WACKER DR 70TH FL
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF **Rock Island**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Gricelda Vasquez
Employee/Petitioner

v.

Walmart Inc.
Employer/Respondent

Case # **18** WC **005413**

Consolidated cases: _____

20IWCC0290

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 **Rock Island**, on **August 7, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **December 9, 2017**, 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 $**24,836.76**; the average weekly wage was $**477.63**.

On the date of accident, Petitioner was **29** years of age, ***single*** with **4** dependent children.

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

Respondent shall be given a credit of $**4,620.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**15,007.14** for other benefits, for a total credit of $**19,627.14**.

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

ORDER

The Arbitrator concludes that Petitioner has proven that her conditions of ill-being was causally connected to her work accident under the Workers' Compensation Act.
The Arbitrator concludes that Petitioner has proven that medical services provided through July 19. 2018 were reasonable and necessary.
The Arbitrator denies the Petitioner's request for prospective medical care as recommended by Dr. Dahlberg.
The Arbitrator concludes that Petitioner is entitled to TTD from March 14, 2018 through July 1, 2018, a period of 15 and 4/7 weeks.
The Arbitrator concludes that Petitioner has failed to prove that she is entitled to penalties or fees relative to this matter.
The Arbitrator concludes that Respondent is entitled to a credit of $19,627.14.

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.

20IWCC0290

D. Dglas McEwen

Signature of Arbitrator

9/24/18
Date

ICArbDec19(b)

SEP 27 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION

GRICELDA VASQUEZ, Petitioner,	)	
vs.	)	Case No. 18 WC 005413
WAL-MART, INC., Respondent.	)	20IWCC0290

I. STATEMENT OF FACTS

Gricelda Vasquez (hereinafter "Petitioner") was employed by Walmart Inc. (hereinafter "Respondent") on December 9, 2017. Petitioner testified that on December 9, 2017, she pulled down on a garage door in the Distribution Center and she felt a "popping" sensation in her left wrist. (T.38). Petitioner testified that she informed a supervisor of the injury. (T.39).

The records reflect that Petitioner first presented for care at Physician's Immediate Care on December 11, 2017. (Px.1.1). She reported that she began experiencing left wrist pain after pulling down a garage door while at work. (Px.1.1). She complained of numbness, tingling, and swelling. (Px.1.1). Petitioner underwent a left wrist MRI on January 19, 2018, which revealed mild degenerative changes to the carpal bone, small joint effusion, and a TFCC tear. (Px.1.3).

Petitioner presented to Dr. Thomas Hernandez at Katherine Shaw Bethea Hospital on January 25, 2018, for an evaluation of her left wrist injury. (Px.1.4). She reported that she pulled down on a cable at work and felt something "give and catch" in her left wrist. (Px.1.4). Petitioner reported initial left hand pain that had progressively become worse over the subsequent weeks. (Px.1.4). Dr. Hernandez assessed Petitioner with Complex Regional Pain Syndrome (hereinafter "CRPS") and prescribed anti-inflammatories and a neuropathic cream. (Px.1.4). He recommended a referral for pain management. (Px.1.4). Dr. Hernandez noted Petitioner's left wrist TFCC tear. (Px.1.4). She was referred back to Physician's Immediate Care to facilitate an orthopedic consultation. (Px.1.4).

On January 25, 2018, per Dr. Hernandez's instructions, Petitioner returned to Physician's Immediate Care, at which time, she was referred to an orthopedic surgeon. (Px.1.1). She was further released with restrictions, which included avoiding strong gripping with the left hand, limited repetitive motion with her left hand, and wearing her splint; the restrictions were noted as to be in effect until February 2, 2018, or until released by orthopedic surgeon. (Px.1.1).

Petitioner presented to Dr. Brian Bear at OrthoIllinois – Rockford Orthopedics, on February 6, 2018, on referral from Dr. Hernandez. (Px.1.5). Petitioner reported that on December 11, 2017, she pulled down a garage door and felt something pop in her left hand. (Px.1.5). She complained of pain in her left hand that radiated up her left arm. (Px.1.5). Dr. Bear noted that her MRI revealed a TFCC tear and a ganglion cyst, and he believed she may have CRPS. (Px.1.5). He prescribed Lyrica, physical therapy, and referred her to Dr. Robin Borchardt for occupational medicine. (Px.1.5). She was also referred for further pain management. (Px.1.5). She was released with restrictions, including no use of her left hand. (Px.1.5).

Petitioner presented at CGH Medical Center on February 20, 2018, for a physical therapy evaluation. (Px.1.10). She reported that on December 11, 2017, she was pulling down on a door dock at the Walmart Distribution Center and she felt pain in her left wrist. (Px.1.10). Petitioner continued to present to physical therapy until July 19, 2018. (Px.1.10). Per the records, her symptoms waxed and waned through her treatment. (Px.1.10).

Petitioner first presented to Dr. Thomas K. Dahlberg, DO., at Rockford Pain Center on March 14, 2018, on referral from Dr. Bear. (Px.1.6). She reported that on December 11, 2017, she was pulling down a dock door when she felt a pop in her hand, with associated warmth and tingling. (Px.1.6). She claimed that the following day, her hand was swollen all the way up to her shoulder and that she was experiencing hypersensitivity in her left arm. (Px.1.6). She told the doctor that the last date that she worked was on February 25, 2018. (Px.1.6). Petitioner was taking Lyrica, naproxen, and Tramadol. (Px.1.6). On this date, Petitioner received her first stellate ganglion block, administered to her left side. (Px.1.6). Petitioner testified to experiencing temporary relief from this injection. (T.52). Dr. Dahlberg excused Petitioner from work on March 14, 2018, until April 13, 2018. (Px.1.6) On March 26, 2018, he scratched out his prior start date of Petitioner's work excuse and changed it to February 25, 2018, through a hand-written amendment, providing a retroactive work excuse. (Px.1.6).

Petitioner followed up with Dr. Dahlberg on March 23, 2018, complaining of continued left hand and arm pain. (Px.1.6). She received a second stellate ganglion block, administered to her left side. (Px.1.6). Petitioner testified that she again, experienced fleeting relief from the injection. (T.52).

She followed up with Dr. Dahlberg on March 30, 2018, complaining of continued left hand and arm pain. (Px.1.6). She received a third stellate ganglion block, administered to her left side. (Px.1.6) Again, Petitioner testified to experiencing temporary relief from the injection. (T.55).

On April 6, 2018, Petitioner presented to Dr. Dahlberg at Rockford Pain Center, complaining of continued left hand and arm pain and received a fourth stellate ganglion block, administered to her left side. (Px.1.6). She testified to experiencing short-term relief from this injection. (T.53).

Petitioner presented to Dr. Robin Borchardt, MD., at Rockford Orthopedic Riverside on April 11, 2018, for an evaluation of her left hand. (Px.1.5). She reported that on December 11, 2017, she was "pulling down a door" when she felt something pop in her hand. (Px.1.5). She reported that she had undergone four stellate ganglion blocks with Dr. Dahlberg, but that she had not experienced any relief from her treatment. (Px.1.5). Dr. Borchardt considered CRPS as a possible diagnosis, but noted that Petitioner did not meet the criteria. (Px.1.5). He recommended that Petitioner be evaluated by a "University pain management" specialist to confirm her diagnosis and to offer treatments that may not be offered in Rockford. (Px.1.5). She was released with continued restrictions. (Px.1.5).

On April 24, 2018, Petitioner presented at Rockford Neuroscience Center to undergo an EMG/NCV. (Px.1.7). The study was unremarkable. (Px.1.7)

Surveillance was conducted on Petitioner on May 2, 2018, through the services of TIG Risk Services. (Rx.1). The investigator on the case was Robert Seymour Jr. (Rx.1). During his surveillance on May 2, 2018, Mr. Seymour took surveillance footage of his observations. (Rx.2). The footage shows Petitioner lift her child from her vehicle and carry her to her front door. (Rx.2). The footage further shows Petitioner lift and carry a gallon of milk from her trunk with her left hand. (Rx.2). A report was prepared following the investigation that contained a summary of what was provided in the surveillance footage. (Rx.1). Respondent entered into evidence the report with agreed upon redactions and the surveillance footage. (Rx.1, Rx.2).

Petitioner presented to CGH Medical Center for a physical therapy session on May 4, 2018, two days after the TIG surveillance was performed. (Px.1.10). She reported to her therapist that she was experiencing pain in her left arm ranging from 7-9/10. (Px.1.10). Her grip strength in her left hand was noted to be painful and decreased, and her exercises were modified to avoid placing stress on the left wrist. (Px.1.10).

On May 10, 2018, Petitioner presented at Forest City Diagnostic to undergo a left shoulder MRI. (Px.1.8). The study revealed mild tendinosis of the distal supraspinatus without evidence of rotator cuff tear or significant abnormality. (Px.1.8).

Petitioner returned to Dr. Dahlberg on May 17, 2018, complaining of continued left hand and arm pain. (Px.1.6). She received a fifth stellate ganglion block, administered to her left side. Her history to Dr. Dahlberg was that she experienced excellent pain relief for approximately two weeks after her prior injection. His diagnosis was that of CRPS with profound improvement. (Px.1.6). She testified that she had experienced temporary relief from her symptoms following this injection. (T.58).

On June 8, 2018, Petitioner presented to Dr. Dahlberg at Rockford Pain Center, complaining of continued left hand and arm pain. (Px.1.6). She received a sixth stellate ganglion block, administered to her left side. (Px.1.6). Dr. Dahlberg recommended that Petitioner undergo

a trial of a Nevro dorsal column pain stimulator. (Px.1.6). He further ordered a psychological evaluation prior to the pain stimulator trial. (Px.1.6).

On July 2, 2018, Petitioner presented at CGH Medical Center for a physical therapy session. (Px.1.10). She reported to her therapist that she was experiencing a 10/10 pain level. (Px.1.10). A grip strength retest was noted at 22lbs. on the left and 67 lbs. on the right. (Px.1.10).

On July 5, 2018, surveillance was conducted on Petitioner through the services of Veracity Research Co. (Rx.4b). The investigator on the case was Wade Phillips. (Rx.4b). Respondent entered into evidence the report prepared by Mr. Phillips; per an agreed stipulation, the contents entered into evidence were restricted to the information pertaining to Mr. Phillip's July 4, 2018, pre-investigation efforts, and the July 5, 2018, surveillance. (Rx.4b). Surveillance footage captured on July 5, 2018, was also entered into evidence. (Rx.5, Rx.6). During his surveillance on July 5, 2018, Mr. Phillips witnessed Petitioner using her left arm through a number of activities, including lifting and carrying her purse and grocery bags with her left arm and hand. (Rx.4b). He further witnessed Petitioner repeatedly lift and carry her child. (Rx.4b). Of note, he witnessed Petitioner lift her child over her head using both of her arms. (Rx.4b). Petitioner's repeated lifting and gripping of objects, including her pitched her child up and over her head, is included in the surveillance footage entered into evidence. (Rx. 5, Rx. 6).

II. CONCLUSIONS OF LAW

The aforementioned Statement of Facts is hereby incorporated into each section of these Conclusions of Law.

Regarding "F" Is Petitioner's current condition of ill-being causally related to the injury? And "K" prospective medical, the Arbitrator concludes as follows:

The Arbitrator concludes that Petitioner's current conditions of ill-being including the residuals from a tear of the left TFCC cartilage and Complex Regional Pain Syndrome of the left hand and wrist are causally related to her accidental injury of December 9, 2017. The extent from which she suffers from those conditions are only relevant to her request for ongoing medical care insofar as this 19 b hearing is concerned, and will be discussed below.

The Petitioner was injured as a result of her accident which was stipulated to by the parties. She was treated on a continuous basis for the above conditions. Her TFCC tear was diagnosed conclusively by the MRI of January 19, 2018. Her CRPS was diagnosed by Dr. Hernandez on January 25, 2018 and also Dr. Bear on February 6, 2018. While Dr. Borchardt on April 11, 2018 noted that she did not meet all of the criteria for the condition, she also did not state that the diagnosis was made in error. She simply suggested further pain management to confirm the diagnosis. (PX 1.5) The medical treatment records from Dr. Dahlberg and CGH Medical Center from March 14, 2018 forward show appropriate treatment and improvement

from said treatment. As stated above, Dr. Dahlberg noted significant improvement through the office visit of May 17, 2018.

The surveillance video from May 2, 2018 is not probative on any issues before the Court. It only shows the Petitioner for a very short time and does not focus on her left hand or arm in much detail. While the Petitioner's facial expressions as she performed very limited activities are not consistent with severe pain, the Arbitrator notes that the medical records at the time show that she was improving through physical therapy and ganglion blocks.

The second surveillance videos lead the Arbitrator to a different conclusion. On July 5, 2018, Petitioner is seen repeatedly using her left hand and arm to grab and lift. She is seen using her left hand to grab and carry her purse and grocery bags, as well as open doors. (Rx.4b, Rx.5, Rx.6). Most notably, Petitioner is seen lifting her child up and over her head, onto her shoulders. (Rx.4b, Rx.5). Upon review of the surveillance footage, Petitioner is not seen exhibiting indications of pain. (Rx.4b, Rx.5, Rx.6). On the same day that Petitioner is seen lifting her child over her head, she presented to CGH Medical Center for therapy, she claimed a pain level of 10/10, and recorded grip strength of 16lbs. (Rx.1.10). Petitioner's subjective complaints and alleged symptoms as reported to her therapist are contradictory to what is provided in the surveillance and inherently not credible. As such, Petitioner was misrepresenting her symptoms to her therapist.

The therapy records further show that the Petitioner was only seen once more for care on July 5, 2018. The records show that she did not show up for therapy on July 17 and was discharged two days later. While Dr. Dahlberg recommended a spinal column stimulator, that recommendation was made on June 8, 2018.

Based upon the above, the Arbitrator finds a causal relationship between the Petitioner's accident and her conditions of ill-being but questions the severity of those conditions. The recommendations for the treatment being sought is denied as not being reasonable and necessary to treat the conditions as they exist at the present time.

Regarding "J" Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

As is stated above, the Arbitrator finds that the treatment provided was reasonable and necessary for the conditions involving the Petitioner's left upper extremity. The Respondent is ordered to pay the charges contained in Pet. Group Exhibit 2, pursuant to the Fee Schedule.

Regarding "L" What temporary benefits are in dispute?

The Arbitrator finds that Petitioner is entitled to TTD benefits from March 14, 2018, when she was taken off by Dr. Dahlberg, through July1, 2018, the day prior to the second surveillance video.

In rendering this finding, the Arbitrator notes that Petitioner is not entitled to past TTD benefits from February 25, 2018. As evidenced by the medical records, Petitioner was first excused from work on March 26, 2018, by Dr. Dahlberg. (Px.1.6). Petitioner testified that she chose to stop going to work as of February 25, 2018. (T.50, T.94). The records clearly indicate that Petitioner first saw Dr. Dahlberg on March 14, 2018. (Px.1.6). She had not presented to Dr. Dahlberg as a physician prior to that date. (Px.1.6). Her records do not indicate that she was fully excused from work until she saw Dr. Dahlberg for the first time. When Dr. Dahlberg provided a retroactive work excuse by scratching out the March 14, 2018, date and replacing it with February 25, 2018, he had no basis to excuse Petitioner from work as he had not had the opportunity to examine Petitioner before March 14, 2018.

Regarding "M" Should penalties be imposed upon Respondent?

Under the Illinois Workers' Compensation Act, penalties and fees are to be imposed upon Respondent only if their conduct is "unreasonable" or "vexatious." In the instant matter, no evidence was presented to show that Respondent acted in any such manner. A simple denial of a case is not enough to constitute unreasonable or vexatious action. Respondent denied benefits on a good-faith basis, as Respondent had received surveillance of Petitioner functioning in a manner that was contradictory to her own medical records and her reports to her physicians. (Rx.4b, Rx.5, Rx.6).

The Arbitrator concludes that Petitioner has failed to prove that she is entitled to penalties or fees relative to this matter.

Regarding "N" Whether Respondent is due any credit.

The Arbitrator finds that Respondent is due credit for rendered reasonable, necessary, and related medical benefits, and necessary temporary benefits provided to Petitioner. Respondent entered into evidence, without objection, a payments ledger outlining any and all benefits provided to Petitioner. Upon review, Respondent is entitled to a credit of $4,620.00, in temporary total disability benefits, and $15,007.14, in medical expenses paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Vernon Robertson,
Petitioner,

vs.

No. 12 WC 41443

20IWCC0291

Southern Illinois University Carbondale,
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, temporary disability and permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner, a 42-year-old part-time maintenance man, injured his right elbow on August 15, 2012 when he struck it against a wooden crate. He was diagnosed with post-traumatic lateral epicondylitis and treated conservatively by orthopedic surgeon, Dr. Treg Brown. On January 16, 2013, Dr. Brown reported Petitioner's condition was, "resolving tennis elbow." Through that date, Petitioner had remained off work as Respondent was unable to accommodate the restrictions he had been given. The parties stipulated that Respondent owed Petitioner TTD between August 22, 2012, and January 27, 2013; but also, that Respondent was entitled to a credit for all medical bills paid, and for $5,251.77 in TTD benefits it paid.

The Arbitrator found Petitioner's condition was related to his accident, but only through January 16, 2013 – the date Dr. Brown, "released Petitioner back to work, full duty, and from care." The Commission finds, however, that Dr. Brown did not release Petitioner to full duty work on that date, but rather, recommended that Petitioner remain on medium duty work restrictions, and not return to full duty work until 2 to 3 weeks later. On January 28, 2013 Petitioner began working for a new employer, Pepsi.

30 : 105

20IWCC0291

Accordingly, the Commission finds Petitioner entitled to 22-5/7 weeks of temporary total disability, commencing August 22, 2012 through January 27, 2013. The Commission also finds Petitioner entitled to the reasonable and necessary medical expenses incurred for treating his right elbow injury through January 27, 2013, pursuant to §8(a) and §8.2 of the Act. Finally, the Commission finds Respondent is entitled to the credits as stated above.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 22, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $286.00 per week for 22-5/7 weeks, for the period of August 22, 2012 through January 27, 2013, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $286.00 per week for 20.24 weeks, as provided in §8(e)10 of the Act, because the injuries sustained caused an 8% loss of use of the right arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred for treating his right elbow injury through January 27, 2013, pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive a credit of $5,251.77 for TTD it paid, and a credit for all medical bills paid through January 27, 2013.

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review; therefore, no appeal bond is set in this case.

DATED: MAY 20 2020

o-05/07/20
mp/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROBERTSON, VERNON
Employee/Petitioner

Case# **12WC041443**

20IWCC0291

SOUTHERN ILLINOIS UNIVERSITY CARBONDALE
Employer/Respondent

On 2/22/2019, 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 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4599 SCHUCHAT COOK & WERNER
CLARE R BEHRLE
1221 LOCUST ST SUITE 250
ST LOUIS, MO 63103

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0558 ASSISTANT ATTORNEY GENERAL
NICOLE M WERNER
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

FEB 22 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20IWCC0291

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Vernon Robertson
Employee/Petitioner

v.

Southern Illinois University Carbondale
Employer/Respondent

Case # **12** WC **41443**

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 **Soto**, Arbitrator of the Commission, in the city of **Herrin**, on **12/13/2018**. 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. [ ] 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. [x] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On **August 15, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**3,815.00**; the average weekly wage was $**346.82**.

On the date of accident, Petitioner was **42** 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 $**5,251.77** for TTD, $**0** for TPD, $**0** for maintenance, and $ for other benefits, for a total credit of $.

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

ORDER

Petitioner has proven by the preponderance of the credible evidence that his right elbow condition up to January 16, 2013, the date of discharge from Dr. Brown, was causally connected to his work injury of August 15, 2012. Petitioner failed to prove by the preponderance of the evidence that his current condition of ill-being, after January 16, 2013, was causally connected to his work injury of August 15, 2012, as set forth in the Conclusions of Law attached hereto;

Respondent **shall pay** medical bills for treatment to Petitioner's right elbow **through January 16, 2013**, pursuant to **Sections 8(a) and 8.2 of the Act and subject to the fee schedule**. Respondent shall receive a credit for any medical bills incurred to and including January 16, 2013 that Respondent paid. Respondent is not liable for medical bills after January 16, 2013, as set forth in the Conclusions of Law attached hereto;

Respondent shall pay Petitioner **286.00/week for 20.24 weeks** because Petitioner sustained permanent partial disability to the extent of **8% loss of use a right arm**, pursuant to Section 8(e)(10) of the Act, as set forth in the Conclusions of Law attached hereto;

Respondent **claim for a credit** of $2,000.00 regarding the settlement of Case No: 13 WC 34889 is hereby **denied** as set forth in the Conclusions of Law attached hereto;

Respondent shall pay Petitioner compensation that has accrued from August 15, 2012 through December 13, 2018 and shall pay the reminder 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

2/21/2019
Date

FEB 22 2019

20 IWCC0291

Procedural History

This matter was tried on December 13, 2018. The issues in dispute are whether Petitioner's current condition of ill-being is causally connected to the injury, whether Respondent is liable for unpaid medical bills after January 16, 2013 and the nature and extent of Petitioner's injury. Respondent is seeking a credit against permanency from Case No. 13 WC 34889, involving an injury to Petitioner's right arm which occurred on January 8, 2013. (Arb. Ex.# 1).

Findings of Fact

Vernon Robertson (hereinafter referred to as "Petitioner") testified that, on August 15, 2012, he was working at an airport facility for Southern Illinois University (hereafter referred to as "Respondent") taking apart wooden creates. Petitioner testified that he was loosening bolts when he swung his right elbow back striking it on another create. Petitioner testified that he experienced pain, numbness and tingling in his right arm that traveled up to his shoulder. Petitioner testified that he reported the injury to his supervisor and he went to Herron Hospital on August 17, 2013.

On August 21, 2012, Petitioner filled out a Workers' Compensation Employee's Notice of Injury form. (RX1). Petitioner indicated that on August 15, 2012, he injured his right elbow when he was using a socket wrench on a crate and his elbow hit the corner of another crate. (RX1). Petitioner indicated he had an immediate onset of pain, followed by numbness in his arm for 20 minutes. (RX1).

On August 17, 2012, Petitioner presented to Urgent Care for his right elbow. Petitioner reported that, on August 15, 2012, he struck his right elbow on the corner of a wooden crate. He further reported that he initially did not have any pain but began experiencing pain the next afternoon. Petitioner was diagnosed with an elbow contusion and told to use ice packs and NSAIDs. Petitioner was to follow up with his primary care physician in a week if pain persisted. On August 20, 2012, Petitioner returned to Urgent Care. Petitioner reported that his pain had worsened. Petitioner was assessed with elbow pain and referred to Dr. Austin. (PX11).

On August 21, 2012, Petitioner saw Dr. Mark Austin at WorkCare. Petitioner reported that he hit his right elbow on a crate while loosening a screw. Petitioner was diagnosed with an elbow contusion and lateral epicondylitis. Petitioner was issued work restrictions, prescribed occupational therapy, and given prescriptions. (PX5).

On September 5, 2012, Petitioner returned to Urgent Care complaining of right elbow pain. Petitioner was assessed with elbow pain and given a prescription. (PX11).

On September 6, 2012, Petitioner returned to Dr. Austin. Petitioner reported that he was regaining strength but when he stretched he felt a shooting pain in his elbow. Petitioner also reported that he had to swerved to avoid hitting a deer which caused him to feel a shooting pain in his arm. Petitioner was prescribed occupational therapy. (PX5).

Petitioner underwent occupational therapy at Herrin Hospital from September 12, 2012 through October 2, 2012. Petitioner was discharged from occupational therapy by his physician. (PX4).

On September 26, 2012, Petitioner presented to the emergency room at Herrin Hospital reporting that his arm went numb while working on the computer. Petitioner was referred to an orthopedist. (PX4).

On September 28, 2012, Petitioner presented to Dr. Sandhya Grandhi at Center for Medical Arts for right elbow pain. Petitioner was diagnosed with elbow pain and epicondylitis and issued a sling. (PX3).

On October 1, 2012, Petitioner returned to Dr. Austin. Petitioner reported that his range of motion improved, but he was still having issues with strength. Petitioner also reported numbness. Petitioner was to continue his work restrictions and his prescriptions were refilled. (PX5).

On October 5, 2012, Petitioner followed up with Dr. Austin. Petitioner refused a trigger point injection due to a news story he saw. Petitioner was referred to an orthopedist. (PX5).

On October 10, 2012, Petitioner presented to Dr. Treg Brown at the Orthopaedic Institute of Southern Illinois. Petitioner reported that his entire arm went numb for approximately 20 minutes after the injury, and that he still experiences occasional numbness. Petitioner further reported that he does not feel that he is getting better. Petitioner said his pain level was a 10 out of 10. During the examination, Dr. Brown noted that "*several aspects of his [Petitioner's] exam was concerning for some symptom magnification*" and "*the dramatic nature of his [Petitioner's] responses were somewhat concerning.*" After subjective complaints of pain during testing, Petitioner refused to allow Dr. Brown to complete the examination. Petitioner had x-rays which were normal. Petitioner was diagnosed with lateral epicondylitis and mild cubital tunnel syndrome. Petitioner was issued work restrictions and an MRI was ordered. (PX2).

On October 19, 2012, Petitioner returned to Dr. Austin. Petitioner complained that Dr. Brown would not order an EMG and asked to be referred to a different orthopedist. Dr. Austin agreed with Dr. Brown's recommendation of an MRI and he proscribed an MRI and EMG. (PX5).

On October 30, 2012, Petitioner underwent an EMG of the right elbow. The EMG was found to be a normal electrodiagnositc study with no evidence of median neuropathy at the wrist, ulnar neuropathy at the elbow, radial neuropathy, or cervical neuropathy. (PX5).

On October 31, 2012, Petitioner underwent an MRI of the right elbow. The MRI was performed at Herrin Hospital. The MRI impression findings were as follows: (1) no acute osseous abnormality, there was evidence of an old healed fracture; (2) mild common extensor tendinosis without evidence of a tendon tear or adjacent inflammation to suggest acute changes of the lateral epicondylitis; (3) mild distal triceps tendinosis with no tendon tear; (4) scarring related to a chronic sprain of the radial collateral ligament without evidence of a full thickness tear; and (5) minimal joint effusion, non-specified. (PX4).

On November 5, 2012, Petitioner returned to Dr. Austion. Petitioner was referred back to the orthopedist at the Orthopaedic Institute of Southern Illinois. (PX5).

On January 10, 2013, Petitioner returned to Dr. Grandhi. Petitioner was given prescriptions and advised to continue using his brace. (PX3).

On January 16, 2013, Petitioner returned to Dr. Brown. At that time, it was noted that Petitioner's ulnar nerve symptoms had fully resolved and that he no longer had any medial-sided pain or anterior pain. Dr. Brown indicated by history, that Petitioner significantly improved since his last visit, but that Petitioner disagreed. During the exam, Dr. Brown noted that Petitioner had no medial tenderness, the Tinel's test was negative, there was no anterior joint tenderness, no distal bicep tenderness, no triceps tenderness, no olecranon tenderness, no radial head tenderness, and no crepitus. Petitioner had full flexion, full extension, full pronation and supination. Petitioner was found to be neurologically intact distally and he had no laxity with varus-valgus stress at 0 or 30 degrees. Petitioner had no pain with hyperextension. Petitioner underwent an EMG which was normal. Dr. Brown also reviewed an MRI of Petitioner's right elbow, which he characterized as normal. Dr. Brown diagnosed Petitioner with resolving tennis elbow and fully resolved cubital tunnel syndrome. Dr. Brown recommended continuing the medium work duty status for two to three weeks and, at that time, Petitioner could return to work full duty. Dr Brown also

recommended occupational therapy. Petitioner was also released from treatment and told to return as needed. (PX2).

On February 1, 2013, Petitioner returned to Dr. Grandhi for an unrelated matter and did not make any right elbow complaints. (PX3).

On January 28, 2013, Petitioner testified that he started a new job. Petitioner worked at Pepsi as an order puller and his job required him to lift cases of pop and stacking them on creates. Petitioner testified that he was having problems with his right arm and he told his employer (Pepsi) that he was having problems lifting orders. Petitioner was moved to another department. Petitioner decided to seek medical care. Petitioner testified that he stopped working for Pepsi on February 22, 2013 and that he returned to Dr. Brown for treatment.

On February 8, 2013, Petitioner attended an occupational therapy. At that time, Petitioner reported injuring his arm the previous day and that he planned on seeing the doctor. On March 19, 2013, Petitioner was discharged from occupational therapy for nonattendance. (PX11).

On February 8, 2013, Petitioner returned to Dr. Grandhi to discuss test results on an unrelated matter. At that time, Petitioner reported that his right elbow pain improved. (PX3).

On July 26, 2013, Petitioner saw Dr. Alex Zambrano for right elbow pain. Petitioner reported pain from his elbow to his hand and numbness. Petitioner was given a steroid injection into his right elbow and prescribed physical therapy. (PX11).

On November 6, 2013, Petitioner returned to Dr. Zambrano. Petitioner reported that his right elbow was back to baseline. The examination showed that Petitioner had full range of motion in both his right elbow and wrist. Petitioner deferred having a second steroid injection. (PX11).

On December 17, 2013, Petitioner saw Dr. Bhargava Trivedi for right elbow pain. Petitioner was diagnosed with elbow pain. Dr. Trivedi did not believe that Petitioner had carpal tunnel syndrome. Petitioner was referred to Dr. Criste for pain management and told to follow up as needed. (PX11).

On April 23, 2014, Petitioner saw Dr. Zambrano for knee and elbow pain. Petitioner was diagnosed with knee osteoarthritis and his knee was aspirated. (PX11).

On April 30, 2014, Petitioner presented to Dr. Gerson Criste for right elbow pain. Petitioner reported a dull pain that radiated into his hand. Petitioner did not report an injury. Petitioner was diagnosed with olecranon bursitis. Dr. Criste noted that Petitioner was a nonsurgical

candidate and he referred Petitioner to physical therapy. Petitioner was told to follow up as needed. (PX11).

On June 6, 2014, Petitioner underwent an MRI of his right elbow at the request of Dr. Michael Beatty. The impression of the MRI was as follows: (1) no acute osseous abnormality, evidence of an old healed fracture; (2) minimal joint effusion, non-specified; (3) common extensor tendinosis; (4) mild common flexor tendinosis without evidence of a tendon tear; (5) mild distal triceps and biceps tendinosis without evidence of a tendon tear; and (6) scarring related to a chronic sprain of the ulnar collateral radial collateral ligament with intact fibers identified. (PX11).

Between August 26, 2014 and July 31, 2015, Petitioner treated extensively for low back pain, including imaging studies and injections, with Dr. Criste and Dr. Zambrano. There was no mention of his right elbow during this time. (PX11).

On October 28, 2014, Petitioner was examined by Dr. Anthony Sudekum pursuant to Section 12 of the Act. Dr. Sudekum took a history from Petitioner, reviewed medical records, and performed a physical examination. Petitioner indicated that on August 15, 2012, he was removing bolts from crates when the wrench slipped off one of the bolts and he hit his right elbow on another crate. On physical examination, Petitioner had a resting tremor of his right hand, no notable swelling or deformity, subjective tenderness with palpation over the right elbow, negative wrist Tinel's and Phalen's, subjective lateral elbow pain with resisted wrist and finger extension, subjective decreased grip strength on the right as compared to the left, but normal and symmetrical pinch strength, and full normal range of the bilateral elbows, forearms, wrists, thumbs, and fingers with normal sensation throughout both upper extremities. Dr. Sudekum took x-rays of Petitioner's right upper extremity which revealed no radiographic evidence of acute or chronic bony pathology and no evidence of any abnormality of the right lateral epicondyle, medial condyle, radial head, radial neck, radial shaft, or bicipital tuberosity. Dr. Sudekum also reviewed the actual films of both of Petitioner's MRIs and noted that the October 31, 2012 MRI showed no evidence of acute trauma or acute changes and only minimal lateral epicondylar tendinosis without evidence of any tendon tear, disruption, or retraction. Dr. Sudekum also noted that the June 6, 2014 MRI showed no evidence of acute or chronic epicondylitis or tendinosis. Dr. Sudekum reviewed Petitioner's nerve conduction studies which revealed no electro-diagnostic evidence of carpal or cubital tunnel syndromes or any neuropathies. Dr. Sudekum noted that Petitioner was no longer was employed by Respondent and held three other jobs. (RX3).

Dr. Sudekum opined that Petitioner sustained a blunt contusion to the right lateral elbow on August 15, 2012. Dr. Sudekum noted that the medical records showed the injury did not result in a laceration, abrasion, swelling, or bruising at the site of the injury. Dr. Sudekum also noted that the MRI did not reveal any objective evidence of acute bony or acute soft tissue pathology. Dr. Sudekum opined that the MRI showed chronic tendinopathies which was not consistent with the August 15, 2012 work injury of a single isolated contusion to the lateral elbow region, especially in the absence of any evidence of an acute trauma noted at the time of injury. (RX3).

On physical examination, Dr. Sudekum found no notable objective abnormality to his right elbow, forearm wrist, or hand. Dr. Sudekum noted Petitioner's current subjective complaints and symptoms remain out of proportion to the findings on objective studies and physical examination. Dr. Sudekum further noted that Petitioner's medical records indicated Petitioner's past complaints and symptoms had been consistently atypical and out of proportion with objective findings. Dr. Sudekum indicated there were multiple red flags that called into question the validity and integrity of Petitioner's subjective complaints. (RX3).

Dr. Sudekum opined Petitioner had sustained a mild contusion to the right lateral elbow due to the August 15, 2012 injury and he had reached maximum medical improvement. Dr. Sudekum also opined that Petitioner did not require any additional studies or treatment related to the August 15, 2012 injury and that Petitioner can work full duty without restriction. Dr. Sudekum noted he did not feel any of Petitioner's subjective symptoms or self-imposed limitation on his activities were required due to the August 15, 2012 injury. (RX3).

Petitioner's Exhibit 12 consist of employment records for Petitioner from Pepsi MidAmerica which show that Petitioner was hired by Pepsi MidAmerica as of January 28, 2013 and that he claimed a work-related injury to his right arm on February 7, 2013. Petitioner reported aggravating his right elbow during pre-building. Petitioner sent an incident letter to his supervisor indicating he was an employee of Pepsi MidAmerica when the incident occurred and requested a response from management/human resources. A workers' compensation claim was filed with Pepsi MidAmerica's insurance company. Petitioner employment with Pepsi MidAmerica was terminated on February 22, 2013 for job abandonment. Petitioner stopped showing up for work and could not be contacted. (PX12).

Respondent's Exhibit 5 is an Illinois Workers' Compensation Commission Settlement Contract Lump Sum Petition and Order between Petitioner and Pepsi MidAmerica (Case No. 13

WC 34889). The date of accident is listed as disputed accident of January 8, 2013. The Settlement Contracts state that Petitioner injured his right upper extremity while lifting crates. The Terms of Settlement state "*...Respondent to pay and petitioner to accept $2,000.00 in full and final settlement of any and all claims arising out of the alleged 01/08/2013 claim against Pepsi MidAmerica, under the Illinois Workers' Compensation and Occupational Disease act for all accidental injuries allegedly incurred as described herein and including any and all results or developments, fatal or non-fatal, allegedly resulting from such accidental injuries. Issues exist between the parties as to whether Petitioner has incurred injuries to the degree alleged and whether or not such injuries are compensable, and this settlement is made to amicably settle all issues...*". (RX5).

On June 28, 2017, Dr. Michael Beatty testified via evidence deposition. (PX1). Dr. Beatty testified he is a plastic reconstructive and hand surgeon. (PX1, tr. 4). Dr. Beatty testified that 40 to 60 percent of the patients he treats are for hand upper extremity issues. (PX1, tr. 5). He is board certified in plastic reconstructive and upper extremity surgery and the board of medical examiners. (PX1, tr. 6). Dr. Beatty testified he evaluated Petitioner at the request of Petitioner's counsel on May 19, 2014. (PX1, tr. 7). Dr. Beatty testified he reviewed multiple medical records of Petitioner. (PX1, tr. 8). Dr. Beatty testified at the time of his evaluation, Petitioner complained of right elbow pain with intermittent intensity with job activity as a machinist. (PX1, tr. 9). Petitioner was working for a tool and laser company. (PX1, tr. 9). Petitioner gave a history consisting of sustaining an injury in August 2012, when he struck his right elbow on the corner of a wooden cage. (PX1, tr. 9). Petitioner indicated he was diagnosed with severe epicondylitis and was given modified work restrictions. (PX1, tr. 10).

Dr. Beatty testified he performed a physical examination of Petitioner. (PX1, tr. 10). Petitioner's range of motion of his right elbow was satisfactory, he had significant tenderness with mild compression in the right lateral epicondyle. (PX1, tr. 10-11). Dr. Beatty diagnosed Petitioner with chronic right lateral epicondylitis. (PX1, tr. 11-12). Dr. Beatty testified this condition can result in persistent elbow pain, aching and throbbing, and radiating pain. (PX1, tr. 13). This condition does not result in numbness in the fingers. (PX1, tr. 13). Chronic lateral epicondylitis can be aggravated by activities, including lifting. (PX1, tr. 15). Dr. Beatty testified he based his diagnosis on Petitioner's complaints, testing during physical examination, and that Petitioner

relates his problem to work. (PX1, tr. 16-17). Dr. Beatty recommended Petitioner undergo a new MRI. (PX12, tr. 17).

Dr. Beatty testified that he compare Petitioner's MRIs from both 2012 and 2014 and they were similar. (PX1, tr. 20). Dr. Beatty testified Petitioner was still complaining of pain in his right elbow at the time he saw him, which suggested his condition was chronic. (PX1, tr. 23). Dr. Beatty testified he would consider Petitioner's complaints while working for Pepsi to be an exacerbation, or worsening, of his previous injury of August 15, 2012. (PX1, tr. 29).

Dr. Beatty testified he thought Petitioner's treatment had been reasonable. (PX1, tr. 31). Dr. Beatty testified Petitioner's prognosis would be dependent until he underwent surgery for lateral epicondylitis. (PX1, tr. 31). Dr. Beatty testified he only saw Petitioner for that one appointment. (PX1, tr. 31).

On cross-examination, Dr. Beatty admitted that he did not hold a Certificate of Added Qualifications in Surgery for the Hands. (PX1, tr. 34). Dr. Beatty also admitted that he did not think he reviewed the actual imaging studies of the MRIs, nor did he consider it to be necessary. (PX1, tr. 35). Dr. Beatty was asked to look at Dr. Austin's record from August 2,1 2012, and he agreed that under physical examination, that next to "edema," Dr. Austin wrote a zero with a line through it. (PX1, tr. 40). He agreed this could mean no edema was found. (PX1, tr. 40). Dr. Beatty agreed that the same record indicated Petitioner's right elbow x-rays were negative, but he did not agree with that interpretation. (PX1, tr. 41). However, Dr. Beatty admitted he did not review the actual films of the x-rays, only the report. (PX1, tr. 41).

Dr. Beatty was asked if Petitioner indicated he was starting to improve until he jerked his steering wheel to avoid a deer, could that be a new injury to his elbow. (PX1, tr. 43). Dr. Beatty testified that since Petitioner did not call it a new injury, it was not a new injury. (PX1, tr. 43-44). Dr. Beatty was asked to review Dr. Brown's record in which he raised concerns of Petitioner showing signs of symptom magnification. (PX1, tr. 45). Dr. Beatty testified that did not affect his opinion. (PX1, tr. 45). Dr. Beatty testified he would have had to see Petitioner prior to May 19 to determine if there was any symptom magnification. (PX1, tr. 46).

Dr. Beatty testified he looked at the EMG but did not review the actual study. (PX1, tr. 47). Dr. Beatty testified the results were normal and there were no findings of cubital or carpal tunnel syndromes or any other neuropathies. (PX1, tr. 48). Dr. Beatty was asked if he was aware of Petitioner's 2012 MRI at the time he authored a letter to opposing counsel on May 21, 2014,

because he indicated in his letter that there was no history of prior MRIs. (PX1, tr. 50-53). Dr. Beatty was not sure. (PX1, tr. 53).

Dr. Beatty testified he was aware that Petitioner filed a workers' compensation claim against Pepsi for an injury in 2013. (PX1, tr. 54). Dr. Beatty did not respond when asked if he considered this a new injury. (PX1, tr. 54). Dr. Beatty admitted that if the history given by Petitioner was inaccurate, it could change his opinion. (PX1, tr. 55). He further testified his causation opinion was based on the history from Petitioner. (PX1, tr. 55).

Dr. Beatty was asked to review an occupational therapy record from February 8, 2013 where Petitioner indicated he had reinjured himself the night before. (PX1. Tr. 56-59). Dr. Beatty was asked if Petitioner reported that he reinjured himself in February 2013, could that change his causation opinion with regard to the August 2012 injury. (PX1, tr. 59-60). Dr. Beatty did not answer the question. (PX1, tr. 60-61). Dr. Beatty testified he did not have any medical records indicating Petitioner treated for his right elbow between February 2013 and when he saw Dr. Beatty in May 2014. (PX1, tr. 61-62). Dr. Beatty testified he only saw Petitioner on that one occasion in May 2014 and he had no idea how he was currently doing. (PX1, tr. 62). Dr. Beatty testified he had no idea what Petitioner's current symptoms or complaints were. (PX1, tr. 63).

On re-direct, Dr. Beatty testified he did not need to review the films of x-rays and MRIs because epicondylitis is diagnosed by the patient's history. (PX1, tr. 64-65). Dr. Beatty testified that a nerve conduction study is not necessary for a lateral epicondylitis patient. (PX1, tr. 68). Dr. Beatty testified the EMG was not helpful to his diagnosis to lateral epicondylitis. (PX1, tr. 69). Dr. Beatty testified Petitioner had no prior history if injury to his right elbow. (PX1, tr. 70). Dr. Beatty also testified it would not be unexpected for Petitioner to have an increase in complaints while performing his job duties. (PX1, tr. 71).

On September 29, 2015, Dr. Anthony Sudekum testified via evidence deposition. (RX4). Dr. Sudekum testified he holds two board certification, in plastic and reconstructive surgery and also surgery of the upper extremity. (RX4, tr. 5). He also holds a Certificate of Added Qualification of Surgery for the Hands. (RX4, tr. 5). Dr. Sudekum testified his practice focuses on treatment of the upper extremity. (RX4, tr. 5-6). Dr. Sudekum testified he is familiar with and treats patients for lateral epicondylitis. (RX4, tr. 7-9). Lateral epicondylitis is tested for by taking a history, performing a subjective physical examination, and imaging studies. (RX4, tr. 9-11).

Dr. Sudekum testified he performed a physical examination of Petitioner and reviewed medical record. (RX4, tr. 13). Dr. Sudekum testified Petitioner gave him a history of taking apart crates using a ratchet wrench to remove a bolt, when the wrench slipped off the bolt, and his right elbow struck another crate nearby. (RX4, tr. 15). Petitioner indicated there was an acute onset of pain, followed by some transient numbness of the right upper extremity. (RX4, tr. 15). Dr. Sudekum testified he reviewed medical records of Petitioner. (RX4, tr. 16). The x-ray report of Petitioner's right elbow indicated there was no evidence of an acute injury. (RX4, tr. 17). Dr. Sudekum testified he reviewed Dr. Austin's record from August 21, 2012, specifically looking for any indication of acute trauma and he found no evidence of that in the report. (RX4, tr. 18-19). Dr. Sudekum testified he reviewed Dr. Brown's record from October 10, 2012, which indicated Petitioner had a negative objective examination, but a very strongly positive subjective examination, raised concerns of symptom magnification. (RX4, tr. 20-21). He reviewed the EMG by Dr. Newell, which was normal. (RX4, tr. 22). Dr. Sudekum testified he reviewed the actual films of both MRIs done of Petitioner's right elbow. (RX4, tr. 23). Dr. Sudekum testified his findings of the first MRI consisted of very mild tendinosis of the lateral epicondylar tendon. (RX4, tr. 24). These changes were barely visible, if at all, on the second MRI. (RX4, tr. 24).

Dr. Sudekum testified that on physical examination, Petitioner had a resting tremor of his right hand, but no other notable deformity of the right upper extremity. (RX4, tr. 24-25). Petitioner had subjective tenderness of the right lateral epicondylar region with palpation, Tinel's and Phalen's were negative at the wrists and positive at the elbows bilaterally, subjective pain over the right lateral elbow, decreased grip strength on the right, normal pinch strength, and full range of motion. (RX4, tr. 25). There was no objective findings of any abnormality, except for the tremor. (RX4, tr. 26). Dr. Sudekum testified some of Petitioner's findings could be signs of symptom magnification. (RX4, tr. 26).

Dr. Sudekum testified that based on Petitioner's subjective symptoms, Petitioner had a possible diagnosis of posttraumatic lateral epicondylitis; however, this diagnosis is questionable as there were multiple signs of symptom magnification and the MRI findings were slight and could even be considered within normal range. (RX4, tr. 27-28). Dr. Sudekum testified Petitioner did not require any additional treatment for the August 15, 2012 injury and was at maximum medical improvement. (RX4, tr. 29-30). Petitioner is capable of working full duty without restriction. (RX4, tr. 30).

On cross-examination, Dr. Sudekum testified he was asked by the work comp carrier or their attorney to evaluate Petitioner. (RX4, tr. 34). Dr. Sudekum testified he saw Petitioner on the one occasion. (RX4, tr. 35). Dr. Sudekum testified he has reviewed 181 cases for the State of Illinois over a five year period. (RX4, tr. 36-37). Dr. Sudekum testified he also treats employee patients. (RX4, tr. 37-38). Dr. Sudekum testified he gives approximately one deposition every other week. (RX4, tr. 40).

Dr. Sudekum testified that the term tendinosis is a more accurate descriptive term for the pathological condition which is frequently called tennis elbow or lateral epicondylitis. (RX4, tr. 41). Dr. Sudekum testified this is a condition that can result in pain complaints, aching, and throbbing. (RX4, tr. 41). It is rare for it to result in persistent right elbow pain. (RX4, tr. 41). The symptoms usually resolve the vast majority of time. (RX4, tr. 41-42). Dr. Sudekum testified it can cause radiating pain down the arm, but not numbness in the fingers. (RX4, tr. 42). Dr. Sudekum testified lateral epicondylitis can be aggravated by lifting and other physical activities. (RX4, tr. 42-43). The symptoms can wax and wane. (RX4, tr. 43). Dr. Sudekum testified that Petitioner had been consistently diagnosed with lateral epicondylitis consistently based on his subjective complaints. (RX4, tr. 43-44). Dr. Sudekum testified there was inconsistency in Petitioner's presentation and symptomatology to Dr. Beatty as compared to Dr. Brown. (RX4, tr. 44-45). Dr. Sudekum testified Petitioner did complain of right elbow pain radiating down his arm to Dr. Beatty. (RX4, tr. 45).

Dr. Sudekum testified Petitioner complained of right elbow pain down his arm to him. (RX4, tr. 45). Petitioner had a positive Tinel's test at both elbows, but that is a normal finding at the elbow. (RX4, tr. 46). Dr. Sudekum testified the findings of his subjective physical examination were consistent with lateral epicondylitis, except for the loss of grip strength. (RX4, tr. 46-49). The findings are subjective because they are dependent on the patient's responses to testing. (RX4, tr. 47-49). Dr. Sudekum testified Petitioner's elbow condition could be a chronic condition that may predate the August 15, 2012 injury as the MRI indicated there may be an old fracture. (RX4, tr. 50-52). Dr. Sudekum testified he identified possible lateral epicondylar tendinosis on Petitioner's 2012 MRI, but it could also fall within the normal variant. (RX4, tr. 56-57).

Dr. Sudekum testified that in the MRIs he reviewed, the second one was slightly better than the first in the lateral epicondylar tendon and he would not recommend surgery. (RX4, tr. 59). Dr. Sudekum testified he mentioned in his report Petitioner's anger and dissatisfaction with his

medical treatment, but could not recall if he discussed it directly with Petitioner. (RX4, tr. 60). He testified this is a red flag for this patient. (RX4, tr. 61).

On re-direct, Dr. Sudekum testified that while Petitioner consistently had the same complaints, all of his complaints were subjective. (RX4, tr. 62). Dr. Sudekum testified that lateral epicondylitis usually resolves within months, even posttraumatic lateral epicondylitis. (RX4, tr. 62). He further testified that given Petitioner's lack of objective findings at the time of his initial evaluation, no swelling, no abrasion, no laceration, he would certainly have expected the effects of the actual event to have resolved long before he saw Petitioner. (RX4, tr. 62).

Petitioner testified to multiple jobs he held after his employment with Pepsi. These include the electronic section at Aisin, where he was for just under a year because he found a better position. He then worked at a metal workshop at KRN Laser. Petitioner testified in December 2015 then moved to Denver Colorado for a position he was offered as a bus driver, but he was unable to pass the test to get the job. Petitioner then worked for a company as a forklift driver for about six months before the company closed. Petitioner testified he then worked at a roofing job for a little over a year in Colorado. Petitioner then worked for a medical supply company before moving back to Illinois in August 2017. Petitioner testified he has not worked since then. Petitioner testified he had some difficulty performing his job duties in these positions due to pain and weakness in his right arm.

Petitioner testified that currently he still gets numbness and weakness in his right arm. The numbness and weakness will extend down to his hand. Petitioner testified he still experiences pain in his arm quite frequently. Petitioner testified activities of normal life make the pain worse in his right arm. Petitioner testified he tries to lift and carry things with his left arm over his right arm. Petitioner testified carrying groceries and washing dishes hurts his right elbow. Petitioner testified he has trouble with overhead lifting, grasping, gripping and he finger gets stuck with writing. Petitioner testified he no longer participates in recreational activities like jogging or lifting weights because of his arm. Petitioner testified he takes over the counter medication approximately three times a week for his right elbow.

Respondent called Jeni Batson as a witness. Ms. Batson testified she is employed at SIU as the workers' compensation and disability coordinator. In her position, she is familiar with and keeps the files for employees' workers' compensation claims. Ms. Batson testified she is familiar with Petitioner's file and has his employment contract. Ms. Batson testified Petitioner's contract

dates were May 29, 2012 through September 28, 2012 and the last date he worked was August 21, 2012. Ms. Batson testified Petitioner was paid TTD benefits from August 22, 2012 through January 27, 2013 at the rate of $231.22. On cross-examination, Ms. Batson testified the TTD check was sent on July 10, 2013.

The Arbitrator did not find the testimony of Petitioner to be credible.

Conclusions of Law

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

The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992). "Liability under the Workmen's Compensation Act may not be based on imagination, speculation, or conjecture, but must have a foundation of facts established by a preponderance of the evidence..." *Shell Petroleum Corp. v. Industrial Commission*, 10 N.E.2d 352 (1937).

With Respect To Issue (F) Whether the Petitioner's Current Condition of Ill-being is Causally Related to the Injury, the Arbitrator Finds as follows:

An accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665, 672 (2003).

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the credible evidence that his right elbow condition up to January 16, 2013, the date of discharge from Dr. Brown, was causally connected to his work injury of August 15, 2012. Petitioner failed to prove by the preponderance of the evidence that his current condition of ill-being, after January 16, 2013, was causally connected to his work injury of August 15, 2012, as set forth more fully below.

Petitioner's accident consists of sticking his elbow on a crate. The medical records, at the time of his initial evaluation, showed no swelling, no abrasion, no laceration, and the x-rays were negative. Shortly thereafter, Petitioner began treating with an orthopedist, Dr. Brown, noted that "several aspects of his [Petitioner's] exam were concerning for some symptom magnification" and "the dramatic nature of his [Petitioner's] responses were somewhat concerning." When Dr. Brown

saw Petitioner again on January 16, 2013, he indicated Petitioner's physical examination was normal, MRI was normal, EMG was normal. Dr. Brown noted that Petitioner had no medial tenderness, the Tinel's test was negative, there was no anterior joint tenderness, no distal bicep tenderness, no triceps tenderness, no olecranon tenderness, no radial head tenderness, and no crepitus. Petitioner had full flexion, full extension, full pronation and supination. Petitioner was found to be neurologically intact distally and he had no laxity with varus-valgus stress at 0 or 30 degrees. Petitioner had no pain with hyperextension. Petitioner underwent an EMG which was normal. Dr. Brown also reviewed an MRI of Petitioner's right elbow, which he characterized as normal. Dr. Brown diagnosed Petitioner with resolving tennis elbow and fully resolved cubital tunnel syndrome. Dr. Brown released Petitioner to return to work full duty in two to three weeks and follow up as necessary. On February 1, 2013, Petitioner saw Dr. Grandhi, for an unrelated matter, and did not make any right elbow complaints. (PX3).

Dr. Brown's findings are consistent with the findings of Dr. Sudekum, who performed a Section 12 examination. Dr. Sudekum, who opined that based on Petitioner's subjective symptoms, he had a possible diagnosis of posttraumatic lateral epicondylitis; however, the diagnosis is questionable as there were multiple signs of symptom magnification and the MRI findings were slight. Also, Petitioner current complaints include numbness. Dr. Sudekum and Dr. Beatty testified numbness is not a symptom of lateral epicondylitis.

The Arbitrator finds the opinions of Dr. Sudekum more reliable than the opinions of Dr. Beatty. Dr. Sudekum holds a Certificate of Added Qualification of Surgery for the Hands, a certification Dr. Beatty does not hold. Dr. Beatty examined Petitioner almost two years after Petitioner's injury, long after Dr. Brown released him from care. Dr. Beatty refused to answer questions regarding the possibility Petitioner reinjured himself and indicated that the fact multiple other doctors raised concerns regarding symptom magnification did not affect his opinions.

Dr. Sudekum not only reviewed Petitioner's medical records, but also reviewed the actual films of the imaging studies. Dr. Beatty admitted that he did not and solely relied on the reports. Dr. Sudekum explained that while Petitioner's complaints were fairly consistent, these complaints were subjective. He further explained that the testing done during physical examinations are subjective, as well, as they are reliant on the patient's responses. This is more persuasive than Dr. Beatty's claim that his physical examination findings were objective, as the testing he did relied on Petitioner indicating if he experienced pain. In reviewing the medical records, it is clear that all

objective testing done: x-rays, MRIs, and EMGs, were unremarkable, the only positive findings were Petitioner's subjective complaints. Based on the foregoing, Dr. Beatty's opinion is given little weight.

The Arbitrator did not find Petitioner's testimony to be credible. The Arbitrator notes numerous inconsistencies between the records and Petitioner's testimony, including:

- When Petitioner went to Urgent Care two days after the injury, he indicated he initially did not have any pain, but began experiencing pain the next afternoon. Later, Petitioner claims to have experienced an immediate onset of pain.

- Petitioner testified he received little to no improvement after completing occupational therapy, but Dr. Brown's January 16, 2013 record indicates Petitioner was no longer having ulnar nerve pain, medial or anterior pain, and was significantly improved.

- Petitioner testified he did not injure his arm more at Pepsi, but was having problems at Pepsi due to the injury at SIU. However, Petitioner told his occupational therapist he had reinjured his arm. Further, Petitioner filed a workers' compensation claim against Pepsi and emailed his manager indicating he injured himself while working at Pepsi.

- Petitioner also testified he told Pepsi about his elbow injury and "explained in great detail on the application" about his condition. However, Petitioner's application is contained in Petitioner's Exhibit 12 and contains no mention whatsoever of his prior elbow injury.

- Petitioner testified that he cannot seek treatment for his right elbow because he has no personal insurance to pay for treatment. However, this is inconsistent with his medical records which show he has treated extensively for other non-related conditions and undergone expensive testing and treatment for these conditions including MRIs, cat scans, and injections.

- Petitioner testified carrying groceries and washing dishes were difficult and caused him pain in his right elbow. The Arbitrator finds this hard to believe as Petitioner held many labor intensive positions after this injury occurred, including forklift operator and roofer, which he testified he was able to perform all of the job duties he was hired to do.

Based upon the foregoing, the Arbitrator finds that Petitioner did not prove his current condition of ill-being, after January 16, 2013, is causally related to the alleged injury.

With Respect to Issue (J), Were The Medical Services Provided to Petitioner Reasonable and Necessary and, if so, has Respondent Paid all Appropriate Charges, the Arbitrator Finds as Follows:

Pursuant to Section 8(a) of the Act, the employer shall pay all necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services which are reasonably required to cure or relieve the employee from the effects of the accidental injury.

Petitioner sustained a sustained a mild contusion to the right lateral elbow and possibly mild lateral epicondylitis due to the August 15, 2012 injury. Petitioner's treating orthopedist, Dr. Brown, released Petitioner back to work, full duty, and from care on January 16, 2013.

Based on the foregoing, the Arbitrator finds that medical treatment received though January 16, 2016 was reasonable and reasonably required to cure or relieve Petitioner from the effects of his injury. As such, Petitioner is awarded all medical bills for treatment for Petitioner's right elbow through January 16, 2013. Any bills for dates of service after January 16, 2013 are hereby denied.

With Respect to Issue (L), the Nature and Extent of Petitioner's injury, the Arbitrator finds as Follows:

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability ("PPD"), 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 include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:

(i) The reported level of impairment;

(ii) The occupation of the injured employee;

(iii) The age of the employee at the time of injury;

(iv) The employee's future earning capacity; and

(v) Evidence of disability corroborated by medical records.

With Respect to 8.1b(b)(i), no AMA Rating was admitted into evidence. Therefore, the Arbitrator gives no weight to this factor.

With respect to 8.1b(b)(ii), the Petitioner was employed as a temporary maintenance worker. Petitioner also cleaned the outside and inside of buildings. There was no evidence submitted that Petitioner's job involved heavy duty work or significant lifting. The Arbitrator finds that this factor weighs in favor of decreased permanence.

With Respect to 8.1b(b)(iii), the Petitioner was 41 years old. He is very young and will have to live and work with his disabilities for a considerable number of years. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016), (wherein the Commission concluded that greater weight should have been given to the fact that Petitioner was younger (46) and would have to work with his disability for an extended period of time), the Arbitrator finds that this factor weighs in favor of increased permanence.

With Respect to 8.1b(b)(iv), there was no evidence that Petitioner sustained any earnings impairment as a result of the accident. As such, the Arbitrator finds that this factor weighs in favor of decreased permanence.

With Respect to 8.1b(b)(v), The medical records do not corroborate Petitioner's complaints. Petitioner testified that he currently experiences numbness and weakness in his right arm that extends down to his hand. Petitioner testified he still experiences pain in his arm frequently. Petitioner testified carrying groceries and washing dishes hurts his right elbow and he has trouble with overhead lifting, grasping, and gripping. Petitioner's complaints are not supported by the records. Petitioner has not sought treatment for his right elbow in over four years. All of his objective studies were unremarkable and multiple doctors raised concerns regarding symptom magnification. Further, there were multiple inconsistencies in Petitioner's testimony which places doubt on the credibility of his subjective complaints. As such, the Arbitrator finds that this factor weighs in favor of decreased permanence. Petitioner was diagnosed with a mild contusion to the right lateral elbow and possibly mild lateral epicondylitis and underwent conservative treatment. While Petitioner testified of continued symptoms due to this injury, these are not corroborated by the evidence admitted at trial.

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 8% loss of use a right arm, pursuant to Section 8(e)(10) of the Act and awards Petitioner permanent partial disability benefits of $286.00/week for 20.24 weeks.

In Support of the Arbitrator's Decision Regarding Issue (N), Whether Respondent is Due a Credit, the Arbitrator finds as follows:

Respondent is claiming a credit of $2,000.00 for the settlement of Case No: 13 WC 34889 which involves an injury to Petitioner's right arm on January 8, 2013. The Terms of Settlement

does not state that the settlement was made pursuant to Section 8(e)(10) of the Act. No percentage of loss of use of a right arm was allocated under the terms of the Terms of Settlement.

Section 8(e) of the Act provides a schedule of compensation of injuries to any of 15 different specified body parts including the "arm". 820 ILCS 305/8(e)(1) (West 2008). For purposes of compensation under section 8(e)(10) of the Act, the "arm" has been defined as "the segment of the upper limb between the shoulder and the elbow" or "between the shoulder and the wrist". *Will County Forest Preserve v. Illinois Workers' Comp. Comm'n*, 970 N.E.2d 16 (3rd Dist. 2012). Section 8(e)(17) of the Act provides that, for the "permanent loss of use, or the permanent partial loss of use of" a "hand, arm, thumb or fingers, leg, foot or any toes" for which compensation has been pain, subsequent injury". The credit under this section of the Act is mandatory. *General Motors Corp, Fisher Body Division v. Industrial Comm'n*, 62 Ill.2d 106, 112-113 (175). The credit is due whether the prior compensation was paid pursuant to an award by the Commission or pursuant to a settlement contract. *Id.* It is well settled that a settlement contact, approved by the Commission is a final award of the Commission for all legal effects, including credits due in later awards and the ability to collaterally attack the agreement. *See Harrison Sheet Steel Co. v. Industrial Comm'n*, 404 Ill. 557, 565 (1950); *Michelson v. Industrial Comm'n*, 375 Ill. 462 (1941).

In this case, Petitioner received a settlement of $2,000.00 but the Terms of Settlement does not state that the settlement was paid pursuant to Section 8(e)(10) of the Act nor does the settlement allocate a percentage of permanence for loss of use of a right arm. The Terms of Settlement states that "*This settlement includes liability for TTD, TPD, PPD and maintenance, for all of which Petitioner expressly assumes responsibility*". (RX 5). A settlement contract, approved by the Commission, is a final award of the Commission for all legal effects, including credits due in later awards and the ability to collaterally attack the agreement. As such, the Arbitrator finds that Respondent is not entitled to a credit of $2,000.00 because the settlement, on its face, was not made pursuant to Section 8(e)(10) of Act and the contract did not find a percentage loss of use a right arm. The settlement included liability for TTD, TPD, PPD and maintenance. To interpret the terms of the prior settlement contract differently would be the equivalent of giving a different legal effect of an existing or prior final award.

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 Maintenance, Permanent Disability	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSEPH SALAS, JR.,

Petitioner,

vs. NO: 05 WC 55398

CITY OF CHICAGO, DEPARTMENT OF TRANSPORTATION,

Respondent.

20IWCC0292

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 causation, temporary disability, and permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Maintenance/Permanent Total Disability

The Majority agrees with the Arbitrator's finding that Petitioner is entitled to maintenance benefits commencing on January 4, 2008. We believe the Arbitrator provided a thorough analysis, made reasonable assumptions, and articulated his conclusions well; we write to expand on the decision relative to the award of maintenance benefits.

The dissenting Commissioner would vacate the award of maintenance benefits from January 4, 2008 through February 10, 2009 based upon the holding in *Euclid Beverage v. Illinois Workers' Compensation Comm'n*, 2019 IL App (2d) 180090WC. However, the Majority is of the opinion that *Euclid Beverage* is clearly distinguishable from the present case.

In *Euclid,* the court was asked to determine whether the Commission erred in awarding maintenance benefits to the petitioner. The court found that petitioner was not entitled to maintenance benefits as petitioner never sought or gained employment following his termination. The court, therefore, found that rehabilitation would be neither mandatory nor appropriate as petitioner did not show an intention to return to work, although he was capable, as evidenced by the doctor's note releasing the petitioner to work with work restrictions. The court held that Euclid's obligation to provide maintenance was never triggered as it was undisputed that the petitioner did not enroll in a vocational rehabilitation program or engage in a self-directed job search after Euclid terminated his TTD benefits on April 24, 2012.

The Court also found that in such a case, the employer was not required to prepare a written vocational assessment pursuant to Commission Rule 7110.10 (Now 9110.10). The Court implied that considering their finding that the petitioner removed himself from employability, a vocational assessment was unnecessary. *Euclid Beverage,* 2019 IL App (2d) 180090, ¶31-32.

In the present case, the Petitioner was placed at maximum medical improvement (MMI) on January 3, 2008 and given permanent restrictions that precluded him from his prior occupation. The Petitioner was then examined by Dr. Chmell on August 7, 2008. Dr. Chmell opined that the Petitioner could never "return to the type of work he was performing before as a concrete finisher." Thereafter, Petitioner underwent a vocational rehabilitation evaluation with Steve Blumenthal on February 11, 2009. Mr. Blumenthal noted that Petitioner could perform some jobs if the City was able to accommodate his restrictions; otherwise, he was a candidate for vocational rehabilitation. There is no evidence that the City chose to accommodate Petitioner's work restrictions despite having a very large workforce as noted by the Arbitrator.

Also, it is clear that no vocational assessment pursuant to the above referenced Commission Rule was ever done, though the evidence shows that it was not only appropriate but required. On January 3, 2008, Dr. Diadula of MercyWorks, the provider to whom the Petitioner was sent by his employer, prescribed permanent restrictions which would prevent the Petitioner from resuming his regular work duties. Instead of starting the vocational process, the Respondent chose to just continue TTD benefits. The Petitioner was left to start the process and his subsequent actions were reasonable. After receiving two sets of restrictions, one from Dr. Sporer on December 14, 2007 and the above from Dr. Diadula, we believe it was reasonable for the Petitioner to seek an independent medical examination. Once that was received, it was appropriate to engage Mr. Blumenthal for a vocational assessment.

We agree with the Arbitrator that once the Petitioner was determined to have reached maximum medical improvement, ending his right to TTD benefits, his right to vocational help and maintenance benefits began.

The Arbitrator awarded maintenance benefits through August 15, 2018, the date of hearing, with permanent total disability benefits pursuant to Section 8(f) to commence on August 16, 2018. The Commission views the evidence regarding Petitioner's date of permanent and total disability differently. The Commission observes Mr. Blumenthal issued a supplemental report on December 5, 2017. Therein, upon reviewing the Coventry vocational reports, Mr. Blumenthal noted the records reflect Petitioner diligently participated in five years of vocational

rehabilitation efforts yet remained unemployed and hindered by major barriers to employment. Significantly, Mr. Blumenthal concluded Petitioner was no longer a viable vocational candidate as he was not employable in any capacity in a stable labor market. PX11. The Commission finds Mr. Blumenthal's opinions are credible and persuasive, and we rely on the December 5, 2017 report to find Petitioner was thereafter permanently and totally disabled pursuant to the odd-lot theory.

The Commission awards permanent total disability benefits commencing on December 6, 2017. The Commission vacates the award of maintenance benefits from December 6, 2017 through August 15, 2018.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 26, 2019, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's left knee condition of ill-being is causally related to the December 7, 2005 accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $936.38 per week for a period of 108 weeks, representing December 9, 2005 through January 3, 2008, 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 maintenance benefits of $936.38 per week for a period of 517 5/7 weeks, representing January 4, 2008 through December 5, 2017, as provided in §8(a) of the Act. The award of maintenance benefits from representing December 6, 2017 through August 15, 2018 is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $618,100.64 for temporary total disability and maintenance benefits that have been paid by Respondent through the hearing date.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent total disability benefits of $936.38 per week for life, commencing on December 6, 2017, as provided in §8(f) of the Act. Commencing on the second July 15 after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in §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.

20IWCC0292

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. 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 Mathis

D. Douglas McCarthy

SPECIAL CONCURRENCE/DISSENT

I concur with the majority's opinion in all aspects other than the award of maintenance benefits for the time period of January 4, 2008 through February 10, 2009. I would vacate the benefits awarded for this time period and allow a credit to Respondent for payment of such benefits.

On November 27, 2007, Petitioner underwent a Functional Capacity Evaluation (FCE) which evidenced Petitioner was able to return to work with certain restrictions. PX6. On January 3, 2008, Dr. Diadula evaluated Petitioner at which time he was placed at maximum medical improvement (MMI) and released to return to work within the parameters of the previously performed FCE. PX1. Petitioner was unable to return to his prior job with the restrictions. T. 41. Thereafter, on February 11, 2009, Mr. Steven Blumenthal, a certified vocational counselor, met with Petitioner at his attorney's request. T. 49. Mr. Blumenthal authored a vocational report identifying potentially available jobs, and a request was tendered to Respondent for vocational retraining. T. 49. Vocational retraining subsequently commenced on a periodic basis and then in earnest as of May 8, 2012. (Respondent conceded its obligation for payment of maintenance benefits as of May 8, 2012). Once initiated Petitioner fully cooperated with the vocational rehabilitation process as noted by the majority.

The record, though, is devoid of any evidence regarding vocational rehabilitation for the period of January 4, 2008 (date of MMI) through February 11, 2009 (meeting with vocational counselor). The majority concedes as much in adopting the Arbitrator's decision which states as follows: "The Respondent has a reasonable argument here given the large gap between January 2008 and the start of vocational services in 2012. However, based on the services provided, it does not appear to the Arbitrator that anything would be different in a *2009 to 2012* job search. (emphasis added)" *Arbitration Decision, p. 11.*

Section 8(a) of the Act requires an employer to pay for all "costs and expenses incidental to the vocational rehabilitation program." *820 ILCS 305/8(a)* (West 2013). An employee is entitled to vocational rehabilitation where the work-related injury causes a reduction in his

20IWCC0292

earning power, and vocational rehabilitation may increase such potential earning power. *Id.* Merely sustaining an injury which results in restrictions which precludes the employee from returning to his pre-injury job does not automatically entitle such employee to vocational rehabilitation. "Since maintenance is awarded incidental to vocational rehabilitation, an employer is obligated to pay maintenance only 'while a claimant is engaged in a prescribed vocational-rehabilitation program.' *W.B. Olson, Inc.*, 2012 IL App (1st) 113129WC, ¶ 39.'" *Euclid Beverage v. Illinois Workers' Compensation Commission*, 2019 IL App (2d) 180090WC, ¶ 29. A prescribed rehabilitation program may include an employee's self-directed job search. *Id.* at ¶ 30.

Here, the record is devoid of any evidence that Petitioner was participating in a vocational program, either prescribed or self-directed during the period of January 4, 2008 through February 10, 2009. As such, Respondent had no obligation to pay benefits for this period of time and the same should be vacated with a credit to Respondent.

For the reasons stated above, I dissent as to the award of benefits.

DATED: MAY 22 2020

L. Elizabeth Coppoletti

LEC

D: 4/15/2020

43

References

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SALAS JR, JOSEPH
Employee/Petitioner

Case# **05WC055398**

CITY OF CHICAGO/DEPT OF TRANSPORTATION
Employer/Respondent

20IWCC0292

On 3/26/2019, 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 2.41% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0494 JOSEPH J SPINGOLA LTD
1314 KENSINGTON
SUITE 3843
OAK BROOK, IL 60522

0766 HENNESSY & ROACH PC
AUKSE R GRIGALIUNAS
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

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

JOSEPH SALAS JR.
Employee/Petitioner

v.

CITY OF CHICAGO / DEPARTMENT OF TRANSPORTATION
Employer/Respondent

Case # **05** WC **55398**

Consolidated cases: _____

20IWCC0292

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 **Paul Cellini**, Arbitrator of the Commission, in the city of **Chicago**, on **August 15, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] 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 **December 7, 2005**, 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 $**73,037.64**; the average weekly wage was $**1,404.57**.

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.

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

Respondent shall be given a credit of $**161,713.92** for TTD, $**0** for TPD, $**456,386.72** for maintenance, and $**0** for other benefits, for a total credit of $**618,100.64**.

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

ORDER

The Arbitrator finds that the Petitioner's left knee condition is causally related to the December 7, 2005 accident.

Respondent shall pay Petitioner temporary total disability benefits of **$936.38 per week** for **108 weeks**, commencing **December 9, 2005 through January 3, 2008**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of **$936.38 per week** for **553-6/7 weeks**, commencing **January 4, 2008 through August 15, 2018**, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of **$618,100.64** for temporary total disability and maintenance benefits that have been paid by Respondent through the hearing date.

Respondent shall pay Petitioner permanent and total disability benefits of $**936.38** per week for life, commencing **August 16, 2018**, as provided in Section 8(f) of the Act.

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

Respondent shall pay Petitioner compensation that has accrued from **December 7, 2005** through **August 15, 2018**, 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

March 21, 2019
Date

MAR 26 2019

STATEMENT OF FACTS

Petitioner, 64 years old at the time of the hearing, testified that he began working for the Respondent in July 1991. He was not working at the time of the hearing but testified that he remains an employee of the Department of Transportation. He previously worked in the curb and gutter section, which is now called "in-house construction." Petitioner testified he was a working foreman of cement finishers. The only difference from a laborer is that he would do the paperwork, and he earned an extra $.50 per hour. He is right hand dominant.

Petitioner testified the curb and gutter job involved going out to locations to provide framing for cement pours. This included pounding in stakes, nailing boards to the stakes and then using a 20-pound maul to make sure the boards were seated properly. He and co-workers would then put stone into the framed area and tamp it down. Laborers would pour the cement with wheelbarrows. Petitioner testified he would get on his knees to sweep off the excess cement and would use a float to smooth the surface. He would then get back on his knees and strike off more cement and smooth the cement again using an edger on the entire side areas of the pour. He then would use a jointer to install joints every six feet. He again would work on his knees using a hand trowel to do a final finish of the concrete surface and would reach as far as he could to do so. He then would again have to re-edge it and redo the joints. This work would be performed to build curbs, gutters, intersections and sidewalks and portions of alleys.

Petitioner testified that he had a prior workers' compensation claim involving his right knee that was resolved. The current case involves the left knee.

On the date of accident, 12/7/05, Petitioner testified he was replacing new curbs at Damen and Grand with co-workers Joe Russo and "Larry". They were installing a curb backboard below grade, using boards to contain the concrete pour. He testified it was icy out and while using a maul to pound the stakes into the ground he slipped and twisted his left knee. He was able to complete his shift, but after that his knee swelled up, especially after he got into warmer temperatures.

Petitioner testified he initially sought treatment the next afternoon at MercyWorks, the facility the Respondent directs its employees to for treatment. On 12/8/05, Petitioner complained of swelling and worsening left knee pain (9/10). Petitioner noted he'd undergone right knee surgery 7 to 8 years prior for a meniscal tear. X-ray revealed extensive chondrocalcinosis involving the menisci and hyaline cartilage. A left knee sprain was

diagnosed, medication and an Ace wrap were prescribed, and Petitioner was referred to physical therapy. Petitioner was held off work. (Px1; Px2).

On 12/15/05, Dr. Marino (MercyWorks) noted left knee x-rays showed extensive chondrocalcinosis and advised Petitioner to follow up for this with his primary provider. On 12/21/05, Petitioner noted some improvement (7/10 pain) but with popping in the knee. A left knee MRI was prescribed and he was continued off work. The MRI report from 12/29/05 indicated findings of a tiny knee joint effusion, mild areas of medical and lateral compartment cartilage thinning, intact ligaments, possible mild anterior patellar tendinopathy versus local trauma, and signal at the lateral and medial menisci that could be related to myxoid degeneration and/or underlying chondrocalcinosis. Some tiny tears or fraying of the lateral meniscus could not be entirely excluded, but no large meniscal tears were seen. On 1/5/06, Dr. Marino referred Petitioner to orthopedic surgeon Dr. Maday at Midland Orthopedics to rule out internal knee derangement. (Px1).

Petitioner saw Dr. Maday on 1/11/06, reporting posterior left knee pain since the work accident. He denied any prior history of significant left knee problems. Following his exam, Dr. Maday diagnosed a left hamstring injury, noting he did not believe Petitioner's symptoms were due to any findings indicated in the left knee MRI. He prescribed Flexeril and a hamstring-focused course of therapy. (Px2).

On 1/11/06, Dr. Marino referred Petitioner to therapy and continued him off work. (Px1). On 1/25/06, Petitioner complained to Dr. Maday of increasing pain with therapy, which Dr. Maday reported was in the left hamstring and calf. He questioned Petitioner's pain levels given the MRI and objective exam findings, changed the therapy regimen and prescribed Neurontin. (Px2).

On 2/8/06, Petitioner reported his pain had decreased and his knee was more mobile, but still had posterior knee pain. Three more weeks of therapy were prescribed to be followed by a possible FCE. (Px2). At MercyWorks on 2/8/06, Petitioner indicated he wanted a second opinion with orthopedic surgeon Dr. Sawchyn, whose office he testified was near his home. (Px1).

On 2/20/06, Dr. Sawchyn noted mildly reduced left knee extension and some medical joint line tenderness. After he reviewed the MRI, he prescribed injections and continued therapy and off work status. (Px3). Petitioner also continued to follow up at MercyWorks. (Px1). On 3/13/06, Petitioner reported that Dr. Sawchyn's 2/27/06 injection only helped for a day or two before he returned to his baseline condition. At that point, given Petitioner had undergone conservative treatment, arthroscopic surgery was prescribed. (Px3).

The 4/7/06 surgery involved anterior synovectomy, partial medial and lateral meniscectomies, and shaving of the medial femoral condyle and the lateral tibial plateau. Post-operative diagnoses of Dr. Sawchyn were medial and lateral meniscus tears and degenerative arthritis. (Px3).

After testing to rule out deep vein thrombosis based on Petitioner's post-surgical calf complaints, Dr. Sawchyn on 4/19/06 prescribed therapy. Petitioner continued to follow-up with Dr. Sawchyn and MercyWorks into June 2006, noting improvement. On 6/28/06, Dr. Sawchyn felt that Petitioner had plateaued in therapy but continued to complain of left calf pain. (Px3). An MRI was obtained on 7/11/06 which indicated no abnormalities at the site of calf discomfort but there was small knee joint effusion. On 7/17/06, Dr. Sawchyn prescribed work conditioning, however on 8/7/06 he noted Petitioner reported having hypertension and dizzy spell issues and was undergoing a cardiac work-up, putting work conditioning on hold. Petitioner testified he passed out at one point in work conditioning and was taken to the ER, but that he then resumed and completed the work conditioning program. On 9/18/06, Dr. Sawchyn noted Petitioner was making slow progress in therapy and

"seems to be trying." He reported his main problem was with kneeling, and Dr. Sawchyn ordered a repeat left knee MRI and continued work conditioning. (Px3).

A repeat MRI on 9/21/06 reflected increased signal in the posterior horn of the medial meniscus compatible with a tear, as well as joint effusion. Petitioner returned to Dr. Sawchyn on 10/9/06, who prescribed a second surgery based on the tear seen on MRI. (Px3).

Petitioner then obtained a second opinion from Dr. Verma on 11/2/06. Petitioner reported he failed to progress in post-operative work conditioning and developed recurrent medial pain and knee swelling. He remained off work. Dr. Verma noted a small effusion on exam and significant chondrocalcinosis on x-ray. He agreed with the radiologist's review of the post-operative MRI. Petitioner was given the option of living with it, getting an injection and medication, or surgery, and Petitioner opted for surgery. Dr. Verma noted that if Petitioner had significant degeneration in the knee he could end up worse, and: "At this point, it is difficult for me to predict whether he will return to his normal heavy labor position." (Px4).

Dr. Verma performed surgery on 12/8/06. On 12/21/06, Dr. Verma noted he did find a small recurrent medial meniscus tear, but more significantly there was diffuse chondral disease in the medial compartment and patellofemoral joint, but no loose bodies. Petitioner reported slow improvement but ongoing pain. Dr. Verma believed most of the ongoing symptoms were due to the chondral disease and that it was unlikely that Petitioner would be able to return to his regular work duties. He indicated Petitioner's only remaining options would be to live with the condition and obtain a functional capacity evaluation (FCE) or to undergo a knee replacement surgery. Therapy was prescribed and Petitioner was continued of work. (Px4). Petitioner continued to follow up at MercyWorks as well. (Px1).

On 1/2/07 Petitioner's therapist noted Petitioner had ongoing pain and that he reported his regular job involved significant prolonged kneeling and squatting. On 2/12/07, Petitioner continued to note pain and limitation of motion but overall improvement. Dr. Verma released Petitioner to seated sedentary work duties. (Px4).

On 4/12/07, Athletico indicated Petitioner had undergone 32 visits but did not meet all his therapy goals, so he was discharged by Dr. Verma and provided with a home exercise program protocol. On that same date, Dr. Verma noted Petitioner reported ongoing severe pain, difficulty walking and "a constant discomfort requiring narcotic analgesics." Dr. Verma noted that "it does seem that his subjective complaints to some degree are out of proportion with his objective findings", but that his only real option was knee replacement, as he had reached maximum post-surgical improvement. He advanced Petitioner's restrictions to intermittent standing and walking four hours per day, no lifting over 10 pound and no squatting, kneeling or stairs. (Px4).

Petitioner testified and Dr. Verma's report reflects that he was referred for a total knee replacement consultation with Dr. Sporer. On 5/11/07, Dr. Sporer noted Petitioner reported 6/10 pain and difficulty with prolonged walking and standing. Dr. Sporer also noted Petitioner had a longstanding history of chondrocalcinosis and that Dr. Verma reported significant grade 4 changes were seen throughout the left knee during surgery. He recommended total knee arthroplasty as Petitioner's only option other than living with his condition. (Px5).

Petitioner underwent total left knee replacement with Dr. Sporer on 7/30/07. (Px5). He continued to follow up with both Dr. Sporer and MercyWorks post-operatively. Formal therapy was instituted on or about 8/15/07 and continued into October 2007. 9/12/07 x-rays noted the components were positioned well. On 10/10/17, Dr. Sporer noted significant improvement in range of motion and that Petitioner was only taking pain medication intermittently. Work conditioning was recommended, and on 11/14/07 Petitioner was participating and

indicated he was much better since surgery but still had significant pain, swelling and fatigue. An FCE was ordered. (Px5).

The FCE was performed on 11/27/07 at Athletico. The report noted Petitioner's job required a heavy physical demand level and that testing indicated he was limited to the light physical demand level. Limitations were noted for a variety of activities and Petitioner was noted to be from the light to the medium demand levels. The report also noted Petitioner's subjective complaints of pain and disability suggested he was functioning at a lower level than what was demonstrated, and that a questionnaire reflected inappropriate illness behavior with a perceived strength level of less than sedentary. His subjective pain ratings however were noted to be consistent with his objective findings. The report stated: "Overall test findings, in combination with clinical observations, suggest the presence of good physical effort on Mr. Salas' behalf. In describing sub-maximal effort, this evaluator is by no means implying intent. Rather, it is simply stated that Mr. Salas can do more physically at times than was demonstrated during this testing day. Any final vocational or rehabilitation decisions for Mr. Salas should be made with this in mind." Additionally, these findings and observations suggested some minor inconsistency to the reliability/accuracy of Petitioner's subjective reports of pain/limitations. Again, the therapist noted this determination did not imply intent but rather that Petitioner was capable of more than he stated or perceived. (Px6).

Petitioner testified that Dr. Sporer and MercyWorks were advised of the restrictions indicated by the FCE testing.

At the last visit with Dr. Sporer on 12/14/07, the doctor opined Petitioner would reach maximum medical improvement (MMI) 6 months post-surgery and would be seen back in six months for evaluation and x-rays. Petitioner reported a sense of stiffness in the anterior and lateral knee but that his pain was much improved. Dr. Sporer recommended no prolonged kneeling, repetitive stooping or bending and otherwise no other long-term restrictions. (Px5). There was no record of a six month follow up in the submitted evidence.

On 1/3/08, Dr. Diadula of MercyWorks released Petitioner at MMI with restrictions of: 1) lifting: floor to knuckle 20 pounds, shin to knuckle 25 pounds, knuckle to shoulder 35 pounds, shoulder to overhead 35 pounds; 2) carry 30 pounds for a distance of 25 feet; 3) pushing: 60 pounds for 25 feet; 4) pulling 40 pounds for 25 feet; 5) no repetitive bending and stooping; 6) no kneeling. (Px1). Petitioner testified that these restrictions would not allow him to return to his regular duty work.

Petitioner's attorney had him evaluated by orthopedic surgeon Dr. Chmell on 8/7/08. Petitioner reported difficulty with prolonged walking, use of stairs and an inability to kneel. On exam, he had a limp, some left knee effusion and swelling, diminished extension (5 degrees) and some weakness versus the right side. Leg lengths were equal. Petitioner denied any prior left knee problems. Dr. Chmell's diagnoses were: 1) torn medial and lateral menisci post-meniscectomies, 2) traumatic aggravation of degenerative arthritis post-shaving of the medial femoral condyle and lateral tibial plateau, 3) traumatic arthritis secondary to numbers 1 and 2 post-total knee replacement. He opined that Petitioner was unable to return to his regular job and was limited to the light level per the FCE, though he did not indicate whether he was aware of Petitioner's regular job duties. (Px7).

Petitioner continued to follow up with MercyWorks through 10/1/15. (Px1).

In 2009, Petitioner's attorney referred him to vocational counselor Steve Blumenthal for a vocational assessment. Mr. Blumenthal's 2/11/09 report noted Dr. Diadula's restrictions. He noted that while "the FCE and his physicians" rated Petitioner at the light work level, "his limitations on ambulating or using his lower extremities as self-reported and documented by the FCE of 11/27/07 indicate that he will require a sedentary job

with limited standing and walking as opposed to work requiring him to be on his feet for extended periods of time." Petitioner had not completed high school or obtained a GED, had no formal apprenticeship program and had no other education or special training. Mr. Blumenthal opined that Petitioner did not have transferrable work skills given he had primarily been a concrete finisher, other than supervisory abilities and communications skills from working with residents and aldermen. Based on vocational testing performed, Mr. Blumenthal indicated Petitioner was capable of learning and recommended he participate in a GED program and computer literacy training. However, he also indicated that this would lift his potential earnings from $9 to $11 per hour up to $10 to $15 per hour at entry level, which is a significant loss from the $43.85 per hour he was earning. Mr. Blumenthal recommended that the Respondent determine if they could accommodate the Petitioner's restrictions following this retraining. If not, he would be a candidate for vocational rehabilitation. (Px8).

Petitioner testified he completed his junior year of high school at DeLaSalle and had no military experience. He does not have a high school diploma or a GED. He initially worked as a laborer for the Milwaukee Railroad, where his job included picking up old brake pads on the side of the tracks in the warehouse, filling engine cars with sand for braking and resupplying the trains with water. He worked for International Harvester for five years as a heat treater for crankshafts and links for the tractors. He then worked for Electromotive for about 3 years, handling acetylene torches and following a welder to check parts that were to be welded. He next worked for the Cook County juvenile detention center for about a year in the warehouse receiving supplies. He worked for Jones Trucking for 6 months, making sure all cargo went out with proper billing and lading. This was office work but involved paperwork as there were no computers at that time. Petitioner testified he then began working for the Chicago Park District for 9.5 years, first as a storekeeper handing out supplies to tradesmen, then traveling park to park as a property inspector to make sure supplies were present. When he was laid off from that position he went to work for Respondent as a cement finisher and had continued to work in that position through the accident date.

Following the report of Mr. Blumenthal indicating there were jobs the Petitioner was capable of performing if he were able to be hired for them, the Petitioner requested vocational rehabilitation services from the Respondent, who retained the services of Coventry in December 2009 to perform these services. Petitioner was interviewed by Coventry at his attorney's offices and, after a labor marker survey was prepared, vocational services were initiated. The labor market survey, dated 9/27/09, identified occupations in the sedentary to light work levels, most of which indicated potential wage levels of approximately $9 to $18 per hour.

Petitioner testified the initial Coventry counselor, Natasha Gutman, helped him to prepare a resume and had him send those to job leads. She would also meet him at job fairs to locate work. She provided him with several job interviews, where she would wait outside for him to find out the results. Petitioner also took GED classes at Daley College, which was monitored by Coventry. Petitioner would report back bi-weekly. Petitioner continued to work with Counselor Gutman through May 2014 but testified he was never offered a job. He indicated the types of jobs Coventry had him looking for were jobs at warehouses, JC Penney, security companies and insurance companies, as these were jobs the counselor thought he would be able to do.

Petitioner submitted his job search logs as Px10, which indicate the job search performed from 11/7/12 through 11/21/14. The vast majority of these jobs indicate the proposed employers were not hiring. (Px10).

Petitioner testified that when his case had previously been scheduled for a hearing, the Respondent reinstated vocational services at the recommendation of the arbitrator. This time Respondent referred Petitioner for services with counselor Dean Geroulis.

Petitioner met with counselor Geroulis in February 2015, and Petitioner testified he began doing the same type of things as Ms. Gutman had been doing, such as creating a new resume and submitting applications for him. Petitioner testified that "at that time nobody was hiring." Jobs were submitted to for him via computer, and he would provide the Petitioner with job leads to contact.

Vocational Activity Reports from counselor Geroulis begin on 3/6/15 (Report #24) and run through 10/4/17 (Report #82). Again, the search was conducted per the restrictions of Dr. Diadula and Dr. Chmell, with a note that this limited the Petitioner permanently to the light work level. Early on, Mr. Geroulis notes that the Petitioner had failed the science portion of the GED three times. He also noted that Petitioner had already performed three years of vocational rehabilitation and reported few interviews in that time. He noted Petitioner's age, restrictions, ten-year work gap and lack of a high school education or computer skills were major barriers to reemployment and put him at a disadvantage in competing for jobs. Counselor Geroulis' reports consistently indicate the Petitioner had met the goals that were set for him, and the reports are fairly repetitive in content. Counselor Geroulis often notes he had sent letters with self-addressed envelopes to prospective employers inquiring on the status of Petitioner's job applications, but either indicated the employers did not reply or were not hiring, or he does not comment on whether he received any responses or not. When he made phone calls to some of these employers, he generally would note he either received no replies or that the prospective employers weren't hiring. Despite repeatedly indicating "file not progressing", services continued for over almost three years with counselor Geroulis. The Arbitrator does note that Reports #25 through #37 are missing from the exhibit. (Px12).

Petitioner was referred to orthopedic surgeon Dr. Cherf for evaluation on 2/3/16 by the Respondent pursuant to Section 12 of the Act. He reviewed Petitioner's medical records and obtained left knee x-rays. Petitioner reported a twisting injury on 12/7/05, and that he had no relief from the initial two arthroscopic surgeries. He reported current symptoms of global 4/10 left knee pain, 55% of normal function, difficulty squatting and an inability to kneel, run or walk distances. He denied any prior left knee problems. X-rays showed a well-fixed arthroplasty. Dr. Cherf opined Petitioner could not return to his regular job but could work with the restrictions that would be typical for a total knee replacement: no running or jumping, no ladders or scaffolds, no kneeling and no continuous lifting over 50 pounds. Dr. Cherf stated that Petitioner "displayed evidence of what appeared to be abnormal illness behavior with limitation of effort, overreaction to examination and gait inconsistency of what I would expect for a patient with a well-fixed total left knee arthroplasty." (Rx1).

Following his review of several surveillance videos (from 10/1/15 and 10/5/15) on 2/9/16, Dr. Cherf indicated they depicted Petitioner walking, prolonged standing, getting in and out of a car, carrying various objects, doing light work around his yard and cleaning his car. He saw no evidence of Petitioner favoring his knee or limiting his activities. He opined that the Petitioner's presentation on exam was not consistent with the video, particularly with regard to an altered gait, noting this was consistent with the FCE, and reiterated the same recommended work restrictions as he had on 2/3/16. (Rx2). The Arbitrator notes that the surveillance videos were not submitted into evidence.

As noted, vocational services with counselor Geroulis continued through 10/14/17. Petitioner testified he tried to get his GED but acknowledged he was unable to pass the science portion of the test despite multiple attempts. While Ms. Gutman had recommended that he take computer classes, Petitioner testified he never did because she indicated to him that the Respondent would not authorize them.

Counselor Blumenthal reviewed the records from Coventry and issued a 12/5/17 supplemental report following his analysis of these records. He noted Petitioner had been participating in vocational rehabilitation for five years, and that Mr. Geroulis had repeatedly documented that Petitioner had major barriers to employment that

included a 10-year employment gap, work restrictions and a lack of high school education and computer skills. Geroulis also noted Petitioner had failed one portion of the GED test three times, and that despite having undergone informal computer classes when Respondent had not funded formal training, Petitioner "learned and retained little and says he cannot even access his emails." While Geroulis indicated he felt he could assist Petitioner in vocational counseling, counselor Blumenthal opined that given no apparent benefit after five years of efforts indicates Petitioner is no longer a viable vocational candidate and is not employable in any capacity in a stable labor market. (Px11).

On 12/13/17, counselor Geroulis prepared a Labor Market Survey. He noted Petitioner was unsuccessful in obtaining a GED and reported having no computer skills. He relied upon Dr. Diadula's work restrictions. An assortment of jobs were noted to be within the light work demand level, with two listed that were at the medium level. The listed jobs indicated wage levels from approximately $9.00 per hour to $15.00 or $20.00 per hour, with some outliers. (Rx3).

Petitioner testified that he still has some continued left knee pain and takes ibuprofen three to four nights a week. He reported a tingling sensation in the top of the knee with colder or damp weather. He doesn't feel the knee is as strong as it was.

Petitioner testified he felt that he would be physically capable of performing some of the jobs he had been looking for, but that he hadn't been offered a job. He testified that he complied with all of the instructions of his vocational counselors.

On cross-examination, Petitioner testified that he was truthful with Dr. Cherf about how he was feeling and what happened to him. He indicated he would not dispute if his records reflected that he last treated at MercyWorks on 1/3/08, and that he received permanent restrictions from Dr. Sporer on 12/14/07.

The labor market survey and vocational reports indicate a range of possible wages within the Petitioner's reach, but it was indicated that, as of 7/1/18, the minimum wage had increased to $12 per hour.

CONCLUSIONS OF LAW

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 the Petitioner's left knee condition is causally related to the 12/7/05 accident. The evidence reveals Petitioner injured his left knee when he slipped on icy ground while performing work on this date. The records of MercyWorks identified an injury to his left knee the following day. The Petitioner's unrebutted testimony regarding his job duties indicated a significant amount of kneeling and bending/squatting that would have to have been performed to work on framing and concrete jobs. The Petitioner testified that he had no prior left knee problems, and no evidence was presented which indicated any prior left knee problems or treatment. The fact that there is no evidence of prior left knee problems despite the type of work he was performing is highly relevant to the Arbitrator.

While it is clear that the Petitioner had preexisting left knee degeneration, given that he had no evidence of prior left knee problems despite what appears to be heavy knee involvement in his job, the chain of events supports the conclusion that Petitioner's current condition of ill being is causally related to his accident. This is supported by the opinion of Dr. Chmell, who diagnosed a traumatic aggravation of degenerative left knee arthritis on

12/7/05. The Respondent has offered no evidence with which to refute or dispute the opinions of Dr. Chmell. Section 12 examiner Dr. Cherf commented that the Petitioner was ten years from a work-related left knee sprain/strain occurring on 12/7/05. While he only diagnosed a sprain/strain, the preponderance of the evidence supports that the accident triggered symptoms in a previously asymptomatic knee which led to multiple knee surgeries and ultimately a total knee replacement. The Arbitrator finds that the greater weight of the evidence supports a causal connection between Petitioner's left knee condition and the 12/7/05 accident.

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

Petitioner requests TTD benefits for the period from 12/9/05 through 3/31/09. The Respondent disputes Petitioner's entitlement to TTD during this period. The Arbitrator finds that, given the findings of the Arbitrator regarding causation, the Petitioner was clearly entitled to TTD benefits from 12/9/05 through 1/3/08. Dr. Sporer issued his recommended restrictions on 12/14/07 following the FCE, and Dr. Diadula of MercyWorks issued his recommended restrictions on 1/3/08. Petitioner was also evaluated at the request of his own attorney by Dr. Chmell on 8/7/08, however the doctor's report indicates essentially similar findings as those indicated by Dr. Sporer and Dr. Diadula in reliance on the FCE. This is essentially when the Petitioner received permanency restrictions from both doctors and had reached MMI. Therefore, the Arbitrator finds that the Petitioner is entitled to TTD benefits from 12/9/05 through 1/3/08.

Taking this into account, the Petitioner is requesting maintenance benefits from 1/4/08 through 8/15/18. The Respondent, per the Statement of Exceptions, acknowledges the Petitioner's entitlement to maintenance benefits from 5/8/12, the date that vocational services were begun with Coventry, through the 8/15/18 hearing date. Thus, the period in dispute is from 1/4/08 through 5/7/12. The Respondent argues that to be entitled to maintenance, the Petitioner must show both that his injury impaired his earning capacity as well as that he was either enrolled in a vocational rehabilitation program or that he was engaged in a diligent self-directed job search, and that he failed to prove the latter by the preponderance of the evidence.

The Arbitrator finds that the Petitioner is entitled to maintenance from 1/4/08 through 8/15/18. The evidence shows that Petitioner was evaluated for vocational rehabilitation services by counselor Blumenthal on 2/11/09. It was Blumenthal's opinion that the Respondent either determine if Petitioner could be placed in a job within his restrictions for the city or begin vocational rehabilitation services. A labor market survey was completed by counselor Petrie of Coventry on 10/6/09, eight months later. The Petitioner testified that he requested vocational rehabilitation services following counselor Blumenthal's report, and that the Respondent at that point obtained the labor market survey of counselor Petrie.

It is unclear to the Arbitrator why further vocation rehabilitation services were not provided until 2012. However, there was an indication in the Coventry records that Petitioner's counsel was demanding that vocational services be performed by a counselor of the Petitioner's choosing. No evidence was presented by either party indicating whether this demand was going to be authorized by Respondent, or whether the Respondent otherwise offered such services to the Petitioner. However, it is clear that Respondent did not begin such services with their chosen provider, Coventry, until mid-2012.

The Petitioner thereafter was participating fully in vocational services from 2012 through 2017 according to the records of counselors Gutman and Geroulis. While the Petitioner's job search logs while working with counselor Gutman reflect that the vast majority of jobs he sought to apply for were not hiring, yet the reports of Gutman consistently indicate that the Petitioner was meeting his required goals. The same goes for the reports of

counselor Geroulis. The Arbitrator looked through years of reports and could not find a single indication from the counselors that the Petitioner was not fulfilling what had been required of him in terms of a job search. Counselor Geroulis repeatedly indicated that the Petitioner's age, restrictions, work gap and lack of education and computer skills were "major barriers" to employment and that he was therefore at a disadvantage in competing for jobs.

Despite the City's obvious workforce size, no jobs were offered to Petitioner within his restrictions. During the gap where the Petitioner's attorney indicated he wanted to select the counselor, there is no evidence that the Respondent was attempting to provide services. The Respondent correctly points out that no evidence was presented indicating that the Petitioner sought a hearing on this issue prior to his starting services with Coventry, but it does appear clear that the Respondent ultimately retained the counselor it chose in this vendor. Given the fact that a labor market survey was initiated, and that job assistance wasn't provided by Coventry until mid-2012, it is highly likely that the parties were at least making an attempt to try to amicably resolve the case. The Arbitrator notes with interest that it took 8 months to obtain the LMS following the issuance of counselor Blumenthal's report.

The evidence indicates that Petitioner met with counselor Gutman in June 2012 and worked with her continuously until 2014. In her reports, counselor Gutman notes the Petitioner's enrollment at Daley College to participate in GED courses, and that he was unsuccessful. The Arbitrator notes that the Petitioner did not complete high school and had been essentially working blue collar type jobs for over thirty years as of the date of accident. The reports also indicate the Petitioner unsuccessfully 's need for computer training classes and the fact Respondent failed to authorize such training. The Arbitrator notes Ms. Gutman identified Petitioner's lack of a GED and lack of computer skills to be a barrier to Petitioner's return to any work. Despite recommending computer classes, Petitioner testified that Gutman indicated the Respondent would not authorize them.

Additionally, it is not clear to the Arbitrator what led to vocational rehabilitation services being terminated for approximately a year before counselor Geroulis became involved. The Petitioner testified services were reinstituted at the recommendation of the prior arbitrator in this case when the Petitioner appeared seeking a hearing. This then went on for almost three years despite Geroulis' indication that Petitioner was at a significant disadvantage in seeking work in a competitive environment, and as noted counselor Geroulis never indicated that there was a lack of effort on the Petitioner's part.

The Respondent has a reasonable argument here given the large gap between January 2008 and the start of vocational services in 2012. However, based on the services provided, it does not appear to the Arbitrator that anything would have been different in a 2009 to 2012 job search.

The Arbitrator finds that the Petitioner is entitled to TTD from 12/9/05 through 1/3/08 pursuant to Section 8(b) of the Act, and to maintenance benefits from 1/4/08 through 8/15/18 pursuant to Section 8(a) of the Act.

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

The Arbitrator finds that the Petitioner has proven by the preponderance of the evidence that he is permanently and totally disabled on an odd-lot basis.

Petitioner underwent total knee replacement surgery with Dr. Sporer on 7/30/07. Following an FCE, Dr. Sporer released Petitioner from his care and issued restrictions including no prolonged kneeling, stooping, or bending. He referred to these as long-term restrictions. On January 1/3/08, Petitioner made a final visit to MercyWorks.

At that time, Dr. Diadula indicated Petitioner was at MMI and issued specific lifting restrictions from 20 to 35 pounds depending on what height level the lifting occurred, reiterated Dr. Sporer's restrictions of no repetitive bending or stooping, and restricted Petitioner from kneeling at all. Thus, the Respondent's company clinic physician issued greater restrictions than Petitioner's surgeon. Petitioner's examiner, Dr. Chmell, opined on 8/2/08 that Petitioner was unable to return to work as a cement finisher, and that he was permanently restricted from work above the light physical demand area. The Arbitrator notes that while Respondent's examining physician Dr. Cherf opined that Petitioner could lift up to 50 pounds so long as it was not continuous, he based this in part on abnormal pain behaviors. Though it did not change the noted restrictions, he later relied on surveillance video which was not submitted into evidence. The opinions of Drs. Sporer, Diadula and Chmell are more persuasive than that of Dr. Cherf.

The Arbitrator concludes there is some difference of opinion between the various treating and examining physicians, but all have essentially limited bending and kneeling in a fashion that prevents him from returning to his regular job with Respondent. The Petitioner testified credibly with regard to the considerable bending and kneeling involved in the duties of a cement finisher. Therefore, the Arbitrator finds that the Petitioner has been unable to return to the work of a cement finisher since the accident date.

The Arbitrator acknowledges that there are some red flags indicated in evidence with regard to the level of Petitioner's disability. On 1/25/06, Dr. Maday questioned Petitioner's subjective pain complaints given the MRI and objective findings. On 9/18/06, Dr. Sawchyn indicated Petitioner "seemed to be trying" in therapy but was making slow progress. On 4/12/07, Dr. Verma noted that Petitioner's subjective complaints seemed to be, "to some degree", out of proportion to his objective findings. The 11/27/07 FCE indicated that Petitioner provided good physical effort and that his subjective complaints were consistent with his objective findings, but also indicated sub-maximal effort and that he could do more than what was demonstrated. However, the reports also noted that the findings and observations suggested some "minor inconsistency" to the reliability/accuracy of his complaints, and that this determination did not imply intent on the part of the Petitioner.

However, the Arbitrator also must acknowledge that the Petitioner underwent multiple left knee surgeries following the accident, with the last one involving a total knee replacement. He lacks a high school education and has worked in blue-collar jobs all of his life. The Petitioner's job with Respondent heavily involved the use of his knees. Despite having numerous municipal departments within Respondent's control, no job was offered to Petitioner within his restrictions. The Petitioner participated in a vocational rehabilitation program for five years with professional counselors retained by Respondent who at no time indicated a concern or belief that the Petitioner's participation in the vocational program was lacking in any way. While the Petitioner initially sought to retain a vocational counselor of his choice, the Arbitrator must assume that the Respondent was unwilling to authorize this, as it is otherwise unclear why vocational services wouldn't have begun with counselor Blumenthal in 2009.

Counselor Blumenthal on 2/11/09 concluded that Petitioner could obtain employment in jobs similar to an unarmed security guard or job titles that essentially involved being a clerk of one sort or another. He noted that Petitioner's lack of a high school diploma or GED would be a hindrance to his ability to obtain new employment, and he recommended that Respondent either seek to employ Petitioner within his restrictions or that he enroll in a GED program as well as computer literacy training. The few jobs he indicated Petitioner could obtain were said to be dependent upon both the completion of his GED program and computer literacy training. Petitioner testified that he requested vocational rehabilitation services be provided, and that the Respondent would not authorize the recommended computer training. Petitioner testified Respondent would not authorize those classes, and that this was indicated to him by counselor Gutman.

As noted above, the evidence in the record does not reflect exactly why it took so long for vocational rehabilitation services to be authorized. However, counselor Gutman's 6/20/12 report indicates that a barrier to Petitioner's return to work is the lack of a GED and the lack of computer skills. The various reports of Gutman indicate and confirm Petitioner was unsuccessful in obtaining any job offers. Vocational rehabilitation efforts of counselor Gutman ceased in May 2014. Petitioner testified he attempted to go to trial once vocational rehabilitation services ceased with Gutman. However, Respondent reinstated vocational rehabilitation services, again through Coventry, but then with Dean Geroulis, a different vocational rehabilitation counselor.

Counselors Gutman and Geroulis indicated that the Petitioner's ability to find employment was limited, with Geroulis specifically noting Petitioner's age, restrictions, ten-year work gap and lack of a high school education or computer skills were major barriers to reemployment and put him at a disadvantage in competing for jobs. While counselor Blumenthal indicated the Petitioner could be employable if he obtained a GED and computer skills, he indicated that this would only lift his earning potential from $9 to $11 per hour to $10 to $15 per hour.

The Arbitrator notes the barriers expressed at the end of almost five years of vocational rehabilitation services are essentially the same barriers described by counselor Blumenthal. Therefore, the Arbitrator hereby finds Petitioner has established that he falls into the odd lot category of persons who are not all together incapacitated but are so handicapped they will not be employed regularly in any well-known branch of the labor market. Petitioner has shown that, in view of his present position, age, experience, training, and education, he is permanently and totally disabled by a showing of a diligent but unsuccessful attempt to find work. Pursuant to Illinois law, the burden at that point shifts to the Respondent to show work is regularly and continuously available to Petitioner in the competitive labor market.

All three counselors indicated that there are positions available that would be able to accommodate the Petitioner's physical restrictions, as noted in the report of counselor Blumenthal and the labor market surveys prepared by Coventry. However, the five years of searching for work, again with no indication of criticism by the Coventry counselors as to how the Petitioner was performing his tasks, carries greater weight in the Arbitrator's view in terms of the Petitioner's ability to obtain employment in a competitive labor environment. In truth, the Arbitrator believes that the leads and services provided by Coventry seem to be lacking to some degree. It appears that job leads often involved employers who did not have any work available. As noted, the reports of counselor Geroulis were significantly repetitive and appeared patterned on a template that included a statement in each one that Petitioner might not be a very good job placement candidate. The Petitioner's lack of a diploma, GED or computer skills were also a significant hurdle to overcome. The Arbitrator finds these reports fail to demonstrate there is a job available to the Petitioner in any well-known branch of the labor market, and that the Respondent has failed to identify suitable work that is regularly and continuously available to the Petitioner. This is further supported by the 12/5/17 report of counselor Blumenthal, indicating he reviewed the reports of Coventry and his conclusion that after five years of vocational rehabilitation services, Petitioner is no longer a viable candidate for additional services and is not employable in any area of a stable labor market.

Overall, while there is evidence that puts the Petitioner's subjective complaints and limitations into question, the Arbitrator believes the greater weight of the evidence indicates that the Petitioner's regular job involved significant and heavy knee use, he has undergone multiple surgeries with a final total knee replacement procedure, and that both the Respondent and its chosen vocational counselors could not locate a position for the Petitioner, while the counselors indicate no issues whatsoever in their reports regarding the Petitioner's job search efforts. This was after five years of professionally assisted job searches, again with no criticism of Petitioner's efforts. The Arbitrator finds that the Petitioner has sustained his burden of proof that he is permanently and totally disabled on an odd-lot basis pursuant to Section 8(f) of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ERIC GILMORE,

Petitioner,

vs. NO: 13 WC 32273

CITY OF CHICAGO,

Respondent.

20IWCC0293

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection,medical expenses,temporary total disability, nature and extent and credit, 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 the Arbitrator's order provides for the payment of maintenance benefits to Petitioner commencing January 9, 2017 through September 14, 2017.Additionally, the Arbitrator's order provides in pertinent part, for the payment of temporary total disability benefits commencing October 9, 2013 through April 4, 2016 and May 8, 2017 through November 29, 2017.

The Arbitrator's decision, as written erroneously provides for payment of both temporary total disability payments and maintenance benefits for the period of May 8, 2017 through September 14, 2017. The Commission hereby corrects the Arbitrator's decision and provides for the payment of TTD benefits for a period commencing October 9, 2013 through April 4, 2016 and a second period commencing September 15, 2017 through November 29, 2017. Maintenance benefits shall be paid commencing January 9, 2017 through September 14, 2017.

All else is affirmed.

20IWCC0293

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $986.67 per week commencing October 9, 2013 through April 4, 2016 and commencing September 15, 2017 through November 29, 2017 for a period of 139.5 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 shall pay to Petitioner the sum of $721.66 per week for a period of 62.5 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the loss of 12.5% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $986.67 per week for a period of 35.4 weeks pursuant to Section 8(a) of the Act, because Petitioner was entitled to maintenance benefits for the period of January 9, 2017 through September 14, 2017.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $18,145.00 to United Physical Therapy and the sum of $ 414.00 to Illinois Bone and Joint Institute pursuant to the medical fee schedule for medical expenses under §8(a) of the Act. Respondent shall receive a credit for any amounts it may have paid.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $143,586.73 in previously paid temporary total disability benefits and $73,520.00 for previously paid maintenance benefits, for a total credit of $217,106.83 for amounts paid, 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 proceeding for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: MAY 22 2020
o-3/25/20
SM/msb
44

Stephen Mathis

Douglas McCarthy

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

GILMORE, ERIC
Employee/Petitioner

Case# **13WC032273**

CITY OF CHICAGO
Employer/Respondent

20IWCC0293

On 1/23/2018, 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 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4564 ARGIONIS & ASSOCIATES LLC
DANA BRISBON
180 N LASALLE ST SUITE 1925
CHICAGO, IL 60601

0766 HENNESSY & ROACH PC
CHRISTOPHER L JARCHOW
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED
ARBITRATION DECISION

Eric Gilmore
Employee/Petitioner
v.
City of Chicago
Employer/Respondent

Case # **13** WC **32273**

20IWCC0293

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 **10/25/2018 and 11/27/2018**. 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 **Credit to Respondent for overpayment of TTD benefits in 09 WC 35814**

FINDINGS

On **08/09/2013**, 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 $**76,960.00**; the average weekly wage was $**1,480.00**.

On the date of accident, Petitioner was **53** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**$143,586.83** for TTD, $**0.00** for TPD, $**73,520.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**217,106.83**.

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

ORDER

- Respondent shall pay petitioner in the sum of $986.67 per week for a period of 158-2/7 weeks as provided in Section 8(b) of the Act, because petitioner was temporarily and totally disabled for the period of October 9, 2013 through April 4, 2016 and May 8, 2017 through November 29, 2017.

- Respondent shall pay petitioner the sum of $986.67 per week for a period of 35-4/7 weeks pursuant to Section 8(a) of the Act, because petitioner was entitled to maintenance benefits for the period of January 9, 2017 through September 14, 2017.

- The respondent shall pay petitioner the sum of $721.66 per week for a period of 62.5 weeks as provided in Section 8(d)(2) of the Act, because petitioner sustained an permanent partial disability in the amount of 12.5% loss of use of the man as a whole.

- Respondent shall be given a credit of $143,586.73 in previously paid TTD benefits and $73,520.00 for previously paid maintenance benefits, for a total credit of $217,106.83.

- Respondent shall pay $18,145.00 to Unitd Physical Therapy and $414.00 to Illinois Bone and Joint Institute pursuant to the medical fee schedule. Respondent shall receive credit for any amounts it may have paid.

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

December 6, 2018
Date

20M 1/23/19

JAN 23 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ERIC GILMORE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 13 WC 32273
	)	
CITY OF CHICAGO,	)	
	)	20IWCC0293
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties agree that on August 19, 2013 Petitioner and Respondent were operating under the Illinois Workers' Compensation or Occupational Diseases Act and their relationship was that of employer and employee. The Parties agree that on August 19, 2013 Petitioner sustained an injury that arose out of and in the course of his employment with the City. The Parties agree that Petitioner's earnings during the year preceding the injury were $76,960.00 and Petitioner's average weekly wage pursuant to Section 10 of the Act was $1,480.00. The parties agree that at the time of the injury Petitioner was 53 years old, single, with zero dependent children.

The threshold issue in dispute at the time of the October 25, 2018 hearing was whether Petitioner's current condition of ill-being is causally related to the August 19, 2013 injury. Additional disputes include whether

Respondent is liable for payment of any of Petitioner's outstanding medical bills, Petitioner's entitlement to TTD benefits, Petitioner's entitlement to maintenance benefits, the nature and extent of Petitioner's injury, and whether the City is entitled to a credit for overpayment of benefits in case 09 WC 53814 for which the Commission issued a final Decision and Opinion on Review on June 20, 2017.

FINDINGS OF FACT

Petitioner testified that he is employed by the City of Chicago Water Management Department as a construction laborer. Petitioner testified he has been employed in this capacity since approximately September 1998. Petitioner testified that a significant portion of his job duties included breaking apart concrete and installing water basins for the City's Water Department.

Petitioner testified that on August 19, 2013, he suffered an injury to his right shoulder while building a basin in his job capacity. Petitioner testified he was swinging a sledgehammer when he suffered an injury to his right shoulder. Petitioner testified he is left handed. Petitioner testified he felt an immediate burning sensation to his right shoulder.

Petitioner testified he sought initial medical treatment at Mercy Works Hospital. The Arbitrator notes that no medical records from Mercy Works were submitted into evidence by either party. Petitioner testified he later began treatment with Dr. Rubenstein with Illinois Bone & Joint Institute. Petitioner was first evaluated by Dr. Rubenstein on October 9, 2013. After review of a September 24, 2013 MRI, Dr. Rubenstein indicated that petitioner likely had a partial thickness tear in the supraspinatus tendon as

well as some acromioclavicular degenerative changes which probably pre-existed the injury. Dr. Rubenstein noted that he did believe, however, that the tear was likely acutely based by the injury in question. Dr. Rubenstein performed a subacromial injection on this date and prescribed petitioner return to work with no lifting greater than 10 pounds. Upon return to Dr. Rubenstein on November 6, 2013, Dr. Rubenstein recommended petitioner performs additional physical therapy prior to considering surgical intervention.

Petitioner returned to Dr. Rubenstein on January 17, 2014. Petitioner was working through physical therapy though petitioner's symptoms had not yet resolved. Dr. Rubenstein recommended an arthroscopic shoulder surgery with subacromial decompression and evaluation for rotator cuff. Petitioner was kept on light duty work.

On April 10, 2014, petitioner underwent surgery in the form of arthroscopy of the right shoulder with debridement and subacromial decompression. Following surgery, Dr. Rubenstein continued to recommend additional physical therapy. On September 3, 2014, petitioner continued to complain of right shoulder problems. Petitioner underwent a subsequent injection to his right shoulder on September 3, 2014. Petitioner continued with physical therapy. On January 9, 2015, due to continued complications, Dr. Rubenstein recommended a Functional Capacity Evaluation to determine petitioner's ability to return to work. On January 28, 2015, petitioner underwent a Functional Capacity Evaluation showing that petitioner could lift up to 50 pounds.

Petitioner continued to follow-up with Dr. Rubenstein through April 4, 2016. On April 4, 2016, petitioner was kept on permanent work restrictions.

Dr. Rubenstein noted that petitioner had attained a state of maximum medical improvement.

Petitioner returned to Dr. Rubenstein on May 8, 2017. Petitioner reported some progress with his right shoulder. Petitioner apparently had indicated he would like to return back to work and request some additional physical therapy in order to do so. Physical therapy was prescribed and petitioner continued with physical therapy.

Petitioner continued to show signs of improvement. On July 16, 2018 it was noted that petitioner reported full range of motion into his shoulder. Petitioner continued to have slight weakness, though strength was slowly coming back through use of a home exercise program.

The most recent note from Dr. Rubenstein is dated November 29, 2017. Petitioner had undergone a Functional Capacity Evaluation. The Functional Capacity petitioner underwent indicated that petitioner was required to lift 100 pounds, though petitioner indicated that that is not in fact accurate and that he rarely ever had to do so. Therefore, Dr. Rubenstein released petitioner to return to work in a full duty capacity on November 29, 2017 and again indicated that petitioner was again at maximum medical improvement.

Petitioner did indicate he was able to return to work for the City in his full duty job, though works at a slower rate. Petitioner testified he is earning the same wages that he was prior to the injury. Petitioner testified he did not have to miss any time from work due to his right shoulder. Petitioner indicates that he continues to work his regular hours and perform his regular job duties. Petitioner testified he has not returned to Dr. Rubenstein since April 2018. Petitioner has no new complaints for his right shoulder.

Petitioner testified he has no additional physical therapy and no additional prescriptions for his right shoulder.

CONCLUSIONS OF LAW

In support of the Arbitrator's decision with respect to F (causation), the Arbitrator finds as follows:

The Arbitrator finds that petitioner's current condition of ill-being with respect to his right shoulder is causally related to the alleged accident in question. Petitioner testified he was working for the City of Chicago Water Department as a laborer when he was swinging a sledgehammer breaking up concrete. Petitioner testified he felt immediate pain in the right shoulder. Petitioner testified he sought immediate medical treatment at Mercy Works Hospital. Petitioner then followed up with Dr. Rubenstein with Illinois Bone & Joint Institute. Petitioner provided a consistent history of his injury to Dr. Rubenstein. As such, the Arbitrator concludes that petitioner's current condition of ill-being with respect to his right shoulder is causally related to the alleged accident in question.

In support of the Arbitrator's decision with respect to K (temporary total compensation), the Arbitrator finds as follows:

An employee is temporarily and totally disabled from the time that an injury incapacitates him from working until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'*n, 138 Ill.2d 107, 118, 149

Ill.Dec. 253, 561 N.E.2d 623 (1990). Our Supreme Court has held the dispositive inquiry for TTD benefits is whether the claimant has reached maximum medical improvement. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill.2d 132, 142, 337 Ill.Dec. 707, 923 N.E.2d 266 (2010).

For a claimant to be entitled to maintenance benefits he must prove by a preponderance of the evidence his injury impaired his earning capacity, and that he is either enrolled in a vocational rehabilitation program or engaged in a diligent job search. *Roper Contracting v. Industrial Commission*, 349 Ill. App. 3d 500, 812 N.E.2d 65 285 Ill Dec 476 (2004)., see also *Nascote Indus. v. Indus. Comm'n*, 353 Ill. App. 3d 1067, 1075, 820 N.E.2d 570, 578 (2004); *Connell v. Industrial Comm'n,* 170 Ill.App.3d 49, 55, 120 Ill.Dec. 354, 523 N.E.2d 1265 (1988).

Petitioner was initially authorized off work by Dr. Rubenstein on October 9, 2013. Petitioner was continuously kept off work by Dr. Rubenstein through April 4, 2016. At that time, Dr. Rubenstein released petitioner to return to work with restrictions outlined in the Functional Capacity Evaluation. Dr. Rubenstein concluded that petitioner attained a state of maximum medical improvement as of April 4, 2016. Petitioner returned to Dr. Rubenstein on May 8, 2017 and engaged in additional

physical therapy. Dr. Rubenstein kept petitioner on work restrictions petitioner could return to work in a full duty capacity. The medical documentation supports that petitioner was temporarily and totally disabled for the period of October 9, 2013 through April 4, 2016, the date that petitioner was initially deemed at maximum medical improvement. Petitioner through January 29, 2017 at which time Dr. Rubenstein confirmed that was also temporarily and totally disabled from May 8, 2017, the date upon which petitioner returned to Dr. Rubenstein for additional treatment, through November 29, 2017, the date upon which Dr. Rubenstein released petitioner to full duty work. The Arbitrator finds that petitioner was temporarily and totally disabled from 158-2/7 weeks.

With respect to maintenance benefits, the Arbitrator finds that petitioner failed to prove an entitlement to maintenance benefits. Maintenance is only owed when the claimant is either engaged in a diligent job search or enrolled in a Vocational Rehabilitation Program. Respondent stipulates that petitioner is owed maintenance benefits for the period of January 9, 2017 through September 14, 2017. No evidence in the records suggest that petitioner was ever enrolled in a Vocational Rehabilitation Program, or ever engaged in a self-directed job search outside of this period of time. Therefore, the Arbitrator awards maintenance benefits in the

amount of 35-4/7 weeks for the period of January 9, 2017 through September 14, 2017, the period stipulated to by respondent.

The Arbitrator finds that petitioner is owed 158-2/7 weeks of TTD at the rate of $986.67 per week. The Arbitrator also finds that petitioner is owed 35-4/7 weeks of maintenance benefits for the period of January 9, 2017 through September 14, 2017 at the rate of $986.67.

The Arbitrator awards respondent a credit in the amount of $143,586.83 for TTD benefits paid prior to the date of trial. The Arbitrator also awards respondent a credit for $73,520.00 for maintenance benefits paid prior to trial. The Arbitrator awards respondent a total credit of $217,106.83 for previously paid maintenance and TTD benefits.

In support of the Arbitrator's decision with respect to L (nature and extent), the Arbitrator finds as follows:

The Arbitrator has had an opportunity to review the totality of the evidence in determining Petitioner's permanent disability with respect to the alleged August 19, 2013 work accident. With respect to Petitioner's claim for permanent partial disability benefits the Arbitrator is to evaluate the claim pursuant to the five factors outlined in Section 8.1b.

Section 8.1b(b) sets forth various factors the Commission must consider when determining the claimant's level of PPD, including "(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." 820 ILCS 305/8.1b(b). The Arbitrator notes that he must also determine, 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." *Corn Belt Energy Corp. v. Illinois Workers' Comp. Comm'n*, 2016 IL App (3d) 150311WC, ¶ 51, 56 N.E.3d 1101, 1112–13, 65 N.E.3d 840 (Ill. 2016).

The first factor to be considered is the AMA impairment rating pursuant to the guides for the evaluation of permanent partial disability. Neither party submitted an impairment rating. The Arbitrator awards this factor no weight.

The second factor in determining PPD is the occupation of the injured employee. Petitioner testified the he is employed as a laborer for the City of Chicago Department of Water Management. Petitioner was deemed capable of full duty work by his treating physician, Dr. Rubenstein, on November 29, 2017. Petitioner testified he did in fact return his regular work activities, working the same hours, and earning the same wages as he was prior to August 9, 2013. The Arbitrator awards significant weight to this factor.

The third factor in determining permanency is the age of the employee at the time the injury. The parties stipulate that at the time of the accident Petitioner was 53 years old. The Arbitrator notes that Petitioner is relatively middle-aged and capable of having a significant amount of years ahead of him in his career. This is evidenced by the fact that Petitioner returned to work for the City as a laborer. The Arbitrator awards moderate weight to this factor.

The fourth factor in determining PPD is the employee's future earning

capacity. The Arbitrator notes that Petitioner was released to full duty work by treating physician on November 29, 2017. Petitioner did return to work at his regular capacity. Petitioner testified that he is working the same amount of hours performing the same job and earning the same wages. Petitioner testified he is receiving the same benefits as he was prior to the injury. The arbitrator gives significant weight to this factor.

The fifth and final factor in determining PPD is evidence of disability corroborated by the treating medical records. Petitioner underwent a right shoulder arthroscopic repair. Petitioner has made a full duty return to work and is able to perform his work tasks using both arms. Petitioner testified he is only taking over-the-counter pain medication with no intention of returning to Dr. Rubenstein in the foreseeable future. The Arbitrator assigns this factor moderate weight.

As a result, based on the pertinent medical documentation, the Arbitrator find that the Petitioner is permanently partially disabled to the extent of 12.5% loss of use of the man as a whole, which is equivalent to 62.5 weeks of benefits, under section 8(d)(2) of the Act.

In support of the Arbitrator's decision with respect to O (other-respondent's credit for overpayment of TTD in 09 WC 35814), the Arbitrator finds as follows:

Any credit resulting from the Arbitrator's award in case number 09 WC 35814 is not part of the orders issued in the instant case. This Arbitrator has no jurisdiction over any matters pertaining to the earlier case. Therefore, any claim for credit due to the results of that earlier case is hereby denied. Due to that lack of jurisdiction.

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

Moises Toro,
Petitioner,

vs. No. 18 WC 10152

City of Chicago,
Respondent.

20IWCC0294

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, medical expenses, penalties and fees, and Respondent's §11 intoxication defense, 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 February 4, 2019, is hereby affirmed and adopted.

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

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

20IWCC0294

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.

Pursuant to §19(f)(2) of the Act, no appeal bond is set in this case. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 27 2020

Marc Parker

Deborah L. Simpson

Barbara N. Flores

mp/wj
05/21/20
68

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

TORO, MOISES
Employee/Petitioner

Case# **18WC010152**

CITY OF CHICAGO
Employer/Respondent

20IWCC0294

On 2/4/2019, 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 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

3098 MICHAEL NICHOLSON
7111 W HIGGINS AVE
CHICAGO, IL 60656

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

.STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

20IWCC0294

☐ 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)

Moises Toro
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **18** WC **10152**

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 **Soto**, Arbitrator of the Commission, in the city of **Chicago**, on **11/15/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 20IWCC0294

On the date of accident, **2/21/18**, 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 **$77,676.60**; the average weekly wage was **$1,489.69**.

On the date of accident, Petitioner was **59** 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 $993.13 for 38 weeks,*** *commencing 2/22/2018 through 11/15/2018, as provided in Section 8(b) of the Act, as set forth in the Findings of Fact and Conclusions of Law attached hereto,*

Respondent shall pay *US Healthworks, Affiliated Radiologist, and North Shore University Health Systems as set forth in the Findings of Fact and Conclusions of Law, as provided in PX 9, pursuant to Sections 8(a) and 8.2 of the Act and subject to the fee schedule.*

The Petition for Penalties and Fees is denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of 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

2/4/2019
Date

ICArbDec19(b)

FEB 4 - 2019

20 IWCC0294

Procedural History

This matter was tried on November 15, 2018 pursuant to Section 19(b) of the Act. The disputed issues involve whether Petitioner sustained an accidental injury that arose out of and in the course of his employment; whether Petitioner's condition of ill-being is causally connected to his employment; Whether Respondent is liable for unpaid medical bills; whether Petitioner is entitled to receive TTD benefits; the parties stipulated that Petitioner's average weekly wage was $1,489.69, pursuant to Section 10 of the Act. Petitioner is seeking penalties and attorney's fees pursuant to Sections 19(k), 19(l) and 16 of the Act. (Arb. Ex #1). Based upon the stipulation this matter is proceeding pursuant to Section 19(b) of the Act and Petitioner is not seeking prospective medical treatment. See the Stipulation made on the Record and the Request for Hearing form. (Arb. Ex. #1), Respondent denied liability for the claim pursuant to Section 11 of the Act. Petitioner tested positive for cocaine and hydrocodone.

Findings of Fact

Moises Toro (hereinafter referred to as "Petitioner") testified that he has been employed by the City of Chicago (hereinafter referred to as "Respondent") as a tree trimmer for 19 years. Petitioner testified that he reported for work on February 21, 2018. Petitioner testified that as a tree trimmer he climbs a ladder on the truck to access the boom. Petitioner testified that on February 21, 2018, he climbed up the truck to take off a cover. After taking off the cover, Petitioner was climbing down the truck when he slipped on the last step. Petitioner testified that it had rained the previous night and the truck was slippery. Petitioner testified that his left leg went down while his right leg shot out and twisted. Petitioner testified that he knew something was wrong, so he called his supervisor and Petitioner was taken for medical treatment. Petitioner testified that when his leg twisted he felt a pop. Petitioner testified that prior to his incident that he never injured his back or received medical treatment for his back.

On February 21, 2018, Petitioner sought medical treatment at U.S. Health Works. Petitioner reported pain radiating into the back, right buttock and into the right calf. Weakness of the right leg was also noted with numbness and tingling of the lower extremities. The history provide to U.S. Health Works consists of 58-year-old male, working as a tree trimmer when climbing down a ladder he slipped, and his right leg went to the side. Petitioner was examined and he had a positive straight leg raise test. Petitioner had an abnormal gait, weakness of the

lower extremities, and loss of lumbosacral lordosis was noted. Petitioner was diagnosed with lumbar radiculopathy and a lumbar strain. The records from U.S. Health Works states "*The findings on exam and diagnosis are consistent with the injury reported by patient. Prior factor such as injuries/medical conditions/diseases/prior activities or exposures are not contributing to the findings. In conclusion, the reported injury, more likely than not, is causing the current symptoms and findings*". Physical therapy was recommended, and Petitioner was issued work restrictions and given a urine test. (PX 5).

On March 2, 2018, Petitioner returned to U.S. Health Works and a MRI was recommended. proscribed. Petitioner's urine test was positive for cocaine and hydrocodone. (PX 5). On March 28, 2018, Respondent issued a letter denying Petitioner's claim as not being compensable. (RX 2).

Petitioner underwent the MRI at Rush University Medical Center. The MRI found a mild disc bulge with ligamentum flavum thickening and facet arthropathy with mild spinal canal stenosis at L1-L2; moderate disc bulge, ligamentum flavum thickening and facet arthropathy with a moderate to severe spinal canal stenosis and nerve root crowding at L2-L3; moderate disc with ligamentum flavum thickening and facet artropathy with synovial joint effusion and moderate spinal canal stenosis and thecal sac crowding with moderate severe bilateral foraminal narrowing at L3-L4; mild to moderate disc bulge with superimposed left paracentral disc herniation, moderate severe canal narrowing, moderate facet changes and ligamentum flavum thickening, moderate right and moderate severe left foraminal narrowing; and mild to moderate disc bulge, with mild-to-moderate facet changes and ligamentum flavum thickening, mild canal narrowing and sever right and moderate left foraminal narrowing.

Petitioner was diagnosed with congenital lumbar spinal stenosis with moderate to severe spinal stenosis, L2-L3 and L3-L4, with resulting low back pain and neurogenic claudication. Surgery was recommended which Petitioner had on May 31, 2018. Petitioner underwent a minimally invasive L2-L3 and L3-L4 laminectomies. Petitioner's postoperative diagnoses was moderate to severe spinal stenosis, L2-L3 and L3-L4, with resulting low back pain and neurogenic claudication. (PX 7).

Petitioner testified that his pain levels improved after the surgery, but he is still experiencing some pain. Petitioner testified that he has not returned to work yet and that he has not received any TTD benefits.

At trial, Petitioner testified that prior to February 21, 2018, he was taking Norco, proscribed to his mother, for pain related to his arm. Petitioner testified that he was not intoxicated on February 21, 2018. Petitioner also testified that he did not take cocaine.

Raymond Toren testified for Petitioner. Mr. Toren is Petitioner's supervisor. Mr. Toren is a supervisor for the Department of Forestry. Mr. Torn testified that he observed the Petitioner and other employees as the checked in and received their job assignments the morning of February 21, 2018. Mr. Toren testified that he knows Petitioner and observed Petitioner before his shift. Mr. Toren testified that he observed Petitioner before the start of the 6 A.M. shift for about 10 minutes. Mr. Toren testified that he believes he spoke to Petitioner. Mr. Toren did not notice anything unusual and he allowed Petitioner to work. Mr. Toren testified that it was icy on February 21, 2018. Mr. Toren testified that about 30-40 people are checking in for the morning shift. Mr. Toren testified that he has no knowledge of Petitioner using controlled substances or taking cocaine. On cross-examination, Mr. Toren testified that he is not trained to identify individuals suffering from addictions. Mr. Toren only observed Petitioner in the morning when he checked in.

The petitioner testified he then reported to his primary care physician at Rush, Dr. Tseng. According to the doctor's records the petitioner called his office on 3/1/18 "*regarding receiving a prescription for Norco*". On 3/2/18 the doctor's records at 9:39AM read in part, "*Patient states that the prescription is needed just to show the job that he has a prescription due to he took some of his mothers pain medication, patient had an accident at the job and it came up on his urine test*". Another entry from Dr. Tseng's records on 3/2/18 but at 4:14PM, read in part, "*Spoke with patient, he had an injury at work, for which he saw a company doctor. He had been taking Norco (his mother's) for arm pain. This predates the olecranon bursitis. The bursitis is asymptomatic. He had a positive Utox, so he asked for a prescription for Norco. It is still unclear what me writing him a current prescription would accomplish*".

The Arbitrator did find the Petitioner's testimony credible, in part, because he testified that he did not take cocaine but tested positive for cocaine. Petitioner failed to provide any

explanation for the finding of cocaine in his urine test. The Arbitrator found the testimony of Raymond Toren to be credible.

Conclusions of Law

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

The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992). To obtain compensation under the Act, the claimant bears the burden of showing by a preponderance of the evidence, he suffered a disabling injury which arose out of, and in the course of his employment. *Baggett v. Industrial Commission*, 201, Ill 2d. 187, 266 Ill. Dec. 836, 775 N.E. 2d 908 (2002).

With Respect to Issue (C) Did Petitioner Sustain an Accident That Arose Out of And in The Course of His Employment, The Arbitrator Finds as Follows:

To recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that his or her injury "arose out of" and "in the course of" the employment. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105 (2006). Both elements must be present at the time of the claimant's injury to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478 (1989). An injury "arises out of" one's employment if its origin is in some risk connected with or incident to the employment, so that there is a causal connection between the employment and the accidental injury. *Jewel Cos. V. Industrial Comm'n*, 57 Ill.2d 38, 310 N.E.2d 12 (1974). A claimant's injury "arises out of" employment if it "had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. v. Industrial Comm'n*, 2017 Ill. 2d 193, 203 (2003).

Section 11 of the Act provides that no compensation shall be payable if (ii) at the time the employee incurred the accidental injury, the employee was so intoxicated that the intoxication constituted a departure from the employment. Admissible evidence of the concentration of (3) a controlled substance listed in the Illinois Controlled Substances Act, or (4) an intoxicating Compound listed in the Use of Intoxicating Compounds Act in the employee's blood, breath, or urine at the time the employee incurred the accidental injury shall be considered in any hearing under this Act to determine whether the employee was intoxicated at the time the employee

incurred the accidental injuries. The Act further provides that if, at the time of the accidental injuries, there was 0.08% or more by weight of alcohol in the employee's blood, breath or urine or if there is any evidence of impairment due to the unlawful or unauthorized use of (2) controlled substances listed in the Illinois Controlled Substance Act or (3) an intoxicating compound listed in the Use of Intoxicating Compounds Act then there shall be a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the employee's injury. The employee may overcome the rebuttable presumption by the preponderance of the admissible evidence that the intoxication was not the sole proximate cause or proximate cause of the accidental injuries.

It is not disputed that cocaine and the unauthorized use of Hydrocodone are classified as controlled substances or intoxicating compounds and listed on the Illinois Controlled Substance act and/or Intoxicating Compounds Act. As such, under Section 11 of the Act, a rebuttable presumption that Petitioner was intoxicated, and that the intoxication was the proximate cause of his injury.

The issue in this case is whether Petitioner overcame the rebuttable presumption by the preponderance of the admissible evidence that the intoxication was not the sole cause or proximate cause of his injury.

Petitioner testified that he was not intoxicated while at work on February 21, 2018. Petitioner admitted taking his mother's Norco but denied taking cocaine. Petitioner's shift started at 6 A.M. Petitioner was injured at 7:45 A.M. (PX 1). Petitioner arrived at U.S. Health Works at 8:40 A.M. Petitioner's supervisor, Raymond Toren, testified that he observed Petitioner for approximately 10 minutes before Petitioner started work at 6 A.M. when Petitioner checked in. Mr. Toren thought he spoke to Petitioner. Mr. Toren did not observe anything unusual about Petitioner. Mr. Toren testified that he is responsible to observes employees when they check in to determine whether the employees are fit to work that day. Mr. Toren further testified that it is his duty to stop employees from working who are impaired.

The Arbitrator does not give any weight to Petitioner's testimony regarding whether or not he was impaired because the Arbitrator found the Petitioner not to be credible. The question is whether Petitioner proved, by the preponderance of the evidence, that Petitioner's intoxication was not the sole or proximate cause of his injury.

Mr. Toren testified that it had rained the night before Petitioner's accidental injury. Mr. Toren testified that it within his job duties to observe employees reporting for work to determine whether or not they are intoxicated. If an employee appears to be intoxicated, Mr. Toren would not let them work. Mr. Toren testified that he had an opportunity to observe Petitioner and that he did not notice anything unusual about Petitioner. Mr. Toren allowed Petitioner to work after observing Petitioner. The Arbitrator notes that Mr. Toren's observations were limited and Mr. Toren was also observing 30 to 40 other employees during the same timeframe. The Arbitrator also notes that Mr. Toren received no specialized training by Respondent to determine intoxication. The Arbitrator finds significant that Mr. Toren's job duties include observing employees for signs of intoxication and/or impairment. Respondent entrusted the responsibility to identify whether an employee is intoxicated or impaired and to prohibit an intoxicated or impaired employee from working. The Arbitrator gives significant weight to Mr. Toren's observations given that Respondent has entrusted this responsibility to Mr. Toren.

The Arbitrator also notes that Petitioner reported to work at 6 A.M. and the accident occurred at 7:45 A.M. and Petitioner was at U.S. Health Works by 8:40 A.M. No observations of intoxication or impairment was made while Petitioner was being treated at U.S. Health Works. No such observation was found in the U.S. Health Works medical records on February 21,2018, the morning of the accident. Petitioner testified that he was taken to U.S. Heath Works by his supervisor. Respondent did not proffer the testimony of Petitioner's supervisor to would have had the opportunity to observe Petitioner while transporting him to U.S. Health Works.

With Respect to Issue (F) Whether Petitioner's Current Condition of Ill-Being is Causally Related To The Injury, The Arbitrator Finds As Follows:

An accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665, 672 (2003). Employers are to take their employees as they find them. *A.C.&S v. Industrial Commission*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982). If a pre-existing condition is aggravated, exacerbated or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Construction v. Industrial Commission*, 227 N.E.2d 2d 65, 67, 68 (1967), see also *Illinois Valley Irrigation v. Industrial Commission*, 362 N.E.2d 339 (1977). When a pre-existing condition is present, a claimant must show that a work related

accidental injury aggravated or accelerated the pre-existing condition such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury. *St. Elizabeth Hospital v. Workers' Compensation Commission,* 864 N.E.2d 266, 272, 273 (5th Dist. 2007). Causal connection between work duties and an injured condition may be established by a claim of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. *Darling v. Industrial Commission*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (1988). A claimant's prior condition need not be a of good health prior to the accident, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition, it is the resulting deterioration from whatever the previous condition had been. *Schroeder v. Illinois Worker's Compensation Comm'n*, 4-16-0192WC (Fourth Dist. 2017).

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the credible evidence that his current condition of ill-being is causally connected to his accidental injury of February 21, 2018, as forth more fully below.

Respondent disputed this case based upon liability and did not proffer any evidence disputing that Petitioner's current condition of ill-being is was causally connected to his accident of February 21, 2018. Petitioner was able to perform his job duties prior to Feburary 21, 2018. Petitioner's supervisor Raymond Toren observed Petitioner at 6 A.M. the prior to his accident. Mr Toren testified that Petitioner was not limping, and Mr. Toren did not observe anything unusual. After slipping and falling off the truck, Petitioner was taken to U.S. Health Works.

While at U.S. Health Works Petitioner was experiencing pain radiating into the back, right buttock and into the right calf. Petitioner also had weakness in his right leg, numbness and tingling of the lower extremities, positive straight leg raise test, abnormal gait, weakness of the lower extremities, and loss of lumbosacral lordosis. The records from U.S. Health Works states "*The findings on exam and diagnosis are consistent with the injury reported by patient. Prior factor such as injuries/medical conditions/diseases/prior activities or exposures are not*

contributing to the findings. In conclusion, the reported injury, more likely than not, is causing the current symptoms and findings". (PX 5).

After his accidental injury of February 21, 2018, Petitioner was issued work restrictions and was not able to return to work. Causal connection between work duties and an injured condition may be established by a claim of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. *Darling v. Industrial Commission*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (1988).

With Respect to Issue (J), Whether the Medical Services Provided to Petitioner Were Reasonable and Necessary and Whether Respondent Paid all Appropriate Charges, the Arbitrator Finds as Follows:

Petitioner claims that Respondent is liable for the medical expenses from U.S. Health Works, Affiliated Radiologist, North Shore University Health Systems as identified in PX 9. Respondent disputed liability not the reasonableness or necessary of the treatment. (Arb. Ex. #1). Respondent did not offer any medical opinions disputing the reasonableness and/or necessity of Petitioner's medical treatment.

Pursuant to Section 8(a) of the Act, the employer shall pay all necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services which are reasonably required to cure or relieve the employee from the effects of the accidental injury. For treatment of an employee's workplace injury to be compensable under the workers' compensation laws, Petitioner must establish the treatment is necessitated by the work injury and not some other condition or conditions. *Hansel & Gretel day Care Center v. Industrial Comm'n,* 215 Ill.App.3d 284; 574 N.E.2d 1244 (1991).

As stated above, the Arbitrator found that Petitioner sustained an accidental injury that arose out of and in the course of his employment and that Petitioner's current condition of ill-being is causally related to his work accident of February 21, 2018. The Arbitrator further finds that the medical treatment Petitioner received was necessary and reasonably required to cure or relieve Petitioner from the effects of his injury. As such, Respondent shall pay US Healthworks, Affiliated Radiologist, and North Shore University Health Systems for the amounts due as indicated in PX 9, pursuant to Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

With Respect to Issue (K), Whether Petitioner is entitled to TTD benefits, the Arbitrator finds as follows:

Petitioner claims to be entitled to TTD benefits from February 22, 2018 through November 15, 2018, representing 38 weeks. (Arb. Ex. #1). A claimant is temporarily and totally disabled from the time an injury incapacitates her until such time as she is as far recovered or restored as the permanent character of her injury will permit. *Westin Hotel. V. Industrial Comm'n*, 372 Ill. App. 3d 527 (2007). In determining whether a claimant is no longer entitled to continue receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of return to the workforce. *Interstate Scaffolding, Inc. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132 (2010). Once a claimant has reached MMI, her condition has become permanent and she is no longer eligible for TTD benefits. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d. 107 (1990).

Respondent denied liability based upon accident the causation. As stated above, the Arbitrator found accident and causation. Respondent did not present evidence that Petitioner's condition had stabilized, and that he was capable of returning to work. The medical records and Petitioner's testimony shows that Petitioner's condition has not stabilized, and Petitioner has restrictions which Respondent has been unable to accommodate. As such the Arbitrator finds that Petitioner was temporarily and totally disabled from February 22, 2018 through November 15, 2018 representing 38 weeks. As such, Respondent shall pay Petitioner $993.13/ week for 38weeks, commencing February 22, 2018 through November 15, 2018, as provided in Section 8(b) of the Act.

With Respect to Issue (M) Penalties and/or Fees, the Arbitrator Finds as Follows:

Section 19(k) of the Act authorizes the assessment of a penalty if the petitioner establishes that the respondent is guilty of unreasonable or vexatious conduct, which does not present a real controversy but are merely frivolous or further delay. *820 ILCS, 305/19.* Penalties under Section 19(k) are discretionary rather than mandatory. *Smith v. Industrial Commission, 170 Ill. App. 3d 626, 525 N.E. 2d 81 (1988).* Section 19(l) of the Act provides, in part, for additional compensation when the respondent "shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of weekly compensation benefits due to an injured employee during the period of temporary total disability". *820 ILCS, 305/19(l).* Findings of the same behavior by the respondent also allows the Commission to "assess all or any part of the attorney's fees and cost against the respondent. *820 ILCS, 305/16.* The purpose of the Act is to "expedite the compensation of industrial injured workers and penalize an employer who

unreasonably or in bad faith, delays or withholds compensation due an employee." *Avon Products v. Industrial Commission, 82 Ill. 2d 297, 412, N.E. 2d 468 (1980).* However, this is not intended to inhibit contests of liability or appeals by employers who honestly believe an employee not entitled to compensation." *Id.* An employer is entitled to challenge liability when the challenge is based upon a reasonable belief that compensation would not be appropriate under the Act. Therefore, a good faith challenge of liability will not warrant the assessment of penalties against the employer. *Id.* Reasonableness is the foremost test for determining whether penalties are appropriate. These sections were created to prevent the bad faith, unreasonable delay or nonpayment in the payment of benefits to injured employees. Where there is a reasonable controversy, which results in the withholding of benefits, the Illinois Courts have refused to assess penalties. To do so would be to deprive the employer's rights to pursue a challenge based upon a reasonable belief as well as to deny their right to an appeal. *O'Neal Brothers Construction Company v. Industrial Commission, 93 Ill.2d 30, 442 N.E.2d 895 (1982)* Doing so "would be substantially burdened were penalties to be imposed on all employers who appeal and lose", as well as unjust. *Id.* The Courts in this State have repeatedly reviewed the determination of reasonableness. As explained in The Board of Education, the standard that the employer is held to is an "objective reasonableness in his belief". *The Board of Education v. Industrial Commission, 93 Ill.2d 1, 422 N.E.2d 861 (1982)* "It is not good enough to merely assert honest belief that the employee's claim is invalid or that his award is not supported by the evidence". *Id.* The Courts look to determine if a "reasonable person" would "justify" the respondent's actions. If so, the employer's belief is deemed "honest". *Id.* When the respondent has a "legitimate doubt, from a legal stand point, of its liability, its conduct [in refusing payment is] not unreasonable". *Avon Products v. Industrial Commission, 82 Ill.2d 297, 412 N.E.2d 468 (1980)*

In determining whether the assessment of penalties was proper the totality of the evidence and facts surrounding the denial of benefits must be thoroughly examined. In this case, Respondent's denial of this claim was reasonable. The positive drug test provided basis for the denial of the claim under the Act. As such the Petitioner failed his burden and his request for penalties and fees is hereby denied

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maritza Martinez,
Petitioner,

vs. No. 18 WC 06416

Harvard Maintenance,
Respondent.

20IWCC0295

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 issue of penalties and attorney's fees under §19(l), §19(k) and §16 of the Act, 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 December 27, 2018, is hereby affirmed and adopted.

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

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

20 IWCC0295

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,600.00. 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: MAY 27 2020

Marc Parker

Deborah L. Simpson

Barbara N. Flores

mp/wj
05/21/20
68

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

MARTINEZ, MARITZA
Employee/Petitioner

Case# **18WC006416**

20IWCC0295

HARVARD MAINTENANCE
Employer/Respondent

On 12/27/2018, 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 2.48% 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:

1747 SEIDMAN MARGULIS & FAIRMAN LLP
KAREN C LEE
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

5001 GAIDO & FINTZEN
GAIL M BEMBNISTER
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

20IWCC0295

☐ 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)

Maritza Martinez
Employee/Petitioner

v.

Harvard Maintenance
Employer/Respondent

Case # **18** WC **6416**

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 **Robert M. Harris**, Arbitrator of the Commission, in the city of **Chicago**, on **October 23, 2018**. 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, **2/9/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**8,504.54**; the average weekly wage was $**340.18**.

On the date of accident, Petitioner was **35** 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 $226.78/week for 34-2/7 weeks, commencing 2/26/18 through 10/23/18, as provided in Section 8(b) of the Act.

Respondent shall pay to Petitioner penalties of **$648.00**, as provided in Section 16 of the Act, **$1,620.00**, as provided in Section 19(k) of the Act, and **$3,240.00**, as provided in Section 19(l) of the Act.

Respondent shall authorize and pay for the reasonable and necessary medical services associated with the prescribed ulnar nerve transposition procedure in accordance with the recommendations of Dr. Scott Rubenstein, as provided in Section 8(a) of the Act.

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

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

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

Robert M. Harris

Signature of Arbitrator

December 27, 2018
Date

DEC 27 2018

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner Maritza Martinez was 35 years old and working for Respondent as a custodian on February 9, 2018. Petitioner's job responsibilities included cleaning floors. On February 9, 2018, Petitioner was using an automatic motorized machine to clean the floors at a school where she was assigned to work by Respondent. The machine was leaking water on the date of the accident. When Petitioner took a step forward, her foot slipped on the water and she fell onto her right hand, elbow and right side. She immediately felt pain in her right side. She reported the accident to Ruben, her supervisor. Petitioner believed that Respondent would authorize and send her to get medical treatment. Petitioner waited for Respondent to direct her to a physician until February 13, 2018, at which time the pain had worsened and became intolerable.

On February 13, 2018 when she had not heard from Respondent, Petitioner presented to the emergency room at Presence St. Mary's of Nazareth Hospital. (PX2). Petitioner provided a history of working as a custodian and using an automated floor washing machine that was leaking and sustaining a slip and fall onto her right side. (PX2). Petitioner complained of pain "throughout her entire right side." (PX2). Petitioner underwent x-rays of her right shoulder, sacrum and coccyx, lumbar spine and ankle, which were within negative for fracture or dislocation. (PX2). Petitioner returned to work and advised Respondent that hospital personnel instructed her to return to light duty. Respondent did not provide Petitioner with light duty. Petitioner continued to perform her normal job activities that involved using her hands and arms.

On February 26, 2018, Petitioner was seen in the emergency room at Norwegian American Hospital. (PX3). These records indicate Petitioner complained of injury to her right arm. (PX3). She was "still unable to move her R arm without alot[sic] of pain." (PX3). Petitioner's right elbow was swollen. (PX3). She had not seen an orthopedic doctor, as she believed Respondent would send her to one. Petitioner was diagnosed with an elbow fracture. (PX3). She was taken off work until further evaluation. (PX3). She did not return to work, but Respondent did not pay Petitioner temporary total disability benefits.

On March 21, 2018, Petitioner was seen at Cook County Hospital, the complete records of which Petitioner was unable to obtain. Petitioner did receive a work status form authored by Dr. Brett Rosenthal at Cook County Hospital that indicated Petitioner was to remain off work until further follow up in 4 weeks. (PX4). Petitioner testified she presented this work status note to Respondent, but Respondent still did not pay Petitioner any temporary total disability benefits.

On May 2, 2018, Petitioner presented to Dr. Scott Rubinstein at Illinois Bone & Joint Institute. (PX4). Petitioner provided a history of a slip and fall on water from a floor scrubbing machine. (PX4). Petitioner stated she landed on her right side. (PX4). Dr. Rubinstein's impression was a mild rotator cuff sprain, cubital tunnel syndrome, and a healed radial head fracture. (PX4). Dr. Rubinstein ordered an EMG and stated Petitioner's problems were a direct result of the injury she sustained in the fall at work. (PX4). Dr. Rubinstein indicated Petitioner needed to remain off work. (PX4). Respondent did not authorize the EMG and did not pay Petitioner any temporary disability benefits.

On May 17, 2018, Petitioner underwent the EMG, which was abnormal and demonstrated electrodiagnostic evidence of a right ulnar nerve injury at the elbow and of a right C8 cervical spine radiculopathy. (PX4). At this time, Respondent had still not paid Petitioner temporary total disability benefits.

On May 21, 2018, Petitioner returned to Dr. Rubinstein to discuss the results of the EMG. (PX4). Dr. Rubinsteain noted the positive findings of the EMG and ordered an MRI of the cervical spine. (PX4). Dr. Rubinstein suspected Petitioner would eventually require an ulnar nerve transposition. (PX4).

On May 24, 2018, Petitioner underwent an MRI of the cervical spine, which revealed a small central disc herniation at C3-4 and a small central disc herniation at C4-5. (PX4). At this time, Respondent had still not paid Petitioner temporary total disability benefits.

On May 30, 2018, Petitioner returned to Dr. Rubinstein. (PX4). At that time, Dr. Rubinstein noted Petitioner's shoulder symptoms had not improved and he recommended a shoulder arthroscopy. (PX4). Dr. Rubinstein indicated the need for the surgery was related to the original injury. (PX4). Dr. Rubinstein requested approval from Respondent, but Respondent did not authorize the surgery continued to deny Petitioner temporary disability benefits.

On June 6, 2018, Petitioner was examined by Dr. Ajay Balaram at Respondent's request pursuant to Section 12 of the Act. Respondent had still not paid Petitioner temporary total disability benefits, but Petitioner nonetheless appeared for the examination. Petitioner provided the same history of accident that was provided in the initial treatment records. (RX1). Petitioner reported that she had pain in her entire right side and neck at the time of the accident. (RX1). At the time of the examination, Petitioner reported pain extending from the elbow to the fingers as well as up to the neck, arm and shoulder, and pain in the neck that radiated to her side. (RX1). Dr. Balaram acknowledged Petitioner reported pain throughout the entire right side of her body when she presented to Presence St. Mary's of Nazareth Hospital on February 13, 2018. (RX1). Dr. Balaram's diagnosis of Petitioner is essentially right arm pain. (RX1). Dr. Balaram noted a substantial basis of his opinion was what he considered an inconsistent timeline relating to the date of injury and the date of the first emergency room visit, then refers to February 19, 2018 as the date of accident. (RX1).

On June 11, 2018, Petitioner returned to Dr. Rubinstein. (PX4). Dr. Rubinstein gave Petitioner an injection into the cubital tunnel. (PX4). Dr. Rubinstein ordered Petitioner to remain off work. (PX4). Respondent did not pay Petitioner temporary disability benefits.

On July 11, 2018, Petitioner returned to Dr. Rubinstein. (PX4). Petitioner continued with elbow and shoulder complaints. (PX4). Petitioner noted only temporary improvement with an injection into the cubital tunnel. (PX4). Dr. Rubinstein opined Petitioner's main problem was cubital tunnel syndrome, directly related to the fall at work. (PX4). Dr. Rubinstein noted the initial emergency records contain complaints of upper extremity pain and right sided body pain, and a direct blow to the elbow was certainly what happened to Petitioner. (PX4). The basis of his opinion is there was no other trauma to the elbow and the consistent history of the accident. (PX4). Dr. Rubinstein opined Petitioner had exhausted conservative management and recommended an ulnar nerve transposition or decompression. (PX4). Dr. Rubinstein noted Dr. Balaram did not have the benefit of the EMG results to review at the time of his report and he believed that once Dr. Balaram had the benefit of the EMG, Dr. Balaram would admit that the objective data corresponds with Petitioner's findings on examination. (PX4). Dr. Rubinstein requested authorization of the ulnar nerve transposition and ordered Petitioner to remain off work. (PX4). Respondent did not authorize the surgery and did not pay Petitioner temporary total disability benefits.

On August 8, 2018, Petitioner returned to Dr. Rubinstein. (PX4). Petitioner continued to complain of significant upper extremity pain relating to the ulnar nerve. (PX4). Dr. Rubinstein noted an extremely positive Tinel's, indicative of irritation of the ulnar nerve. (PX4). Dr. Rubinstein reiterated his opinion that Petitioner sustained traumatically induced cubital tunnel syndrome. (PX4). Dr. Rubinstein again requested authorization for the ulnar nerve transposition and ordered Petitioner to remain off work. (PX4). Respondent did not authorize the ulnar nerve transposition and did not pay Petitioner temporary total disability benefits.

On September 12, 2018, Dr. Balaram authored an addendum to his original report. (RX2). Dr. Balaram acknowledged Petitioner has confirmed cubital tunnel syndrome. (RX2). Dr. Balaram wrote that Petitioner's subjective findings did not point to a specific nerve distribution, but he admitted the objective EMG findings indicate cubital tunnel syndrome and electrodiagnostic evidence of C8 cervical spine radiculopathy. (RX2). Dr. Balaram noted review of an emergency department record from April 23, 2017 where Petitioner evidently struck her right elbow on a wall. (RX2). Dr. Balaram noted this was about 1 year prior to the reported injury. (RX2). Dr. Balaram noted x-rays of Petitioner's elbow were negative at that time. (RX2). Dr. Balaram noted Petitioner was referred to an orthopedic follow-up and which was not provided. (RX2). Dr. Balaram does not opine that Petitioner's condition was either preexisting or caused by Petitioner striking her elbow on a wall. (RX2). Dr. Balaram maintained his opinion that Petitioner had no complaints of elbow pain at the initial emergency room visit. (RX2). Dr. Balarm does agree with Dr. Rubinstein's diagnoses. (RX2).

On October 23, 2018, date of hearing, Petitioner testified she was in her usual state of health prior to the accident; this testimony was not rebutted. Petitioner testified she wished to undergo the ulnar nerve transposition, she is unable to work secondary to her work injury, and she was never paid any temporary total disability benefits.

CONCLUSIONS OF LAW

IN SUPPORT OF THE ARBITRATOR'S FINDINGS AND CONCLUSIONS RELATED TO DISPUTED ISSUES:

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

"An injury 'arises out of' employment when it originates from some risk related to the employment, thereby establishing a causal connection between the injury and the occupation. A compensable injury occurs 'in the course of' employment when it is sustained while a claimant is at work or while he performs reasonable activities in conjunction with his employment." *Wise v. Indus. Comm'n*, 54 Ill.2d 138, 142 (1973).

The Arbitrator finds and concludes Petitioner's injuries arose out of and in the course of Petitioner's employment. All of the evidence, testimony and records in evidence support the finding and conclusion that Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent on February 9, 2018. Respondent offered no rebuttal evidence of any kind to even suggest, let alone indicate or prove, that anything other than this accident at work on February 9, 2018 occurred; there was no evidence of any other cause, reason, accident or explanation for her injuries (such that she was not injured at work on the date claimed, or was not working on that date, or was injured while on vacation, etc.). Even Respondent's own trial exhibit, RX 3, the Form 45, clearly indicates a reported injury claim of February 9, 2018, albeit it is labeled as "allegedly."

Further, Respondent's Section 12 examining expert Dr. Balaram never in either of his two reports, opines that Petitioner was not injured while working for Respondent on February 9, 2018; rather, his opinions focus on causation and related matters. That is because Dr. Balaram apparently was never pointedly asked whether Petitioner sustained an accident on February 9, 2018; to the contrary, the questions he was asked presupposed a claimed accident on that date. Again, the focus for Dr. Balaram was whether Petitioner's claimed right arm/elbow condition was causally related to this claimed accident of February 9, 2018 – not whether she suffered an accident on that date. The Arbitrator finds Petitioner's description of the accident/mechanism of injury, while admittedly far from perfect and totally consistent in all aspects, is sufficiently credible and substantially (if not completely)

corroborated on multiple occasions in the medical records. The Arbitrator therefore finds and concludes Petitioner has sufficiently met her burden of proving an accident occurred on February 9, 2018 arising out of and in the course of her employment with Respondent. Again, no alternative explanation or rebuttal evidence was offered, let alone proved.

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

The Arbitrator finds and concludes Petitioner has sufficiently proven by a preponderance of the credible evidence that her current condition of ill-being – which includes her right arm and elbow – is causally related to the accident sustained while working for Respondent on February 9, 2018.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999).

Further, the law is that "[a] chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *Int'l Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 63-64, 442 N.E.2d 908, 911 (1982). It is well established that prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

The Arbitrator finds and concludes the "chain of events" legal theory supports Petitioner's claim. Petitioner testified that she fell violently on her right side. Petitioner's testimony is credible and substantially consistent with the histories contained within the medical records. Petitioner was in a condition of good health, and after a fall onto her right side, amongst other conditions, she developed cubital tunnel syndrome. The Arbitrator notes with emphasis there is no alternate mechanism of injury present in the record. Based on the chronology of complaints, objective findings, absence of any intervening accident or injury, and the logical opinion of Dr. Rubinstein, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury.

It is the Commission's function, to choose between conflicting medical opinions. *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill.2d 1, 4, 31 Ill. Dec. 789, 394 N.E.2d 1166, 1168 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 232, 168 Ill. Dec. 756, 590 N.E. 2d 78, 82 (1992). Not only may the

Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician. *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill.2d 1, 4, 31 Ill. Dec. 789, 394 N.E.2d 1166, 1168 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 232, 168 Ill. Dec. 756, 590 N.E. 2d 78, 82 (1992). Expert opinions must be supported by facts and are only as valid as the facts underlying them." *Gross v. Illinois Workers' Comp. Comm'n*, 2011 IL App (4th) 100615WC, ¶ 24, 960 N.E.2d 587, 594 (4th Dist. 2011).

Accordingly, the Arbitrator finds and concludes the opinions of Dr. Balaram are unpersuasive and are afforded less weight and reliance than those of treating physician Dr. Rubinstein. Dr. Balaram's only real point of disagreement with Dr. Rubinstein concerns their disagreement regarding causation. The Arbitrator resolves that conflict in Dr. Rubinstein's favor. The Arbitrator notes that Dr. Balaram's opinions are based almost exclusively on the premise and argument that Petitioner did not ***explicitly*** complaint of elbow pain at the initial emergency room visit on February 13 at Presence St. Mary of Nazareth Hospital. (PX2). This was only four days after the accident. However, this premise is faulty because the records as a whole contain multiple reported complaints of pain on Petitioner's "entire right side." The Arbitrator finds it obvious that the right side of the body contains the elbow. It is also not unreasonable to draw the inference that other parts of her body, at that time, presented with greater symptoms than her right elbow (e.g., her low back). Further, while Petitioner admittedly did not specifically mention her right elbow, she did indicate and complain of "...right shoulder pain feels as though she cannot move her shoulder..."

Further, during Petitioner's admission at Norwegian American Hospital (PX 3) on February 26, 2018, Petitioner's chief complaint then was "Rt arm pain after fall 2 weeks ago." Further history indicates, "Pt states that she fell and injured ger R arm 2 weeks ago at work...Pt still unable to mover her R arm without a lot of pain. ***Swelling noted r elbow***." Further history indicates, "...presents to the ER with complaint of right arm pain...Patient states she fell because she is a housekeeper at a high school and was mopping floors when she slipped and fell on her side. Patient states that she is having pain in her right humerus right elbow right wrist and right hand. Patient states she is limited range of motion of the hand. Patient with positive edema of the extremity. Patient with no pain to her shoulder." X-rays of the right elbow showed "chip fracture of the coronoid process of the ulna." The history in the May 17, 218 EMG/NCV notes, "She was injured at work when she slipped and fell on a wet floor. She landed on the right side onto her elbow. She reports that the worst pain is at the elbow.."

The Arbitrator credits Petitioner's testimony and the opinions of Dr. Rubinstein that the medical evidence is sufficiently consistent with a fall onto the elbow, the Arbitrator finds Dr. Balaram's opinions are unreliable. The Arbitrator notes that the several injury histories/mechanisms of injury found in the record are admittedly not perfect nor without any inconsistencies or variations; however, Respondent has cited no case law to support a

legal theory which requires a Petitioner to offer only "perfectly consistent injury histories/mechanisms of injury" in order to prove accident or causation. Petitioner's history of the mechanism of injury - imperfect as it may well be - was sufficiently consistent in its essentials to support her claims.

Lastly, the Arbitrator emphasizes treating physician Dr. Rubinstein was fully aware of Petitioner's weaknesses as an historian yet he nonetheless opined credibly in her favor: On July 11, 2018, Dr. Rubinstein wrote a letter addressed to Respondent's agent and noted, "I will note Maritza is not a good observer of her own symptoms and it takes a lot of careful exam to come up with the appropriate answers, **but when done carefully, her symptoms have been consistent from the beginning of cubital tunnel syndrome as her primary source of neurologic findings in her upper extremities**..." Dr. Rubinstein further indicated, "Overall my opinion is that her main problem causing her upper extremity pain is cubital tunnel syndrome. **I think this is directly related to the fall that she had on her elbow.** Knowing Maritza, I am not surprised that her Emergency Room visit at St. Mary's which I had a chance to review the records of mentions upper extremity pain and right side of her body pain without being specific about the elbow, but certainly a direct blow to her elbow is what happened when she fell on her side could have caused the cubital tunnel syndrome. While her radial head fracture was diagnosed late, she denies to me any other trauma to her elbow other than the fall at work."

Dr. Rubinstein further commented on Dr. Balaram's initial Section 12 report: "While he mentions Maritza's exam is quite dramatic and may be out of line with her actual symptoms, this is more in relation to her personality than anything else and certainly once I have gotten to know her and narrowed things down in a little more detail, I have been able to get a more accurate examination without the drama that I also saw on her initial evolution." Further, "I think once he sees this and understands there is objective data that does correspond with the majority of her exam findings that he might be more agreeable to ulnar nerve transposition. Certainly, over the last few visits with me, her exam has been much more consistent and shows clear signs of cubital tunnel syndrome. Therefore, I would once again request the ulnar nerve transposition."

K. Is Petitioner entitled to any prospective medical care?

Respondent disputes its liability to provide prospective medical treatment on the basis of its contentions that (a) Petitioner's conditions of ill-being are not causally related to her work accident and (b) that Petitioner's work accident did not arise out of and in the course of employment. However, for the reasons discussed in sections C and F, the Arbitrator has found that Petitioner's work accident arose out of and in the course of employment, and that her conditions of ill-being are causally related to the work accident.

Petitioner testified that conservative treatment has not alleviated her right elbow symptoms that prevent her from returning to work. Dr. Rubinstein opined that Petitioner's ongoing symptoms are consistent with her EMG results, and that Petitioner would benefit from an ulnar nerve transposition procedure. Petitioner testified she would like to undergo the prescribed surgery. It is significant to emphasize that Dr. Balaram does not disagree with this treatment recommendation. Having decided the issues of accident and causation in Petitioner's favor, the Arbitrator awards Petitioner prospective medical treatment for her elbow condition in accordance with Dr. Rubinstein's treatment recommendations of Dr. Rubinstein.

L. What temporary benefits are in dispute?

Respondent disputes its liability to provide temporary total disability benefits and temporary partial disability benefits on the basis of its contentions that (a) Petitioner's conditions of ill-being are not causally related to her work accident and (b) that Petitioner's work accident did not arise out of and in the course of employment. However, for the reasons discussed in sections C and F, the Arbitrator has found that Petitioner's work accident arose out of and in the course of employment, and that her conditions of ill-being are causally related to the same. Therefore, the Arbitrator finds Respondent liable for TTD benefits for the period of Petitioner's temporary disability, as supported by the medical records in evidence and her credible testimony.

Petitioner was off work for 34-2/7 weeks, from February 26, 2018 to October 23, 2018. Respondent is therefore ordered to pay Petitioner $7,775.65 in TTD benefits (34-2/7 weeks x $226.78).

M. Should penalties or fees be imposed upon Respondent?

The Arbitrator finds and concludes the facts of this case warrant that penalties and fees should be imposed on Respondent. There was no objective basis to deny any benefits **prior to** Dr. Balaram's Section 12 report of June 13, 2018 and **therefore any denial of benefits before that date was objectively unreasonable and without basis.** The Arbitrator finds and concludes Dr. Balaram's Section 12 report and addendum meet the minimum threshold for Respondent to have objectively and reasonably placed reliance on his opinions to dispute the claim going forward only after his report was issued.

The purpose of sections 19(l), 19(k) and 16 of the Act is to expedite the compensation of industrially injured workers and deter employers from unreasonably or in bad faith delaying or withholding compensation due an employee. *Oliver v. Illinois Workers' Compensation Commission, et. al.*, 2015 Ill. App. (1st) 143836 (citing *Avon Products, Inc. v. Industrial Comm'n,* 82 Ill. 2d. 297, 301 (1980). Section 19(l) provides that "in case the employer or his 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). Section 19(k) provides that "in case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act, shall be considered unreasonable delay." 820 ILCS 305/19(k). Section 16 provides that "whenever the Commission shall find that the employer, 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 the provisions 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." 820 ILCS 305/16.

There was no testimony or evidence introduced that purports to explain the delay or denial in payment of temporary total disability benefits to Petitioner. On February 13, 2018, Respondent was presented with a work status form indicating Petitioner was medically unable to perform her regular job duties, yet Respondent failed to provide Petitioner with light duty work or pay her temporary disability benefits. Respondent was consistently presented with work status forms beginning February 26, 2018 indicating that Petitioner was medically unable to work. Respondent acknowledges timely notice of Petitioner's accident and no evidence was introduced that would support an accident defense, and no evidence suggests that Petitioner was injured in any manner other than how she testified. Respondent did not have the benefit of any Section 12 report until June 13, 2018, about four months after Petitioner's initial demand for payment of temporary total disability benefits. When the report was made available, it was based entirely on questionable information, and did not offer any further explanation for Petitioner's injuries. The Arbitrator finds that Respondent, lacking good faith, had chosen to withhold temporary total disability benefits from Petitioner with no just or reasonable delay. As there is no objectively reasonable defense to Petitioner's Petition, penalties are awarded. Pursuant to Section 19(l), Petitioner is awarded $30.00 per day from

February 26, 2018 through June 13, 2018, or 15-3/7 weeks, or 108 days, the period for which Respondent unreasonably failed to pay benefits in accordance with Section 8(b). **Therefore, the total penalty awarded to Petitioner under Section 19(l) shall be $3,240.00 (108 X $30.00).**

Pursuant to Section 19(k), Respondent is determined to have acted in an unreasonable and vexatious manner in the delay of payment of temporary total disability. The amount of temporary total disability due to Petitioner and subject to Section 19(K) is $3,240.00. Section 19(k) provides for a penalty of 50% of the amount due that was unreasonably withheld to be awarded as a penalty. **Therefore, Petitioner is awarded an additional amount of $1,620.00 pursuant to Section 19(k).**

Pursuant to Section 16, the penalty awarded due to the unreasonable and vexatious delay of nonpayment of TTD shall be 20% of the unreasonably unpaid TTD amount, for a total of $648.00 (20% of $3,240.00).

Robert M. Harris

Robert M. Harris, Arbitrator

Date: December 27, 2018

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

WANDA SKOLIMOWSKI,

Petitioner,

20IWCC0296

vs. NO: 06 WC 45655

BEKIN VAN LINES OPERATIONS, LLC
BEKINS VAN LINES/THE BEKINS COMPANY
and ILLINOIS STATE TREASURERas 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 accident, benefit rate, employer-employee relationship, causal connection, medical expenses,temporary total disability, and nature and extent of 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.

As the Supreme Court of Illinois noted in *Roberson v. Industrial Commission*, "the question of whether a person is an employee remains 'one of the most vexatious *** in the law of compensation.' [citation omitted]. The difficulty arises not from the complexity of the applicable rules, but the fact-specific nature of the inquiry." 225 Ill. 2d 159, 174, 866 N.E.2d 191 (2007). As the Arbitrator found and the Commission affirms, the evidence is well-balanced but, taken as a whole, preponderates in favor of a lack of an employee-employer relationship.

20IWCC0296

In order to determine whether a person is classified as an employee or an independent contractor, the Commission analyzes numerous factors: "whether the employer may control the manner in which the person performs the work; whether the employer dictates the person's schedule; whether the employer pays the person hourly; whether the employer withholds income and social security taxes from the person's compensation; whether the employer may discharge the person at will; and whether the employer supplies the person with materials and equipment." *Roberson* at 175.

Along with the above identified factors, the Commission considers: "'[B]ecause the theory of [worker's] compensation legislation is that the cost of the industrial accidents should be borne by the consumer as part of the cost of the product, this court has held that a worker whose services form a regular part of the cost of the product, and whose work does not constitute a separate business which allows a distinct channel through which the cost of an accident may flow, is presumptively within the area of intended protection of the compensation act.' *Ragler Motor Sales v. Industrial Comm'n, 93 Ill. 2d 66, 71, 442 N.E.2d 903, 66 Ill. Dec. 342 (1982).*" *Id.*

No one single factor is determinative, and the weight to be afforded the respective factors will change depending on the specific case at hand. *Luby v. Industrial Commission*, 82 Ill. 2d 353, 412 N.E.2d 439 (1980). Control is "perhaps the most important single factor in determining the relationship [citation omitted]..." *Bauer v. Industrial Commission*, 51 Ill. 2d 169, 172, 282 N.E.2d 448 (1972). Specifically, it is the right to control the work not the exercise of such right. *Immaculate Conception Church v. Industrial Commission*, 395 Ill. 615, 71 N.E.2d 70 (1947).

Petitioner testified Respondent was in the business of "moving people and offices." T. 48, 06/16/16. As such, Respondent provided the trailers to Petitioner and her husband which were attached to the truck owned by Petitioner's husband. T. 61, 06/16/16. Petitioner did not work an assigned shift nor was she provided assigned loads. In order to obtain a load, Petitioner was required to solicit the same from a dispatcher for Respondent who advised Petitioner where to acquire the trailer and the destination for delivery of the trailer. T. 65, 06/16/16. The "Independent Contractor Agreement" (the Agreement) executed by both Petitioner's husband and Respondent states Respondent did not guarantee any specific number of loads. PX2.

Moreover, once Petitioner accepted a load, Respondent exercised no control over the manner in which Petitioner delivered the load or performed her work. Petitioner was free to

0850310

20IWCC0296

choose her own route, schedule breaks, and meals. T. 18, 22, 06/17/16. Although Respondent provided the ultimate destination with accompanying mileage and delivery date, the details in how to accomplish the delivery were entirely in Petitioner's control. Further, pursuant to the Agreement, the Petitioner was allowed to drive for another company so long as Respondent's identifying information was removed. Additionally, the Agreement executed by Petitioner's husband expressly provides that Petitioner's husband could hire his own employees, and if said employee drove the truck, pursuant to federal regulations, Respondent was required to qualify her. PX2.

Respondent did not dictate Petitioner's schedule and paid Petitioner by the mile as opposed to hourly. T. 59, 06/16/16. Respondent did not withhold income taxes instead it issued a 1099 to Petitioner's husband who then issued a separate 1099 to Petitioner. T. 71, 06/16/16. Petitioner in filing her income taxes for 2005 utilized the 1099 issued by her husband and further deducted business expenses such as fuel and additional truck expenses. *Id.* Pursuant to the terms of the Agreement, 30-day written notice was required by either party to terminate the agreement. *Id.* Undeniably, Respondent provided equipment and materials including a uniform but suppling such does not negate all other factors.

Finally, Petitioner's work as a driver falls squarely under Respondent's general business of moving product. Much like the requirement that Respondent comply with all federal regulations, this is merely a factor to consider in determining if a driver is an employee or an independent contractor. See *Roberson v. The Industrial Commission*, 255 Ill. 2d 159, 178, 866 N.E.2d 191 (2007) ("Freedom of contract requires that parties may structure a relationship as they see fit, provided they do not neglect the requirements of federal law"). To that end, many of the factors highlighted by the Dissent are federal requirements with which Respondent must comply.

In assessing all the factors and weighing them accordingly, Petitioner's business relationship with Respondent is that of an independent contractor and not an employee.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 8, 2017 is hereby affirmed and adopted.

8680536

20IWCC0296

IT IS FURTHER ORDERED BY THE COMMISSION that all benefits to Petitioner are denied because an employee-employer relationship did not exist. The remaining issues are moot.

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 $0.00. 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: MAY 28 2020
SJM/msb
O: 4/15/20
44

Stephen Mathis

L.Elizabeth.Coppoletti

DISSENT

I dissent from the Majority's decision to affirm and adopt the Arbitrator's finding that the Petitioner was an independent contractor and not Respondent's employee on the alleged date of accident of November 9, 2005.

I find the instant case analogous to our Supreme Court case of *Roberson v. Indus. Comm'n*, 225 Ill. 2d 159 (2007), and analogous to the Appellate Court case of *Ware v. Indus. Comm'n*, 318 Ill. App. 3d 1117 (2000). In both cases, the Courts determined that the claimants were employees and not independent contractors notwithstanding any so-called independent contractor agreements.

"An employment relationship is a prerequisite for an award of benefits under the Act." *Roberson v. Indus. Comm'n*, 225 Ill. 2d 159, 174 (2007). In assessing whether an individual is an employee, our Supreme Court has articulated a number of factors, including:

> [W]hether the employer may control the manner in which the person performs the work; whether the employer dictates the person's schedule; whether the employer pays the person hourly; whether the employer withholds income and social security taxes from the person's compensation; whether the employer may

> discharge the person at will; and whether the employer supplies the person with materials and equipment. *Id.* at 175.

No single factor is determinative; the determination rests on the totality of the circumstances. *Id.* However, Illinois courts have expressed that the purported employer's right to control the actions of the employee, and "the nature of the work performed by the alleged employee in relation to the general business of the employer" are the most important factors to consider. *Roberson v. Indus. Comm'n*, 225 Ill. 2d 159, 175 (2007), *E.g.*, *Ware v. Indus. Comm'n*, 318 Ill. App. 3d 1117, 1122 (2000). A factor of lesser weight, although still a consideration, is the label the parties place upon their relationship. *Ware v. Indus. Comm'n*, 318 Ill. App. 3d 1117, 1122 (2000).

The parties herein entered into an Independent Contractor Agreement (the "Agreement") wherein Petitioner was considered a "Contractor" and Respondent was considered the "Company." However, when weighing the facts pertaining to the employer's right to control, the evidence demonstrates that Respondent exercised substantial control over Petitioner's activities: Petitioner was required to complete a job application, as well as a physical examination by a physician chosen by Respondent, and undergo training on driving with loads and how to complete log books; Respondent's dispatcher provided Petitioner with pick-up and delivery instructions, including pick-up and drop-off times; although Respondent did not give Petitioner a specific route to take, Respondent gave Petitioner a cutoff as to the number of miles she was permitted to travel. She would not be paid for any miles that exceeded the permitted mileage limit; Petitioner was required to display decals bearing Respondent's name on the truck owned by Petitioner's husband and leased to Respondent; the trailers that were attached to Petitioner's truck and owned by Respondent also bore Respondent's name; the truck could not be leased to any other carrier or person unless all identification, trademarks, trade-names and logos of Respondent were removed; Petitioner was required to wear a uniform supplied by Respondent; and, Respondent assigned Petitioner an employee identification number. At the time of Petitioner's injury, Petitioner worked exclusively for Respondent.

The Agreement held the Contractor responsible for the operation and performance of all services provided to Respondent, which included loading and unloading of equipment, packing and unpacking boxes, determining the routes of travel and rest stops, and the servicing of equipment. Petitioner was also responsible for taxes, truck maintenance, fuel, truck insurance, mileage, tolls, hotels, meals, phone, and laundry. Petitioner testified that she was not responsible for loading and unloading the trailers and Respondent would reimburse her for toll expenses and trailer washes. Respondent not only provided Petitioner with the trailers, it supplied her with tools for the trailers, crowbars, sheets of plywood, blankets, as well as log books and inventory cards. Petitioner was obligated to report all accidents to Respondent by telephone and to file a written report if required by Respondent.

The Arbitrator in the present case placed emphasis on factors that carried little weight according to *Ware*, 318 Ill. App. 3d 1117, 1126-27 (2000), including the label the parties applied to their relationship, the manner in which payment and taxes were paid, and the fact that Petitioner purchased occupational accident insurance.

Bibliography

20IWCC0296

With respect to the nature of Petitioner's work in relation to the general nature of Respondent's business, this factor further indicates that Petitioner was an employee of Respondent. Respondent was in the business of transporting loads from state to state for its customers and Petitioner's job as a truck driver was transporting those loads for Respondent's customers.

Considering the foregoing factors in their totality, especially the employer's right to control and the nature of the work performed by the alleged employee in relation to the general business of the employer, I find that the evidence weighs in Petitioner's favor in that Petitioner was Respondent's employee and not an independent contractor on November 9, 2005. As such, I respectfully dissent from the Majority's decision.

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SKOLIMOWSKI, WANDA
Employee/Petitioner

Case# **06WC045655**

BEKINS VAN LINES OPERATIONS LLC-ILLINOIS STATE TREASURER AS EX OFFICIO OF THE IWBF
Employer/Respondent

20IWCC0296

On 3/8/2017, 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 0.83% 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:

0328 LEWISDAVIDSON & HETHERINGTON
ANN-LOUISE KLEPER
ONE N FRANKLIN ST SUITE 1850
CHICAGO, IL 60606

4661 SEGAL McCAMBRIDGE SINGER ET AL
LAWRENCE D MASON
233 S WACKER DR SUITE 5500
CHICAGO, IL 60606

0639 ASSISTANT ATTORNEY GENERAL
CHARLENE C COPELAND
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS) 20IWCC0296
)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

Wanda Skolimowski
Employee/Petitioner
v.
The Bekin Van Lines Operations, LLC –
Illinois State Treasurer as ex officio of the Injured Workers' Benefit Fund
Employer/Respondent

Case # **06** WC **45655**

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 **June 16, 2016, July 21, 2016, August 19, 2016, September 19, 2016, November 15, 2016, and December 15, 2016**. 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 9, 2005**, 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.

ORDER

The Arbitrator denies all benefits because an employee-employer relationship did not exist.

The remaining 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.

Milton Black

Signature of Arbitrator

March 8, 2017
Date

MAR 8 - 2017

STATEMENT OF FACTS

Petitioner, Wanda Skolimowski, was an over-the- road truck driver. She stated that she and her husband saw a Bekins ad seeking drivers and that her husband completed an application. In that application, the Petitioner and her husband characterized his position as an Owner-Operator. It is signed by both Petitioner and her husband. (Px. 1) Petitioner testified that she and her husband began working for Bekins in September 2005. She explained that her husband owned the cab. She indicated that she and her husband worked as a team traveling cross-country, moving commercial businesses for Bekins. Both she and her husband possessed commercial

driver licenses. She testified that Bekins supplied the log book and the uniforms which they wore with Bekins name on them.

Offered into evidence as Px. 2 is an Independent Contractor Agreement entered into between the Skolimowskis and Bekins. That Agreement includes language that the Contractor (the Skolimowskis) agrees to direct the operation and performance of all services provided to Company (Bekins) including the loading and unloading of equipment, packing and unpacking boxes and furthermore, that the Contractor agrees to be responsible to and shall determine the routes of travel, servicing of equipment and the labor necessary to operate it as well as when to stop and rest while en route to a destination. Petitioner confirmed that the Company did not instruct them to take any certain route when delivering a load. The Agreement also obligates the Contractor to be responsible for paying any income taxes, business taxes, employer and employee taxes and fuel taxes among others. (Px.2)

Pursuant to that Agreement in which Petitioner and her husband agreed to pay any taxes, Petitioner entered into evidence Px. 3 which is a copy of a 1099 for 2005 filed with the IRS showing a total income of $58,580.73 filed by Petitioner and her husband. Petitioner's Exhibit 6 is a list of expenses she and her husband were responsible for including such items as fuel, truck maintenance, hotels, mileage and fuel taxes among other items.

Petitioner testified that on November 9, 2005, she and her husband were in Fresno, California delivering a load when she experienced a sudden snap in her lower back while pushing a heavy pallet to be unloaded from the front of the truck to the rear. She explained that she called the dispatcher and told her that something happened to her back and that her husband would be unable to unload the truck by himself. She testified that she took some over the counter medication hoping her pain would subside and she continued working.

She and her husband were eventually able to return to Illinois and subsequently she visited her daughter who resided in Delaware. She first saw Dr. Martin Malz, a primary care physician on December 23, 2005. Dr. Malz ordered an MRI of her spine and also prescribed pain medication. The MRI showed degenerative changes at L2-3, L4-5 and L5-S1 but at L5-S1, the MRI reflected a large disc herniation. Dr. Malz prescribed an injection and took her off work. (Px.7). He referred her to Dr. Bruce Katz, an orthopedic surgeon.

Her initial visit with Dr. Katz was January 24, 2006. He recommended physical therapy, Vicodin and nerve blocks. (Px.8). She had a follow-up appointment with Dr. Katz on February 14, 2006 and at that time, she voiced complaints of increasing back and right leg pain although she also felt that the injection had been effective. (Px.8). Two days later, on February 16, 2006, she discussed different treatment options with Dr. Katz with the progress note indicating that she wanted to consider surgery. As a result, she underwent a microdiscectomy performed by Dr. Katz on April 18, 2006. However, within ten days after surgery, she experienced severe spasms in her back as well as in her right calf. At that time, she resumed physical therapy and found it to be helpful.

On May 30, 2006 she advised Dr. Katz that her overall pain was significantly improved. By June 13, 2006 she told the doctor that she was feeling much better. While the doctor felt she would benefit from a work hardening program, Petitioner indicated that she would be unable to participate since she needed to return to work to help her husband. She added that she was not in the area for any extended period of time.

She returned to Dr. Katz July 11, 2006 again complaining of right sided leg pain. He ordered a new MRI which revealed degenerative disc disease but no significant pressure upon the nerve roots. Since she had ongoing complaints of pain and Dr. Katz was unclear as to the

etiology, he referred her to a neurosurgeon. She was given restrictions of sedentary work with no truck driving. While she attempted additional physical therapy at that time, she stated she was having too much pain.

In September 2006 she was given a nerve block which did not help. On November 7, 2006 Petitioner voiced complaints of pain in her neck, thoracic spine, lumbar spine and abdomen. She was seen in the emergency room at a hospital in Paducah, Kentucky where she was diagnosed with pleurisy. She also had an MRI of her cervical spine which revealed degenerative changes at C5-6 and C6-7 as well as an MRI of the thoracic spine, both of which were normal. In 2007 she saw Dr. Townsend of Neurology Associates complaining of leg pain. Dr. Townsend believed her leg pain was related to the laminectomy and that she might possibly have a vascular problem. On June 24, 2010 she had a spinal stimulator implanted; however, the pain relief did not last and subsequently it was removed in May of 2012. Since that time she has undergone more conservative treatment consisting of pain management.

She was sent to Dr. Michael Treister for an Independent Medical Examination on August 16, 2007. Dr. Treister noted that Petitioner complained of lower back pain. She advised him that she had experienced numbness of her right foot since undergoing her laminectomy (Px26, p20). Dr. Treister opined that Petitioner was suffering from degenerative spondylosis (Px26, p21).

Dr. Treister diagnosed Petitioner with a disc herniation at L5/S1 as well as nerve root difficulties at L4-5. Based on that diagnosis, it was his opinion that Petitioner was in need of a wide laminectomy from L4 to S1. (Px 26, pgs. 26 and 27). Dr. Treister felt her condition was a result of the incident on November 9, 2005 due to the sudden onset of pain. (Px. 26, p. 27). He did not believe she was capable of working at that time.

Dr. Treister examined Petitioner a second time in December 2010. He testified that he had reviewed various records including a bone scan, a nerve conduction study, a thoracic MRI as well as a nerve conduction study. He explained that Petitioner continued to experience pain in the lower back and that it was nearly identical to the symptoms she was having prior to her surgery. (Px. 26, pgs. 32,33). Dr. Treister noted that her pain doctor had recommended the use of a dorsal pain stimulator. He noted that when the trial stimulator was inserted, Petitioner had nearly complete pain relief. (Px. 26, p. 33). Since Petitioner experienced such good relief with the trial stimulator, they placed a permanent one in her spine. However, the pain returned shortly thereafter.

Dr. Treister was questioned as to what he found upon examination of Petitioner the second time. He testified that she continued to have no sensation on the right foot. (Px. 26, p. 35). When asked for his diagnosis at that time, he opined that she was suffering from failed back syndrome. (Px. 26, p. 35). He continued by finding that she was incapable of working and that she was totally and permanently disabled from gainful employment. (Px. 26,p.36).

CONCLUSIONS OF LAW

Whether or not Respondent employer was subject to the Illinois Workers Compensation Act, the Arbitrator finds as follows:

The Arbitrator finds that Respondent was involved in a business in which electric, gasoline or other power driven equipment is used in the operation thereof. Therefore, the Arbitrator finds that Respondent was subject to the provisions of the Illinois Workers= Compensation Act.

Whether or not there was an employer-employee relationship, the Arbitrator finds as follows:

Petitioner's exhibits entered into evidence reflect the following: 1) an independent contractor agreement signed by the parties which sets forth, among other things, that Petitioner is in control of all activities, that Petitioner and her husband may choose any route they wish to take, that the couple is responsible for paying for all operating expenses including fuel and fuel taxes, tolls, layovers, state mileage as well as truck repairs. In addition, Petitioner's Exhibit 3 demonstrates that Petitioner and her husband characterized themselves as owner-operators, meaning that they owned the cab which was to be utilized in order to perform the duties associated with moving commercial businesses cross country. Petitioner also submitted into evidence a Form 1099 reflecting the fact that she and her husband were not paid a regular salary by Respondent nor were taxes deducted. As such, the Arbitrator finds that Petitioner has not proven by a preponderance of the evidence that she was an employee of Bekins as opposed to being an independent contractor.

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 LASALLE)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Gary Wissen,

Petitioner, **20IWCC0297**

vs. NO. 16 WC 33083

Royal Vending, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 31, 2018 is hereby affirmed and adopted.

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

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

DATED: MAY 28 2020
o-05/19/2020
SJM/sj
44

Stephen J. Mathis

L. Elizabeth Coppoletti

Douglas D. McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WISSEN, GARY
Employee/Petitioner

Case# **16WC033083**

ROYAL VENDING, INC
Employer/Respondent

20IWCC0297

On 7/31/2018, 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 2.16% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1097 SCHWEICKERT & GANASSIN LLP
SCOTT J GANASSIN
2101 MARQUETTE RD
PERU, IL 61354

5265 WOLF LAW LTD
STEVEN WOLF
25 E WASHINGTON ST SUITE 801
CHICAGO, IL 60602

20IWCC0297

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSALLE)

☐ 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

Gary Wissen
Employee/Petitioner

v.

Royal Vending, Inc.
Employer/Respondent

Case # **16** WC **33083**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Ottawa**, on **May 31, 2018**. 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 **February 4, 2016**, 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 as explained *infra*.

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 **$1,333.88**; the average weekly wage was **$900.00**.

On the date of accident, Petitioner was **59** years of age, ***married*** with **no** 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 **$19,800.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$19,800.00**.

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

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has failed to establish that he sustained a compensable accident at work. By extension, all other issues are rendered moot and all requested compensation and benefits including temporary total disability benefits, payment of medical bills, and permanent partial disability 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

July 26, 2018
Date

ICArbDec p 2

JUL 31 2018

20IWCC0297

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Gary Wissen
Employee/Petitioner

v.

Royal Vending, Inc.
Employer/Respondent

Case # **16** WC **33083**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute at this hearing include accident, causal connection, Respondent's liability for certain unpaid medical bills, Petitioner's entitlement to a period of temporary total disability benefits commencing on commencing April 7, 2016 through July 20, 2016, and the nature and extent of the injury. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Gary Wissen (Petitioner) testified that he was the owner of Royal Vending, Inc. (Respondent) and that he also did physical work for the company. Respondent's business involved the supply and repair of soda and snack vending machines to various customers. Specifically, he explained that Respondent repaired coin mechanisms and replaced machine motors and other parts. Petitioner testified that the snack machines weighed approximately 500 pounds and soda machines weighed approximately 800 pounds. He explained that another service person did repairs, but if he was occupied, Petitioner would make repairs.

Prior Medical Treatment

The medical records reflect that Petitioner received treatment at OSF Center for Health in Streator, Illinois with Glen Ricca, M.D. (Dr. Ricca) on January 25, 2016. RX1. Petitioner presented for follow up after an episode of tachycardia, but Dr. Ricca also noted Petitioner's report of "[r]ight leg pain-Today he complains of right leg pain. Mostly his right knee, but he also has some sciatica type pain. He did have LS spine x-rays last June. Most of his pain today again seems to be around the knee joint." *Id.* Dr. Ricca drained Petitioner's right knee, which he diagnoses with primary osteoarthritis, and he administered an injection into the right knee. *Id.*

February 4, 2016

On the alleged date of accident, Petitioner testified that he and an employee, Rick Kolesar (Mr. Kolesar), drove to a customer's facility to remove a machine in need of repair. He testified that the soda machine weighed about 1000 pounds, as it had product in it. Petitioner testified that he and Mr. Kolesar were loading the machine onto the lift gate on the back of the truck. He was located below the lift gate with a dolly and Mr. Kolesar was located above. While in the process of pushing and lifting the soda machine onto the lift gate, Petitioner testified that he felt pain and discomfort in his low back. Mr. Kolesar did not testify at the hearing.

[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.

Petitioner testified that he talked to his secretary, Julie Schmidt (Ms. Schmidt) about the incident the following day. Ms. Schmidt did not testify at the hearing.

Medical Treatment

The medical records reflect that Petitioner initially sought treatment with a chiropractor, Matthew Marti, D.C. (Dr. Marti), on February 10, 2016. PX2 at 42-43; RX3. A "Confidential Case History" reflects Petitioner's report of constant pain for an unidentified condition stemming from an injury at work on February 2, 2016. *Id.* He reported painful activities included sitting, standing, walking, bending, and lying down. *Id.*

On February 23, 2016, the Petitioner was evaluated for physical therapy at OSF Center for Health in Streator, Illinois. PX8 at 422-433. He reported a work-related injury to his back earlier that month while lifting a machine. *Id.*, at 422. The pain had now worsened to include pain in his right knee. *Id.* Petitioner participated in physical therapy at OSF in Streator through March 1, 2016. PX4 at 232.

Dr. Marti ordered full spine x-rays, which Petitioner underwent on March 2, 2016. PX2 at 41; RX3. Petitioner reported "[a]cute low back pain, tension and general stiffness throughout spine, resulting from recent work related injury, no previous history of low back pain." *Id.* Dr. Marti noted cervical and lumbar presentations consistent with mechanism of injury. *Id.* Dr. Marti's records contain bills for treatment and diagnostic tests performed between February 10, 2016 through July 25, 2016, but no corresponding progress or treatment notes. PX2.

Also on March 2, 2016, Petitioner returned to Dr. Ricca reporting that "[h]is right knee pain is no better. The injection we have him did not help. He does have an appointment to follow up with Orthopedics today." RX1. Dr. Ricca noted that Petitioner would follow up with orthopedics for the right knee condition. *Id.* Dr. Ricca also noted Petitioner's complaint of "[p]aresthesia-He states he does get some numbness and tingling along his lateral right foot, and wonders if he has some back problem also, as he does have chronic back pain. We will sort this out after he sees Orthopedics about his knee." *Id.*

Additionally on March 2, 2016, Petitioner presented to Raymond Meyer, M.D. (Dr. Meyer) at Rezin Orthopedics. PX5 at 320. He reported a right knee injury at work on February 4, 2016 while loading a vending machine and lifting it up a ramp. *Id.* Petitioner specified that "he felt pain in his mid to right low back radiating down his leg. He also felt pain in his right knee." *Id.* Dr. Meyer diagnosed Petitioner with right knee pain, effusion, sprain, and a medial meniscus tear. *Id.* He aspirated the right knee and administered a corticosteroid injection. *Id.* Dr. Meyer also ordered an MRI of the right knee. *Id.*

In a narrative letter dated March 3, 2016, Dr. Marti stated that Petitioner presented to his office on February 10, 2016 "with a chief complaint of acute low back pain radiating to the right knee. [Petitioner] stated that he was moving heavy equipment at work when he felt a sharp pain in the low back." RX3. Dr. Marti diagnosed Petitioner with an acute low back sprain resulting in vertebral misalignments and radicular pain. *Id.* He further stated that Petitioner was under the care of an orthopedic specialist for a right knee injury related to the incident, but not related to his low back condition. *Id.*

On March 16, 2016, Dr. Meyer reviewed Petitioner's MRI, which he stated showed tearing of the mid body and posterior horn of the medial meniscus with some displacement, mild degenerative changes about the medial and patellofemoral joints, and a small knee joint effusion. PX5 at 318. He diagnosed Petitioner with a right knee

sprain, medial meniscus tear, and mild degenerative joint disease. *Id.* Dr. Meyer noted that "we feel that his symptoms are primarily due to his medial meniscus tear. He may have some contribution from his mild degenerative changes." *Id.* Dr. Meyer also noted that Petitioner's symptoms did not begin until after his work-related injury. *Id.* He recommended a right knee arthroscopy, partial medial meniscectomy and debridement, due to the failure of extensive conservative treatment. *Id.* Dr. Meyer also continued to prescribe light duty work for Petitioner. *Id.*

On April 26, 2016, Dr. Meyer performed the recommended surgery in the form of a right knee arthroscopy, partial medial and lateral meniscectomy, debridement, chondroplasty and synovectomy on April 26, 2016. PX3 at 81-83. Post-operatively he diagnosed Petitioner with a right knee medial meniscal tear, sprain and degenerative joint disease. *Id.*

On May 4, 2016, Petitioner followed up with Dr. Meyer who kept him off work and ordered physical therapy. PX5 at 316. Petitioner presented to Champion Fitness Physical Therapy on May 11, 2016 for an initial evaluation. *Id.*, at 354-358; RX2. At his initial visit on May 11, 2016, Petitioner reported that he had previously experienced right lower back pain as a result of lifting some equipment on February 6, 2016. *Id.* However, Petitioner's complaints were limited to pain in his medial right knee. *Id.* Petitioner did not report low back pain at the time. *Id.*

Between May 11, 2016 and July 5, 2016, Petitioner attended 22 visits of physical therapy. RX2. No complaints of low back pain were noted. *Id.* Petitioner did report that his knee continued to be sore and he was experiencing constant pain as of May 25, 2016. PX5 at 350; RX2.

Petitioner also saw Dr. Meyer on May 25, 2016 reporting that he was doing well overall, but he had been having swelling, tightness, and discomfort over the prior week as well as difficulty performing activities in physical therapy. PX5 at 314. Dr. Meyer diagnosed Petitioner with a mild effusion and discomfort, aspirated the knee, and administered another corticosteroid injection. *Id.* Dr. Meyer continued physical therapy and kept Petitioner off work. *Id.*

As of June 14, 2016, Petitioner's physical therapist noted that Petitioner was no longer showing improvement in therapy and that he still showed swelling in the right knee. PX5 at 347. Petitioner was referred to his physician for follow up. *Id.*

On June 15, 2016, Dr. Meyer noted Petitioner's slow progress. PX5 at 312. He also noted Petitioner's report of post-physical therapy soreness, swelling and difficulty walking. *Id.* Dr. Meyer diagnosed Petitioner with a right knee effusion and status post right knee arthroscopy with partial medial and lateral meniscectomy, debridement, chondroplasty, and synovectomy. *Id.* He ordered another three weeks of physical therapy, light duty including sedentary work only. *Id.*

As of July 5, 2016, the physical therapist noted that Petitioner continued to experience moderate to severe pain in his right knee with limited progress. PX5 at 339-341. Due to the lack of progress and ongoing pain, Petitioner was discharged from physical therapy and referred back to Dr. Meyer. *Id.*

On July 6, 2016, Petitioner presented to Dr. Meyer reporting right knee soreness, an inability to put pressure on the right leg, and his recent discharge from therapy. PX5 at 310. Dr. Meyer aspirated Petitioner's knee again

and administered another injection. *Id.* He then prescribed home exercises and light duty restrictions, with a full duty release effective July 21, 2016. *Id.*

As of August 10, 2016, Petitioner complained of pain over the lateral knee, difficulty going up and down stairs, and, for the first time to Dr. Meyer, he reported pain to his lower lumbar spine. PX5 at 307-308. Dr. Meyer administered a corticosteroid injection to the right knee. *Id.*

On September 21, 2016, Petitioner continued to report low back and right leg pain, numbness and tingling. PX5 at 304-305. Dr. Meyer placed the Petitioner at maximum medical improvement for his right knee and referred him to Dr. Ali for a second opinion for his back. *Id.* Dr. Meyer also prescribed the Petitioner Tramadol for pain and placed him on light duty, sit-down work only. *Id.*

Petitioner saw Dr. Ali at Rezin Orthopedics on October 4, 2016. PX5 at 297-299. He reported low back pain with radiating bilateral L5 radicular pain, with right-side pain being greater than the left. *Id.* Dr. Ali reviewed Petitioner's x-rays and MRI noting grade I spondylolisthesis with severe right-sided lateral recess stenosis from a disc herniation, severe bilateral neuroforaminal stenosis at the L4-L5 level, and mild lateral recess stenosis at that level. *Id.* Dr. Ali recommended bilateral L5 injections, which he administered on October 6, 2016. *Id.*

On October 18, 2016, Petitioner reported only a few days of relief from the injections and greater right sided pain than left. PX4 at 240-241. Dr. Ali recommended an L4-L5 lumbar decompression and fusion via right sided approach. *Id.* He further reviewed the report from Dr. Anderson, and agreed that his clinical recommendation may have been appropriate for the knee, but disagreed with his findings related to Petitioner's spine. *Id.* Dr. Ali prescribed the Petitioner light duty status related to the lumbar spine on October 18, 2016. *Id.* Dr. Ali further wrote that after the lumbar fusion surgery he proposed, Petitioner would be expected to return to light duty work at six weeks post fusion and return to full duty in as early as four months. *Id.*

On November 17, 2016, Petitioner sought a second opinion with Patrick Sweeney, M.D. (Dr. Sweeney) at Minimally Invasive Spine Specialists. PX4 at 204-207. He reported a work-related on February 4, 2016 in an incident when he was helping an employee load a soda machine onto a truck. *Id.* Petitioner also reported an onset of right-sided low back pain, which he tried to live with for three weeks until undergoing chiropractic care followed by physical therapy and a referral to Rezin Orthopedics. *Id.* Dr. Sweeney noted "At this time the patient had developed bilateral knee pain and right lateral foot numbness in addition to the right sided LBP." *Id.* Dr. Sweeney diagnosed Petitioner with L4-5 spondylolisthesis/stenosis and left knee derangement, and administered bilateral knee injections. *Id.*

Petitioner returned to Dr. Sweeney on March 2, 2017 reporting continued low back pain and bilateral knee pain, which was worse. PX4 at 185-186, 192. He maintained Petitioner's diagnoses, and referred him to Dr. Primus, a joint specialist. *Id.*

Additional Information

Regarding his current condition of ill-being, Petitioner testified that he has difficulty with his right leg and climbing stairs. He explained that he climbs stairs sideways. Petitioner also testified that the bottom of his right foot is numb where he has no feeling and the whole side of the leg is also numb. Petitioner testified that he is constantly in pain, which is why he is selling his business. In the meantime, Petitioner testified that he

does not move machines anymore. Petitioner also testified that he did not wish to undergo the recommended low back surgery.

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 the hearing as follows:

In support of the Arbitrator's decision relating to Issues (C) and (D), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent and the date of the accident, the Arbitrator finds the following:

In light of the record as a whole, the Arbitrator finds that Petitioner has failed to establish that he sustained a compensable injury while working for Respondent on February 4, 2016 as claimed.

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 2003). 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 (1989)). A claimant must prove both elements were present (i.e., that an injury arose out of and occurred in the course of his employment) to establish that his injury is compensable. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (1st Dist. 2006).

Ten days before the alleged accident at work, Petitioner saw Dr. Ricca on January 25, 2016. He reported sciatica-type pain and undergoing lumbar spine x-rays the prior summer. Petitioner also reported right knee pain. Dr. Ricca aspirated Petitioner's knee and administered a right knee injection. Petitioner then alleges that he sustained an injury while helping one of his employees lift and load a heavy soda machine onto the lift gate of his truck on February 4, 2016.

An intake form dated February 10, 2016 from Petitioner's chiropractor, Dr. Marti, reflects his report of constant pain for an unidentified condition stemming from an injury at work on February 2, 2016. Petitioner began a course of physical therapy at OSF Streator and a physical therapy note dated February 18, 2016 makes no mention of any work-related injury. To the contrary, reflects Petitioner's report of "no trauma."

Petitioner then saw three doctors on March 2, 2016. Dr. Marti diagnosed Petitioner with acute low back pain, noting "no previous history of low back pain." He also opined that Petitioner's presentation was consistent with mechanism of injury. Also on March 2, 2016, Petitioner saw Dr. Ricca who noted his history of chronic low back pain. Of note, Petitioner did not report any injury at work occurring between his last visit on January 25, 2016 and this visit. Finally, Petitioner saw Dr. Meyer on March 2, 2016 at which time he reported a right knee injury at work with "mid to right low back radiating down his leg[and]pain in his right knee." Dr. Meyer

provided the same treatment as Dr. Ricca provided less than two weeks before the accident—he aspirated the right knee and administered an injection. Dr. Meyer later noted that Petitioner's symptoms did not begin until after his work-related injury, which is controverted by other evidence. Given the recent records of Dr. Ricca, the understanding of Dr. Marti and Dr. Meyer regarding Petitioner's prior medical history is inaccurate. Thus, the Arbitrator accords no weight to their opinions in this case.

Moreover, the record is devoid of evidence corroborating the circumstances of Petitioner's alleged accident on February 4, 2016. Petitioner testified that he sustained his accident at work while helping one of his employees, Mr. Kolesar, load a heavy soda machine. He also testified that he reported the injury the following day to his administrative assistant, Ms. Schmidt. Neither Mr. Kolesar nor Ms. Schmidt testified at the hearing. The lack of other evidence supporting Petitioner's version of events on February 4, 2016 is remarkable given the medical treatment noted just 10 days before the accident and Petitioner's failure to report the accident at work to Dr. Ricca when he returned on March 2, 2016.

Based on the totality of the evidence, the Arbitrator finds that Petitioner has failed to establish that he sustained a compensable accident at work on February 4, 2016 as claimed. By extension, all other issues are rendered moot and all requested compensation and benefits including temporary total disability benefits, payment of medical bills, and permanent partial disability benefits are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sandra Kennedy,

Petitioner,

20IWCC0298

vs.

NO: 16 WC 29265

Warren G. Murray Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, causal connection, prospective medical care, maximum medical improvement date, intervening 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. 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, 2019 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.

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

20 IWCC0298

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, this Decision and Opinion on Review of a claim against the State of Illinois is not subject to judicial review.

DATED: MAY 28 2020
SJM/sj
o-5/19/2020
44

Stephen J. Mathis

L Elizabeth Coppoletti

Douglas D. McCarthy

Authorization- Special Concurrence/Dissent

I concur with the majority in all aspects of its decision other than its order to compel Respondent to authorize medical treatment. This issue was previously addressed by the Court in Hollywoood Casino-Aurora, Inc. v. Illinois Workers' Compensation Commission, 2012 IL App (2d) 110426WC, which is dispositive. The Court noted "Assuming for the sake of analysis that this provision of the Act [Section 8(a)] is sufficiently broad so as to include a requirement that an employer authorize medical treatment for an injured employee in advance of the services being rendered, the fact still remains that there is no provision in the Act authorizing the Commission to assess penalties against an employer that delays in giving such authorization." Id. at ¶ 19. Ordering Respondent to authorize medical treatment is meaningless where no enforcement mechanism exists under the Act. In accordance with Section 8(a) of the Act and the Court's holding in Hollywood Casino, I would order Respondent to provide and pay for the awarded medical expenses and/or treatment.

L. Elizabeth Coppoletti

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

KENNEDY, SANDRA K
Employee/Petitioner

Case# **16WC029265**

WARREN G MURRAY CENTER
Employer/Respondent

20IWCC0298

On 7/8/2019, 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 2.04% 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:

0384 NELSON & NELSON
NATHAN C LANTER
420 N HIGH ST PO BOX Y
BELLEVILLE, IL 62222

0558 ASSISTANT ATTORNEY GENERAL
NICOLE M WERNER
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

JUL -8 2019

Brandan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20IWCC0298

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)

Sandra K. Kennedy
Employee/Petitioner

Case # 16 WC 29265

v.

Consolidated cases: n/a

Warren G. Murray Center
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on May 29, 2019. 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 _____

20 IWCC0298

FINDINGS

On the date of accident, June 13, 2016, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $39,851.89; the average weekly wage was $813.30.

On the date of accident, Petitioner was 56 years of age, married with 0 dependent child(ren).

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

Respondent shall be given a credit of $19,790.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $19,790.00.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 7, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the cervical fusion surgery recommended by Dr. David Robson.

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

July 2, 2019
Date

ICArbDec19(b)

JUL 8 - 2019

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on June 13, 2016. According to the Application, "Petitioner was injured while trying to change and dress an uncooperative individual" and sustained an "Acute cervical injury, MAW & other body parts" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills as well as prospective medical treatment. By agreement, counsel for Petitioner and Respondent reserved issues in regard to Petitioner's entitlement to temporary total disability and temporary partial disability benefits. Respondent stipulated Petitioner sustained a work-related accident, but disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a mental health technician. On June 13, 2016, Petitioner was attempting to change the clothing of a patient who was uncooperative. Petitioner was next to the patient's bed and, when she attempted to raise him, she felt a "shock" in the base of her neck. The accident was reported to Respondent in a timely manner.

Petitioner initially sought medical treatment at SSM Health Express Clinic on June 13, 2016, where she was seen by Kendra Bowen, a Physician Assistant. Petitioner informed PA Bowen of the accident and complained of pain referable to the upper back. PA Bowen diagnosed Petitioner with a muscle strain and prescribed medication (Petitioner's Exhibit 1).

Petitioner was subsequently evaluated by Dr. Robert Guillemette, a physician with SSM Health Express Clinic, on June 28, 2016. At that time, Petitioner complained of upper back/neck pain. Dr. Guillemette prescribed medication and ordered physical therapy (Petitioner's Exhibit 1).

Dr. Guillemette continued to see Petitioner in July/August, 2016. When he saw Petitioner on August 12, 2016, Petitioner had complaints of neck pain with radiation into the right shoulder. Petitioner had been receiving physical therapy, but advised it was not helping. Dr. Guillemette ordered an MRI scan of Petitioner's cervical spine (Petitioner's Exhibit 1).

The MRI was performed on October 7, 2016. According to the radiologist, the MRI revealed degenerative disc disease at C5-C6 and C6-C7 as well as moderate/severe foraminal narrowing relating to disk osteophyte complex (Petitioner's Exhibit 4).

On October 18, 2016, Petitioner was seen at SSM Health Express Clinic by Michelle Harter, a Physician Assistant. PA Harter's record of that date noted the findings of the MRI scan and referred Petitioner to Dr. Robinson [Robson], a spine specialist (Petitioner's Exhibit 1).

Petitioner was evaluated by Dr. David Robson, an orthopedic surgeon, on January 11, 2017. Petitioner advised Dr. Robson of the accident and that she continued to have lower neck and right shoulder pain and physical therapy had worsened her symptoms. Dr. Robson reviewed the MRI scan and opined Petitioner had a disk osteophyte complex at C5-C6 and C6-C7. He recommended Petitioner undergo an epidural steroid injection and referred Petitioner to Dr. Kaylea Boutwell, a pain management specialist (Petitioner's Exhibit 5).

Dr. Boutwell saw Petitioner on February 13, 2017. At that time, Dr. Boutwell administered an epidural steroid injection on the right at C6-C7 (Petitioner's Exhibit 6).

When Petitioner was seen by Dr. Robson on February 23, 2017, she advised the injection had a complete resolution of her pain symptoms; however, it was temporary. Petitioner was again complaining of neck and right arm pain. Dr. Robson recommended Petitioner undergo another epidural steroid injection (Petitioner's Exhibit 5).

Dr. Boutwell again saw Petitioner on March 13, 2017. At that time, Dr. Boutwell administered an epidural steroid injection on the right at C6-C7 (Petitioner's Exhibit 6).

When Petitioner was seen by Dr. Robson on March 30, 2017, she advised the second injection was not as effective as the first. However, Dr. Robson recommended Petitioner undergo another epidural steroid injection (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. Michael Chabot, an orthopedic surgeon, on June 5, 2017. In connection with his examination of Petitioner, Dr. Chabot reviewed medical records provided to him by Respondent. Included in the medical records reviewed/abstracted by Dr. Chabot were medical records, which predated the accident, dated July 5, July 31, and August 14, 2012. According to Dr. Chabot's medical report, the records appeared to be in regard to a lumbar strain (Respondent's Exhibit 4). The actual records were not tendered into evidence at trial.

Dr. Chabot's findings on examination were benign and he noted only a slight decrease of the range of motion of the cervical spine. He reviewed the MRI and agreed it revealed disc degeneration at C5-C6 and C6-C7. Dr. Chabot opined Petitioner was at MMI, could return to work without restrictions and no further medical treatment was indicated, including epidural steroid injections (Respondent's Exhibit 4).

Petitioner was scheduled to be seen by Dr. Robson on June 12, 2017, but the appointment was canceled. At trial, Petitioner testified she was returning from the canceled appointment and was a passenger in a vehicle driven by her husband. While on the highway, the vehicle Petitioner was in was involved in a serious accident and Petitioner's husband was killed as a result thereof. The vehicle's airbag was deployed and Petitioner sustained a fracture of the sternum and two ribs. However, Petitioner testified she did not experience any new neck symptoms as a result of the accident.

Subsequent to the vehicular accident, Petitioner was treated at St. Louis University Hospital. Respondent tendered into evidence the hospital records which confirmed Petitioner sustained a fracture of the sternum as well as the left fourth and fifth ribs. Petitioner underwent CT scans of the cervical, thoracic and lumbar spine, which revealed no evidence of fractures. Petitioner did not receive any treatment for cervical/neck complaints (Respondent's Exhibit 6).

Petitioner was again seen by Dr. Robson on April 25, 2018, which was over one year since the last time she saw him on March 30, 2017. At trial, Petitioner testified that while her neck symptoms continued, her life was dominated by dealing with the tragic loss of her husband.

When Dr. Robson saw Petitioner on April 25, 2018, Petitioner continued to complain of neck pain as well as bilateral arm pain. Petitioner was willing to consider surgery. Dr. Robson reaffirmed his diagnosis of disk osteophyte complex at C5-C6 and C6-C7 which had failed conservative treatment over a significant period of time. Dr. Robson ordered an MRI scan of the cervical spine (Petitioner's Exhibit 5).

The MRI was performed on April 30, 2018. According to the radiologist, there was disc bulging at multiple levels of the cervical spine, mild central canal stenosis at C6-C7 and C7-T1 and moderate left foraminal stenosis at C5-C6 and C6-C7 (Petitioner's Exhibit 5).

Dr. Chabot was deposed on March 23, 2018, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Chabot's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Dr. Chabot stated that, based upon his review of the medical records, Petitioner had a history of neck complaints prior to the accident of June 13, 2016. He testified Petitioner sustained a lower cervical and thoracic strain as a result of the accident, Petitioner was not in need of any further medical treatment, was at MMI and could work without restrictions (Respondent's Exhibit 5; pp 9, 14-17).

Respondent's counsel then posed a hypothetical question to Dr. Chabot in which they asked him to assume Petitioner had been involved in an automobile accident in which she had sustained a fracture of the sternum and fractured ribs and whether this could affect her cervical condition. Dr. Chabot responded that such an accident could have caused Petitioner to have sustained a whiplash injury (Respondent's Exhibit 5; pp 17-18).

On cross-examination, Dr. Chabot agreed that the records he reviewed regarding the treatment Petitioner sought in July/August, 2012, made no reference to Petitioner having cervical spine or neck complaints. Dr. Chabot also agreed he had no knowledge of Petitioner's current condition or complaints (Respondent's Exhibit 5; pp 19-24).

Dr. Robson was deposed on December 20, 2018, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Robson's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. In regard to his not having seen Petitioner for over one year, Dr. Robson testified it was his understanding Petitioner's husband had died and her life had been dominated with dealing with that tragedy. Dr. Robson ordered the second MRI scan because of the amount of time that had lapsed since the first MRI scan was performed and Petitioner was contemplating surgery (Petitioner's Exhibit 8; pp 12-14).

Dr. Robson testified the MRI scans were similar and consistent with his findings on examination. He recommended Petitioner undergo an anterior cervical discectomy and fusion from C5 to C7. He testified the accident of June 13, 2016, was the cause of the condition he diagnosed and for which he was recommending surgery (Petitioner's Exhibit 8; pp 14-17).

In regard to the automobile accident, Dr. Robson testified this did not cause him to change his opinion in regard to either causation or Petitioner's need for medical treatment (Petitioner's Exhibit 8; pp 18-19).

On cross-examination, Dr. Robson was interrogated about his opinion in regard to the automobile accident. He agreed it was "possible" that a fractured sternum and fractured ribs could have also affected her neck; however, he noted he had reviewed MRIs taken before and after the accident which were "unchanged" (Petitioner's Exhibit 8; pp 26-28).

At trial, Petitioner testified she still has neck and arm pain. Petitioner no longer works as a mental health technician because she obtained a job in Respondent's kitchen. At trial, Petitioner testified she was concerned about the safety of both herself and the patients because of her neck pain. Petitioner stated she does seek help from other employees on an as needed basis. She wants to proceed with whatever treatment Dr. Robson recommends.

Rebecca Spencer testified for Respondent at trial. Spencer was Petitioner's supervisor in dietary. Spencer testified Petitioner was able to perform all of her job duties. On cross-examination, she agreed Petitioner was an honest person.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of June 13, 2016.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident injuring her neck and right arm on June 13, 2016.

There was no evidence Petitioner had any neck or cervical spine symptoms prior to June 13, 2016. The prior medical records from July/August, 2012, referenced in Dr. Chabot's report were apparently in regard to a lumbar strain. As noted herein, the actual records were not tendered into evidence at trial.

Petitioner's primary treating physician, Dr. Robson, has opined Petitioner has a disk osteophyte complex at C5-C6 and C6-C7 which has failed conservative treatment. In that regard, Petitioner has received medication, physical therapy and undergone epidural steroid injections. According to Petitioner, the physical therapy worsened her symptoms and the injections only provided temporary relief.

Respondent's Section 12 examiner, Dr. Chabot, opined Petitioner had prior cervical spine and neck complaints, apparently basing this on the medical records from July/August, 2012. As aforestated, these records apparently referenced a lumbar strain. Further, on cross-examination, Dr. Chabot admitted there was no reference in those prior medical records regarding any neck/cervical complaints by Petitioner.

Dr. Chabot has also opined Petitioner may have sustained a whiplash injury as a result of the vehicular accident in which she sustained a fractured sternum and fractured ribs.

Dr. Robson testified the car accident did not cause him to change his opinion in regard to causality. While he agreed it was "possible," the vehicular accident may have affected Petitioner's neck, he noted that he reviewed MRIs of the cervical spine taken before and after the accident which were "unchanged."

Given the preceding, the Arbitrator finds the opinion of Dr. Robson to be more persuasive than that of Dr. Chabot in regard to causality.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusion of law in regard to disputed issue (F) the Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified Petitioner's Exhibit 7, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes Petitioner is entitled to prospective medical treatment, including, but not limited to, the cervical fusion recommended by Dr. Robson.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeff Thirtyacre,

Petitioner,

20IWCC0299

vs. No. 16 WC 03524

Illinois Department of Transportation,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issue of the nature and extent of Petitioner's 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.

For the reasons that follow, the Commission finds that Petitioner failed to prove any permanent disability resulting from the work accident. The record shows that on May 24, 2013, Petitioner fell while climbing out of a loader. Petitioner received same day treatment at Centegra Hospital. The attending physician diagnosed a low back strain/sprain/contusion, prescribed Ultram and Robaxin, and imposed work restrictions. After taking five days off work, Petitioner returned to work full duty. Petitioner did not follow up with any medical providers regarding his back injury. Petitioner testified that he is more cautious now about how he performs his job duties. Petitioner similarly testified that he is careful and limits himself when doing maintenance around the house or on his car. On cross-examination, Petitioner admitted that his primary care doctor attributed his lifting limitations to his age (Petitioner was 53 years old at the time of the arbitration hearing).

20IWCC0299

Having considered the factors enumerated in section 8.1b(b) of the Workers' Compensation Act (the Act), particularly factor (v), the Commission finds that Petitioner failed to carry his burden of proof by a preponderance of the evidence. The Commission therefore vacates the award of permanent partial disability benefits.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 1, 2019, is hereby modified as stated herein and otherwise 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.

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: MAY 28 2020

d-05/06/2020
SM/sk
44

Stephen Mathis

L. Elizabeth Coppoletta

Douglas McCarthy

SOTMCO0589

DEC 2 1 2004

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

THIRTYACRE, JEFF
Employee/Petitioner

Case# **16WC003524**

IL DEPT OF TRANSPORTATION
Employer/Respondent

20 IWCC0299

On 10/1/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.79% 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:

0745 KURASCH & KLEIN LTD
DANIEL KLEIN
100 N LASALLE ST SUITE 2005
CHICAGO, IL 60602

6096 ASSISTANT ATTORNEY GENERAL
JOHN M CATALANO JR
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
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

OCT 1 - 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20IWCC0299

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

JEFF THIRTYACRE
Employee/Petitioner

v.

ILLINOIS DEPARTMENT OF TRANSPORTATION
Employer/Respondent

Case # **16** WC **3524**

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 **CHARLES WATTS**, Arbitrator of the Commission, in the city of **CHICAGO**, on **SEPTEMBER 17, 2019**. 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 **5/24/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**71,668.84**; the average weekly wage was $**1,378.25**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of $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

HE ABITRATOR FINDS THAT THE PETITIONER'S ACCIDENT AROSE OUT OF THE COURSE OF PETITIONER'S EMPLOYLMENT BY RESPONDENT.

THE ARBITRATOR FINDS THAT PETITIONER'S LUMBAR SPINE INJURIES ARE CAUSALLY RELATED TO THE MAY 24, 2013 ACCIDENT AT WORK.

RESPONDENT SHALL PAY PETITIONER THE SUM OF $712.55(WEEK) FOR A FURTHER PERIOD OF 15 WEEKS AS PROVIDED IN SECTION 8(D)(2) OF THE ACT, BECAUSE THE INJURIES SUSTAINED CAUSED A 3% LOSS OF A PERSON AS A WHOLE.

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

October 1, 2019
Date

OCT 1 - 2019

FINDINGS OF FACT

Petitioner, a 47-year-old heavy equipment operator, worked full time for Respondent, Illinois Department of Transportation. Petitioner's date of birth is January 18, 1966. Petitioner was responsible for running jackhammers, driving skid steers and loaders in the maintenance of highways for over 20 years. He lifted over 50 pounds or greater on a frequent basis. Petitioner operated loaders of various manufacturers over the course of his employment, including John Deere and Volvo and was familiar with their operation.

Petitioner injured his back on May 24, 2013, stepping down from a new Volvo loader to the ground when the lowest step of the Volvo loader, he had been operating, flexed improperly so that it twisted under the loader unexpectedly, causing him to lose his grip on the stair handles with his right hand. Losing his grip caused petitioner's body to twist around 180 degrees so that his shoulder and back swung around and struck the loader tire. Petitioner testified that while the lowest step of loaders are meant to flex up and down, they are not intended to twist under the loader when bearing the weight of the operator. The injury occurred in the morning. Petitioner notified his supervisor, John Tenabrina(sp), that he had injured his back and had lower leg and back pain. Mr. Tenabrina took Petitioner to Centegra Hospital-Woodstock emergency room.

Petitioner was triaged at the emergency room at Centegra Hospital-Woodstock, where he complained of back pain and gave a history that he was stepping off a loader at work and "jammed lower back while attempting to step on the lowest stair." (PX.1) The attending physician, John Pacini, M.D., charted that the patient complained of pain to his back, that the onset was recent, was at work, and that the pain was a 10/10, although Petitioner testified at hearing that his pain was a 7/10 at the emergency room. The doctor further charted that the petitioner had symptoms

that included difficulty walking, worsened by upright position, and that nothing relieved the pain.(PX.1) The physical exam for the neck was non-tender and painless range of motion. The physical exam of the back was charted as decreased range of motion, muscle spasm, and vertebral point tenderness.(PX.1) Xrays were negative for fracture.(PX.1) The clinical impression included acute low back pain, acute strain/sprain, contusion lumbar.(PX.1) Petitioner was prescribed Ultram (Tramadol) 50mg #20, Robaxin 750 mg one p.o. QID #20 and he was given work restrictions. Petitioner received Ketorolac 60 MG/2 ML (Toradol) intramuscularly.(PX.1)

Petitioner testified that he returned to work after 5 days at full duty, however, his work activities, home activities, and recreational activities continued to be affected following the injury and up to the current day. Petitioner attended no further treatment but has had to change and adjust the way he performs his job since the date of the accident and injury. Petitioner has had to change and adjust the way he performs activities outside of work as a result of the injury to his back. Petitioner had no lower back problems during the period leading up to and just prior to the occurrence and has had no new injuries to his lower back since the accident of May 24, 2013.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the following Conclusions of Law.

WITH RESPECT TO THE 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 testified, without contradiction, that the accident occurred on May 24, 2013, while he was performing his job within his employment for respondent. Petitioner testified, without contradiction, that he is a heavy equipment operator with respondent and was in the

course and scope of his employment when he was injured exiting a respondent owned Volvo loader as part of his job.

Therefore, the Arbitrator finds Petitioner's sustained an accident on May 24, 2013 that arose out of and in the course of Petitioner's employment by respondent.

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

Petitioner testified without contradiction that he injured his low back at work on May 24, 2013, stepping down from the loader he had been operating, when the bottom step twisted under the loader unexpectedly and improperly. Petitioner immediately felt shoulder and back pain.

Petitioner's supervisor took him to the emergency room at Centegra Hospital – Woodstock. Petitioner complained of back pain and gave a history that he was stepping off a loader at work and that he "jammed lower back while attempting to step on the lowest stair." (PX.1) The attending physician, John Pacini, M.D., charted that the patient complained of pain to his back, that the onset was recent, was at work. The physical exam of the back was charted as decreased range of motion, muscle spasm, and vertebral point tenderness. (PX.1) The clinical impression included acute low back pain, acute strain/sprain, contusion lumbar.(PX.1)

The Arbitrator notes that Petitioner was not suffering from any low back pain prior to the time of the occurrence. Petitioner was working full-duty, full-time without any physical restrictions prior to his injury at work. Petitioner was not taking any pain medication or muscle relaxants prior to his injury at work.

The Arbitrator finds Petitioner's medical records documenting acute low back sprain and strain and muscle spasms persuasive. The medical records clearly reflect a traumatic sustained at

work on May 24, 2013. Therefore, the Arbitrator finds that Petitioner's condition of ill-being of the lumbar spine is causally related to the May 24, 2013 injury at work.

WITH RESPECT TO ISSUE (J) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES? THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Respondent paid all appropriate charges for all reasonable and necessary medical services.

WITH RESPECT TO ISSUE (K) WHAT TEMPORARY TOTAL DISABILITY BENEFITS ARE DUE IN DISPUTE? THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Petitioner has waived any claim to TTD benefits.

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

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 Associations "Guidelines 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 respect to Subsection (i) of §8.1b(b) the Arbitrator notes that Respondent did not obtain an impairment rating. Consequently, the Arbitrator gives this factor no weight.

With respect to Subsection (ii) of §8.1b(b) the Arbitrator notes that Petitioner worked as a heavy equipment operator. Petitioner's job requires heavy lifting, climbing up and down stairs, operating heavy equipment. Petitioner has worked over 20 years in that capacity. The Arbitrator places some weight on this factor.

With respect to Subsection (iii) of §8.1b(b) the Arbitrator notes that Petitioner was 47 years old at the time of her injury at work. The Arbitrator notes that Petitioner has a very long future work life and places great weight on this factor.

With respect to Subsection (iv) of §8.1b(b) the Arbitrator notes that while Petitioner has returned to work full duty, Petitioner's work has been permanently affected. Petitioner has permanently changed they way he performs his job to accommodate his back injury. The Arbitrator places great weight on this factor.

With respect to Subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the physical exam of the back was charted as decreased range of motion, muscle spasm, and vertebral point tenderness.(PX.1) The clinical impression included acute low back pain, acute strain/sprain, contusion lumbar.(PX.1) Petitioner further testified that his back injury has permanently changed the way he performs his work, home, and recreational activities, and that they are all more difficult due to the injury.

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 3% loss of a person as a whole pursuant to section 8(d)(2) 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

KATHERINE HARTZELL,

Petitioner,

20IWCC0300

vs.

NO: 17 WC 2273

STATE OF ILLINOIS, D.H.F.S.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but modifies the reasoning as outlined below.

Regarding the permanent partial disability analysis under §8.1b(b) of the Act, we agree with the Arbitrator's analysis of factors (i), (ii) and (iv).

For factor (iii), Petitioner's age, the Arbitrator wrote, "She likely has at least 20 years of work, if not more, remaining. Also, she is a woman with a low back/tailbone injury now, which can become a complicated medical condition in middle aged women." We find that there is no basis in the evidence for this finding. Dr. Benningfield noted that Petitioner fell on her sacrum and buttocks and that an MRI showed a congenital malformation of the sacrum and lumbosacral vertebra but no evidence of a sacral fracture. Although Dr. Benningfield opined that "an injury to a congenital malformation could leave her more susceptible to reaggravation," there is no evidence that Petitioner being a woman or "middle aged" has any effect on the severity of her condition or level of disability. The Commission modifies this factor to remove that sentence and give this factor no weight, since the evidence regarding Petitioner being "more susceptible to reaggravation" is already included in the Arbitrator's analysis of the fifth factor.

For factor (v), the Commission notes that the decision is not clear regarding what conditions Petitioner is being awarded permanency. Although Petitioner testified about sustaining a finger injury during the accident, this did not require any treatment, and she is not seeking a finger award.

20IWCC0300

The remainder of Petitioner's testimony was about her tailbone and low back symptoms and treatment. The Arbitrator wrote:

> [Petitioner] suffered a questionable fracture to her sacrum, which MRI three months later found resolved or ruled out. Petitioner's diagnoses included lumbago, which has not fully resolved as of the date of Arbitration. Petitioner testified that she had to ice her low back as recently as two weeks prior to Arbitration. Petitioner denied and there is no evidence in the record of any prior low back or sacral issues for Petitioner, nor has she suffered any subsequent intervening injuries to those areas.
>
> On cross-examination, Petitioner affirmed that she is physically capable of performing all of her job duties. *Dec. at 7.*

The Commission agrees that the above findings are supported by the evidence and relate to Petitioner's low back and sacrum. However, the Arbitrator later wrote:

> Dr. Benningfield treated Petitioner's neck and back regularly for 3 months. His report states, "...I am optimistic of her recovery although an injury to a congenital malformation could leave her more susceptible to reaggravation." ... Also, on [7/28/17], her last date of chiropractic treatment, [Petitioner] continued to report tightness and discomfort, and rated her current pain at 3 out of 10. Her examination that day revealed spasm and tenderness in her neck and thoracic spine. ... The treating records support ongoing symptomatology. This factor supports compensation, and the Arbitrator places a moderate degree of weight on this factor. *Dec. 8.*

We note that Petitioner testified about her sacrum and low back problems but did not testify about any neck or thoracic problems. Although Dr. Benningfield's July 9, 2019 letter purports to causally relate Petitioner's "back and neck pain" to her December 19, 2016 accident, he does not provide any actual diagnoses. Many of the assessments in the records are left blank and others simply state, "Katherine responded well to the adjustment and reported feeling better after the treatment."

In addition, the April 25, 2017 Patient Health Questionnaire (completed over five months after Petitioner's accident) indicates that Petitioner had only begun experiencing neck and upper back pain for a "few days." The Commission finds Dr. Benningfield's causation opinion regarding the "neck pain" unpersuasive. We acknowledge that Respondent stipulated to causation if accident was found. However, based on Petitioner's testimony, it is clear that she was not seeking a permanency award for a neck or upper thoracic injury. Furthermore, Petitioner's own brief does not specifically mention any of her neck or upper thoracic treatment in the permanent partial disability analysis but only focuses on the low back and sacral issues.

The Commission finds that the diagnoses supported by the medical records are: 1) the generic "tailbone injury" noted at OSF Big Hollow on December 21, 2016 with the March 20, 2017 MRI indicating no evidence of sacral fracture; and 2) the April 13, 2017 diagnoses/ assessments of lumbago, lumbar strain, and "low back pain" by Dr. O'Leary's PA-C, Alesia Svymbersky.

We also note that much of Petitioner's treatment with Dr. Benningfield was focused on the neck and upper back with very little focused on the low back. The last note containing any mention of

501RCC0360

20IWCC0300

the low back was on July 3, 2017. The last chiropractic record on July 28, 2017, which mentioned tightness and discomfort and 3/10 pain was referring to Petitioner's neck and thoracic spine; not her low back.

At the hearing, Petitioner testified about her initial symptoms as well as those she had "until about six months ago." *T.36.* There is not a lot of testimony about what symptoms she *currently* experiences other than she "tends" to have lower back pain which she never had before. The only specific example she gave was having low back pain while sitting on hard bleachers at her daughter's swimming practices. She uses a "shepherd's hook thing" (the "Thera-cane" mentioned in the records) to loosen up the pressure points in her lower back. *Id.* She also uses ibuprofen and ice to alleviate the tightness when her back "flares up." *T.46.* She last iced her back "probably two weeks ago." *T.37.* She was also given exercises to do by Dr. Benningfield's office, which along with the shepherd's hook "tends to alleviate the pain." *Id.* She has not sought any treatment for any of her ongoing discomfort or swelling. *T.46.*

We believe the treatment records only minimally corroborate an ongoing disability and should be given "some" instead of "moderate" weight. To remove any ambiguity, we also remove the reference to neck and upper thoracic complaints from this factor and clarify that Petitioner's permanent partial disability award is related to her low back and sacral conditions.

Despite our modification of the §8.1b(b) reasoning, we do believe that the award of 3% of Petitioner-as-a-whole is reasonable and affirm that award for the diagnosed conditions of tailbone injury, lumbar strain, and lumbago.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 10, 2019, is hereby affirmed and adopted with the modifications in reasoning noted above.

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

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: MAY 29 2020

Maria Elena Portela

Maria E. Portela

Thomas J. Tyrrell

Thomas J. Tyrrell

Kathryn A. Doerries

Kathryn A. Doerries

SE/
O: 5/5/20
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HARTZELL, KATHERINE
Employee/Petitioner

Case# **17WC002273**

STATE OF ILLINOIS D H F S
Employer/Respondent

20IWCC0300

On 12/10/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% 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
KEVIN ELDER
4242 N KNOXVILLE AVE
PEORIA, IL 61614

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

6140 ASSISTANT ATTORNEY GENERAL
JOSEPH L MOORE
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

DEC 10 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20IWCC0300

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

KATHERINE HARTZELL
Employee/Petitioner

v.

STATE OF ILLINOIS, D.H.F.S.
Employer/Respondent

Case # **17** WC **002273**

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 **PAUL SEAL**, Arbitrator of the Commission, in the city of **PEORIA, ILLINOIS**, on **10/09/2019**. 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 **12/19/2016**, 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 $**61,499.88**; the average weekly wage was $**1,182.69**.

On the date of accident, Petitioner was **38** years of age, ***married*** with **1** dependent child.

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

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

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

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

ORDER

Respondent is found liable for unpaid medical bills in the amount of $2,225.59.

Petitioner is found to have suffered permanent partial disability of 3% loss of use of the person as a whole, or 15 weeks at the rate of $709.61 per week under 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

December 5, 2019
Date

DEC 10 2019

In Support of the Arbitrator's decision regarding **(C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent**, the Arbitrator notes as follows:

Petitioner Hartzell is employed by Respondent, State of Illinois Department of Health and Family Services as an assistant attorney general. She is a lawyer. Her job duties are child support enforcement, primarily in two counties. Approximately two times per week, Ms. Hartzell is required to appear in various courts for the State of Illinois. She regularly covers Peoria County and Woodford County, and occasionally covers the additional counties of Knox, Henry, Marshall and Tazewell Counties, assisting co-workers who are unable to cover their court docket or have a high volume and need additional manpower. She drives her own vehicle to most of her court appearances, but she does have a state-owned vehicle available. She has an office in Peoria where she spends the remainder of her work time when not in Court.

On December 19, 2016, Petitioner was asked to help a co-worker cover a busy court docket in Tazewell County. Over the previous weekend, ice had covered must of the area, including Pekin, Illinois where the courthouse was located. Petitioner testified that it was a bitterly cold Monday morning and that ice "was everywhere". She was wearing snow boots, bringing her heeled work shoes in her briefcase, along with pens, paper, and various office supplies. She also carried her purse. Her co-workers already had the necessary court files at the courthouse.

Petitioner parked her car about a block from the courthouse in a public parking lot where she regularly parked for court. As she stepped up onto a curb from the street, her feet flew out from underneath her and she landed on her "backside" on the concrete sidewalk. She initially felt pain in her right ring finger which had gotten twisted in her briefcase

handle. She eventually got up from the icy sidewalk and carefully walked in a grassy area to get to the courthouse. As she performed her court duties that morning, she began to notice numbness and stiffness in her tailbone area and difficulty and pain when bending over. She was able to complete her court duties, but then went home for the remainder of the day, due to increasing pain. Ms. Hartzell advised her supervisor, Kim Russini, of her accident and filled out an accident report online within a day to two of her accident.

Ms. Hartzell initially sought medical attention on December 21, 2016 at an OSF Prompt Care. (Petitioner Exhibit 3) She was x-rayed and given pain medication. She testified that she was advised to give her injured tailbone 12 weeks to resolve, and to return at that time if symptoms persisted. In early March 2017, Petitioner's tailbone symptoms were still ongoing, so she returned to the Prompt Care. An MRI was ordered, and Petitioner was directed to be more active and "quit babying" her injury. The x-ray taken on December 21, 2016 showed a questionable segmentation lucency versus a non-displaced fracture of the sacrococcygeal articulation, and hypertrophy (swelling) of the left transverse process of the L5 vertebrae. (Petitioner Exhibit 3, p.8) The MRI of March 20, 2017 was interpreted as normal with "no evidence of sacral fracture". (Petitioner Exhibit 2, pp.13-14) Petitioner was also referred to Midwest Orthopedic for MRI results and a consultation.

Petitioner was seen one time at Midwest Orthopedic by the physicians' assistant working with Dr. O'Leary, a spine specialist, on April 13, 2017. (Petitioner Exhibit 2, pp.10-11) She gave a perfect accident history and complained of continuing buttock pain and lumbar pain and tightness. She was diagnosed with lumbago and referred to physical therapy. At Petitioner's request, she was referred for chiropractic care.

On April 25, 2017, Petitioner began a three-month course of chiropractic manipulation, exercise, electrical stimulation therapy, and massage therapy. She improved with care and was discharged on July 28, 2017. Chiropractor Benningfield opined that her back and neck

pain and treatment were directly related to her December 19, 2016 accident. (Petitioner Exhibit 1, p.2)

Petitioner has had no further medical care for her tailbone, back and neck since July 28, 2017. She initially missed a few half-days in December 2016 and January 2017, but she had no compensable lost time. She denied having any current medical treatment as of the date of Arbitration. She denied any prior or subsequent injures to her affected body parts and denied having any other workers' compensation or personal injury claims. At Arbitration, she complained of still being uncomfortable sitting on hard seats, such as wood bleachers, and pain with prolonged sitting. She still has low back pain, and occasionally ices her low back when she has flare-ups.

Respondent has denied liability for the claim, disputing that Petitioner's accident arose out of her employment, citing the neutral risk of walking on icy roads and sidewalks. Respondent presented no witnesses at Arbitration.

It is undisputed that Petitioner was in the course of her employment when she fell. Her job required regular travel to various courthouses. On the day of her accident, she was attending court on behalf of her employer, took no dangerous detours, and was in a place and time where her employer could reasonably expect her to be.

First, it should be noted that Petitioner is appropriately considered to be a traveling employee. A "traveling employee" is one whose work requires him to travel away from his employer's office. Hoffman v. Industrial Commission, 128 Ill. App 3d 290, 293, 470 NE 2d 507 (1984). An injury sustained by a traveling employee arises out of his employment if he was injured while engaging in conduct that was reasonable and foreseeable to the employer. Robinson v. Industrial Commission, 96 Ill, 2d 87, 92, 449 NE 2d 106 (1983).

Recently, the traveling employee doctrine was re-visited by the First District Appellate Court in Nee v. Illinois Workers' Compensation commission, 28 NE 3d 961 (1st

Dist 2015). In Nee, Petitioner was a City of Chicago plumbing inspector who tripped on a sidewalk while leaving an inspection. The Nee court applied a risk analysis to the traveling employee, stating that a traveling employee, although treated differently from other employees, must still prove that his injury arises out of his employment. Therefore, risk analysis was appropriate. The Petitioner in Nee tripped on a curb, which is a neutral risk and generally not compensable unless they are exposed to the neutral risk to a greater degree than the general public. In awarding compensation, the Nee court noted than when a traveling employee is exposed to a neutral risk while working, he is presumed to have been exposed to a greater degree than the general public. (28 NE 3d 961, 966)

The Arbitrator accordingly finds as follows:

1.) Petitioner is a traveling employee.

2.) Slipping on an icy sidewalk is a neutral risk

3.) Ms. Hartzell is exposed to this risk to a greater extent than the general public.

4.) Therefore, her accident was in the course of and arose out of her employment with Respondent.

In Support of the Arbitrator's decision regarding **(J) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services**, the Arbitrator notes as follows:

Petitioner's Exhibit 4 consists of the itemized bill of Chiropractor Benningfield in the amount of $2,225.59. As the issue of "accident" has been found in favor of the injured worker, and causal connection has been stipulated to, it logically follows that the related medical treatment is also properly awarded.

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

Ms. Hartzell suffered a questionable fracture to her sacrum, which MRI three months later found resolved or ruled out. Petitioner's diagnoses included lumbago, which had not fully resolved as of the date of Arbitration. Petitioner testified that she had to ice her low back as recently as two weeks prior to Arbitration. Petitioner denied and there is no evidence in the record of any prior low back or sacral issues for Petitioner, nor has she suffered any subsequent intervening injuries to those areas.

On cross-examination, Petitioner affirmed that she is physically capable of performing all of her job duties.

Examining the five factors enumerated in Section 8.1(b) the Arbitrator notes as follows:

The first factor is a permanent partial impairment rating. No such evidence was presented by either party. The Arbitrator places no weight on this factor.

The second factor is Petitioner's occupation. She is an attorney which is typically a light duty job, but a job that requires a lot of sitting, both in a vehicle when she travels, and while working at her desk. These sitting activities are likely to continue to provoke symptoms for Petitioner. The Arbitrator places some weight in favor of compensation on this factor.

The third factor is the age of the Petitioner at the time of injury. Ms. Hartzell was 38 when she had her accident. She likely has at least 20 years of work, if not more, remaining. Also, she is a woman with a low back/tailbone injury now, which can become a complicated

medical condition in middle aged women. The Arbitrator places some weight in favor of compensation on this factor.

The fourth factor is the effect upon the worker's future earning capacity. Petitioner presented no evidence of any detrimental effect upon her future earnings. This factor cuts against compensation.

The fifth factor is the evidence of disability corroborated by the treatment records. Dr. Benningfield treated Petitioner's neck and back regularly for 3 months. His report states, "...I am optimistic of her recovery although an injury to a congenital malformation could leave her more susceptible to reaggravation". (Petitioner Exhibit 1, p.2) Also, on July 28, 2017, her last date of chiropractic treatment, Ms. Hartzell continued to report tightness and discomfort, and rated her current pain at 3 out of 10. Her examination that day revealed spasm and tenderness in her neck and thoracic spine. (Petitioner Exhibit 1, pp.55) The treating records support ongoing symptomatology. This factor supports compensation, and the Arbitrator places a moderate degree of weight on this factor.

In summary, the Arbitrator awards P.P.D. of 3% loss of use of the person as a whole, 15 weeks compensation at $709.61 rate under section 8(d) (2) of the Act.