STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Manuel Bejarano,
Petitioner,

vs. NO: 08 WC 35856

John Henry Homes,
Respondent.

14IWCC1040

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 19, 2013, 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 removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $34,200.00. 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: DEC 04 2014

Daniel R. Donohoo

Ruth W. White

o-11/12/14
drd/wj
68

DISSENT

I must respectfully dissent and would award continuing medical and temporary total disability benefits. Petitioner testified that he had no injuries to his low back prior to June 14, 2007, when he experienced low back pain after lifting a 400-500 pound rock with three co-workers. Petitioner underwent an L5-S1 discectomy, fusion with Stalif cage, and bone morphogenetic protein (BMP) arthrodesis on May 28, 2008. Petitioner testified that he currently has 5-6/10 pain in the lower left back and tingling in his left leg. He testified that he stays at home, exercises "a bit," walks, and waters plants. His wife takes out the garbage and does the dishes but he does go to the store for groceries. He also changes diapers for his 3-year old daughter and gives her a bottle, but doesn't pick her up.

On March 12, 2009, Petitioner's treating physician, Dr. Laich, continued to keep Petitioner off work and recommended a myelogram, dynamic lumbar x-rays, EMG/NCV testing, and physical therapy. On February 4, 2010, Dr. Laich recommended an SI fixation and fusion and discussed a trial of a dorsal column stimulator. On November 14, 2012, Petitioner complained of low back and left leg pain for which Dr. Laich again recommended surgery and a spinal cord stimulator.

I find the causation opinion of Dr. Laich to be more persuasive than that of Respondent's Section 12 physician, Dr. Lami. Dr. Lami had not seen Petitioner's actual MRI films. Although Dr. Lami speculated that diabetes could lead to possible neuropathy, he agreed that the diabetes was not contributing to the lumbar condition. Dr. Lami based his opinion, in part, on the surveillance video, which he felt showed Petitioner was exaggerating his symptoms. However, I do not believe that the surveillance video shows Petitioner performing any activities that exceed his restrictions or that indicate that he is not credible regarding his complaints. On January 3, 2011, Dr. Lami also disputed the need for a spinal cord stimulator because Petitioner was "not even on any pain medications." However, this is inaccurate because Petitioner had been prescribed Norco since October 2010. He was also taking Cymbalta and Lyrica on a long-term basis.

14IWCC1040

I would find that Petitioner's current complaints are credible and remain causally related to his work injury on June 14, 2007. Based upon the continuing treatment recommendations and causation opinion of Dr. Laich, I would find that Petitioner has not reached maximum medical improvement and is entitled to temporary total disability benefits through the date of hearing as well as prospective medical care with Dr. Laich.

Charles J. DeVriendt

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

BEJARANO, MANUEL
Employee/Petitioner

Case# **08WC035856**

14IWCC1040

JOHN HENRY HOMES
Employer/Respondent

On 11/19/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% 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:

5122 PORRO NIERMANN & PETERSEN LLC
MICHELLE PORRO
821 W GALENA BLVD
AURORA, IL 60506

1860 CACCHILLO LAW GROUP LLC
JAMES WEILER
180 N LASALLE ST SUITE 2250
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF GENEVA)

☐ 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)

MANUEL BEJARANO
Employee/Petitioner

v.

JOHN HENRY HOMES
Employer/Respondent

Case # **08** WC **35856**

Consolidated cases: _____

14IWCC1040

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 **Geneva, Illinois**, on **August 13, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **June 14, 2007**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$40,363.71**; the average weekly wage was **$763.34**.

On the date of accident, Petitioner was **41** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$107,375.79** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$107,375.79**.

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

ORDER

- Respondent shall pay Petitioner temporary total disability benefits of $ **$508.89**/week for **67** weeks, from **12/17/07** through **03/30/09**, which is the period of temporary total disability for which compensation is payable.
- Respondent is entitled to a credit of $ **107,375.79** for TTD paid to Petitioner.
- The respondent shall pay the further sum of $ **0** for necessary medical services, 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.

Signature of Arbitrator

11/18/13
Date

ICArbDec19(b)

NOV 19 2013

14IWCC1040

STATEMENT OF FACTS

Petitioner was employed by Respondent as a laborer at the time of his accident on June 14, 2007. Petitioner testified he was injured while lifting a rock weighing approximately 400-450 pounds along with three of his co-workers. Petitioner testified that he immediately felt pain in his lower back. Petitioner immediately notified John Simbriski, the owner of the company.

Following his accident, Petitioner continued to work for a period of time before seeking medical treatment. Petitioner testified that John Simbriski sent him to chiropractor William Hestrup, at the St. Charles Chiropractic Clinic.

Petitioner testified that he did not experience any improvement in his lower back pain with chiropractic treatment. On August 13, 2007, Petitioner underwent an MRI that demonstrated 1.) mild facet arthropathy on the right at L3-4, and 2.) disc degenerative changes at L5-S1 associated with broad-based central bulging and an annular tear. (PX 10)

Pursuant to Dr. Hestrup's referral, Petitioner saw Dr. John Mazur of the Spine Surgery Center on October 11, 2007 Upon examination and review of the August 13, 2007 MRI, Dr. Mazur opined that there was no evidence of injury, no neurologic deficit and that Petitioner's area of diminished strength and sensation could not be explained on an anatomical basis. Dr. Mazur recommended that Petitioner return to his previous work. (PX 10)

On October 22, 2007, Petitioner sought treatment from Dr. Daniel Laich a neurosurgeon at Neuro-Spine Center. Dr. Laich's impression was that Petitioner had low back pain, bilateral lower extremity pain radiating from his back; degenerative disk disease at L5-S1 with dehydration and hyperintensity zone; diabetes; and obesity. Dr. Laich recommended that Petitioner engage in physical therapy as well as address his diet with nutrition and weight loss. Dr. Laich then returned Petitioner to work with restrictions. Petitioner was taken off work for a month during his next visit with Dr. Laich on December 13, 2007. Petitioner continued conservative treatment with regular follow-ups with Dr. Laich until April 24, 2008. During that visit, Dr. Laich recommended that Petitioner undergo an L5-S1 anterior reconstruction surgery. (PX 6)

On May 28, 2008, Petitioner underwent L5-S1 anterior discectomy surgery. At his first follow-up visit on June 27, 2008, Petitioner stated he felt improvement and was experiencing less pain than before the surgery. Petitioner continued to follow-up regularly with Dr. Laich post surgery. During a follow-up visit on November 10, 2008, Petitioner complained of burning, numbness and a tingling feeling in his feet to go along with continued complaints of pain in his left lower extremity and buttocks. Dr. Laich recommended a sacroiliac joint injection, a CT myelogram and a MRI. Petitioner underwent bilateral sacroiliac joint injection on November 24, 2008. He continued to follow-up with Dr. Laich with continual complaints of pain in his lower back, left leg, left foot and right leg. (PX 6)

On March 30, 2009, Dr. Babak Lami of Illinois Spine Institute performed an independent medical examination of Petitioner. Dr. Lami noted that Petitioner complained of back pain and numbness of the bilateral upper and lower extremities. Dr. Lami opined that Petitioner did not have a neurologic deficit that explained his subjective complaints of pain. Dr. Lami further opined that the numbness Petitioner was feeling in his extremities can be attributed to his diabetes. Dr. Lami opined that as of March 30, 2009 Petitioner had reached maximum medical improvement and was not a candidate for further surgery or injections. (RX 1)

On February 4, 2010, Dr. Laich recommended Petitioner undergo an SI fixation and fusion. Dr. Laich also discussed the trial of a dorsal column stimulator at that time. (PX 5)

On February 15, 2010, Dr. Lami performed a repeat independent medical examination of Petitioner. Dr. Lami noted Petitioner's complaints of pain involving his neck, thoracic spine and lower back, as well as, numbness involving the left lower extremity in a non-anatomical distribution. Dr. Lami also had the opportunity to review a surveillance video of Petitioner. Dr. Lami provided that the video showed Petitioner getting in and out of his car without difficulty, squatting and bending to perform yard work, and carrying a hose (The Arbitrator also reviewed the surveillance video. The Arbitrator concurs with Dr. Lami's description). Dr. Lami opined that the description of his disabilities and physical examination that day compared to the surveillance tape clearly demonstrated symptom magnification. Dr. Lami opined that Petitioner's symptoms involving his neck and upper back were unrelated to any work accident. Dr. Lami re-affirmed his opinion that Petitioner had reached maximum medical improvement as of March 30, 2009 and was not a candidate for further surgery or injections. (RX 2)

On January 3, 2011, Dr. Lami performed a third independent medical examination of Petitioner. Dr. Lami opined that his third examination of Petitioner did not change his opinion that Petitioner reached maximum medical improvement on March 30, 2009 and that he is not a candidate for further surgery. Dr. Lami also noted that Petitioner was taking Lyrica, a medication approved for diabetic neuropathy, and Cymbalta, a medication for depression, and was not taking any pain medication. Dr. Lami opined that Petitioner was not a candidate for a spinal cord stimulator. (RX 3)

On June 3, 2011, Dr. Lami performed a review of additional medical records related to Petitioner's use of Norco. Dr. Lami opined that the review of additional records did not alter his prior opinions. Dr. Lami again opined that Petitioner was not a candidate for SI joint stabilization surgery or a spinal cord stimulator. (RX 4)

Petitioner's last visit with Dr. Laich was on November 14, 2012. At that time, Petitioner complained of low back pain and left leg pain. Dr. Laich again recommended left SI fixation fusion and spinal cord stimulator. (PX 4)

With respect to (F.) IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO HIS INJURY, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner's current condition of ill-being is not causally related to his injury on June 14, 2007. The burden is on Petitioner to prove by a preponderance of credible evidence the elements of the claim. *Hannibal, Inc. v. Indus. Comm'n*, 38 Ill.2d 473, 231 N.E.2d 409, 410 (1967). Relying on the opinions of Dr. Lami, the Arbitrator finds that Petitioner failed to prove by a preponderance of credible evidence that his current condition of ill-being is causally related to his injury of June 14, 2007. The Arbitrator is not persuaded by the opinions of Dr. Laich. Also, Petitioner's testimony lacks credibility.

During his March 30, 2009 independent medical examination, Dr. Lami noted that Petitioner complained of lower back pain as well as numbness involving the bilateral lower extremities as well as numbness involving both upper extremities and hands. Dr. Lami opined that his examination findings demonstrated that there was no neurologic deficit that explained Petitioner's subjective complaints of pain. The Arbitrator finds this opinion credible as it is supported by the opinion of Dr. Laich who testified that there was no conclusive pathoanatomy reflective of Petitioner's significant complaints.

The Arbitrator also finds Dr. Lami's opinion that Petitioner's complaints of pain involving his neck, upper back, and right leg are not related to his work injury of June 14, 2007 to be credible. Again, Dr. Lami's opinion is supported by Dr. Laich who testified that Petitioner's complaints of upper back pain really are not

related to his work injury. When asked whether or not Petitioner's complaints of right leg numbness and pain were causally related to his work accident, Dr. Laich could not state directly and with certainty that it was related. Instead, Dr. Laich testified that it may be loosely associated to left sacroiliac disease. Dr. Laich did not provide a sound basis for his opinion that it may be loosely associated with left sacroiliac disease. Moreover, Dr. Lami opined that SI join dysfunction would not explain the complaints of numbness radiating all the way to the foot.

The Arbitrator finds that Petitioner's complaints of numbness and tingling in his upper and lower extremities are not causally related to his work accident. The Arbitrator notes that Petitioner has a history of diabetes for which his treatment is unclear and may have included drinking vinegar. There are no medical records submitted into evidence that indicated that Petitioner was treating regularly for his diabetes. However, the medical records do show that Petitioner was prescribed Lyrica for his complaints of pain. Dr. Lami opined that Lyrica is a medication approved by the FDA for diabetic neuropathy and fibromyalgia. Dr. Lami opined that the neuropathy in the upper and lower extremities can be attributed to Petitioner's diabetes. Similarly, Dr. Laich testified that Petitioner's diabetes has to play a role in his complaints of tingling and numbness in the upper and lower extremities. Dr. Laich further testified that with any diabetic person, the nerve function will not be as good.

The Arbitrator further finds that Petitioner's complaints of testicular pain are not causally related to his work accident. Petitioner failed to prove by a preponderance of credible evidence that his testicular pain is causally related to his work accident. Petitioner's own treating physician, Dr. Laich, testified that he could not relate the testicular pain to his work accident.

The Arbitrator also notes that on February 15, 2010, Dr. Lami found that Petitioner's description of his disabilities and his physical examination findings compared to the activities performed on the surveillance video clearly demonstrated symptom magnification. Dr. Laich also testified that he has cause for concern with Petitioner that there are symptom magnification issues. Dr. Laich further testified that Petitioner's complaints of pain could be related to psychological issues and Petitioner spiraling in the wrong direction. Petitioner has been prescribed Cymbalta which is a medication for depression. The Arbitrator also finds Petitioner's testimony as to his complaints of pain and the restrictions on his daily activities to be inconsistent with the physical capabilities that he demonstrated on the surveillance video.

Based upon the foregoing, the Arbitrator finds that Petitioner reached maximum medical improvement on March 30, 2009 and that his current condition of ill-being is not causally related to his work accident of June 14, 2007.

With respect to (G.) WHAT WERE PETITIONER'S EARNINGS, the Arbitrator finds as follows:

After the hearing in this matter, the parties stipulated to an AWW of $763.34 and that Respondent is entitled to a credit for TTD payments in the amount of $107,375.79.

As such, the Arbitrator finds that Petitioner's average weekly wage was $763.34.

With respect to (L.) WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, the Arbitrator finds as follows:

Relying on the Arbitrator's findings noted above in Issue (F.), the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from December 17, 2007 through March 30, 2009, or a period of 67 weeks. Respondent is entitled to a credit of $107,375.79 for temporary total disability benefits paid to Petitioner.

With respect to (J.) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO THE PETITIONER REASONABLE AND NECESSARY, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner's current condition of ill-being is not causally related to Petitioner's injury on June 14, 2007. The Arbitrator finds that Petitioner reached maximum medical improvement on March 30, 2009. As of March 30, 2009, Petitioner was not a candidate for injections into his lower back. The Arbitrator relies on the opinion of Dr. Lami that there was no basis for these procedures. Moreover, Petitioner experienced no relief from the injections and on occasion experienced worsening pain. Therefore, Petitioner's medical treatment subsequent to March 30, 2009 was not reasonable, necessary or related to Petitioner's work accident of June 14, 2007. Respondent is entitled to a credit for medical expenses previously paid.

With respect to (K.) IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, the Arbitrator finds as follows:

The Arbitrator having found that Petitioner's current condition of ill-being is not causally related to his injury on June 14, 2007, Petitioner's request for prospective medical care is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Larry Biggerstaff,
Petitioner,

vs.

NO: 10 WC 00512

14IWCC1041

GM Sipes Construction,
Respondent.

DECISION AND OPINION PURSUANT TO §8(a)

This matter comes before the Commission on Petitioner's Section 8(a) Petition, filed on February 28, 2013. A hearing was held before Commissioner Donohoo in Mt. Vernon, Illinois on May 15, 2014. Both parties were represented by counsel. The underlying claim arises out of a low back injury that occurred on May 9, 2009. The claim was tried at arbitration on December 18, 2012 before Arbitrator Gallagher with a Decision issued on January 25, 2013. The only disputed issue at arbitration was nature and extent of permanent disability. The arbitrator concluded that Petitioner sustained permanent partial disability to the extent of 10% loss of use of the body as a whole due to the work injury.

Petitioner filed this Section 8(a) Petition seeking medical expenses for ongoing treatment and medication, which he alleges is related to the 2009 work injury. Although the Petitioner's Petition under Section 8(a) also seeks penalties and fees under Section 16 and Section 19, Petitioner stated in his Statement of Exceptions and Brief on Review that he is no longer seeking penalties and fees against Respondent.

Petitioner, a 54 year old laborer, suffered a low back injury on May 9, 2009 when lifting a tapper plate. He experienced an onset of pain in his lower back going into the left buttock and leg. Petitioner had previously sustained a low back injury that required a discectomy at L5-S1 in 2001. Shortly before arbitration on the May 9, 2009 accident, Petitioner was injured at work in October 2012 when he was struck by a truck and sustained a fracture to one of his legs.

After the low back injury on May 9, 2009, Dr. Kovalsky, an orthopedic surgeon, began treating Petitioner and continued to do so through hearing on the 8(a) Petition. After the accident, Dr. Kovalsky treated Petitioner conservatively and prescribed medication to manage Petitioner's pain complaints. Petitioner was released to return to work without restrictions on June 1, 2009 but he continued to treat with Dr. Kovalsky for complaints of back pain on the left side and continued taking medications for his complaints. In January 2011, an MRI showed degenerative changes at L5-S1 and a very small recurrent disc herniation at that level. Dr. Kovalsky recommended an epidural steroid injection which Petitioner had in January 2012 allowing for relief of his leg pain.

Petitioner has consistently been prescribed Vicodin and Flexeril since the 2009 accident in an effort to mitigate his complaints and allow him to continue working full duty as a union laborer. Dr. Kovalsky prescribed 500 mg Vicodin for Petitioner's low back complaints after the 2009 accident. After Petitioner sustained an injury at work in October 2012 causing injury to his leg, he was prescribed 750 mg Vicodin by Dr. Beck for his new leg complaints and his ongoing low back complaints. Prior to that time, Petitioner testified he was taking between two to four 500mg Vicodin a day depending on his activity level. At arbitration hearing, Petitioner testified that while he continued to work full duty, he required the assistance of co-workers with certain tasks and was selective in the jobs he accepted. He continued to complain of low back pain with radiation down the legs, more so on the left. Petitioner further testified that the October 2012 knee injury did not re-injure his low back.

After the October 2012 work injury and before arbitration on the May 9, 2009 accident, Petitioner returned to Dr. Kovalsky on December 6, 2012. Petitioner was noted in the record as stating that his back and leg pain was tolerable provided he took three to four Vicodin 5/500 a day but then he was struck by a semi-truck in October 2012 and suffered a lateral tibial plateau fracture requiring higher dosage of Vicodin for the new knee complaints, as well as his ongoing low back pain. Dr. Kovalsky noted that he would follow up with Petitioner in four months to monitor his progress.

After arbitration, Petitioner was released by Dr. Beck for the knee injury and returned to Dr. Kovalsky in April 2013 for continuing care for his low back pain. Dr. Kovalasky noted in his April 4, 2013 office visit record that Petitioner was taking two to four 5/500 Vicodin a day for pain in his back before suffering a knee injury in October 2012. Dr. Kovalsky noted the knee injury did cause some increase in Petitioner's back pain, and he therefore increased the strength of Petitioner's Vicodin prescription from 5/500 to 7.5/750, with a maximum of four pills per day. Petitioner's other medication for his low back, Flexeril, was continued at the same dosage. Dr. Kovalsky refilled Petitioner's medications on June 6, 2013 after examination and advised Petitioner to follow-up in six months. The last treatment note in the record of Dr. Kovalsky is dated December 5, 2013. At that time, Petitioner presented with continued complaints, but he stated he was taking less Vicodin because he was not currently working due to the knee injury. Dr. Kovalsky changed his prescription for Vicodin to Norco 735/325 due to Vicodin/Hydrocodone at 7.5/750 being discontinued. All other medications were continued and Petitioner was to return to Dr. Kovalsky in six months for a recheck. Petitioner testified at review hearing that he has not been able to return to Dr. Kovalsky due to financial constraints.

14IWCC1041

Petitioner was evaluated by Dr. Stiehl pursuant to Section 12 on January 15, 2014. Dr. Stiehl noted that Petitioner continued to have pain with the left knee but had no significant findings after release from treatment by Dr. Beck. Regarding the low back, Dr. Stiehl found Petitioner continued to suffer from chronic pain with occasional numbness radiating from the back of the left leg, tingling in the calf and pain with maneuvering stairs. Dr. Stiehl opined that if Petitioner required chronic medication, it would be related to the left knee condition sustained in the October 2012 work injury.

Prior to arbitration, Dr. Stiehl performed a Section 12 examination of Petitioner with report issued April 8, 2011. Dr. Stiehl opined at that time that Petitioner required Vicodin and Nortiptyline as needed for ongoing pain related to the 2009 work injury.

Petitioner argues that he has continued to experience low back pain post-arbitration that has required continued treatment with Dr. Kovalsky on a regular basis. Petitioner testified at hearing on the Section 8(a) Petition that he currently takes at least two 750 mg Vicodin a day and the Vicodin he takes for his back complaints also helps with any leg symptoms he experiences l. Petitioner has not returned to work since the October 2012 work injury but he is no longer treating for that injury. Petitioner further testified that he is not taking any medication other than Vicodin/Norco for his back complaints.

The medical records of Dr. Kovalsky immediately prior to the October 2012 work accident provide insight into Petitioner's back condition before that injury. On September 1, 2011, Dr. Kovalsky prescribed continuing refills of Flexeril, Nortiptyline, and Vicodin, and Petitioner was to return in six months for medical management of his low back pain. Vicodin was prescribed at #120 5/500. On June 6, 2012, Dr. Kovalsky noted Petitioner was able to work full duty, but in order to do so, required two to three Vicodin daily for pain complaints. Petitioner was scheduled to see Dr. Kovalsky in six months for continued management of his pain medication.

After the knee injury in October 2012, Petitioner treated with Dr. Beck for his leg complaints and was prescribed a higher dosage of Vicodin to combat the new leg complaints in addition to his continued back pain. After Dr. Beck released Petitioner from his care, Petitioner returned to Dr. Kovalsky for maintenance of his medications for his low back pain, including Vicodin. In April 2013, Dr. Kovalsky noted Dr. Beck increased Petitioner's Vicodin dosage to 750mg when treating for the knee complaints, and Dr. Kovalsky agreed to continue Petitioner on the same dosage, with a maximum of four pills per day. While Dr. Kovalsky noted that Petitioner did sustain an aggravation to his low back with the 2012 knee injury, he continued Petitioner on the same medications as prior to the 2012 accident, although a slightly higher dosage of Vicodin. In December 2013, Dr. Kovalsky changed Petitioner's Vicodin/Hydrocodone prescription to Norco. Apart from the increase in Vicodin/Hydrocodone dosage and then a change to Norco 735/325, Petitioner's medications remained the same as pre-2012 work injury.

14IWCC1041

After review of the record as a whole, the Commission finds Petitioner proved that his current condition of ill-being as related to the low back is causally connected to the work accident of May 9, 2009. Petitioner has met his burden of proof that the post-arbitration treatment with Dr. Kovalsky and prescribed medications are reasonably required to cure or relieve him from the effects of the May 9, 2009 injury. The Commission does not find the 2014 causation opinion of Dr. Stiehl persuasive as it contradicts, without sufficient explanation, his prior 2011 opinion in which he opined that Petitioner required ongoing medical management, including Vicodin, for his chronic low back complaints stemming from the 2009 work injury. Respondent stipulated at arbitration to all issues less permanent disability, including causal connection and medical expenses related to the 2009 work injury. Petitioner testified credibly regarding his pain complaints and need for prescription medication both before and after the October 2012 work injury.

Petitioner's Exhibit 6 contained outstanding medical bills post-arbitration. The bills included office visits with Dr. Kovalsky from June 6, 2013 and December 5, 2013 totaling $300.00 and related prescription costs through Injured Workers Pharmacy totaling $1,901.08. The medical expenses represent treatment that was reasonable and necessary to cure and relieve Petitioner from the effects of the May 2009 work injury to his low back. The Commission finds the post-hearing treatment and medical management of Dr. Kovalsky for the low back contained in the record is causally connected to the May 9, 2009 work injury and hereby grants Petitioner's Section 8(a) Petition for continued treatment with Dr. Kovalsky and medical management of his low back complaints as prescribed by Dr. Kovalsky.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §8(a) petition is granted. Petitioner's request for penalties and fees pursuant to Section 19 and Section 16 is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,201.08 for medical expenses contained in Petitioner's Exhibit 6, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for reasonable and necessary prospective medical services with Dr. Kovalsky and medication as prescribed for treatment of the low back, as provided in Sections 8(a) and 8.2 of the Act.

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

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

14IWCC1041

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,300.00. 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: DEC 0 4 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

drd/adc
o-09/23/14
68

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Terry Thies,
Petitioner,

vs. No. 08 WC 36612

14IWCC1042

State of Illinois,
Menard Correctional Center,
Respondent.

DECISION AND OPINION ON REVIEW UNDER
SECTION 8(a) AND SECTION 19(h)

This cause comes before the Commission on Petitioner's second Petition under Section 8(a) and Section 19(h) which was filed on August 6, 2013. The arbitration hearing on the underlying claim was held on April 17, 2009, and Arbitrator Dibble issued a decision on May 11, 2009, finding that Petitioner was permanently partially disabled due to injuries sustained on May 28, 2007 to the extent of 22.5% of the person-as-a-whole. Neither party filed a Petition for Review.

Petitioner filed his first Section 8(a)/19(h) Petition on May 4, 2010, and the review hearing was held before Commissioner Donohoo on September 21, 2010. The Commission entered an order on April 26, 2013, granting Petitioner additional medical expenses under Section 8(a) and additional temporary total disability. The Commission notes that at the time of oral arguments before the Commission on Petitioner's first Section 8(a)/19(h) Petition, Respondent stipulated to its liability for payment of all medical expenses contained in Petitioner's Exhibit 2 and for the additional temporary total disability claimed by Petitioner. Petitioner did not seek additional permanency at that time.

14IWCC1042

On August 6, 2013, Petitioner filed the current Petition under Section 8(a)/19(h), again seeking payment for additional medical treatment and lost time benefits. Petitioner also sought an increase in permanent partial disability of 7.5% loss of use of the person as a whole. A review hearing was held before Commission Donohoo on May 15, 2014 in Mount Vernon, Illinois. After review of the record as a whole, the Commission grants Petitioner's petition for additional medical benefits under Section 8(a), but denies Petitioner's petition for additional temporary total disability and an increase in permanency under Section 19(h) as being time-barred.

Petitioner suffered an injury to his lumbar spine while bending to pick up inmate laundry on May 28, 2007. He initially treated with his chiropractor, but eventually underwent L5-S1 disc replacement surgery with Dr. Gornet. The underlying claim was tried before Arbitrator Dibble, who awarded Petitioner 22.5% loss of the person as a whole on May 11, 2009. Petitioner now claims additional medical expenses, temporary total disability, and an increase in permanent partial disability.

Section 8(a). Respondent argues that Petitioner suffered an intervening motor vehicle accident on October 2, 2010, after which his work related back injury worsened. Respondent urges the Commission to find that Petitioner's medical expenses after October 2, 2010 were incurred as a result of the intervening motor vehicle accident and not as a result of the continued degeneration of his work-related back injury. Petitioner testified at the review hearing on May 15, 2014 that the motor vehicle accident did temporarily increase his back complaints, but noted that this aggravation was mild and resolved after a short time. Dr. Gornet's office note from November 1, 2010 indicates that the doctor reviewed Petitioner's post-motor vehicle accident x-rays and found no change from his pre-accident condition. Petitioner testified that he did not claim a low back injury in the claim for damages related to his motor vehicle accident, and he did not miss any work due to that accident. Petitioner cites *Vogel v. Illinois Workers' Compensation Comm'n*, 354 Ill. App. 3d 780, 821 N.E.2d 807, 290 Ill. Dec. 495 (2nd Dist. 2005), in which the Appellate Court held that a vehicular accident which aggravated the claimant's work-related injury did not break the chain of causal connection. *See Lasley Const. Co. v. Industrial Comm'n*, 274 Ill. App. 3d 890, 655 N.E.2d 5, 211 Ill. Dec. 345 (5th Dist. 1995). The Commission finds that Petitioner's October 2, 2010 motor vehicle accident did not constitute an intervening accident and did not sever the causal connection between Petitioner's May 28, 2007 work accident and his need for further treatment to the low back after the September 21, 2010 Section 8(a)/19(h) hearing. The Commission finds that Petitioner proved that his current condition of ill-being in his low back is causally related to the May 28, 2007 work injury.

Petitioner stipulated at the review hearing that he was not seeking payment for any medical services rendered after his return to work at full duty on November 1, 2010. However, he submitted bills totaling $6,489.00 for chiropractic services, epidural steroid injections administered by Dr. Granberg, and a CT scan performed at CT Partners. All of the chiropractic visits occurred after Petitioner's return to work, as did his CT scan. The only bills that were incurred before November 1, 2010 are those associated with Dr. Granberg's injections. The Commission finds that Petitioner met his burden of proof that the treatment with Dr. Granberg after his Section 8(a) hearing on September 21, 2010 was reasonably required to cure or relieve him from the effects of his May 28, 2007 work injury. Therefore, pursuant to Petitioner's stipulation at hearing, the Commission awards Petitioner $2,773.00 in Section 8(a) benefits.

14IWCC1042

Section 19(h). In his Petition for Section 19(h) benefits, Petitioner seeks 7-1/7 weeks of temporary total disability and an increase of 7.5% loss of use of the person as a whole in permanency. The Commission notes that temporary total disability benefits may not be awarded under Section 19(h) unless the Commission finds that Petitioner is entitled to an increase in permanency. *Briggs Manufacturing Co. v. Industrial Comm'n*, 212 Ill. App. 318, 321, 570 N.E.2d 1152, 156 Ill. Dec. 430 (3d Dist. 1989).

Respondent argues that Petitioner's claims for additional temporary total disability and increased permanency are time-barred. Section 19(h) provides in pertinent part:

> An agreement or award under this Act providing for compensation in installments, may at any time within 18 months after such agreement or award be reviewed by the Commission at the request of either the employer or the employee, on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.
>
> However, as to accidents occurring subsequent to July 1, 1955, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement or award may at any time within 30 months, or 60 months in the case of an award under Section 8(d)1, after such agreement or award be reviewed by the Commission at the request of either the employer or the employee, on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.
>
> On such review, compensation payments may be re-established, increased, diminished or ended.

Arbitrator Dibble entered his Arbitration Decision on May 11, 2009. Petitioner did not file this Petition under Section 19(h) until August 6, 2013, over 30 months after the Decision was entered and became final. The timely filing of one Petition under Section 19(h) does not toll the running of the 30-month limitations. *Behe v. Industrial* Comm'n, 365 Ill. App. 3d 463, 848 N.E.2d 611. 302 Ill. Dec. 312 (2nd Dist. 2006). Here, Petitioner's first Section 8(a)/19(h) Petition was timely filed within 30 months of the date of the Arbitration Decision and a decision was entered by the Commission on April 26, 2013. However, the instant Petition was filed after 30 months had passed since the Arbitration Decision. Therefore, the Section 19(h) portion of the Petition is not timely. Petitioner's request for additional temporary total disability and increased permanent partial disability is therefore denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Section 8(a) Petition is granted and Petitioner's Section 19(h) Petitioner is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner $2,773.00 for reasonable and necessary medical services, pursuant to Sections 8(a) and 8.2 of the Act.

14IWCC1042

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's requests for an increase in permanent partial disability and for additional temporary total disability pursuant to Section 19(h) are denied as time-barred.

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.

Pursuant to Section 19(f)(1)(1) of the Act, in this case, where the Respondent is the State of Illinois, the decision of the Commission shall not be subject to judicial review.

DATED: DEC 04 2014

Daniel R. Donohoo

Charles J. DeVriendt

o-09/24/14
drd/dak
68

Ruth W. White

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

Machelle Owen,
Petitioner,

vs.

No: 06 WC 047727

Harrisburg School District, Unit 3,
Respondent.

14IWCC1043

DECISION AND OPINION PURSUANT TO SECTION 8(a)

This matter comes before the Commission on Petitioner's Section 8(a) Petition, filed on June 19, 2012. The underlying claim arises out of an acute trauma to Petitioner's cervical spine suffered on September 14, 2004, when a special education student head butted Petitioner in the face. That case was tried before Arbitrator Dibble on October 20, 2008, on the sole issue of nature and extent. By Decision issued on December 13, 2008, Arbitrator Dibble awarded Petitioner 37.5% loss of use of the person as a whole for her cervical and facial injuries. On or about June 19, 2012, Petitioner filed a Petition for Review under Section 8(a), requesting that the Commission enter an order for prospective medical benefits.

The parties proceeded to hearing before Commissioner Donohoo on August 14, 2013 in Mount Vernon. After considering the entire record, including the transcripts of the original arbitration hearing and the August 14, 2013 review hearing and oral arguments presented on September 23, 2014, the Commission finds that Petitioner's post-arbitration 2012-13 treatment, including cervical epidural steroid injections, cervical MRI, cervical nerve blocks, radiofrequency ablation and pain medications are causally connected to her September 14, 2004 work injury and grants her Section 8(a) petition for additional medical expenses.

14IWCC1043

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. On September 14, 2004, Petitioner was employed by Respondent as a middle school teacher when a special education student head-butted her in the face, causing facial and dental injuries and aggravating her pre-existing cervical spondylosis.

2. Petitioner underwent significant physical therapy and injections before undergoing cervical fusion surgery at the C5-6 level. The fusion eliminated her upper extremity radicular symptoms and healed solidly, but Petitioner continued to suffer from periodic exacerbations of her degenerative cervical condition, requiring trigger point injections, cervical epidural steroid injections, nerve blocks and radiofrequency ablations, as well as a long list of medications.

3. In April 2011, Petitioner's car was rear-ended by another vehicle. She suffered low back and right foot pain as a result, but denied any neck pain. She received physical therapy for her low back, and the pain resolved relatively quickly.

4. A couple months after the accident, Petitioner's upper extremity numbness and tingling returned, and she again sought treatment from Dr. Swarm, at the pain management clinic at Washington University. Dr. Swarm administered additional cervical epidural steroid injections and nerve branch blocks and performed two radiofrequency ablations. He also continued Petitioner's medication management, including her long-term use of Nortriptyline and Toparmirate.

5. Respondent argued that Petitioner recovered from her 2004 work injury following her fusion surgery and her return to work. She worked full duty at her teaching job and required only periodic treatment with pain medication for her residual neck pain.

6. Respondent obtained Section 12 opinions from Dr. Cantrell and Dr. Hogan. Dr. Cantrell opined on April 17, 2012 that any treatment after Petitioner's 2011 motor vehicle accident was not related to her 2004 work accident, but either to her pre-existing degenerative osteoarthritis or to the 2011 auto accident. Dr. Cantrell found no objective explanation for Petitioner's upper extremity complaints. Dr. Hogan provided a neurological evaluation on August 31, 2012. He opined that Petitioner had been misdiagnosed with migraine headaches, and the Topamirate she was prescribed would be inappropriate for treatment of muscular contraction or tension headaches. Dr. Hogan also disagreed with Petitioner's taking Nortriptyline, which was prescribed for her depression. The doctor acknowledged, however, that Petitioner's work accident and resulting surgery might have worsened her pre-existing depression, so that the Nortriptyline might be useful in that context.

7. Petitioner countered that her motor vehicle accident had little or no effect on her cervical spine. Dr. Swarm opined at his July 24, 2013 deposition that the motor vehicle accident did not sever the causal relationship between her 2004 work injury and her current condition. Any aggravation of her cervical condition was temporary.

14IWCC1043

8. Respondent also argues that Petitioner's treatment was not reasonable and necessary. Dr. Cantrell opined that the epidural steroid injections and radiofrequency ablations administered by Dr. Swarm were unnecessary, and Dr. Hogan disagreed with the medications prescribed by Dr. Swarm. However, both Dr. Cantrell and Dr. Hogan acknowledged that at least part of Petitioner's current cervical complaints could be attributable to her 2004 work injury.

9. Petitioner testified at the August 14, 2013 review hearing that she continued to suffer back pain every day to the left of the C5-6 surgery site. Although her pain was managed with medication, it was ongoing and occasionally worsened. She testified that she had recently taken disability due to her pain level, but at the time of the review hearing, her condition was much improved, and she anticipated a return to work full duty in the near future. She believed that the drugs prescribed by Dr. Swarm improved her condition, despite Dr. Hogan's opinions, and that the injections were helpful, despite Dr. Cantrell's opinion.

Petitioner introduced treatment records and medical bills from the period between her arbitration and review hearings as Petitioner's Exhibit 1. Although Respondent's Section 12 examiners expressed some disagreement with the treatment and medications prescribed, Petitioner testified that she benefitted from the treatment and medications, and treating Dr. Swarm testified by deposition that her medical treatment was reasonable and necessary and improved Petitioner's ability to function. The Commission finds that Petitioner has met her burden of proving that these treatments and medications were reasonably necessary to cure and relieve her of the effects of her September 2004 work accident. In reaching this conclusion, the Commission finds Dr. Swarm's opinions more persuasive than the opinions of Dr. Hogan and Dr. Cantrell.

The Commission, after considering the entire record, including the transcripts of the Arbitration Hearing October 20, 2008 and the Review Hearing before Commissioner Donohoo on August 14, 2013, finds Petitioner has proved she is entitled to medical expenses pursuant to Section 8(a) of the Act for the reasons set forth above.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Section 8(a) Petition is granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical expenses related to the treatment of her cervical condition, pursuant to Sections 8(a) and 8.2 of the Act, as found in PX1.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,000.00. 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:

DEC 04 2014

o-09/23/14
drd/dak
68

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

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

Mark Vinyard,

Petitioner,

vs.

NO. 13WC 37425

14IWCC1044

Centralia Correctional Facility,

Respondent.

DECISION AND OPINION ON REVIEW

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

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

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

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

No bond is required for removal of this cause to the Circuit Court.

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

DATED: DEC - 4 2014
SJM/sj
o-11/6/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VINYARD, MARK
Employee/Petitioner

Case# **13WC037425**

CENTRALIA CORRECTIONAL FACILITY
Employer/Respondent

14IWCC1044

On 5/8/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.45% 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:

4128 RUBENS AND KRESS
FRANK KRESS
134 N LASALLE ST SUITE 444
CHICAGO, IL 60602

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

4948 ASSISTANT ATTORNEY GENERAL
WILLIAM PHILLIPS
201 W POINTE DR SUITE 7
SWANSEA, IL 62226

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

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

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

MAY - 8 2014

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

14IWCC1044

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Case # 13 WC 37425

MARK VINYARD
Employee/Petitioner

v.

CENTRALIA CORRECTIONAL FACILITY
Employer/Respondent

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 **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **March 5, 2014**. By stipulation, the parties agree:

On the date of accident, **May 30, 2013**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned **$71,916.00**, and the average weekly wage was **$1,383.00**.

At the time of injury, Petitioner was **40** years of age, ***single*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

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

The parties stipulated to the issuance of a short decision form, and therefore the Arbitrator is issuing a short decision form pursuant to Section 19(b) of the Act as opposed to written findings.

ORDER

Respondent shall pay Petitioner the sum of $712.55/week for a further period of 88.55 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the 35% loss of use to the left arm.

Respondent shall pay Petitioner compensation that has accrued from October 3, 2013 through March 5, 2014, and shall pay the remainder of the award, if any, in weekly payments.

Respondent stipulated that it would pay all unpaid and related medical bills pursuant to the medical fee schedule, Section 8.2 of the Act.

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

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

Signature of Arbitrator

05/04/2014
Date

MAY - 8 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ed Brown,

Petitioner,

vs. NO. 12WC039566

GSI Group,

Respondent.

14IWCC1045

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, prospective medical, causal connection and permanent partial disability, 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 January 10, 2014 is hereby affirmed and adopted.

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

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

14IWCC1045

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

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

DATED: DEC 4 2014
SJM/sj
o-09/24/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

BROWN, ED
Employee/Petitioner

Case# 12WC039566

14IWCC1045

GSI GROUP
Employer/Respondent

On 1/10/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0258 HELLER HOLMES & ASSOC
FRED JOHNSON
PO BOX 889 1101 BROADWAY
MATTOON, IL 61938

0771 FEATHERSTUN GAUMER POSTLEWAIT ET AL
DAN GAUMER
PO BOX 1760
DECATUR, IL 62525

14IWCC1045

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

ED BROWN
Employee/Petitioner

v.

GSI GROUP
Employer/Respondent

Case # **12** WC **039566**

Consolidated cases: ___

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Urbana**, on **12/19/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

☐ 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 **Medical/Prospective Medical**

FINDINGS

On the date of accident, **5/25/11**, Respondent operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident given to Respondent.

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

In the year preceding the injury, Petitioner earned **$31,200**; the average weekly wage was **$600**.

On the date of accident, Petitioner was **66** years of age, with **0** dependent children.

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

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

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

ORDER

PETITIONER'S CURRENT STATE OF ILL BEING IS CAUSALLY RELATED TO HIS ACCIDENT OF MAY 25, 2011.

RESPONDENT IS ORDER TO PAY, PURSUANT TO THE FEE SCHEDULE, THE PROSPECTIVE MEDICAL CARE ORDERED BY DR. MCKECHNIE CONSISTING OF EPIDURAL STEROID INJECTIONS.

RESPONDENT IS ORDERED TO PAY, PURSUANT TO THE FEE SCHEDULE, THE PAST MEDICAL BILLS CONTAINED IN PETITIONER'S DEPOSITION EXHIBIT 4 OF PETITIONER'S EXHIBIT, THE BILLS OF DR. MCKECHNIE

RESPONDENT IS ENTITLED TO CREDIT FOR ALL MEDICAL PAID EITHER BY ITS WORKERS COMPENSATION OR GROUP PROVIDER..

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

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

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

D. Dlee Mc Cauley
Signature of Arbitrator

Jan. 7, 2014
Date

ICArbDec19(b)

JAN 10 2014

ADDENDUM

A. CAUSATION/MEDICAL AND PROSPECTIVE MEDICAL BENEFITS

The issues before the Arbitrator are whether the outstanding bill of Dr. McKechnie, attached to his deposition (Petitioner Exhibit 4), was causally related to the trauma of the accident on May 25, 2011, and whether prospective medical benefits in the form of injections recommended by Dr. McKechnie should be authorized. The Arbitrator finds a causal relationship exists between the services rendered by Dr. McKechnie to the Petitioner and the trauma of the accident on May 25, 2011, and further finds that the prospective medical benefits in the form of injections recommended by Dr. McKechnie are causally related to the trauma of the accident and should be authorized. It is undisputed that the Petitioner, while driving a truck on May 25, 2011, traveled into a ditch and was violently thrown about within the cab as a result of adverse weather conditions. The records of St. Anthony Memorial Hospital document the nature of the Petitioner's injuries. (See Petitioner Exhibit 9-St. Anthony Memorial Hospital records.) The Petitioner was taken to St. Anthony's Hospital by ambulance. Thereafter the Petitioner was seen by his family physician, Leland Phipps and Dr. John Rowe. (See Petitioner Exhibit 6-Dr. Phipps subpoenaed records and Petitioner Exhibit 7-Dr. Rowe subpoenaed records.) Dr. Phipps referred the Petitioner for physical therapy at Paris Community Hospital following his accident. The records of physical therapy of the Petitioner at the Paris Community Hospital are found in Petitioner's exhibit 5. According to the physical therapist note from July 28, 2011, the Petitioner's chief complaint was:

> "Severity at worse: 10/10; current severity: 3/10; relieving factors: turning head left, right increases radiating distal pain, cervical extension creates centralized cervical pain; lifting increases pain, reaching with arm; location: radiating, UE: neck to upper arm: posterior."

The physical therapy note from July 28, 2011 stated that the Petitioner's overall rehabilitation potential was "fair". Although the Petitioner was prescribed further therapy, the Petitioner testified he did not continue with his physical therapy because he did not feel it was helping him and that his work schedule made it difficult to attend therapy. The Petitioner did speak with his therapist by phone on August 9, 2011 and report that he was making progress with his home exercise program.

The physical therapy records from the Paris Community Hospital on August 8, 2012, document that the Petitioner advised the physical therapy department that his work schedule made him "unable to make visits." The Petitioner nonetheless resumed physical therapy as of August 8, 2012 on the recommendation of Dr. James McKechnie, a board certified orthopaedic surgeon. The Petitioner sought treatment with Dr. James McKechnie because of his ongoing pain and the fact he trusted Dr. McKechnie based upon prior treatment the Petitioner received from Dr. McKechnie many years earlier for a low back condition. The physical therapy note from August 8, 2012 states:

> "PT in truck accident May of 2011 and has started having more issues in his neck in the eight weeks. Had started therapy prior but due to work schedule unable to make his visits. Having difficulty with moving his neck, interfering with driving."

The Petitioner thereafter, on the recommendation of Dr. McKechnie, continued physical therapy appointments until he was discharged on August 24, 2012, based upon the fact the Petitioner had "plateaud" and was directed to continue a home exercise program by physical therapist Martha E. Williams.

The only medical testimony presented was that of Dr. James McKechnie, whose evidence deposition is found in Petitioner's Exhibit 4. Dr. McKechnie diagnosed the Petitioner as suffering

from a "cervical strain with persisting symptoms" (Dr. McKechnie deposition page 8), as well as cervical disc bulges (Dr. McKechnie deposition page 12-13), as well as an aggravation of pre-existing degenerative changes in the Petitioner's neck. Dr. McKechnie further testified that the aggravation of the pre-existing condition was causally related to the trauma of the accident (Dr. McKechnie deposition page 14), as was the cervical strain (Dr. McKechnie deposition page 11). Dr. McKechnie further testified that the services represented in his bill were causally related and reasonably necessary to treat the Petitioner for the effects of the trauma of the accident, and further recommended cervical epidural steroid injections to decrease the inflamation that was causing the Petitioner pain (see Dr. McKechnie deposition page 16-17). At page 18 of his deposition Dr. McKechnie was asked:

> "Question: Doctor, in your opinion, with reasonable medical and surgical certainty how important is it for the patient to have those epidural cervical injections?
> Answer: It is something that is very likely to be beneficial and to help in the healing process."

At page 16 of his deposition Dr. McKechnie further testified as follows:

> "Question: Can you tell us with reasonable medical and surgical certainty whether those injections were reasonably necessary to treat the patient for the effects of the trauma on the May 25, 2011 incident?
> Answer: Yes, I felt they were necessary for the treatment of the pathology resulting from the trauma."

The Respondent offered no contrary medical testimony to refute the opinions of Dr. McKechnie on the issue of causation. The Respondent resists payment of Dr. McKechnie's bill and authorization for further injections, primarily based upon a gap in treatment for cervical pain. They state that the Petitioner did not seek treatment from Dr. McKechnie for 14 months following his

accident. The Arbitrator does not see a 14 month gap in treatment. The timeline before and after the accident is relevant. The Petitioner injured his cervical spine when he rolled his semi on May 25, 2011. A CT scan done at the hospital showed that he had extensive degeneration throughout the cervical spine, and medical records in evidence show that the petitioner had an MRI of the cervical spine in 2006. However, there are no medical records or other evidence to show that the Petitioner was having any ongoing symptoms or treatment for the neck prior to the accident in question. He had driven a truck for the Respondent for 18 years. If he had ongoing prior neck problems which interfered with his job performance, there would have been evidence introduced to that effect. The day after his accident, he went to Dr. Phipps, his family doctor, with neck complaints. He continued to treat for those complaints until August 9, 2011. His physical therapy exam done on July 28, 2011, showed pain and restricted motion in the cervical spine.

He was not seen for any more neck treatment until April 12, 2012 by Dr. Rowe, and his office note is particularly relevant to the issue of causal connection. First of all, the note indicates he was seeing the Petitioner on referral from Dr. Phipps. The Respondent argues that the Petitioner stopped complaining about his neck to Dr. Phipps in July 2011. If so, why would he make the referral? Secondly, the Petitioner gave Dr. Rowe a history consistent with his testimony. He told him about his accident, said he tried some therapy which did not help, and reported his neck symptoms remained the same. Dr. Rowe's exam revealed muscle spasm, limited range of motion and cervical pain. Dr. Rowe opined that the accident "...certainly aggravated" his degenerative spinal condition. (PX 7) From that point forward, the Petitioner has remained in treatment.

The issue then is whether the Petitioner healed in 2011, and either had a new injury or

coincidental flare up of his spinal condition leading him to Dr. Rowe. He testified that he continued to work in the interim with symptoms, and his history to Dr. Rowe matched his testimony. There was no evidence of an intervening accident. He did fall and injure his lower back, but that didn't happen until June 2012.

The Petitioner apparently did fail to tell Dr. Phipps of his neck problems during a number of office visits between August 2011 and May 2012, but that is understandable. Dr. Phipps is his family doctor. He was seen for things like hypertension, acute sinusitis and an infected leg wound. It would be unusual for him to complain about his neck, or to have those complaints recorded in the doctors notes during those visits. Also, he saw Dr. Phipps on a number of occasions after he began treatment with Dr. McKechnie, and those notes also do not contain any reference to neck complaints.

The Respondent also argues the significance of the Petitioner's obtaining his CDL license renewals in 2011 after his accident, without mentioning his neck problems to his examiners. Obviously, he wanted to and did keep driving. He even told Dr. Phipps in November 2011 that he was concerned that the Respondent might not believe that he was still healthy enough to drive. It is entirely understandable that he not make neck complaints under those circumstances.

The evidence shows that the Petitioner had extensive cervical degeneration before his accident of May 25, 2011. The evidence also does not show any ongoing treatment or complaints until said accident. Thereafter, he has had treatment. He went to physical therapy for a month in August 2012, but showed no significant improvement. His doctor now wants to try the next most logical treatment, epidural steroid injections. The Arbitrator believes the treatment is reasonable and, based upon the above, is causally related to his accidental injuries.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Glen Hale,

Petitioner,

vs.

NO. 13WC01156

14IWCC1046

Pepsi Americas,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 26, 2013 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 $41,400.00. 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: DEC 04 2014
SJM/sj
o-10/2/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

HALE, GLEN
Employee/Petitioner

Case# **13WC001156**

14IWCC1046

PEPSI BEVERAGES COMPANY
Employer/Respondent

On 8/26/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

ANKIN LAW OFFICE LLC
DEREK S LAX
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

GAIDO & FINTZEN
JUSTIN KANTER
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

14IWCC1046

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)

Case # 13 WC 001156

Glen Hale
Employee/Petitioner

v.

Consolidated cases: -----

Pepsi Beverages Company
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **June 28, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, November 26, 2012, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$39,998.40**; the average weekly wage was **$769.20**.

On the date of accident, Petitioner was **45** years of age, ***married*** with **1** 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 **$3,570.32** 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 $704.32 under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $512.80/week for 30 5/7ths weeks, commencing November 27, 2012 through June 28, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from November 27, 2012 through June 28, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $3,570.32 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $14,402.00 to West Suburban Medical Center, $13,362.00 to Oak Park Medical Center, and $1,872.00 to Hinsdale Orthopedics, which totals $29,867.60, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $704.32 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for a cubital tunnel release as recommended by Dr. Victor Romano including all reasonable and necessary associated rehabilitative care.

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.

L. Thompson Smith

Signature of Arbitrator

August 23, 2013

AUG 26 2013

GLEN HALE
13 WC 01156

STATEMENT OF FACTS

The petitioner worked for the respondent as a merchandiser and driver; his job duties included stocking shelves, pulling pallets, condensing back rooms, driving and making deliveries. The petitioner testified that on November 26, 2012, he was injured while delivering to one of his accounts. On that day the petitioner, while making a delivery to Meijer's, he was pulling a pallet with a manual hand jack. His left foot or toe caught the front wheel of the hand-jack, causing him to fall backwards. The petitioner testified that he fell backwards landing directly on his elbows, hands, back, neck, shoulder, and buttocks. He further testified that he felt immediate pain and a pop in his right arm and it felt as though something was sticking him in the hip. Petitioner testified that he immediately contacted his employer and was told to return to the respondent's work location at 35th and Ashland, in Chicago, Illinois. Upon returning to Respondent's plant, he was seen by an on-site nurse where a history of the accident was noted. Petitioner described sharp radiating pain down his right arm from his shoulder area to his right little finger. Petitioner although in obvious pain, was given an over-the-counter medication and returned to his work duties. Accident and notice are not in dispute. *See*, PX2 &AX1.

On November 26, 2012, the petitioner, still in pain, presented to his primary care physician, Dr. Catalina Grija; the same history of accident was given. The petitioner was noted to have developed numbness along the ulnar aspect of the right forearm, suffering from back spasms, right shoulder and left hip. In addition, the petitioner was noted to be limping. He was given medication; x-rays were ordered, and he was told to stay off work for two (2) days before a follow up. Petitioner had x-rays taken at West Suburban Medical Center ("West Suburban") on November 27, 2012. *See,* PX3 & PX6.

The petitioner followed up with Dr. Grija, who ordered a CT scan of the left hip as well. The CT scan was performed on November 29, 2012 at West Suburban and upon follow up with Dr. Grija on December 3, 2012, the CT scan results showed myositis ossificans.

Pain in the left hip was noted when turning, his right shoulder was very sore with severe back spasms, and Petitioner still had numbness from right elbow ulnar distribution. Petitioner was prescribed physical therapy, and an MRI of the right shoulder. The petitioner was seen at Oak Park Medical Center to begin physical therapy and was taken off work. Petitioner underwent physical therapy from December 10, 2012 through May 28, 2013 and testified that the physical therapy did help. *See,* PX5 & Tr. pg. 20. Petitioner underwent a right shoulder MRI on December 6, 2012 at West Suburban. On December 20, 2012, the petitioner followed up again with Dr. Grija and it was noted that his shoulder was improving but he was still suffering lower back pain and right elbow numbness. His right elbow was not getting better therefore; Petitioner was kept off work and referred to an orthopedic surgeon. *See,* PX3.

On January 2, 2013 the petitioner was seen at Hinsdale Orthopedics, by Dr. Victor Romano, upon a referral from Dr. Grija. The petitioner indicated a similar history of accident and was kept on physical therapy; placed on work restrictions of limited squatting, and no lifting of more than twenty-five (25) pounds. On January 4, 2013, the petitioner returned to Dr. Grija for continuing pain complaints in the right elbow and wrist, and was still having trouble sleeping at night. The petitioner was seen on January 9, 2013, for his first independent medical examination ("IME") with Dr. Ira Kornblatt. The petitioner was noted to have been uncooperative and work status was inconclusive at this time. *See,* RX1;PX3; Px4 & PX7.

On January 11, 2013, the petitioner again presented to Dr. Nathan Fanter in Dr. Romano's absence. During that appointment, his chief complaint was right elbow pain and he demonstrated a positive Tinel's test in this region. He also demonstrated weakness in grip strength compared to the left arm. He was diagnosed with a posteromedial elbow contusion with subsequent ulnar nerve paresthesias. Petitioner's doctor believed the injury was a direct result of his work injury. He was kept on restrictions of no use of the right arm and was prescribed a right elbow EMG and MRI.

On January 23, 2013, Petitioner underwent an EMG and an MRI of the right upper extremity, which showed a partial tear of the common extensor tendon, consistent with lateral epicondyltis. On January 28, 2013 the petitioner was re-evaluated by Dr. Victor Romano and he noted that physical therapy wasn't helping the problem. Dr. Romano refined his diagnosis to moderate iliopsosas tendinitis of the right hip, moderate cervical radiculopathy on the right side with moderate cubital tunnel syndrome of the right elbow. Petitioner was told to follow-up in four (4) weeks and kept off work, as no light duty work was available.

On January 30, 2013, he continued to follow-up with Dr. Grija who noted the positive EMG and ordered a spine MRI. He also noted that the orthopedic surgeon felt that surgery would be necessary. Further, Dr. Grija noted that the petitioner tried to return to modified duty, but no work was available. The petitioner testified that the respondent had no light duty work available, but he was paid an initial six weeks of temporary total disability ("TTD") benefits.

The petitioner underwent bilateral hip MRI's on February 6, 2013 at West Suburban, which found the hip structures to be intact with no fractures. The petitioner again followed-up with Dr. Romano on February 28, 2013, who noted continued right arm pain. Dr. Romano felt that Petitioner's ulnar neuropathy was limiting the rehabilitation of his shoulder and he was again ordered off work; and a right elbow cubital tunnel release was proposed. This procedure was again recommended on April 4, 2013. The petitioner was kept in physical therapy for range of motion exercises and he again presented at Hinsdale Orthopedics on April 8, 2013 and was seen by Dr. Kathleen Essenberg, for continued pain complaints.

On March 18, 2013, an additional report was authored by Dr. Kornblatt, which determined that Petitioner had extensive subjective complaints without any significant objective findings. He also determined that the petitioner was capable of doing far more than he admitted to be capable of and that his left hip contusion, right shoulder and elbow strains had resolved. He state that the petitioner was at maximum medical improvement ("MMI") and although he noted findings consistent with ulnar neuropathy

with compression at the cubital tunnel, he opined that this condition was not work related.
It was noted that conservative care had failed and he would benefit from a cubital tunnel release. Surgery was attempted to be scheduled but was not authorized, and he was kept off work because light duty work was not available.

On April 22, 2013, the petitioner was again evaluated and prescribed an MRI arthrogram of the right shoulder; continued off work status and continued on physical therapy; while waiting for surgery to be authorized. On April 30, 2013, the petitioner underwent an MRI arthrogram, which was performed under fluoroscopic guidance at West Suburban. The petitioner had his last follow-up on June 3, 2013 with Dr. Romano and again, cubital tunnel surgery on the right elbow, was recommended as the pain in the right elbow had worsen. The petitioner was ordered to continue physical therapy, and to remain off work because no light duty work was available.

On June 5, 2013, the petitioner again saw Dr. Ira Kornblatt who issued a report that indicated less exaggerated behavior patterns and that the petitioner suffered from minor loss of motion, right shoulder has some loss of overhead motion. He further noted tenderness over the cubital tunnel with a positive Tinel sign at the area. The report noted that the petitioner had diminished sensation over the ulnar nerve area, and he had findings consistent with ulnar neuropathy with compression at the cubital tunnel.

The petitioner testified that he continues to be in pain today, and that he has never injured his elbow before. He continues to have pain in the neck and shoulder area and has hip complaints notably while climbing stairs. The petitioner further testified that he did have a previous workers' compensation claim six or seven years ago and maybe a car accident on the job as well however, it was resolved through conservative care and he had been working, in a full duty capacity, since that time. The petitioner further testified that he did wear a sling provided by his doctors, but he no longer wears it at his doctor's suggestion. The petitioner also stated that he is being prescribed and still takes, pain medication.

The respondent offered the testimony of private investigator, Brian Lukasiewicz who was paid by the respondent's insurance company to perform surveillance on the petitioner. Surveillance was conducted between December 11, 2013 and April 6, 2013 on several occasions. The petitioner put mild pressure on his arm, and was seen carrying a plastic car panel that weighed no more than approximately five (5) pounds. At no time was he recorded doing anything in violation of his restrictions, and it was noted that the petitioner, on occasion, favored his right arm. *See,* RX5.

CONCLUSIONS OF LAW

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

Under the provisions of the Illinois Workers' Compensation Act (the "Act"), the Petitioner has the burden of proving, by a preponderance of credible evidence, that the accidental injury both arose out of and occurred in the course of employment. *Horath v. Industrial Commission*, 96 Ill. 2d 349, 449 N.E. 2d 1345 (1983). An injury arises out of the Petitioner's employment if its origin is in the risk connected with or incidental to employment so that there is a causal connection between the employment and the accidental injury. *See, Warren v. Industrial Commission*, 61 Ill. 2d 373, 335 N.E. 2d 488 (1975). *See also, Technical Tape Corp. v. Industrial Commission*, 58 Ill.2d 226 (1974). The mere fact that the worker is injured at a place of employment will not suffice to prove causation. The Act was not intended to insure employees against all injuries. *Quarant v. Industrial Commission*, 38 Ill. 2d 490, 231 N.E. 2d 397 (1967). The burden is on the party seeking an award to prove, by a preponderance of credible evidence, the elements of the claim; particularly the pre-requisite that the injury complained of arose out of and in the course of employment. *Hannibal, Inc. v. Industrial Commission*, 38 Ill. 2d 473, 231 N.E. 2d 409, 410 (1967).

The Arbitrator finds that the petitioner's current condition of ill-being is causally related to his undisputed November 26, 2012 work related injury. Proof of prior good health and change immediately following and continuing after an injury may establish that an impaired condition was due to the injury. *See, Land and Lakes Co. v. Industrial Comm'n.*, 359 Ill.App.3d 582, 593 2d Dist. (2005). The petitioner was injured in an undisputed work related accident on November 26, 2012 while operating a manual jack carrying a full pallet of cases. The petitioner hit his left foot, causing him to fall backwards twisting, landing on his hands and elbows, butt, back, and hip. The petitioner's initial medical records with Dr. Grija and the company nurse document that the petitioner complained of pain to his right arm, shoulder, neck, back, and hip. The petitioner testified credibly at trial that he had a consistent course of conservative medical treatment, that his pain has not subsided, and that he has never had a previous injury to his right elbow before this accident of November 26, 2012. It has been noted by all specialists at Hinsdale Orthopedics that conservative care has failed, and that the petitioner would benefit from a right cubital tunnel release ordered by Dr. Victor Romano. The Arbitrator finds the opinion of Dr. Romano to be more persuasive than those of Dr. Kornblatt moreover, Dr. Kornblatt's IME of June 5, 2013 indicates findings consistent with ulnar neuropathy with compression at the cubital tunnel. The petitioner has undergone physical therapy and has diagnostic examinations that are consistent with this diagnosis. The Arbitrator finds that the petitioner current condition of ill-being is causally related to the undisputed November 26, 2012 work related injury.

J. Were the medical services that were provided to Petitioner reasonable and necessary and has Respondent paid all appropriate charges?

The Arbitrator finds that the medical services provided to the petitioner were reasonable and necessary and that the Respondent has not paid all appropriate charges. The petitioner sustained an injury to his right shoulder, right arm, bilateral hips, lumbar and cervical spines as a result of his November 26, 2012 work related injury. The petitioner underwent physical therapy, diagnostic testing, pain medication and has had doctor's visits to treat his multiple conditions; thus far having received a conservative course of

treatment. The Arbitrator finds that the petitioner's treatment has been reasonable and necessary. Further, the Arbitrator finds that the Respondent has not paid all appropriate charges. The petitioner produced outstanding medical bills. Having found the petitioner's treatment to be reasonable and necessary, the Arbitrator hereby awards the petitioner's outstanding medical bills as reflected in petitioner's exhibit number 1.

K. Is Petitioner entitled to any prospective medical care?

The Arbitrator finds that the petitioner is entitled to prospective medical care in the form of a right cubital tunnel release recommended by Dr. Victor Romano, along with all associated reasonable and necessary post-operative care. The petitioner has demonstrated, by the preponderance of credible evidence, that his injury is causally related to his work injury. Dr. Romano is currently recommending treating the petitioner's right elbow, and allowing him to benefit more from physical therapy for his right shoulder. The Arbitrator hereby awards the petitioner that procedure along with all reasonable and necessary post-operative medical care.

L. What temporary total benefits are in dispute?

The Arbitrator finds that the petitioner is entitled to TTD benefits from November 27, 2012 to June 28, 2013. The petitioner's medical records establish that the petitioner has been medically unable to work or has not been provided light duty work within his restrictions, since his accident of November 26, 2012. The petitioner testified that he received some TTD payments, but it has been established that these benefits ceased after about six (6) weeks. The petitioner has been in an off work status since his November 26, 2012 accident, and no light or restricted duty was ever offered to the petitioner even after he attempted to return on several occasions. Accordingly, the petitioner is awarded TTD benefits from November 27, 2012 through June 28, 2013, payable at a rate of $512.74.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Frankie Nelson
Petitioner,

vs.

NO. 09WC046803

Provident Hospital of Cook County,

Respondent.

14IWCC1047

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 19, 2013 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 the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

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

No bond is required for removal of this cause to the Circuit Court. 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: DEC 0 4 2014
SJM/sj
o-10/02/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

NELSON, FRANKIE
Employee/Petitioner

Case# **09WC046803**

PROVIDENT HOSPITAL OF COOK COUNTY
Employer/Respondent

14IWCC104

On 7/19/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

0132 COOK COUNTY STATE'S ATTORNEY
KEVIN G WALLACH ASA
500 RICHARD J DALEY CENTER
CHICAGO, IL 60602

14IWCC1047

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)

Frankie Nelson
Employee/Petitioner

v.

Provident Hospital of Cook County
Employer/Respondent

Case # **09** WC **46803**

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 **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Chicago**, on **June 5, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC1047

FINDINGS

On the date of accident, **9/16/2008**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Petitioner's condition of ill-being through 4/7/09 *is* causally related to the accident. **See Decision**

In the year preceding the injury, Petitioner earned $**52,143.00**; the average weekly wage was $**1002.75**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of $**2,674.00** for TTD, $**.00** for TPD, $**.00** for maintenance, and $**.00** for other benefits, for a total credit of $**.00**.

Respondent is entitled to a credit of $**.00** under Section 8(j) of the Act.

ORDER

- The Respondent shall pay the petitioner temporary total disability benefits of $ **664.72**/week for 3-5/7ths weeks, from **9/29/08 through 10/24/08** as provided in Section 8(b) of the Act. SEE DECISION. Respondent shall receive credit for amounts paid.
- The respondent shall pay to Petitioner the reasonable and necessary medical expenses incurred through 4/7/09 pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any.
- In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

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

Carolyn Doherty

Arbitrator Carolyn Doherty

7/19/13

Date

ICArbDec19(b)

JUL 19 2013

14IWCC1047

FINDINGS OF FACT

On September 16, 2008, Petitioner was 58 years of age and worked at Provident Hospital of Cook County as a supervisor in the housekeeping/custodial department. Petitioner testified that on 9/16/08, she was turning in her chair while attempting to retrieve a file from a cabinet when her chair slipped out from under her causing her to fall forward and strike her right shoulder on a file cabinet. Petitioner testified that she felt immediate pain in the middle front portion of her right shoulder. Petitioner reported the injury the same day and notice was stipulated at trial. ARB EX 1.

Petitioner testified that she continued to work and did not seek immediate medical care since she thought her condition would improve. When her right shoulder condition did not improve, Petitioner sought treatment from her family doctor, Dr. Yeturu of Advocate Health on September 29, 2008. Dr. Yeturu's records are replete with treatment to Petitioner for a myriad of complaints dating back to 2005 and some of the complaint pertained to right shoulder and low back pain. PX 9.

On 9/29/08, Petitioner's chief complaint was "... here today with f/u from fall out of chair. Whole body is sore." Petitioner provided a history as "fell on the job. Hurting all over pain in the neck, knees and shoulder and lower back. No head injury. no loc." PX 1. Petitioner's physical exam on that date showed tenderness of the upper back and lower back, right and left knee and right shoulder tenderness and crepitus. PX 1. Petitioner was assessed with knee joint pain, cervicalgia and other unrelated conditions including diabetes and hypertension. PX 1. Petitioner was prescribed Tylenol with codeine and rest. She was taken off work and told to follow up in 7 to 10 days. TTD benefits were initiated by Respondent as of 9/29/08.

On October 6, 2008 petitioner returned to Dr. Yeturu. Petitioner complained of pain in the left side of the neck and lower back. Petitioner did not complain of right shoulder problems on that date and the assessment was lower back pain, cervicalgia and depression. PX 1. Dr. Yeturu noted tenderness of the upper back on the left side "and also lower back." Petitioner was sent to "psychiatry for depression and stress on the job" and " to physical therapy, workmans comp." PX 1. Petitioner began physical therapy on October 8, 2008 at Physiotherapy Associates.

Petitioner attended PT from 10/8/08 through 11/20/08. PX 7. In the interim, Petitioner attended a Section 12 exam with Dr. Khanna on 10/15/08. Dr. Khanna examined Petitioner and noted the same history of accident at work on 9/16/08 when Petitioner fell from a chair at work. Petitioner reported that she landed on both knees after striking her head on the file cabinet and that the chair landed on top of her. Petitioner reported pain in her neck, back, shoulders and both knees. At the time of the exam, Petitioner reported an 8/10 pain rating for her neck, back and both shoulders and a knee pain score of 6/10. RX 1. Again, prior shoulder treatment dating from 1996 was noted. X-rays of both shoulders showed AC joint arthritis with spurring bilaterally off of the distal clavical. Cervical x-rays showed osteoarthritis at C4-C7 and degenerative disc disease at C5-C7. A lumbar spine x-ray showed slight decrease in the L3-4 disc space. Bilateral knee x-rays were significant for extensive osteoarthritis in both knees and a decrease in the medial compartment joint space bilaterally. RX 1. Dr. Khanna diagnosed cervical strain, bilateral shoulder strain, bilateral knee contusion and lumbago and determined those conditions work related. Dr. Khanna further noted that the bilateral shoulder, bilateral knee and cervical osteoarthritis was not work related nor was the cervical degenerative disc disease. RX 1. Finally, Dr. Khanna noted that she reviewed a lumbar MRI from 10/6/08 which showed multilevel degenerative change with hypertropic spurring and facet osteoarthritis "which is unchanged from a previous examination of July 13, 2005."

In her recommendations, Dr. Khanna noted that the majority of Petitioner's subjective complaints of pain were "out of proportion to any physical examination findings" and that it was "quite evident throughout the entire

examination that Ms. Nelson made a point to exaggerate her complaints of pain and frequently resisted my performing the diagnostic tests by providing counter forces to limit her movement. On occasions when I was able to distract her, it was quite evident she had more motion than she eluded too. [sic] For example, when I asked her to move her neck she attempted not to move her neck to look down. However, when I asked her to show me where her knee was injured she had absolutely no limitation or difficulty bending her neck down and point to her knee. These inconsistencies were noted on numerous occasions throughout her entire examination." Dr. Khanna further noted that the majority of Petitioner's complaints were related to her non-work related osteoarthritis and that she could elect to follow up with her private insurance and personal physician for "her underlying osteoarthritic complaints of pain throughout her body." Dr. Khanna returned Petitioner to regular duty work without restrictions and she determined Petitioner's strains and contusions should have resolved two to three weeks after injury and by the time of the Section 12 exam. RX 1. Per results of the Section 12 exam, Petitioner was released to return to work on October 27, 2008. Respondent terminated TTD and medical benefits after this date.

On 10/17/08, Petitioner saw Dr. Yeturu and complained of neck, pain, shoulder and knee pain and low back pain. Dr. Yeturu noted that Petitioner was attending physical therapy which was "helping a little." PX 1. On exam, Dr. Yeturu noted tenderness of the upper back and also lower back and both knees medially, no effusion of knees, full range of motion." Orders for physical therapy continued and tramadol was prescribed for pain. Petitioner's off work authorization was continued to 10/22/08. PX 9. On November 4, 2008, Petitioner saw Dr. Yeturu who referred her to an orthopedic doctor and prescribed petitioner more medications. Petitioner continued to complain of pain in both shoulders. Dr. Yeturu noted that petitioner was continuing to take Tramadol for pain. Dr. Yeturu referred petitioner to an orthopedic for further evaluation. PX 9.

Petitioner first presented to Midland Orthopedic Associates on 11/25/08. PX 8. The Midland records reflect that on 7/20/06, two years prior to the instant accident, Petitioner presented for evaluation of right shoulder and chronic low back pain. Petitioner reported having the right shoulder pain for "at least 8 to 9 months." Petitioner had a right shoulder cortisone injection in 2005. Petitioner was noted as not recalling an obvious fall. Petitioner was also noted as reporting chronic low back pain "for many years." PX 8. On 7/20/06, Petitioner was diagnosed with right shoulder pain secondary to impingement/rotator cuff tendinitis and received an injection to the right shoulder. Petitioner was also sent to PT for her shoulder and low back complaints. Petitioner's right shoulder and back pain was noted as improved with PT as of 9/28/06 and Petitioner was discharged.

On her next visit of 11/25/08, Petitioner reported having continued pain in both shoulders with little improvement from medication and physical therapy. Dr. Strugala noted Petitioner fell from a chair 2 -1/2 months earlier and that she had previously treated for a shoulder problems but improved with a cortisone injection and therapy and had not treated after that point. Dr. Strugala ordered an MRI of her right shoulder and left shoulders to evaluate for significant rotator cuff tear.

Petitioner underwent the MRI on December 4, 2008 and a left shoulder MRI on December 6, 2008. PX 8. Petitioner followed up with Dr. Strugala post-MRI on December 9, 2008. Dr. Strugala read the MRI results to demonstrate rotator cuff tendinopathy without full thickness tear bilaterally. PX 8. A corticosteroid injection was performed on said date to alleviate shoulder pain and inflammation. Petitioner was to follow up in two weeks for her shoulders and mentioned some "low back and neck issues" for which she was to obtain a referral from her primary physician. PX 8.

Between December 2008 and March 1, 2009, Petitioner had no medical treatment for any claimed related condition.

On April 7, 2009, Petitioner returned to Dr. Strugala who noted Petitioner was last seen in the clinic "in December for bilateral shoulder pain which improved with corticosteroid injection." On 4/7/09, Petitioner complained of ongoing low back pain for the "past 6 months post a fall." Dr. Strugala further noted complaints of right leg pain and ordered a lumbar MRI. Finally, Petitioner complained of bilateral knee pain so radiographs of both knees were ordered to "evaluate degenerative joint disease." On 5/1/09, Dr. Strugala noted the MRI of the lumbar spine demonstrated degenerative changes without significant spinal stenosis and significant facet joint arthropathy in the lumbar spine. He recommended possible facet joint injections. The knee radiographs showed moderate hypertrophic degenerative changes without evidence of fracture. PX 8.

On 5/11/09, Petitioner saw Dr. Harsoor as referred by her treating physicians for pain management consult due to low back pain and radiating neck pain. Dr. Harsoor noted that the "patient wonders if all these pains started, when she was working in the elevator at Cook County Hospital as most of the time elevators were malfunctioning and because of poor functioning elevator, they would drop many floors and they had to climb up back by using ladders." PX 5. Dr. Harsoor prescribed tramadol for pain due to the diagnosed lumbar and cervical radiculopathy, degenerative disk disease and SI joint arthritis and myofascial pain. PX 5. Petitioner did not return to Dr. Harsoor for treatment at any point.

On November 5, 2009, Petitioner returned to Dr. Yeturu who noted complaints of "pain on right side of neck and upper back and shoulder. Has cervical radiculopathy, wants to go for physical therapy/had gone to physical therapy in the past. Helped." PX 8. Dr. Yeturu prescribed six weeks of physical therapy.

Petitioner attended four physical therapy visits from November 19, 2009 to December 29, 2009 at Physiotherapy Associates. PX 7.

Petitioner retired from her job on February 28, 2010. Between her return to work on 10/25/08 and her retirement in February 2010, Petitioner worked her regular job per her testimony at trial.

On April 8, 2010 petitioner presented to Dr. Yeturu for follow up. Petitioner reported "right shoulder pain from time to time" and on exam was noted "slight decrease movements right shoulder no tenderness." PX 9. Petitioner was told to do exercises for her right shoulder. Petitioner was also following up at the time for various other unrelated conditions.

On August 11, 2010 petitioner returned to Dr. Yeturu. The reason for visit was noted as "pt c/o having a rash on both arms mva 8/9/10." PX 9. Under history it was noted "MVA 8/9/10 the rim of the 18 wheeler tire blew and hit her car and it was with difficulty stop the car. Started hurting neck and shoulder both shoulders some tingling in the hands no weakness. … Took some Tylenol and that it helping a little." Exam revealed tenderness paracervical area." Petitioner was referred to physical therapy and told to continue taking Tylenol.

Petitioner returned to Dr. Strugala on October 25, 2011. The doctor noted that he had not seen the patient in approximately 2 ½ years. He again referenced Petitioners 2008 "injury at work which included injury to both shoulders" and that after injection in December 2008 Petitioner reported improvement in the shoulder symptoms. He further noted "her focus then shifted to a lumbar spine issue. She presents today, however, with ongoing right shoulder pain. There has been no new trauma. She has pain in the right shoulder with overhead activities. She notes a catching sensation in the shoulder. Shoulder pain limits ability to lift objects and reach overhead." PX 8. His assessment was chronic right shoulder pain, status post a fall. Symptoms have been present for greater than 3 years." He ordered a new MRI and recommended considering surgical options. PX 8.

Petitioner underwent an MRI of her right shoulder on October 28, 2011 at Advanced Medical Imaging Center. The impression was "severe distal supraspinatus tendinopathy with a probably nonvisualized tiny pinhole full thickness tear as described. If more accurate depiction of the probable tear is a clinical necessity, shoulder arthrogram might be considered." PX 3. On December 6, 2011, Dr. Strugala noted a possible small rotator cuff tear from his reading of the MRI. Due to petitioner's ongoing symptoms she was referred to Dr. William Heller, a shoulder specialist who was also at Midland Orthopedic Associates. PX 8.

Petitioner presented to Dr. Heller on January 10, 2012. Dr. Heller noted gross rotator cuff weakness, abduction and external rotation diminished, and positive testing for supraspinatus impingement and tenderness. The doctor reviewed the October 28, 2011 MRI and noted that it does show evidence of a full thickness tear of the distal supraspinatus tendon. Due to lack of improvement through therapy and injections and also due to fact that it had been a number of years the doctor recommended surgery, specifically arthroscopic repair. Petitioner agreed and surgery was initially scheduled at Mercy Hospital. On January 20, 2012 Dr. Heller wrote a doctor's note indicating that petitioner's right shoulder surgery is directly related to the work injury on "10/16/2009." The Arbitrator notes the correct alleged accident date of 9/16/08.

It appears that petitioner presented for preoperative evaluation at Mercy Hospital on January 26, 2012. Petitioner underwent blood work and EKG.

While waiting for surgical authorization, Petitioner attended a Section 12 exam with Dr. Garelick at Illinois Bone and Joint Institute on 3/5/12. RX 2. Dr. Garelick examined Petitioner and reviewed her treatment records from Dr. Strugala, Dr. Heller and from physical therapy. On exam, Petitioner demonstrated positive Waddell signs and diffuse tenderness to light touch of the cervical spine, the deltotrapezial musculature and into the right arm. The pain is in a nonanatomic distribution. Petitioner also demonstrated inconsistencies with range of motion on both shoulders.

Dr. Garelick opined that Petitioner's right rotator cuff tear is not causally related or a direct result of the 9/16/08 work injury. He noted that is answer "is based on the fact that an MRI that was obtained somewhere after the 11/25/08 office visit did not demonstrate any full-thickness tears. Further, the patient has a pre-existing history of right shoulder pain necessitating corticosteroid injections. Further, and probably most importantly, the right shoulder pain was significantly improved following an injection of the shoulder on December 9, 2008. In fact, when she returned in April of 2009, her shoulder did not seem to be a source of her pain. Rather, the focus of her pain was in her low back. Finally, the pain in her right shoulder seemed to resolve until she followed up with Dr. Strugala in October of 2011."

With regard to the necessity and casual relation of the recommended shoulder surgery, Dr. Garelick opined, "at this time, it is much more probably true than not that the rotator cuff tear manifested by the patient is a natural history of her rotator cuff disease which was known as early as 2006. Therefore, while surgery may be orthopaedically indicated at this time, it is due to a pre-existing and ongoing problem and not related to the September 16 2008 work injury. While the September 16, 2008 work injury may have exacerbated her shoulder problem, this would have been a temporary exacerbation, which is borne out by the medical records as it seems to have resolved by the April 2009 office visit." Dr. Garelick opined that Petitioner would have been at MMI 6 to 8 weeks following her work related temporary aggravation of her pre-existing condition. RX 2. He offered an impairment rating of 5% of the upper extremity for the full thickness tear.

Petitioner once again presented to Mercy Hospital for preoperative evaluation on April 13, 2012. Petitioner underwent blood work and an EKG. On April 17, 2012 petitioner presented to Cardiovascular Care Consultants,

a division of Christ Medical Center, for pre-operative clearance. Petitioner underwent an EKG and other heart evaluations. Dr. Gautam Patel released petitioner to surgery at a small-to-medium level risk.

On April 18, 2012 petitioner underwent surgery with Dr. Heller at Mercy Hospital. The surgery consisted of right rotator cuff arthroscopic repair, long head biceps tendon resection, arthroscopic subacromial decompression, and arthroscopy and extensive debridement of the glenhumeral joint. PX 8. PX 2. Surgery was performed through Petitioner's husband's insurance with the City of Chicago after Petitioner agreed to sign a reimbursement agreement with the City.

On May 4, 2012 petitioner presented to Dr. Heller for post-operative follow up. Petitioner was noted to be healing well. Dr. Heller recommended using a sling for an additional two weeks and prescribed physical therapy. On June 15, 2012 petitioner returned to Dr. Heller for a two month follow up appointment. Dr. Heller noted that active motion had improved. An additional 3-4 months of therapy was prescribed but petitioner last attended on July 18, 2012.

Petitioner presented to Dr. Heller on August 6, 2012. Petitioner right shoulder was markedly improved and was noted as doing well but was referred back to PT for the right shoulder. Dr. Heller also noted Petitioner now noted increased pain in her left shoulder. Dr. Heller ordered an MRI of her left shoulder. According to Midland Orthopedic petitioner did not return after this date for further treatment. PX 8.

On February 21, 2013 petitioner presented to Dr. Michael Gross for an IME exam. Dr. Gross diagnosed petitioner with residual soft tissue injury to the bilateral shoulder, low back, bilateral knees, and post-operative rotator cuff injury. Also noted was pre-existing arthritis to both shoulders, lumbar spine and both knees. Dr. Gross opined that petitioner's condition was related to her work injury on 9/16/2008 and suffered permanent impairment. Dr. Gross further opined that the subsequent surgery was related to the injury. Petitioner was placed at a major loss to the right shoulder, moderate loss to the left shoulder, major loss to the right knee, residual loss to the left knee and moderate loss to the whole person. Dr. Gross opined that petitioner was only capable of work with no walking, lifting or overhead work. Petitioner was placed a maximum medical improvement. Dr. Gross noted that some degenerative changes can be expected due to petitioner's size and age but that the accident aggravated her conditions and never fully recovered from the injury thus preventing a return to full duty work. PX 10.

At trial, Petitioner testified that she no longer has full reach of her right arm over her head making it difficult to take a shower using her right arm and hand. She is unable to cook as she did before the accident and must depend more on her left hand. Petitioner is no longer able to drive. Petitioner retired in February 2010 and was working prior to her retirement.

CONCLUSIONS OF LAW

The foregoing findings of fact are incorporated into the following conclusions of law.

The Arbitrator renders the following findings on the issues of C – Whether an Accident Occurred and F – Is Petitioner's Condition of Ill-being causally related to the accident?

Based on the foregoing, the Arbitrator finds that Petitioner sustained accidental injuries to her right shoulder only as a result of a work related accident on 9/16/08 in the form of a temporary exacerbation of a pre-existing right shoulder condition. The Arbitrator finds causal connection for Petitioner's right shoulder condition

through her April 7, 2009, visit with Dr. Strugala who noted Petitioner was last seen in the clinic "in December for bilateral shoulder pain which improved with corticosteroid injection." PX 8.

In so finding, the Arbitrator places greater weight on the opinion of Dr. Garelick. Dr. Garelick agreed that as of 3/5/12 Petitioner sustained a right rotator cuff tear that necessitated surgical repair. However, Dr. Garelick opined that Petitioner's right rotator cuff tear is not causally related or a direct result of the 9/16/08 work injury. He noted that is answer "is based on the fact that an MRI that was obtained somewhere after the 11/25/08 office visit did not demonstrate any full-thickness tears. Further, the patient has a pre-existing history of right shoulder pain necessitating corticosteroid injections. Further, and probably most importantly, the right shoulder pain was significantly improved following an injection of the shoulder on December 9, 2008. In fact, when she returned in April of 2009, her shoulder did not seem to be a source of her pain. Rather, the focus of her pain was in her low back. Finally, the pain in her right shoulder seemed to resolve until she followed up with Dr. Strugala in October of 2011."

The Arbitrator further notes that on the causal relation and necessity of the shoulder surgery, Dr. Garelick opined, "at this time, it is much more probably true than not that the rotator cuff tear manifested by the patient is a natural history of her rotator cuff disease which was known as early as 2006. Therefore, while surgery may be orthopaedically indicated at this time, it is due to a pre-existing and ongoing problem and not related to the September 16 2008 work injury. While the September 16, 2008 work injury may have exacerbated her shoulder problem, this would have been a temporary exacerbation, which is borne out by the medical records as it seems to have resolved by the April 2009 office visit." Dr. Garelick opined that Petitioner would have been at MMI 6 to 8 weeks following her work related temporary aggravation of her pre-existing condition. RX 2.

Finally, based on the foregoing as detailed in the above findings of fact, the Arbitrator finds no causal connection for any other claimed condition of ill-being including injuries to the low back, neck, left shoulder, or bilateral knees. The Arbitrator finds Petitioner's testimony on these injuries not credible. The Arbitrator's finding is buttressed by the diffuse nature of the complaints on these injuries as documented in the treating medical records and by the examining physicians.

The Arbitrator renders the following findings on the issues of J – Medical Expenses.

Based on the above findings on the issues of accident and causal connection, the Arbitrator further finds that Respondent is to pay Petitioner's reasonable and necessary medical expenses incurred through April 7, 2009 pursuant to Section 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid.

The Arbitrator renders the following findings on the issues of L – TTD Benefits

ARB EX 1 indicates Petitioner's request for TTD commencing 9/29/08 through 10/24/08 when she returned to work. Based on the Arbitrator's findings on the issue of accident and causal connection, the Arbitrator finds that Petitioner was temporarily and totally disabled for the period of 3-5/7 weeks commencing 9/29/08 through 10/24/08 pursuant to Section 8(b) of the Act. Respondent shall receive credit for amounts paid.

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

JOSEPH SOTO,
Petitioner,

vs.

14IWCC1048

NO: 09WC24837

CITY OF CHICAGO,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue(s) of penalties and fees, 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 February 25, 2013, is hereby affirmed and adopted.

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

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

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

DATED: DEC - 5 2014
O11/12/14
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SOTO, JOSEPH
Employee/Petitioner

Case# **09WC024837**

14IWCC1048

CITY OF CHICAGO
Employer/Respondent

On 2/25/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2675 COVEN LAW GROUP
MARK J SCHECHTER
180 N LASALLE ST SUITE 3650
CHICAGO, IL 60601

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

14IWCC1048

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

JOSEPH SOTO
Employee/Petitioner
v.
CITY OF CHICAGO
Employer/Respondent

Case # 09 WC 24837

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 **December 12, 2011, January 26, 2012, March 20, 2012, March 27, 2012, may 3, 2012, and July 25, 2012**. 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 10, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$71,990.88**; the average weekly wage was **$1,384.44**.

On the date of accident, Petitioner was **48** years of age, ***single*** 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 **$64,343.50** for TTD, **$0** for TPD, **$47,466.51** for maintenance, and **$3,691.84** for an advance of 4 weeks of benefits, for a total credit of **$115,501.85**.

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

ORDER

Respondent shall be given a credit of **$64,343.50** for TTD, **$0** for TPD, **$47,466.51** for maintenance, and **$3,691.84** for an advance of 4 weeks of benefits, for a total credit of **$115,501.85**.

Respondent shall further pay Petitioner permanent partial disability benefits of $664.72/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

February 22, 2013
Date

ICArbDec p. 2

FEB 25 2013

FACTS:

Petitioner testified that on June 10, 2009 he was a construction laborer in the Department of Water Management for the City of Chicago and was so employed for over 18 years. On that date his duties consisted of installing a catch basin and frame, and his hours were 7:00 AM to 3:30 PM.

Petitioner testified that on June 10, 2009, while he was lifting a catch basin weighing between 150 to 200 pounds with another laborer, he experienced immediate and intense pain in his low back, abdomen and groin. He was taken by ambulance to Swedish Covenant Hospital experiencing severe pain to his low back and groin. While there he was examined and given Flexeril and Vicodin for pain. Thereafter he sought treatment from Respondent's medical provider, MercyWorks on with complaints of low back pain as well as pain to his right groin and buttocks. He was diagnosed with a lumbosacral sprain, was prescribed Celebrex and Flexeril, and was instructed to remain off work.

Petitioner testified to a prior work-related back injury on October 20, 2005, which resulted in back surgery consisting of a lumbar fusion. He testified that he returned to work following that accident and had been working pain-free since returning to work as a construction laborer for Respondent.

Petitioner testified that he went to his own orthopedic surgeon, Dr. Geri Gireesan on June 16, 2009. Dr. Gireesan's diagnosis was post-traumatic myofascial syndrome low back from irritation from the hardware as a result of a previous lumbar fusion. Petitioner testified that Dr. Gireeson had previously treated Petitioner for a low back injury that he sustained on October 2, 2005. As a result of the earlier injury, Dr. Gireeson had performed a lumbar laminectomy and fusion. Petitioner testified that following release from Dr. Gireeson's care, he had returned to his duties as a laborer with Respondent. Dr. Gireeson recommended removal of the fusion hardware, which Petitioner declined. Dr. Gireeson prescribed medication and instructed Petitioner to remain off work. He also prescribed physical therapy,

which Petitioner commenced at Athletico.

Petitioner testified that sought a second opinion from Dr. Christopher Bergin, an orthopedic surgeon. Dr. Bergin ordered a CT scan and an MRI. Dr. Bergin's review of the CT scan showed a solid fusion L4 to the sacrum. Dr. Bergin recommended a posterior implant removal, believing that the L4 screws might be impinging on the L3-4 joints. His impression was painful hardware and chronic low back pain. He also recommended a pain management group. Petitioner testified that he returned to Dr. Bergin on September 7, 2010 and told him that he did not want to have hardware removal surgery. According to Dr. Bergin, Petitioner was at maximal medical improvement. Petitioner continued to see Dr. Bergin.

Petitioner testified that he continued to treat with MercyWorks. He was seen at MercyWorks until he was discharged from their care on October 11, 2010 and was instructed to remain off work during that time. He attended an FCE at Respondent's request at NovaCare on September 14, 2010. Following the FCE he returned to MercyWorks where Dr. Diadula found Petitioner to be at maximal medical improvement and discharged him with the permanent restrictions.

Petitioner went to his primary care physician, Dr. John Lee with complaints of low back pain and abdominal distention on the right side after lifting a heavy object at work. He did not treat with Dr. Lee at that time, preferring to return to Dr. Gireesan. He returned to Dr. Lee on 8/3/11 complaining of low back pain and was prescribed narcotic medication. Petitioner testified that he remains under the care of Dr. Lee for his low back pain.

Petitioner testified that he has remained off work since the date of the accident. At the request of Respondent, he attended a meeting with at the City of Chicago Department of Personnel on October 14, 2010 and was instructed to seek employment and to provide proof of ten job searches a week based upon his permanent restrictions. He began the job search. In support thereof, he tendered the completed

City of Chicago injury on duty job search logs.

Petitioner attended a meeting with the department of Human Resources. He testified that they interviewed him but was told that no job was forthcoming. He subsequently received a letter from Kirstjen Lorenz, Director, Workers' Compensation Division, dated 10/17/11 (Pet. Ex. # 13), stating that his benefits would be suspended for submitting duplicate job searches. The letter did state that the suspension of benefits would be reconsidered if Petitioner provided a handwritten explanation within 10 days. Petitioner testified that he didn't know that follow-up calls were not considered new job searches and sent a hand-written letter to Ms. Lorenz stating that he misunderstood and that he would comply with Respondent's request to obtain 10 new job searches weekly. Petitioner testified that his benefits were not resumed, nor did he receive a response from Ms. Lorenz regarding his explanation.

Petitioner underwent a second functional capacity evaluation, this one at ATI, at his attorney's request.

Mr. Joseph Belmonte was retained by Petitioner to prepare a vocational assessment. Mr. Belmonte testified by evidence deposition that he interviewed Petitioner for the purpose of performing a vocational evaluation and prepared a report of his findings and conclusions. Mr. Belmonte testified that the medical evidence presented to him placed Petitioner at the sedentary level. The educational history provided to Mr. Belmonte was that Petitioner did go to high school but did not graduate; neither did he obtain a GED. Mr. Belmonte testified that Petitioner's employment history consisted mainly of unskilled, labor-intensive positions. He concluded that there was no stable job market for Petitioner based upon his medical restrictions, age, job skills, education and language limitations.

Petitioner testified that prior to his June 10, 2009 accident he had sustained an injury to his low back while working as a laborer for Respondent on October 20, 2005, which had resulted in a lumbar fusion. Petitioner had filed a claim and had received an award of 40% loss of the person as a whole. Petitioner had returned to his position as a laborer, without restrictions. He testified that he worked in that capacity free from

low back pain until he reinjured his back on June 10, 2009.

Petitioner was examined by Dr. Carl Graf at Respondent's request. Dr. Graf did not find an objective basis for Petitioner's physical complaints. Petitioner was video surveilled extensively, and he was shown moving about and walking freely without the use of a cane, despite his testimony to the contrary.

The Arbitrator makes the following findings on the issue of (F), Causal Connection:

The Arbitrator finds that Petitioner's low back injury is causally related to the June 10, 2009 accident.

Petitioner sustained an aggravation of a pre-existing condition as documented by medical records and medical opinions in those records as well as consistent sequence of events.

The Arbitrator makes the following finding on the issue of (K), maintenance.

The Arbitrator finds that Petitioner is entitled to the stipulated maintenance benefits of $50,762.69 that were actually paid. No additional maintenance shall be awarded, and the Respondent cannot now disclaim its prior voluntary maintenance benefits. Respondent was justified in suspending maintenance, because Petitioner did not cooperate when he submitted duplicate job searches. Petitioner's representation that from that date forward he would comply was in and of itself insufficient to reinstate maintenance.

At the recommendation of this Arbitrator, Respondent paid Petitioner four weeks of temporary benefits in the amount of $3,691.84, for which Respondent is entitled to a credit.

The Arbitrator makes the following findings on the issue of (L), the Nature and Extent of Petitioner's Injury:

Petitioner claims that he is entitled to an odd-lot total permanent total award.

Respondent claims there is no permanency, because Petitioner had a temporary but resolved aggravation of a pre-existing condition. Respondent argues that Petitioner is exaggerating.

The Arbitrator agrees that Petitioner has exaggerated. However that does not mean that Petitioner was not injured. The FCE from ATI is given no weight, because no physician ever ordered it. It was

ordered by an attorney.

Based upon the medical records, the Arbitrator finds that Petitioner sustained a 10% loss of the person as a whole.

The Arbitrator makes the following findings on the issue of (M), penalties and fees.

Based upon this entire record, Respondent was reasonable in disputing Petitioner's benefits. Therefore, Petitioner's claim for sanctions is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT HASKINS,

Petitioner,

vs.

NO: 13 WC 7932

14IWCC1049

STATION IMAGING,

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, causal connection, and medical expenses, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of accident, but attaches the Arbitrator's Decision for the statement of facts, with the modifications noted below, which is attached hereto and made a part hereof.

The Commission finds that Petitioner failed to prove that he sustained an accidental injury arising out of and in the course of his employment while climbing scaffolding on July 31, 2012. We note that Petitioner did not seek any medical treatment after this alleged injury and did not lose any time from work. Although the Advocate Condell record from August 9, 2012 indicates that Petitioner had lateral right wrist pain for nine days after climbing scaffolding, the record of Dr. Hoepfner from the same date indicates that Petitioner gave a recent history of working on August 8th and experiencing pain affecting his right wrist after swinging a hammer. Dr. Hoepfner stated that Petitioner had a history of "intermittent stiffness affecting his wrist for many years in addition to intermittent pain" but he had a significant worsening of this pain particularly after the August 8th incident.

We also find the March 27, 2013 letter from Dr. Hoepfner relevant to this issue. Dr. Hoepfner again wrote that Petitioner had intermittent stiffness and pain affecting his wrist in the past, but the August 8th incident caused severe enough pain for him to seek treatment. Dr.

Hoepfner opined that Petitioner suffered a severe aggravation of his wrist pain after a day of forceful hammering at work and that it was his work activity in **August** 2012 that aggravated his pre-existing right wrist arthritis.

Based on the above, we find that Petitioner failed to prove that he sustained an accident on July 31, 2012 and that this alleged accident was causally related to his need for treatment. Therefore, we reverse the Arbitrator's decision on the issue of accident and vacate the medical award. All other issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision, filed October 10, 2013, 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.

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: DEC 0 5 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

SE/
O: 10/21/14
49

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

HASKINS, ROBERT
Employee/Petitioner

Case# **13WC007932**

14IWCC1049

STATION IMAGING
Employer/Respondent

On 10/10/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1948 LIPKIN & HIGGINS
MITCHELL LIPKINS
222 N LASALLE ST SUITE 2100
CHICAGO, IL 60601

4866 KNELL O'CONNOR DANIELEWICZ
KAROLINA M ZIELINSKA
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

14IWCC1049

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
19(b)

Robert Haskins
Employee/Petitioner
v.

Station Imaging
Employer/Respondent

Case # **13** WC **7932**

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 **Woodstock**, on **September 6, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **July 31, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$58,240.00**; the average weekly wage was **$1,120.00**.

On the date of accident, Petitioner was **50** years of age, *married* with **0** dependent children.

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

Respondent is entitled to a credit of **$1,040.06** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of **$2,868.00**, as provided in Sections 8(a) and 8.2 of the Act.

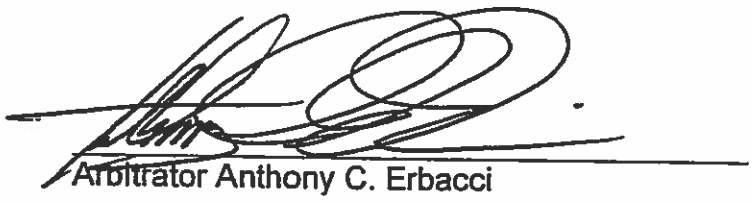
Respondent shall be given a credit of **$1,040.06** for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

No other benefits are awarded herein.

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

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

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



Arbitrator Anthony C. Erbacci

October 7, 2013
Date

13 WC 7932
ICArbDec19(b)

OCT 10 2013

14IWCC1049

FACTS:

The Petitioner testified that on July 31, 2012, he was employed by the Respondent as a working foreman, having been so employed for fifteen to twenty years. The Petitioner testified that on July 31, 2012 he was working at a gas station in Round Lake and that, in the performance of his work, he was required to climb some scaffolding. He testified that as he was climbing the scaffolding, he was holding onto the scaffolding with his right hand and he swung his body around to get onto the platform of the scaffolding. The Petitioner testified that as he swung his body around, his right wrist "popped" and he experienced a sharp pain in the wrist. The Petitioner testified that he continued to work the rest of that week but the pain did not go away. The Petitioner testified that on August 9, 2012 he had difficulty grasping the hammer he was using and he told his boss who directed him to go to the Condell Medical Center.

The Petitioner testified that his work required him to use hand tools and a screw gun on a daily basis but, prior to July 31, 2012, he had never injured his right wrist or sought medical treatment for his right wrist.

On August 9, 2012, the Petitioner presented to Condell Medical Center complaining of pain in the right wrist. The history noted is "pain R wrist since July 31, 2012 → climbing scaffolding 'no' specific trauma." X-rays were completed and the Petitioner was directed to follow up with an orthopedic physician.

On August 9, 2012, the Petitioner also presented to Dr. Peter Hoepfner at Illinois Bone & Joint Institute. The note of that visit indicates that Petitioner reported he was recently climbing a scaffold when he twisted his right wrist and had an onset of pain. The note also indicates that the Petitioner further reported that "He then had a new injury that he reports occurred on August 8, 2012, which has been more problematic." It is noted that the Petitioner reported that on August 8, 2012, he was working when he had pain affecting his right wrist after swinging a hammer. He was frequently hammering as well as twisting his wrist." Dr. Hoepfner's note also indicates that the Petitioner reported that he had intermittent stiffness and pain affecting his right wrist for many years.

On examination, Dr. Hoepfner noted very limited motion in the right wrist, moderate pain over the right radiocarpal joint with dorsoradial swelling, and negative Tinel's and Phalen's tests. Dr. Hoepfner noted that the Petitioner's x-rays indicated significant right wrist arthritis with complete obliteration of the radioscaphoid joint as well as early narrowing of the capitolunate joint. Dr. Hoepfner's diagnosis was a temporary aggravation of right wrist arthritis and he injected the Petitioner's right radiocarpal joint. The Petitioner was returned to regular duty work with use of splint and told to follow up in 6 weeks.

On September 12, 2012 the Petitioner returned to Dr. Hoepfner and reported that the injection helped, but that he now had a recurrence of pain when using his right wrist. Dr. Hoepfner opined that the Petitioner sustained an injury at work on August 8, 2012 and he again injected that Petitioner's right wrist. Dr. Hoepfner recommended surgery for the

Petitioner consisting of a scaphoid excision with four-corner fusion. The Petitioner was returned to regular duty work with the use of splint.

On October 9, 2012, a Utilization Review was conducted regarding Dr. Hoepfner's recommendation for a scaphoid excision with four-corner fusion. Following a records review, Dr. Marco Berard opined that the Petitioner's lesion was chronic and that there was no evidence that working in construction would create a scapholunate advance collapse. Dr. Berard opined that the record did not establish evidence of any clear trauma that triggered the scapholunate advance collapse and that; therefore, there was no direct causal relationship between the requested surgery and the reported industrial accident. Based on that Utilization Review report, the recommended surgery was not authorized.

On December 11, 2012, the Petitioner returned to Dr. Hoepfner. Dr. Hoepfner's note indicates that the Petitioner was climbing a scaffold on August 8, 2012 when he awkwardly twisted his right wrist. Dr. Hoepfner opined that the Petitioner "suffered a temporary aggravation of this underlying preexisting wrist arthritis due to the reported twisting injury at work on August 8, 2012." Dr. Hoepfner recommended moving forward with the surgery consisting of a scaphoid excision with four-corner fusion due to a diagnosis of "advanced right wrist arthritis." The Petitioner was administered an additional cortisone injection and was returned to regular duty work with the use of a splint.

On March 27, 2013, Dr. Hoepfner drafted a narrative report at the request of the Petitioner's attorney. Dr. Hoepfner opined that the Petitioner suffered "an acute aggravation of underlying right wrist pain." Dr. Hoepfner further wrote: "Based on Mr. Haskins' description of his symptoms and his diagnosis, it is my opinion that his work activity of August 2012 aggravated his pre-existing right wrist arthritis."

On August 13, 2013, the Petitioner was examined by Dr. Michael Vender, at the request of the Respondent. In his report, Dr. Vender noted that the Petitioner reported that he was climbing up scaffolding, performing his normal work activities, turning his wrist, when he felt a pop in his wrist. Dr. Vender diagnosed the Petitioner with end-stage degenerative arthritis of the right wrist and opined that the Petitioner's diagnosis represented the significant progression of a degenerative condition. Dr. Vender explained that there is a natural course to degenerative arthritis with progressing complaints and findings although he acknowledged that acute injuries, such as slip and falls, can at times represent aggravations to such a pre-existing condition. Dr. Vender explained that the Petitioner's symptoms had been present for a long time with the known pre-existing condition and that the Petitioner did not describe a true injury that could be considered an exacerbation of the pre-existing condition. Rather, he explained, the Petitioner simply noted a change in the level of his symptoms as they would relate to performing his normal activities. Dr. Vender opined that this would represent the natural progression of the Petitioner's pre-existing condition, and as such, would not be the result of his alleged July 31, 2012 work accident. Dr. Vender did opine that the surgery consisting of a scaphoid excision with four-corner fusion was appropriate treatment for the Petitioner.

The Petitioner testified that he currently experiences discomfort and cramping in his right wrist as well as pain which he described as being at 4/10. He testified that when he works, his pain is at 6/10. The Petitioner testified that, at work, he now does less actual work and he delegates more of the physical work to others.

CONCLUSIONS:

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

The Petitioner testified that on July 31, 2012, he felt a pop and an onset of pain in his right wrist, when he swung his body around to get onto the platform of a scaffold. He testified that although he continued to work, his pain continued and, on August 9, 2012, while he was swinging a hammer, his pain increased to the point that he could no longer grasp his hammer.

The August 9, 2012 record of Condell Medical Center indicates that the Petitioner complained of right wrist pain since July 31, 2012 when he was climbing scaffolding. The August 9, 2012 record of Dr. Hoepfner indicates that the Petitioner reported a recent onset of pain when he twisted his right wrist while climbing a scaffold and "a new injury" on August 8, 2012, "which has been more problematic" when he had pain in his right wrist after swinging a hammer. Dr. Hoepfner's note also indicates that the Petitioner reported that he had intermittent stiffness and pain in his wrist for many years. Dr. Hoepfner's diagnosis was a temporary aggravation of right wrist arthritis and he injected the Petitioner's right radiocarpal joint.

While the histories contained in the records of the Petitioner's initial medical treatment do not specifically refer to a "pop" in the right wrist while climbing a scaffold, the histories contained in those records are sufficiently corroborative to support the conclusion that the Petitioner had an onset of right wrist pain while climbing a scaffold at work on July 31, 2012.

Based upon the Petitioner's testimony and the records of the Petitioner's initial medical treatment, the Arbitrator finds that the Petitioner did sustain an accidental injury arising out of and in the course of his employment with the Respondent on July 31, 2012.

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

The Arbitrator notes that the Request for Hearing form submitted by the parties, (Arbitrator's Exhibit 1), indicates a claimed accident date of July 31, 2012, and that no request to amend that form was made at hearing. The Petitioner testified that on July 31, 2012, he felt

a pop and an onset of pain in his right wrist, when he swung his body around to get onto the platform of a scaffold. He testified that although he continued to work, his pain continued and, on August 9, 2012, while he was swinging a hammer, his pain increased to the point that he could no longer grasp his hammer. Although the Petitioner testified that he used hand tools and a screw gun on a daily basis, no other testimony or evidence in support of a repetitive trauma type injury was presented.

The August 9, 2012 record of Dr. Hoepfner indicates that the Petitioner reported a recent onset of pain when he twisted his right wrist while climbing a scaffold and "a new injury" on August 8, 2012, "which has been more problematic" when he had pain in his right wrist after swinging a hammer. Dr. Hoepfner's note also indicates that the Petitioner reported that he had intermittent stiffness and pain in his wrist for many years. Dr. Hoepfner's diagnosis was a temporary aggravation of right wrist arthritis and he injected the Petitioner's right radiocarpal joint.

On September 12, 2012 the Petitioner returned to Dr. Hoepfner and reported that the injection had helped, but that he "now had a recurrence of pain when using his right wrist". At that time, Dr. Hoepfner opined that the Petitioner sustained an injury at work on August 8, 2012. Dr. Hoepfner again injected that Petitioner's right wrist and he recommended surgery for the Petitioner. The Petitioner was returned to regular duty work with the use of splint.

On December 11, 2012, Dr. Hoepfner opined that the Petitioner "suffered a temporary aggravation of this underlying preexisting wrist arthritis due to the reported twisting injury at work on August 8, 2012." Dr. Hoepfner recommended moving forward with the surgery due to a diagnosis of "advanced right wrist arthritis." The Petitioner was administered an additional cortisone injection and was returned to regular duty work with the use of a splint.

On March 27, 2013, Dr. Hoepfner drafted a narrative report at the request of the Petitioner's attorney. Dr. Hoepfner opined that the Petitioner suffered "an acute aggravation of underlying right wrist pain." Dr. Hoepfner further wrote: "Based on Mr. Haskins' description of his symptoms and his diagnosis, it is my opinion that his work activity of August 2012 aggravated his pre-existing right wrist arthritis."

Dr. Berard, who conducted a Utilization Review on October 9, 2012, opined that the Petitioner's lesion was chronic, that there was no evidence that working in construction would create a scapholunate advance collapse and that there was no direct causal relationship between the surgery recommended for the Petitioner and the reported industrial accident.

Dr. Vender, who examined the Petitioner on August 13, 2013 at the request of the Respondent diagnosed the Petitioner with end-stage degenerative arthritis of the right wrist and opined that the Petitioner's diagnosis represented the significant natural progression of the Petitioner's pre-existing degenerative condition. While Dr. Vender did opine that the surgery consisting of a scaphoid excision with four-corner fusion was appropriate treatment for the Petitioner, he opined that the need for the surgery was not a result of his alleged July 31, 2012 work accident.

14IWCC1049

The Petitioner argues that there is a clear inference that but for the July 31, 2012 and August 9, 2012 incidents, the Petitioner would not have sought medical treatment at all, let alone require surgery. First, the Arbitrator notes that there is no August 9, 2012 accident claimed in the Request for Hearing form submitted by the parties, (Arbitrator's Exhibit 1). Additionally, the Arbitrator notes that the inference that the Petitioner's work accident only temporarily aggravated his pre-existing degenerative condition is equally plausible in the instant matter.

The evidence demonstrates that the Petitioner was working with "intermittent" pain and stiffness in his right wrist prior to July 31, 2012. While the Petitioner experienced an increase in his right wrist pain while climbing a scaffold on July 31, 2012, he continued to work thereafter until he sought medical treatment on August 9, 2012 after an increase in his right wrist pain while he was hammering. The Petitioner missed no time from work following either of those incidents and he has continued to work through the present time, although he now uses a splint and does more supervising and less physical work.

While Dr. Hoepfner, the Petitioner's treating physician, ultimately opined that the Petitioner suffered "an acute aggravation of underlying right wrist pain" and that "his work activity of August 2012 aggravated his pre-existing right wrist arthritis", he initially diagnosed the Petitioner as having suffered a temporary aggravation of his pre-existing right wrist arthritis. Additionally, although Dr. Hoepfner ultimately indicated the Petitioner's "work activity of August 2012 aggravated his pre-existing right wrist arthritis", on December 11, 2012 as well as March 27, 2013, Dr. Hoepfner's treating records contain causal connection opinions indicating that the Petitioner's injury occurred on August 8, 2012.

Dr. Hoepfners records contain no specific opinion that the Petitioner's present condition of ill-being or the need for surgery is causally related to the injury of July 31, 2012. Similarly, Dr. Hoepfners records contain no specific opinion that the Petitioner's work injury accelerated the need for surgery. Both Dr. Berard and Dr. Vender specifically opined that the Petitioner's right wrist condition was not causally related to his claimed work injury.

It is axiomatic that the Petitioner bears the burden of proving all of the elements of his claim by a preponderance of the credible evidence and that an award of benefits cannot be based upon mere speculation. The Arbitrator finds that the Petitioner has not met that burden here. In so finding, the Arbitrator finds that the opinions of Dr. Hoepfner are lacking in accuracy, specificity, persuasiveness, and, ultimately, reliability. There are no other medical opinions in the record which support a finding of causation. The Arbitrator further finds that the opinions of Dr. Vender and Dr. Berard are sufficiently credible and persuasive to be reliable in the instant matter.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that as a result of the injury of July 31, 2012, the Petitioner sustained a temporary aggravation of his pre-existing right wrist arthritis. The Arbitrator further finds that the Petitioner failed to prove that his present condition of ill-being

is causally related to the Petitioner's work injury of July 31, 2012. Additionally, the Arbitrator finds that the Petitioner failed to prove that the need for the right wrist surgery recommended for the Petitioner by Dr. Hoepfert is causally related to the Petitioner's work injury of July 31, 2012.

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

The Petitioner introduced evidence of medical expenses totaling $2,868.00. Petitioner's Exhibit 4 shows the charges of Advocate Condell Medical Center in the amount of $848.00 for a date of service of August 9, 2012. Petitioner's Exhibit 5 shows the charges of Illinois Bone and Joint Institute, (Dr. Hoepfner), in the amount of $2,020.00 for dates of service from August 9, 2012 through March 8, 2013. The parties stipulated that the Respondent paid $1,040.06 in benefits for which credit may be allowed under Section 8(j) of the Act.

Based upon the Arbitrator's findings and conclusions relating to the issues of accident and causation, which are adopted and incorporated herein, the Arbitrator finds that the medical treatment provided to the Petitioner through March 8, 2013 was reasonable, necessary and casually related to the injury of July 31, 2012.

Consequently Respondent should pay the Advocate Condell bill in the amount of $848.00 and the charges of Illinois Bone & Joint through August 13, 2013, subject to the limits of the Medical Fee Schedule provided for in the Act and reduced by $1,040.06 for medical benefits Respondent has previously paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DOUGLAS KOZEL,

Petitioner,

vs.

NO: 12 WC 16190

OWENS & MINOR, INC.,

Respondent,

14IWCC1050

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 benefit/wage rate, temporary total disability, nature and extent, 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 finds that Petitioner is entitled to additional temporary total disability (TTD) benefits for the period from April 27, 2010 through August 26, 2010. Even though he was returned to full duty on January 26, 2010, Petitioner was never released by Dr. Cummins at maximum medical improvement (MMI). On that date, Dr. Cummins noted that Petitioner still had stiffness in his shoulder and he wanted to follow Petitioner for the next three to six months to see how things progressed with a home exercise program. Dr. Cummins specifically held off declaring Petitioner at MMI because of the possibility he would require a revision shoulder arthroscopy. On April 27, 2010, Dr. Cummins noted that Petitioner continued to have limited motion due to stiffness and that Petitioner complained of an inability to perform his activities of daily living with his right arm. Based on Petitioner's failure to improve nine months following his surgery, Dr. Cummins recommended an MRI and revision arthroscopy.

The evidence shows that the insurance company was aware of Dr. Cummins' request for authorization for surgery shortly after this visit. It was not approved right away and, instead, Respondent sent Petitioner for a Section 12 examination with Dr. Breslow in August before ultimately approving the surgery that was done in October 2010. Although Dr. Cummins did not explicitly change Petitioner's work restrictions on April 27th, we find that this is most likely due

to the fact that Petitioner was not working at the time. Petitioner was also not represented by an attorney at that time. Based on the above, we find that the evidence clearly shows that Petitioner was not at MMI and needed additional treatment. Therefore, he is entitled to TTD from April 27, 2010 through August 26, 2010, the date of his examination with Dr. Breslow.

Regarding the calculation of Petitioner's wage differential under Section 8(d)1, we find that Petitioner has proven that he is capable of earning $8.25 per hour. That is the amount he earned during his seasonal job with Banner Daycare in 2012 and also what he is currently earning in his 32-hour-per-week, part-time position at Wal-Mart, a job which he found through the efforts of Petitioner's vocational rehabilitation counselor, Kari Stefsath. Petitioner's earnings are consistent with Ms. Stefsath's testimony that Petitioner was capable of earning between $8.25 and $10 per hour. Respondent's vocational counselor, Lisa Gallant, testified that Petitioner could find suitable jobs earning between $9 and $14 per hour. However, we find that many of the jobs listed by Ms. Gallant's labor market survey are outside of Petitioner's qualifications and skill level, considering his below-average cognitive abilities. We also find that Petitioner's wage differential should be based on the 32 hours per week he is currently working. Although Petitioner is not physically incapable of working 40 hours per week, there is no guarantee that his hours at Wal-Mart will be increased and it would be speculative to base a wage differential on a full, 40-hour week. We also note that Ms. Gallant agreed that it was appropriate for Petitioner to accept the part-time position at Walmart earning $8.25 per hour. Based on the above, we find that Petitioner is capable of earning $264.00 per week ($8.25 per hour x 32 hours). His pre-injury earnings were stipulated to be $912.46 per week. His wage differential benefit under Section 8(d)1, beginning May 2, 2013, is $432.31 ($912.46 - $264.00 = 648.46 x 2/3).

We note that, in the beginning, Respondent paid all of Petitioner's medical expenses and TTD. It even eventually accepted the second surgery and paid TTD for a couple of months after Petitioner stopped treating regularly with Dr. Cummins in March 2011. Petitioner is not asking for penalties on the disputed period of TTD in 2010 prior to his second surgery. However, Respondent did terminate TTD on May 25, 2011 without notifying Petitioner in writing as to why. Petitioner testified that he spoke with the adjustor and told him he was looking for a job, so there was some contact. However, we note that Petitioner was unrepresented at that time, which explains his lack of knowledge regarding his rights to demand vocational rehabilitation and maintenance. It wasn't until Petitioner hired an attorney in May 2012 that he was given a $20,000 check for past TTD but that was only paid through January 11, 2012. The remaining 13-4/7 weeks of TTD (through April 15, 2012) wasn't paid until almost ten months later on February 1, 2013.

We find that Respondent had no basis for not paying TTD and/or maintenance during this period. There was no dispute about Petitioner's restrictions. Petitioner had been laid off by Respondent in 2009 and he was unemployed. Respondent should have initiated vocational rehabilitation in May 2011 instead of simply cutting off TTD and leaving an unrepresented Petitioner on his own. We note that when Petitioner's attorney demanded the retroactive TTD, Respondent did pay a large portion of it within a couple of months. Rx4 indicates that Petitioner's attorney agreed to accept the $20,000 on June 22, 2012 and return the case to the call instead of proceeding to trial at that time. However, there doesn't seem to be any basis for Respondent to have withheld the additional TTD (through April 15, 2012) until February 1, 2013. Respondent failed to provide any evidence to rebut a finding that these delayed payments were unreasonable and vexatious. We therefore award Section 19(k) penalties and Section 16 attorney's fees for Respondent's unreasonable and vexatious failure to timely pay TTD for the period from January 11, 2012 through April 15, 2012.

14IWCC1050

We also find that Respondent's failure to pay temporary partial disability (TPD) from April 16, 2012 through August 10, 2012, was unreasonable and vexatious. Although the Arbitrator found that the earning records from Banner Daycare were inconsistent regarding the regular and overtime hours and "utilized an inaccurate conversion of the minutes worked into decimals and computed partial weeks seven and twenty-four as full weeks" (Dec. at 7), even if there were minor disputes over the exact dollar amount of TPD, Respondent still should have paid what *it* thought the amount should be and worked out any differences later at hearing. We therefore award Section 19(k) penalties and Section 16 attorney's fees for Respondent's unreasonable and vexatious failure to timely pay TPD for the period from April 16, 2012 through August 10, 2012.

We also affirm the Arbitrator's award of $10,000.00 in Section 19(l) penalties but we reverse the award of $2,000 in attorney's fees that are based on the Section 19(l) penalties because attorney's fees are only applicable for Section 19(k) awards.

Based on the above, we award the following penalties and attorney's fees:

$10,000.00	**Section 19(l) penalties**
$8,255.64	TTD for 1/12/12 – 4/15/12 (13-4/7 weeks @ $608.31 per week)
+$6,364.83	TPD for 4/16/12 – 8/10/12
$14,620.47	Total unreasonable and vexatious late payments
X 50%	Section 19(k) rate
$ 7,310.24	**Section 19(k) penalties**
$14,620.47	Total unreasonable and vexatious late payments
X 20%	Section 16 rate
$ 2,924.09	**Section 16 Attorney's fees**

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $608.31 per week for a period of 132-6/7 weeks from July 1, 2009 through January 26, 2010 (30 weeks) and April 27, 2010 through April 15, 2012 (102-6/7 weeks), that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $6,364.83 for the period from April 16, 2012 through August 10, 2012, that being the period of temporary partial disability under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $608.31 per week for a period of 37-5/7 weeks from August 11, 2012 through May 1, 2013, that being the period of maintenance under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $432.31 per week beginning May 2, 2013, as provided in §8(d)1 of the Act, for the reason that the injuries partially incapacitated him from pursuing his usual and customary line of employment.

14IWCC1050

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $7,310.24 as provided in §19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $10,000.00 as provided in §19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the attorney for the Petitioner legal fees in the amount of $2,924.09 as provided in §16 of the Act; the balance of attorneys' fees to be paid by Petitioner to his attorney.

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 $36,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 0 5 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

SE/
O: 10/22/14
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KOZEL, DOUGLAS
Employee/Petitioner

Case# **12WC016190**

OWENS & MINOR
Employer/Respondent

14IWCC1050

On 9/26/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0247 HANNIGAN & BOTHA LTD
RICHARD D HANNIGAN
505 E HAWLEY ST SUITE 240
MUNDELEIN, IL 60060

0560 WIEDNER & McAULIFFE LTD
BROOKE TORRENGA
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

DOUGLAS KOZEL
Employee/Petitioner

v.

Case #12 WC 16190

OWENS & MINOR
Employer/Respondent

14IWCC1050

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on February 19, 2013, and August 27, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

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

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

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

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

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On June 15, 2009, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- On this date, the petitioner sustained injuries that arose out of and in the course of employment.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $47,447.92; the average weekly wage was $912.46.
- At the time of injury, the petitioner was 57 years of age, *single* with no children under 18.
- The parties agreed that the petitioner received all reasonable and necessary medical services.
- The parties agreed that the respondent paid the appropriate amount for all the related, reasonable and necessary medical services provided to the petitioner.
- On February 19, 2013, a Section 19(b) hearing was started and testimony was given, however the parties reached an agreement and the 19(b) petition was withdrawn. The parties agreed that the evidence and testimony presented on February 19, 2013, be considered in this hearing *sub judice*.
- On February 19, 2013, the respondent agreed that the petitioner was entitled to temporary total disability benefits for 145-5/7 weeks from July 1, 2009, through April 15, 2012, temporary partial disability benefits for 16-5/7 weeks from April 16, 2012, through August 10, 2012, and maintenance benefits for 27-4/7 weeks from August 11,

2012 through February 19, 2013, but currently disputes the petitioner's entitlement to any benefits from January 27, 2010, through October 27, 2010, and August 11 through 13, 2012.

- On August 27, 2013, the respondent also agreed that the petitioner is entitled to additional temporary total disability benefits for 38 weeks from August 14, 2012, through May 6, 2013, and for 2 weeks from May 14, 2013, through May 27, 2013, and to additional temporary partial disability benefits for 8-4/7 weeks from May 28, 2013, through July 26, 2013.

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $608.31/week for 115-4/7 weeks, from July 1, 2009, through January 26, 2010, and August 26, 2010, through April 15, 2012, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner.

- The respondent shall pay the petitioner temporary partial disability benefits of $6,364.83 for the period from April 16, 2012, through August 10, 2012.

- The respondent shall pay the petitioner maintenance benefits of $608.31/week for 37-5/7 weeks for the period from August 11, 2012, through May 1, 2013.

- The respondent shall pay the petitioner the sum of $352.84/week for the duration of the petitioner's disability, as provided in Section 8(d)1 of the Act, beginning on May 2, 2013.

- The respondent shall pay the petitioner compensation that has accrued from June 15, 2009, through August 27, 2013, and shall pay the remainder of the award, if any, in weekly payments.

- The respondent shall pay $10,000.00 in penalties, as provided in Section 19(l) of the Act.

- The respondent shall pay $2,000.00 in attorney's fees.

- All claims for Section 19(k) penalties and fees are denied.

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

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

Robert Williams

9/26/13
Date

SEP 26 2013

FINDINGS OF FACTS:

The petitioner, a warehouse worker, injured his right shoulder while lifting on June 15, 2009. The petitioner sought care at Mercy Health System on June 19th and it was noted that he had received prior emergency care for right shoulder pain on June 18th and that he exhibited decreased range of motion, tenderness and decreased strength in his right shoulder. Their diagnosis was a right shoulder strain and rotator cuff sprain. On June 23rd, Dr. Craig Cummins examined the petitioner and on July 14th opined that an MRI revealed a rotator cuff tear of the supraspinatus tendon. On July 29th, Dr. Cummins performed a right shoulder arthroscopic capsular release, a debridement of calcific tendinitis, an acromioplasty, a rotator cuff repair and a biceps tenodesis. The petitioner reported improved symptoms at follow-ups with Dr. Cummins through January 26, 2010, at which time, he was released to full-duty work and physical therapy was discontinued.

On April 27, 2010, the petitioner complained to Dr. Cummins of stiffness and limited range of motion in the right shoulder, and an inability to perform activities of daily living. Dr. Cummins opined on May 18th that an MRI revealed a healed rotator cuff. Dr. Marc Breslow opined after an independent evaluation on August 26th that the petitioner needed first, an arthroscopic release and manipulation and second, a revision rotator cuff repair. On October 28, 2010, the petitioner underwent a right shoulder capsular release, lysis of adhesions, removal of a loose suture anchor and a subacrominal decompression by Dr. Cummins. The petitioner started physical therapy on October 29th and was released to light duty by Dr. Cummins on November 9th. He was started with work conditioning on January 19, 2011. A functional capacity examination on February 22, 2011, demonstrated the petitioner's ability was at the medium physical demand level

with right-sided restrictions of no occasional unilateral lifting greater than five pounds above shoulder height, no frequent, prolonged or repetitive above-shoulder-level reaching or lifting and no unilateral carrying greater than 50 pounds. On March 8, 2011, Dr. Cummins released the petitioner to medium-level work with right arm restrictions and opined that the petitioner should be at maximum medical improvement nine months after October 28, 2010, i.e. July 28, 2011.

On May 29, 2012, the petitioner returned to Dr. Cummins and reported no significant pain but continued stiffness with some limitation of function. The doctor recommended a home exercise program. He was evaluated by Dr. Peter Tonino on September 20, 2012, who opined that the petitioner was at MMI and was capable of working within the restrictions of the FCE.

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

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

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND MAINTENANCE:

The respondent agreed to benefits for the petitioner from July 1, 2009, through January 27, 2010, but disputes any benefits through October 28, 2010. On January 26, 2010, the petitioner was released to full-duty work by Dr. Cummins. On April 27, 2010, Dr. Cummins requested an MRI and discussed the possibility of a revision surgery but did not change the petitioner's work status. Dr. Cummins recommended surgery on May

18th without changing the petitioner's work status. Dr. Marc Breslow opined on August 26th that the petitioner was not at maximum medical improvement.

The petitioner failed to prove that he was entitled to temporary total disability benefits from January 27, 2010, through August 25, 2010. Nor did the petitioner establish any entitlement to maintenance benefits since he did not prove that his termination was due to his injury or that he was conducting a genuine job search or undergoing vocational rehabilitation during that period. The petitioner's request for temporary total disability and/or maintenance benefits from January 27, 2010, through August 25, 2010, is denied. The petitioner's request for temporary total disability benefits from August 26, 2010, through October 27, 2010, is granted based on Dr. Breslow's opinion on August 26th that the petitioner was not at maximum medical improvement.

The respondent agreed to pay temporary total disability benefits from October 28, 2010, through April 15, 2012 and temporary partial disability benefits from April 16, 2012, through August 10, 2012, however, the parties dispute the amount of the temporary partial disability benefits due the petitioner. During that period, the petitioner's regular earnings at Banner Day Camp were $8.25 per hour. Petitioner's Exhibit #14, the petitioner's request to the respondent for benefits, included documents that were not consistent regarding the petitioner's regular and overtime hours or his total hours worked. It also included unreliable calculations of the temporary partial disability benefits since it utilized an inaccurate conversion of the minutes worked into decimals and computed partial weeks seven and twenty-four as full weeks. Except for two days at the start of the petitioner's employment with Banner, he worked more than eight hours every day for a total of 722.98 hours over 16-5/7 weeks (or 17 weeks), which is approximately 43

overtime hours. Excluding any overtime pay earned by the petitioner, which would reduce the amount of any benefits due the petitioner, two-thirds of 17 weeks at $910.46/wk minus 723 hours at $8.25/hr is $6,364.83, which is approximately the amount paid by the respondent.

The respondent shall pay the petitioner temporary total disability benefits of $608.31/week for 115-4/7 weeks, from July 1, 2009, through January 26, 2010, and August 26, 2010, through April 15, 2012, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner. The respondent shall pay the petitioner temporary partial disability benefits of $6,364.83 for the period from April 16, 2012, through August 10, 2012.

The petitioner began a job search and obtained the assistance of Vocatmotive in November 2012. He started working at Walmart on May 2, 2013, at $8.25 per hour. The petitioner is awarded maintenance benefits of $608.31/week for 37-5/7 weeks for the period from August 11, 2012, through May 1, 2013.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner complains of occasional right shoulder pain. He can lift his arm but refrains from heavy lifting and overhead lifting. His current wages are $8.25 per hour for 30 to 32 hours per week at Walmart. He is capable and is not prohibited from working forty hours per week. The petitioner worked more than forty hours a week with Banner and is applying for more hours with Walmart. The parties' opinions of the petitioner's earning capacity based on their respective labor market surveys were $8 to $10 per hour and $9 to $14 per hour. Averaging the mean hourly rates provided by the parties and the

petitioner's current hourly rate, the petitioner's earning capacity is $9.58 per hour. The petitioner's earning capacity for a 40-hour week is $383.20 ($9.58 times 40 hours).

There is no evidence of the wages the petitioner would currently earn in his former position with the respondent or any competent evidence of the wages he last earned in the employ of the respondent. Based on the stipulated average weekly wage of $912.46, the petitioner has a wage differential loss pursuant to Section 8(d)1 of the Act of $352.84 (two-thirds of $912.46 minus $383.20). The respondent shall pay the petitioner the sum of $352.84/week for the duration of the petitioner's disability, as provided in Section 8(d)1 of the Act beginning on July 27, 2013.

FINDING REGARDING PENALTIES AND FEES:

The petitioner's request for penalties for the delay in the payment of temporary partial disability benefits for the period from April 16, 2012, through August 10, 2012, is denied. The petitioner's request to the respondent for benefits included documents that were inconsistent regarding the petitioner's regular, overtime and total hours. Moreover the petitioner's request did not include copies of the petitioner's weekly wages or documentation for an accurate and reliable calculation of benefits due.

The petitioner proved that he is entitled to Section 19(l) penalties of $10,000.00. On March 8, 2011, Dr. Cummins opined that the petitioner would be at maximum medical improvement on July 28, 2011, and released the petitioner to medium-level work with right arm restrictions. The petitioner was not at maximum medical improvement and had work restrictions on May 26, 2011. He was entitled to temporary total disability benefits for 9-1/7 weeks from May 26, 2011, through July 28, 2011. The temporary total disability benefits were paid on July 6, 2012, which is more than 345 days from the date

the last benefit was due. The respondent failed to rebut the presumption of unreasonableness of their delay in the payment of the temporary total disability benefits. The petitioner is awarded penalties under Section 19(l) of $10,000.00 and attorney's fees of $2,000.00.

The petitioner's request for Section 19(k) penalties and fees is denied. The petitioner failed to prove that the respondent's conduct was vexatious or unreasonable. All claims for Section 19(k) penalties and fees are denied.

FINDING REGARDING BENEFITS PAID BY THE RESPONDENT:

Based on Respondent's Exhibit #1, the respondent paid $99,072.29 in temporary total disability, temporary partial disability and maintenance benefits to the petitioner and is entitled to an off-set toward benefits due the petitioner for said amount.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SUSAN ROUTT,

Petitioner,

vs.

NO: 12 WC 26412

WAL-MART STORES, INC.,

14IWCC1051

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of "Application Dismissal" and being advised of the facts and law, reverses the Arbitrator's grant of Respondent's Motion to Dismiss and reinstates the Application for Adjustment of Claim in the above case.

The issue in this case is whether a dismissal for want of prosecution (DWP) precludes the filing of a new Application for Adjustment of Claim within the statute of limitations. Petitioner filed his first Application on February 8, 2011 (11 WC 4612), alleging a date of accident of November 9, 2010. This case was dismissed by Arbitrator Carlson on December 23, 2011. Petitioner filed a motion to reinstate on June 29, 2012, which was denied by Arbitrator Carlson. On August 2, 2012, Petitioner filed a second Application alleging the same date of accident. Respondent filed a motion to dismiss this second application alleging that this claim was barred because the dismissal of the first Application acted as a ruling on the merits of the case. This motion was granted by Arbitrator Flores on August 2, 2013. Petitioner filed a Petition for Review on August 7, 2013.

We first address Respondent's argument that the Commission no longer has jurisdiction to hear this Review because Petitioner failed to file an authenticated transcript by the return date on review. We note that Petitioner filed a Motion to Extend Time to File Transcript on November 22, 2013 claiming that her attorney did not receive the transcript until November 21, 2013 even though the return date on review was November 15th. On December 9, 2013, Commissioner DeVriendt granted Petitioner's motion. We find that the Commission still has

14IWCC1051

jurisdiction to hear this Review.

Regarding Petitioner's second Application, we find that it is not barred by the dismissal of the first Application. The second Application was filed timely within the statute of limitations and we follow the Commission decision of Johnson v. IDOT, 6 IWCC 991 (11/14/06) and the Supreme Court case of Chicago Rawhide Mfg. Co. v. IC, 35 Ill. 2d 595 (1966).

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Application for Adjustment of Claim is hereby reinstated.

DATED: DEC 0 5 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

SE/
O: 10/21/14
49

'STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MANUEL MENDOZA,

Petitioner,

vs.

NO: 11 WC 27410

14IWCC1052

HEATMASTERS, INC.,

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 temporary total disability (TTD), permanency, penalties and attorneys fees and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

With regard to the issues of TTD, permanency and Section 19(l) penalties, the Commission affirms the decision of the Arbitrator. With regard to the issues of Section 19(k) penalties and Section 16 attorney fees, the Commission modifies the Arbitrator's decision and finds Petitioner is entitled to penalties and fees pursuant to these sections of the Act, for the reasons noted below.

Petitioner presented evidence at hearing in support of his argument that Respondent unreasonably and/or vexatiously delayed payment of statutory amputation benefits, medical expenses and TTD. Respondent presented evidence in opposition to this argument.

Dr. Ostric issued a report on October 18, 2011 indicating the fact that there was bone loss to Petitioner's index finger. The Petitioner was examined at that time, but the report appears to be in the form of a narrative. Respondent introduced evidence (Respondent's Exhibits 6, 7 and 8) indicating that evidence of bone loss was requested on October 17, 2011, that a phone call was

made requesting same on January 25, 2012, and that the report was forwarded to Respondent on January 27, 2012. Petitioner's Exhibit 11 indicates the statutory amputation benefit payment was made on January 30, 2012. Thus, it appears this benefit was paid within 3 days of receipt of the only report in evidence confirming bone loss. As the records in evidence prior to October 18, 2011 do not make clear that there was loss of bone due to Petitioner's accident, the Commission finds there was no unreasonable or vexatious delay in payment of the statutory amputation benefit.

The delay in payment of various medical expenses related to this case is another matter.

Petitioner's Exhibit 2 indicates Petitioner emailed Respondent's claim handler, Darrell Cohn, on April 8, 2011 inquiring about the payment of a bill from Resurrection Hospital, noting the provider had contacted him indicating it was awaiting Mr. Cohn's response regarding payment. In his April 14, 2011 email response, Mr. Cohn responds: "I just got off the phone with Debra at Resurrection and we are in the process of settling this bill. On June 7, 2011 Petitioner again wrote to Cohn indicating that Resurrection Hospital had again contacted him, indicating that Respondent was refusing to pay the bills. Cohn responded that Petitioner should notify Resurrection, if they called him again, that he had made a $1,000 payment, and that "more is on the way". Two months later, Petitioner forwarded the email correspondence with Mr. Cohn to his employer, and the employer forwarded them to Mr. Cohn, who replied that he was again "working on" the bills.

The records in Petitioner's Exhibit 6 indicate the following correspondence, fax confirmations and bills were sent by Petitioner's attorney, as indicated:

July 22, 2011 – Lakeshore Anesthesia, Ltd. ($770.00) sent by Petitioner's attorney to Darrell Cohn. The letter indicates that the provider invoice was included.

July 28, 2011 - Lakeshore Anesthesia, Ltd. ($770.00), Advanced Occupational Medicine Specialists ($6,586.00) and Our Lady Resurrection Medical Center ($7,475.75) sent by Petitioner's attorney to Darrell Cohn. The letter indicates that the provider invoices were included.

August 4, 2011 - Our Lady of the Resurrection (totaling $655.19) sent by Petitioner's attorney to Darrell Cohn. The letter indicates that the provider invoice was included.

August 24, 2011 – Advanced Occupational Medicine Specialists ($6,586.00) sent by Petitioner's attorney to Darrell Cohn. The letter indicates that the provider invoice was included.

August 24, 2011 - Our Lady of the Resurrection ($1,454.00, $4,927.75 and $101.00) sent by Petitioner's attorney to Darrell Cohn. The letter indicates that the provider invoice was included.

August 30, 2011 - Our Lady of the Resurrection ($4,837.63 & $1,464.00) sent by Petitioner's attorney to Darrell Cohn. The letter indicates that the provider invoice was included.

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September 1, 2011 – Our Lady of the Resurrection ($4,837.63) sent by Petitioner's attorney to Darrell Cohn. The letter indicates that the provider invoice was included.

September 8, 2011 – Lakeshore Anesthesia, Ltd. ($770.00), Advanced Occupational Medicine Specialists ($6,586.00) and Our Lady Resurrection Medical Center ($7,475.75) sent by Petitioner's attorney to Respondent's attorney and to Darrell Cohn. Both letters indicate that the provider invoices were included.

November 7, 2011, February 2, 2012 and September 24, 2012 – Midwest Plastic & Reconstructive Surgery bill ($9,532.00 and/or $9,552.00) sent by Petitioner's attorney to Respondent's attorney and to Darrell Cohn. Both letters indicate that the provider invoices were included.

Each letter requests that the Respondent either place the bills in line for payment, or to notify the Petitioner within 7 days as to the Respondent's basis for failing to do so.

Respondent's Exhibit 11 indicates that the Respondent paid $3,643.46 to Midwest Plastic & Reconstructive Surgery on September 28, 2012. This was almost 10 months after Petitioner's attorney first forwarded the bill from this provider on November 7, 2011. Respondent's Exhibit 13 reflects the Respondent paid $5,694.75 to Advanced Occupational Medicine Specialists on August 19, 2011. Petitioner's Exhibits indicate the bill was first sent to Respondent by Petitioner's attorney on July 28, 2011. Respondent's Exhibit 13 reflects the Respondent paid $715.26 to Lakeshore Anesthesia, Ltd. on January 19, 2011. Petitioner's Exhibits indicate the bill was first sent to Respondent by Petitioner's attorney on July 22, 2011. Respondent's Exhibit 13 reflects the Respondent paid $6,643.46 to Midwest Plastic & Reconstructive Surgery on September 28, 2012. This was also about 10 months after Petitioner's attorney first forwarded the bill from this provider on November 7, 2011. Respondent's Exhibit 13 reflects the Respondent paid $4,589.09 to Resurrection Hospital on August 19, 2011. As noted above, Petitioner's Exhibit 2 indicates Respondent was made aware of this bill by Petitioner in April 2011. The Petitioner's attorney first sent the bill to Respondent on July 28, 2011. Two other payments of $1,000.00 were noted in Respondent's Exhibit 14, but the majority of the check stub is not visible with regard to these two payments, so it is unclear for certain when they were paid or to which provider or providers.

Based on a review of the above noted evidence, the Commission finds that the Respondent unreasonably delayed payment of the medical bills from Midwest Plastic & Reconstructive Surgery and Resurrection Hospital, and thus is subject to penalties on these bills pursuant to Section 19(k) and attorney fees pursuant to Section 16. The Commission further finds that the Midwest Plastic & Reconstructive Surgery bill totaled $9,532.00, and the Resurrection bill totaled $7,475.75. The total amount subject to penalties and attorney fees is thus $17,007.75. As such, the Petitioner is entitled to Section 19(k) penalties (50% of the amount subject to penalties) totaling $8,503.87 and Section 16 attorney fees (20% of the Section 19(k) penalties) totaling $1,700.77.

While the Arbitrator noted that the records of Petitioner emailing Respondent's claim handler do not indicate that the actual bills were attached, the email responses from the handler,

Mr. Cohn, clearly indicate that he was well aware of the bills. The Commission does not see how Respondent can argue that it had no knowledge of the bill when the claim handler specifically notes he spoke to the provider's representative. In a case where accident and causation were undisputed, the Respondent should have either made sure that all outstanding bills were paid, or that the provider seeking payment would no longer contact Petitioner. At a minimum, the Respondent should have provided the Petitioner, or his counsel once he became represented, the specific reason(s) why the bills were not being paid in a timely manner.

While Respondent's response to Petitioner's penalty petition indicates that all bills were paid within 60 days of receipt, the Commission first notes that Section 8.2 of the Act requires payment within 30 days, as long as the claim contains substantially all the required data elements necessary to adjudicate the bills. If the Respondent did not have these data elements, or if the bills were not being paid timely for any other reason, it was the Respondent's responsibility to provide the reason or reasons to the Petitioner in writing. Here, the evidence indicates the Respondent failed to do so, instead offering vague explanations to the Petitioner in the face of repeated contacts to the Petitioner from medical providers. The claim representative's statements that he was "working on them" or "in the process of settling" them explains nothing about the reason for the delay, and does not assist in preventing collection efforts by the providers against the Petitioner. We find this to be significantly unreasonable, and therefore find Petitioner is entitled to Section 19(k) penalties and Section 16 attorney fees with regard to the medical expenses that were not paid in a timely fashion.

One of the arguments Respondent appears to be making is that, based on its ongoing negotiations with medical providers, it should not be required to make payments on behalf of Petitioner in an undisputed case. We strongly disagree. In the case at bar, the claimant was receiving collection notices and phone calls from the provider seeking payment. This was evidenced by the Petitioner's testimony, and Petitioner's Exhibits 2 and 6. This shows the claimant clearly notified the Respondent's carrier that he was being repeatedly contacted by medical providers seeking payment. Again, this case was undisputed with regard to compensability, thus the only dispute Respondent could have had was with regard to the reasonableness and necessity of the treatment, or the reasonableness of the charges themselves.

Respondent has not indicated any reasonable argument to the Commission that it had a basis to dispute the reasonableness or necessity of the treatment provided to Petitioner. With the institution and applicability of the medical fee schedule to workers compensation medical charges incurred after February 1, 2006 (pursuant to Section 8.2 of the Act), it is hard to understand the basis for any argument Respondent may have had to the reasonableness of the charges themselves. The fee schedule dictates what is to be paid to a provider by a Respondent or its carrier within the workers compensation scheme based on medical treatment/procedure codes, regardless of what is charged by the provider or providers. The Respondent had not indicated any specific basis for the delay in payment of medical expenses.

While a Respondent has every right to seek a better bargain versus the fee schedule allowance with the providers in paying such benefits, doing so while such providers are actively seeking collection against the Petitioner in an undisputed case is unreasonable. In our view, in an undisputed accident and causation case, a claimant should not be required to field collection calls

from a provider due to the employer "working on" or being "in the process of settling" bills with providers. As soon as the employer's carrier was notified that the collection activity was occurring, the bill balance needed to be resolved or the carrier should have ensured that the collection activity came to an end. If the employer and/or its carrier are reasonably disputing whether a compensable accident occurred, or whether a medical bill is causally related, it is within their rights to dispute and negotiate the bill. Here, at a minimum, the Respondent could have paid the provider at least what it believed was owed on the bill and continue to negotiate the remaining balance. Here, there is no evidence which justifies the Respondent's piecemeal approach to payment of the medical expenses, especially since Respondent had knowledge that the providers were harassing the Petitioner for payment.

As noted above, the Commission also affirms the Arbitrator's award of maximum Section 19(l) penalties of $10,000.00 based on the failure to promptly pay TTD. We agree that the Respondent provided no valid explanation for its delay in fully paying the full amount due to Petitioner after it became aware of the exact period of disablement. We agree that such delay was unreasonable and without good and just cause, but such delay did not rise to the level of Section 19(k) penalties or Section 16 attorney fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision is modified as noted above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $296.61 per week for a period of 2-1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $466.13 per week for a period of 21.5 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 50% of the left index finger.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $8,503.87 as provided in §19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $10,000.00 as provided in §19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the attorney for the Petitioner legal fees in the amount of $1,700.77 as provided in §16 of the Act; the balance of attorneys' fees to be paid by Petitioner to his attorney.

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

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

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Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $20,900.00. 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: DEC 05 2014
TJT: pvc
O: 09/29/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
AMENDED

MENDOZA, MANUEL
Employee/Petitioner

Case# **11WC027410**

HEATMASTERS INC
Employer/Respondent

14IWCC1052

On 5/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

1042 LAW OFFICES OF OSVALDO RODRIGUEZ PC
1010 LAKE ST
SUITE 424
OAK PARK, IL 60301

4799 KOREY COTTER HEATHER RICHARDSON LLC
NICK TATRO
20 S CLARK ST SUITE 500
CHICAGO, IL 60603

14IWCC1052

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
AMENDED ARBITRATION DECISION

Manuel Mendoza
Employee/Petitioner

v.

Heatmasters, Inc.
Employer/Respondent

Case # **11** WC **27410**

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 **Chicago**, on **February 19 and 20, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

14IWCC1052

On **January 26, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$23,135.84**; the average weekly wage was **$444.92**.

On the date of accident, Petitioner was **26** 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 as explained *infra*.

Respondent shall be given a credit of **$522.56** for TTD, **$0** for TPD, **$0** for maintenance, and **$10,021.80** for other benefits, for a total credit of **$10,544.36**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $296.61/week for 2 and 1/7th weeks, commencing January 27, 2010 through February 10, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from January 27, 2010 through February 19, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $522.56 for temporary total disability benefits that have been paid.

Permanent Partial Disability

Respondent shall pay Petitioner permanent partial disability benefits of $466.13/week for 21.5 weeks, because the injuries sustained caused the Petitioner 50% loss of use of the left index finger, as provided in Section 8(e) of the Act.

Respondent shall be given credit for the $10,021.80 payment made to Petitioner.

Penalties & Fees

As explained in the Arbitration Decision Addendum, the Arbitrator awards $10,000.00 in penalties pursuant to Section 19(l), and denies penalties and fees under Sections 19(k) or 16 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

April 30, 2013
Date

MAY - 1 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
AMENDED ARBITRATION DECISION *ADDENDUM*

Manuel Mendoza
Employee/Petitioner

v.

Heatmasters, Inc.
Employer/Respondent

Case # **11** WC **27410**

Consolidated cases: **N/A**

FINDINGS OF FACT

The only issues in dispute are whether Respondent timely paid Petitioner's medical bills, temporary total disability benefits and statutory amputation benefits, whether Respondent underpaid Petitioner's temporary total disability benefits, the nature and extent of Petitioner's injury, and whether penalties and attorney's fees should be awarded pursuant to Sections 16, 19(k) and 19(l) of the Act. Arbitrator's Exhibit ("AX") 1. The parties have stipulated to all other issues. *Id.*

Accident and Medical Treatment

Petitioner sustained an undisputed work-related injury on January 26, 2010 while working for Respondent. AX1. He testified that he smashed his left index finger against a beam, a piece of his finger was cut off, and it was bleeding a lot. On cross-examination, Petitioner testified that the top of his finger was chopped off and that the bone was cracked, but still there. Shortly after his accident, Petitioner testified that a co-worker took him to Our Lady of Resurrection Medical Center ("Resurrection"). *See also* Petitioner's Exhibit ("PX") 3.

A physician's assistant progress note dated January 26, 2010 at 11:50 a.m. reflects that Petitioner had an "[a]vulsion at left 2nd finger, nail completely missing, bone exposed." PX3 at 113. An injection and pain medication was administered. *Id.* The attending physician's note reflects that Petitioner had a "partial amputation." *Id.* Petitioner was referred to Dr. Ostric for follow-up care and surgery the following day and placed off work until he was cleared by the hand surgeon. PX3 at 113, 115.

In a note dated January 26, 2010, Petitioner supervisor, Juan Prieto ("Mr. Prieto"), corresponded with an insurance adjuster at Respondent's insured relating his understanding of Petitioner's accident. RX1. Mr. Prieto's letter refers to Petitioner's nail loss and fingertip fracture, but it does not reference his understanding that Petitioner sustained any bone loss. *Id.*

On January 27, 2010, Dr. Ostric noted "[t]his gentleman sustained an avulsion injury to the left index finger at work which resulted in a soft tissue amputation at the tip." PX3 at 109. He further noted "the tip of the bone was fractured [illegible] nail plate was avulsed." *Id.* Dr. Ostric recommended surgery to be performed as soon as possible including a nail bed repair with eponychial splint, excisional debridement, and hypothenar full thickness graft. *Id.*

On January 28, 2010, Petitioner underwent surgery. PX3 at 89-90. Specifically, Dr. Ostric performed the following: (1) excisional debridement past the margins of the wound of the left index finger; (2) application of full thickness skin graft from the left hypothenar area to close the fingertip wound; and (3) reconstruction repair of nail bed with suture of the graft and placement of an eponychial nail splint. *Id.* Pre- and postoperatively, Dr. Ostric diagnosed Petitioner with left index fingertip amputation through soft tissue and bone. *Id.* The surgery

occurred without complication and Dr. Ostric kept Petitioner off work until his postoperative evaluation. *Id*; PX5 at 20.

On February 1, 2010, Petitioner returned for a postoperative visit reporting significant pain and remained off work per Dr. Ostric's orders. PX3 at 61; PX5 at 16. The parties stipulated that Petitioner was off work from January 27, 2010 through February 10, 2010. AX1.

Petitioner underwent ongoing treatment with Dr. Ostric from February 10, 2010 through April 7, 2010. PX3 at 33, 40, 43, 50; PX5. Dr. Ostric monitored Petitioner's recovery status post left index fingertip amputation, ordered continued physical therapy/outpatient therapy, and restricted Petitioner to light duty (one-handed) work. *Id*; PX5 at 13-14. Petitioner underwent physical therapy at Advanced Occupational Medicine Specialists from February 26, 2010 through May 3, 2010. PX4.

On May 5, 2010, Dr. Ostric placed Petitioner at maximum medical improvement. PX3 at 26; PX5 at 5-6. Petitioner was returned to full duty work. *Id*; PX9.

On October 18, 2011, Petitioner returned to Dr. Ostric for a "long follow-up visit" at which time Dr. Ostric noted that he was doing well and tolerating full duty work although he had some pain with heavy lifting and had to adjust appropriately. PX5 at 2, 4. In a letter of the same date addressed "To Whom It May Concern," Dr. Ostric noted that Petitioner "suffered a left index fingertip amputation, full amputation, which includes loss of the bone from his distal phalanx." PX5 at 2.

Regarding current condition, Petitioner testified that he notices that his finger is sensitive to touch, painful with sensation of hot or cold water, painful in cold weather, and he occasionally experiences a shooting pain.

Medical Bills & Payment Information

Petitioner corresponded with Respondent's insurance adjuster, Mr. Cohn at Metropolitan Associates, on September 29, 2010 regarding unpaid, and unidentified, medical bills from Resurrection. PX2 at 1-2, 6. Mr. Cohn responded that Petitioner's anesthesia bill was paid and that they were "working on the others, including this one." *Id.*

Petitioner emailed Mr. Cohn again on April 8, 2011 regarding unpaid, and unidentified, medical bills from Resurrection. PX2 at 3-4. Mr. Cohn responded on April 14, 2011 that he was in contact with someone at Resurrection and "in the process of settling this bill." *Id.* Petitioner also emailed his email correspondence with Mr. Cohn to Steve Weiland ("Mr. Weiland") at stevew@heatmasters.com on June 15, 2011. PX2 at 5-6. Mr. Weiland appears to have had his email forwarded to or read by Marlene Dose ("Ms. Dose") at mdose@heatmasters.com who forwarded the string of emails to Mr. Cohn again. *Id.* He replied that "[w]e're working on these bills." *Id.*

Petitioner's counsel faxed correspondence to Respondent's counsel requesting payment of various invoices as follows:

- July 22, 2011 - $770.00 from Lakeshore Anesthesia. PX6 at 34-36.
- July 28, 2011 - $14,831.75 from Lakeshore Anesthesia, Advanced Occupational Med Specialists, and Our Lady of Resurrection Medical Center. PX6 at 31-33.
- August 4, 2011 - $655.19 from Resurrection. PX6 at 29-30.

- August 24, 2011 - $6,586.00 from Advanced Occupational Med Specialists. PX6 at 25-26.
- August 24, 2011 - $6,482.75 from Resurrection. PX6 at 27-28.
- August 30, 2011 - $6,301.63 from Resurrection. PX6 at 22-24.
- September 1, 2011 - $4,837.63 from Resurrection. PX6 at 20-21.
- September 8, 2011 - $14,831.75 from Lakeshore Anesthesia, Advanced Occupational Med Specialists, and Resurrection with invoices. PX6 at 14-19; RX3.
- November 7, 2011 - $9,552.00 from Midwest Plastic and Rec surgery. PX6 at 9-13. A balance sheet with ICD and CPT codes is included. *Id*; PX13. Petitioner's counsel requested the same on February 2, 2012 and September 24, 2012. PX6 at 1-8; RX10.

The Resurrection and Lakeshore Anesthesia invoices referenced in these letters were not attached to the faxes, but they were submitted into evidence in Petitioner's Exhibits 7-8. The remaining provider invoices referenced in these letters were not attached to the faxes or submitted into evidence unless otherwise noted herein.

Respondent issued checks to Petitioner as follows:

- March 5, 2010 check for $522.56 for "TTD (missed 1/26-2/10/10)." PX12.
- January 30, 2012 check for $10,021.80 for "bone loss." PX11.

Respondent issued payments to Petitioner's medical providers as follows:

- January 19, 2011 check for $715.26 to Lakeshore Anesthesia for a February 8, 2010 bill for "886.1 TRAUMATIC AMPUTATION OF O[]". RX13 at 2.
- Two undated checks for $1,000.00 each to Resurrection for two February 17, 2010 bills. RX13 at 4. It appears that these checks were issued sometime around June 15, 2011. PX2.
- August 19, 2011 check for $5,694.75 to Advanced Occupational Medicine for a May 3, 2010 bill. RX13 at 1.
- August 29, 2011 check for $4,589.09 to Resurrection for an August 26, 2011 bill. RX13 at 4.
- September 28, 2012 check for $3,643.46 to Midwest Plastic and Reconstructive Surgery for multiple undated bills. RX11; RX13 at 3.

On August 29, 2011, Petitioner's counsel made a settlement demand to Mr. Cohn noting that bone was exposed, but with no indication of bone loss. RX2. Respondent's counsel entered his appearance on Respondent's behalf on September 1, 2011. RX14. On September 8, 2011, Petitioner's counsel made a settlement demand to Respondent's counsel indicating bone amputation. PX15. On September 12, 2011, Respondent rejected Petitioner's settlement demand and counter-offered. RX5. Respondent also noted that medical bills forwarded on September 8, 2011[1] had been paid. *Id.*

On October 5, 2011, the parties' attorneys discussed settlement in Petitioner's claim of bone loss. RX6. Respondent's counsel noted that he had not received records evidencing Petitioner's claimed bone loss. *Id.*

On January 25, 2012, Respondent's counsel noted his conversation with Petitioner's counsel wherein the latter stated that he would send over records showing bone loss. RX7.

[1] $14,831.75 from Lakeshore Anesthesia, Advanced Occupational Med Specialists, and Our Lady of Resurrection Medical Center. PX6 at 14-19; RX3.

On January 27, 2012, Petitioner's counsel faxed copies of Petitioner's medical records from Midwest Plastic and Reconstructive Surgery indicating that Petitioner had bone loss. RX8.

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 hearing the parties' testimony, reviewing the evidence, and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

The parties have stipulated that Petitioner is entitled to temporary total disability benefits commencing on January 27, 2010 through February 10, 2010 for 2 and 1/7th weeks. The parties also stipulated that Petitioner's average weekly wage is $444.92 resulting in a temporary total disability rate of $296.61. Respondent paid $522.56 to Petitioner in temporary total disability benefits. Thus, the Arbitrator finds that Respondent underpaid Petitioner in the amount of $113.08.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

The parties have stipulated that Petitioner received a 50% statutory loss payment for the index finger totaling $10,021.80 at the rate of $466.13. The record reflects that Petitioner underwent surgery for a fracture including a non-specific partial amputation of the distal phalange of his index finger and a full thickness skin graft, followed by a course of physical and occupational therapy. Petitioner has been working full duty since May 5, 2010, has had no medical treatment for the index finger since that time, and he has residual sensitivity to temperature and weather. As explained in the penalties and fees analysis below, the Arbitrator does not find that Petitioner sustained an amputation pursuant to the Act and has been compensated for his permanent partial disability. Thus, the Arbitrator finds that Petitioner is not entitled to any further permanent partial disability benefits.

In support of the Arbitrator's decision relating to Issues (M) and (O), whether Petitioner's benefits and medical bills were timely paid and whether penalties or fees should be imposed upon Respondent, the Arbitrator finds the following:

Petitioner claims that Respondent unreasonably delayed in paying the following compensation meriting penalties pursuant to Sections 19(k) and 19(l) of the Act and an award of attorney fees under Section 16 of the Act: (1) temporary total disability benefits; (2) statutory amputation benefits; and (3) medical expenses from various providers. The Arbitrator finds that penalties pursuant to Section 19(l) should be imposed and declines to award penalties and fees under Sections 19(k) or 16 of the Act.

Section 19(k) of the Act provides in pertinent part:

> In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous

or for delay, then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act, shall be considered unreasonable delay. 820 ILCS 305/19(k) (Lexis 2010).

Section 19(l) provides in pertinent part:

> If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d). In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. 820 ILCS 305/19(l) (Lexis 2010).

Section 16 of the Act provides for an award of attorney fees where an employer, its agent, or insurance carrier "has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee… or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier." 820 ILCS 305/16 (Lexis 2010).

First, the Arbitrator addresses Respondent's underpayment of Petitioner's temporary total disability benefits. Respondent failed to timely pay any of Petitioner temporary total disability benefits resulting from his undisputed accident for an undisputed period of disablement. The error was corrected by Respondent approximately three weeks later on March 5, 2010. Respondent asserts that it was not aware of when Petitioner's period of disability began until February 11, 2010. The Arbitrator finds that the evidence does not support such a conclusion.

Petitioner's supervisor, Mr. Prieto, sent a fax to Mr. Cohn, the insurance adjuster, on January 26, 2010 at 3:36 p.m. including Petitioner's off work note from Resurrection of the same date. PX10 at 37-42. On February 4, 2010, Mr. Prieto sent another two-page fax to Mr. Cohn noting "an update on Mr. Mendoza," but only the fax confirmation cover page is included. PX10 at 43. "When a party fails to produce evidence within its control, the presumption arises that the evidence would be adverse to that party." *Reo Movers v. Industrial Comm.*, 226 Ill. App. 3d 216, 223, 589 N.E.2d 704 (1992). Thus, it is unknown what update Mr. Prieto provided to Mr. Cohn on February 4, 2010 and the Arbitrator finds that this information would be adverse to Respondent's assertion that it was unaware of Petitioner's disablement at the time. Moreover, Respondent was aware that Petitioner continued to be off work after his surgery on January 28, 2010 through February 10, 2010 despite a fax from Mr. Prieto to Mr. Cohn stating "Here is Mr. Mendoza's return to work release[,]" when the attached doctor's form stated that Petitioner continued to be off work through February 10, 2010 and that he would require occupational therapy. PX10 at 44-46. Petitioner returned to work on February 11, 2010, however, and the medical records reflect he was placed on light duty through May 5, 2010.

14IWCC1052

Respondent also failed to pay Petitioner the full amount of temporary total disability at any time after March 5, 2010. Again, the record reflects that the parties stipulated to accident, notice, causal connection, average weekly wage, Petitioner's medical bills (as negotiated or pursuant to the fee schedule), and Petitioner's period of temporary total disability. Respondent provided no explanation whatsoever for its delay in underpaying Petitioner's temporary total disability benefits once, as it argues, it became aware of the exact period of Petitioner's temporary total disablement. Based on all of the foregoing, the Arbitrator finds that Respondent or its insurance carrier failed, neglected or unreasonably delayed, without good and just cause, to pay Petitioner's benefits under Section 8(b) of the Act. Thus, the Arbitrator awards additional compensation in the sum of $30 per day for each day that the benefits under Section 8(b) were withheld after March 5, 2010 not to exceed $10,000.

Second, the Arbitrator addresses Respondent's payment of Petitioner's medical bills. Petitioner asserts that Respondent failed to timely pay his Section 8(a) medical benefits. Respondent contends, essentially, that no penalties or fees should be imposed because Petitioner's emails to Mr. Cohn requesting payment of medical bills did not include invoices and Petitioner's counsel's correspondence to Mr. Cohn and Respondent's counsel did not attach invoices rendering it unable to "adjudicate" the bills with the providers. The Arbitrator views the evidence differently.

Whether he knew it or not, Petitioner made a written demand to Mr. Cohn pursuant to Section 19(l) of the Act for payment of benefits under Section 8(a) triggering Respondent's duty to explain the reason for its delay. Petitioner was not represented at the time that he began corresponding with Mr. Cohn on September 29, 2010 approximately 8 months after his undisputed accident at work and nothing requires a claimant to have legal representation to obtain benefits due to him under the Act. Mr. Cohn's email responses amount to representations that the bills would be paid and he intimated that he was negotiating some or all of the bills directly with the medical providers. No explanation was provided by Respondent regarding why it only began paying Petitioner's medical bills on January 19, 2011 given Petitioner's inquiry in September of 2010 and Mr. Cohn's representations that he somehow received and was negotiating the bills. Moreover, Respondent only paid one February 8, 2010 bill from Lakeshore Anesthesia almost one year later on January 19, 2011 and two February 17, 2010 bills from Resurrection for $1,000 each sometime in June of 2011. Even after Petitioner obtained legal counsel in July of 2011, Respondent failed to begin paying the bulk of Petitioner's medical bills until August 19, 2011 when it issued a check to Advanced Occupational Medicine for $5,694.75 for a May 3, 2010 bill and then to Resurrection for $4,589.09 for an August 26, 2011 bill. Thereafter, Respondent failed to pay any medical bills until September 28, 2012 when it issued a check for $3,643.46 to Midwest Plastic and Reconstructive Surgery for multiple undated bills. The Arbitrator also notes, however, that the record is unclear as to the first date that Respondent or its insurance carrier received any of Petitioner's medical bills.

Based on all of the foregoing, the Arbitrator finds that Respondent or its insurance carrier failed, neglected or unreasonably delayed, without good and just cause, to pay Petitioner's benefits under Section 8(a) of the Act. Thus, the Arbitrator awards additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) were withheld after September 29, 2010 not to exceed $10,000 in conjunction with the Section 19(l) compensation awarded for Respondent's late payment of Petitioner's Section 8(b) benefits.

Third, the Arbitrator addresses Respondent's payment to Petitioner of statutory amputation benefits. The parties stipulated that Respondent paid Petitioner $10,021.80 for statutory "amputation" benefits on January 30, 2012. AX1. Petitioner asserts that Petitioner should have received this payment immediately on February 11, 2010. Respondent contends that Petitioner did not sustain an amputation as defined by the Act. The Arbitrator agrees

and references the Appellate Court's decision in *Greene Welding and Hardware v. Illinois Workers' Compensation Comm.* as instructive given Respondent's alleged delay in payment of statutory amputation benefits and medical expenses. 396 Ill. App. 3d 754, 919 N.E.2d 1129 (2009).

Respondent was aware that Petitioner sustained amputation to some extent given that its own exhibit reflects a February 8, 2010 bill for anesthetics provided during a "TRAUMATIC AMPUTATION" procedure. However, the amount of bone loss sustained by Petitioner in the distal phalange of the index finger is not specified in his medical records, was minimally apparent (although it was apparent) when viewed by the Arbitrator at trial, and it does not rise to the level of an amputation requiring immediate payment as defined by the Act. Moreover, the written communication between Petitioner and Respondent, and later Petitioner's counsel and Mr. Cohn or Respondent's counsel, is muddied. Neither Petitioner nor Petitioner's counsel indicated to Respondent that Petitioner sustained any, or sufficient, bone loss such that he would be entitled a statutory amputation loss payment until a settlement demand letter dated September 8, 2011 that was preceded by an August 29, 2011 settlement demand to the insurance carrier noting that bone was exposed, but with no indication of any bone loss. In comparison, the claimant in *Greene Welding* underwent an undisputed total amputation of the right ring finger and partial amputation of the right middle finger. 396 Ill. App. 3d at 755.

Penalties and fees may be awarded where the delay of payment is deliberate, resulted from bad faith or improper purpose. *McMahan v. Industrial Comm.*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 553 (1998); *Mechanical Devices v. Industrial Comm.*, 344 Ill.App.3d 752, 764, 800 N.E.2d 819, 829 (2003). Section 19(k) penalties and Section 16 attorneys' fees require a higher standard of proof than Section 19(l) penalties. *McMahan*, 183 Ill. 2d at 514-515, 702 N.E.2d at 553; *Mechanical Devices*, 344 Ill.App.3d at 764, 800 N.E.2d at 829-830. Moreover, Section 16 attorneys' fees are not recoverable in the absence of a Section 19(k) penalties award. *Gallentine v. Industrial Comm.*, 201 Ill.App.3d 880, 890, 559 N.E.2d 526, 533 (1990).

Based on all of the foregoing, the Arbitrator finds that Respondent had a reasonable dispute as to whether Petitioner's undisputed accident resulted in any amputation as defined by the Act and that its conduct was not unreasonable, vexatious and/or in bad faith. Thus, the Arbitrator denies Petitioner's claim for penalties and fees under Sections 19(k) or 16 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

Michael J. Yacko,

Petitioner,

14IWCC1053

vs.

NO: 12 WC 23737

AGI of North America,

Respondent.

DECISION AND OPINION ON REVIEW

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

14IWCC1053

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

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

DATED: DEC 0 8 2014

DLG/gaf
O: 12/4/14
45

David L. Gore

Stephen Mathis

Mario Basurto

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

YACKO, MICHAEL J
Employee/Petitioner

Case# **12WC023737**

14IWCC1053

AGI OF NORTH AMERICA
Employer/Respondent

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

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

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

4084 LAW OFFICE OF TIMOTHY J DEFFET
PO BOX 18035
CHICAGO, IL 60618

2337 INMAN & FITZGIBBONS LTD
SCOTT McCAIN
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC1053

Case # 12 WC 23737

Michael J. Yacko
Employee/Petitioner

v.

AGI of North America
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 **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **November 26, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **May 25, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did* 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 **$45,614.92**; the average weekly wage was **$877.21**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of **$32,026.53** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$32,026.53**.

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 **$584.81**/week for **74 3/7^{ths}** weeks, commencing **June 24, 2012** through **November 26, 2013**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **June 24, 2012** through **November 26, 2013**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of **$32,026.53** for temporary total disability benefits that have been paid.

Respondent shall pay **$122,045.81** for medical services, as provided in Section 8(a) 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 shall authorize and pay for physical therapy and follow up appointments, as ordered by Dr. Bare.

Respondent shall be given a credit of **$32,026.53** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$32,026.53**.

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

Respondent shall be given a credit for all amounts paid to or on behalf of Petitioner on account of the accident of May 25, 2012.

Petitioner's claim for penalties and attorneys' fees is denied, because Respondent's legal and factual positions are not unreasonable.

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 17, 2014
Date

MAR 17 2014

ICArbDec19(b)

FACTS

Petitioner testified that he injured his left knee on May 25, 2012. Petitioner had previously injured his left knee in 1997 resulting in surgery, physical therapy, and time off work. Petitioner testified that his knee was feeling fine when he drove to work on May 25, 2012 and that he had felt left knee pain about every six months.

Petitioner's was placed on light duty after his May 25, 2012 accident. Petitioner testified that he was laid off by Respondent approximately June 24, 2012, while he was on light duty. Petitioner was ordered off work by his physician after he was laid off. Petitioner testified that he has not returned to work.

Petitioner has again undergone surgery and physical therapy. Petitioner remains under the postoperative treatment of his orthopedic surgeon, Dr. Chudick, who has ordered physical therapy, follow up appointments, and off work. Dr. Chudick has opined that there is a causal connection between the accident of May 25, 2012 and the current condition of ill being.

Respondent's examining physician, Dr. Bare, has testified in an evidence deposition, and he has opined that Petitioner sustained a temporary aggravation of a pre-existing condition.

Petitioner testified that overtime was not mandatory and that he did not work regularly or consistently any set number of overtime hours.

CAUSATION

Petitioner's testimony is corroborated by the medical records and the medical opinion of his treating physician. The sequence of events is consistent with Petitioner's testimony. The opinions of Respondent's examining physician are not persuasive.

Therefore, the Arbitrator finds that Petitioner's current condition of ill being is causally related to the accident of May 25, 2012.

AVERAGE WEEKLY WAGE

Petitioner testified that overtime was not mandatory and that he did not work regularly or consistently any set number of overtime hours. Petitioner's testimony was insufficient to carry his burden of proof on this issue.

Therefore, the Arbitrator finds that in the year preceding the injury Petitioner earned $45,614.92 and that the average weekly wage was $877.21, as alleged by Respondent.

MEDICAL

Respondent's defense on this issue is premised upon its examining physician's opinion that Petitioner sustained a temporary aggravation of a pre-existing condition. The arbitrator has already found that said opinion is not persuasive.

Therefore Petitioner is awarded the claimed medical bills.

TEMPORARY TOTAL DISABILITY

Respondent's defense on this issue is premised, in part, upon its examining physician's unpersuasive opinions. Furthermore, Petitioner's orthopedic surgeon has continued to keep him off of work postoperatively.

Therefore Petitioner is awarded temporary total disability benefits commencing with the layoff date of June 24, 2012 through the hearing date of November 26, 2013.

PENALTIES

Respondent's legal and factual positions are not unreasonable.

Therefore, Petitioner's claim for penalties and attorneys' fees is denied.

CREDIT

The parties have agreed to the temporary total disability credit. Respondent claims additional credit for medical that has been paid.

Respondent shall have credit for all amounts paid to or on behalf of Petitioner on account of the accident of May 25, 2012.

PROSPECTIVE MEDICAL

Respondent's defense on this issue is premised upon its examining physician's unpersuasive opinions. Furthermore, Petitioner's orthopedic surgeon has ordered that Petitioner undergo physical therapy and have follow-up appointments.

Therefore Respondent shall authorize and pay for physical therapy and follow up appointments, as ordered by Dr. Bare.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

☒ 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

Zachary Stohr,

Petitioner,

vs.

NO: 11 WC 24006

14IWCC1054

Area Mechanical,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 3, 2013, is hereby affirmed and adopted.

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

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

14IWCC1054

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: DEC 08 2014
TJT:yl
o 10/7/14
51

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully dissent from the Majority's decision. I would find Petitioner failed to prove a causal connection between the condition of his lumbar spine and his January 21, 2011 work accident. I find Dr. Weiss persuasive and would hold that Petitioner suffered a strain that resolved within six to twelve weeks after the accident. Petitioner suffered from degenerative disc disease and a review of the records show after he strained his back he sought medical treatment only one time. Petitioner was able to return to work full duty and did not follow up for additional treatment. I would modify this award to 3% loss of the man as a whole.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

STOHR, ZACHARY
Employee/Petitioner

Case# **11WC024006**

14IWCC1054

AREA MECHANICAL
Employer/Respondent

On 6/3/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

2489 LAW OFFICES OF JIM BLACK & ASSOC
BRAD A REYNOLDS
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

2461 NYHAN BAMBRICK KINZIE & LOWRY
THOMAS J MALLERS
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

14IWCC1054

STATE OF ILLINOIS)
)
COUNTY OF Winnebago)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Zachary Stohr

Case # 11 WC 024006

Employee/Petitioner

v.

Rockford

Area Mechanical
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 Edward Lee, arbitrator of the Commission, in the city of Rockford, on April 9, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

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

K. ☒ What amount of compensation is due for temporary total disability?

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

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

N. ☒ Is the respondent due any credit?

O. ☐ Other _____

14IWCC1054

FINDINGS

- On **January 21, 2011**, the respondent _____ *was* operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship *did* exist between the petitioner and respondent.
- On this date, the petitioner *did* sustain injuries that arose out of and in the course of employment.
- Timely notice of this accident *was* given to the respondent.
- In the year preceding the injury, the petitioner earned $ **27,664**; the average weekly wage was $ **532.00**.
- At the time of injury, the petitioner was **31** years of age, ***married*** with **2** children under 18.
- Necessary medical services ***have not*** been provided by the respondent.
- To date, $ **0** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $ **354.67**/week for **13 and 2/7th's** weeks, from **August 7, 2012** through **November 18, 2012**, which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay the petitioner the sum of $ **319.20**/week for a further period of **100** weeks, as provided in Section **8(d)(2)** of the Act, because the injuries sustained caused **20% loss of Man as a Whole**.
- The respondent shall pay the petitioner compensation that has accrued from _____ through _____, and shall pay the remainder of the award, if any, in weekly payments.
- The respondent shall pay the further sum of $ **55,210.06** for necessary medical services, as provided in Section 8(a) of the Act.
- The respondent shall pay $ **0** in penalties, as provided in Section 19(k) of the Act.
- The respondent shall pay $ **0** in penalties, as provided in Section 19(l) of the Act.
- The respondent shall pay $ **0** in attorneys' fees, as provided in Section 16 of the Act.

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

5/30/13
Date

JUN -3 2013

14IWCC1054

IN AND BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Zachary Stohr,	)	
	)	
Employee/Petitioner,	)	
	)	Case No. 11 WC 024006
v.	)	
	)	
Area Mechanical,	)	
	)	
Employer/Respondent.	)	
	)	

STATEMENT OF UNDISPUTED FACTS

Petitioner, Zac Stohr, was employed by the Respondent, Area Mechanical, as a truck driver. Mr. Stohr was employed by the Respondent since August 7, 2008. As a truck driver, Mr. Stohr's primary responsibility was delivery of equipment and parts needed to complete jobs. In addition, Mr. Stohr testified that on certain jobs he would stay to help complete assignments. Respondent's primary business was heating, air conditioning, plumbing, and mechanical work. On January 21, 2011, Petitioner was working in a sewer pit. He helped to pull out a large pump, which weighed more than 300 pounds. After the pump was pulled out, it was cleaned and then the pump had to be placed back into the pit and reset. Mr. Stohr testified he was lifting and moving the large pump into place when he felt pain in his low back. Mr. Stohr was by himself in the pit at that time. Immediately he stopped working, climbed out of the pit, and reported the accident to his supervisor. Petitioner testified that he had low back pain and pain radiating down his buttocks and right leg. The following day he reported he had difficulty getting out of bed, standing up straight, and getting dressed.

The Respondent does not dispute that an accident arose out of and in the course of Petitioner's employment on January 21, 2011. Respondent agrees that the Petitioner gave timely notice of the accident within the time limits stated in the Act. Arbitrator Exhibit No. 1.

DISPUTED ISSUES

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

Petitioner was seen by his primary care physician, Dr. James Woodman, on January 24, 2011. At that time, history noted he was seen for low back pain with referenced injury to low back years before, along with recent aggravation following a lifting incident. PX 7. Physical examination revealed reduced lumbar range of motion by 60% in all planes and positive Straight Leg Raising on the right at 10 degrees. PX 7. The preliminary diagnosis was back ache. Injections of Ketorolac Tromethamine (30 milligrams) as well as an additional injection of Toradol (15 milligrams) were completed at that time. In addition, Vicodin and Flexeril were prescribed for low back pain. PX 7. Mr. Stohr was not seen again by any medical providers until April 27, 2011. During this time, Mr. Stohr reported that he continued working for the Respondent but he was not engaged in any heavy lifting but only driving the truck. On April 27, 2011, Mr. Stohr was re-checked for his low back. The diagnosis remained backache. He was continued on Vicodin and given a formal referral by Dr. Woodman to Swedish American Hospital Outpatient Therapy. PX 7.

According to therapy notes, therapy began on May 2, 2011 at Swedish American Medical Center in Belvidere. PX 5. History was that the Petitioner had, had on and off back pain in the past, but had reinjured his back in January and had pain. PX 5. It was recommended that the Petitioner attend rehabilitative therapy twice a week for eight weeks. PX 5. The May 9, 2011 physical therapy note indicated that the patient was doing yard work over the weekend, and after his spouse gave him a massage that his back pain level in his low back increased to 7 out of 10, and he had to use pain medications to reduce the pain level to 3 out of 10. His pain complaint on May 9, 2011 at PT was 3 out of 10. PX 5.

At trial, Petitioner reported that after his wife sat on his legs to give him a massage, that it caused pain in his bilateral hips. It was noted by the therapist that the patient was instructed to have his spouse stay on one side of him while performing any future massages to eliminate hip pain. PX 5. Later that same evening, Petitioner was seen at the emergency room at Swedish American Hospital in Belvidere with a primary complaint of testicular pain. According to the Triage Nurse's note, Petitioner developed bilateral testicular pain following dinner tonight and having reported that he had completed physical therapy earlier in the day and stated that he had not felt quite right. It was noted that he was hypoglycemic. PX 5. Physical examination of Petitioner's testes was normal. The on-call physician, Dr. Sullivan, suspected nerve root irritation referable to lumbar disk disease. Petitioner was instructed to follow-up with his primary care physician. PX 5. During testimony at trial, the Petitioner testified that he did not feel well during physical therapy that day and that he had fainted or passed out. Petitioner believed this was due to his hypoglycemia. During direct examination, the Petitioner testified that he and his wife did perform yard work over the weekend. Petitioner testified his wife mowed and he simply removed light debris, including leaves and sticks, in the yard. Petitioner testified that his wife sat on his legs and gave him a massage. Petitioner testified this did not cause an increase in his low back pain.

Petitioner was next seen by Dr. Woodman on May 10, 2011 with reports of severe pain in his testes, following physical therapy and having been seen in the Belvidere Emergency Department the previous evening. It was also noted during therapy that the Petitioner had fainted. PX 7. Physical examination noted reduced lumbar range of motion by 50% and Straight Leg Raising positive at 10 degrees. PX 7. Dr. Woodman diagnosed lumbosacral neuritis and ordered a lumbar MRI. The lumbar MRI dated May 16, 2011 revealed broad-based posterior bulge with superimposed right paracentral protrusion, which contacts and indents the sac right paracentrally and posteriorly displacing the right S1 nerve

roots with right lateral recess encroachment at L5-S1. PX 7. Dr. Woodman then referred Mr. Stohr to spine surgeon, Dr. Nesher Asner. PX 7.

On May 27, 2011, Petitioner was seen in tandem by physician's assistant, Mary Zingre and Dr. Asner. PX 2. The physician's assistant took a history that Petitioner's symptoms began on January 21, 2011, when he was installing a pump in a sewer. He reported the development of low back and buttocks pain. It was noted that he had, had a prior back injury some 10 years ago with intermittent strains over the years, which would resolve after a few days. PX 2. Physical examination showed reduced range of motion in the low back with flexion and extension. Straight Leg Raising was positive on the right at 60 degrees. PX 2. Increased right low back and thigh pain occurred with internal rotation of Petitioner's left hip. PX 2. Dr. Asner reviewed x-rays, as well as the MRI film. Dr. Asner diagnosed broad based disk bulge at L4-5 and right herniated nucleus pulposus at L5-S1 with nerve impingement. Diagnosis included chronic intermittent mechanical low back pain- well tolerated, acute low back strain and spasm, and acute right L5-S1 herniated nucleus pulposus with right radiculopathy. PX 2. Dr. Asner's plan was to attempt lumbar steroid injection and recommence physical therapy. PX 2. Petitioner was referred, at that time, to Dr. Wajciechowski for lumbar epidural steroid injection. On initial pain assessment form in Dr. Asner's office, the Petitioner was asked when and how his injury occurred. The Petitioner reported "On January 1, 2011, I was at work installing a grinder pump at a mobile home park". PX 2.

Petitioner was seen by Rock Valley Advanced Pain Management on June 2, 2011. Physical exam revealed Straight Leg Raising positive at 70 degrees bilaterally. History included a history of previous low back pain that usually resolved on its own, but in January of this year he suffered an injury while at work that had not improved despite rest and medications. PX 1. On June 7, 2011, Dr. Wajciechowski provided a lumbar steroid injection

at L4. On June 23, 2011, a repeat injection at L4 was provided by Dr. Wajciechowski. PX 1. On June 7, 2012, the Petitioner was also seen by Dr. Asner with reported ongoing posterior right lower extremity symptoms and low back pain. Physical exam showed positive Straight Leg Raising on the right at 30 degrees. The impression was persistent S1 radiculopathy due to HNP. PX 2. Dr. Asner recommended L5-S1 lumbar steroid injection, noting that previous injections had been only to L4-5. PX 2.

Petitioner was then seen by Dr. Asner on June 28, 2011. PX 2. Dr. Asner noted L4-5 lumbar epidural steroid injections with Dr. Wajciechowski. It was reported that low back and radicular pain had resolved following injection. PX 2. Dr. Asner noted that the Petitioner had also been seen at Med Choice Clinic for a consultation. The diagnosis was resolving radiculopathy. Dr. Asner planned to monitor pain relief following the recent lumbar epidural steroid injection. PX 2. Petitioner was sent back to physical therapy and told to follow-up in five weeks. PX 2. On August 12, 2011, he was re-seen by Dr. Asner reporting occasional back and leg pain. He was reportedly improved and told to follow-up on an as needed basis. PX 2.

Petitioner testified that he continued to work at Area Mechanical until August 5, 2011. At that time, he voluntarily left his employment with the Respondent to accept a job at All World Machine. Petitioner testified that he worked less than three weeks for All World Machine before he accepted a new job at Allen Heating and Cooling. The job at Allen Heating and Cooling was also limited employment in the number of hours worked. According to the Petitioner, he worked there less than two full weeks. Then, the Petitioner was hired as a truck driver by Cirrone on October 1, 2011. Petitioner testified he remained in the employ of Cirrone at the time of the parties hearing.

Petitioner was then re-seen by Dr. Asner on September 26, 2011 with history that his right buttock pain had returned two weeks prior. PX 2. It was reported that he was currently

laid off and that he had not strained his low back lately. Impression was persistent right S1 pain. Dr. Asner referred him to Medical Pain Management for a lumbar epidural steroid injection, this time at L5-S1. PX 2. Petitioner was then next seen (after he obtained group health insurance) in March 2012 at Med Choice where he reported continued low back and buttocks pain. PX 12. Physical therapy was utilized with no improvement in his symptoms. PX 12. Petitioner then returned to Dr. Asner and was evaluated on 6-7-12. PX 2. Complaints continued to be chronic low back and right lower extremity pain which was constant. Physical exam showed SLR positive on the right at 30 degrees. PX 2. The diagnosis was L5-S1 HNP and persistent radiculopathy. Again Dr. Asner recommended L5-S1 LESI. PX 2.

Petitioner was seen at the request of Dr. Asner by Dr. Howard Weiss at Medical Pain Management Services on July 19, 2012. PX6. Dr. Weiss noted Petitioner's history of low back pain after lifting a pump into a sewer at work on January 21, 2011. Physical exam showed positive Straight Leg Raising on the right at 40 degrees. Diagnosis was lumbar radiculitis on the right at S1, secondary to herniated disk at L5-S1. PX6. Dr. Weiss performed L5-S1 right sided epidural steroid injection. PX 6. Petitioner then returned to Dr. Asner and was evaluated on August 2, 2012. Dr. Asner noted his right L5-S1 LESI with Dr. Howard Weiss on July 20, 2012. Mr. Stohr reported relief of his right lower extremity pain for several hours. However thereafter, buttocks pain and leg pain returned. Dr. Asner noted positive Straight Leg Raising on the right at 50 degrees. PX2. The diagnosis was persistent S1 radiculopathy due to L5-S1 herniated disk. Having failed conservative treatment, Dr. Asner recommended lumbar surgery as a single level microsurgical hemilaminotomy and discectomy. PX 2. Repeat lumbar MRI dated August 8, 2012 showed broad-based disk bulge with superimposed right paracentral protrusion at L5, which displaced the right S1 nerve roots and contact and indented the fecal sac on the right. PX 2. On August 17, 2012,

Petitioner underwent right L5-S1 microsurgical hemilaminotomy and discectomy and repair of a dural tear at Swedish American Hospital by Dr. Asner. PX 2, PX 4.

In support of medical causation, the Petitioner offers the opinions of Dr. Howard Weiss and Dr. Nesher Asner. When seen by Dr. Weiss on July 19, 2012, Dr. Weiss opined by history that the Petitioner's L5-S1 herniated disk was clearly work-related and caused by his January 21, 2011 work accident while lifting a pump into a sewer at work. PX 6.

In addition to the opinion of Dr. Weiss, the Petitioner also offered the opinion of the treating spine surgeon, Dr. Asner. PX 8. Dr. Asner testified that when he saw Zac Stohr on June 28, 2011 that he had, had a lumbar epidural steroid injection at L4-5. Dr. Asner noted, at that time, that his low back pain and radicular pain had resolved. Specifically, Dr. Asner attributed the improvement in his symptoms, at that time, to Petitioner's response to the lumbar epidural steroid injection that had been performed. PX 8, Deposition Transcript Page 13. Dr. Asner noted that Mr. Stohr had been released by his physician's assistant in August of 2011 to return as needed. Dr. Asner testified when the Petitioner was then seen on September 26, 2011, that the Petitioner had noted a return of his right buttocks pain and leg pain. PX 8, Deposition Transcript Page 15. Dr. Asner testified that the symptoms Petitioner described on September 26, 2011 were a subset, or one of the symptoms that Mr. Stohr had described at his initial visit in May of 2011. PX 8, Deposition Transcript Page 15.

When re-seen by Dr. Asner on June 7, 2012, Petitioner was noted to have positive Straight Leg Raising on the right at 30 degrees. The diagnosis, at that time, was persistent S1 radiculopathy due to HNP at L5-S1. PX 8, Deposition Transcript Page 17. In advance of surgery, Dr. Asner ordered an updated MRI. In comparing the MRI films, Dr. Asner noted that there was a persistent rightward L5-S1 disk herniation, posteriorly displacing the right S1 nerve root. PX 8, Deposition Transcript Page 18. Dr. Asner testified that the persistence in

appearance was also seen on the original MRI from May of 2011. PX 8, Deposition Transcript Page 19.

Dr. Asner testified he performed right L5-S1 microsurgical hemilaminotomy and discectomy, and also a patch repair of a dural tear. The purpose, or intended consequence, of the right L5-S1 hemilaminectomy was to remove the pressure on the right S1 nerve root. According to Dr. Asner, his observation during surgery confirmed a disk herniation impinging upon the S1 nerve root on the right. PX 8, Deposition Transcript Pages 19-20. Dr. Asner also noted two very small holes in the nerve root sheath. Dr. Asner patched the dura with dura form, which is a dural substitute, and then sealed it with a sealant in order to try to prevent post-operative spinal fluid leakage. PX 8, Deposition Transcript Page 20. Dr. Asner opined that the two holes that he saw were caused from a prior epidural injection received by the Petitioner. PX 8, Deposition Transcript Page 20. Dr. Asner testified that the Petitioner stayed two nights in the hospital following surgery to observe and make sure there was no additional spinal fluid leakage following surgery. PX 8, Deposition Transcript Pages 21-22.

Dr. Asner testified to a reasonable degree of medical and surgical certainty that his final diagnosis regarding the Petitioner was chronic intermittent mechanical low back pain, right S1 radiculopathy due to herniated nucleus pulposus, dural tear, or dural puncture due to prior injection, and acute low back strain and spasm in 2011. Dr. Asner further testified that there was a causal relationship between each of his diagnoses and the Petitioner's January 21, 2011 work accident. PX 8, Deposition Transcript Page 27. Dr. Asner testified as follows:

> A. I think that the chronic intermittent mechanical low back pain is not causally related to the work incident of January, 2011. I think that the herniated disk is causally related to the January, 2011 incident. I think the acute low back strain and spasm that he was suffering in 2011 is causally related to the January, 2011 work accident, and I do not—I think that the puncture, the dural puncture, is related to treatment that he received, and that treatment was rendered to try and help him with the disk herniation. And I think the disk herniation was causally related to the January, 2011 work incident.

Dr. Asner also testified that the surgery performed in August of 2012 was to try to remove the herniated disk at L5-S1 on the right and it was his opinion that the disk herniation was causally related to the January 21, 2011 work accident. PX 8, Deposition Transcript Pages 27-28.

Respondent disputes medical causation beyond a lumbar strain causally related to the January 21, 2011 work accident, based on the IME opinion of Dr. Stephen Weiss. Dr. Weiss opined that the Petitioner sustained merely a lumbar strain as the result of lifting the pump on January 21, 2011. In support of his opinion, Dr. Weiss cited the initial visit with Dr. Woodman on January 24, 2011 where Dr. Weiss reports a normal neurological exam and a physical exam not consistent with evidence of a true radiculopathy. Dr. Weiss then notes the absence of medical treatment until after the third physical therapy session on May 9, 2011, where the Petitioner reported increased pain over the weekend in bilateral thigh pain. The lumbar MRI, which was done after the incidents described on May 9, 2011, then revealed paracentral protrusion on the right displacing the right S1 nerve root.

According to Dr. Stephen Weiss' opinion, this disk herniation did not appear in the chronology or timeline until after the events of May 9, 2011 and were not causally related to the January 21, 2011 work injury. It was Dr. Weiss' opinion that the right-sided L5-S1 herniated disk and radiculopathy were neither caused nor aggravated by the January 21, 2011 work injury. Dr. Weiss also stressed the fact that Petitioner had allegedly reported back to normal activity following the January 24, 2011 visit with Dr. Woodman and did not require any treatment of any kind for three months.

Dr. Asner was cross examined extensively by Respondent's counsel concerning Petitioner's symptoms following the January 21, 2011 work injury, as well as reported symptoms after the physical therapy session on May 9, 2011. The following exchange took place on cross examination:

Q. Okay. Now, you've already testified that you hold the opinion that the low back, excuse me, the low back strain and disk herniation at L5-S1 level were due to the accident of January 21, 2011, correct?
A. Yes.

Q. What's the basis for the opinion?
A. Primarily the patient's history.

Q. Is there anything else that goes into that determination for you?
A. Well, the fact that he had the positive Straight Leg Raising I felt supported the diagnosis that there was a radiculopathy from that disk herniation.

PX 8, Deposition Transcript Pages 35-36.

Q. Okay. And am I correct that part of the basis for your opinion that there's a causation between this accident and the HNP at L5-S1 is the immediate onset of complaints and the continuation of those complaints up until the time that he met with you four months after the event occurred?
A. Yes, and the fact that he did not describe leg pain as part of this constellation of low back pains prior to January of 2011.

With regards to therapy records, the following exchange took place between Respondent's counsel and Dr. Asner:

Q. Okay. And if the records from physical therapy on May 2 of 2011 reveal no radicular complaints but do show low back pain rated at one slash ten, and then the records of May 9, 2011, one week later, record that Mr. Stohr performed outside yard work the prior weekend and that after this his wife sat on him while providing a massage after which his pain increased to seven slash ten, which gradually reduced to three slash ten, would you have an opinion that these activities might or could have aggravated or caused the disk herniation which you first discovered when you met with him on May 27, 2011?
A. **None of that tells me about the appearance of radicular symptoms, of when they have first appeared.**

Q. And if there was no indication on clinical examination or no prior MRI to suggest a herniated disk at the L5-S1 level prior to this date of May 9, 2011, would it make it more likely than not that the disk was, in fact, caused by these events?
A. Again, it's hard for me to form an opinion, because, again, the question is when did the radicular systems first appear? And other than my own notes from May of 2011, I have nobody who's talked about their presence or absence yet.

Dr. Asner stated his causation opinion this way:

Q. And if those radicular symptoms had been present since the date of the injury, which was 1-21-11, it would be your opinion that his diagnosis of the surgery that you performed are causally related to that work event?
A. That's correct.

The Arbitrator finds that the Petitioner sustained his burden of proof that his current condition of ill-being is causally related the to January 21, 2011 work injury. Several reasons support the Arbitrator's finding. First, both Dr. Asner and Dr. Weiss offer a similar "test" concerning the issue of causation. It was the opinion of both physicians that Petitioner's current condition of ill-being could be said to be causally related to the January 21, 2011 accident, so long as the Petitioner had a persistence of radicular symptoms or a true radiculopathy beginning with the injury event on January 21, 2011. Dr. Asner made it clear that his opinion was premised on an absence of leg and buttocks symptoms prior to the event, in addition to a persistence of those symptoms from the date of the accident until he was seen by Dr. Asner on May 27, 2011. Dr. Weiss, on the other hand, opines that there was no evidence in the medical records of a true radiculopathy until after the weekend events surrounding the physical therapy session of May 9, 2011. Dr. Weiss opines in the chronology of events that the Petitioner's medical records do not demonstrate symptoms of a true radiculopathy until after the events described in the May 9, 2011 physical therapy record. Therefore, it was the opinion of Dr. Weiss that the Petitioner had simply sustained a lumbar strain only from the January 21, 2011 work accident and that the herniated disk, which ultimately required surgery, did not occur until after May 9, 2011 and was not associated with the work injury of January 21, 2011, as described by the Petitioner.

The Arbitrator agrees that this is a reasonable basis upon which to determine whether the Petitioner's current condition of ill-being is causally related to the January 21, 2011 work injury. After careful review of the medical records and opinions of the doctors, the Arbitrator

finds that the Petitioner had a true radiculopathy **prior** to the events of May 9, 2011. When initially seen by Swedish American Medical Center in Belvidere for physical therapy on May 2, 2011, objective examination revealed that the Petitioner walked with an antalgic gait. PX 5. Petitioner had positive palpation of the lumbosacral region on the right. PX 5. Petitioner also demonstrated guarding of his erector spine on the right, during physical examination. Range of motion of the spine was measured and it was noted to be diminished in extension, flexion, and right-sided bending. **Significantly, Straight Leg Raise testing was noted to be positive at 35 degrees on the right.** Petitioner was seen again on May 4, 2011 at Swedish American Medical Center in Belvidere for additional physical therapy. Petitioner noted the pain level in his low back had increased following the first physical therapy session. PX 5. On physical examination, again Petitioner was noted to have positive lumbar palpation on the right and a **positive Straight Leg Raise test at 35 degrees on the right.** PX 5.

Both Dr. Asner and Dr. Weiss testified that a true lumbar radiculopathy would reveal itself in a positive Straight Leg Raising test beyond 30 degrees. Dr. Weiss testified that Petitioner's January 24, 2011 visit with Dr. Woodman, which revealed positive Straight Leg Raising test at 10 degrees, is not indicative of any nerve root irritation or sciatica. Dr. Weiss Deposition Transcript, Page 10.

Dr. Weiss testified:

> "Straight leg raising, in order to be indicative of nerve root tension, which, in turn, is usually due to a herniated disk, has to be present with leg pain between about 30 and 80 degrees of elevation of the leg".

Dr. Weiss then explained:

> "In the first 30 degrees the nerve roots are slack in terms of a herniated disk. So it isn't until those loops are taken off the ground, in other words, when the slackness goes out, that you get a nerve root tension sign. So a positive straight leg raising is about 30 to 80 or 85 degrees with reproducible leg pain."

Dr. Weiss Deposition Transcript, Pages 10-11. Dr. Asner also testified that a positive Straight Leg Raising on the right at 10 degrees is not consistent with a true radiculopathy because usually the first 30 degrees or so are more stretching muscles of the low back. PX 8, Deposition Transcript Page 58.

Clearly, Petitioner's medical records demonstrate positive right-sided Straight Leg Raising at 35 degrees of elevation on both May 2, 2011 and May 4, 2011. According to both physicians, this is indication of nerve root irritation and a positive radiculopathy consistent with a herniated disk.

Second, Petitioner testified that he had no prior buttocks and leg pain on the right before the work accident. This testimony was bore out in Petitioner's medical records. Respondent's Exhibit 3 is primary care physician records from Dr. Woodman, concerning the Petitioner, before the accident date. In those extensive records, there are only two medical records which describe low back pain prior to January 21, 2011. Petitioner was seen for low back and right thigh or hip pain on October 30, 2006. Physical exam on that date revealed *negative Straight Leg Raising.* The diagnosis was backache, rule out lumbar strain. When reevaluated on November 4, 2006. it was noted that Petitioner had a normal neurological exam and no other abnormalities. Final diagnosis was backache and all medications were discontinued and he was released from medical care. Mr. Stohr made no further low back complaints with Dr. Woodman for nearly five years, until the January 21, 2011 work injury. In review of Dr. Woodman's records prior to January 21, 2011, there are no x-rays, MRI's, or medical diagnosis concerning an L5-S1 herniated disk. Mr. Stohr did not actively treat with a physician for low back complaints after November of 2006 and was not referred for physical therapy, medical pain management, or instructed whatsoever to see a spine surgeon.

The Arbitrator credits the testimony of the Petitioner, finding him credible that his low back, buttocks, and right leg pain did not begin until January 21, 2011 and following an

injury involving lifting a pump which weighed over 300 pounds. Certainly, Petitioner's mechanism of injury could have caused a herniated disk. Medical records made clear that Petitioner did not have a herniated disk at L5-S1 prior to January 21, 2011.

Third, Dr. Weiss opined that Petitioner saw Dr. Woodman once and then carried out full work activities between January 24, 2011 and until the events of May 9, 2011 described in physical therapy records. The Arbitrator does not find that this is consistent with the evidence. Petitioner testified after January 21, 2011 that while he did continue working, that he worked light-duty and drove the truck but was not lifting heavy objects at work... Petitioner's history of modified or light-duty activities following the January 21, 2011 work accident is also verified in the physical therapy records dated May 2, 2011 and May 4, 2011. See PX 5.

Lastly, the Arbitrator is not persuaded that Petitioner's herniated disk came as a result of performing light yard work the week of May 9, 2011, or that the Petitioner's massage from his wife while sitting on his legs which caused hip pain, was the cause of his herniated disk. Petitioner credibly testified that his wife's massage did not increase his low back pain, and in fact, the Petitioner had, had low back pain from the date of the injury and continuing until surgery. Nor is the Arbitrator persuaded that petitioner reached MMI on 8-12-11 when released to return as needed. Dr. Asner testified that the Petitioner's condition had improved by August of 2011, but he did not agree that Petitioner's condition had become stable or that Petitioner had reached the point of MMI when he was cleared to go back to full-duty work in August of 2011. PX 8, Deposition Transcript Page 48. Dr. Asner testified that it would be common to expect that the patient might experience the benefits of an epidural for up to two months. PX 8, Deposition Transcript Page 63.

For the reasons stated above, the Arbitrator finds the Petitioner sustained his burden of proving causation.

J. Were the medical services that were provided to the Petitioner, reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Having found that Petitioner sustained his burden of proving accident, notice, and causation, the Arbitrator further finds that all of Petitioner's medical treatment from the injury date through the date of his release at MMI by Dr. Asner was reasonable and necessary to treat the condition of ill-being concerning his low back. Therefore, the Respondent is ordered to pay the medical bills contained in PX 9, pursuant to the Illinois Fee Schedule or the negotiated rate, whichever is less. The Arbitrator also specifically finds that the Respondent is due a credit under 8(j) for medical bills paid for by Blue Cross Blue Shield, in the amount of $2,066.02. The Respondent, by operation of the Act, is to hold the Petitioner harmless from claims of reimbursement by any group health plan including Rawlings and Coventry Health Care.

Respondent is ordered to pay the following balances, pursuant to the Illinois Fee Schedule or the negotiated rate, whichever is less:

Medical Provider	Total Outstanding Balance
1) Med. Choice Medical	$13,379.21
2) Medical Pain Management	$2,175.00
3) Rock Valley Advanced Pain Management	$2,803.61
4) Rockford Anesthesiologists	$1,890.00
5) Swedish American Hospital	$2,497.80
6) Swedish American Medical Group	$8,650.50

K. What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ■ TTD

The Arbitrator finds that the Petitioner is entitled to an award of TTD benefits from August 7, 2012 through November 18, 2012 or 13 and 2/7 weeks at the TTD rate of $354.67.

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

Review of the operative report demonstrates the Petitioner underwent microdiscectomy and hemilaminotomy, as well as repair of a dural tear. Petitioner completed in post-operative rehabilitation. He was released at MMI by Dr. Asner with no restrictions and returned to full-duty work as of January 2, 2013. PX 2. At the time of the trial, Petitioner testified that his buttock and leg symptoms had resolved following surgery and that he had a good outcome. Petitioner testified that he tries to avoid lifting objects that weight more than 50 pounds. He testified, at the time of the hearing, that he puts on his shoes differently in order not to aggravate his low back. The Arbitrator finds that the Petitioner is entitled to an Award of 20% MAAW, pursuant to 8(d)(2) of the Act.

N. Is Respondent due any credit?

The Arbitrator finds that the Respondent is entitled to an 8(j) credit in the amount of $2,066.02 representing charges paid for by Blue Cross Blue Shield, which was the group health plan of the Respondent for which Petitioner was an eligible member at the time certain medical services were rendered.

_____ _____

Date Arbitrator Edward Lee

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cathy Martin,

Petitioner,

vs.

NO: 13 WC 14407

14IWCC1055

Pal Health,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 10, 2014, is hereby affirmed and adopted.

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

14IWCC1055

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 $25,400.00. 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: DEC 9 - 2014
TJT:yl
o 12/2/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

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

MARTIN, CATHY
Employee/Petitioner

Case# **13WC014407**

PAL HEALTH TECHNOLOGIES
Employer/Respondent

14IWCC1055

On 6/10/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

2904 HENNESSY & ROACH PC
MIKE HOLT
2501 S CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

14IWCC1055

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CATHY MARTIN
Employee/Petitioner

v.

PAL HEALTH TECHNOLOGIES
Employer/Respondent

Case # 13 WC 14407

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS McCARTHY**, Arbitrator of the Commission, in the city of **PEORIA, ILLINOIS**, on **APRIL 23, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **11/19/2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$30,056.00**; the average weekly wage was **$578.00**.

On the date of accident, Petitioner was **56** 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 under Section 8(j) of the Act.

ORDER

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

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

Respondent shall pay Petitioner temporary total disability benefits of $385.33/week for 11 3/7 weeks, commencing 02/10/2014 through 04/23/2014, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $20,894.65, 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.

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

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

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

D. D. McCarthy
Signature of Arbitrator

May 30, 2014
Date

JUN 10 2014

ATTACHMENT TO ARBITRATOR'S DECISION

Cathy Martin vs. Pal Health Technologies Inc.

IWCC No.: 13 WC 14407

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** and **(F) Is Petitioner's current condition of ill-being causally related to the injury**, the Arbitrator notes as follows:

The Petitioner testified at Arbitration that she has been employed by the Respondent, Pal Health Technologies, in the glue department. She testified that her job requires her to glue material onto orthotic devices which fit into shoes. She testified that this requires her to squeeze glue with one hand while brushing it onto the orthotic with her other hand. She then places the material onto the orthotic and, using both hands, presses the material onto the orthotic device. The Petitioner testified that she occasionally uses a small roller to assist her in this task but, the majority of the time, uses her hands for the task. The Petitioner demonstrated these job duties for the court and it was noted that it required strenuous, forceful pushing and pinching on the orthotic device using her thumb, index, and middle fingers bilaterally. The Petitioner testified at Arbitration that she repeats this process approximately 56 times per hour during her 10 hour shift. The Petitioner further testified that she is given one 10 minute break, two 15 minute breaks, and a half-hour lunch during each shift.

The Petitioner testified at Arbitration that during the performance of these duties, she began to experience pain and discomfort in her left index finger. She sought medical treatment from Dr. Jeffrey Garst, an orthopedic surgeon in Peoria. The intake sheet from

the Petitioner's first visit with Dr. Garst indicates that her problems began on November 19, 2012 and that her left index finger had developed a "bump". The intake sheet further states that the Petitioner stated that her finger was sore from overuse at work. (Petitioner Exhibit 1, p.3) The Petitioner testified that on that date Dr. Garst recommended the Petitioner undergo a DIP joint fusion for her left index finger. It should be noted that Dr. Garst had previously performed this same procedure on the Petitioner's left and right thumb, as well as her right index finger.

The Petitioner testified that she did not undergo this surgical procedure immediately due to problems developing in her right middle finger. Dr. Garst stated in his September 16, 2013 note that the Petitioner was having trouble with her right hand with a lot of pain at the DIP joint of the right middle finger, which prevents her from doing her glue job at Pal. Dr. Garst went on to state that "These problems with her hands are significant because she has a job, which is very strenuous and hand-intensive." (Petitioner Exhibit 1, p.9)

The Petitioner testified that eventually she was released from Dr. Garst's care with regard to the right middle finger and the treatment focus turned back to her left index finger on January 22, 2014. At that point, Dr. Garst scheduled the Petitioner for a left index finger joint fusion to be performed on January 31, 2014. (Petitioner Exhibit 1, pp.26-27) The Petitioner underwent the aforementioned surgical procedure on January 31, 2014. (Petitioner Exhibit 1, pp.35-36) The Petitioner testified that she continues to be off-work from this procedure and has a follow-up visit scheduled with Dr. Garst on May 12, 2014. (Petitioner Exhibit 1, p.47)

In his evidence deposition, Dr. Garst was asked whether he had an opinion as to whether or not the Petitioner's job duties caused the left index DIP joint arthritis that he had diagnosed. Dr. Garst responded:

> Well, I guess I'll elaborate on that a little further. I would say that I see a lot of patients with arthritis in the hands. The vast majority are idiopathic or arthritic – generalized arthritic condition.
>
> I don't do all work comp. I try to avoid it if I can. And usually when I see the work arthritis on a diagnosis, I know it's a red flag, and it's usually not a work comp type claim.
>
> However, my understanding with PAL Technologies is they're relatively good employer, but the work they do is hard on their hands because they have to do a lot of fine manipulation with a lot of force on their fingertips with a bur. And I do think that will wear down those joints, and I do think it's work related.
>
> (Petitioner Exhibit 2, pp.10-11)

Dr. Garst was then asked if, regardless of causation, whether that he thought the Petitioner's work at Pal for over 20 years aggravated the arthritis to the point where she was requiring the surgery recommended. Dr. Garst responded:

> Well, I think – let me just put it a different way. You're saying that if she was to get the arthritis anyway this would have made it worse. I think that's reasonable.
>
> (Petitioner Exhibit 2, p.11)

Finally, Dr. Garst was given additional information regarding the Petitioner's work duties, specifically describing the gluing and pressing materials onto the orthotics repetitively, at asked whether or not that was consistent with his understanding with her job, to which Dr. Garst replied:

> I would say yes and no. It contradicts my understanding of her job because I am – mainly emphasized burs and vibratory tools, and that doctor's talking about gluing and fitting orthotics.

> Let me –
> I have heard about that before with those patients. That's somewhat forceful, too. …the gluing I have heard about in the past.
> (Petitioner Exhibit 2, p.12)

On cross-examination, Dr. Garst was asked whether or not the Petitioner's pain was just a symptom of her arthritis and not necessary caused by her work duties, to which Dr. Garst responded:

> I don't necessarily agree. I think they're all interrelated because her work duties I think are a prime cause or a significant contributing factor to the arthritis which is causing her pain. So I think they're all – the three are related.
> (Petitioner Exhibit 2, p.17)

At the request of the Respondent, the Petitioner was examined by Dr. Ramsey Ellis on March 15, 2013. It was Dr. Ellis' opinion that the Petitioner's job duties neither caused nor aggravated her underlying pre-existing arthritic condition. (Respondent Exhibit 1, pp.11-13) On cross-examination, Dr. Ellis stated that in her opinion there is no activity that a person could perform that would accelerate the condition of osteoarthritis. (Respondent Exhibit 1, p.22)

Based upon the foregoing, the Arbitrator finds the testimony of the Petitioner in this matter to be credible. The Arbitrator further finds the testimony of Dr. Garst in this matter to be more persuasive. While Dr. Garst based his opinions in part upon the belief that the Petitioner was using a bur at work with her left hand, an incorrect assumption, he did say that using a lot of force with her fingertips was a causative factor. Clearly the Petitioner, in pressing the fabric to the plastic orthotics on a repetitive basis throughout the day for many years, placed a lot of force on her fingertips. The force is what Dr. Garst said could wear down the joints. Therefore, based upon the foregoing, the Arbitrator

hereby finds and concludes that the Petitioner did sustain an accident which arose out of and in the course of her employment with the Respondent and further finds that the Petitioner's current condition of ill-being is causally related to this injury.

In Support of the Arbitrator's decision regarding **(L) What temporary benefits are in dispute, T.T.D.**, the Arbitrator notes as follows:

Having found that the Petitioner did sustain an accident which arose out of and in the course of her employment and that her current condition of ill-being is causally related to said injury, the Arbitrator further finds and concludes that the Petitioner is temporarily and total disabled as a result of this injury. Dr. Garst's treatment notes indicate that he removed the Petitioner from work for her left hand effective February 10, 2014 through the date of Arbitration. (Petitioner Exhibit 1, pp.44-47) The Arbitrator therefore orders the Respondent to pay the Petitioner the sum of $385.33 per week for 11 3/7ths weeks.

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:

Having previously found that the Petitioner did sustain an accident which arose out of and in the course of her employment with the Respondent and, having further found that the Petitioner's current condition of ill-being is causally related to this injury, the Arbitrator further finds that the medical care which has been given to the Petitioner

was both reasonable and necessary and orders the Respondent to pay the aforementioned medical bills listed in Petitioner's Exhibit 3, pursuant to the applicable fee schedule.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Krista A. Kane-Boop,

Petitioner,

vs.

NO: 12 WC 43695

14IWCC1056

State of Illinois Department of Corrections,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, and 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 30, 2013, 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.

14IWCC1056

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: DEC 9 - 2014
TJT:yl
o 12/1/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

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

KANE-BOOP, KRISTA A
Employee/Petitioner

Case# **12WC043695**

DIXON CORRECTRIONAL CENTER
Employer/Respondent

14IWCC1056

On 12/30/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2028 RIDGE & DOWNES LTD
JOHN E MITCHELL
415 N E JEFFERSON AVE
PEORIA, IL 61603

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

0988 ASSISTANT ATTORNEY GENERAL
BRETT KOLDITZ
500 S SECOND ST
SPRINGFIELD, IL 62706

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

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

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

DEC 30 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC1056

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)

Krista A. Kane-Boop
Employee/Petitioner

v.

Dixon Correctional Center
Employer/Respondent

Case # 12WC 43695

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 **Mathis**, Arbitrator of the Commission, in the city of **Rock Island**, on **4/4/2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC1056

FINDINGS

On the date of accident, 9/9/2012, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$54,960.00**; the average weekly wage was **$1,056.92**.

On the date of accident, Petitioner was **29** years of age, ***married*** with **2** children under 18.

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**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $704.61/week for 29 5/7 weeks, commencing 9/10/2012 through 4/4/2013, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 9/9/2012 through 4/4/2013, and shall pay the remainder of the award, if any, in weekly payments.

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

12-20-13
Date

DEC 30 2013

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF ROCK ISLAND)

14IWCC1056

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KRISTA KANE-BOOP,	)	
	)	
Petitioner,	)	
	)	
v	)	IWCC: 12WC 43695
	)	
DIXON CORRECTIONAL CENTER,	)	
	)	
Respondent.	)	

FINDINGS OF FACTS APPLICABLE TO ALL ISSUES

The Petitioner, a registered nurse, became employed by the Respondent in April 2012. Her shift starts at 3:00 p.m. Her job was that of a registered nurse at the dispensary at Dixon Correctional. She described her job duties which included periodic examination of inmates.

At approximately 7:30 p.m. on September 9, 2012, Petitioner and her charge nurse, Virginia Mavis, were going to call in the next inmate for an EKG. Respondent offered pictures of the area showing the inside of the door which Petitioner opened, the hallway outside and the bench where individuals sat. The door was described by the Petitioner as being very heavy, hard to open, and was made of steel. The door had a very slender window above the doorknob. Petitioner stated that the window allowed them to look straight out but not peripherally.

Petitioner stated that she has not encountered similar doors unless she was in an old hospital. Otherwise, she does not encounter doors similar to the dispensary door. She didn't see them at the malls or in a residence.

As she opened the door, approximately wide enough for her body to be between the door jam and the door, an inmate coming down the hall sharply slapped the door closing it abruptly and forcefully. As the Petitioner saw the door coming at her, she turned her head and twisted her body to avoid being struck in the head. In so doing, she experienced immediate pain in her low back which initially went down her left leg.

She stated that her charge nurse saw the incident. Petitioner continued her shift doing primarily paperwork.

On September 11, 2012 Petitioner sought medical care from Margaret Ditmer, FPN, BC of Midwest Health Clinic. She complained of pain in her low back being 6 out of 10 and radiating down both legs with numbness. She gave the practitioner detailed description if what happened consistent with her accident. She noted that she had pain down her left side with immediate numbness in the left thigh continuing down to the heel. The pain has now moved down both legs. Numbness is present in the thighs bilaterally. She has taken only Tylenol, rest and ice. It was noted that she complained of joint pain, joint stiffness, knee pain, back pain and hip pain. Straight leg raising was found to be 30 degrees on the right and 15 degrees on the left. Her gait was stiff but without ataxia or antelgia. Pain was elicited for the examination of the back to the buttocks, the right thigh and right knee. She was not able to twist from side to side without pain. She was unable to touch her toes and unable to squat. The practitioner assessed her as having low back with radiculopathy and a differential diagnosis of disc herniation versus disruptor versus muscle strain. Due to her pregnancy, medication was limited. Rest but not bed rest as well as ice was prescribed. The avoidance of lifting or twisting was recommended. She was taken off work.

On September 17, 2012 Petitioner consulted with Lynnette Jones, PT, at Rock Valley. Complaints of noticing increased pain with activities of daily living, she was unable to work due to her dysfunction. She could neither lift nor carry due to pain. She could walk short distances with difficulty but was unable to sit for an hour. She has trouble getting in a comfortable position. She avoids standing due to immediate increase in pain. She is sleeping about half of her normal time. She has severe restrictions in her ability to perform normal parenting, household work and recreational activities. Walking is worse than sitting.

Petitioner then followed with Nurse Practitioner Ditmer on September 26, 2012 and October 24, 2012. At the visit of October 24, 2012 nurse Practitioner Ditmer noted Petitioner complained that she could not be on her feet more than 20 minutes before the pain became intolerable. Musculoskeletal examination was positive for back pain with radiation down both legs. Neurologic exam was positive for tingling and numbness bilaterally in the extremities more often at night. She showed an antalgic gait and

straight leg raising was 30 degrees bilaterally. Assessment remained low back pain with radiculopathy which appears to have mildly lessened. She exercises daily. She is still being kept off work.

On October 29, 2012 Lynnette Jones wrote a letter to Ms. Ditmer advising that the Petitioner was unable to keep her visit because worker's compensation denied her claim.

Petitioner was again seen on November 7, 2012, November 21, 2012, January 5, 2013, January 15, 2013 and February 20, 2013. On that listed last visit, her level of pain was that of 8 out of 10 with numbness down both legs. She was using a lumbar support but due to the status of her pregnancy, she did not take over the counter pain medication. Any type of everyday life activity exacerbated her back pain and discomfort. Neurologically, she was positive for weakness and numbness in both lower extremities. Her musculoskeletal examination disclosed that she walked with a wide stance gait, had pain upon palpation of the lower mid spine and sacroiliac region, the right greater than left, straight leg raising was 30 degrees on the right and 45 degrees on the left. Normal deep tendon reflexes were noted. The nurse practitioner's assessment was that of chronic low back pain. She recommended continuance of home exercises and the avoidance of strenuous activities. She could not work due to unmanageable low back pain with radiculopathy related to her work injury.

At her most recent visit with her nurse practitioner. Petitioner was referred for an MRI and it was to be conducted on April 5, 2013. During the entire period of time, she was kept off work by Ms. Ditmer.

At the time of the occurrence Petitioner was 12 weeks pregnant. She also consulted with her OB/GYN regarding medication. She was given Vicodin but used it sparingly. She could not take Ibuprofen because of the pregnancy but did take Tylenol.

Petitioner states that the Respondent's group insurance denied payment of her bills because it was a work related injury. She was added to her husband's group insurance during the enrollment period in January 2013. Her more recent bills are being submitted to them for payment.

Throughout her medical care, the Petitioner noted difficulty performing activities of everyday living, she did not pick up her children, she did not grocery shop. She indicated that walking caused pain, sitting was little bit better but still uncomfortable.

She experienced pain when twisting or bending. She didn't sleep much at all because of pain.

In support of Arbitrator's decision relating to __C__, the Arbitrator finds the following facts:

The Petitioner described the door which she opened was a type of door that she saw nowhere else other than in old hospitals. The window was of no assistance as she described. The door was suddenly and forcefully pushed back towards her. She moved to evade injury to her face and head. However, in so doing, she twisted her back.

The testimony of the Petitioner is both credible and unrebutted. Her statement to the Respondent at the time of accident is consistent with her testimony. Her job required her to go in and out of the door to call patients.

As such, the Arbitrator finds the Petitioner sustained an accidental injury arising out of and in the course of her employment.

In support of Arbitrator's decision relating to __F__, the Arbitrator finds the following facts:

Respondent offered into evidence the medical note from Dr. Gullone at Midwest Medical Center regarding an examination conducted on July 20, 2011. In that note, the Petitioner complained of awaking with pain and radicular pain. The history indicated Petitioner awoke with severe back pain five days before the visit. When examined, there was no acute distress but she walked with a limp. Petitioner did not remember that visit. She stated there was no incident that incited that visit which is consistent with the history. No follow up visits were had.

The medical records of Margaret Ditmer, FNP-BC, disclosed a consistent history and consistent findings subsequent to the original visit. Her notes attribute the Petitioner's condition of ill-being to the work accident of September 9, 2012.

Respondent presented no medical evidence, other than a July 20, 2011 office note of Dr. Gullone. However, no evidence links that condition to the Petitioner's condition of ill being subsequent to her accident of September 9, 2012.

As such, the Arbitrator finds credible medical evidence and testimony establishing a causal relationship between the accident the Petitioner sustained on September 9, 2012 and her current condition of ill being.

In support of Arbitrator's decision relating to __J__, the Arbitrator finds the following facts:

Medical bills and group liens, if any, will be submitted at a subsequent hearing.

In support of Arbitrator's decision relating to __L__, the Arbitrator finds the following facts:

Respondent agrees that Petitioner was off work for the period of commencing September 10, 2012 that is consistent with both the testimony of the Petitioner and the medical records submitted. Petitioner testified that she had an additional doctor visit subsequent to the February 24 visit and was again kept off work. Liability for those benefits were disputed.

Given the findings with respect to accident and causal relationship, the Arbitrator finds the Petitioner is entitled to have and receive total temporary disability benefits commencing on the first day of lost time, September 10, 2012 through and including the date of hearing, April 4, 2013, a period of 29 5/7 weeks.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Carol Dufrane,

Petitioner,

vs.

NO: 12 WC 2587

14IWCC1057

Casino Queen,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 30, 2014, is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $33,600.00. 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: DEC 9 - 2014
TJT:yl
o 12/1/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

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

DUFRANE, CAROL
Employee/Petitioner

Case# **12WC002587**

CASINO QUEEN
Employer/Respondent

14IWCC1057

On 1/30/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

BROWN & BROWN LLP
RIHCARD E SALMI
5440 N ILLINOIS ST SUITE 101
FAIRVIEW HTS, IL 62208

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

14IWCC1057

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)

Carol Dufrane
Employee/Petitioner

v.

Casino Queen
Employer/Respondent

Case # 12 WC 002587

Consolidated cases: n/a

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

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ 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 _____

14IWCC1057

FINDINGS

On the date of accident, March 31, 2011 Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$26,665.60**; the average weekly wage was **$512.80**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of $33,523.10, pursuant to the medical fee schedule, direct to the medical providers, as outlined in Petitioner's Exhibit 11.

Respondent shall authorize and pay for the medical treatment pursuant to the recommendations of Dr. Matthew Gornet.

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

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

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

Edward Lee
Signature of Arbitrator

1/27/14
Date

ICArbDec19(b)

JAN 30 2014

FINDINGS OF FACT AND CONCLUSIONS OF LAW

An Application for Adjustment of Claim was filed in this matter. The case was heard by the Honorable Edward Lee, Arbitrator of the Illinois Workers' Compensation Commission, in the City of Collinsville on December 20, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES:

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

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

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?

THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Petitioner began working for Respondent on March 3, 1998 and continues to the present. She testified her duties as a cocktail waitress include taking customer orders, cleaning tables, working as a bar back, and delivering trays of drinks. She testified the trays of drinks weigh up to 15 pounds and typically weigh about 10 pounds. She was carrying a tray of drinks on March 31, 2011 when her arm suddenly gave way and she became unable to lift her arm overhead. Respondent agrees with this description of the incident.

From November 6, 2008 thru November 17, 2009 Petitioner underwent treatment at Conolly Chiropractic Center for headaches, including some treatment to her neck. She acknowledged having problems with neck pain, low back pain and sore and weak muscles, explaining these are common complaints among her coworkers. She had no problems with numbness or tingling in her arms or hands. On November 17, 2009 she was feeling excellent and was released from treatment. (PX3).

On February 16, 2011 Petitioner reported to her primary care physician, Dr. Yaganti with right shoulder pain and intermittent right shoulder blade muscle spasms. She reported that she carries trays at work, but no specific injury was involved. There was occasional burning in the right shoulder blade but no tingling or numbness in the hands. Dr. Yaganti considered ordering an MRI if her pain did not improve. (PX2). He did not recommend work restrictions or take Petitioner off work.

The last week of March, Petitioner went on vacation to Florida to visit relatives. She did not sustain any injuries while on vacation. On March 31 she returned to her usual work duties. She testified that during the first three to four hours of her shift, she felt strong and had no difficulty performing her normal work duties as she had always performed them, including carrying a full drink tray raised up above shoulder level.

She testified it was busy for a Thursday and about 4 hours into her shift she was carrying a tray full of drinks when her right arm suddenly gave way. She nearly dropped the tray and two of her co-workers noticed she was having problems and came to her assistance, asking her if she was okay.

Petitioner described a sudden pain in the back of the arm, weakness of the arm and an inability to lift her elbow above shoulder level. She also had an increase in her neck and shoulder pain. She testified she was able to continue her shift, but could not hold her tray overhead, instead having to hold it underhand, using both hands to support the tray.

Petitioner testified the arm and hand symptoms which started on March 31 were new and different from anything she had experience before. In addition, the shoulder blade and neck symptoms she reported to Dr. Yaganti six weeks prior were suddenly worse.

On April 1, Petitioner scheduled an appointment with Dr. Yaganti. She was able to get an appointment the same day because her condition was out of the ordinary. She discussed her new symptoms with Dr. Yaganti: numbness and tingling in her hand; an inability to lift or carry anything with the right arm; an inability to lift her right arm above her head. She told him there was no particular injury or fall, which means she did not get bumped or hit. Petitioner credibly testified that later references of no accident mean she did not have a specific trauma, did not fall, was not hit or struck by someone or something.

On April 1, Dr. Yaganti ordered a cervical MRI. He took Petitioner off work. Petitioner had not previously missed work for any neck-related issues.

The cervical MRI of April 7, 2011 was read to show small central disc protrusions at C3-4 and C4-5. Dr. Yaganti referred Petitioner for cervical injections and physical therapy. She had not previously had injections or therapy for cervical problems.

On April 24, 2011 Petitioner returned to work. She had made some improvement but had to modify the way she did her job because of continued symptoms in the right arm. Petitioner testified that prior to March 31, 2011, she was always able to carry her drink tray overhead, but she now needs to carry her tray underhand, using the left hand as additional support. Petitioner testified her symptoms continued and she sought out additional treatment.

On February 6, 2012, Petitioner saw Dr. Naseem Shekhani, a physiatrist, for evaluation. (PX5). Petitioner reported continued numbness and tingling in the right upper extremity. Dr. Shekhani diagnosed her with cervicalgia, cervical radiculopathy and right shoulder pain and referred her for chiropractic treatment. He also recommended she undergo a series of epidural steroid injections.

On February 8, Petitioner saw Dr. Stephen Woods for chiropractic treatment. (PX6). She described continued neck, shoulder and arm pain and was unable to lift her arm above shoulder level. When her condition did not improve, Petitioner was referred to Dr. Matthew Gornet in April 2012 (PX7).

On April 6, 2012, Petitioner saw orthopedic surgeon, Dr. Matthew Gornet. Petitioner continued to report neck pain, scapular pain, right shoulder pain, numbness and tingling in her right arm and hand. Petitioner underwent additional cervical injections on referral by Dr. Gornet, and those resulted in temporary relief. (PX10).

A November 1, 2012 MRI noted broad-based protrusions at C4-5 and C5-6 creating right neural foraminal encroachment at C4-5. (PX8). Dr. Gornet recommends disk replacement surgery at C4-5 and C5-6 as a consequence of her work accident. He bases his causation opinion on the sequence of events with onset of severe symptoms while performing her work duties on March 31, 2011, MRI (April 7, 2011) evidence correlating to her symptoms, and the fact that reaching and lifting activities place stress on the cervical spine which can cause cervical injury.

On December 20, 2012, Dr. Matthew Gornet testified by deposition. He testified the C4-5 disc herniation correlates with the symptoms Petitioner described beginning on March 31. The C4-5 disc herniation at a minimum is causally connected to Petitioner's lifting activities, based on his review of the MRI's, the treatment records, her history and his experience treating similar patients. He testified that reaching activities, extending the arm out, lifting things, all place a mechanical load on the spine which can easily cause injury to the cervical spine. He believes Petitioner's work activities on March 31, 2011 caused her need for further treatment.

Dr. Gornet believes surgery should address both C4-5 and C5-6 because Petitioner has right scapula and right arm pain which has been consistent from the time of the accident. There was clearly disc pathology present at both C4-5 and C5-6 on the original MRI of April 7, 2011.

Petitioner was evaluated by Dr. Kevin Rutz on behalf of Respondent on January 15, 2013. (RX1). Dr. Rutz performs approximately 95% of his evaluations on behalf of Respondents. Dr. Rutz believes Petitioner has a right sided C4-5 disc herniation with symptoms which have not completely resolved. Although Petitioner was carrying a tray of drinks when she had some new (arm weakness, numbness and tingling in the right arm and hand) and some increased symptoms (neck and shoulder), he does not believe the symptoms were caused by her work activities.

Dr. Rutz acknowledged that lifting 10 pounds overhead places force on the neck and on the shoulder but believes Petitioner's injury would have happened no matter what she was doing. The problem is that the disc was going to herniate, and any minor force might be that last little bit, but it's not a significant force.

Dr. Rutz testified the need for further medical treatment depends on Petitioner's symptoms. He would recommend additional workup to determine whether the C4-5 level is still the problem, rule in or rule out the C5-6 level and then recommend surgery based on that work-up. If Petitioner remains symptomatic it is most likely from the changes that occurred at the C4-5 disc. If Petitioner still requires narcotic pain medicine that is a reasonable reason to consider surgery.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO DISPUTED ISSUES C AND F, ACCIDENT AND CAUSAL CONNECTION, THE ARBITRATOR FINDS THE FOLLOWING:

On March 31, 2011, Petitioner sustained a work accident. She suffered injury causally related to her work as a cocktail waitress for Respondent. An injury is accidental within the meaning of the Workers' Compensation Act when traceable to a definite time, place and cause, occurring in the employment unexpectedly and without affirmative act or desire of the employee. **Laclede Steel Company v. Industrial Com'n,** 6 Ill.2d 296, 300 (1955). There does not need to be any external violence to the body to constitute an accidental injury, and compensation is allowed where a workers' existing physical structure, whatever it may be, gives way under the stress of her usual labor. **Id.**

Prior to March 31, 2011, Petitioner had yet to suffer a cervical injury taking her off work, necessitating physical therapy, injections or surgery. Following this incident, however, Petitioner was immediately taken off work. She was referred for physical therapy and cervical injections and surgery has been recommended because the symptoms she developed on March 31 have not resolved. Petitioner testified to some right shoulder and right shoulder blade symptoms prior to March 31, but did not miss any time from work and was able to perform her usual work duties without modification. Petitioner described weakness of the right arm, numbness and tingling down the right arm and into the right hand which are new and distinct from any symptoms she had prior to March 31. Petitioner credibly testified that her pre-existing symptoms in her shoulder and shoulder blade worsened as a consequence of the March 31 incident. Where Petitioner was able to carry out all of her daily activities, and then is in constant pain and describes ongoing weakness after the work related incident, she has suffered a compensable injury. *See e.g.* **O'Fallon School District 90 v. Industrial Com'n**, 729 NE 2nd 523 (Ill.App. 5.Dist. 2000).

In concluding that Petitioner's condition is causally related, the Arbitrator has carefully considered the medical expert opinions. The Arbitrator places greater weight on the opinion of Dr. Matthew Gornet who testified that Petitioner's work activities caused her disk herniation. His opinion that lifting activity places stress on the cervical spine is consistent with the sudden onset of weakness, numbness and tingling of the right arm and hand, the same side Petitioner used to carry drink trays overhead. His opinion is consistent with the immediate and sudden onset of new symptoms in the right arm and hand Petitioner suffered while carrying a tray of drinks. It is also consistent with the sudden need for Petitioner to be off work and her need for physical therapy and injections ordered by Dr. Yaganti.

The opinion of Respondent's examining physician is given little weight. The import of Dr. Rutz's testimony is that Petitioner's cervical condition would have happened no matter what she was doing. The premise that a condition would have happened even if a worker had not engaged in the work activity, has long been rejected. *See e.g.* **Laclede Steel** at 302-303.

Dr. Rutz testified that her disc was going to herniate anyway, no matter what she was doing, and any minor force might be that last little bit. He acknowledges carrying a tray weighing ten pounds puts stress on the spine. The Arbitrator finds that the last little bit Dr. Rutz references, was in fact Petitioner's job duties on March 31. This causal connection finding is consistent with the chain of events, Petitioner's inability to perform her full duties following March 31 and the ongoing symptoms of a new and different character and degree beginning the date of accident.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO DISPUTED ISSUE J, REASONABLENESS AND NECESSITY OF THE MEDICAL TREATMENT RELATED TO THE MARCH 31, 2011 ACCIDENT, THE ARBITRATOR FINDS THE FOLLOWING:

Given that Petitioner suffered injury causally related to her work accident, the Arbitrator concludes the medical services rendered in response to that injury were reasonable and necessary. Dr. Gornet testified Petitioner's treatment has been reasonable and necessary. Petitioner was provided with conservative treatment which helped to control her symptoms. The treatment has been targeted to bring relief to Petitioner from the symptoms she has endured since the present work accident and therefore has been reasonable and necessary.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO DISPUTED ISSUE K, WHETHER PROSPECTIVE MEDICAL CARE IS INDICATED, THE ARBITRATOR FINDS THE FOLLOWING:

Petitioner testified that she continues with periodic chiropractic treatment to help make it through her workdays. She credibly testified that at the end of the day, she is simply worn out from the symptoms she has from her neck injury. She testified she still requires narcotic pain medicines, which she only takes after her shift, to help her manage her symptoms. Dr. Rutz testified that if she still has symptoms and still requires narcotic pain medicine or if it had been several years and she is sick of it, he thinks that is a reasonable reason to consider surgery.

Dr. Gornet testified that the C4-5 disc herniation is causally connected to her work accident of March 31. He testified that in order to relieve Petitioner's symptoms, a responsible surgeon would perform surgery at both C4-5 and C5-6. Accordingly, the Arbitrator finds the two-level disk replacement surgery recommended by Dr. Gornet is warranted as a consequence of her work accident.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kenneth Lindsey,

Petitioner,

vs.

NO: 11 WC 28789

14IWCC1058

The Stove Shop,

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 causal connection, temporary total disability, temporary partial disability, medical expenses, permanent partial disability, credit, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

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

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

14IWCC1058

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,600.00. 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: DEC 9 - 2014
TJT:yl
o 12/2/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LINDSEY, KENNETH
Employee/Petitioner

Case# **11WC028789**
11WC035255
12WC003642

THE STOVE SHOP
Employer/Respondent

14IWCC1058

On 2/11/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4707 LAW OFFICE OF CHRIS DOSCOTCH LLC
CASEY MATLOCK
2708 N KNOXVILLE AVE
PEORIA, IL 61604

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
JOHN MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606-3833

14IWCC1058

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

KENNETH LINDSEY,
Employee/Petitioner

v.

THE STOVE SHOP,
Employer/Respondent

Case # 11 WC 28789

Consolidated cases: 11 WC 35255 & 12 WC 03642

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was consolidated with claim no. 11 WC 35255 and 12 WC 03642 and heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Peoria**, on **November 21, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

On this date, Petitioner ***did*** 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 **$21,840.00**; the average weekly wage was **$420.00**.

On the date of accident, Petitioner was **56** 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 **$ 0.00** for TTD, **$ 0.00** for TPD, **$ 0.00** for maintenance, and **$ 0.00** for other benefits, for a total credit of **$ 0.00**.

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

ORDER

Respondent shall ***not*** pay Petitioner temporary total disability benefits of **$280.00**/week, as provided in Section 8(b) of the Act, as Petitioner failed to prove the period of time lost from work was causally related to this accidental injury.

Respondent shall pay Petitioner permanent partial disability benefits of **$253.00**/week for **10** weeks, because the injuries sustained caused the **2%** loss to his **person as a whole,** as provided in Section 8(d)2 of the Act.

Respondent ***not*** shall pay to Petitioner reasonable and necessary medical services, pursuant to Section 8(a) of the Act, subject to the medical fee schedule as created by Section 8.2 of the Act, as Petitioner failed to prove that the condition treated for which such medical charges were incurred are causally related to this accidental injury.

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

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

JOANN M. FRATIANNI
Signature of Arbitrator

January 31, 2014
Date

FEB 11 2014

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

Petitioner worked for Respondent installing stoves and fireplaces. On March 1, 2011, Petitioner was working on a fireplace in a customer's private residence when a worker from another company dropped a 2 x 6 from above him, striking him on his head. Petitioner testified the 2 x 6 was dropped from an 8 foot height.

Petitioner testified he did not lose consciousness, reported the incident to his supervisor, Mr. David Wildenradt, refused medical treatment, and continued working.

Mr. Wildenradt testified he noticed a cut on Petitioner's head with some bleeding. They both worked an additional 2-3 hours until the job was completed. Mr. Wildenradt testified he then rode back with Petitioner to the shop, a 45 mile journey. During this time, Petitioner and Mr. Wildenradt conversed in what he described as a normal fashion. Petitioner voiced no complaints and Mr. Wildenradt noticed nothing unusual about him.

Petitioner testified that on the next day he experienced a headache. He then sought medical care in the emergency room of Pekin Hospital. A history of injury was recorded there consistent with Petitioner's testimony, including a 2 x 2 cm area of dry blood on the left side of his head. Included in the history was waking up with chills and the shakes. Cranial, cerebral and sensory exams were normal. A CT scan was prescribed but refused. (Rx3)

Petitioner then saw a chiropractor later that same day at Camden Chiropractic. Petitioner testified he had treated there in the past several years. Petitioner complained of a bad headache and pain to his cervical region that he described as being 7 out of 10. A history of injury was recorded similar to Petitioner's testimony. Of interest, Dr. Camden recorded symptoms over the past two weeks. Dr. Camden's records also reflect prior complaints of headaches dating back to early 2000, including references to migraines. Prior treatment included neck and back pain along with left arm pain and a diagnosis of subluxation. Several earlier accidents or injuries were treated by Dr. Camden. (Rx1) Petitioner also saw Dr. Sumer for prior injuries and complaints of neck, thoracic and back pain with left arm numbness. (Rx2)

Petitioner then worked his full duty tasks for Respondent from March 3, 2011 through June 3, 2011.

Petitioner was examined by Dr. Elizabeth Kessler on October 31, 2011. A history was recorded of not having experienced symptoms prior to March 1, 2011 of headaches, neck or shoulder pain. Petitioner reported no prior medical problems.

Petitioner testified on March 14, 2011, he tripped over a downspout while working, landing on his back. Petitioner following that episode continued working, which is the subject matter of case no. 11 WC 35255, and which was consolidated and heard with this matter. He received no initial medical treatment for that incident and continued working through June 3, 2011. On June 3, 2011, Petitioner testified that he strained his right arm while lifting at work, which is the subject matter of case no. 12 WC 03642, which was also consolidated and heard with this matter.

Petitioner sought treatment in the emergency room of Pekin Hospital on June 6, 2011 with complaints of neck pain with the onset of symptoms around 3:00 a.m. A history was recorded seeing a chiropractor earlier that morning and that he gets headaches when his neck gets out of whack. (Rx3)

Petitioner then saw Dr. Sumer on June 7, 2011, who recorded a history of a headache that began the day before located behind his right eye. Petitioner denied any significant headaches in the past. A CT scan performed that same day was normal. Dr. Sumer diagnosed a headache and herpes zoster and diagnosed an MRI. The MRI to the head was performed on June 8, 2011, and revealed some white matter disease to the brain. (Rx2) (Rx5)

Petitioner then returned to see Dr. Sumer on June 13, 2011 and June 20, 2011. Dr. Sumer noted the headaches were diffuse with no specific location.

Petitioner then traveled to the Mayo Clinic, where he saw Dr. Jeffrey Shah. Dr. Shah did not feel Petitioner's symptoms matched the clinical findings. Any neurological issues were ruled out and Dr. Shah could not render an underlying diagnosis. A cervical MRI was subsequently performed that revealed some diffuse bulging.

Petitioner eventually underwent spinal surgery on September 15, 2011 for advanced cervical spondylosis. (Rx11)

Petitioner was examined by Dr. Kessler on October 31, 2011. This was at the request of Respondent. Dr. Kessler also reviewed some medical records of treatment. Dr. Kessler diagnosed a closed head injury with scalp abrasion and hematoma. Dr. Kessler felt Petitioner could have a transient headache related to that injury. She felt the only necessary treatment related to this injury was the emergency room visit of March 2, 2011. Dr. Kessler later reviewed the cervical MRI and other records and authored a supplemental report dated May 4, 2012. Dr. Kessler concluded Petitioner suffered from degenerative disc disease and spinal stenosis, which she felt were not related to the incident of March 1, 2011.

Dr. Lee performed a neuropsychological exam on November 3 and 18, 2011. Dr. Lee noted adequate cognitive skills with somewhat lower memory function. Dr. Lee did not know if this was due to an injury. (Px10)

Petitioner was examined by Dr. Klopfenstein on February 15, 2012. Dr. Klopfenstein also reviewed the cervical MRI and concluded the spondylosis at C5-C6 and C6-C7 were most likely longstanding in duration. Dr. Klopfenstein indicated he could not attribute the spondylosis to his work related event and felt there was a functional component to some of the symptoms complained of.

Petitioner was examined by Dr. Fassett on August 13, 2012. This exam was at the request of Respondent. Dr. Fassett's findings during examination were normal. His review of the cervical MRI revealed spondylitic changes at C6 and C7 and felt the vast majority of symptoms could not be explained based on spinal degeneration.

Based upon the above, the Arbitrator finds that on March 1, 2011, Petitioner sustained a head injury that included a scalp abrasion and hematoma, which was caused by this accidental injury.

Based further upon the above, the Arbitrator finds all other conditions as noted above to not be causally related to the accidental injury of March 1, 2011.

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

See findings of this Arbitrator in "F" above.

Based upon said findings, all medical charges introduced into evidence after March 2, 2011 by Petitioner are not causally related to this accidental injury and are thus, hereby denied.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "F" above.

Based upon said findings, all claims for temporary total disability benefits made by Petitioner after March 2, 2011 in this matter are herby denied.

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

See findings of this Arbitrator in "F" above.

The Arbitrator finds that Petitioner sustained a head injury including a hematoma and scalp abrasion as a result of this accidental injury. There are some findings of memory loss, which Dr. Lee indicates are now permanent in nature, but he could not state whether they were due to the injury or from pre-trauma functioning.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kenneth Lindsey,

Petitioner,

vs.

NO: 11 WC 35255

14IWCC1059

The Stove Shop,

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, temporary total disability, medical expenses, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

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

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

14IWCC1059

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: DEC 9 - 2014
TJT:yl
o 12/2/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LINDSEY, KENNETH
Employee/Petitioner

Case# **11WC035255**

11WC028789
12WC003642

THE STOVE SHOP
Employer/Respondent

14IWCC1059

On 2/11/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4707 LAW OFFICE OF CHRIS DOSCOTCH LLC
CASEY MATLOCK
2708 N KNOXVILLE AVE
PEORIA, IL 61603

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
JOJN MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606-3833

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

KENNETH LINDSEY
Employee/Petitioner
v.

THE STOVE SHOP
Employer/Respondent

Case # 11 WC 35255

Consolidated cases: 11 WC 28789 & 12 WC 03642

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was consolidated with claim no. 11 WC 28789 and 12 WC 03642 and heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Peoria**, on **November 21, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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. ☒ 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 **March 14, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$21,840.00**; the average weekly wage was **$420.00**.

On the date of accident, Petitioner was **56** 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 $ **0.00** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **0.00**.

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

ORDER

Petitioner failed to prove that the conditions of ill-being complained of are causally related to the accidental injury claimed on March 14, 2011.

All claims for compensation and medical expenses in this matter are thus hereby denied.

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

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

JOANN M. FRATIANNI
Signature of Arbitrator

January 31, 2014
Date

FEB 11 2014

14IWCC1059

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

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

Petitioner testified he tripped over a downspout while working on March 14, 2011, and landed on his back.

Following this episode, Petitioner saw Dr. Camden, a chiropractor on March 16, 2011, where a history was recorded consistent with his testimony. D. Camden noted complaints of left shoulder pain. Examination was described as being normal. Petitioner had seen Dr. Camden in the past for multiple conditions including his left shoulder. (Rx1)

Petitioner testified his left shoulder symptoms did not worsen since this injury, but have remained the same. Petitioner then worked his full duty tasks for Respondent from March 14, 2011 through June 3, 2011.

Petitioner was examined by Dr. Elizabeth Kessler on October 31, 2011. A history was recorded of not having experienced symptoms prior to March 1, 2011 of headaches, neck or shoulder pain. Petitioner reported no prior medical problems.

Petitioner testified on March 1, 2011, he was struck on the head by a falling 2 x 6 while working. That episode is the subject matter of case no. 11 WC 28789, which was consolidated and heard with this matter. On June 3, 2011, Petitioner testified that he strained his right arm while lifting at work, which is the subject matter of case no. 12 WC 03642, which was also consolidated and heard with this matter.

Based upon the above, the Arbitrator finds that on March 14, 2011, Petitioner sustained an accidental injury that arose out of and in the course of his employment by Respondent. Based further upon the above, the Arbitrator finds Petitioner failed to prove that his current left shoulder condition was caused by this accidental injury.

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

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, all claims made by Petitioner for medical expenses in this matter are hereby denied.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "C" and "F" above.

Based upon the above, the Arbitrator finds that all claims made by Petitioner for temporary total disability for this accident are hereby denied.

14IWCC1059

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

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, all claims made by Petitioner for permanent partial disability benefits in this matter are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kenneth Lindsey,

Petitioner,

vs.

NO: 12 WC 3642

14IWCC1060

The Stove Shop,

Respondent.

DECISION AND OPINION ON REVIEW

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

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

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

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

141WCC1060

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: DEC 9 - 2014
TJT:yl
o 12/2/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LINDSEY, KENNETH
Employee/Petitioner

Case# **12WC003642**

11WC035255
11WC028789

THE STOVE SHOP
Employer/Respondent

14IWCC1060

On 2/11/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4707 LAW OFFICE OF CHRIS DOSCOTCH LLC
CASEY MATLOCK
2708 N KNOXVILLE AVE
PEORIA, IL 61603

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
JOHN MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606-3833

14IWCC1060

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

KENNETH LINDSEY,
Employee/Petitioner

v.

THE STOVE SHOP,
Employer/Respondent

Case # 12 WC 03642

Consolidated cases: 11 WC 28789 & 11 WC 35255

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was consolidated with claim no. 11 WC 28789 and 11 WC 35255 and heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Peoria**, on **November 21, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

C. ☐ 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 3, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$21,840.00**; the average weekly wage was **$420.00**.

On the date of accident, Petitioner was **56** 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 **$ 0.00** for TTD, **$ 0.00** for TPD, **$ 0.00** for maintenance, and **$ 0.00** for other benefits, for a total credit of **$ 0.00**.

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

ORDER

Petitioner failed to prove that he sustained an accidental injury arising out of and in the course of his employment with Respondent on June 3, 2011. Petitioner further failed to prove the condition of ill-being complained of is causally related to his work activities performed upon Respondent.

Petitioner further failed to prove that he gave Respondent timely notice of this alleged accident, as defined by the Act.

All claims for compensation and medical expenses made by Petitioner for this alleged injury are thus hereby denied.

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

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

JOANN M. FRATIANNI
Signature of Arbitrator

January 31, 2014
Date

FEB 11 2014

14IWCC1060

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

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

Petitioner testified that on June 3, 2011, he was lifting and strained his right arm.

Voluminous medical evidence was introduced in this matter and in the companion claim nos. 11 WC 28789 and 11 WC 35255. Nothing in that evidence corroborates a right shoulder injury at work.

Based upon the above, the Arbitrator finds that on June 3, 2011, Petitioner failed to prove that he sustained an accidental injury that arose out of and in the course of his employment.

Based further upon the above, the Arbitrator finds that Petitioner failed to prove that a causal relationship exists between the conditions of ill-being complained of and an alleged accident of June 3, 2011.

E. Was timely notice of the accident given to Respondent?

No evidence was presented by Petitioner as to giving Respondent timely notice in this matter. Mr. Wildenradt testified the first notice he received was when he received delivery of the filed Application for Adjustment of Claim in 2012.

Based upon the above, the Arbitrator finds that Petitioner failed to prove that he gave Respondent timely notice of this alleged accident, as defined by the Act.

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

See findings of this Arbitrator in "C" and "F" above.

Based upon the above, all claims made by Petitioner for medical expenses for this matter are hereby denied.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "C" and "F" above.

Based upon the above, all claims made by Petitioner for temporary total disability benefits for this matter are hereby denied.

14IWCC1060

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

See findings of this Arbitrator in "C" and "F" above.

Based upon the above, all claims made by Petitioner for permanent partial disability benefits for this matter are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Branden Schrader,
Petitioner,
vs.
State of Illinois-Big Muddy River Correctional Center,
Respondent,

NO: 10 WC 43101
14IWCC1061

DECISION AND OPINION ON REVIEW

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

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

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

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

DATED: DEC 9 - 2014
MJB/bm
o-12/2/14
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SCHRADER, BRANDEN
Employee/Petitioner

Case# **10WC043101**

14IWCC1061

SOI-BIG MUDDY RIVER CORRECTIONAL CENTER
Employer/Respondent

On 5/8/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.45% 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:

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

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

0558 ASSISTANT ATTORNEY GENERAL
AARON L WIRGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

MAY - 8 2014

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

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
NATURE AND EXTENT ONLY

BRANDEN SCHRADER
Employee/Petitioner

v.

STATE OF ILLINOIS –
BIG MUDDY RIVER CORRECTIONAL CENTER
Employer/Respondent

Case # 10 WC 43101

14IWCC1061

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 **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **March 6, 2014**. By stipulation, the parties agree:

On the date of accident, **October 19, 2010**, 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 **$56,400.00**, and the average weekly wage was **$1,197.92**.

At the time of injury, Petitioner was **39** years of age, ***married*** 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 **$5,991.45** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$5,991.45**.

The parties stipulated to the issuance of a short decision form, and therefore the Arbitrator is issuing a short decision form pursuant to Section 19(b) of the Act as opposed to written findings.

ORDER

Respondent shall pay Petitioner the sum of $669.64/week for a further period of 162.7 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the 15% loss of use of Petitioner's right and left hands (61.5 weeks), and the 20% loss of use of Petitioner's right and left arms (101.2 weeks), as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

05/01/2014
Date

MAY - 8 2014

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))
	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Clint Branon,
Petitioner,

14IWCC1062

vs.
State of Illinois-DuQuoin Impact Incarceration Program,
Respondent,

NO: 10 WC 47717

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 16, 2014, is hereby affirmed and adopted.

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

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

DATED: DEC 9 - 2014
MJB/bm
o-12/2/2014
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

BRANON, CLINT
Employee/Petitioner

Case# **10WC047717**

ST OF IL-DUQUOIN IMPACT INCARCERATION PROGRAM
Employer/Respondent

14IWCC1062

On 6/16/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

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

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

0499 DEPT OF CENTRAL MGMT SERVICES
MGR WORKMENS COMP RISK MGMT
801 S SEVENTH ST 6 MAIN
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

JUN 16 2014

DONALD D. PARGIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC1062

CLINT BRANON
Employee/Petitioner
v.

Case # 10 WC 47717

STATE OF ILLINOIS - DUQUOIN IMPACT INCARCERATION PROGRAM
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 **Edward Lee**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **April 9, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **November 29, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was 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 **$56,599.50**; the average weekly wage was **$1,088.45**.

On the date of accident, Petitioner was **53** 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 **$ANY** under Section 8(j) of the Act.

ORDER

NO BENEFITS AWARDED. CLAIM 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.

Carol Lee
Signature of Arbitrator

6/14/14
Date

ICArbDec19(b)

JUN 16 2014

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC1062

CLINT BRANON
Employer/Petitioner

Case # 10 WC 47717

v.

STATE OF ILLINOIS – DUQUOIN IMPACT INCARCERATION PROGRAM
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner filed an application for adjustment of claim with the Illinois Workers' Compensation Commission. Petitioner alleges that he sustained an injury to his right hand as a result of repetitive duties while working for DuQuoin Impact Incarceration Program (DQIIP). Petitioner has alleged the date of accident as November 29, 2010. This is a repetitive trauma claim where Respondent has disputed accident, causation, notice, medical, and prospective medical.

Petitioner was 53 years old at the time of his alleged accident. He has been employed as a correctional officer with the Illinois Department of Corrections for approximately 20 years, specifically at DQIIP since 1999. Petitioner retired on December 31, 2012.

Prior to seeing Dr. David Brown Petitioner filled out a new patient questionnaire on October 27, 2010. (PX 3) Petitioner noted on the form that he was there for a work related injury, he was involved in litigation related to this problem, and that he was represented by an attorney for this problem. Petitioner listed his job duties at DQIIP as unlocking doors often, driving work vans, etc. Petitioner presented to Dr. Brown on November 29, 2010. Petitioner reported a long history of numbness and tingling in his right hand. Petitioner had a negative Tinel's test over the right cubital tunnel, a negative direct compression test/elbow flexion test on the right, Tinel's and direct compression test induced some discomfort and parasthesias over the right carpal tunnel. The Phalen's test was also negative.

Petitioner underwent a nerve conduction test with Dr. Daniel Phillips on the same date. (PX 4) Dr. Philips reported that the test showed significant moderate sensory motor median neuropathy across the right carpal tunnel. Dr. Brown reviewed the test findings and diagnosed Petitioner with significant right carpal tunnel syndrome. (PX 3) Dr. Brown recommended a wrist splint to

be worn at night and if Petitioner's symptoms failed to improve he advised the next step would be a carpal tunnel release.

Petitioner filled out an employee's notice of injury on December 1, 2010. Under "Detail how the injury occurred" Petitioner wrote "18 years as a correctional officer (turning keys, writing reports, etc.) and 9 years as a support service worker in the Dept. of Mental Health (lifting, writing reports, etc.)" (PX 6)

Petitioner presented to Dr. Steven Young on January 31, 2012. (PX 5) Prior to seeing Dr. Young Petitioner filled out a patient intake questionnaire. Petitioner reported that writing or overuse made his symptoms worse.

When Petitioner saw Dr. Young he reported having numbness and pain in his right hand. (PX 5) He had numbness in the thumb, index finger, and long finger, as well as occasionally in the small finger and ring finger. Petitioner advised that he tried wearing a splint and had a nerve conduction study performed. Dr. Young reviewed Petitioner's previous nerve conduction study and assessed him with right carpal tunnel syndrome. Dr. Young noted he was going to place Petitioner on the surgical schedule for a right carpal tunnel release. Dr. Young also wrote an addendum to the note on January 31, 2012. Dr. Young noted that Petitioner had some right thumb carpometacarpal arthrosis and positive compression grind trapeziometacarpal stress test, pain over the CMC joint. Dr. Young stated he planned to treat that condition conservatively with a thumb spica splint.

Petitioner was examined by Respondent's Section 12 examiner, Dr. James Williams, on October 24, 2012. Dr. Williams testified via deposition on January 8, 2014. (RX 7) Dr. Williams testified that he reviewed medical records, performed a physical exam, and obtained a verbal job description from the Petitioner. Dr. Williams testified that he has toured Pinckneyville Correctional Center, Pontiac Correctional Center, Jacksonville Correctional Center, and Canton Illinois River Valley. Dr. Williams testified that while at Pinckneyville he performed activites of cuffing/uncuffing handcuffs, and key turning small and large keys. Dr. Williams testified that he did not find any of Petitioner's job duties to be repetitive or vibratory. Dr. Williams opined that, based upon a reasonable degree of medical certainty, Petitioner's job activities at DQIIP did not cause or aggravate his right carpal tunnel syndrome or his right CMC joint arthritis. Dr. Williams testified that he did not believe Petitioner's work at Big Muddy Correctional Center, Pontiac Correctional Center, or at Warren G. Murray could have caused or aggravated his right carpal tunnel syndrome or his right CMC joint arthritis. Dr. Williams based his opinion on the fact that it had been at least 10 – 12 years since Petitioner had worked at any of the other facilities, and that was too long a time period for even a latent problem to come about. He testified that a two to three year latency period would be reasonable, but ten years was excessive. Dr. Williams believed Petitioner's carpal tunnel syndrome was related to his hobbies of hunting, riding a motorcycle, and his pre-existing CMC joint arthritis.

Dr. Young testified via deposition on February 11, 2014. (PX 8) Dr. Young testified that he became aware of a work history timeline for Petitioner the week of the deposition. Dr. Young testified that he believed that the work duties Petitioner described doing at Warren G. Murray, Big Muddy Correctional Center, and DQIIP could have caused or contributed to the development

of Petitioner's carpal tunnel symptoms. On cross examination Dr. Young admitted that he did not take a verbal job history from the Petitioner. Dr. Young testified that he believed Petitioner's job duties from 20 years ago could have just now manifested into carpal tunnel syndrome because of a latency period. Dr. Young believed that there was no cut off in a latency period. Dr. Young admitted that he was unaware that correctional officers did not bar rap or use Folger Adams keys at DQIIP until he read Dr. Williams deposition. Dr. Young testified that even if Petitioner did not use Folger Adams keys or cuff inmates his opinion would not change because he believed Petitioner's work activities from 1983 – 1999 contributed to the development of his carpal tunnel syndrome. Dr. Young agreed that riding a motorcycle could contribute to the development of carpal tunnel syndrome.

Petitioner testified that he worked at Warren G. Murray's Children's Center from 1983 until 1992. Petitioner testified that he worked in the kitchen where he scrubbed pots and pans, and also helped prepare food. Petitioner testified that he also worked in the laundry department where he received washed clothes and put them in the dryer. Petitioner testified that after the laundry department he transferred to the clothing department. In the clothing department Petitioner was required to measure recipients and fill out order forms for clothing.

Petitioner testified that in 1992 he transferred to Pontiac Correctional Center where he worked for 3 - 4 months. Petitioner testified that while at Pontiac he used Folgers Adams keys, bar rapped, cuffed and uncuffed inmates, and pulled on doors. Petitioner testified on cross examination that he worked all shifts while at Pontiac, and agreed that some shifts were less labor intensive than others.

Petitioner testified that in February 1993 he began working at Big Muddy Correctional Center where he stayed until late 1999 or early 2000. Petitioner testified that he worked as a wing officer at Big Muddy. Petitioner testified that he experienced symptoms of numbness and tingling and some symptoms at night while working at Big Muddy, however he did not see a doctor and just lived with it.

Petitioner testified on cross examination that Big Muddy opened in 1992 and when he started there in 1993 it was a new state of the art facility. He also testified that during his tenure at Big Muddy the inmates had their own keys, and that the keys used were small keys. Petitioner agreed that since the inmates had their own keys the officers were required to do less keying. Petitioner testified that he did not use Folger Adams keys in the wing house, nor did he bar rap. Petitioner testified that while at Big Muddy he worked day shift and midnight shift. Petitioner testified that on midnight shift he was required to key out approximately 15 – 18 inmate porters at night. Petitioner did agree that he was not required to cuff or uncuff inmates on midnights.

Petitioner transferred to DQIIP in 1999. Petitioner testified that from 1999 – 2012 he worked at DQIIP as a correctional officer. Petitioner testified that during his tenure at DQIIP he worked as a dormitory officer and a work crew officer. Petitioner testified on direct examination that as a correctional officer at DQIIP he would lock and unlock doors, write reports, write demerits and tickets, cuff inmates and take them to Pinckneyville Correctional Center, and restrain inmates. Petitioner also testified that he would supervise the work crew, demonstrate activities to the work crew, and drive a van to the work site.

Petitioner testified on cross examination that there are no Folger Adams keys or bar rapping at DQIIP. Petitioner testified that from 2000 – 2001 he worked the 9:30 pm to 5:30 am shift at DQIIP. Petitioner agreed that while working on this shift he checked doors and patrolled the grounds. He further agreed he would check 1 – 20 doors a night, and that he would check them twice a night at the most.

Petitioner testified on cross examination that from 2001 – 2010 he worked as a dorm officer at DQIIP on the 5:30 am to 1:30 pm shift. Petitioner testified that he would be required to take inmates to chow and shower as a dorm officer, but that the inmates were not cuffed for these activities. Petitioner testified that there are two dorms at DQIIP, a north dorm and a south dorm, and once officer was assigned to each dorm. Petitioner testified that each dorm had five rooms total and that those rooms were always open. Petitioner agreed that the only door you might have to key would be the front door of the dorm with a small key, but that someone in control would typically let them in electronically with a toggle switch.

Petitioner testified on cross examination that from 2011 – 2012 he supervised the work crew from 7:30 am to 3:30 pm. Petitioner admitted that other than occasionally having to demonstrate how to use a tool, he did not do the work himself. Petitioner testified that approximately 60% of the time the work crew was at the DuQuoin State Fairgrounds. He agreed that the fairgrounds are approximately one mile away from DQIIP. Petitioner testified that he would drive the work crew in the van approximately one mile there and then drive the crew one mile back to DQIIP. Petitioner would also drive the van slowly behind the work crew if they moved to different parts of the fairgrounds to work. Petitioner agreed that the inmate work crew was not cuffed when traveling to or from the work site.

Petitioner testified that he would write a maximum of 10 reports per day. Petitioner testified that he would write inmates tickets a couple of times a day, and that each ticket might be 3 – 4 sentences. Petitioner testified that as a dorm officer he was required to keep a logbook, and the logbook consisted of signing in and out and the activities performed prior to leaving the dorm. Petitioner testified that the he also kept a log while on work crew, and that it consisted of the activities performed that day but could be a couple sentences long.

Petitioner testified that the amount of times he was required to cuff inmates to take them to Pinckneyville varied. He testified that at times he took two to three inmates, but that he would not have to take any for a week to 10 days.

Petitioner testified that he would have to physically restrain inmates quite a bit in the dorms, but that he would rarely have to cuff them. Petitioner admitted that a supervisor carried the cuffs and would sometimes cuff the inmates.

Petitioner testified on direct examination that he did not really have any hobbies that required the repetitive use of his hands or arms. Petitioner later testified that he rode motorcycles, but said he did very little riding. Petitioner testified that his motorcycle is a 2004 model that he bought in 2006 with 5,000 miles on it. Petitioner said the same motorcycle recently turned over to 25,000 miles. Petitioner stated that the motorcycle is a 1450 cc Heritage softail. Petitioner admitted on

cross examination that he occasionally used the motorcycle as his mode of transportation. Petitioner testified that the entire time he has ridden a motorcycle he has worn antivibration gloves. Petitioner testified that he started wearing the gloves to help with the pain and numbness he experienced while riding his motorcycle. Petitioner testified that he had done a couple of rides, like the Jerry Kill Cancer Crusade, that were close to 50 miles. Petitioner admitted to telling Dr. Williams that he experienced pain in his hand after riding 40 – 60 miles on his motorcycle.

Petitioner was asked on cross examination if he hunted, Petitioner denied hunting and stated that it had been approximately 10 years since he last hunted. However, Petitioner was asked about Department of Natural Resources records that reflected him harvesting a deer in 2009 and a permit he applied for in 2011 to hunt with a muzzleloader. When asked if he recalled killing a deer in Perry County in 2009 the Petitioner responded by saying, "[i]f you're saying that I did or if it says that I did, then I must have." Petitioner denied hunting with a bow, but admitted to hunting with a muzzleloader. Petitioner stated a muzzleloader uses black powder. Petitioner admitted that in order to load a muzzleloader a bullet had to be tamped down and that it would take about 20 – 30 lbs of force to tamp it down into the gun.

Petitioner testified that he experienced symptoms of numbness and tingling while he was at Big Muddy, but that he also experienced symptoms in 2005 and 2006. Petitioner testified that he did not know at that time that his symptoms were work related. Petitioner testified that he had a nerve conduction study done on October 27, 2010 for his left hand and arm, which was not related to this claim, and Petitioner reported to Dr. Philips he was also having symptoms in his right hand at that time. Petitioner testified that he did not know that his right hand symptoms were work related at that time. However, when asked why he saw his attorney before seeing a doctor for his complaints Petitioner admitted he thought that his symptoms were work related.

Petitioner testified that despite his retirement he still experiences symptoms. He described his symptoms as numbness and pain that he has every day. Petitioner testified that he still rides his motorcycle.

Superintendent Clem Campanella appeared as a witness on behalf of the Respondent and was called by Petitioner's counsel in his case in chief. Supt. Campanella testified that he has been the superintendent at DQIIP since 1999. Supt. Campanella testified that he was the duty warden at Big Muddy when Petitioner was there. Supt. Campanella was asked if Petitioner accurately stated his job duties at Big Muddy. Supt. Campanella testified that he seldom saw officers do door checks. Supt. Campanella also disagreed with Petitioner's testimony about the number of inmates keyed out at night, he thought 15 – 18 was too high and that 5 – 6 was a more accurate number.

On cross examination Supt. Campanella was asked if Petitioner's description of his job duties at DQIIP was accurate. Supt. Campanella felt that his testimony was accurate for the most part, however he took exception to Petitioner's testimony that he wrote several tickets per day. Supt. Campanella testified that was simply not true.

CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
F. Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner failed to prove that his current conditions of ill-being are a result of his work-related duties as a correctional officer at DuQuoin Impact Incarceration Program The job description given to Dr. Young was not an accurate representation of Petitioner's jobs or duties. Dr. Williams' knowledge of the job duties of a correctional officer at DQIIP is more extensive than Dr. Young's and is given more weight. Not only had Dr. Williams reviewed Petitioner's medical records, but he also obtained an accurate job assignment history and accurate description of Petitioner's job duties from the Petitioner before rendering his opinion. The Commission has determined that a claimant fails to prove causation from repetitive trauma when the treating physician testified repetitive motions caused the injuries but failed to detail what repetitive motions the petitioner engaged in and the frequency of the motions. *Gambrel v. Mulay Plastics*, 97 IIC 238. An examination of the record and deposition of Dr. Young clearly shows that any causal opinion is based on flawed information. Dr. Young based his opinion on the assertion that Petitioner turned keys, locked/unlocked doors, and cuffed and uncuffed inmates repeatedly throughout the day. Petitioner did not testify to this at trial. Dr. Young was basing his opinions on flawed information.

D. What was the date of the accident?
E. Was timely notice of the accident given to Respondent?

Under 820 ILCS 305/6(c), an injured employee must give notice to the employer as soon as practical but not later than 45 days after sustaining an accident injury arising from the employment. In repetitive trauma cases, the date of an accidental injury is the date in which the injury manifests itself, meaning the date on which both the fact of the injury and the causal relationship of the injury to the worker's complement would become plainly apparent to a reasonable person. *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 530, 505 N.E.2d 1026, 1029 (1987). A formal diagnosis is not required to determine manifestation date. *Durand v. Industrial Comm'n*, 224 Ill.2d 53, 71, 862 N.E.2d 918, 929 (2006).

In the case at bar, Petitioner clearly testified that while working at Big Muddy and in 2005 – 2006 he began experiencing symptoms of numbness and tingling. Prior to seeing Dr. David Brown Petitioner filled out a new patient questionnaire on October 27, 2010. Petitioner noted on the form that he was there for a work related injury, he was involved in litigation related to this problem, and that he was represented by an attorney for this problem. When asked why he saw his attorney before seeing a doctor for his complaints Petitioner admitted he thought that his symptoms were work related.

The claim is denied. All other issues as to medical and prospective medical are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Teri Mayhugh,
Petitioner,
vs.

NO: 04WC 53754
04WC 53756

Federal Express Corp,
Respondent,

14IWCC1063

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner, herein and notice given to all parties, the Commission, after considering the issues of medical expenses, 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 April 17, 2014, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,165.49. 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: DEC 9 - 2014
MJB/bm
o-12/1/14
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MAYHUGH, TERI
Employee/Petitioner

Case# **04WC053754**

04WC053756

14IWCC1063

FEDERAL EXPRESS CORP
Employer/Respondent

On 4/17/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4111 VANDERGINST LAW PC
JOHN H WESTENSEE
4950 38TH AVE
MOLINE, IL 61265

2912 HANSON & DONAHUE LLC
KURT HANSON
900 WARREN AVE SUITE 2
DOWNERS GROVE, IL 60515

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

TERI MAYHUGH
Employee/Petitioner

v.

FEDERAL EXPRESS CORP.
Employer/Respondent

Case # **04** WC **53754**

Consolidated cases: **04 WC 53756**

14IWCC1063

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Bloomington**, on **3/26/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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 **8/27/02 and 10/23/02**, 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 **$20,632.56**; the average weekly wage was **$396.78**.

On the date of accident, Petitioner was **36 and 37** 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 **$3,438.76** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and $ for other benefits, for a total credit of **$3,438.76.**

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $264.52/week for 13-3/7 weeks, commencing 8/28/02 and extending through 9/12/02 and commencing 10/23/02 and extending through 1/9/03, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 8/27/02 through 1/9/03, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $3,438.76 for temporary total disability benefits that have been paid.

Based upon the original accidents, the Respondent shall pay Petitioner permanent partial disability benefits of $238.07 for 25 weeks, because the injury sustained caused 5% Person As A Whole, as provided in Section 8(d)(2) of the Act.

Based upon the attached Findings of Fact and Conclusions of Law, Petitioner's claim for medical benefits is denied.

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

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

D. Dyl McCarthy

April 14, 2014

APR 17 2014

FINDINGS OF FACT 14IWCC1063

The Petitioner is a 48 year old female with a high school education, who was previously employed by the Respondent as a handler. Her job involved lifting boxes and packages, and loading and unloading delivery trucks.

On August 27, 2002, the Petitioner was in the process of loading a truck, when a box fell on to her head. The Petitioner complained of injuries to her back, neck and shoulder. At arbitration, the Petitioner initially pointed to an injury occurring on the right side of her back, but later testified that she was injured on the left side.

The petitioner initially testified that she immediately sought treatment in the emergency room on that date, but later indicated that she obtained treatment the following day.

The records of Trinity Medical Center reveal that the Petitioner reported for treatment on August 28, 2002. By history, she stated that she was lifting a 75 pound box yesterday at Fed Ex and "pulled my muscles in my shoulder." She denied any direct trauma. She was diagnosed with a left trapezius and deltoid strain. She was referred to Work Fitness for further treatment. (Pet. Ex. 2, Ex. 2 p. 287) The Petitioner was seen at the Work Fitness Center on that same date, August 28, 2002, complaining of a cramp in her left shoulder while loading a plane. She was diagnosed with a left shoulder strain and AC strain. (Pet. Ex. 2, Ex. 2 p. 267)

The Petitioner continued care at the Work Fitness Center, and when seen on September 13, 2002, she reported that she was "entirely pain free." (Pet. Ex. 2, Ex. 2 p. 269) The Petitioner reported that she had completed physical therapy and felt ready to return to regular duties. Her diagnosis was resolved left shoulder strain and left AC strain. The Petitioner was found to have reached maximum medical improvement. (Pet. Ex. 2, Ex. 2 p. 269)

At arbitration, the Petitioner agreed that she returned to full duty work, but testified that she was not fully healed and was still having problems.

The Petitioner was then loading planes on October 23, 2002 when she was strapping a part inside a plane. The Petitioner testified that the part came down, causing herself to twist. She complained of injury again to her neck, shoulder and low back.

The Petitioner was seen at the Work Fitness Center on October 23, 2002, complaining that she was loading a trailer and that she hurt left shoulder and neck. She indicated that she had been discharged from care for her prior left shoulder injury, and "was doing well." Examining physician, Dr. Christine Deignan, noted that when the Petitioner entered the room, the Petitioner was sitting on the table with her head cocked to the left. Diagnosis was cervical strain. (Pet. Ex. 2, Ex. 2 p. 271) X-rays taken on that date were normal. (Pet. Ex. 2, Ex. 2 p. 270) The Petitioner was seen by Dr. Deignan on October 28, 2002 complaining of neck pain, headaches and popping in her shoulder. She

was diagnosed with a cervical strain with torticlolis. (Pet. Ex. 2, Ex. 2 p. 273) It was noted that the Petitioner had missed her last physical therapy appointment and the doctor urged her to obtain that treatment. (Pet. Ex. 2, Ex. 2 p. 273) The parties stipulated that the Petitioner went off work as of that date.

The Petitioner was seen by Dr. Deignan on November 6, 2002, complaining of continued neck pain. She also complained of a persistent headache. Additional complaints included tingling of the left upper extremity into the tips of the fingers. Petitioner was diagnosed with cervical spasm, and Dr. Deignan recommended the petitioner undergo an MRI of the cervical spine. (Pet. Ex. 2, Ex. 2 p. 274) The Petitioner underwent an MRI of the cervical spine on November 22, 2002, which revealed focal central disc bulges, which were minimal at C2-C3, C3-C4, C4-C5 and C5-C6, without evidence for cord compromise. Also noted was normal signal intensity to the spinal cord. (Pet. Ex. 2, Ex. 2 p. 285)

The Petitioner was seen in follow-up by Dr. Deignan on November 25, 2002, still complaining of tingling in the left arm. Dr. Deignan noted that when she entered the room, the Petitioner was sitting with her head in a normal alignment. Dr. Deignan returned to the room, after leaving to obtain the results of the MRI, and the Petitioner was sitting with her neck cocked to the left. Dr. Deignan diagnosed a cervical spasm with degenerative disc, no effacement. (Pet. Ex. 2, Ex. 2 p. 281) Dr. Deignan recommended referral to a pain clinic.

The Petitioner was seen by Dr. Deignan on December 4, 2002, complaining of neck pain and spasm. She also complained of headaches, with photophobia and hypersensitivity of her skin. Dr. Deignan noted that the Petitioner was sitting with her head tilted to the left, but with verbal cuing, she was able to straighten her neck and relax her shoulder. Diagnosis was cervical spasm. (Pet. Ex. 2, Ex. 2 p. 282)

The Petitioner was seen for an independent medical evaluation at the request of the Respondent with Dr. Steven Delheimer on December 10, 2002. At that time, she was complaining of headaches along with left shoulder pain. Dr. Delheimer reviewed the Petitioner's MRI, which he interpreted to show mild degenerative disc disease. He noted there was no evidence of herniated disc. Dr. Delheimer diagnosed a soft tissue injury involving the left shoulder, and indicted that there was no objective basis for a cervical radiculopathy. Dr. Delheimer felt the Petitioner's headaches, associated with photophobia or possibly migraine in type could possibly be stress/tension type headaches. He concluded that the Petitioner had reached maximum medical improvement for her work injuries, and that the Petitioner could return to regular duty without restrictions. (Res. Ex. 1, Ex. #2)

The Petitioner was seen in follow-up by Dr. Deignan on December 30, 2002, at which time the Petitioner complained of difficulty with sleeping, with headaches and tenderness over the left shoulder. Dr. Deignan indicated that the Petitioner was sitting with her midline, but during examination her head tended to tilt toward the left. The Petitioner was noted to be quite guarded and was unwilling to objective shoulder. Dr.

Deignan diagnosed cervical spasm, and continued treatment for pain. (Pet. Ex. 2, Ex. 2 p. 283)

The Petitioner returned to Dr. Deignan on January 10, 2003, complaining of difficulty sleeping and pain in the right shoulder. Diagnosis remained cervical strain. At that point, since it was reported that the insurance company was choosing to go with the IME, and consider the Petitioner at MMI, Dr. Deignan discontinued treatment. (Pet. Ex. 2, Ex. 2 p. 284)

The Petitioner testified that she had previously received regular personal care through the University of Iowa Hospitals and Clinics and she sought treatment on January 14, 2003. The Petitioner was seen for complaints of left shoulder and neck pain. Dr. Gwen Bach, an internist, diagnosed left shoulder pain, left trapezius and cervical muscular spasm, numbness in the fingers of the left hand, muscular tension headaches and elevated blood pressure with a past history of hypertension. (Pet. Ex. 2, Ex. 2 p. 2) X-rays of the left shoulder taken on that date were normal. (Pet. Ex. 2, Ex. 2 p. 3)

The Petitioner then returned to the University of Iowa Clinics on February 26, 2003, reporting that her "pain is better in the left shoulder. However, she reports she cannot go back to work because she is feeling dizzy most of the time. These episodes of dizziness have been there for the past two to three weeks, where the patient reports feeling a floating sensation and a turning sensation that occurs whenever she goes up or down stairs, as well as when she is walking." (Pet. Ex. 2, Ex. 2 p. 4) The Petitioner was diagnosed with uncontrolled hypertension, with the possibility of secondary hypertension. Dr. Bruce Johnson noted that the shoulder pain appeared to be improving. He recommended that she continue range of motion exercises. Dr. Johnson felt that her vertigo was likely secondary to a labyrinthitis. (Pet. Ex. 2, Ex. 5 p. 5)

The Petitioner was seen in follow-up for her high blood pressure on March 31, 2003, and at that time she continued to complain of symptoms of vertigo. The Petitioner reported that she "thinks that she still cannot drive." (Pet. Ex. 2, Ex. 2 p 9) The Petitioner was then diagnosed with uncontrolled hypertension, and vertigo secondary to a labyrinthitis. (Pet. Ex. 2, Ex. 2 p. 10) Also noted was left shoulder pain secondary to a trauma and was noted that the Petitioner appeared to have symptoms of a frozen shoulder. (Pet Ex. 2, Ex. 2 p. 10)

Petitioner continued treatment for her high blood pressure, but was seen for a consultation for her left shoulder on May 6, 2003 with Dr. James Nepola. At that time, the Petitioner complained of continuing left shoulder pain. There continued to be no complaints of headaches or problems with the neck. Dr. Nepola diagnosed shoulder pain, and suggested the Petitioner undergo an MRI of the left shoulder. (Pet. Ex. 2, Ex. 2 p. 13-15)

The Petitioner was seen for an MRI of her left shoulder on July 21, 2003 which revealed mild AC arthropathy and a small subacromial spur, without evidence of a rotator cuff tear. (Pet. Ex. 2, Ex. 2 p. 23)

The Petitioner was seen on February 11, 2004, with Dr. Johnson for follow-up for hypertension and syncopal episodes. By history, the Petitioner stated that she had a history of vertigo for about a year, which had been treated with no improvement. The Petitioner reported that she had not been able to drive since that started and had been discharged from her job. The Petitioner reported that she had syncopal episodes and had fallen about 20 times or more since December. Complained of dizziness with every vertigo episode, but admitted that she does have baseline dizziness that waxes and wanes. The Petitioner was diagnosed with syncopal episodes, likely related to vertigo. (Pet. Ex. 2, Ex. 2 p. 54-55) The Petitioner also continued to complain of left shoulder pain on that date. (Pet. Ex. 2, Ex. 2 p. 56)

The Petitioner was seen on April 21, 2004 for follow-up for hypertension and syncopal episodes. The Petitioner reported that she faints repeatedly. She reported that her symptoms got worse to the point where she was not able to drive anymore and had been discharged from her job at Federal Express. The Petitioner was again diagnosed with syncopal episodes likely related to vertigo. On that date, the Petitioner complained of right-sided, low back pain, but denied any trauma. (Pet. Ex. 2, Ex. 2 p. 57-59) The Petitioner was seen for treatment on June 7, 2004 at the University of Iowa for complaints of urinary frequency. Diagnosis was waning symptoms and mild stress urinary incontinence. (Pet. Ex. 2, Ex. 2 p. 61-62)

The Petitioner was seen on October 13, 2004 with persistent dizziness and vertigo episodes, and complaints of chronic headaches. She also continued to have problems with hypertension. Low back pain was noted at that date and an MRI for a low back was considered. There was no mention of shoulder complaints at that time. (Pet. Ex. 2, Ex. 2 p. 66-68)

The Petitioner was seen for reassessment of hypertension on April 4, 2005 at which time she indicated her activities were basically sedentary and she did minimal walking because "feels too tired." Petitioner also complained of chronic back pain. (Pet. Ex. 2, Ex. 2 p. 89-90)

The Petitioner was seen on June 8, 2005 at the University of Iowa Hospital in follow-up for hypertension, and a complaint of "constant low back pain." She complained of involuntary weight loss secondary to decreased appetite due to pain. The Petitioner was diagnosed with hypertension and chronic pain. (Pet. Ex. 2, Ex. 2 p. 99-100)

Dr. Mulder of the University of Iowa Hospital issued a report dated June 8, 2005 indicating that the Petitioner was not capable of employment due to severe intolerance of activity due to back pain. (Pet. Ex. 2, Ex. 2 p. 101)

The Petitioner continued treatment for hypertension and chronic low back pain, with complaints of shoulder pain no longer documented. The Petitioner was seen on

September 21, 2005, diagnosed with chronic low back pain with new bilateral leg radiation. (Pet. Ex. 2, Ex. 2 p. 111)

The Petitioner was seen on October 24, 2005 for blood pressure and chronic pain issues. At that time, she complained of a new onset of headaches. (Pet. Ex. 2, Ex. 2 p. 113) At that time the Petitioner continued to receive pain medications for her chronic low back pain. (Pet. Ex. 2, Ex. 2 p. 114)

The Petitioner obtained continuing treatment for back pain, and an umbilical hernia, of which was first complained of on December 16, 2005. (Res. Ex. 2, p. 102) At that time, the Petitioner reported that the bellybutton hernia developed in the year 2002, and she thought it occurred at work. (Pet. Ex. 2, Ex. 2 p. 122) The Petitioner underwent an MRI of her lumbar spine on October 12, 2005, which revealed mild degenerative disc disease. (Pet. Ex. 2, Ex. 2 p. 22) Petitioner continued treatment throughout the year of 2006 with Dr. Mulder at the University of Iowa Hospital, mostly for hypertension and chronic pain for low back. A complaint of shoulder pain was only documented once in the records throughout the year of 2006, on August 30, 2006. (Pet. Ex. 2, Ex. 2 p. 153)

The Petitioner was seen on November 20, 2006 with Dr. Mulder, complaining of an onset of bilateral occipital headaches, worsening for the past month. The Petitioner reported that those headaches were not like her previous headaches, since she no longer had any photophobia. Dr. Mulder diagnosed hypertension and headache. The Petitioner then also complained that neck pain, for the first time in a number of years, and was diagnosed with decreased cervical spine range of motion, suggesting a "possible arthritis component." (Pet Ex. 2, Ex. 2 p. 157) Dr. Mulder issued a note dated November 27, 2006, indicating that her neck x-rays revealed degenerative arthritic changes, and basically appeared to be normal. (Pet Ex. 2, Ex. 2 p. 159)

On February 28, 2007 the Petitioner was seen by Dr. Mulder who referred her for an MRI of her neck, although the doctor felt she probably had muscle spasms in her neck. (Pet. Ex. 2, Ex. 2 p. 165) In follow-up, Dr. Mulder issued a report dated March 1, 2007, indicating that the Petitioner had no abnormal spinal cord signals, and felt there was no serious spinal stenosis. He felt there was no evidence of any nerve roots being squeezed or crushed on exam. (Pet. Ex. 2, Ex. 2 p. 168)

The Petitioner then switched physicians at the University of Iowa Hospital and Clinic, and began treating with Dr. David Wiblin in April of 2007. Dr. Wiblin has continued to treat the Petitioner, acting as a personal care physician, since that time, for all her medical conditions, including hypertension and occasional neck and low back pain. He has provider pain medication prescriptions for the Petitioner's complaints of chronic pain. A note from Dr. Wiblin from April 26, 2010 states the Petitioner was seen in follow-up for a cholecystectomy, listed no less than 14 diagnoses including cervicalgia and lumbago, and headaches, but no indication of left shoulder complaints.

Dr. Wiblin issued a handicap parking garage application for the Petitioner on September 15, 2002 based upon a diagnosis of back pain. (Pet. Ex. 2, p. 221)

The Petitioner was seen for an independent medical evaluation at the request of her attorney, with Dr. Robert Milas, on October 2, 2012. The deposition of Dr. Milas was taken on January 8, 2013, at which time Dr. Milas diagnosed a cervical radiculopathy, secondary to a herniated cervical disc at the C5-C6 level, and thoracic radiculopathy, secondary to a herniated thoracic disc at the T11-T12 level, and derangement of the left shoulder. Dr. Milas felt that the Petitioner's accident of August 27, 2002 is a direct cause of her condition of ill-being. He felt that her accident of October 23, 2002 aggravated the pre-existing injury. Dr. Milas felt the Petitioner had a permanent inability to return to the type of work she performed with the Respondent. Dr. Milas indicated that his opinion on causation was based in great part on the history that the Petitioner provided, and agreed that he was not sure as to the specific history of the accident, in terms of mechanics, and assumed that when the Petitioner was loading objects, she was using her arms and twisting. (Pet. Ex. 2, p. 28) Dr. Milas agreed that the Petitioner's conditions were never severe enough to the point where any doctor recommended surgery. Ultimately, Dr. Milas agreed that the Petitioner was likely capable of doing sedentary work. (Pet. Ex. 2, p. 48)

The Petitioner was seen for a follow-up IME with Dr. Steven Delheimer on February 22, 2012. The Petitioner had chronic complaints of pain involving the neck area, bilateral shoulders, mid and low back and headaches. Dr. Delheimer indicated on examination that loss of motion of her left shoulder resulted in a frozen partial left shoulder. Dr. Delheimer concluded that the Petitioner had recovered from her 2002 soft tissue injuries, and additional, updated medical information and updated examination did not change his opinion. Dr. Delheimer indicated that the only objective finding on the Petitioner's examination was a loss of passive motion of the shoulder, for which he indicted a general term partial frozen shoulder was a result of that loss of motion. Since that was not evident at the time of his initial examination in December 2002, he could not causally relate that condition to her prior injuries. (Res. Ex. 1, Ex. #3)

Dr. Delheimer further indicated that there was no causal relationship between the Petitioner's blood pressure readings and her work injuries as her condition had pre-dated her occupational injuries. (Res. Ex. 1, Ex. #3)

Dr. Delheimer noted that her low back pain was not documented until 2004 and thus he found no causal relationship. Dr. Delheimer also concluded that the Petitioner's complaints of headaches were not related to her work claim from 2002 since the nature of the headaches had changed from possible migraine type headaches, to stress/tension-related headaches. (Res. Ex. 1, Ex. #3)

Dr. Delheimer felt the Petitioner was capable of working without restrictions regardless of causation issues. (Res. Ex. 1, Ex. 3)

The parties stipulated that the Petitioner was temporarily totally disabled as a result of her October23, 2002 accident from 10/23/2002 through 1/9/2003, a period of 11 1/7 weeks. (Arb. Ex. 3)

The evidence deposition of Dr. Delheimer was taken on March 27, 2013. Dr. Delheimer testified consistent with his reports, and indicating that his opinions had not changed on the basis that the Petitioner did not have any objective findings in support of her subjective complaints. (Res. Ex. 1) Dr. Delheimer indicated that the only objective findings were a partially frozen left shoulder, along with excessive pain manifestations. (Res. Ex. 1, p. 19) Dr. Delheimer indicated that he found evidence of symptom magnification on the examination. (Res. Ex. 1, p. 19) He could not relate any of her claimed conditions to her original work accidents on the basis that she had multiple subjective complaints but no real objective findings. Dr. Delheimer indicated that he could not relate the partially frozen shoulder since it was not present on the first examination, and he did not know why it developed "other than she probably did not use the arm normally." (Res. Ex. 1, p. 21) Dr. Delheimer confirmed in the course of her examination that a person could develop a frozen shoulder if not using the extremity. (Res. Ex. 1, p. 32)

Dr. Delheimer also indicated that a frozen shoulder may take several months to develop, but that even if the Petitioner did not have a frozen shoulder at the time of his first examination, she would have had more significant symptoms findings upon examination to support the subsequent development of a frozen shoulder. (Res. Ex. 1, p. 41)

The evidence deposition of Dr. R. Todd Wiblin was taken on November 25, 2013. With regard to her neck pain and causation, Dr. Wiblin indicated that it being so many years out from the injury that it was "hard to do with a total degree of cause and effect certainty." (Pet. Ex. 12, p. 11) During his deposition, Dr. Wiblin indicated that pain can worsen blood pressure, and that he could "even say there is probably a relationship" with her blood pressure and her pain complaints. (Pet. Ex. 4, p. 15) But Dr. Wiblin agreed during his deposition, and with his report dated September 19, 2013, indicating that he could not say with certainty how severe her blood pressure and headache problems would be today if she had not been injured. (Pet. Ex. 4, Dep. Ex. 1; Pet. Ex. 4, p. 34) Dr. Wiblin agreed that her blood pressure condition could have progressed absent any injury and could be the same. (Pet. Ex. 4, p. 34)

Dr. Wiblin also agreed that since he began seeing her in 2007 and that he has not specifically documented any pain complaints regarding the Petitioner's shoulders. (Pet. Ex. 4, p. 21) Dr. Wiblin agreed that the Petitioner's low back conditions do not appear to be related to the Petitioner's alleged accidents. (Pet. Ex. 4, p 21)

Dr. Richard J. Carroll, a board certified cardiologist, issued a report following a records review for the case, dated November 10, 2013, indicating that the Petitioner has a history of chronic hypertension predating her injury. Dr. Carroll indicated, to a reasonable degree of medical and scientific certainty, that the Petitioner's hypertension was not caused, contributed or aggravated by her subjective complaints of chronic pain. This opinion was based upon his review of the medical records and agreement of how the hypertension treatment was approached by her treating physicians. Dr. Carroll noted that

the Petitioner's records indicate that the Petitioner's condition was coded as essential hypertension, and never secondary to chronic pain. (Res. Ex. 2)

The Petitioner admitted at arbitration that she had prior problems with high blood pressure and headaches prior to the injuries, although she testified that her prior headaches were not as severe, despite the fact that she did seek medical treatment for them.

At arbitration, the Petitioner testified that she had quit smoking, but in his evidence deposition Dr. Wiblin indicated that he had continuously recommended smoking cessation, but that she had never quit smoking. (Pet. Ex. 4, p. 35) Dr. Wiblin agreed that smoking can continue to worsen blood pressure. (Pet. Ex. 4, p. 36)

At present, the Petitioner complained of generalized chronic pain, and an inability to walk due to dizziness and vertigo. The Petitioner testified that she has never attempted to return to work in any capacity since 2002.

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 as follows:

The Arbitrator finds that the Petitioner failed to prove a causal connection between her current alleged medical condition and her accidents of August 27, 2002 and October 23, 2002.

Specifically, the Arbitrator finds that the accident of August 27, 2002 resulted in injury to the Petitioner's left shoulder only, based upon the initial treating medical records from Trinity Hospital and the Work Fitness Center which documents left shoulder strain and no injuries to the neck or lower back as alleged by Petitioner. The Petitioner reached maximum medical improvement with the left shoulder injury on September 13, 2002, at which time the Petitioner reported that she was entirely pain free and was allowed to return to full duty work without restriction, which she did. The medical records of the Work Fitness Center reveal that the Petitioner reported that she returned to work and was doing well until her second reported accident of October 23, 2002.

The Arbitrator rejects the opinion of Dr. Milas who found that the Petitioner sustained injuries to her left shoulder, neck, thoracic spine as a result of her accident of August 27, 2002, as his opinion is entirely predicated upon an inaccurate history of injury and history of the conditions since the original accidents as provided by the Petitioner.

The Arbitrator finds that the Petitioner's reported accident of October 23, 2002 resulted in soft tissue injuries involving the neck and the Petitioner's left shoulder. The Arbitrator notes that after that accident, the Petitioner's diagnosis with the Work Fitness Center focused upon neck complaints and no diagnosis was even documented thereafter of the left shoulder injury. Further, when the Petitioner was seen at the Work Fitness Center by Dr. Deignan on November 6, 2002 and November 14, 2002, Petitioner voiced no complaints involving her left shoulder.

When the Petitioner was examined by Dr. Delheimer on December 10, 2002, he found evidence of a resolved soft tissue injury involving the Petitioner's left shoulder.

While the Arbitrator notes that the Petitioner continued complaints of left shoulder pain throughout the year of 2003, and into 2004, and was sporadically diagnosed with a frozen left shoulder, diagnostic tests including MRI of the shoulder from July 2003 were essentially normal and no additional surgery or treatment was undertaken except for recommendations for physical therapy for the left shoulder. There is no indication the Petitioner obtained any physical therapy, but at arbitration the Petitioner agreed that she has was never denied any medical treatment.

While Dr. Milas and Dr. Delheimer both found evidence of partially frozen shoulder upon examination in 2012, the Arbitrator finds it significant that diagnosis was subjective in nature and can be caused by self-limitation and non-use of the arm. The Arbitrator notes that as early as November of 2002, Dr. Deignan documented inconsistent

behavior with pain complaints by the Petitioner upon examination. Further, the Arbitrator finds it most significant that while the Petitioner complained of ongoing difficulties with her left shoulder at arbitration, the medical records of Dr. Wiblin and the University of Iowa Clinic reflect no treatment or diagnosis involving the left shoulder since 2005, and Dr. Wiblin indicated in his evidence deposition that he has treated the Petitioner on a regular basis since 2007, over the last seven years preceding arbitration, and has never documented left shoulder complaints.

The Arbitrator finds that the Petitioner sustained a soft tissue neck injury as result of her accident of October 23, 2002. Following that accident, the Petitioner's MRI from November 2002 was essentially normal without pathology, and after the Petitioner's examination at the University of Iowa Clinic on January 14, 2003, the Petitioner voiced no complaints involving neck pain until the year of 2006 with repeat MRIs of the cervical spine in 2007 and 2009 which showed progressive arthritis in the Petitioner's neck. Dr. Delheimer found no causation between those findings and the Petitioner's reported work accident, and Dr. Wiblin testified that he could not state with any certainty, this many years out, whether the Petitioner's reported accidents caused or contributed to that condition. Again, the opinion of Dr. Milas on this issue is predicated upon an inaccurate history by the Petitioner and an assumption that the Petitioner has had continuing neck complaints since the time of the injury, which is not reflected in the treating medical records.

The Arbitrator finds that the Petitioner did not sustain a low back injury on either August 27, 2002 or October 23, 2002, based upon the absence of any low back complaints in the treating medical records until the year of 2004. Dr. Milas, Dr. Delheimer or Dr. Wiblin found causation with any low back complaints. The Arbitrator does note that the Petitioner's complaints of low back pain were her primary cause of disability beginning in 2004 and onward as evidenced by the reports of Dr. Mulder from 2006 which found the Petitioner disabled from working due to chronic low back pain.

The Arbitrator finds no causation between the Petitioner's complaints of headaches, or issues with her high blood pressure, as both conditions admittedly pre-existing the Petitioner's dates of accident, and there was no medical opinion providing supporting causation on the issue. Dr. Wiblin testified that he could not state with certainty whether the headaches or high blood pressure would have been different with or without the accident. Dr. Milas offered no opinion on the issue, but Dr. Delheimer found no causation. Dr. Carroll, a board certified cardiologist, found no evidence of causation based upon his review of the treating medical records.

There is no indication or claim that the Petitioner's complaints of dizziness or vertigo, which were the primary cause of her disability beginning in the year 2003, and caused her inability to return to work, are in any way related to her work injuries.

The Arbitrator finds that based upon the Petitioner's current complaints, her primary disability, if any, stems from issues with her high blood pressure, dizziness and vertigo with only generalized complaints of chronic pain. The Petitioner testified at

arbitration that she had difficulty performing activities of walking due to issues of dizziness and vertigo. The Petitioner complained of generalized chronic pain, feeling miserable, but was vague and unable to specify problems with any disability other than her claim of issues involving her left shoulder, which the Arbitrator finds as not being related to her original accidents.

Further, the majority of the chronic pain involved the Petitioner's neck and low back, of which the current and ongoing conditions are unrelated to her claims.

In support of the Arbitrator's decision relating to (J) Were the medical services that were provided to Petitioner reasonable and necessary?, the Arbitrator finds as follows:

Having found that the Petitioner's treatment beyond 2002 was not causally related to the Petitioner's work accident, payment of medical charges are herein denied. The Arbitrator notes that a significant portion of the medical bills submitted at arbitration were in the form of statements of payment previously made by the Illinois Department of Public Aid, or Medicare, and without the proper bills being submitted, a fee schedule amount could not be applied regardless.

In support of the Arbitrator's decision relating to (L) What is the nature and extent of the injury?, the Arbitrator finds as follows:

The Arbitrator finds that the Petitioner sustained a 5% loss of use of the person as a whole, based upon her diagnosis of a shoulder strain as a result of the accident of August 27, 2002, and an aggravation of that shoulder injury occurring on October 23, 2002, and a neck strain occurring on October 23, 2002, resulting in subjective complaints without objective findings, which had reached maximum medical improvement by December 30, 2002.

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

Jeremiah Liebendorfer,
Petitioner,
vs.

NO: 11WC 47770

City of Bloomington,
Respondent,

14IWCC1064

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent, herein and notice given to all parties, the Commission, after considering the issue of nature and extent, 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 23, 2014, is hereby affirmed and adopted.

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

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

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: DEC 9 - 2014
MJB/bm
o-12/1/14
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

LIEBENDORFER, JEREMIAH
Employee/Petitioner

Case# **11WC047770**

CITY OF BLOOMINGTON
Employer/Respondent

14IWCC1064

On 4/23/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

RUSIN MACIOROWSKI & FRIEDMAN LTD
MARK COSIMINI
2506 GALEN DR SUITE 108
CHAMPAIGN, IL 61821

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
NATURE AND EXTENT ONLY

Jeremiah Liebendorfer
Employee/Petitioner

Case # **11** WC **47770**

v.

City Of Bloomington
Employer/Respondent

14IWCC1064

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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Bloomington**, on **January 30, 2014**. By stipulation, the parties agree:

On the date of accident, **October 16, 2011**, 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 **$71,218.16**, and the average weekly wage was **$1,369.58**.

At the time of injury, Petitioner was **37** years of age, ***married*** with **1** dependent child.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of **$36,522.00** for Temporary Total Disability.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$695.78**/week for a further period of **50** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **a 10% disability to the Petitioner's whole person**.

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.

Arbitrator Anthony C. Erbacci

April 10, 2014
Date

APR 23 2014

14IWCC1064

FACTS:

The Petitioner sustained undisputed accidental injuries arising out of and in the course of his employment as a patrol officer with the Respondent on October 16, 2011. The Petitioner testified that he was placing a suspect into custody when the suspect resisted and a struggle ensued. The suspect was placed in handcuffs and lifted to his feet but he continued to resist and he pulled the Petitioner to the ground causing injury to the Petitioner's right arm and shoulder. The Petitioner testified that he is right hand dominant.

The Petitioner sought treatment that day at the emergency room and he then followed up at St. Joseph Occupational Medical Center. The Petitioner then saw Dr. Robert Seidl, an orthopedic surgeon, and underwent an MRI which was reported to reveal a suspected avulsion detachment of the anterior/superior glenoid labrum. The Petitioner was then administered an injection, which reportedly provided no relief. On February 1, 2012, the Petitioner underwent a diagnostic arthroscopy with subacromial decompression and bursectomy, debridement of a partial thickness rotator cuff tear and debridement of a type I SLAP lesion. The Petitioner underwent a post operative course of physical therapy and received three more injections to his shoulder.

On June 19, 2012, Dr. Seidl noted that the Petitioner's range of motion and strength were improving and he had less impingement. The focus of the Petitioner's treatment with Dr. Seidl then shifted to the Petitioner's right knee which had been injured in an unrelated accident. On July 20, 2012, Dr. Seidl released the Petitioner to return to light duty work and on January 7, 2013, Dr. Seidl released the Petitioner to return to unrestricted work as of January 5, 2013.

The Petitioner testified that he currently continues to experience a loss of strength and stamina in his right arm and shoulder as well as a loss of range of motion. The Petitioner testified that he also continues to experience clicking, popping, catching, and pain. He testified that he experiences difficulty with drawing his duty weapon in the proper manner as well as difficulty with driving, lifting, and throwing. The Petitioner acknowledged that he has not made any complaints or reported any difficulties regarding his left arm or shoulder to his supervisor, and he testified that he felt he was capable of performing all of the duties of his job as a patrol officer.

The Respondent introduced into the record an Impairment Rating report prepared by Dr. Dru Hauter on December 5, 2013. Dr. Hauter noted that the Petitioner did have a right shoulder labral tear which was repaired and that the Petitioner was at maximum medical improvement with regard to his right shoulder. Dr. Hauter calculated the Petitioner's impairment to be 4% of the upper extremity which converted to 2% whole person impairment.

The sole disputed issue in this matter is the nature and extent of the Petitioner's injury.

14IWCC1064

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to the nature and extent of the injury, the Arbitrator finds and concludes as follows:

The Petitioner's accident occurred after September 1, 2011. Therefore, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The level of impairment reported by a physician licensed to practice medicine in all of its branches which includes an evaluation of medically defined and professionally appropriate measurements of impairment that establish the nature and extent of the impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment.

* the occupation of the injured employee:

* the age of the employee at the time of the injury;

* the employee's future earning capacity; and

* evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability and the relevance and the weight of any factors used in addition to the level of impairment as reported by the physician must be explained.

In the instant case, the Petitioner suffered an avulsion detachment of the anterior/superior glenoid labrum and he underwent a diagnostic arthroscopy with subacromial decompression and bursectomy, debridement of a partial thickness rotator cuff tear and debridement of a type I SLAP lesion.

With regard to the reported level of impairment pursuant to Section 8.1(b), the level of impairment reported by Dr. Dru Hauter pursuant to the American Medical Association's Guides to Evaluation of Permanent Impairment, 6th Edition, is 4% of the upper extremity which is converted to 2% whole person impairment. The Arbitrator notes that impairment does not equate to permanent partial disability under the Workers' Compensation Act.

With regard to the occupation of the injured employee, the Petitioner's occupation is that of a patrol officer, which the Arbitrator notes can require the use of a great deal of physical strength in a sudden and unpredictable manner. The Arbitrator concludes that the Petitioner's ability to perform the duties of his employment will be more adversely affected by his permanent partial disability than would the ability of an individual who performs lighter work. Thus, the Arbitrator concludes that the Petitioner has sustained a greater amount of

permanent partial disability than an individual who performs lighter work. The Arbitrator finds this factor to be particularly relevant and significant in determining the level of permanent partial disability sustained by this Petitioner.

With regard to the age of the employee at the time of injury, the Petitioner's age at the time of injury was 37 years old. The Arbitrator considers the Petitioner to be a younger individual and concludes that the Petitioner's permanent partial disability will be more extensive than that of an older individual because he will have to live with the permanent partial disability longer.

With regards to the employee's future earning capacity, the Arbitrator notes that the Petitioner's future earning capacity does not appear to be significantly diminished because he has been released to return to work with no restrictions. While the Petitioner testified that he has some difficulty working as a patrol officer due to his current condition, the Petitioner testified that he was capable of performing all of the duties of his job as a patrol officer.

With regard to the evidence of disability corroborated by the treating medical records, the Petitioner credibly testified that he currently experiences a loss of strength and stamina in his right arm and shoulder as well as a loss of range of motion. The Petitioner testified that he also continues to experience clicking, popping, catching, and pain. These complaints are corroborated in the medical records of Dr. Seidl as well as Dr. Nord, who examined the Petitioner at the request of his attorney. The Petitioner's complaints as supported by the medical records, evidences a disability as indicated by Commission decisions regarded as precedent pursuant to Section 19(e).

The determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 10% disability to his whole person.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NOEMI DAMASO,

14IWCC1065

Petitioner,

vs.

NO: 13 WC 1414

TGI FRIDAY'S,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §§8(a) and 19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, total temporary disability, and whether Petitioner exceeded her choice of physicians 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 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).

Findings of Fact and Conclusions of Law

1. Petitioner testified through an interpreter on December 21, 2012, she was working for Respondent as a line cook sautéing food. On that date a line cook "on the side" pushed her manager, Johnny, causing his body to come into contact with her. Petitioner struck the food preparation table on the left side by her ribs and then her neck and back. Petitioner felt pain all through her left side, from her lower back to her neck.

14IWCC1065

2. The accident occurred toward the end of the work day. Petitioner was able to complete her shift. Petitioner went to the emergency room the next day and began treating at Phoenix Medical Associates on December 26, 2012. There she was told to return to the emergency room due to her pain. She returned to an emergency room and on January 3, 2013, she began treating at La Clinica, where she still treats. Petitioner was taken off work since she first went to Phoenix.

3. Petitioner has had physical therapy at La Clinica, which has helped reduce her pain. She has also had two injections in the base of her neck, which also helped reduce her pain. Nevertheless, the treatment has not completely resolved her pain and she still had pain on the day of arbitration. Petitioner testified she had never previously had any medical treatment for neck, back, or left-sided pain.

4. On cross examination, Petitioner testified she initially went to Swedish Covenant Hospital the day after the accident; they told her to take a couple of days off. She then went to Phoenix Associates on December 26, 2012 and then went to Illinois Masonic that same day. Petitioner denied that there she was told to return to work without restrictions and if their notes indicated otherwise they would be incorrect. She could not recall whether Illinois Masonic referred her to Phoenix. She did not recall whether Phoenix and La Clinica were in the same building. She could not remember whether on December 28, 2012, Phoenix released her to work as of January 2, 2013.

5. Petitioner denied that she was released to work on January 24, 2013 by La Clinica, "it depended on how much [she] was getting better." She then agreed that the work status note indicated she could return to work without restrictions on January 24, 2013. However she did not return to work.

6. Petitioner testified she saw her chiropractor in February for pain in her back, and left side. Her neck was still bothering her and she had pain going down her left leg. On February 22, 2013, she was given a girdle "to kind of hold [her] up." It was prescribed by La Clinica. She still uses it when she walks a lot. She did not know whether the girdle cost $4,000, but it could have.

7. Johnny Graves testified he is currently employed by Respondent as bar manager. On December 21, 2012, he worked for Respondent as kitchen manager. He was Petitioner's supervisor at that time. Another line cook was turning to put a steak on a plate and bumped into him. He then bumped into Petitioner. It was "not a big move."

8. Initially, Petitioner indicated she was okay, but towards the end of her shift she said that she had some pain. The witness was not injured and the other line cook did not fill out an accident report.

9. The medical records indicate that in March of 2007, Petitioner presented twice to the emergency room at Swedish Covenant Hospital complaining principally of abdominal and or chest pain.

10. On December 22, 2012, Petitioner again presented to the emergency room at Swedish Covenant Hospital with multiple complaints most notably abdominal and chest pain. She also had some pain in her flank, back, and arm. The pain was rated as 5/10. The pain worsened after eating. She had not taken pain medication. Petitioner reported getting pushed into the corner of a table at work and hitting hard on the left side ribs.

11. The emergency room records indicate there was no swelling, redness, or abrasion. X-rays of the ribs were interpreted as normal. Rib contusion was the diagnosis. She was prescribed Famotidine and Naproxen and advised to follow up with general practitioner in a day or two. She was given a note indicating she should be excused from work for two days.

12. On December 26, 2013, Petitioner presented to Phoenix Medical Associates. She was referred to an emergency room due to abdominal pain. Petitioner presented to the emergency room at Illinois Masonic Hospital. The emergency room report indicated Petitioner presented complaining of low back pain which began five days ago. They noted she could return to work on December 28, 2012.

13. On December 28, 2012, a doctor at Phoenix Medical Associates issued an open letter indicating that Petitioner was under his care on December 26, 2012 and she could return to work on January 2, 2013. However, physician comments indicate she cannot return to work until she was pain free.

14. On January 2, 2013, Petitioner presented at La Clinica. She reported working on the line in a kitchen and was pushed by a coworker and "her body slammed in the corner of metal table" which dug into her left side. She complained of 7-10/10 and her pain diagram showed pain in the left side of her neck, left shoulder, left wrist, low back, and left leg.

15. On January 3, 2013, a sonogram of the abdomen was unremarkable except for increased echogenicity of the liver parenchyma suggesting fatty change. Petitioner was taken off work until January 9, 2013. On January 10, 2013, Petitioner was released to work as of January 24, 2013, but on January 21, 2013, Petitioner was taken off work for two weeks.

16. On January 14, 2013, Petitioner began physical therapy at La Clinica as prescribed by Dr. Jao for diagnoses of "cervical disc syndrome, lumbar facet syndrome, and left rib contusion."

17. A cervical CT taken at La Clinica on January 24, 2013 showed a 1 mm posterior central disc bulge at C4-5 with associated central canal narrowing and straightening of the cervical lordosis.

18. On January 28, 2013, Dr. Jao prescribed a TENS unit for lumbar sprain/strain. CTs of the abdomen and pelvis taken on January 30, 2013 were unremarkable, and an EMG/NCV taken on February 8, 2013 showed evidence of left-sided cervical radiculopathy at C-6.

19. On April 1, 2013, Dr. Jao released Petitioner to restricted work as of April 15, 2013.

20. On April 17, 2013, Dr. Jao noted Petitioner's symptoms improved after approximately 27 physical therapy/chiropractic sessions and "especially after her first injection," of which there appears to be no record. He also noted Petitioner was not allowed back to light duty work. She would stay off work another month and try another injection and Dr. Jao decreased the frequency of her visits to once a week.

The Commission concludes that the Petitioner did not sustain her burden of proving that her alleged condition of ill-being related of her lumbar or cervical spine are causally related to her accident on December 21, 2012. There is not such medical opinion of such causation in the record. The medical records indicate the work accident but they do not specifically relate her back/neck conditions to that accident. The records of La Clinica are not helpful in any determination of causation. There does not really appear to be any specific diagnosis except for the vague notation by Dr. Jao that she had cervical disc syndrome, lumbar facet syndrome, and left rib contusion. In fact the records of La Clinica are virtually devoid of any treatment notes except for some limited physical therapy entries.

In addition, Petitioner did not establish the mechanism of injury to explain how the accident caused her lumbar or cervical condition. According to the testimony of Mr. Graves, the accident was not particularly traumatic and Petitioner did not complain of pain immediately thereafter. It simply does appear intuitively logical that a relatively minor blow to one's ribs would cause significant long-lasting lumbar pain and a cervical bulge causing radiculopathy, especially in the absence of any corroborating medical testimony. The records of La Clinica, incomplete as they are, indicate that Petitioner was treated there for her neck and back complaints. Because the Commission finds that Petitioner has not proved those conditions were causally related to her accident, the Commission vacates the award of medical bill incurred from the treatment provided by La Clinica.

The Arbitrator awarded total temporary disability benefits in accordance with off-work notes from La Clinica. Those notes were based on Petitioner's back and neck complaints. Because the Commission found those conditions were not related to her work accident, the

14IWCC1065

Commission terminates total temporary disability benefits from the date she was released to work by Phoenix Medical Associates for her rib condition, January 2, 2013, 1&2/7 weeks.

Respondent alleges that Petitioner's decision to seek treatment from La Clinica exceeded her choice of physicians; however, the finding that treatment by La Clinica was not causally connected to this accident renders this issue moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $330.00 per week for a period of 1&2/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical expenses incurred from the treatment provided by Swedish Covenant Hospital, Illinois Masonic Hospital, and Phoenix Medical Associates pursuant to §8(a), and subject to the appropriate medical fee schedule pursuant to §8.2, of the Act.

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

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

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

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

DATED: DEC 10 2014

Ruth W. White

Daniel R. Donohoo

Charles J. DeVriendt

RWW/dw
O-10/21/14
46

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

14IWCC1065

DANASO, NOEMI
Employee/Petitioner

Case# **13WC001414**

TGI FRIDAY'S
Employer/Respondent

On 1/3/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

2999 LITCHFIELD CAVO LLP
ROBERT LAMMIE
303 W MADISON ST SUITE 300
CHICAGO, IL 60606-3309

14IWCC1065

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)

Noemi Damaso
Employee/Petitioner

v.

TGI Friday's
Employer/Respondent

Case # 13 WC 01414

Consolidated cases: ___

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **June 24, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **December 21, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$18,980.00**; the average weekly wage was **$365.00**.

On the date of accident, Petitioner was **31** 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 **$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

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$330.00**/week for **15-6/7** weeks, commencing **12/22/12** through **12/24/12** and from **12/26/12** through **2/25/13** and from **4/1/13** through **4/15/13** and from **4/17/13** through **5/17/13**, as provided in Section 8(b) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services of **$32,185.96** as provided in Section 8(a) and subject to Section 8.2 of the Act.

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

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

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

Signature of Arbitrator

December 31, 2013
Date

ICArbDec19(b)

JAN 3 - 2014

STATEMENT OF FACTS

The Petitioner, Noemi Damaso (hereinafter referred to as "the Petitioner") works for the Respondent, TGI Friday's (hereinafter referred to as "the Respondent") as a cook. On the date of accident, the Petitioner was a 31-year-old single mother of four children under 18. This Spanish-speaking Petitioner testified via an interpreter.

The Petitioner's past medical history is significant for an infectious disease on April 15, 2005, in which she experienced an acute headache, joint pain, pressure in eyes and neck, photophobia and pins and needles sensation in her joints. A differential diagnosis of meningitis was made. After a course of antibiotics, the Petitioner's condition resolved. (Pet. Ex. #2)

On December 13, 2006, the Petitioner presented at Swedish Covenant Hospital with complaints of abdominal pain, as well as pain in her chest, head and eyes. She underwent a CT scan of the head, without contrast, and received an injection of Toradol. (Pet. Ex. #2)

In March 2007, the Petitioner was treated at Swedish Covenant Hospital for pain in the left upper quadrant of her abdomen and mid-chest pain. She described the pain as burning, post-meals. She was diagnosed with an ulcer. (Pet. Ex. #2)

It is undisputed that on December 21, 2012, the Petitioner was pushed into a sauté table at work. She testified that on the date of the injury, her manager, Johnny, was speaking with a cook, Juan Carlos, near where she was working. She did not see what happened between Johnny and Juan Carlos, but soon thereafter Johnny fell into the Petitioner after Juan Carlos made contact with Johnny. As a result, the Petitioner fell against the table. It was like a chain reaction. The Petitioner testified that the left side of her ribs struck the table, and she then felt pain in her left side, ribs, back, and neck.

The Respondent offered into evidence a group exhibit that consists of photographs of the workplace. (Resp. Ex. 1A-1D) The Petitioner did not object to the admission of such photos. Respondent's Exhibits 1C and 1D shows the table which the Petitioner struck. Such table is 36 inches, or three feet in height. The La Clinica February 8, 2013 EMG report appears to be the only medical record that reflects the Petitioner's height and weight. The EMG report indicates that the Petitioner's height is 105 cm. and her weight is 152 lbs. (Pet. Ex. 3) The Arbitrator takes judicial notice that there are 2.54 centimeters in an inch. The La Clinica height measurement is surely incorrect as 105 cm. divided by 2.54 = 41.33 inches divided by 12 inches = 3 ft. 5 in. The Arbitrator remembers the Petitioner and from personal observation at the arbitration hearing, knows that she was taller than 3 ft. 5 inches.

The Petitioner testified that the incident happened at the end of the workday and she completed her shift.

The Petitioner testified that she went to the Emergency Room on December 22, 2012, which was the following day the accident. (Pet. Ex. #2)

The Swedish Covenant Hospital ER records indicate that the Petitioner arrived at 7:58 P.M. Her reason for the visit was "ABDOMINAL PAIN." (Pet. Ex. #2) At 9:44 P.M., Heidi Ulreich, R.N. took the following notes:

> "RECEIVED PT TO ROOM FOR EVALUATION OF ABDOMINAL PAIN. PER PT, WAS ACCIDENTALLY PUSHED INTO A CORNER OF A DESK AND SINCE THEN HAS HAD LT SIDED ABDOMINAL PAIN. DENIES N/V/D OR DYSURIA. STATES PAIN INCREASED AFTER EATING. NO MEDICATIONS TAKEN AT HOME. NO TRAUMA NOTED TO ABDOMEN."
>
> (Pet. Ex. #2)

At 8:00 P.M., Erin Lane, R.N., entered the following note:

"PT WAS HIT WITH THE CORNER OF A TABLE AT WORK HARD, AND NOW WITH PAIN TO LEFT ABDOMEN, FLANK BACK AND ARM. PT DID NOT TAKE ANY MEDICINE FOR THE PAIN AT HOME. PT DENIES ANY URINARY OR BOWEL ISSUES. NO ECCYMOSIS NOTED TO AREA. ABDOMEN SOFT. AREA OF INJURY TENDER TO PALPATION. PT IN NO DISTRESS." (Pet. Ex. #2)

Then, Ayesha Ali, M.D., at Swedish Covenant Hospital, examined the Petitioner and found, *inter alia*, the following:

Neck normal inspection, non-tender, supple, full range of motion, normal alignment, no carotid bruit.

Nexus C-Spine Criteria No midline c-spine tenderness, No neuro deficit, No altered mental state, No intoxication, No distracting injury.

Gastrointestinal soft, non distended, no rebound, no guarding, normal bowel sounds

Back Exam normal inspection, no CVA tenderness, no vertebral tenderness, PAIN LEFT SIDE RIBS

Neurologic alert, clear speech, no facial asymmetry, no focal deficit, no motor/sensory deficits, oriented to place, oriented to person, oriented to time

At 10:21 P.M., Dr. Ali recorded the following note:

"31 YEAR OLD FEMALE GOT PUSHED AGAINST A TABLE NO FALL NO HEAD INJURY HIT CORNER OF TABLE TO THE LEFT SIDE RIB NO SWELLING BRUISE REDNESS NO ABRASION PAIN. PATIENT DENIEAS (sic) ANY FALL NO OTHER INJURY PROBLEM" (Pet. Ex. #2)

Dr. Ali diagnosed the Petitioner with "S/P injury left rib contusion." He found her to be in good condition and as the Petitioner had no PCP, referred her to Family Practice Clinic within 24-48 hours. Dr. Ali also prescribed Naproxen 500 mg. PO bid. Dr. Ali issued additional instructions: "FOLLOW UP WITH PRIMARY CARE DOCTOR RECHECK 1-2 DAYS CALL AND SCHEDULE IF FEVER VOMITING BREATHING PROBLEM RETURN TO ER." (Pet. Ex. #2)

In a Work Release note dated 12/22/12, Dr. Ali indicated that Petitioner was excused from work for 2 days. (Resp. Ex. #4)

The Petitioner testified that she then presented to Phoenix Medical Associates on December 26, 2012. (Pet. Ex. #5) A Phoenix Medical Associates' "To Whom It May Concern" note indicates that someone at Phoenix Medical Associates referred her to the "emergency dept. for abd. pain." (Pet. Ex. #5) Another Phoenix Medical Associates' "To Whom It May Concern" note indicates that Petitioner was under the care of a medical professional there of December 26, 2012 and that she will be able to return to work on January 2, 2013. (Resp. Ex. 2) The note also indicates that Petitioner is unable to return to work until she is "pain-free." (Id.)

The Petitioner testified that she went to the Advocate Illinois Masonic Medical Center emergency room on December 26, 2012. The Advocate Illinois Masonic Return to Work note indicates "Employee may return to work on: 12/28/2012." (Pet. Ex. #3)

The Petitioner followed up with Phoenix Medical Associates on January 2, 2013. A Phoenix Medical Associates' "To Whom It May Concern" note indicates that Petitioner may be able to return to work on January 5, 2013. (Pet. Ex. #3)

On January 2, 2013, the Petitioner presented to La Clinica where she was diagnosed with a neck sprain/strain, cervical disc syndrome, rib contusion, abdominal contusion, cervical

radiculitis, and lumbar radiculitis. (Pet. Ex. #3) La Clinica took her off of work from January 3, 2013 through February 11, 2013 and again from April 1, 2013 through April 15, 2013 and ordered physical therapy, an EMG/NCV, and an MRI. (Pet. Ex. #3)

An MRI of the cervical spine on January 24, 2013 showed a posterior central disc bulge at C4-5 with associated posterior central canal narrowing and straightening of the cervical lordosis. (Pet. Ex. #3) An MRI of the lumbar spine from January 16, 2013 was unremarkable. (Pet. Ex. #3) CT scans, with and without contrast, of the pelvis and upper abdomen were read as "unremarkable." (Pet. Ex. #3) Subsequently on February 12, 2013, the EMG/NCV showed evidence of left-sided cervical radiculopathy at the C6 level. (Pet. Ex. #3)

The Petitioner testified that she received two injections to the neck at La Clinica, which helped her pain. (Pet. Ex. #3) At the date of trial, the Petitioner testified that she was still in pain and continued to take pain medications. She also testified that she had never hurt herself before her work injury of December 21, 2012. Finally, the Petitioner testified that she never received temporary total disability benefits from the Respondent while she was off work and that she remained off work from the date of her injury on December 21, 2012, until the date of trial on June 24, 2013.

On cross-examination, the Petitioner testified to using a back brace for her pain that was prescribed by Dr. Jao of La Clinica. (Pet. Ex. #4) She testified that she did not wear it on the date of the trial.

The Respondent called one witness, Mr. Johnny Graves, the Respondent's kitchen manager and the Petitioner's supervising manager. He testified that Juan Carlos was turning to put a steak on a plate and bumped into him causing him to bump into the Petitioner. He admitted that he did not see the Petitioner strike the table, but said that it happened so quickly and that he

felt the table move. Further, he testified that the Petitioner told him that she was in pain and he completed her injury report.

CONCLUSIONS OF LAW

(F) WITH REGARD TO ITEM (F), IS THE PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE WORK INJURY, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to her December 21, 2012 work injury. The Petitioner treated consistently from the date of accident and each medical provider that the Petitioner sought treatment with noted a mechanism of injury and history consistent with the Petitioner's trial testimony. The Petitioner testified that she still has pain on her entire left side, including her back, neck, and ribs. Due to her continued pain, the Petitioner testified that she still requires pain medication and the use of her back brace in order to subdue the pain. The Petitioner has met her burden of proof as to causation by a preponderance of credible evidence. The Respondent produced no medical evidence or testimony rebutting the Petitioner's position.

"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)

Based on the evidence and the law, the Arbitrator finds that the Petitioner's current condition of ill-being is causally related to her December 21, 2012 work injury.

(J) WITH REGARD TO ITEM (J), WAS THE MEDICAL TREATMENT PROVIDED REASONABLE AND NECESSARY AND HAS THE RESPONDENT PAID ALL APPROPRIATE CHARGES, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the medical treatment provided to the Petitioner was reasonable and necessary and the Respondent has not paid all appropriate charges.

As a result of the Petitioner's December 21, 2012, work-related injury, the Petitioner sustained a bulging disk at C4-5, cervical disc syndrome, a rib contusion, an abdominal contusion, cervical radiculitis, and lumbar radiculitis. (Pet. Ex. #3) The Petitioner was initially treated with physical therapy, diagnostic testing and pain medication. (Pet. Ex. #3) When the Petitioner's symptoms did not abate with this treatment, the Petitioner received two pain injections. (Pet. Ex. #3) However, her pain did not completely resolve as she testified that she still requires pain medication and her back brace in order to control her pain. The Respondent produced no medical evidence or opinions to refute the reasonableness and necessity of any of the treatment received by the Petitioner. The Arbitrator finds that the Petitioner's medical treatment was both reasonable and necessary.

The Petitioner visited the emergency room of Swedish Covenant Hospital and was told to follow up with her Primary Care Physician. The Petitioner did not have a Primary Care Physician and so she began treating with Phoenix Medical Associates. Phoenix Medical Associates referred her to the Advocate Illinois Masonic Hospital emergency room. The Petitioner then chose to treat at La Clinica.

The Arbitrator finds that the Respondent has not paid all appropriate charges. The Petitioner produced medical bills that show that the Respondent has not paid any of her medical bills. (Pet. Ex. #1) The Arbitrator awards the Petitioner the medical bills contained in Petitioner's Exhibit #1, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

(K) WITH REGARD TO ITEM (K), WHAT AMOUNT IS OWED FOR TEMPORARY TOTAL DISABILITY BENEFITS, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the Petitioner is entitled to 15-6/7 weeks of temporary total disability benefits from December 22, 2012 through December 24, 2012, from December 26, 2013 through February 25, 2013 and from April 1, 2013 through April 15, 2013 and April 17, 2013 through May 17, 2013. In an April 17, 2013 chart note, Dr. Jao wrote that he wanted to keep the Petitioner off work for another month. (Pet. Ex. #3) The other off work periods are supported by off work notes or statements in the medical records.

The Petitioner testified that she had been kept off work through the date of the trial. Yet, the medical records do not support such assertion.

The Respondent produced no medical testimony or evidence to the contrary.

Therefore, the Arbitrator finds that the Petitioner is entitled to 15-6/7 weeks of TTD benefits.

(O) WITH REGARD TO ITEM (O), CHAIN OF DOCTORS, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the Petitioner had a proper chain of doctors within the province of the Act. Initially, the Petitioner sought treatment with Phoenix Medical Associates based on a referral from Swedish Covenant Hospital. (Pet. Ex. #2) While treating with Phoenix Medical Associates, she was referred to an emergency room for her pain. (Pet. Ex. #5) She presented to the emergency room due to severe pain that she testified was an emergent situation. Soon thereafter, she began treating with La Clinica as her second choice of doctor. (Pet. Ex. #3) She continued to treat with La Clinica until the date of trial, June 24, 2013. (Pet. Ex. #3) The

Petitioner's two choice of doctors were Phoenix Medical Associates and La Clinica, with the remaining treatment being emergent and not considered towards her choice of doctors. Thus, the Arbitrator finds that the Petitioner's chain of doctors was proper.

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

Felipe Raphael Torres Flores,
Petitioner,

vs.

NO: 13WC 20307

GDB International, Inc.,
Respondent,

14IWCC1066

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, prospective medical, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 29, 2014, is hereby affirmed and adopted.

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

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

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

DATED: DEC 10 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

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

FLORES, FELIPE RAPHAEL TORRES
Employee/Petitioner

Case# **13WC020307**

GDB INTERNATIONAL INC
Employer/Respondent

14IWCC1066

On 4/29/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1239 KOLKER LAW OFFICES PC
DANIEL G BROOMBAUGH
9423 W MAIN ST
BELLEVILLE, IL 62223

2871 LAW OFFICES OF PATRICIA M CARAGHER
WILLIAM PASCH
1010 MARKET ST
ST LOUIS, MO 63101

14IWCC1066

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)

FELIPE RAPHAEL TORRES FLORES
Employee/Petitioner

v.

GDB INTERNATIONAL, INC.
Employer/Respondent

Case # 13 WC 20307

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Collinsville**, on **February 27, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC1066

FINDINGS

On the date of accident, **September 13, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the alleged injury, Petitioner earned **$22,152.00**; the average weekly wage was **$426.00**.

On the date of the alleged accident, Petitioner was **31** years of age, ***single*** with **5** 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

Because Petitioner has failed in his burden of proving a compensable accident or that proper notice was given, all benefits are hereby denied.

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

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

Signature of Arbitrator

04/21/2014
Date

ICArbDec19(b)

APR 29 2014

14IWCC1066

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

FELIPE RAPHAEL TORRES FLORES
Employee/Petitioner

v.

Case # 13 WC 20307

GDB INTERNATIONAL, INC.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Felipe Raphael Torres Flores, began work for Respondent, GDB International, in September 2010 at Respondent's facility in Nashville, Illinois. His initial job was on the floor of the plant, but after the first month of work he drove a forklift for the remainder of his employment. Respondent recycles paint and sells the recycled product.

When initially hired, Petitioner was given safety training that included requirements of reporting work accidents to Respondent. (See Respondent's Exhibit (RX) 1). Petitioner acknowledged the training as well as his signature on the safety training sheet. (RX 1). It should be noted that Petitioner is not fluent in English, rather he is fluent in Spanish. The undisputed testimony of his supervisor Mario Santos, who is fluent in Spanish, is that he went over all of the parts of Respondent's Exhibit 1 with Petitioner in Spanish when he was hired. Specifically, Petitioner was instructed in the need to promptly report accidents.

Petitioner alleges that while working in the late summer of 2011, he was on the top of a container that paint to be recycled goes into when that shifted, causing an injury to his left knee. He claims that the knee started hurting that day and swelled and hurt worse over the course of the next few days. He testified to the accident being witnessed by six or seven co-workers. It is his testimony that the day after the accident he told his supervisor, Mr. Santos, about the accident. He testified that he then went to a doctor on September 16, 2011. He denies any prior knee injuries.

Petitioner is unsure of the actual date of injury. His initial Application for Adjustment of Claim alleges a date of injury of July 19, 2011. (Arbitrator's Exhibit (AX) 2, p. 1). This Application was signed by Petitioner and filed in June 2013. (AX 2, p. 1). He filed an amended Application on January 31, 2014, alleging a different date of injury of September 13, 2011. (AX 2, p. 2). Petitioner's testimony is that he is not sure of the date of injury. Both Applications indicate that the alleged accident occurred due to a "tank collapse." (AX 2).

When he asked off for his first doctor's appointment regarding the knee injury, Petitioner used a form for non-work related injuries. (RX 2). At this time, he advised Mr. Santos that he was going to the doctor, but

did not tell Mr. Santos that the need for the visit was related to a work injury. It was Mr. Santos' understanding that the need for the visit was related to a soccer injury, not a work injury, as that is what Mr. Santos' testified was told to him by Petitioner.

Heather Burgess, Respondent's Director of Operations, testified at trial. Ms. Burgess testified that the processes of Respondent require prompt and accurate reporting of any and all work injuries. This is necessary in order to provide the prompt provision of medical benefits and to see to the safety of the workers in investigating the accident and changing work processes if necessary. Ms. Burgess testified that she first learned Petitioner was claiming a work-related related injury with Respondent in April 2013, when she received a medical invoice from Petitioner's attorney. Ms. Burgess stated that Petitioner's Application noted that he fell on a tank. She testified that this would have been physically impossible, and that there was no need to investigate such a possible occurrence because she knew that said claimed mechanism of injury was not possible. At trial, when presented with the notion that Petitioner could have been standing on a paint tote, she testified that said information would undoubtedly have changed the way she conducted her investigation. Mr. Santos testified that no worker would stand on a tote the way Petitioner claimed. Mr. Santos also testified that at any time in 2011, Petitioner was a forklift driver, and that the duties of a forklift driver did not include pouring paint as Petitioner stated. Rather, Respondent had other employees that poured the paint. Petitioner's employment with Respondent ended in September 2012.

CONCLUSIONS OF LAW

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

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

The Arbitrator finds that this claim is barred pursuant to 820 ILCS 305/6(c), by the failure of Petitioner to give proper notice of the alleged accident to Respondent within the necessary time period of 45 days, and that due to the failure to give proper notice, Respondent was unable to properly investigate the accident and that Respondent was thereby prejudiced.

This is a situation in which Petitioner testified that he did give notice of a work accident and Respondent's two witnesses testified that no such notice was given. Based on the posture of this case, reference to the evidence on the record as a whole is necessary to discern which party's testimony and evidence is to be given weight and probative credibility.

The evidence taken as a whole confers credibility upon Respondent's testimony and evidence. There are significant inconsistencies in Petitioner's testimony that make clear that his version of events does not carry with it probative weight and credibility.

Petitioner, while hampered by a language gap, was understood by and understood his supervisor, Mario Santos. Petitioner received safety training, including being taught the necessity to report any and all work injuries immediately at the time Petitioner was hired. This is evidenced in Respondent's Exhibit1, as well as the testimony of Mr. Santos and Ms. Burgess.

Petitioner did not follow the procedures for reporting work accidents after the alleged incident of September 13, 2011. He approached Mr. Santos with an absence request. Mr. Santos and Ms. Burgess testified

that these requests were to be used for non-work absences. Petitioner did not testify that he was unaware of this use. He approached Mr. Santos to approve his absence for the doctor's appointment of September 16, 2011, on September 14, 2011. However, he never told Mr. Santos of the work relatedness of the visit or the accident. In fact, it is Mr. Santos' testimony that when he asked Petitioner about his difficulty with his knee that Petitioner told him he had injured the knee playing soccer.

Upon return to work following the doctor's visit of September 16, 2011, Petitioner did not present Mr. Santos or Ms. Burgess with either the doctor's note or his bill from the visit. The record goes on to show a number of visits under absence requests in the next year for treatment of the knee condition. Yet each time. Petitioner failed to give either Mr. Santos or Ms. Burgess any records of the visits or to provide Respondent with copies of the bills for payment as part of his workers' compensation benefits. This is behavior on the part of Petitioner that is more compelling then any testimony on his part and is wholly consistent with the testimony of Mr. Santos that Petitioner failed to inform him of a work related injury, and is wholly consistent with Petitioner having told Mr. Santos of a different cause of his knee problems, *i.e.*, playing soccer.

In order to satisfy the notice requirement under the Illinois Workers' Compensation Act (820 ILCS 305/6(c)), Petitioner must show that not only did he give notice of an injury, but that he must communicate facts allowing Respondent to understand that the injury stemmed from a work accident. This is to allow Respondent to investigate the claimed accident. *See S&H Floor Covering, Inc. v. Ill. Workers' Comp. Comm'n*, 373 Ill. App. 3d 259, 870 N.E.2d 821 (4th Dist. 2007); *see also White v. Ill. Workers' Comp. Comm'n*, 374 Ill. App. 3d 907, 873 N.E.2d 388 (4th Dist. 2007).

The record is absent any evidence that Petitioner came to either Mr. Santos or Ms. Burgess at any time in the approximate year between the injury date and the date Petitioner left Respondent's employment, or the approximate nineteen month gap between the alleged accident and when Petitioner requested that his medical bills be paid by Respondent due to a work related accident.

Petitioner is also unsure about the date of injury. His initial Application for Adjustment of Claim, filed in June 2013, stated an injury date of July 19, 2011. This was subsequently amended for an accident date of September 13, 2011. Under examination at hearing about this change, he could not recall the correct accident date, or state why there had been the original injury date listed of July 19, 2011. Even allowing for translational issues, Petitioner appeared confused and unsure of the actual accident date during this lien of questioning.

Petitioner claims to have told Mr. Santos about the accident and that six-to-seven witnesses saw the accident occur. Despite the number of witnesses he claims to have seen the accident, none appeared at trial.

Mr. Santos and Ms. Burgess testified believably that work accidents with Respondent are handled immediately once they are reported. This is because of the responsibility to provide benefits and to amend work processes for the safety of workers. There is nothing in the record that makes the Arbitrator believe that if this accident had been reported, Petitioner would not have been given necessary medical care. The Arbitrator found both Mr. Santos and Ms. Burgess to be very credible witnesses at trial. Both testified in an open and forthcoming manner, and appeared to be endeavoring to give the full truth.

Due to the inconsistencies indicated, the Arbitrator finds the evidence of Respondent more credible, and while Petitioner may have given notice of some type of injury to his knee, he failed to give notice of a work related accident. As a result, Petitioner's lack of notice frustrated Respondent's ability to investigate Petitioner's alleged work accident and therefore Respondent has been prejudiced and this claim is barred.

Furthermore, due to all of the inconsistencies mentioned above, as well as the credibility issues already noted, the Arbitrator finds that Petitioner failed to prove he sustained an accident that arose out of and in the course of his employment with Respondent.

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

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?; and

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

Because Petitioner has failed in his burden of proving a compensable accident or that proper notice was given, the issues of causal connection, liability for medical expenses, and prospective medical treatment are hereby rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kim Laudadio,
Petitioner,

vs.

NO: 13WC 2281

Target,
Respondent,

14IWCC1067

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 3, 2014, is hereby affirmed and adopted.

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

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

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

DATED: DEC 10 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

o120214
CJD/jrc
049

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

LAUDADIO, KIM
Employee/Petitioner

Case# **13WC002281**

TARGET
Employer/Respondent

14IWCC1067

On 4/3/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0190 LAW OFFICES OF PETER F FERRACUTI
JENNIFER L KIESEWETTER
110 E MAIN ST
OTTAWA, IL 61350

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
KEITH HERMAN
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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
19(b)

KIM LAUDADIO,
Employee/Petitioner
v.
TARGET,
Employer/Respondent

Case # 13 WC 02281

14IWCC1067

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **GERALD GRANADA**, Arbitrator of the Commission, in the city of **OTTAWA**, on **2/26/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☐ What temporary benefits are in dispute? ☐ TPD ☐ Maintenance ☒ TTD

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

N. ☒ Is Respondent due any credit?

O. ☐ Other

FINDINGS

14IWCC1067

On the date of accident, 9/13/12, 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 not* causally related to the accident.

In the year preceding the injury, Petitioner earned $12,055.16; the average weekly wage was $231.83.

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

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

Respondent shall be given a credit of $5,437.15 for TTD, $0.00 for TPD, $0.00 for maintenance, and $1,100.00 for other benefits, for a total credit of $6,537.15.

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

ORDER

Petitioner failed to meet her burden of proof regarding the issue of causation. Therefore, her claim for benefits is denied.

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

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

Signature of Arbitrator

3/26/14
Date

ICArbDec19(b)

APR 3 - 2014

14IWCC1067

FINDINGS OF FACT

The Petitioner, Kim Laudadio, age 57, began working for the Respondent, Target Corporation, in 2011 as a cashier. In June 2012, Respondent promoted her to Front End Manager. Her job duties involved overseeing the cashiers along with customer service and maintaining the service desk and front end of the Target store in Peru, Illinois. Petitioner claims two loss dates. On August 2, 2012, she caught her foot on a rubber mat and fell. She did not seek medical treatment or lose any time from work. At arbitration, the Petitioner amended the date of loss from "August 2, 2013" to "August 2, 2012" on the record without objection. The Petitioner then stipulated that she was not seeking any benefits for this loss date, and voluntarily dismissed the Application for Adjustment of Claim for this loss date, which is known as "13WC 17827".

The Petitioner also claims injury on September 13, 2012. On that date, she was processing defective products. She was working at a register on the front end. The task required her to scan product tags. There was a scanner cord hanging down where she was working and she caught her left foot in the cord. The Petitioner described falling onto her right side; striking her right ring finger, right knee and right hip as she fell. A customer saw her and summoned help. Two managers assisted the Petitioner until EMS transported her to St. Margaret's Hospital emergency room by ambulance.

The parties stipulated that the Petitioner sustained an accident on September 13, 2012 arising out of and in the course of her employment. The parties also stipulated that Respondent had paid all medical expenses to date with the exception of a $419.00 bill from Dr. Shin. Respondent's counsel noted for the record that Respondent submitted this bill for payment in accordance with Section 8(a), 8.2 and 8.7 of the Act.

The Petitioner has a history of low back treatment dating back to a surgery in 1999 with Dr. Gutierrez (Px 4). The Petitioner did not produce treating records for a second surgery in 2003; however, subsequent treatment records suggest it involved a laminectomy at L2-3 and L3-4. Following the second surgery, Petitioner had a lengthy recovery that included physical therapy. She had been seeing a chiropractor for a long period of time since 1999 (Px 7; p. 15). In 2009, she saw Dr. Rubinstein and Dr. Ahsan for low back pain and weakness in her lower extremities (Px 7).

Dr. Rubinstein diagnosed lumbar stenosis noting L5 radicular symptoms and reported abrupt loss of strength while standing. The doctor suspected post-operative spondylolisthesis or neurogenic claudication. He recommended an MRI and EMG/NCV. Petitioner reported difficultly sleeping (Px 7; p. 15). Dr. Rubinstein referred the Petitioner to Dr. Ahsan for further evaluation. The Petitioner had a lumbar MRI on June 20, 2009. There was a disc protrusion at T11/12, a left paracentral protrusion at L2/3 with a disc bulge resulting in neural foraminal narrowing, a prominent annular bulge at L3/4 with possible right paracentral protrusion and bilateral neural foraminal narrowing. At L5/S1, the report noted neural foraminal/lateral protrusion at L5/S1. There was evidence of mild central canal stenosis at L2/3. Additional MRI views in standing, flexion and extension position were unremarkable when compared to the neutral position (Px 7; p. 17-20) The EMG/NCV on June 29, 2009 reported L4 or L5 radiculopathy (Px 7; p. 23).

When Dr. Ahsan examined the Petitioner following the diagnostic tests, he noted the Petitioner had been using a cane and a walker for the past year. He diagnosed the Petitioner with neurogenic claudication and right L5 radiculopathy along with trochanteric bursitis of the right hip. Dr. Ahsan noted that the Petitioner requested pain pills. He offered the Petitioner a transforaminal epidural injection and she deferred; advising the doctor

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she preferred to return in two weeks with a ride (Px 7; p. 16). Petitioner testified that she never followed up with Dr. Ahsan or Dr. Rubinstein. Petitioner also testified that around this time, her group medical insurance ceased.

On September 13, 2012 while at the emergency room at St. Margaret's Hospital following the accident at issue in this case, the Petitioner provided the doctor with a history of injury. The emergency room records note injuries to the right buttock area, right knee and right fourth finger. Petitioner denied any other injuries and the Petitioner specifically denied injury to her head, neck or back. X-rays and CT scan of the right hip showed no fracture and osteophytic spurring of the humeral head. X-rays and CT scan of the right knee ruled out a suspected fracture and noted degenerative changes. X-ray of the right fourth finger was unremarkable. Diagnosis was pain in the lower limb. The hospital discharged the Petitioner with instructions to remain off work and follow up with her primary care doctor in a week (Px 11). Petitioner testified that she was alert and understood all of the questions at the emergency room. She stated that her primary care doctor was Dr. Carol Graham in 2009 (Rx 5), and that she did not have a primary care doctor after she relocated to her current residence.

The Petitioner began treating with Dr. Koogler at St. Margaret's Occupational Health on September 18, 2012. Her primary complaint was right hip pain, which was worse first thing in the morning. The Petitioner now reported low back pain rated 3-4/10 with some numbness over the top of the right thigh to just above her knee. She gave a history to Dr. Koogler only describing treatment in 1999 and 2002. Diagnosis was right hip and knee contusion with low back pain and right thigh numbness. He referred the Petitioner for physical therapy and released her for light duty work (Px 5). Dr. Koogler continued to treat the Petitioner while she attended physical therapy and worked light duty. On October 9, 2012, the Petitioner told the doctor that she felt she could perform the essential functions of her job without restrictions. Dr. Koogler released her to work full duty (Px 5; p.35). On October 31, 2012, he continued to prescribe physical therapy, ibuprofen and regular duty work (Px 5; p. 33). On December 5, 2012, Dr. Koogler referred the Petitioner to see Dr. Shin, an orthopedic doctor for further evaluation due to right hip pain and low back pain (Px 5; p. 21).

Dr. Shin initially examined the Petitioner on December 1, 2012. The history provided by the Petitioner only included treatment in 1999 and 2003 (Px 9; p. 12-14). Petitioner did not describe the PT and chiropractic treatment or the treatment contained in records of Dr. Rubinstein and Dr. Ahsan in 2009. Dr. Shin ordered a lumbar MRI. Petitioner continued to work light duty. The MRI dated December 19, 2012 identified a small central disc protrusion and mild central canal stenosis at T10/L2. At L2/3, there was a right paracentral protrusion with endplate spurring and hypertrophic facet arthrosis impinging the posterolateral recess on the right traversing L3 nerve. At L3/4, there is a left posterolateral disc protrusion causing moderate impingement on the left L4 nerve. At L4/5, there is moderate right foraminal stenosis. At L5/S1, there is moderate biforaminal stenosis (Px 6)(Px 9). On January 2, 2013, Dr. Shin noted that the follow up was for low back pain, right leg radicular pain, bilateral lower extremity weakness and lumbar degenerative joint disease. Her pain was on the right side and involved the greater trochanter region. Dr. Shin referred the Petitioner to see Dr. Atwater for further evaluation (Px 9; p.8-9). Dr. Shin continued to allow light duty work (Px 8).

Dr. Alexander Ghanayem examined the Petitioner on April 29, 2013 at the Respondent's request pursuant to Section 12 of the Illinois Workers' Compensation Act Dr. Ghanayem reviewed the December 19, 2012 MRI and the medical records prior to the September 13, 2012 work injury. Contrary to the Petitioner's allegation that she was doing well after the 1999 and 2003 surgeries, Dr. Ghanayem did not believe that the Petitioner had

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complete resolution of her pain following her 2003 surgery. He noted her issues with weight gain and difficulty walking. Dr. Ghanayem concluded that the September 13, 2012 work injury likely resulted in a "hip pointer" or trochanteric contusion. He did not believe that the 2012 MRI supported any acute findings attributable to the work injury. He felt that there was likely a soft tissue injury to the low back. Her subjective complaints could not be attributed to the objective findings on the MRI, and as a result, Dr. Ghanayem recommended a full duty release for work with no further medical treatment for the low back. He deferred on the issue of the trochanteric bursitis as that was outside his area of expertise (Rx 1).

Dr. Atwater examined the Petitioner on July 18, 2013. At the time of his examination, the Petitioner reported a long history of back pain with numbness and tingling in her feet and right hip. She reported the prior history of treatment in 1999 and 2003 and said she had "done well" with her treatment until September, 2012. Subjectively, the Petitioner reported to Dr. Atwater that she felt back pain, right hip pain and axial discomfort. She claimed weakness and lack of stability when walking. The doctor noted she had a walker with her at the time her visit (Px 2) Dr. Atwater reviewed the 2012 MRI and commented that the Petitioner did not have prior laminectomies but rather laminotomies (Px 2; p. 17). The March 23, 1999 operative report indicates a "lumbar laminectomy" (Px 4; p. 10). Following his examination of the Petitioner, Dr. Atwater diagnosed degenerative disc disease of the lumbar spine and right trochanteric bursitis. He injected the Petitioner's right hip, and he ordered an EMG and discogram. The doctor placed the Petitioner off work pending the diagnostic tests (Px 4).

Dr. Lawrence Lieber at M & M Orthopedics examined the Petitioner on October 17, 2013 pursuant to Section 12 relative to the right hip. This examination was in response to Dr. Ghanayem's deference in his report. Dr. Lieber took a history from the Petitioner and reviewed MRI imaging as well as medical records from the treating doctors. Dr. Lieber referenced the CAT scan of the right hip on September 13, 2012, when the Petitioner went to the emergency room at St. Margaret's Hospital. Dr. Lieber diagnosed post-laminectomy syndrome with associated degenerative lumbar disc disease as well as trochanteric bursitis of the right hip. He did not believe that there was any evidence of acute abnormalities within the back or right hip that could be attributed to the events of September 13 or August 2, 2012. He believed all of the current condition of ill-being was related to the prior degenerative lumbar disease and post-laminectomy syndrome from 1999 and 2003. Dr. Lieber also opined that there was no aggravation of the pre-existent condition and that all of the current symptomatic complaints were associated with the pre-existent condition and not the September 13, 2012, fall. Dr. Lieber did not believe that the Petitioner required any further treatment for the right hip and that she was capable of returning to work full duty. Dr. Lieber placed the Petitioner at maximum medical improvement (Rx 2).

Dr. Atwater testified by deposition on January 22, 2014. The doctor related a history of the September 13, 2012 work accident consistent with his chart note, which he relied upon during his testimony. The doctor testified as to his understanding of the Petitioner's medical and surgical history as provided by the Petitioner, his review of the 2012 MRI and his review of the Section 12 reports of Dr. Ghanayem and Dr. Lieber (Px 3). Dr. Atwater testified as to his diagnosis, which was right trochanteric bursitis and low back symptoms consistent with aggravation of a pre-existing condition based on her degenerative disc disease. He believed that Petitioner's fall on September 13, 2012 caused an aggravation of her pre-existing condition and that his objective examination results were consistent with her subjective complaints (Px 3). On cross examination, Dr. Atwater admitted that he did not review the emergency room records from St. Margaret's Hospital, Dr. Shin's records or any other treating records relative to the September 13, 2012 injury date. He also admitted that he did not review any of the earlier treatment records from the Petitioner's earlier surgery in 1999 or 2003 and was not aware of the .

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treatment or diagnostic testing, including the MRI and EMG in 2009. Dr. Atwater conceded that having access to other MRI images would have been helpful in assessing the Petitioner's degenerative condition (Px 3). After seeing the records from Dr. Rubinstein and Dr. Ahsan from 2009, Dr. Atwater conceded that the Petitioner had ongoing issues with her back that were chronic in nature (Px 3; p. 22). Dr. Atwater admitted that he had reviewed both Dr. Ghanayem's IME report and Dr. Lieber's IME report. As to Dr. Ghanayem's report, Dr. Atwater stated that he simply had a different opinion as to the diagnosis. Dr. Atwater offered no opinion as to Dr. Lieber's opinion (Px 3). Dr. Atwater testified that an EMG/NCV and discogram were reasonable and medically necessary. He agreed that the results of these tests would not address "causation" but rather "diagnosis". Dr. Atwater conceded that the prior surgeries could call into question the accuracy of the discogram (Px 3; p. 23-25). Dr. Atwater agreed that the Petitioner sustained an aggravation of a pre-existing condition, but did not believe this was a temporary aggravation (Px 3). Dr. Atwater stated that there was nowhere in his notes "anything about surgery" (Px 3; p. 27).

At trial, when asked what she noticed about herself after the September 13, 2012 work accident, Petitioner testified that she still has spasms and back pain on her right side, has spasms, difficulty sleeping at night and taking medication for her pain. The Petitioner testified that she seeks prospective medical; specifically, the EMG/NCV test and discogram recommended by Dr. Atwater. She agreed that she is has not been scheduled for surgery.

CONCLUSIONS OF LAW

1. The Arbitrator finds that the Petitioner failed to meet her burden of proof on the issue of causation. Specifically, the Petitioner failed to prove that her current condition of ill-being involving her low back and right hip is causally connected to the work accident of September 13, 2012. The decision hinges on the opinions of the treating doctor, Dr. Atwater, and the opinions of the examining doctors, Dr. Ghanayem and Dr. Lieber. Each doctor, including Dr. Atwater, examined the Petitioner on one occasion and each doctor had an opportunity to take a history from the Petitioner. However, unlike Dr. Ghanayem and Dr. Lieber, Dr. Atwater did not review any of the treating records of other treating doctors involved in the care and treatment of the Petitioner following the September 13, 2012 injury date or the earlier treatment records from Dr. Gutierrez in 1999. Further, Dr. Atwater did not request to see the MRI imaging study from 2009 although he conceded that he would find reviewing the earlier MRI helpful in assessing the progression of the degenerative disc disease. Dr. Atwater also did not inquire further about the treatment the Petitioner received in 2009 despite the fact that the MRI report from 2012 clearly references a prior report of "6/20/2009" (Px 6; p. 8). The Arbitrator notes that when called upon to describe what she noticed about herself after the September 13, 2012 work accident, Petitioner testified that she *still had* spasms and back pain on her right side, difficulty sleeping at night and taking medication for her pain. These symptoms are similar to the complaints she testified to prior to the work accident and as recorded in the records in 2009 with Dr. Rubinstein and Dr. Ahsan (Px 7; p. 11, 14-15). Further, on January 2, 2013, Dr. Shin noted that subjectively, Petitioner reported low back pain, right leg radicular pain, bilateral lower extremity weakness and lumbar degenerative joint disease. Her pain was on the right side and involved the greater trochanter region (Px 9; p. 8). This is very similar to the complaints she reported in 2009 to Dr. Rubinstein and Dr. Ahsan. The Arbitrator infers from the medical records proffered as true and accurate as well as the Petitioner's testimony, that her symptoms are long standing and chronic in nature as suggested by Dr. Ghanayem and by Dr. Lieber. The Arbitrator finds that Dr. Atwater, in relying solely upon the Petitioner's flawed history, failed to accurately assess the Petitioner's "normal state of being" prior to the September 13, 2012. The Arbitrator is not persuaded by Dr. Atwater's testimony that the fact that

14IWCC1067

because the Petitioner began working for the Respondent, this somehow proves that she did not have an ongoing chronic condition. Dr. Atwater admitted that he has not seen a job description of the Petitioner's job duties for Respondent. The Arbitrator concludes that the opinions of Dr. Ghanayem and Dr. Lieber are more credible and more persuasive than those of Dr. Atwater. Both Dr. Ghanayem and Dr. Lieber attribute the Petitioner's condition to a longstanding degenerative condition. Their opinions are based not only on physical examination and history, but on medical records that Dr. Atwater could have, but did not, review.

The Arbitrator finds that the Petitioner sustained soft tissue injuries to her right hip and low back on September 13, 2012, which was a temporary aggravation of a pre-existing degenerative condition that has since resolved. Her current condition of ill-being involving her right hip and lumbar spine is attributed to the prior pre-existent condition and is not causally related to the injury on September 13, 2012. All benefits are hereby denied and all other issues to be adjudicated are rendered moot.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Janine Glass,
Petitioner,

vs.

NO: 10WC 46696

14IWCC1068

Galesburg Cottage Hospital,
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, causation, temporary total disability, medical, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 10, 2013, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $20,000.00. 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: DEC 10 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

o120214
CJD/jrc
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GLASS, JANINE
Employee/Petitioner

Case# **10WC046696**

GALESBURG COTTAGE HOSPITAL
Employer/Respondent

14IWCC1068

On 12/10/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% 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:

4134 VanDerGINST LAW PC
JOHN WESTENSEE
1705 2ND AVE 6TH FL
ROCK ISLAND, IL 61201

0560 WIEDNER & McAULIFFE LTD
RANDALL W SLADEK
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

14IWCC1068

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

JANINE GLASS,
Employee/Petitioner

v.

GALESBURG COTTAGE HOSPITAL,
Employer/Respondent

Case # 10 WC 46696

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 **Rock Island**, on **11/13/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **9/25/10**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$63,063.00**; the average weekly wage was **$1,212.75**.

On the date of accident, Petitioner was **53** 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 **$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 **$4,976.18** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $808.50/week for 4 weeks, commencing 10/27/10 through 11/23/10, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of Orthopedic Specialists from 10/7/10-1/4/11; Cottage Hospital on 10/11/10; Trinity Medical Center on 10/26/10; Dr. Barney on 10/27/10; and Cottage Rehab & Sports Medicine from 11/1/10-11/15/10 as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $4,976.18 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 $669.64/week for 32.25 weeks, because the injuries sustained caused the 15% 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

12/5/13
Date

DEC 10 2013

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 53 year old registered nurse, alleges she sustained an accidental injury to her left knee that arose out of and in the course of her employment by respondent on 9/25/10. Petitioner testified that on 9/25/10 she was performing repeat catheter irrigations that required her to lean down near the floor, kneel, squat, and bend over. She stated that while she was bending over, squatting and twisting her leg she felt a sharp pain in the back of her left knee. Petitioner gave a history of a prior total knee arthroscopy to her right knee that left her with a significant decrease in range of motion in her right knee.

Petitioner drafted a statement regarding her alleged accident. She reported that she worked a 12 hour shift on 9/25/10. She claimed that she had to take care of a man who required continuous bladder irrigations, and two other patients. Petitioner claimed that on the night of 9/25/10 she was repeatedly squatting to empty the patient's drainage bag, reaching high to hang new bags of fluid for irrigation, and hand irrigating the patient's bladder when the CBI stopped draining into the bag. Petitioner also had to give IV pain medications to the patient. Petitioner reported that the hand irrigations required a substantial amount of time stretching, leaning over, and twisting in uncomfortable positions. While taking care of the patient and performing hand irrigations the petitioner pulled something behind her knee and it immediately hurt. She reported the injury to a fellow RN, Wendy Kircher, who at the end of the shift reported it to the Unit Manager, Deb Thompson. Petitioner completed her shift. Petitioner reported that she spent about 6 hours of her shift in the one patient's room.

On 9/26/10 petitioner worked another 12 hour shift. She continued the same routine with the same patient she worked with on 9/25/10 where she performed procedures that required squatting, stretching, hyper-extending, and twisting her knee. She reported that by the end of the shift she was tired and sore. She continued to experience soreness in her left knee.

Petitioner reported that she had previously purchased tickets to a Cardinals game on 9/30/10. Petitioner had a few days off prior to the game. Petitioner drove to St. Louis, but her knee remained sore. At one point petitioner went to get up from her seat at the stadium and caught her right knee on the cup holder in front of her. When this happened her left knee continued to extend and she continued to have soreness behind her left knee in the same area that it hurt on 9/25/10.

When petitioner got home the back of her knee was uncomfortable and she took 600 mg of naproxen. She could not get a comfortable position for her left knee. By morning the pain was unbearable when she tried to put weight on her left knee. She used crutches for another day and a half.

On 10/7/10 petitioner presented to Dr. Hoffman. She gave a history of being at work 2 weeks ago leaning over a patient's bed to empty a catheter and felt a pull in the posterior aspect of her left knee. She reported that she continued to work and did not report the injury, but noted left knee pain. Petitioner also reported that she was at a ball game in St. Louis and she got up out of her seat and her right knee caught the cup holder on the chair and the left knee stumbled and twisted when the right knee caught the cup holder increasing her left knee pain. Petitioner reported that she had taken herself off work for the past 3 days due to pain, having had 2 injuries in the left knee with one on the job and one at the ball game in St. Louis. Petitioner stated that she had been using 600 mg of Naprosyn with minimal help. Petitioner gave a history of a right knee replacement with less than stellar results as far as range of motion goes. Her right knee range of motion was 8-75, and her left was 5-130. Petitioner complained of marked pain on the medial joint line of the left knee with trace effusion and painful medial McMurray test. She also demonstrated mild patellofemoral crepitus without discomfort and mild pain with patella inhibition test. An x-ray of the left knee revealed mild to moderate compartment degeneration and patellofemoral and lateral facet DJD. Dr. Hoffman's impression was medial meniscus tear of the left knee.

On 10/11/10 petitioner underwent an MRI of the left knee. The impression was horizontal oblique tear of the posterior horn and body of the medial meniscus; small joint effusion and synovitis; and chondromalacia.

On 10/26/10 petitioner followed-up with Dr. Hoffman. She discussed a left knee arthroscopy and wondered about an arthroscopic release of the right knee because of her poor motion status post total knee arthroplasty. Dr. Hoffman noted that her range of motion of the right knee was poor. Petitioner's examination and Dr. Hoffman's impression and plan were primarily related to the right knee. No recommendations were made with respect to the left knee.

On 10/27/10 petitioner underwent a left knee arthroscopy with partial medial menisectomy and chondroplasty of the medial compartment, and chondroplasty patellofemoral compartment. This procedure was performed by Dr. Hoffman. Petitioner followed-up with Physicians Assistant Teresa Palmer on 11/4/10. She reported that her preoperative discomfort had resolved. She reported new lateral left knee pain with walking and standing, and usually resolves with rest. Dr. Hoffman performed a steroid injection for the left knee. Dr. Hoffman authorized petitioner off work for four weeks.

On 1/4/11 petitioner followed-up with Dr. Hoffman. She reported that the injection significantly helped. She stated that she was back and work and was happy with her knee. She stated that things were going well. She reported some mild lateral-sided pain in the lateral portal of the arthroscopy incision.

Dr. Hoffman released petitioner from his care. He noted that since petitioner had some chondral pain on the medial side of the knee she may eventually need a joint replacement.

On 11/20/12 Dr. Hoffman drafted a letter. Dr. Hoffman noted that petitioner injured her left knee while helping a patient. He noted that she twisted her left knee and had instant swelling and pain. He further noted that she retwisted her left knee at a ball game on 9/30/10 when she stumbled. Dr. Hoffman opined that the injury followed by the ball park injury was a continuance of the original injury at work on 9/25/10.

On 4/18/13 the evidence deposition of Dr. Hoffman, an orthopedic surgeon, was taken on behalf of the petitioner. Dr. Hoffman opined that the accident history petitioner provided was a very typical history of a meniscus tear. He opined that when it rips a little bit, people don't think much of it at the time, and then it becomes increasingly painful and swollen and does not go away, Dr. Hoffman opined the initial rip occurred at work on 9/25/10, and then she tweaked it at the game. Dr. Hoffman opined that once the meniscus is ripped, the pain can be intermittent, because it can sort of flip out of the way and not get caught, or one can catch that torn edge with a particular movement, and it can be very uncomfortable. Dr. Hoffman opined that the history petitioner gave him regarding the incident on 9/25/10 was entirely consistent with a tear that happened at one point in time. Dr. Hoffman opined that twisting is very common, but it is not necessarily the only mechanism of tearing that meniscus. Dr. Hoffman opined that soreness and limping are very consistent with a meniscus injury.

On 9/4/13 Dr. Michael Nogalski performed a record review and drafted a report at the request of the respondent. Dr. Nogalski reviewed records from Dr. Hoffman, Galesburg Cottage Hospital, a narrative report generated by petitioner, and Cottage Rehabilitation and Sports Medicine. After reviewing these records Dr. Noglaski opined that the claimed 9/25/10 event was not the cause, nor the specific aggravating factor for a meniscal problem for which she underwent surgery by Dr. Hoffman.

Petitioner testified that she still works as an RN, but not for respondent. She testified that she still notices some aching and discomfort in the left knee. She stated that she tries to avoid squatting and bending. Petitioner takes over the counter antiinflammatories.

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

Petitioner testified that on 9/25/10 she was performing repeat catheter irrigations that required her to lean down near the floor, kneel, squat, and bend over. She stated that while she was bending over, squatting and

twisting her leg she felt a sharp pain in the back of her left knee. Respondent offered no credible evidence to rebut this claim.

Based on the above, the arbitrator finds the petitioner has proven by a preponderance of the credible evidence that she sustained an accidental injury to her left knee that arose out of and in the course of her employment by respondent on 9/25/10.

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

Petitioner claims her current condition of ill-being as it relates to her left knee is causally related to the injury she sustained on 9/25/10. Respondent claims that petitioner only sustained a strain or pull to her left knee on 9/25/10 and the intervening accident at the St. Louis Cardinal ball game on 9/30/10 when petitioner caught her right knee on the cup holder and twisted her left knee was an intervening accident that caused the meniscal tear for which she underwent surgical intervention.

Petitioner testified that following the incident on 9/25/10 she felt a sharp pain in the back of her left knee and it immediately hurt. Petitioner worked a 12 hour shift the next day. She stated that by the end of the shift she was tired and continued to experience soreness in her left knee. Thereafter, petitioner was off work for a few days.

On 9/30/10 petitioner took her son to a prescheduled Cardinals game in St. Louis. She stated that her left knee was sore before she went, but she did not want to let her son down. She further testified that when she got out of the car after the 4 hour drive her leg was really sore and she was limping. While at the ball park when petitioner stood up to get out of her chair her right knee got caught on a cup holder. When this happened she retwisted her left knee and had ongoing soreness in her left knee.

By the next morning petitioner's pain in her left knee was unbearable and she took herself off work. On 10/7/10 she sought treatment with Dr. Hoffman. She provided him with a consistent history of the accident on 9/25/10 and the reaggravation on 9/30/10.

Dr. Hoffman opined that the petitioner injured her left knee while helping a patient on 9/25/10. He was of the opinion that she twisted her left knee and had instant pain and swelling. Dr. Hoffman opined that the twisting of the left knee on 9/30/10 was a continuance of the original injury at work on 9/25/10. Dr. Hoffman opined that the accident history petitioner provided was a very typical history of a meniscus tear. He opined that when it rips a little bit, people don't think much of it at the time, and then it becomes increasingly painful and swollen and does not go away. Dr. Hoffman opined the initial rip occurred at work on 9/25/10, and then she tweaked it at the game. Dr. Hoffman opined that once the meniscus is ripped, the pain can be intermittent,

because it can sort of flip out of the way and not get caught, or one can catch that torn edge with a particular movement, and it can be very uncomfortable. Dr. Hoffman opined that the history petitioner gave him regarding the incident on 9/25/10 was entirely consistent with a tear that happened at one point in time. Dr. Hoffman opined that twisting is very common, but it is not necessarily the only mechanism of tearing that meniscus. Dr. Hoffman opined that soreness and limping are very consistent with a meniscus injury.

Dr. Nogalski, who did not examine petitioner, and only performed a record review, opined that the event on 9/25/10 was not the cause, nor the specific aggravating factor for a meniscal problem for which petitioner underwent surgery by Dr. Hoffman.

Based on the above, as well as the credible evidence the arbitrator adopts the findings and opinions of Dr. Hoffman who treated petitioner, over those of Dr. Nogalski, who simply performed a record review. Having adopted the findings and opinions of Dr. Hoffman, the arbitrator finds the petitioner's current condition of ill-being is causally related to the accident she sustained on 9/25/10.

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 left knee, and that her current condition as it relates to her left knee is causally related to the injury she sustained on 9/25/10, the arbitrator finds the medical treatment received from Orthopedic Specialists from 10/7/10-1/4/11; Cottage Hospital on 10/11/10; Trinity Medical Center on 10/26/10; Dr. Barney on 10/27/10; and Cottage Rehab & Sports Medicine from 11/1/10-11/15/10 for her left knee were reasonable and necessary to cure or relieve petitioner from the effects of the injury she sustained on 9/25/10.

The arbitrator finds the respondent shall pay any unpaid bills from these providers for these dates pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for the $4,976.18 in medical bills it paid through its group medical plan for which credit may be allowed under Section 8(j) of the Act, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

The petitioner claims she was temporarily totally disabled from 9/27/10 through 11/24/10. Petitioner testified that she took herself off work on 9/27/10. Petitioner provided no off work authorization until she underwent her left knee surgery on 10/27/10. At that time Dr. Hoffman authorized petitioner off work for 4 weeks.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner was temporarily totally disabled from 10/27/10 through 11/23/10, a period of 4 weeks.

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

As a result of her injury on 9/25/10 petitioner underwent a left knee arthroscopy with partial medial menisectomy and chondroplasty of the medial compartment, and chondroplasty patellofemoral compartment. Petitioner followed up post operatively with Dr. Hoffman through 1/4/11. This treatment included a course of physical therapy.

On 1/4/11 petitioner reported that the injection significantly helped. She stated that she was back and work and was happy with her knee. She stated that things were going well. She reported some mild lateral-sided pain in the lateral portal of the arthroscopy incision. Dr. Hoffman released petitioner from his care.

Petitioner testified that she still works as an RN, but not for respondent. She testified that she still notices some aching and discomfort in the left knee. She stated that she tries to avoid squatting and bending. Petitioner takes over the counter anti-inflammatories.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner sustained a 15% loss of use of her left leg pursuant to Section 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 SANGAMON	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Thomas Lovelace,

Petitioner,

vs. NO: 13WC 5700

Stanley Ryan Trucking,

14IWCC1069

Respondent,

DECISION AND OPINION ON REVIEW

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

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

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

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

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

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

DATED: DEC 10 2014

Charles J. DeVriendt

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CJD/jrc
049

Daniel R. Donohoo

Ruth W. White

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

LOVELACE, THOMAS
Employee/Petitioner

Case# **13WC005700**

STANLEY RYAN TRUCKING
Employer/Respondent

14IWCC1069

On 3/24/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0564 WILLIAMS & SWEE LTD
DIRK A MAY
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

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

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Thomas Lovelace
Employee/Petitioner

v.

Stanley Ryan Trucking
Employer/Respondent

Case # 13 WC 05700

Consolidated cases: n/a

14IWCC1069

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Springfield, on February 14, 2014. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, October 22, 2012, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $35,137.00; the average weekly wage was $878.00.

On the date of accident, Petitioner was 48 years of age, single with 1 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 $32,299.45 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $32,299.45.

Respondent is entitled to a credit of $26,626.30 under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 5 as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall be given a credit of $26,626.30 and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and make payment for a functional capacity evaluation (FCE) as recommended by Dr. Mark Greatting.

Respondent shall pay Petitioner temporary total disability benefits of $585.33 per week for 57 6/7 weeks commencing January 5, 2013, through February 14, 2014, as provided in Section 8(b) of the Act.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

March 17, 2014
Date

MAR 24 2014

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on October 22, 2012. According to the Application, Petitioner sustained an injury to the left arm when a landing gear broke. This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of temporary total disability benefits and medical bills as well as prospective medical treatment, specifically, that Respondent be ordered to pay for a functional capacity evaluation (FCE). Respondent denied liability on the basis of accident and causal relationship. Respondent also disputed the amount of temporary total disability benefits claimed by Petitioner and the necessity for a functional capacity evaluation.

Petitioner testified that he worked for Respondent as an over the road truck driver and on October 22, 2012, he had just backed his truck into a trailer. One of the connecting devices which Petitioner described as a "landing gear" broke and struck Petitioner's left forearm/elbow. This caused a significant amount of pain/swelling, but Petitioner initially thought that he had just sustained a bruise. This accident occurred in North Carolina.

Petitioner continued to work for Respondent but the symptoms in his left arm got progressively worse. Petitioner ceased working on December 26, 2012; however, he did not seek any medical treatment until January 5, 2013, when he was seen in the ER of Taylorville Memorial Hospital. The ER record contained a history of the work-related accident. At that time, Petitioner complained of a burning sensation beginning in the elbow and down the forearm. X-rays were taken which were negative and Petitioner was discharged and instructed to follow up with his primary care physician. He was authorized to be off work (Respondent's Exhibit 6).

Petitioner subsequently sought medical treatment from Dr. Mark Greatting, an orthopedic surgeon, who initially saw Petitioner on January 31, 2013. At that time, Petitioner informed Dr. Greatting of the work-related accident. Petitioner complained of pain and a burning sensation in the left elbow and forearm that increased with use. Dr. Greatting opined that Petitioner had elbow tendinitis in an injury/contusion with entrapment of the left posterior interosseous nerve. Dr. Greatting ordered an EMG and nerve conduction studies and authorized Petitioner to remain off work (Petitioner's Exhibit 1).

An EMG and nerve conduction studies were performed on March 6, 2013, which were positive for left posterior interosseous neuropathy. Dr. Greatting saw Petitioner on March 14, 2013, reviewed the diagnostic studies and recommended that Petitioner have decompression surgery performed. Dr. Greatting performed surgery on April 16, 2013, the procedure consisted of a left posterior interosseous nerve decompression (Petitioner's Exhibit 1).

Following the surgery, Petitioner continued to be treated by Dr. Greatting. Petitioner developed an abscess in the left proximal biceps area which required a surgical excision that was performed by Dr. Greatting on June 4, 2013. Dr. Greatting prescribed medication, ordered physical therapy and authorized Petitioner to remain off work. When Dr. Greatting saw Petitioner on August 28, 2013, he noted that the range of motion of the left elbow, forearm, wrist and hand was full;

however, Petitioner was going to continue with therapy to improve his strength and work conditioning (Petitioner's Exhibit 1).

At the direction of Respondent, Petitioner was examined by Dr. R. Evan Crandall, a plastic surgeon, on September 18, 2013. In connection with his examination of Petitioner, Dr. Crandall reviewed Petitioner's medical records. Dr. Crandall opined that Petitioner's radial tunnel issue was related to the work-related accident and that the treatment he received was appropriate. He noted that Petitioner had an unusually long recovery time and opined that Petitioner could return to work without restrictions (Respondent's Exhibit 1). Petitioner was subsequently seen by Dr. Greatting on September 23, 2013, and he also released Petitioner to return to work without restrictions (Petitioner's Exhibit 1).

Petitioner testified that he attempted to return to work in October, 2013, but that he was unable to perform his job duties. Petitioner stated that his left arm became swollen and that his fingers were numb. Because the vehicle he drives has a 13 speed manual transmission he uses his right hand to operate and he is required to use his left hand to steer the vehicle. Further, because of his symptoms, Petitioner stated that he was unable to tarp and load the vehicle.

Because of the symptoms Petitioner experienced when he attempted to return to work, he was seen by Dr. Greatting on October 2, 2013. Dr. Greatting recommended Petitioner have another EMG and nerve conduction studies performed and authorized him to remain off work. The EMG and nerve conduction studies were performed on October 7, 2013, which showed improvement of the neuropathy when compared with the studies performed before the surgery. Dr. Greatting saw Petitioner on October 10, 2013, and his record indicated that Petitioner would be given restrictions and he would reevaluate Petitioner in two months. He noted that if Petitioner did not improve, Petitioner may require permanent restrictions and that he may have to seek another occupation (Petitioner's Exhibit 1).

Respondent obtained approximately 20 minutes of surveillance video of Petitioner on October 9, 11, 12, 13, 23 and 24, 2013. Respondent tendered a DVD of the surveillance into evidence at trial and the Arbitrator has reviewed same. Most of the video was in regard to Petitioner's activities at or near an automobile repair facility called "M & M Auto Repair."

On October 9, 2013, Petitioner was initially videoed carrying a 12 pack of soda with his left hand, placing it into the back seat of his car and talking on a cell phone. On that same day, while at M & M Auto Repair, Petitioner was observed with another individual under a car that was raised on a rack. Petitioner was observed with both of his arms overhead and he appeared to be holding something in place while another individual used what appeared to be a drill. On that same day, a soda machine was moved from a building across the street from M & M Auto Repair to M & M Auto Repair. The soda machine was strapped to a dolly and three other individuals moved the machine while Petitioner stood in the middle of the street. Once the machine was across the street, Petitioner briefly assisted the three other individuals move the machine. The machine was then opened and Petitioner appeared to do some sort of inspection of a portion of the inside.

On October 11, 2013, Petitioner was videoed using a push broom around the area where the soda machine was located. On October 12, 2013, Petitioner was videoed walking, talking on his cell phone and smoking a cigarette. On October 13, 2013, Petitioner was videoed washing his car at a car wash using both his left and right hands holding and directing the wand. The video obtained on October 23, and October 24, 2012, briefly showed Petitioner driving a vehicle.

Petitioner testified that M & M Auto Repair is owned by friends of his and that, while he was not working, he would go there and visit with his friends. He stated that the garage is on the way to his daughter's school and their children play together. In regard to his activities while at the garage, Petitioner testified that while he was visiting his friends he provided some assistance by holding a bolt in place on a car that was on the rack. As to moving the soda machine, Petitioner stated that he did not participate in moving the machine and the only thing he did was block traffic while others moved the machine across the street. In regard to his use of the broom, Petitioner stated there was a broken bottle in front of the shop and he swept it up so that no one would be injured.

At trial, Melissa Krug testified on behalf of the Petitioner. Melissa Krug and her husband are the owners of M & M Auto Repair and, prior to her testifying, she watched the surveillance video of Petitioner. She testified that Petitioner is not employed by M & M nor has he ever been paid any money by M & M for any work performed there. She confirmed that Petitioner was a friend of both her and her husband and that he has visited them at their place of business on a regular basis.

At the direction of Respondent, Petitioner was re-examined by Dr. Crandall on October 24, 2013. Dr. Crandall noted that Petitioner had no tenderness, the range of motion was full and that his findings on physical examination were normal. He opined that Petitioner had symptom magnification and noted that Petitioner used abusive language at his office. He did recommend that Petitioner undergo a work capacity evaluation or FCE (Respondent's Exhibit 2).

Respondent sent the surveillance video to Dr. Crandall for him to review. In a supplemental report dated December 9, 2013, Dr. Crandall opined that the video revealed Petitioner was able to use his arms and was capable of working full duty. He retracted his recommendation that Petitioner have an FCE performed (Respondent's Exhibit 3).

Petitioner was seen by Dr. Greatting on December 12, 2013, and he noted on examination that Petitioner had a good range of motion of the elbow, forearm, wrist and hand. He agreed that an FCE was appropriate and, once one was obtained, Petitioner would be released from care at MMI (Petitioner's Exhibit 1).

At trial, Petitioner testified that he still experiences pain and swelling in his left arm as well as numbness in his fingers. He does want to proceed with the FCE.

Conclusions of Law

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

The Arbitrator concludes that Petitioner sustained an accidental injury arising out of and in the course of his employment for Respondent on October 22, 2012.

In support of this conclusion the Arbitrator notes the following:

The Petitioner's testimony regarding the accident of October 22, 2012, was unrebutted, the accident was reported to Respondent in a timely manner and the circumstances of the accident were consistently reported to the physicians who treated or examined the Petitioner.

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

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of October 22, 2013.

In support of this conclusion the Arbitrator notes the following:

Dr. Greatting treated Petitioner for his left arm condition and Respondent's Section 12 examiner, Dr. Crandall, agreed that the condition was related to the accident.

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

The Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of 57 6/7 weeks commencing January 5, 2013, through February 14, 2014.

In support of this conclusion the Arbitrator notes the following:

While Petitioner ceased working on December 26, 2012, he did not obtain any medical treatment and was not authorized to be off work until he was seen in the ER on January 5, 2013.

The basis for Respondent's termination of temporary total disability benefits was the surveillance video of Petitioner obtained from October 9, 2013, through October 24, 2013. The Arbitrator viewed the surveillance video and finds it to be of minimal probative value.

While Petitioner was observed with both arms overhead while under a car raised on a rack where he appeared to be holding something in place while another individual used a tool which appeared to be a drill. The video showed Petitioner doing this activity for less than one minute.

In regard to the moving of the soda machine, Petitioner's testimony that he did nothing more than block traffic when the machine was moved is reasonably consistent with the video. Three other individuals moved the machine, which was on a dolly, across the street and it was not until the machine was moved to the opposite side of the street that Petitioner rendered some assistance moving the machine.

Petitioner's brief sweeping of an area in front of the soda machine and his use of a hose to wash his car were activities that Petitioner only briefly engaged in and were not extremely strenuous.

None of the aforestated activities that Petitioner was observed doing in the surveillance video are comparable to the use of his upper extremities in the performance of his job duties.

The testimony of Melissa Krug, that Petitioner was a friend of both her and her husband, that he would visit their place of business and that he did not work there, was unrebutted.

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

The Arbitrator concludes that Petitioner is entitled to a functional capacity evaluation (FCE) as recommended by Dr. Greatting.

In support of this conclusion the Arbitrator notes the following:

Petitioner's treating physician, Dr. Greatting, opined that an FCE is appropriate to determine Petitioner's work/activity restrictions.

Respondent's Section 12 examiner, Dr. Crandall, initially agreed that an FCE was appropriate but he retracted that recommendation when he reviewed the surveillance video of Petitioner. As aforestated, the Arbitrator has viewed the video and finds it to be of minimal probative value.

The fact that Dr. Greatting did not view the surveillance video is not critical because of the video's minimal probative value.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 5, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of $26,626.30 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.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF EDGAR)

☐ 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

Don Young,
Petitioner,

vs. No. 10 WC 20979

Doncasters, d/b/a MECO,
Respondent.

14IWCC1070

DECISION AND OPINION ON REMAND
FROM THE APPELLATE COURT

This case appears on Remand from the Appellate Court, Fourth District, which reversed the Commission's denial of Petitioner's claim and remanded the matter to the Workers' Compensation Commission for further proceedings. Petitioner filed his Application for Adjustment of Claim, alleging a work-related injury to his left shoulder, on February 19, 2010. The case was tried before Arbitrator Stephen Mathis on August 25, 2011 in Mattoon, Illinois. On November 23, 2011, Arbitrator Mathis entered his Decision, finding that the accident did not arise out of Petitioner's employment with Respondent and denying all benefits. Petitioner appealed the Arbitrator's Decision to the Commission, and on October 29, 2012, the Commission majority affirmed and adopted the Arbitrator's Decision. On May 13, 2013, the Circuit Court of Edgar County confirmed the Commission's Decision, denying all benefits. Petitioner timely appealed to the Appellate Court, which reversed the Circuit Court and remanded the matter to the Commission for further findings.

Findings of Fact and Conclusions of Law

At arbitration, Petitioner testified he worked as a parts inspector for Respondent, ensuring that the parts met specifications, completing paperwork, placing the parts into appropriate containers, and entering data in a computer. The number of parts he inspected each day and their sizes and weights varied according to the order. Petitioner testified that on Friday, February 19, 2010, he was reaching into a box "about 36 inches deep or more and 16 by 16" to remove a "spring clip" for inspection. The clips were made of stainless steel formed into a semi-cone and weighed between 12 and 20 pounds. Petitioner testified that he had to "bend over into the box" and "reach down deep into it to retrieve" the last part for inspection. He could not fit both shoulders into the box at the same time, and he injured his left shoulder.

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Petitioner noticed some slight pain in his left shoulder, but continued to work the remainder of his shift. By evening, his arm began hurting "quite a bit," and his condition worsened over the weekend. On Monday, he returned to work, but noticed a lack of mobility in his left shoulder. He testified that he had experienced no prior problems with his left shoulder, although he had injured his right shoulder while working for a different employer.

Prior to Arbitration, Respondent asked Petitioner to reenact his accident, and Petitioner was photographed as he demonstrated how he had reached into the box. Petitioner introduced the February 25, 2010 photo showing how he had bent over to reach the spring clip from the box, and the photo was part of an "Accident & Counter Measure Report" prepared by Respondent. Respondent listed the cause of Petitioner's accident as "over extended reaching limits."

Petitioner sought medical treatment on February 25, 2010 from Dr. Leland Phipps, Respondent's company doctor. Dr. Phipps noted that Petitioner was injured when he "stretched extra" while reaching into a box and felt a pop in his shoulder. Dr. Phipps ordered x-rays and returned Petitioner to work with the restriction that he not raise his arm above shoulder level. Petitioner testified that Respondent did not modify his job duties and he could not perform his job as he normally would, due to his slower pace and need to rely on co-workers for assistance in lifting large objects. Dr. Phipps ordered physical therapy and an MRI. On April 8, 2010, the doctor noted that the MRI showed a small tear in the supraspinatus and referred Petitioner to Dr. Louis Angelicchio at Sports Medicine Institute of Indiana.

On April 20, 2010, Dr. Angelicchio noted that Petitioner was injured while overstretching his left arm and shoulder reaching into a box. Petitioner's MRI was "consistent with a partial thickness tear of the rotator cuff, degenerative changes at the AC joint, subacromial bursitis, and some mild degenerative changes." Dr. Angelicchio recommended surgery.

Dr. James Kohlmann performed a Section 12 examination for Respondent on July 15, 2010. Petitioner again explained the mechanism of his injury as reaching down into a box to retrieve a part for inspection. Dr. Kohlmann concluded that Petitioner had significant degenerative changes in his left shoulder that may have been asymptomatic prior to his work accident and that the injury Petitioner described substantially aggravated his pre-existing and asymptomatic shoulder arthritis and bursitis. The doctor agreed with Dr. Angelicchio's recommendation of surgery.

Petitioner testified that he decided to treat with Dr. Kohlmann due to insurance coverage issues. Dr. Kohlmann performed left shoulder surgery on October 1, 2010 to address Petitioner's AC joint arthritis, full-thickness rotator cuff tear, and supraspinatus tendon bursitis. Following surgery, Petitioner performed physical therapy and followed up with Dr. Kohlmann, who released him to return to work full duty in January 2011.

This matter was tried before Arbitrator Stephen Mathis in Mattoon, Illinois on August 25, 2011. Arbitrator Mathis entered his Decision on November 23, 2011, denying all benefits for Petitioner's failure to prove that he suffered an accident that arose out of his employment with Respondent. The Arbitrator found that merely reaching down is an activity of daily living; he

14IWCC1070

found no increased risk of injury peculiar to Petitioner's job duties or created by his employment. Arbitrator Mathis concluded that "[t]he chronology of Petitioner's left shoulder problem was more consistent with natural degeneration rather than the result of any acute event."

On November 9, 2012, the Commission, with a dissent by Commissioner Tyrrell, affirmed and adopted the Arbitrator's Decision, but struck the line cited above based on the absence of medical opinions supporting a finding that Petitioner's condition was merely degenerative. The Circuit Court of Edgar County confirmed the Commission Decision on May 13, 2013, and Petitioner timely appealed to the Appellate Court.

The Appellate Court filed its Decision on July 7, 2014, reversing the Circuit Court's judgment and remanding the matter to the Commission for further proceedings consistent with its ruling. The Court determined that Petitioner's injury arose out of an employment-related risk and was compensable, based upon its finding that the "evidence unequivocally shows claimant was performing acts that the employer might reasonably have expected him to perform so that he could fulfill his assigned duties on the day in question." The Court further determined that the Commission erred in applying standards related to a neutral risk. The Appellate Court found that the risk encountered by Petitioner here was not a neutral risk, but an employment-related risk. The test to be applied, therefore, was not the "greater risk than the general public" applied to neutral risks. The Court found Petitioner was exposed to a risk distinctly associated with the claimant's employment as he was "performing acts the employer might reasonably have expected him to perform incident to his assigned duties and, as a result, his injury arose out of his work for the employer." The Court deemed Petitioner's reaching into the box as an act that was "incidental to the fulfillment of his job-related duties." The Court concluded that "[a]lthough the act of 'reaching' is one performed by the general public on a daily basis, the evidence in this case established the risk to which claimant was exposed was necessary to the performance of his job duties at the time of injury."

The Court found its decision in this matter consistent with its holding in *Autumn Accolade v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120588WC, par. 19, 990 N.E.2d 901. In *Autumn Accolade,* the claimant was a caregiver at an assisted living facility who injured her cervical spine while assisting a resident in the shower. The claimant extended her left arm to remove a soap dish that was causing suds to accumulate in the shower. As she held the resident with her right arm and removed the soap dish with her left, she felt a pop in her neck and pain travel down her right arm. The Court found that the claimant was engaged in an activity she might reasonably be expected to perform incidental to her assigned duties and concluded that her injury was compensable under the Act.

Pursuant to the instructions of the Appellate Court in its review of this case, the Commission finds that Petitioner proved that his injury arose out of and in the course of his employment. Petitioner seeks related temporary total disability, medical expenses, and permanent partial disability benefits.

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TTD. Prior to the Arbitration Hearing on August 25, 2011, the parties stipulated to Petitioner's average weekly wage of $595.28, which yields a temporary total disability rate of $396.85, and to the period of temporary total disability from October 1, 2010 through November 22, 2010, or 7-3/7 weeks. Accordingly, Respondent is ordered to pay Petitioner $2,948.03 in temporary total disability benefits. Respondent is given credit for all amounts paid.

Medical Expenses. On the Request for Hearing filed prior to the Arbitration Hearing on August 25, 2011, Petitioner alleged outstanding medical expenses of $35,501.52. Arbitrator's Exhibit 1 attachment. The attachment, which also appears in Petitioner's Exhibit 6, revealed that Respondent had paid all of Petitioner's medical bills except for October 1, 2010 charges from Provena Covenant Medical Center associated with Petitioner's surgery on that date and charges for his pre-operative tests and post-operative physical therapy. Respondent did pay Dr. Kohlmann's bills associated with that surgery, and Petitioner's group health carrier, Tri-Care, paid Paris Community Hospital's charges for Petitioner's pre- and post-operative medical care, including physical therapy.

Respondent claimed no credit under Section 8(j) for medical benefits paid by Petitioner's group health insurer, Tri-Care. Therefore, no credit is awarded for those payments.

The Commission further notes that Respondent raised no objection to the reasonableness and necessity of the shoulder surgery and post-operative treatment. Its only objection to liability was its argument that no compensable accident had occurred. Dr. Kohlmann, who performed a Section 12 exam at Respondent's request, found Petitioner's condition to be causally related to his February 19, 2010 accident and further found surgery to be reasonable and necessary to relieve Petitioner from the effects of his work injury. The Commission finds that Petitioner's medical expenses as submitted in evidence were reasonable and necessary.

Pursuant to the Appellate Court's instructions, the Commission orders Respondent to pay all reasonable and necessary medical expenses, as documented in Petitioner's Exhibit 6. Respondent is to receive credit for all payments made on its behalf.

Permanent Partial Disability. Petitioner testified that he still suffers a small amount of pain in his shoulder and is unable to reach for things in the same way he did before his injury. However, his complaints were not sufficient to require additional treatment. He did undergo arthroscopic surgery to repair his full thickness rotator cuff tear, an anterior acromioplasty, and open distal clavicle resection, as well as post-operative physical therapy. Following his surgery on October 1, 2010, Petitioner experienced some residual pain complaints and reported hearing snapping and popping sounds in his shoulder. Dr. Kohlmann diagnosed him with incompletely resolved bursitis on January 27, 2011, his last appointment before his arbitration hearing on August 25, 2011.

14IWCC1070

Petitioner testified that prior to this accident, he had a work restriction limiting lifting to 25 pounds. He testified that because Respondent had a policy of no workers lifting more than that amount, he was able to work full duty. Following his shoulder surgery, Petitioner returned to work again at full duty. Based upon the foregoing, the Commission finds that Petitioner suffered a loss of use of 12.5% of the person as a whole as a result of his January 29, 2010 work-related accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses documented in Petitioner's Ex. 6, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $396.85 per week for a period of 7-3/7 weeks, 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 pay to Petitioner the sum of $357.17 per week for a period of 50 weeks, as provided in Section 8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 10% of the person-as-a-whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: DEC 10 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-12/02/14
drd/dak
68

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Yousef Elayyan,
Petitioner,

vs. NO: 09 WC 37192

Independent Mechanical Industries, Inc.,
Respondent.

14IWCC1071

DECISION AND OPINION ON REVIEW

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

After considering the entire record, the Commission affirms the Arbitrator's finding that Petitioner did not prove by a preponderance of the evidence that he sustained an accident that arose out of and in the course of employment on June 26, 2008. In addition to the findings of the Arbitrator in his September 9, 2013 Decision, the Commission makes the following findings of fact and conclusions of law:

To establish a compensable accident under the Act, a Petitioner must prove by a preponderance of the credible evidence that the accident or accidental injury arose out of and in the course of employment. An employee who suffers a repetitive trauma injury still may apply for benefits under the act, but must meet the same standard of proof as an employee who suffers a sudden injury. *See AC&S v. Industrial Comm'n*, 304 Ill. App. 3d 875 (1st Dist. 1999). That means, inter alia, an employee allegedly suffering from a repetitive trauma injury must still point to a date within the limitations period on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person. *Williams v. Industrial Comm'n*, 244 Ill. App. 3d 204 (1st Dist. 1993). Setting the manifestation date is a fact determination for the Commission. *Palos Electric Co. v. Industrial Comm'n*, 314 Ill. App. 3d 920 (1st Dist. 2000). The aggravation of a preexisting disease may be an accidental injury and

may be compensable if it meets the requirement that the occurrence be traceable to a definite time, place and cause. *Riteway Plumbing v. Industrial Comm'n*, 67 Ill. 2d 404 (1977).

In resolving questions of fact, it is within the province of the Commission 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. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665 (1st Dist. 2009).

Bearing these general principles in mind and turning to the facts of this case, the Commission, after review of the record as a whole, finds Petitioner failed to prove by a preponderance of the credible evidence that he suffered an accidental injury that arose out of and in the course of employment on June 26, 2008. In reviewing the medical evidence, we find that Petitioner first treated for foot pain with Dr. Powers on May 26, 2008, a month before his alleged date of injury. The initial intake form noted that Petitioner's feet and heels hurt and that he suffered from flat feet. Petitioner noted on the intake form that his symptoms were not work related. Petitioner was diagnosed after exam on that date with bilateral calcaneal spurs and plantar fasciitis. Dr. Powers did not give an opinion regarding causation of Petitioner's condition at that time. Petitioner treated with Dr. Powers again on June 2, 2008 for continued pain in the left heel. Custom orthotics were prescribed and again, the note is devoid of any opinion regarding causation of Petitioner's complaints or condition. Petitioner returned to Dr. Powers on June 26, 2008. It was at this visit that Petitioner was dispensed prescription orthotics and Dr. Comfort boots for continued foot pain, and he was to return in two weeks for follow up. Petitioner testified that on June 26, 2008, he noticed pain in his feet from standing all day in construction boots that he was required to wear and the pain gradually increased day by day (Tr. 14-16). Petitioner alleged in his Application for Adjustment of Claim that he injured both feet due to having to wear steel toed work boots to do his job. Petitioner admitted at trial, however, that he was only required to wear construction grade shoes, not steel toed boots (Tr. 37).

Petitioner testified that it was only after he began wearing his orthotics Dr. Comfort boots that he had a conversation with his supervisor about his foot pain. Petitioner testified he spoke with Wally Kozak soon after purchasing the boots. Mr. Kozak said, "Hey, nice shoes," to which Petitioner replied, "Thank you." (Tr. 26). Petitioner further testified that he told Mr. Kozak they were prescription due to foot pain and that Mr. Kozak asked them how they felt, to which Petitioner replied, "So far, so good." (Tr. 27). Petitioner testified that he stopped wearing his Dr. Comfort boots after a couple of days because they were punctured by a nail. (Tr. 28). Petitioner presented to Dr. Powers on one additional occasion, July 10, 2008, at which time it was noted that Petitioner was not wearing his prescription boots because they didn't offer enough protection, and he was not taking the Indocin prescribed. Dr. Powers made no opinion regarding causation of Petitioner's complaints or foot condition(s).

Petitioner did not seek treatment for a period of nine months. He then presented to a new podiatrist, Dr. Pandit, on April 20, 2009. Dr. Pandit noted that Petitioner reported painful heels after rest and when waking up and that his problem was not helped by the fact that he had to wear steel toed shoes at work. Petitioner was diagnosed by Dr. Pandit with bilateral plantar fasciitis and neuritis and was casted for orthotics for use in his steel toed boots. Dr. Pandit provided her opinions by way of deposition on August 26, 2010. Dr. Pandit stated that Petitioner denied seeing any other doctors for treatment of his feet before treating with her. At hearing, Petitioner testified that he did not have any problems with his feet or seek any medical care for

his feet prior to June 26, 2008. (Tr. 33) Dr. Pandit testified that the Petitioner's flat feet condition was related to the condition of plantar fasciitis but did not provide further reasoning for this opinion. Dr. Pandit confirmed that she did sign a form on May 4, 2010 stating that Petitioner's foot condition was not work related.

Petitioner was examined by Dr. Vinci pursuant to Section 12 on request of Respondent on November 3, 2010. Dr. Vinci noted that Petitioner had initial pain and discomfort in his bilateral feet beginning in June 2008 and the Petitioner felt that the fact he has to wear work boots contributed to his discomfort. He was not taking any medication and on examination is noted to have severe flat footedness bilaterally with a complete collapse of the medial longitudinal arch bilaterally. Dr. Vinci also diagnosed bilateral plantar fasciitis and noted severe pronation associated with bilateral flat-footedness. Dr. Vinci testified by way of deposition on February 6, 2013. He opined that, based on 28 years of practice as a board certified podiatrist and ankle and foot surgeon, there is no correlation between steel toed shoes or hard soled shoes and development of plantar fasciitis. Dr. Vinci testified that it is the biomechanics of the foot during ambulation that creates the symptoms and associated diagnosis of plantar fasciitis, not the shoe it is housed in (Rx2, P25). Dr. Vinci further opined that after review of the medical records and exam of the patient, there was no relation to Petitioner's foot condition and his work. Dr. Vinci did state that certain work, such as operating a foot pedal repetitively, could lead to plantar fasciitis. Petitioner's genetic condition of severe flat feet caused a positioning of the foot creating an abnormal stress and strain on the fascial band leading to the development of plantar fasciitis symptoms. (Rx2, P.34).

Petitioner alleges on his application for Adjustment of Claim filed September 8, 2009, that, on June 26, 2008, he "injured both feet due to having to wear steel toe work boots to do his job." The Application for Adjustment of Claim was amended at hearing on July 23, 2013 to change the Respondent's name but no other changes were made. Petitioner treated for his foot condition prior to June 26, 2008 and was diagnosed with plantar fasciitis on May 26, 2008. He testified at trial that he was not required to wear steel toed boots, only construction grade shoes. The date of accident chosen by Petitioner, June 26, 2008, is a date of treatment with Dr. Powers. It is not the first treatment date, the last treatment date, or a date on which any opinion regarding causation was given. He continued to treat with Dr. Powers, but no causation opinion as given by this treater regarding the condition. Petitioner ceased treatment for a period of nine months after receiving conservative care including custom orthotics, and then began treating with Dr. Pandit in February 2009 for the same condition. Petitioner told Dr. Pandit that he had not had any prior treatment before seeing her for care. A compensable accident must be able to be traced to a definite time, place, and cause. The evidence in the record does not lead to a finding of May 26, 2008 as a manifestation date of Petitioner's condition. The Commission further finds that it is unable to assign any other date as a proper date of manifestation based on the evidence contained in the record. The Commission affirms the Arbitrator's finding that Petitioner failed to prove he sustained an accidental injury that arose out of and in the course of employment for Respondent on June 26, 2008.

The Commission further finds that Petitioner did not prove by a preponderance of the evidence that his condition, bilateral plantar fasciitis, arose out of and in the course of his employment for Respondent. Petitioner specifically alleged in his Application for Adjustment of

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claim, in his medical records, and in his testimony at arbitration, that his current condition of ill-being was caused, in part, by the requirement that he wear steel toed work boots to do his job.

Petitioner later testified that he did not have to wear steel toed work boots as he told his medical providers and as alleged on the application, but instead was only required to wear construction grade shoes. Dr. Pandit had no knowledge of Petitioner's prior treatment with Dr. Powers when providing her opinions that Petitioner's bilateral plantar fasciitis was due to the lack of bend in hard soled shoes. Dr. Pandit further opined that Petitioner's severe bilateral flat feet was totally unrelated to his plantar fasciitis but she gave no reasoning for this opinion. Petitioner was quoted in his medical records as stating that he always had flat feet. Dr. Vinci opined that Petitioner's bilateral plantar fasciitis was due to severe pronation associated with bilateral flat footedness which was so severe that he had a complete collapse of his arches. Dr. Vinci testified that there was no relation to Petitioner's condition of ill being and his employment for Respondent. The Commission finds the opinions of Dr. Vinci more credible than Dr. Pandit regarding causation of Petitioner's condition of plantar fasciitis and related symptoms. The Commission adopts the opinions of Dr. Vinci that there is no relation to petitioner's bilateral foot condition and his work for Respondent.

All other issues are moot. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 9, 2013, is hereby affirmed and adopted with additional reasoning.

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

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

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: DEC 10 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-10/21/14
drd/adc
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ELAYYAN, YOUSEF
Employee/Petitioner

Case# **09WC037192**

INDEPENDENT MECHANICAL INDUSTRIES INC
Employer/Respondent

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On 9/9/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4128 RUBENS AND KRESS
FRANK KRESS
134 N LASALLE ST SUITE 444
CHICAGO, IL 60602

2623 McANDREWS & NORGLE LLC
MATTHEW McENERY ESQ
53 W JACKSON BLVD SUITE 315
CHICAGO, IL 60604

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Yousef Elayyan
Employee/Petitioner

v.

Independent Mechanical Industries, Inc.
Employer/Respondent

Case #: 09 WC 37192

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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 **July 23, 2013 and August 29, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the accident?
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 26, 2008**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was not*** given to Respondent; based on a finding of no compensable accident, the issue of notice is moot.

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

In the year preceding the injury, Petitioner earned **$34,155.16**; the average weekly wage was **$656.83**.

On the date of accident, Petitioner was **23** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$2,585.76** for other benefits, for a total credit of **$2,585.76** for payment of short-term disability benefits for which credit is allowed under Section 8(j) of the Act.

Respondent is entitled to a credit of **$12,446.26** under Section 8(j) of the Act for payment of medical expenses.

ORDER

Petitioner has failed to prove that he sustained an accidental injury in the course of and arising out of employment with Respondent on June 26, 2008. Accordingly, Petitioner's claim for worker's compensation benefits is denied in its entirety.

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 David Kane

September 9, 2013

Date

SEP 9 – 2013

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FINDINGS OF FACT

The Arbitrator finds the following facts relevant to determining the disputed issues at bar.

Petitioner alleges an accidental injury in the course of and arising out of his employment with Respondent on June 26, 2008. Petitioner alleges injuries to both feet allegedly the result of "repetitive trauma" from allegedly being required to wear steel-toed boots at work. Respondent disputes these allegations and accordingly has denied liability for any allegedly-related or corresponding WC benefits.

On the date of the alleged accident on June 26, 2008, Petitioner was a 23 year old married male with no dependents under 18. (Arb. Ex. 1) He was employed with Respondent as an apprentice pipefitter for approximately 1 year since his date of hire on June 11, 2007 (PX 9).

On May 29, 2008 (approximately one month prior to his alleged accident date), Petitioner saw a podiatrist, Dr. Richard Powers, for pain in his feet. The medical record from this date reflects a history that Petitioner was complaining of pain in both heels and arches **ongoing since starting a new job in the pipe-fitters union.** (PX 1) Based on Petitioner's hire date of June 11, 2007, this history of foot pain dates back to a symptom onset date of approximately **June of 2007**.

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Dr. Powers noted that Petitioner remarked "always having flat feet." (PX 1) On the registration form with Dr. Powers' office dated May 29, 2008, Petitioner checked the line "NO" for whether his symptoms or conditions were "work related" and right next to that he wrote his initials "Y. E." (PX 1)

Petitioner saw Dr. Powers again on June 2, June 26, and July 10, 2008. The primary working diagnosis while treating with Dr. Powers was bilateral plantar fasciitis. (PX 1)

Petitioner testified that on June 26, 2008, his job duties involved anything having to do with pipes including connecting pipes, preparing pipes for welding by grinding them, and "fire watch" which was to make sure the welders did not start a fire while welding pipes. His job also involved standing and walking constantly, including going up and down 3 or 4 floors of concrete stairs, and constantly moving back and forth.

In describing his job duties from June 26, 2008, Petitioner testified that he noticed pain in his feet and a burning sensation in his heels when working. He testified that he was working on piping assembly and assisting with loading and unloading. His work gear included a hard hat, safety glasses and construction grade boots.

On June 26, 2008, Petitioner returned to see Dr. Powers. (PX 1) The medical record from this date does not reflect any history of repetitive work activities, or specifically steel-toed boots, as being the cause or source of Petitioner's foot pain. This record simply states

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that Petitioner was "having a lot of pain when he is not wearing the ankle paddings previously dispensed. He also has some secondary pain in the left ankle at times with wearing the paddings." (PX 1) Dr. Powers dispensed "Dr. Comfort" boots. (PX 1)

Petitioner testified that some time during the first week of July of 2008, he came to the jobsite wearing his new Dr. Comfort work boots that Dr. Powers had prescribed. When he arrived, he had a conversation with his supervisor, Wally Kozak. According to Petitioner's testimony, Mr. Kozak said "nice boots" to which Petitioner responded "thank you" and further said "my doctor prescribed these boots for me because of the pain in my feet." Petitioner testified that Mr. Kozak then said "how are they feeling?" to which Petitioner replied "so far, so good."

On July 10, 2008 Petitioner returned to see Dr. Powers and reported 50% to 60% improvement with the orthotics. He was not wearing the Dr. Comfort boots because they were too flexible, not protective enough and there were durability issues. Dr. Powers noted that Petitioner's bilateral plantar fasciitis was improving and he prescribed Indocin along with icing. Dr. Powers wanted to see Petitioner again in one month. (PX 1)

On August 11, 2008, Petitioner missed a scheduled appointment with Dr. Powers. (PX 1)

There are no records of treatment or documented complaints regarding Petitioner's feet from July 11, 2008 through April 19, 2010,

representing a period of ostensible symptom alleviation or resolution of approximately nine months.

From Petitioner's date of hire on June 11, 2007 through his final work week ending May 17, 2009, he worked a total of 3,793 hours. (RX 1) He worked 52 weeks from June 11, 2007 through June 8, 2008 and 49 weeks from June 9, 2008 through May 17, 2009. (RX 1)

On April 20, 2009, Petitioner saw another podiatrist, Dr. Bela Pandit for foot pain. (PX 4) The records of Dr. Pandit consist of 117 pages, but the certification page from Dr. Pandit's office states there are 187 pages. (RX 4) This represents a discrepancy and shortfall of 70 pages between the certification and the actual number of pages. Neither Dr. Pandit nor Petitioner has offered any explanation to reconcile this discrepancy.

The initial history of injury to Dr. Pandit on April 20, 2009 reflects that Petitioner was complaining of painful heels of gradual onset for a duration of 6 months. (PX 4) This history of injury dates to a symptom onset time frame of approximately **October of 2008**. Petitioner reported to Dr. Pandit that "his work states he must wear steel toe shoes which does not help his problem." (PX 4) Also on April 20, 2009, on a "Foot History" form where it requests information regarding "Previous treatment &/or physicians", Petitioner failed to mention anything about Dr. Powers and left the line entirely blank. (PX 4)

Petitioner treated with Dr. Pandit from April 20, 2009 through July 26, 2010. The working diagnosis was bilateral plantar fasciitis. (PX 4)

Petitioner continued working for Respondent through the pay period ending May 17, 2009. (RX 1) Petitioner testified that his last day of work was May 14, 2009.

Petitioner saw Dr. Pandit again on Monday, May 18, 2009. (PX 4)

On May 21, 2009, only one week after his last day of work with Respondent, Petitioner filled out an "Accident Form" for Local 597 which is part of Dr. Pandit's records. (PX 4) On this form, Petitioner failed to mention anything about repetitive work activities, the date of onset of symptoms, or steel-toed boots. Specifically, on the line for "Related to the job", Petitioner failed to provide an answer. (PX 4)

Also on May 21, 2009, Petitioner stated on a "Weekly Accident and Sickness" form for Local 597 in his own writing that his condition was **not** work-related. (PX 4) Petitioner confirmed in his testimony at trial on July 23, 2013 that he was open and honest about the information on all of the forms he completed for Dr. Pandit's office.

On May 25, 2009, Dr. Pandit stated on the same "Weekly Accident and Sickness" form that Petitioner's condition was **not** due to a work-related injury. (PX 4) On this same form, Dr. Pandit further stated that the date the "symptoms first appeared" was **November 8, 2007**. (PX 4)

On a "Referral Intake Form" dated June 1, 2009 from ATI Physical Therapy, the "Date of Injury/Onset Date" is listed as **May 26, 2009**. (PX 2) On June 3, 2009, when Petitioner presented for initial evaluation at ATI, on the "Medical History Form" he placed a check-mark in the box for "Work-related injury". (PX 2) He left the "Date of Injury/Onset" line entirely blank. (PX 2)

The handwritten initial evaluation report dated June 3, 2009 reflects a history as follows: "onset of pain greater than 1.5 years ago; patient states he believes pain is worse secondary wearing steel toed boots at work; off work until end of July". (PX 2) Petitioner underwent physical therapy for his feet from June 3, 2009 through July 7, 2009 for a total of 15 sessions. (PX 2) On June 26, 2009, Petitioner reported to the physical therapist that he felt better without the orthotics in his shoes. (PX 2)

Petitioner received short term disability benefits through his pipe fitters' union from June 1, 2009 through July 24, 2009. This was a period of STD payments of 8 weeks at $323.22 per week, or $2,585.76. (PX 8)

On July 7, 2009, Petitioner stated to the physical therapist the he was "going out of the country for the next 6 – 8 weeks." (PX 2) Petitioner confirmed in his testimony at trial that he did in fact go to the country of Jordan for approximately 6 weeks for the purposes of vacation.

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There are no treatment records from July 8, 2009 to August 23, 2009, which was approximately 6.5 weeks. This was the period of time Petitioner was in Jordan for vacation.

Petitioner saw Dr. Pandit again on Monday, August 24, 2009. Petitioner reported to Dr. Pandit that he was interested only in surgery to his feet. (PX 4)

Four days later on August 28, 2009, Petitioner retained counsel. On September 8, 2009, Petitioner filed his Application at the Commission alleging an accident date of June 26, 2008.

On February 11, 2010, Petitioner presented to Accelerated Rehab for another course of physical therapy. (PX 5) The history of injury stated in the record was "pain in bilateral feet starting in **December of 2007**". (PX 5) Petitioner underwent physical therapy at Accelerated Rehab from February 11, 2010 through April 28, 2010 for a total of 17 visits. Petitioner also cancelled or was a "no show" on 4 occasions. (PX 5)

On May 28, 2010, Petitioner underwent surgery to both feet by Dr. Pandit. This procedure was carried out at Grand Avenue Surgical Center and consisted of bilateral plantar fasciotomies. (PX 4, PX 6)

Petitioner completed treatment with Dr. Pandit as of his last office visit with her on July 26, 2010. (PX 4)

On August 26, 2010, Dr. Pandit testified by way of evidence deposition. (PX 10) Dr. Pandit testified that when she first saw Petitioner on April 20, 2009, he gave her a history that he had painful

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heels which "started when was he was working and he was wearing steel-toed boots and he's on his feet all day." (PX 10, p. 6) Dr. Pandit provided no testimony regarding a date of onset of the symptoms or even an approximate time frame of the onset of the symptoms. (PX 10)

On November 2, 2010, Petitioner saw podiatrist Dr. Samuel Vinci at M & M Orthopedics, for a medical examination at Respondent's request pursuant to Section 12 of the Act. (RX 2) On February 6, 2013, Dr. Vinci testified by way of evidence deposition. (RX 2)

Dr. Vinci recorded a history from Petitioner that he had "initial pain and discomfort on the bottom of both his feet starting roughly in June, 2008." (RX 2) Petitioner further reported to Dr. Vinci that "all of his pain and discomfort started in his feet approximately three to six months after he started a new job for Independent Mechanical Industries." (RX 2)

Dr. Vinci testified that based on Petitioner's hire date with Respondent of June 11, 2007, the onset of symptoms three to six months after starting work with Respondent would be some time in September to December of 2007. Comparing that report with the previous statement that Petitioner's symptoms started roughly in June of 2008, Dr. Vinci testified that Petitioner gave him (Dr. Vinci) **two different symptom onset dates**. (RX 2, pgs. 11 – 13) Petitioner did

not mention anything to Dr. Vinci about allegedly being "required" to wear "steel-toed" boots while working for Respondent.

On Respondent's document titled "Safety Rules For All Employees", Paragraph 10 states "Shoes shall be construction grade, hard soled and ankle high." (PX 9) This "basic safety rule" was to be obeyed in order for Respondent to comply with the Federal Safety and Health Act. (PX 9)

On cross examination at trial on July 23, 2013, Petitioner acknowledged that Respondent required him to wear construction grade shoes with a hard sole and which were ankle high. Petitioner also admitted on cross examination that Respondent had **no job requirement** for him specifically to wear steel-toed boots. Petitioner further admitted that he liked to exercise and participate in sports and those activities included basketball, football working out and running.

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CONCLUSIONS OF LAW

Issue (C):

With respect to the issue of whether Petitioner sustained an accidental injury in the course of and arising out of employment with Respondent on June 26, 2008, the Arbitrator concludes as follows:

Petitioner has failed to prove that he sustained an accidental injury in the course of and arising out of employment with Respondent on June 26, 2008. An injury is accidental within the meaning of the Act when it is "traceable to a ***definite time***, place and ***cause*** and occurs in the course of employment unexpectedly and without affirmative act or design of the employee." International Harvester v. Industrial Commission, 56 Ill.2d 84, 305 N.E.2d 529 (1973, emphasis added), citing Matthiessen & Hegeler Zinc Co. v. Industrial Board, 284 Ill. 378, 120 N.E. 249. The Supreme Court of Illinois has consistently adhered to this definition. Id. It is the Petitioner's burden of proof and the Supreme Court has "denied recovery because the claimant failed to prove the definite-time-place-and-cause requirement of an accidental injury." Id., citing Hales & Hunter v. Industrial Commission, 31 Ill.2d 139, 198 N.E. 2d 846 (1964).

In International Harvester, the Court stated that a "disease may be an accidental injury under the Workmen's Compensation Act if it is contracted accidentally or as a result of an accident...however, the

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same definition of 'accident' is applicable as in the traditional accidental injury case, and the **requirement that the occurrence must be traceable to a definite time, place and cause applies.**" Id. at 89, emphasis added. The International Harvester Court further stated "Likewise, the aggravation of a pre-existing disease may be an accidental injury and compensable under the Workmen's Compensation Act", and "again, the same **requirement** that the occurrence be traceable to a definite time, place and cause applies." Id. at 89, emphasis added.

In International Harvester, the claimant was claiming that his emphysema was related to or caused by allegedly **repetitive** exposure to fumes in the work place. The claimant originally sought benefits under the Workers' Occupational Diseases Act, but he subsequently amended his claim to pursue benefits under the Workmen's Compensation Act. 56 Ill.2d at 85. Applying the above-referenced principles, the Court ultimately concluded that the claimant "failed to prove that he suffered an accidental injury arising out of and in the course of his employment and is therefore not entitled to recover under the Workmen's Compensation Act." Id. at 94.

In this case, there are several pieces of evidence, most of which are Petitioner's Exhibits as part of his case-in-chief, that defeat

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his claim. The medical histories are conflicting with each other and fail to either support or corroborate Petitioner's testimony.

At trial on July 23, 2013, Petitioner testified that he never experienced any foot pain prior to seeing Dr. Powers on May 29, 2008. When Petitioner first presented to Dr. Powers on May 29, 2008, the medical record from this date reflects a history that Petitioner was complaining of pain in both heels and arches **ongoing since starting a new job in the pipe-fitters union.** (PX 1)

Based on Petitioner's hire date of June 11, 2007, this history of foot pain dates back to a symptom onset date of approximately **June of 2007**. This evidence contradicts Petitioner's alleged "manifestation" date of June 26, 2008 and contradicts his testimony of never having any foot pain prior to May 29, 2008.

Also on May 29, 2008, Petitioner filled out a form with Dr. Powers' office specifically denying that his foot problems were in any way work-related. (PX 1) Petitioner confirmed in his testimony that he was open and honest with all of the information he provided to Dr. Powers. This specific denial of a work-related injury by Petitioner directly contradicts his allegation that any aspect of his employment was a cause in the development of his foot pain and therefore defeats the definite cause requirement in the elements of his burden of proof.

When Petitioner returned to see Dr. Powers on June 26, 2008, the very date he alleges to be his "manifestation" date, the medical record from this date does not reflect any history of repetitive work

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activities, or specifically steel-toed boots, as being the cause or source of Petitioner's foot pain. This record simply states that Petitioner was "having a lot of pain when he is not wearing the ankle paddings previously dispensed. He also has some secondary pain in the left ankle at times with wearing the paddings." (PX 1) This evidence fails to support the definite time, place and cause requirements of Petitioner's burden of proof.

On April 20, 2009, Petitioner reported to Dr. Pandit that he had bilateral foot pain for 6 months. This dates to a symptom onset time frame of **October of 2008** and contradicts Petitioner's alleged "manifestation" date of June 26, 2008, thus defeating the definite time requirement in the elements of his burden of proof.

On May 21 and May 25, 2009, both Petitioner and Dr. Pandit specifically denied that his foot problems were in any way work-related. (PX 1) These additional denials by Petitioner and his treating physician again directly contradict his allegation that any aspect of his employment was a cause in the development of his foot pain and therefore defeat the definite cause requirement in the elements of his burden of proof.

Also on May 25, 2009, Dr. Pandit indicated on the Form that the onset date of Petitioner's symptoms was **November 8, 2007**. This evidence directly contradicts Petitioner's alleged "manifestation" date of June 26, 2008 and therefore defeats the definite time requirement in the elements of his burden of proof.

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On the Referral Intake Form with ATI on June 1, 2009, Petitioner reported his date of injury / onset as **May 26, 2009**. This evidence contradicts Petitioner's alleged accident date of June 26, 2008 and therefore defeats the definite time requirement in the elements of his burden of proof.

When Petitioner presented to Accelerated Rehab for additional physical therapy on February 11, 2010, he gave a history of injury that the pain in his feet started in **December of 2007**. This evidence again contradicts Petitioner's alleged accident date of June 26, 2008 and therefore defeats the definite time requirement in the elements of his burden of proof.

Furthermore, when Petitioner saw Dr. Vinci for a Section 12 examination on November 2, 2010, he first gave a history that his foot pain began in **June of 2008** and then gave an additional history that his foot pain began three to six months after he began working for Respondent which would have been somewhere **between September and December of 2007**. In his testimony, Dr. Vinci correctly pointed out that these two histories reflected two different dates of onset of Petitioner's symptoms. This evidence defeats the definite time requirement in the elements of his burden of proof.

All told, Petitioner has offered at least **five different histories** to several different medical providers of when his symptoms began (dates of onset): June of 2007 (Dr. Powers), October of 2008 (Dr. Pandit), November 8, 2007 (Dr. Pandit), May 26, 2009 (ATI),

December of 2007 (Accelerated Rehab); and then two different histories to the same physician (June of 2008 and between September and December of 2007 to Dr. Vinci). In his testimony, Petitioner offered no explanation to reconcile these conflicting pieces of evidence.

Petitioner also **specifically denied** that his condition was work-related on **three separate occasions**. Again those denials were as follows: May 29, 2008 to Dr. Powers, May 21, 2009 to Dr. Pandit and then Dr. Pandit, on behalf of Petitioner, denied that the condition was work-related on May 25, 2009. Petitioner offered no testimony at trial to reconcile these denials which in turn, as evidence in his case-in-chief, only serve to undermine the very premise of his claim and also, as prior inconsistent statements, impeach his testimony regarding the alleged source of his pain, thus defeating the definite cause element of his burden of proof.

Finally, Petitioner admitted on cross examination that his job with Respondent **did not** require him to specifically wear steel-toed boots. This admission directly undermines the very premise of his allegation on his filed Application that he **had** to wear steel-toed boots for his job, thus impeaching the overall credibility of his claim and defeating the definite cause element of his burden of proof.

Abiding by the Supreme Court's definition and application of the "definite-time-place-and-cause" requirement, and based on the evidence in this case as analyzed above, the Arbitrator concludes

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that Petitioner has failed to prove that he sustained an accidental injury in the course of and arising out of employment with Respondent on June 26, 2008. Accordingly, Petitioner's claim for worker's compensation benefits is denied in its entirety and determination of any remaining disputed issues is moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Clinton Young,

Petitioner,

14IWCC1072

vs.

NO: 10 WC 35982
13 WC 2200

Southwest Airlines,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 3, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

14IWCC1072

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 $1,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 10 2014

DLG/gaf
O: 12/4/14
45

David L. Gore

Stephen Mathis

Mario Basurto

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

14IWCC1072

YOUNG, CLINTON
Employee/Petitioner

Case# **10WC035982**

13WC002200

SOUTHWEST AIRLINES
Employer/Respondent

On 4/3/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0290 KARCHMAR & STONE
LARRY KARCHMAR ESQ
111 W WASHINGTON ST SUITE 1030
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
JOHN D WHEELER
140 S DEARBOR SUITE 700
CHICAGO, IL 60603

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

14IWCC1072

CLINTON YOUNG
Employee/Petitioner

Case #10 WC 35982
#13 WC 2200

v.

SOUTHWEST AIRLINES
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on February 27, 2014. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

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

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

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

M. ☐ Is the respondent due any credit?

N. ☒ Prospective medical care?

FINDINGS

- On March 20, 2013, and January 11, 2013, the respondent was operating under and subject to the provisions of the Act.
- On those dates, an employee-employer relationship existed between the petitioner and respondent.
- On those dates, the petitioner sustained injuries that arose out of and in the course of employment.
- Timely notice of the accidents was given to the respondent.
- In the year preceding the injuries, the petitioner earned $26,752.44; the average weekly wage was $514.47.
- At the time of injuries, the petitioner was single with one child under 18.
- The parties agreed that the respondent paid $51,991.80 in temporary total disability benefits.

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $$342.98/week for 152-4/7 weeks, from March 20, 2010, through December 21, 2012, and from February 12, 2013, through April 12, 2013, which are the periods of temporary total disability for which compensation is payable.
- The medical care rendered the petitioner for his lower back was reasonable and necessary and is awarded. The respondent shall pay the medical bills in accordance with the Act and the medical fee schedule. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act, and any adjustments, and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.
- The petitioner's request for a L5-S1 laminectomy and discectomy surgery is denied.
- The petitioner is entitled to have a functional capacity evaluation and a vocational assessment pursuant to Rule 7110.10.

- The petitioner's request for penalties and fees is denied.
- In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

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

Robert E. Williams
Signature of Arbitrator

March 31, 2014
Date

APR 3 - 2014

FINDINGS OF FACTS:

The petitioner, a ramp agent, felt low back pain on March 20, 2010, while lifting a bag. The incident is the subject matter of claim #10 WC 35982. The petitioner received conservative care at MacNeal Occupational Health Services on March 22nd for sharp lower back pain. He was given work restrictions and medication for a lumbar strain. He reported continued aching lower back pain at follow-ups on March 24th and April 3rd. An MRI on April 19th revealed degenerative disc disease and facet arthropathy with central spinal canal/foraminal narrowing at L5-S1, and early degenerative changes throughout the lumbar spine without significant associated abnormality. At his last follow-up at MacNeal on April 22nd, he felt that his back pain had not improved and that walking, sitting and driving aggravated his back pain. The doctor noted no numbness or tingling or radiation of pain down his lower extremity. Their diagnosis remained a lumbar sprain for which a 15-pound lifting restriction was continued.

The petitioner saw Dr. Mark Chang on June 22nd. Dr. Chang's impression was acute lower back pain secondary to an aggravation of L5-S1 disc degeneration, slight bulging and no significant neurological problems. He followed up with Dr. Chang on July 20th, August 31st and September 28th but reported little improvement with physical therapy. On September 13th, Dr. Klaud Miller's diagnosis after an evaluation of the petitioner pursuant to the respondent's request was degenerative disc disease. He opined that the petitioner was at MMI, that muscle relaxant and epidural injections would not be beneficial and that he could work with a limitation of no frequent lifting greater than twenty-five pounds.

Dr. Chang continued to recommend epidural steroid injections and no work at monthly follow-ups through August 30, 2011. On September 29th, the petitioner reported that an epidural injection helped for about a week and a half. The petitioner reported a little longer relief after a second injection but no benefit from a third injection. Dr. Chang recommended an L5-S1 laminectomy and discectomy on May 24, 2012. Dr. Lami opined after his Section 12 examination on October 3, 2012, that no surgery was warranted. An MRI on June 28th revealed a diffuse bulge at L5-S1 causing mild narrowing of the central canal and neural foramina, bilaterally, a mild diffuse bulge at L4-5 and minimal retrolisthesis of L5 over S1. The petitioner elected to be examined by Dr. Sean Salehi on December 26, 2012, who opined that an L5-S1 laminectomy and discectomy would not be helpful and recommended an FCE. The petitioner reported to Dr. Salehi that he had returned to work full duty four days earlier without restrictions. Dr. Chang noted on January 8, 2013, that he disagreed with Dr. Salehi's recommendation of work restrictions since prior work restrictions he had given the petitioner in the past were not well tolerated and that the petitioner's predominant pain was his left leg pain.

On January 11, 2013, the petitioner re-injured his lower back lifting bags. The incident is the subject matter of claim #13 WC 2200. Dr. Chang saw the petitioner on February 12th and recommended no work until his recovery from surgery. Dr. Lami evaluated the petitioner on April 12, 2013, and noted complaints of lower back, butt cheeks and buttock pain. Dr. Lami opined that a lumbar decompression was not recommended, that he could return to work and that the degenerative disc disease and annular tear were not due to a work injury. On May 28th, Dr. Chang noted moderate back tenderness and mild weakness in the right ankle. Lower back and right leg pain was noted

by Dr. Chang on July 23rd. Low back pain and radiating pain into both buttocks and down the right leg were noted by Dr. Chang on August 20th. Dr. Chang recommended that the petitioner remain off work through February 11, 2014.

The petitioner had two back injuries with the respondent in March 2008. Both claims were resolved pursuant to a settlement contract on January 29, 2010. He returned to his regular work duties with the respondent on May 29, 2009.

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

The medical care rendered the petitioner for his lower back was reasonable and necessary and is awarded.

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

Based upon the testimony and the evidence submitted, the petitioner proved that his current condition of ill-being with his low back is causally related to the work injuries. The petitioner had pre-existing degenerative disc disease prior to the work injuries. Dr. Lami's opinion that the petitioner's annular tears are due to the process of degeneration and are distinct from an acute annular tear caused by a herniation, fracture or dislocation is credible and logical. However, the petitioner's degenerative disc disease and/or annular tears became symptomatic due to lifting luggage on March 20, 2010, and January 11, 2013.

Based upon the testimony and the evidence submitted, the petitioner failed to prove that his current symptom of radiating pain into his lower extremity is causally related to the work injuries. The petitioner did not report nor did Dr. Chang or the other medical providers and evaluators note any complaints of lower extremity pain prior to Dr.

Chang's report on January 8, 2013, of radiating left leg pain. After the petitioner's second injury on January 11, 2013, he did not report any lower extremity pain to Dr. Lami or to Dr. Chang until July 23, 2013, at which time Dr. Chang noted right leg pain. The petitioner's request for benefits for his lower extremities symptoms is denied.

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

After his first injury on March 10, 2010, the petitioner was unable to work and was off of work from March 20, 2010, through December 21, 2012. After the petitioner's second injury on January 11, 2013, the petitioner's earliest medical care was with Dr. Chang on February 12, 2013. At that time, Dr. Chang recommended no work until after the petitioner's recovery from surgery. The petitioner did not prove that the surgery recommended by Dr. Chang was reasonable and necessary. Dr. Lami opined on April 12, 2013, that a lumbar decompression was not recommended and that the petitioner could return to work but that the petitioner's work duties could cause an increase in his pain. The respondent shall pay the petitioner temporary total disability benefits of $342.98/week for 152-4/7 weeks, from March 20, 2010, through December 21, 2012, and from February 12, 2013, through April 12, 2013, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner.

FINDING REGARDING PROSPECTIVE MEDICAL:

The petitioner failed to prove that the L5-S1 laminectomy and discectomy recommended by Dr. Chang is reasonable medical care necessary to relieve the effects of the work injuries. Drs. Miller, Lami and Salehi all indicated that the petitioner suffers from a degenerative disc disease and that a laminectomy and discectomy surgery would not be beneficial. Dr. Chang's notes on January 8, 2013, that he gave the petitioner work

restrictions that were not well tolerated and that his predominant pain was left leg pain is not supported by any of his treating records or off-work slips. His opinion is of no probative value. The evidence is insufficient to establish that a L5-S1 laminectomy and discectomy surgery is reasonable or necessary medical care to relieve the effects of the work injuries. The petitioner's request for a L5-S1 laminectomy and discectomy surgery is denied.

FINDING REGARDING A VOCATIONAL ASSESSMENT:

Based on the evidence and the testimony, the petitioner is entitled to have a functional capacity evaluation and a vocational assessment pursuant to Rule 7110.10.

FINDING REGARDING PENALTIES AND FEES:

Based on the evidence and the testimony, the petitioner failed to prove that the respondent has been vexatious and unreasonable in the payment of benefits. The petitioner's request for penalties and fees is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mario Mora,

Petitioner,

vs.

United Airlines, Inc.,

Respondent.

14IWCC1073

NO: 09 WC 42242

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

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

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

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

DATED: DEC 10 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 12/4/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MORA, MARIO
Employee/Petitioner

Case# **09WC042242**

14IWCC1073

UNITED AIRLINES INC
Employer/Respondent

On 3/11/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

0328 LEWIS & DAVIDSON
RICHARD C SHOLLENBERGER JR
ONE N FRANKLIN ST SUITE 1850
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
LINDA ROBERTS
20 N CLARK ST SUITE 1000
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 14IWCC1073

MARIO MORA,
Employee/Petitioner

Case # 09 WC 42242

v.

Consolidated cases:

UNITED AIRLINES, INC.,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **LYNETTE THOMPSON-SMITH**, Arbitrator of the Commission, in the city of **CHICAGO**, on **January 3, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did 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

14IWCC1073

FINDINGS

On 8/4/2009, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did not*** exist between Petitioner and Respondent.

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

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

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

In the year preceding the injury, Petitioner earned $11,660.29; the average weekly wage was $306.84.

On the date of accident, Petitioner was 27 years of age, ***single*** with 1 dependent child.

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

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

Respondent shall be given a credit of **$14,053.90** for TTD, $ 0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of **$14,053.90**

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

ORDER

Petitioner has not proven, by a preponderance of the evidence that he sustained an accident that occurred out of and in the course of his employment with Respondent therefore, no benefits are awarded, pursuant to the Act.

Credits

Respondent shall be given a credit of **$14,053.90** for TTD.

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.

14IWCC1073

FINGINGS OF FACT

The disputed issues in this matter are: 1) accident; 2) notice; 3) causal connection; 4) earnings; 5) average weekly wage; 6) permanent partial disability 7) temporary total disability; and 8) the nature and extent of Petitioner's injuries. *See,* AX1.

Mario Mora ("Petitioner") testified that he has been employed as a baggage handler by United Airlines Inc. ("Respondent") since July 21, 2000. He also testified that this job requires lifting baggage that weighs from fifty (50) to one hundred (100) pounds, on a regular basis.

He further testified that on the date of his accident, he grabbed an overweight bag from a high stack, with his right arm. The bag was not marked overweight but was in fact overweight and very heavy. As he pulled the bag off, the weight of the bag yanked his right arm down. He testified that he had an immediate onset of pain in his elbow, radiating into the third, fourth and fifth fingers of his right hand.

Prior to Petitioner's testimony, the parties had stipulated that the accident occurred on August 4, 2009, and that timely notice of the accident was given to the Respondent. During direct examination, Petitioner testified that the accident occurred on August 4, 2009 however, during cross-examination, Petitioner was questioned regarding several absences from work in the year 2008. He testified that he began to lose time during 2008 was due to his inability to tolerate work activities due to injuries to his right arm. Petitioner's counsel, on redirect examination, attempted several times to rehabilitate the petitioner's testimony regarding the accident however, the petitioner continued to state that he injured himself in August of 2008. Petitioner further testified that he was unable to work in 2008, due to the pain in his elbow.

Prior to closing proofs, Respondent was granted leave to withdraw its stipulation as to accident and notice. Thereafter, Petitioner was allowed to supplement his testimony on redirect examination. Petitioner testified that he remembered that his above-described accident occurred on August 4 but in the year 2008, and not 2009 as previously stipulated. Thereafter, Petitioner testified that prior to the accident; he had never had any injuries, received any treatment, or had any symptoms in his right elbow. Finally, Petitioner also testified that he reported the accident to his supervisor and the safety supervisor on the date of the accident.

Medical treatment

Petitioner testified that he first saw Dr. Dennis Mess the day after his accident. Dr. Mess' records contain a progress note dated August 5, 2009, which stated that he was 24 hours status post acute strain of the right forearm after lifting a bag at work. His main complaint was numbness in the 4th and 5th digits. The impression was acute ulnar nerve strain at work and ulnar neuritis. He was taken

off work until August 13, 2009, and an EMG/NCV was ordered. On August 12, 2009, Dr. Mess again recommended an EMG/NCV and took Petitioner off work until October 17, 2009, at which time he would be allowed to return to work with restrictions. *See,* PX1 pgs.2 & 5.

On August 28, 2009, Dr. Myron Glassman performed an EMG/NCV and found evidence of right ulnar nerve neuropathy at the right upper elbow region. Petitioner testified that Respondent allowed him to return to light duty work on August 30, 2009. *See,* PX2, p.3.

On August 31, 2009, Petitioner returned to Dr. Mess who prescribed a Medrol dose pack. On September 4, 2009, Dr. Mess provided a prescription recommending that Petitioner remain on restricted duty. On September 21, 2009, Dr. Mess noted unresolved elbow pain, recommended continuation of light duty restrictions and a FCE. On September 30, 2009, Dr. Mess provided a prescription for occupational therapy for ulnar neuritis. On November 16, 2009, Petitioner returned to Dr. Mess, who again recommended occupational therapy. *See,* PX1 pgs. 8, 10-11.

An initial occupational therapy evaluation was performed on November 18, 2009, at Swedish Covenant Hospital. Petitioner provided an onset date of August 4, 2009, while working, pulling bags as a ramp handler. He explained he pulled a bag toward himself that was too heavy, and the bag did not have a heavy tag. The bag yanked him down, and he felt something in his right arm pull. His arm felt sore and tight, and later he had numbness from the ring and small finger to the wrist. The therapist found marked decreased grip and pinch strength, pain on palpation of the right elbow, pain with full extension and flexion of the right elbow, and swelling around the right medial epicondyle compared to the left. He was provided a foam pad for his elbow and a custom splint. *See,* PX3 pgs. 2-3.
Occupational therapy commenced on November 25, 2009. The parties had previously agreed that Petitioner was entitled to temporary total disability commencing on December 10, 2009. Therapy continued through January 13, 2010, at which time Petitioner reported felling a little better. *See,* AX1, PX3 pgs.14 & 19.

On Dr. Mess' referral, Dr. Glassman performed a second EMG on January 22, 2010, which was read to show ongoing but improved right ulnar neuropathy. *See,* PX2 p.5.

On February 10, 2010, Petitioner consulted Dr. James Cohen. He provided a history of lifting a bag at work on August 4, 2009, and an onset of numbness and tingling in his ring and small fingers. On examination, Dr. Cohen found right elbow range of motion from 10 to 130 degrees with some guarding, compared to 135 degrees on the left. There was medial elbow pain with extension. Motor and sensory examinations were normal. He demonstrated loss of grip and pinch strength on the right compared to the left. He had a mildly positive Tinel's sign along the ulnar nerve at the cubital tunnel. Dr. Cohen diagnosed cubital tunnel syndrome, which could be treated with or without surgery

depending on the intensity of symptoms. On March 24, 2010, Petitioner contacted Dr. Cohen expressing interest in proceeding with surgery. *See*, PX4 pgs.2 &.5.

On April 21, 2010, Petitioner returned to Dr. Cohen stating that his symptoms had not improved. Petitioner requested and Dr. Cohen scheduled cubital tunnel release surgery. See, PX4 p.7.

Thereafter, Respondent authorized surgery by Dr. Cohen, which was performed on July 6, 2010. The surgery was a right cubital tunnel release with formal transposition of the ulnar nerve. *See,* PX8.

On July 23, 2010, Petitioner resumed occupational therapy on order of Dr. Cohen. On August 30, 2010, Dr. Cohen confirmed continued sensitivity and numbness at the medial elbow with improvement and ordered progression to more aggressive therapy. On September 29, 2010, Dr. Cohen recommended work conditioning. On October 20, 2010, Dr. Cohen noted ongoing complaints of numbness, tingling and weakness, and ordered additional therapy for strength and conditioning followed by a functional capacity evaluation ("FCE"). *See,* PX3 p.22; PX4 pgs. 15-20.

On November 12, 2010, an FCE was performed at AthletiCo. The evaluation found the Petitioner provided "near full levels of physical effort" throughout the testing day and that there was the suggestion of the presence of minor inconsistencies to the reliability and accuracy of Petitioner's reports of pain and disability. It also stated Petitioner did not demonstrate the ability to meet the demands of his regular heavy-duty job and did demonstrate the capacity to perform medium to heavy level work. Dr. Cohen imposed medium level work restrictions. *See,* PX4 & 5 .

Petitioner was referred for a repeat IME with Dr. Pomerance on January 6, 2011. Dr. Pomerance found mild, diminished sensation at the incision, percussion over the medial epicondyle, which produced numbness; and clicking, with instability in the elbow, was reproduced during flexion and extension. Dr. Pomerance opined that because the FCE noted sub-maximal effort that a full duty release was appropriate. *See,* RX4.

Petitioner testified that despite the restrictions recommended by Dr. Cohen, Respondent agreed only to provide unrestricted work. The parties have stipulated that Petitioner retuned to unrestricted work as of February 22, 2011, ending his period of temporary total disability. *See,* AX1.

Since that date, Petitioner has performed his regular duty work. He testified that he continues to experience numbness, pain and weakness in his right elbow, hand and fingers. He explained that these symptoms would appear following his heavy work activities and that he would frequently miss time from work, due to this pain.

As to average weekly wage, Petitioner provided his attendance records for the fifty-two (52) weeks preceding his accident. Petitioner and Respondent's witness, Kelly Bongiorno agreed that in the year

preceding the accident, Petitioner did not work as a result of illness, traded days and requested days off work without pay. *See*, PX7 & RX1.

The Petitioner testified as to the number of hours and days he worked prior to his alleged injury. The petitioner testified that in September 2008 he worked a total of 11 days. Petitioner testified that he had been scheduled to work for 40 hour a week, 5 days a week. However, Petitioner voluntarily chose not to work all assigned days. *See*, RX1.

In October 2008, Petitioner worked a total of 12 days. Petitioner chose not to work and traded his shift for 6 days. Petitioner also had sick pay for 3 days and had an anniversary vacation day.

In November 2008, Petitioner worked 5 days. Petitioner voluntarily traded his shifts for 9 days, took sick leave for 4 days and vacation for 2 days. Petitioner testified that it was a voluntary decision not to work the days he had been scheduled.

In December 2008, the Petitioner worked for 3 days; took vacation for 5 days and chose to trade his assigned shifts for 10 days and used sick time for 3 days.

Petitioner testified that in January 2009 he worked a total of 14 days. The payroll records indicate Petitioner took sick leave for 2 days and traded his shift for 5 days.

Petitioner testified that in September 2012 he worked for a total of 8 days. Petitioner took voluntary absences for 10 days and traded off his scheduled workdays four times.

Petitioner testified that in October 2012 he worked for 11 days, traded his shift for 7 days and took a voluntary leave of absence for 4 days.

In November 2012, the petitioner worked for 3 days; traded his assigned shifts for 7 days and took a voluntary leave of absence for 6 days. In December 2012, the Petitioner worked for 4 days, traded his shift for 6 days and took voluntary absences for 11 days.

In January 2013, the payroll records reflect that Petitioner worked for 3 days, traded his shift for 6 days, and took voluntary absences for 6 days. *See*, RX2.

The petitioner's wage statement, which was admitted into evidence, at trial, indicates that the petitioner earned a gross pay of $11,660.29 over 38 weeks prior to the date of injury of August 4, 2009. *See*, RX3.

The Petitioner testified that he has returned to work, in a full duty capacity, without restrictions.

14IWCC1073

Respondent's Witness

Ms. Kelly Bongiorno, a manager for ramp service for the respondent, testified that Petitioner was scheduled for a 40-hour week however; he could voluntarily choose to work less than 40-hours a week. Kelly Bongiorno further testified that Petitioner's hourly rate of pay was $20.47 as of August 4, 2008, which increased to $20.98 on April 26, 2009, and again to $20.99 on July 19, 2009. *See,* PX6 p. 4.

CONCLUSIONS OF LAW

C. Did an accident occur that arose out of an in the course of the Petitioner's employment by the Respondent?

A decision by the Commission cannot be based upon speculation or conjecture. *Deere and Company v Industrial Commission*, 47 Ill.2d 144, 265 N.E. 2d 129 (1970). A petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d 236, 369 N.E.2d 853 (1977). Where a petitioner fails to prove by a preponderance of the evidence that there exists a casual connection between work and the alleged condition of ill-being, compensation is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v Industrial Commission*, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs. Industrial Commission*, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).
It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

The Illinois Supreme Court has held that a claimant's testimony standing alone may be accepted for the purposes of determining whether an accident occurred. However, that testimony must be proved

credible. *Caterpillar Tractor vs. Industrial Commission*, 83 Ill.2d 213, 413 N.E.2d 740 (1980). In addition, a claimant's testimony must be considered with all the facts and circumstances that might not justify an award. *Neal vs. Industrial Commission*, 141 Ill.App.3d 289, 490 N.E.2d 124 (1986). Uncorroborated testimony will support an award for benefits only if consideration of all facts and circumstances support the decision. *See generally, Gallentine v. Industrial Commission*, 147 Ill.Dec 353, 559 N.E.2d 526, 201 Ill.App.3d 880 (2nd Dist. 1990), *see* also *Seiber v Industrial Commission*, 82 Ill.2d 87, 411 N.E.2d 249 (1980), *Caterpillar v Industrial Commission*, 73 Ill.2d 311, 383 N.E.2d 220 (1978). It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence, and assign weight to the witness' testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); *Hosteny v Workers' Compensation Commission*, 397 Ill.App. 3d 665, 674 (2009).

The record of treatment by Dr. Mess, the occupational therapist, and Dr. Cohen contain a history of Petitioner's accident occurring on August 4, 2009. This was the date of accident stipulated to at commencement of the hearing. However, during cross-examination, Petitioner was questioned regarding his multitude of absences from August 2008 through August 2009. He testified that some of these absences, in 2008, were due to injury to his right elbow. Petitioner was then questioned further and every attempt was made by his counsel to rehabilitate his testimony, regarding the date of accident however, Petitioner insisted that his accident occurred on August 4, in the year 2008 and not 2009. Thereafter, Respondent withdrew its stipulation regarding the date of accident and notice making it Petitioner's burden to prove these disputed issues.

Petitioner also maintained that he had suffered only one injury to his right elbow and that he never lost time from work due to an elbow condition prior to the subject accident.

The petitioner specifically testified that he did not work his assigned hours in 2008 because of his shoulder injury. He then insisted that the injury occurred in 2008. To find that Petitioner became confused during both the cross-examination and redirect examination, as to the year of his accident, is asking the Arbitrator to speculate. The Arbitrator finds that the petitioner has not proven, by a preponderance of the evidence, that an accident occurred in August of 2008, that arose out of and in the course of his employment by Respondent, therefore no benefits are awarded pursuant to the Act. As the Arbitrator has found that the petitioner has not proven an accident, the remaining issues are moot and will not be addressed.

14IWCC1073

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
09WC42242
SIGNATURE PAGE

Signature of Arbitrator

March 11, 2014
Date of Decision

MAR 17 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Paul Ishikawa,
Petitioner,
vs.

NO: 13WC 25890

Peoria Disposal Company,
Respondent,

14IWCC1074

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, 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 22, 2014, is hereby affirmed and adopted.

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

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

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: DEC 11 2014
MJB/bm
o-12/1/2014
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

ISHIKAWA, PAUL
Employee/Petitioner

Case# **13WC025890**

PEORIA DISPOSAL COMPANY
Employer/Respondent

14IWCC1074

On 4/22/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

2674 BRADY CONNOLLY & MASUDA PC
JULIA McCARTHY
705 E LINCOLN ST SUITE 313
NORMAL, IL 61761

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)

Paul Ishikawa
Employee/Petitioner

v.

Peoria Disposal Company
Employer/Respondent

Case # **13** WC **25890**

Consolidated cases: _____

14IWCC1074

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 **Bloomington**, on **March 27, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [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 _____

FINDINGS

On the date of accident, **7-15-13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$47,069.60**; the average weekly wage was **$904.80**.

On the date of accident, Petitioner was **37** years of age, ***single*** with **2** dependent children.

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

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

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

ORDER

Denial of Benefits.
The arbitrator finds petitioner has failed to prove an accident arising out of and in the course of his employment, all benefits are denied. As there are no benefits payable, there is no credit 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.

D. Dylan McCarthy
Signature of Arbitrator

April 15, 2014
Date

ICArbDec19(b)

APR 22 2014

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PAUL ISHIKAWA, Petitioner,	)	
vs.	)	No. 13 WC 25890
PEORIA DISPOSAL COMPANY, Respondent.	)	14IWCC1074

STATEMENT OF FACTS

The petitioner testified he has been employed with Peoria Disposal Company as a driver since June 2008. The job involves transporting hazardous waste materials as well as residential garbage collection. The petitioner testified he has had various duties from 2008 through 2013 as a driver.

Petitioner testified his job duties have included picking up hazardous waste. The petitioner testified in detail with regard to his job duties at the Keystone site. The petitioner testified to lining large boxes/waste containers, unrolling tarps over the containers to fill the containers and rerolling the tarps.

Petitioner testified he is 5'2". To roll and unroll the tarps involves complete outstretched overhead reaching with his arms. Sometimes he has to stand on his tiptoes. He testified that cranking with the handle does involve some level of force which varies.

The petitioner testified that the rolling and unrolling of tarps does vary with the season. In winter it is more difficult due to freezing of the tarps and it becomes easier in the summer.

The petitioner testified the number of times he would roll and unroll a tarp would vary from day to day.

The petitioner testified that he did work in different positions. With regard to the Keystone job site, he did advise that it is voluntary. It is not mandatory for each driver to work

on that job site. Petitioner testified that the Keystone job assignment is two weeks on, two weeks off. He testified that on the average he would load 8-9 garbage containers per day.

With regard to petitioner's neck problems, the petitioner testified his problems began in January 2013. He noted stiffness in his neck and back. He sought chiropractic treatment and was undergoing adjustments. He testified that he would experience some improvement with the chiropractic treatment. His symptoms would come and go.

In the spring of 2013 he experienced an increase in his symptoms. He experienced significant change in his symptoms in early July, his pain and stiffness increased.

The petitioner testified that his chiropractor, Dr. Glas, referred him to his primary care physician, Dr. Morozok for further evaluation.

Petitioner testified he saw his PCP July 15, 2013. His doctor told him he had a disc injury and recommended an MRI.

Following the MRI the petitioner was referred to Dr. Dinh by his PCP. He testified Dr. Dinh advised him he needed further treatment and surgery. He testified he did not care for Dr. Dinh as he was very short with him. Petitioner testified he returned to his PCP requesting a second opinion and his PCP then recommended he be seen at Midwest Orthopedics. The petitioner testified that he did not proceed with treatment at Midwest Orthopedics as there was a two to three month delay in obtaining an appointment. The petitioner testified his doctor then referred him to Dr. Kube.

He came under the care and treatment of Dr. Kube beginning August 8, 2013. Dr. Kube has recommended surgery, a double disc replacement. Dr. Kube referred him to Dr. Trudeau for an EMG study.

The petitioner testified he is seeking the arbitrator award the surgery as recommended by Dr. Kube. Petitioner testified he did have group benefits when he was employed but Dr. Kube would not take his group benefits.

The petitioner testified he had no prior neck injuries. He did have a prior injury in 2011 to his right arm. He testified following that injury he was seen at IWIRC and by Dr. Merkley. He underwent a cervical MRI.

Petitioner testified he has a workers' compensation claim pending from that injury as well as the current claim. Other than those two claims, he has no other workers' compensation claims pending.

The petitioner testified he has ongoing increased stiffness in his neck. The pain is not that bad right now. However, he has constant right arm symptoms.

On cross-examination the petitioner testified that with regard to July 2013 he agreed he was off work on July 4, July 6, July 7, July 8 and July 9. The petitioner admitted that on July 11, 2013 he told his chiropractor he had increased neck problems.

With regard to his care and treatment with Dr. Glas, the chiropractor, and Dr. Kube, the petitioner testified that he told the doctors of his complaints and he would have no dispute as to the doctor's records regarding any referrals or how he arrived at that particular provider for medical treatment. Further, he testified that Mr. Mroczko is his PCP and he provided him with a history of his problems.

Further, the petitioner admitted that after several days off in July he told his chiropractor on July 11, 2013 he had increased neck symptoms. He was then seen by his PCP and referred for an MRI. Following the MRI he returned to the PCP on July 25, 2013 and was advised there were significant findings on the MRI. At that time he was referred to Dr. Dinh.

The petitioner testified he then went to an attorney on July 30, 2013 and signed his application for work related injury. It was after the meeting with the attorney that he gave notice to his employer of a work related injury. Further, it was after meeting with the attorney that he first sought treatment with Dr. Kube on August 8, 2013.

The petitioner testified that he admitted he reported a work injury to his supervisor, Matt Champion, in January 2011. He testified he was aware of the reporting procedure for workers' compensation injuries at Peoria Disposal. He was aware that you were to report injuries immediately to his supervisor.

Further, petitioner testified that if an employee felt a condition was work related it should be reported immediately as well.

The petitioner also testified that he did have group benefits in July 2013. He was paid short term disability benefits while he was initially off work.

On behalf of the respondent, testimony was given by Dave Owen. Mr. Owen testified he is a dispatcher at Peoria Disposal. He was in the same position in July 2013. During July 2013 he would see petitioner on a daily basis at work. He recalled petitioner coming in on July 12, 2013 advising his neck hurt. At that time Dave Owen advised petitioner to report it to his supervisor, Matt Champion. Dave Owen testified that the petitioner stated it was not work related. Mr. Owen testified that he told the petitioner he should tell Matt Champion anyway.

Also on behalf of the respondent, testimony was presented by Matt Champion. Mr. Champion testified he is a manager/supervisor at Peoria Disposal. He has been employed with Peoria Disposal for 19 years. In his capacity as a manager/supervisor, he is aware of the workers' compensation reporting procedure. That procedure is to report any injuries to your supervisor immediately. That procedure was in place July 2013.

Mr. Champion testified that in July 2013, he was working on Saturday, July 13, 2013. He vividly remembers the date. On that date at approximately 8:00 a.m. the petitioner inquired as to whether he would be able to have Monday, July 15, 2013 off as he had a doctor's appointment scheduled. Mr. Champion inquired as to whether it was for a work related problem and the petitioner specifically stated it was not work related. Mr. Champion advised he would be able to have the day off as he had other people to cover the shift and they had not been that busy.

Mr. Champion testified he specifically remembered petitioner reported that it was not work related. He testified as a supervisor if a condition is reported as work related, paperwork/a work related injury document is completed. Further, the employee is then taken off work until they can be seen at the company clinic, drug tested and receive a release to return to work. Petitioner was not sent to the company clinic nor drug tested as he did not report it was work related. Further, he was allowed to work on the following day, July 14, 2013.

Mr. Champion went on to testify that he vividly remembered the specific date, as subsequent to petitioner requesting the day off he received a call from another employee whose son was killed that day in a motorcycle accident. As Mr. Champion is an avid motorcycle rider, he specifically recalled the date and the incident.

Also on behalf of the respondent testimony was presented by Steven Petersen. Mr. Petersen is an HR manager for Peoria Disposal. He has worked in that capacity since January 2005.

Mr. Petersen also testified as to the reporting procedure for workers' compensation injuries, immediate notice to a supervisor.

Mr. Peterson advised he first became aware petitioner was having medical problems in July 2013 when he received a telephone call from the petitioner on July 15, 2013. The petitioner advised he had been to a doctor and was on Vicodin. He was inquiring as to whether it was safe

for him to return to work as a driver. At that time Mr. Petersen specifically inquired as to whether the condition was work related and the petitioner stated it was not a work related condition. Mr. Petersen then advised petitioner that he would follow up on the issue of the Vicodin and get back to him.

Mr. Petersen then spoke with another HR representative, Stacey Wolfe, who followed up with medical personnel regarding the use of Vicodin and driving a truck. Upon confirmation of the safety and driving the truck, as long as the medication was taken the night before and the prescription followed, Mr. Petersen then again contacted the petitioner to advise he would be safe to drive. At no time did the petitioner advise Mr. Petersen that his condition was work related.

With regard to whether the petitioner sustained an accident arising out of and in the course of his employment causally related to his condition of ill being, the arbitrator finds the following:

The arbitrator notes the findings of facts and incorporates herein. The arbitrator notes that the petitioner as well as all three of respondent's witnesses testified as to the reporting procedure for a workers' compensation claim at Peoria Disposal. The procedure is for immediate notice to the employee's supervisor. Further, it was testified that the supervisor would then complete paperwork which is then submitted to HR. It was also testified to that following the report the employee would be seen at the company clinic and undergo drug testing.

Respondent's Exhibit #10 was an accident report form regarding an earlier incident reported by the petitioner on January 17, 2011 and signed by his supervisor, Matt Champion. Respondent's Exhibit #10 reflects petitioner's knowledge regarding immediate report of an injury as well as documentation by a supervisor at the respondent.

Testimony was given by three witnesses on behalf of respondent, Dave Owen, Matt Champion and Steve Petersen. Dave Owen testified that on July 12, 2013, petitioner complained of his neck. Petitioner at that time specifically denied that it was work related. On the following day, July 13, 2013, petitioner advised his supervisor Matt Champion he had a doctor's appointment pending on July 15, 2013. Again, when specifically asked if it was work related, the petitioner again denied that it was work related. On July 15, 2013, petitioner called in and spoke with Steve Petersen to advise he was on Vicodin and questioned whether it was safe for him to drive. At that time, petitioner was once again asked if his condition was work related. Petitioner denied that his condition was work related. Petitioner offered no rebuttal testimony to contradict the testimony of Mr. Owen, Mr. Champion and Mr. Petersen.

Petitioner further admitted that he was off work on July 4, 2013, July 6, July 7, July 8 and July 9, 2013. In addition to his testimony, the time off work is supported by Respondent's Exhibit #8, petitioner's time card for July 2013. Following multiple days off work, petitioner sought treatment at his chiropractor on July 11, 2013. The chiropractor's record from July 11, 2013 reflects the following entry:

> SUBJECTIVE: Mr. Ishikawa presented today for detection and analysis of vertebral subluxation. He mentioned he is having pain from his lower back radiating down right shoulder which is getting worse. He is gong to see MD for Neuro referral Monday 7-15-13.
> OBJECTIVE: Subluxations were detected and adjusted at C7, T5 & L5.
> ASSESSMENT: Vertebral Subluxations were adjusted and reduced.
> PLAN: Evaluate and adjust subluxations once per week as maintenance or as Mr. Ishikawa seems necessary for an ongoing basis.
> VIRTUAL SIGNATURE: *Dr. Bret Glas, D.C.*

Clearly, the records reflect that petitioner advised the doctor his symptoms had increased and he was seeking treatment with his PCP.

There is nothing in the chiropractor's records to indicate that petitioner advised him the increase in his symptoms were in any way work related. (Respondent's Exhibit #1)

Notes from his family doctor's medical facility indicate that the petitioner called on July 12, 2013 with pain complaints and saw the doctor on July 15, 2013 with similar complaints. (Respondent's Exhibit #2) Neither record shows the petitioner complaining that his neck symptoms were work related.

Petitioner underwent an MRI on July 16, 2013. (Respondent's Exhibit #4) Following that MRI, petitioner did return to his chiropractor, Dr. Glas, on July 19, 2013 advising he was not going to undergo any further chiropractic treatment due to the condition of his neck. (Respondent's Exhibit #1) Again there is nothing in the chiropractor's records to indicate petitioner was claiming his condition as work related.

Petitioner then returned to Dr. Mroczko on July 29, 2013, at which time he was referred to Dr. Dinh for a surgical evaluation. On that date, for the first time, after learning that he had MRI findings of a cervical disc herniation, did the petitioner reference his work.

The petitioner testified he then met with an attorney on July 30, 2013 and signed an application. (Arbitrator's Exhibit #2)

The petitioner testified that following the meeting with the attorney he then reported a work related injury on August 7, 2013. (Petitioner's Exhibit #2) On the following day, August 8, 2013, petitioner sought treatment with Dr. Kube.

Dr. Kube's testimony is problematic to the petitioner's claim with respect to both accident and causation. First of all, while the petitioner is alleging a repetitive trauma accident, Dr. Kube only relates his herniated disc to a specific event. He said that the petitioner told him that one day, while rolling tarps, he felt a pinch in his shoulder girdle which was followed by radiating right arm pain a few days later. (PX 8 at 16) He said that this pinching episode was when the disc herniation occurred. (Id at 32) Even when provided with a hypothetical question by the petitioner's attorney seeking an opinion regarding repetitive activity, Dr. Kube referenced the

alleged pinch while rolling the tarp. (Id at 36) The arbitrator does not see an opinion or explanation from Dr. Kube, or any other medical provider, on the issue of causation related to repetitive activity.

More importantly, Dr. Kube was the only provider whose history contained a reference of a pinch followed a few days later with arm radiation. Dr. Glas' records are silent with respect to the petitioner's work. The primary care provider's notes of encounters on July 12 and July 15 not only are silent with reference to work, but also describe a gradual onset of symptoms. (PX 3 at 22, 27) If a pinching event occurred, an event which Dr. Kube found so significant on the issue of causation, it certainly was not corroborated by any other evidence. Such an event is also inconsistent with the petitioner's theory of liability, contained in his application for adjustment of claim. (Arb. X 2)

While petitioner testified he was aware of the procedure for reporting a work related injury as well as had previously reported a work related injury in January 2011, petitioner on three separate occasions to three different representative of the employer denied that his condition was work related. More importantly, the petitioner chose not to present any evidence to rebut the testimony of those three witnesses.

Based on the evidence as a whole, the arbitrator finds petitioner has failed to prove an accident arising out of and in the course of his employment causally related to his condition of ill being. While the evidence shows petitioner's work to be hard work, hard work does not meet the burden of proof of establishing a work related injury.

Benefits are denied, and all other issues are thus rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Todd Cyrier,

Petitioner,

vs.

NO: 11 WC 18093

The TLC Companies,

14IWCC1075

Respondent.

DECISION AND OPINION ON REVIEW

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

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent and find that Petitioner has established entitlement to reimbursement from Respondent of his out-of-pocket medical expense payments, medications and travel expenses incurred during treatment.

The Commission notes that Petitioner entered into evidence the medical bills, including Petitioner's out-of-pocket payments for treatment and medications prescribed by his treating physicians, along with printouts from Mapquest detailing Petitioner's travel routes to and from the offices of Dr. Sommerville, Dr. Trivedi, and Midwest Ear Nose and Throat. (PX10 & PX11) The printouts detailing Petitioner's travel show the amount of miles traveled by Petitioner. Finally, the Commission notes that Petitioner assigned a cost of 55 cents a mile for each mile Petitioner drove to and from his medical treatment visits.

14IWCC1075

Just as the court did in *General Tire & Rubber Co. v. Industrial Commission*, 221 Ill. App. 3d 641(1991), the Commission finds that it was "reasonably necessary" for Petitioner to travel to and from the offices of Dr. Sommerville, Dr. Trivedi, and Midwest Ear Nose and Throat for diagnosis and treatment of his headaches and hearing problems which resulted from the November 19, 2010 undisputed work accident. The record shows that Dr. Sommerville and Dr. Trivedi were Petitioner's treating physicians and, as such, the doctors most familiar with Petitioner's medical history and conditions. As for Petitioner's trips to Midwest Ear Nose and Throat, the Commission finds those necessary for diagnosis and evaluation of Petitioner's ongoing hearing problems. The Commission further finds Petitioner's assessment of 55 cents a mile for his travel a reasonable amount.

Therefore, based on the above, the Commission finds that Petitioner is entitled to reimbursement of his out-of-pocket expenses for medical treatment and medications, totaling $743.64, and travel expenses for diagnosis and treatment, totaling $2,108.50.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical services of $1,065.90 to Primary Care Group; $9,199.00 to Talley Eye Care; $108.78 to Eubanks & Daugherty, LLC; and $264.00 to Cape Radiology as provided under Sections 8(a) and 8.2 of the Act. Respondent shall be given credit for medical benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner $2,852.14 for reimbursement of out-of-pocket payments for treatment and medication and travel expenses as provided under Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner permanent partial disability benefits of $489.55 per week for a further period of 62.5 weeks, as provided in Section 8(d)2 of the Act, because the injury sustained caused a 12.5% loss of use of the person as a whole.

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

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

14IWCC1075

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $41,300.00. 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: DEC 11 2014
MJB/ell
o-11/03/14
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CYRIER, TODD
Employee/Petitioner

Case# **11WC018093**

14IWCC1075

THE TLC COMPANIES
Employer/Respondent

On 5/27/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1167 WOMICK LAW FIRM CHTD
CASEY VANWINKLE
501 RUSHING DR
HERRIN, IL 62948

0299 KEEFE & DePAULI PC
TOM KUERGELEIS
#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

Todd Cyrier
Employee/Petitioner

v.

The TLC Companies
Employer/Respondent

Case # 11 WC 18093

Consolidated cases: N/A

14IWCC1075

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee** , Arbitrator of the Commission, in the city of **Collinsville**, on **03/28/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

Todd Cyrier vs. The TLC Companies
IWCC No: 11 WC 18093

14IWCC1075

FINDINGS

On **11/19/2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$42,427.84**; the average weekly wage was **$815.92**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$2,875.25** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$2,875.25**.

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

ORDER

The claim of Petitioner for injuries to his head, left index finger, and eyes are causally related to the work accident of 11/19/2010.

Petitioner's claim for hearing loss is denied as no evidence exists of a causal relationship between the alleged hearing loss and the work accident of 11/19/2010.

Respondent shall pay reasonable and necessary medical services, pursuant to the Medical Fee Schedule, of $1,065.90 to Primary Care Group; $9,199.00 to Talley Eye Care; $108.78 to Eubanks & Daugherty, LLC; and $264.00 to Cape Radiology as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given credit for medical benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of $489.55/week for 62.5 weeks because the injury sustained caused 12.5% 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

5/23/14
Date

MAY 27 2014

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The Arbitrator makes the following Findings of Fact on all disputed issues:

Petitioner testified that on November 19, 2010, he was employed by The TLC Companies as a coal truck driver. On that date, while driving, he struck a deer that came through the front windshield, struck the right side of Petitioner's head, and exited the back window.

Petitioner was seen at the Harrisburg Medical Center for a right ear contusion, a left hand abrasion and laceration, facial and head lacerations, and difficulties with his eyes. Subsequent treatment included removal of a glass splinter from his left index finger that subsequently healed and left an alleged loss of dexterity.

Petitioner continued to complain of headaches, visual disturbances, and hearing loss. Treatment by Dr. Sommerville for floaters in his eyes resulted in corrective surgery by Dr. Sommerville. Dr. Sommerville, as well as Petitioner, testified that the surgical procedure resolved the problem with floaters and on May 26, 2013 Dr. Sommerville had no findings on examination. Petitioner continues to use drops in his eyes.

In addition, Petitioner was diagnosed with post-traumatic neuralgia causing pain in the temple area of the right side of his face. Petitioner receives medication for the complaints of pain.

Finally, Petitioner complains of loss of hearing on the right side. A review of the medical records from Midwest Ear, Nose and Throat Clinic reveals inconsistent findings on audiogram. The examination of January 12, 2011 reveals no compensable loss to the right ear and subsequent findings are inconsistent with a notation that the examination of January 12, 2011 was confirmed. In addition, the medical records are void of any opinion causally relating any alleged hearing loss to the work accident of November 19, 2010. Therefore, Petitioner's claim for hearing loss is denied as no causal relationship exists between the work accident of November 19, 2010 and the alleged hearing loss.

Respondent provided the medical records of Colorado Pain Consultants. That report found no loss of visual acuity and found that Petitioner sustained an impairment of 4% disability to the person as a whole.

A review of Petitioner's CT scan of the head dated December 6, 2010, the x-ray of the cervical spine of December 9, 2010, the x-ray of the left second finger dated December 20, 2010, and the MRI of the head dated October 9, 2012 were all negative.

Based on the above, the Arbitrator concludes that Petitioner sustained 12.5% loss of the person as a whole as provided in Section 8(d)2 of the Act for the injuries to Petitioner's left hand, head, and eyes as a result of the work accident of November 19, 2010.

Petitioner's claim for hearing loss is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Linda Bartolomeo,

Petitioner,

vs.

14IWCC1076

NO: 07 WC 54543

Cook County Sheriff's Department,

Respondent.

DECISION AND OPINION ON REMAND

This cause comes before the Commission pursuant to the Rule 23 Order of the Appellate Court, First District, Workers' Compensation Commission Division, entered December 27, 2011.

Respondent appealed the October 31, 2008, 19(b) Decision of Arbitrator Galicia finding that Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent, that Petitioner's current condition of ill-being is causally related to that accident, that Petitioner was temporarily totally disabled for a period of 31-4/7 weeks, from October 11, 2007, through May 18, 2008, at the rate of $677.96 per week under Section 8(b), and that Respondent shall pay the sum of $33, 415.39 for necessary medical services as provided in Section 8(a). The issues on review were whether Petitioner sustained an accidental injury arising out of and in the course of her employment with Respondent, whether her current condition of ill-being is casually connected to said accident, medical expenses, and temporary total disability benefits.

The Commission, in a February 11, 2010 Decision, reversed the Decision of the Arbitrator, and found Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment with Respondent, and denied Petitioner's claim for compensation. Petitioner appealed the Commission's Decision and Opinion on Review. In a December 31, 2010 Order, the Circuit Court of Cook County confirmed the Decision of the Commission. Petitioner appealed the Circuit Court's Decision, and the Appellate Court, in a December 27, 2011 Rule 23 Order, vacated the judgment of the Circuit Court, vacated the

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Commission Decision, and remanded the matter to the Commission with "instructions to issue an amended decision containing specific findings as to the risk to which the claimant was exposed that caused her to fall."

On November 20, 2012, Judge Margaret Ann Brennan issued an order ordering the Clerk of the Circuit Court of Cook County to transfer the record of the proceedings in this matter back to the Commission.

Pursuant to the Appellate Court's instructions, and upon receipt of the record of proceedings in this matter, the Commission hereby issues an amended decision, containing specific findings as to the risk to which the claimant was exposed that caused her to fall.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, a 40 year-old deputy sheriff, testified that on October 11, 2007, she was working front door security at the Rolling Meadows courthouse, screening visitors and their belongings through x-ray machines. Petitioner testified she left her post at 9:15 a.m. to use the washroom located on the lower level, as the washroom on the first floor was being cleaned by the custodians. (T10-12). Petitioner testified she descended the first set of stairs, started to descend the second set of stairs, and then fell. Petitioner admitted the stairs had a yellow non-skid strip on the front of each step, and that there were railings located on each side of the stairway. Petitioner testified she was descending the stairs, on the left side of the stairwell, right next to the railing, while carrying her radio in her left hand, and at that time her right foot became stuck right before the yellow non-skid strip tape on the stair. Petitioner testified she threw her radio to the ground in order to grab the railing, twisted her whole body while attempting to grab the railing, and ended up on her buttocks on the last step. (T12-16).

Petitioner testified that it had to have been candy or gum that her right foot became stuck on while descending the stairs, as she always observed trash on the stairs when she used the stairs in the past. Petitioner suspected the trash she previously observed on the stairs was due to the children visiting the Women in Crisis department on the lower level, or due to the location of the cafeteria and the medical department on the lower level. (T16-18, 45).

The Commission finds Petitioner's testimony as to the cause of her fall is inconsistent with the ambulance report from the date of injury, Petitioner's own written statement provided on the date of injury, the October 11, 2007, supervisor's investigation report, the witness statement, and the initial treating records.

The October 11, 2007, Northwest Community EMS report indicates Petitioner provided a history of twisting her ankle while walking down the stairs, and catching herself on the stairway rail. There is no mention of any substance on the stairs, or of the non-slip strips contributing to her fall. (PX2). Petitioner was then seen in the emergency room of Northwest Community Hospital, at which time she provided a history of slipping on stairs and twisting her ankle. The records contain no reference to Petitioner slipping on a substance or on any non-slip strips. Petitioner was diagnosed with a left distal fibular fracture, her injury was casted and she was authorized off work. (PX3).

The Employee's Accident Report completed by the Petitioner on the date of injury, upon her return from the emergency room, indicates she was going down the staircase to the basement, and her foot became stuck on the non- slip tape, after which she fell forward onto the railing, and twisted her left ankle. The statement does not mention gum, candy or debris as the cause of her fall. Furthermore, the statement fails to indicate Petitioner was carrying a radio in her hand, inhibiting her ability to grab the railing during her fall. (RX1). Petitioner testified her report was incorrect, that she did not slip on non-slip tape, and that she was so "wasted" from the narcotic medication she received from the hospital that she just wrote down exactly what her union steward dictated to her to write down on the Employee's Accident Report. (T45-48, 51-55). On cross examination Petitioner testified that she "fell on something sticky and went flying down the stairs." (T55). Although Petitioner claims she was unable to comprehend what she was doing at the time she completed the Employee's Accident Report due to the influence of narcotic medication she had received at the hospital, this is contradicted by her admission that the Employee's Accident Report correctly lists the date of accident, her name, date of birth, address, social security number, job title, department, supervisor, supervisor's badge number, as well as the name and phone number of her treating doctor. (T48-51). Although Petitioner testified she was too heavily medicated to comprehend what she was doing at the time she completed the Employee's Accident Report, the Commission is not persuaded by this testimony.

Although Petitioner testified she must have stepped in candy or gum that her right foot became stuck on while descending the stairs, the October 11, 2007, Supervisor's Investigation Report completed by Lieutenant Collins indicates Petitioner provided a different history. The report instead indicates Petitioner provided a history of tripping on a "loose piece of tape." The report further indicates that her accident was witnessed by Officer Mark Kaplan, and that Lieutenant Collins examined the accident area and found no loose tape, deficiencies, or flaws on the stairs. (RX2). The October 17, 2007, witness statement provided by Officer Mark Kaplan indicates that as he was approaching the lower level staircase from below, he observed Petitioner catch the sole of her shoe on the non-slip strip on the 4th or 5th step from the bottom, lose her footing, and fall. In addition to the witness statement, a memorandum signed by Officer Kaplan contains the same history of injury, that Petitioner stumbled on the stairs, lost her balance and twisted her ankle. (RX3). The Commission finds no mention of Petitioner carrying a radio, or of Petitioner slipping on gum, candy or debris, in the Supervisor's Investigation Report, the witness statement, or witness memorandum.

The day after Petitioner's injury, she sought follow up care with her family physician, Dr. Maciorowski. At that time, Petitioner reported she tripped over stairs and broke her ankle. Dr. Maciorowski's records fail to mention gum, candy or debris as a contributing factor to Petitioner's fall. (PX7).

The Commission, after considering the entire record, reverses the Arbitrator's Decision and finds Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment with Respondent. The purpose of the Act is to protect employees from risks and hazards that are peculiar to the nature of the work they are employed to do. Illinois Bell Telephone Co. v. Industrial Commission, 131 Ill.2d 478, 483(1989). It is axiomatic that an injury is compensable under the Act only if it "arises out of" and occurs "in the course of"

a claimant's employment. Illinois Bell Telephone Co., 131 Ill.2d at 483; Caterpillar Tractor Co. v. Industrial Commission, 129 Ill.2d 52, 57-58 (1989). Petitioner must prove both by a preponderance of the evidence. First Cash Financial Services v. Industrial Commission, 367 Ill. App. 3d 102, 105(2006). In the case at bar, the parties agree that Petitioner sustained injuries in the course of his employment. The issue presented is whether the injuries also "arose out of" Petitioner's employment with Respondent.

"Arising out of" employment pertains to the origin or cause of an employee's injury. First Cash Financial Services v. Industrial Commission, 367 Ill. App.3d 102 (2006). In order to determine whether an employee's injury arose out of her employment, the risk of injury must first be categorized. There are three categories of risk an employee may be exposed to: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. Compensation for neutral risks depends upon whether claimant was exposed to a risk of injury to an extent greater than to which the general public is exposed. Illinois Institute of Technology Research Institute v. Illinois Industrial Commission, 314 Ill.App.3d 149 (1st Dist. 2007).

The mere fact that an incident occurred on the premises of the employer is not sufficient evidence to prove that an accident arose out of the employment. Builders Square v. Industrial Commission, 339 Ill.App.3d 1006, 110-111, 791 Ill.Dec. 897(2003). Illinois has rejected the doctrine of positional risk and the petitioner bears the burden of proving that there was an increased risk caused by the employment. Oldham v. Industrial Commission, 139 Ill.App.3d 594(1985).

The Commission specifically finds that Petitioner was exposed to a neutral risk of traversing stairs used by general public, of no particular employment or personal characteristics, to which the general public is equally exposed, relying on First Cash Financial Services v. Industrial Commission, 367 Ill.App.3d 102, 853 N.E. 2d 799, 304 Ill.Dec. 722 (2006), and relying on Illinois Consolidated Telephone Co v. IC, 314 Ill.App.3d 347(2000).

To obtain compensation, Petitioner must establish facts to show that the conditions or nature of her employment increased this neutral risk of falling beyond that to which anyone else would be exposed. Petitioner failed to prove an increased risk due to her employment. Although Petitioner testified gum, candy or debris on the stairs contributed to her fall down the stairs, and that her two-way radio in her left hand also contributed to her falling, the ambulance report, Petitioner's own accident report, the statements of Petitioner's supervisor and the co-worker who witnessed the fall, as well as the initial treating records, strongly suggest Petitioner fall on the stairs was as a result of a neutral risk to which the general public was equally exposed. The Commission finds Petitioner's testimony as to the cause of her fall to be less than credible. Instead the Commission finds the record indicates Petitioner's fall was caused either by her twisting her ankle and slipping, or by her mis-stepping and slipping down the stairs.

The Commission, relying on First Cash Financial Services v. Industrial Commission, 367 Ill.App.3d 102, 853 N.E. 2d 799, 304 Ill.Dec. 722 (2006), finds no reasonable certainty that Petitioner's injuries stemmed from a risk associated with her employment. Although Petitioner speculated that she slipped on gum, candy, or debris, it is equally possible to infer that the stairs

were free of any debris. There is no other evidence in the record to support Petitioner's speculation as to the cause of her fall. Petitioner fell while using stairs used on an unlimited basis by the general public, and the record further indicates there was also access to the lower level via an escalator. Petitioner was not providing building surveillance, requiring her to go up and down stairs all day, but instead traveling down to the lower level as the bathroom on the floor she was working on was being serviced at that particular time of the day.

In Illinois Consolidated Telephone, the Court found a claimant was exposed to greater risk than then general public while descending stairs, as it was sole means, seeking personal comfort, and furthermore that it was not unreasonable for the Commission to infer that the accident was attributable to worn stair treads, lack of handrail or landing, or slipperiness of the landing. However, in the matter herein: the stairs were not the sole means as an escalator was available; there was no evidence of worn stair treads, defect, or slipperiness of stairs or landing; there was no evidence of a lack of a handrail; and, there was no evidence to support Petitioner's testimony about radio in her hand contributing to her injury. Petitioner repeatedly denied at hearing that she slipped on non-slip tape. Although Petitioner testified that she thought she slipped on gum, candy, or debris, it is equally possible to infer that the stairs were free of any debris. There is no other evidence in the record to support Petitioner's speculation as to the cause of her fall. Petitioner claimed her fall was also a result of her carrying a radio in her left hand which inhibited her ability to grab the railing, but the Commission finds nothing at all in any of the medical records, investigation reports, witness statements, ambulance or ER reports to support Petitioner's testimony about a radio contributing to her injuries. Petitioner fell while using stairs used by the general public. Petitioner was not providing building surveillance, requiring her to go up and down stairs all day, but instead traveling down to the lower level as the bathroom on the floor she was working on was being serviced at that particular time of the day. There was no credible evidence the stairs were defective, contained debris or that the non-slip strip was defective and contributed to her twisting her ankle and falling. There also was no credible evidence to suggest Petitioner's fall was contributed to by her carrying a two way radio in her left hand while descending the stairs. Instead, Petitioner merely mis-stepped while descending the stairs, twisted her ankle, and lost her balance.

In Anderegg v. Kesler, Garman, Brougher & Townsley, 12 IWCC 1070, the Commission found that a claimant failed to prove she sustained accidental injuries arising out of and in course of her employment. The Commission found that the claimant failed to prove she was exposed to a neutral risk not common to the general public. The claimant was bringing some items she baked into the office, when she entered the building through an employee entrance, walked toward the stairs when some items slipped, and as she attempted to catch the container she lost her balance and fell. She testified that her toe struck a metal edge located at the end of the landing as she fell. She petitioner fell onto the hallway and suffered a fractured humerus. The Commission found that her testimony illustrated that she lost her balance and began to fall as she attempted to catch a plastic container which had slid off of another container, and that although the petitioner testified that her toe struck the edge strip at the end of the landing, there was no evidence that the edge strip was defective or otherwise caused an increased risk to her. The Commission concluded there was no evidence that the edge strip or the stairway created an increased risk beyond that to which the general public was exposed.

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The primary issue is whether or not Petitioner sustained an accidental injury that arose out of her employment by Respondent on October 11, 2007, whether or not the employment was a causative factor. The Arbitrator concluded Petitioner was exposed to a greater risk than that of the general public due to the fact that she used the stairs to get to the bathroom, and that an even greater risk was created if debris on the stairway caused her foot to get stuck and caused her to fall. The Commission finds no support for the Arbitrator's conclusion that the fact an employee/claimant uses stairs to get to a bathroom automatically exposes them to a greater risk than that of the general public. This Commission finds that Petitioner was not exposed to this staircase and the risk of fall to a greater degree than the general public. The staircase was not peculiar to the work environment and no evidence seems to exist that she was exposed to staircases to a greater degree than the general public. There also appears to be no defect noted about the staircase in this case.

At the time of hearing, Petitioner testified that she was descending a staircase to the bathroom on the lower-level, and that she fell and injured her left ankle when her right foot became stuck from gum or candy right before a yellow non-skid strip tape on a stair in the stairwell. However, based on the evidence in the record, Petitioner cannot show more than a mere possibility that the stairs had gum or candy on the stair when she fell, and that this was the cause of her fall, and, thus, there is no reasonable certainty that the claimant's injury stemmed from a risk associated with her employment. The Commission notes Petitioner's testimony with respect to how the accident occurred was significantly different from the three other histories she provided during the hours that followed the accident - to her employer, to the ambulance provider, and to the Emergency Room personnel. It was not until Petitioner testified at trial that the accident history significantly changed. Petitioner admitted the general public had access to this staircase, and testified she was using the restroom on the lower level at that time only because the one on the second level where she worked was closed for cleaning. The sole witness to the incident, Officer Mark Kaplan, provided a witness statement on the date of injury indicating Petitioner caught the sole of her shoe on the non-slip strip on the 4th or 5th step from the bottom and then lost her footing and fell. The history recorded by the ambulance provider indicates Petitioner's fall down the stairs was a result of her twisting her ankle. The history recorded by the Emergency Room indicates Petitioner provided a history of twisting her ankle and slipping on stairs. Contrary to Petitioner's testimony, the Petitioner's own report of injury completed on the date of injury attributes her slip and fall to defective non-slip tape on the stairs. The witness statement of Lieutenant Collins completed on the date of injury indicates that although Petitioner reported she tripped on a loose piece of tape on the stairs, he examined the accident area and found no loose tape at the site on the stairs, no deficiencies, and no flaws. The Commission finds that the statement of the witness Mark Kaplan, the investigation report of Lieutenant Collins, and the histories of injuries provided by the Petitioner to the ambulance driver, the emergency room, and to the Respondent in the first report of injury, all fail to support Petitioner's testimony that she slipped on the stairs due to the existence of some gum, candy, or debris, right before the non-slip strip, or that she was carrying and listening to a radio in her left hand at the time of her fall which inhibited her ability to grab the railing. The Commission concludes that while Petitioner was descending the stairs on a break to use the restroom she merely mis-stepped and fell, and that no debris, nor any device in her hand, contributed to her misstep and fall on the stairs.

14IWCC1076

Based on the above, as well as the credible record, the Commission finds the testimony of Petitioner at trial regarding how the accident occurred inconsistent with the histories given most contemporaneous with the accident. The Commission finds the testimony of the Petitioner not credible. The Commission reasonably infers from the credible evidence that the Petitioner changed the history of the accident in an attempt to make it more likely that the accident would be found compensable.

The Commission finds that Petitioner has failed to prove by a preponderance of the credible evidence that the risk to which Petitioner was exposed, risk of fall from descending stairs, was distinctly associated with her employment or that she was exposed to a risk of injury to a greater extent than that to which the general public was exposed. In the case at bar, the Commission rejects Petitioner's testimony that her foot became stuck in some candy or gum when she slipped on the stairs or that she was carrying a radio that contributed to her injuries, since the first mention of this alleged accident history was not made until Petitioner testified at trial and not supported by any of medical records, witness statements or Petitioner's own accident report. The Commission also notes there was nothing to suggest that Petitioner was hurrying down the stairs, that the lighting in the staircase was defective, that there were any defects on the stairs, or that the staircase she was descending was a staircase that she repeatedly used.

For these reasons, the Commission finds the Petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury that arose out of and in the course of her employment by Respondent on October 11, 2007. The Commission finds the Petitioner has failed to show that she was exposed to a risk of fall and injury to a greater extent than that to which the general public was exposed while walking down the stairs.

Accordingly, compensation is denied. Furthermore, based upon Petitioner's failure to prove accidental injuries, the Commission finds all other issues are moot.

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IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 31, 2008, is hereby reversed. Compensation is denied.

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

No bond is set by the Commission based upon the denial of compensation herein.

DATED: DEC 12 2014
KWL/kmt
R- 12/02/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MINAS ARMIRAS,

Petitioner,

14IWCC1077

vs.

NO: 07 WC 01622

PALMER HOUSE HILTON,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand pursuant to a December 23, 2013 Order from the Appellate Court of Illinois, First District, Minas Armiras v. Illinois Workers' Compensation Commission *et al.* (Palmer House Hilton), No. 1-12-2852WC.

On April 04, 2009, the Arbitrator issued a §19(b) decision finding Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent on August 11, 2005, that his current condition of ill-being was causally related to his work injury, that Petitioner was temporarily totally disabled for a period of 178-3/7 weeks, from August 12, 2005 through March 18, 2007, and May 02, 2007 through February 26, 2009, at the rate of $884.55 per week, that Respondent shall pay $15,172.44 for medical services pursuant to §8(a) of the Act, and that Respondent shall hold Petitioner harmless with respect to $3,984.99 in medical bills paid out by Petitioner's personal health insurance carrier.

Timely Petition for Review was filed by Respondent on May 07, 2009, requesting the Commission review the July 22, 2010 Section §19(b) with regard to issues of causal connection, medical expenses, and temporary total disability. On November 06, 2009, the Commission issued a Decision and Opinion on Review, 09 IWCC 1177, affirming and adopting the Arbitrator's decision. The Commission further remanded the case to the Arbitrator for further proceedings for 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).

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On October 25, 2010, the Arbitrator issued a decision on remand from the Commission finding Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent on August 11, 2005, that his current condition of ill-being was causally related to his work injury, that Petitioner was temporarily totally disabled for a period of 267 weeks, from August 12, 2005 through August 29, 2010, at the rate of $884.55 per week, that Respondent shall be given a credit of $231,163.10 for temporary total disability benefits paid, that Respondent shall pay reasonable and necessary medical services of $17,732.89 pursuant to §8(a) and §8.2 of the Act, that Respondent shall pay Petitioner permanent total disability benefits of $884.55 per week for life, commencing September 29, 2010, as provided in §8(f) of the Act, and that Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in §8(g) of the Act.

Timely Petition for Review was filed by Respondent on November 19, 2010, requesting the Commission review the October 25, 2010 Decision of the Arbitrator with regard to issues of causal connection, medical expenses, temporary total disability, and permanent partial disability benefits. On September 27, 2011, the Commission issued a Decision and Opinion on Review, in 11 IWCC 1166, modifying the Arbitrator's decision by reducing Petitioner's temporary total disability award to 189-3/7 week, from August 12, 2005 through March 30, 2009, vacating the permanent total disability award under §8(f), finding Petitioner entitled to an award of 50% loss of use of the man as a whole under §8(d)2, awarding $17,732.80 in medical expenses under §8(a), and otherwise affirming and adopting the Arbitrator's decision.

On December 5, 2012, Petitioner appealed the Commission's Decision and Opinion on Review, 11 IWCC 1166, to the Circuit Court of Cook County, 11 L 51428. On August 31, 2012, the Circuit Court confirmed the Decision of the Commission. On September 24, 2012 Petitioner appealed the Circuit Court's Decision to the Appellate Court. On December 23, 2013 the Appellate Court of Illinois, First District, in Minas Armiras v. Illinois Workers' Compensation Commission *et al.* (Palmer House Hilton), No. 1-12-2852WC, vacated the judgment of the Circuit Court, vacated the Decision of the Commission, and remanded the matter back to the Commission for further proceedings, finding that the Commission determined the matter on an issue not raised by either party, and instructing the Commission to address the arguments raised by the claimant, that the Commission "make appropriate findings of fact and conclusions of law necessary to determine whether the claimant proved he was permanently and totally disabled based upon the preponderance of the medical evidence."

The Commission, after further deliberation, and pursuant to the remand Order of the Appellate Court, finds that based upon a preponderance of the medical evidence Petitioner failed to prove entitlement to a permanent total disability award under §8(f) of the Act. The Commission finds the preponderance of the medical evidence in the record establishes Petitioner is entitled to an award of permanent partial disability of 50% loss of use of the man as a whole under §8(d)2 of the Act.

On March 21, 2008, Dr. Michael noted Petitioner's examination was "unchanged neurologically," without documentation of his examination findings. He opined on that date that Petitioner should remain off work, that he was totally permanently disabled, and should continue

conservative treatment per his orthopedic surgeon for his right shoulder. (T303). On June 13, 2008, he continued to continued to authorize Petitioner off work, noted that his examination was unchanged neurologically unchanged, but made no documentation of any physical findings. (T304). Based upon the billing statement in evidence from the Illinois NeuroSpine Institute, and Petitioner was seen in follow up with Dr. Michael on July 25, 2008, September 05, 2008, October 03, 2008, November 14, 2008, and February 16, 2009. (T492-499) At the time of his July 25, 2008 office visit Petitioner complained of right shoulder pain, his examination was not to be unchanged neurologically, and no physical examination findings were documented. (T307). Other than the billing statement, the record is void of any documentation for the office visits from September 05, 2008 through February 16, 2009.

On March 03, 2009, Petitioner underwent a Functional Capacity Evaluation ("FCE") with ATI Physical Therapy. (T507-515). The FCE indicated Petitioner was capable of functioning at the light to medium physical demand level, occasionally lifting 34.6 lbs. and frequently lifting up to 28 lbs, and it further recommended that he undergo a course of work conditioning. The FCE was noted to be a valid representation of Petitioner's present physical capabilities, and to be current safe capability level. The FCE report was specifically addressed to Dr. Michael and the examiner specifically thanked Dr. Michael for referring Petitioner to ATI Physical Therapy.

In his March 23, 2009 office note Dr. Michael recorded Petitioner's complaints of right neck pain, right upper extremity pain with elevation, an electrical shock-like sensation and occasional headache. Petitioner's objective exam was noted as "unchanged neurologically," without any actual examination findings documented at this office visit. Dr. Michael recommended Petitioner continue his current level of activity and restrictions, expressed his displeasure with the fact Petitioner had undergone a Functional Capacity Evaluation ("FCE") without his knowledge and against his advice. Dr. Michael opined Petitioner was "currently total permanently disabled," although he had not yet reviewed the FCE. (T477). On March 30, 2009, Petitioner followed up with Dr. Michael, at which time he complained of right neck and shoulder pain, and his examination was noted to be "unchanged" without any examination findings documented by the examiner. During that office visit Dr. Michael reviewed the FCE, noted it demonstrated Petitioner was capable of working light-to-medium physical demand level, noted it was below his current work demand level of medium or higher, and further stated that, "Regarding what if any employment the patient may find, I reserve the right to review any potential job. Otherwise, I consider the patient to be totally permanently disabled." (T478).

Thereafter, Petitioner followed up with Dr. Michael on July 14, 2009, September 11, 2009, November 23, 2009, January 11, 2010, February 22, 2010, April 5, 2010, May 17, 2010, July 12, 2010, and September 13, 2010. On each of those office visits Petitioner complained of neck and right arm pain, his examination was noted to be "unchanged," without documentation of any specific physical findings, and he was continued off work. (T479-489).

The Commission finds Dr. Michael's opinion on Petitioner's permanent total disability, offered in his March 21, 2008 office note and office notes thereafter, to be insufficient to establish a permanent and total disability award based upon a preponderance of the medical evidence within the record. In Federal Marine Terminals v. Illinois Workers' Compensation Commission, 371 Ill.App.3d 1117(2007), the Appellate Court noted that there were three ways a

14IWCC1077

claimant can establish permanent and total disability," namely: by a preponderance of medical evidence; by showing a diligent but unsuccessful job search; or by demonstrating that, because of his age, training, education, experience, and condition, there are no jobs available for a person in his circumstances." Petitioner sought to prove his entitlement to permanent total disability benefits by a preponderance of the medical evidence. We conclude that Petitioner failed to carry his burden in that regard.

Although Dr. Michael opined Petitioner is totally permanently disabled, the Commission finds this opinion to be less than persuasive given the valid FCE results, the fact the FCE was ordered by Dr. Michael, the fact that Dr. Michael did not dispute the FCE findings or order a new FCE, and the fact Dr. Michael instead demanded he be able to review any potential job offered or obtained by the Petitioner

In support of the Commission reversal of the Arbitrator's permanent total award, the Commission notes Dr. Michael offered a total permanent disability opinion in his office notes, but those office notes fail to reflect any detailed examination results during any of Petitioner's office visits from March of 2008 through September of 2010. Dr. Michael indicated after reviewing the March 2009 functional capacity evaluation placing Petitioner at the light to medium physical demand level that he wished to review any potential job being considered for Petitioner. While there is no testimony in the record from Dr. Michael, it would appear from the from the March 30, 2009 office note that the doctor was of the opinion Petitioner could not return to his prior job, but that something within the functional capacity evaluation parameters could be considered. The FCE indicates Petitioner is capable of functioning in the light to medium physical demand level, and the test further indicates it was ordered by Dr. Michael. The evidence in this matter persuades us that Petitioner cannot return to his former occupation, but is capable of returning and has chosen not to attempt a return to work with restrictions. Petitioner himself admitted on cross-examination that he made no attempt to obtain employment as of the date of hearing, September 29, 2010, more than 1-1/2 years subsequent to his FCE. (T471). We rely on the valid functional capacity evaluation, which placed Petitioner at the light to medium physical demand level, capable of occasionally lifting 34.6 lbs. and frequently lifting up to 28 lbs, and the March 30, 2009 office note of Dr. Michael which acknowledged the results of the FCE, noted that it was below his current job, and reserved the right to review any potential new job. The Commission finds this evidence more persuasive and credible than the blanket statements by Dr. Michael on numerous occasions that indicate Petitioner is permanently totally disabled yet fail to indicate Petitioner's physical examination findings in support of that conclusion.

Relative to the extent of the permanent partial disability, we award Petitioner permanent partial disability benefits of 50% loss of man as a whole based upon permanent restrictions set out in his FCE, his current complaints and physical findings.

Furthermore, based on the above evidence we terminate temporary total disability benefits as of March 30, 2009, the date Petitioner was at maximum medical improvement per his treating physician.

14IWCC1077

IT IS THEREFORE ORDERED BY THE COMMISISON that the Decision of the Arbitrator filed 10/25/10 is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $884.55 per week, from August 12, 2005 through March 30, 2009, 189-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $591.77 per week for a period of 250 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 50% loss of use of the man as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $17,732.80 for medical expenses under §8(a) of the Act.

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

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

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

DATED: DEC 12 2014
KWL/kmt
R-12/01/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Donna Kammerman,
Petitioner,

vs.

14IWCC1078

NO: 10 WC 21781

Graymont Cooperative Assn.,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 2, 2014 is hereby affirmed and adopted.

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

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

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

DATED: DEC 12 2014
KWL/vf
O-12/1/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC1078

KAMMERMANN, DONNA
Employee/Petitioner

Case# **10WC021781**

GRAYMONT COOPERATIVE ASSN
Employer/Respondent

On 6/2/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

0481 MACIOROWSKI SACKMANN & ULRICH
JEREMY SACKMANN
10 S RIVERSIDE PLZ SUITE 2290
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC1078

Case # 10 WC 21781

Donna Kammerman
Employee/Petitioner

v.

Graymont Cooperative Assn.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Bloominton**, on **April 14, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 26, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$27,040.00**; the average weekly wage was **$520.00**.

On the date of accident, Petitioner was **48** 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 **$10,240.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$10,240.00**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**346.67**/week for **23 4/7** weeks, commencing **2/26/10** through **8/10/10**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule of $2,140.56 to OSF Medical Clinic, as provided in Sections 8(a) and 8.2 of the Act. The Arbitrator denies prospective medical for recommended shoulder joint replacement as it is not causally connected to the work injury."

Respondent shall pay Petitioner permanent partial disability benefits of $**312.00**/week for **37.95** weeks, because the injuries sustained caused the **15%** loss of the **right arm**, 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

May 28, 2014
Date

JUN - 2 2014

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FACTS:

The Petitioner sustained an undisputed injury arising out of and in the course of her employment with the Respondent on February 26, 2010. The Petitioner had worked for Respondent as a computer bookkeeper for thirty years prior to that date, and she described her job as a sedentary job requiring lifting of no more than ten pounds.

The Petitioner admitted having a history of significant rheumatoid arthritis prior to February 26, 2010 and treating for this condition since the age of 14. She testified to treating with Dr. Couri in Peoria and acknowledged taking narcotic medication for the rheumatoid arthritis prior to February 26, 2010. She also admitted that prior to the February 2010 accident, she had pain in her joints throughout her body from the rheumatoid arthritis and that she had undergone four prior hip replacements, one on the right and three on the left, and bilateral knee replacements on two occasions. She also admitted that prior to February of 2010, she had difficulty with her shoulders and hands and that her bilateral shoulder motion was diminished.

The Petitioner testified that on February 26, 2010, while she was answering the telephone in the performance of her job, her chair broke and she fell, landing on her right arm. She testified that she felt severe pain in her right shoulder. The Petitioner was taken from the scene by ambulance and transported to the emergency room at St. James Hospital where she was diagnosed with a right proximal humerus fracture and she was admitted for pain control and orthopedic consultation. X-rays revealed a right humeral neck fracture and treatment included a sling, conservative modalities and pain control. The Petitioner was discharged from the hospital on March 5, 2010 and was placed in a nursing home for further recuperation.

The Petitioner was admitted to Evenglow skilled nursing facility on March 5, 2010. While at Evenglow, the Petitioner received physical therapy and occupational therapy including gait training.

The Petitioner also came under the care of Dr. Brian Sipe who diagnosed her as having a proximal humerous fracture with severe degenerative changes in addition to the underlying fracture. Dr. Sipe reported that x-rays of the shoulder showed end-stage rheumatoid arthritis with hypertrophic osteophytosis and loss of joint space. Dr. Sipe reported that regardless of the fracture, the Petitioner would continue to have shoulder pain from her arthritic shoulder and he suggested shoulder replacement with removal of the joint. While Dr. Sipe also indicated that a replacement would fix the fracture with the stem of the prosthesis, he advised that the surgery was extremely risky because of the Petitioner's pre-existing condition and obesity. He felt there was a high chance of complications. The Petitioner deferred surgery, wishing to discuss it with her family.

On May 3, 2010, Dr. Sipe noted that the Petitioner had no tenderness to palpation of the proximal humerus with some limitation of shoulder range of motion. He reported that the humeral neck fracture appeared completely healed on x-rays, with no change in alignment or

14IWCC1078

position, and he started the Petitioner on therapy for active and passive range of motion of the shoulder. The Petitioner was discharged from Evenglow on June 8, 2010.

On June 22, 2010, Dr. Sipe noted that the Petitioner no longer had a lot of pain to the proximal humerus. He reported that she might eventually require shoulder replacement for her advanced arthritis, but advised she could return to work in another four weeks. On August 11, 2010, Dr. Sipe reported that the Petitioner's proximal neck fracture was healed, that she was at maximum medical improvement for the fracture, and that she was able to return to work per the results of an August 11, 2010 functional capacity exam. Dr. Sipe discharged the Petitioner from his care on that date.

The Petitioner returned to her prior job with the Respondent in August of 2010 and she continued to work until September 10, 2010. The Petitioner testified that when she first returned to work, she was working a reduced number of hours and she was working her way up to a full eight-hour day.

On September 11, 2010, the Petitioner fell while shopping at Wal-Mart. The Petitioner testified that she stepped off the store threshold wrong or caught her foot and fell directly onto her right arm. She was brought to the emergency room where a humeral shaft fracture was diagnosed. Dr. Richardson became her treating surgeon and after noting that her previous fracture had been conservatively treated and healed, he reported that she had a different humeral fracture. He described it as a spiral fracture of the mid-shaft of the humerus, said it was obviously displaced and required open reduction/internal fixation with screws. Operative findings indicated severe osteoarthritis and bone disease as well as the severe comminuted fracture. Dr. Richardson discharged the Petitioner to a nursing facility.

On October 1, 2010, Dr. Richardson advised that the Petitioner needed total shoulder arthroplasty due to her rheumatoid arthritis, lack of shoulder range of motion and adhesive capsulitis. The Petitioner continued to follow up with Dr. Richardson who noted that her fracture was slowly healing and her shoulder pain was decreased. As of March 26, 2011, Dr. Richardson reported that the Petitioner had disabling, crippling rheumatoid arthritis and he recommended bilateral total shoulder replacements to maintain shoulder motion. Dr. Richardson released the Petitioner from his care and recommended she see an arm specialist for further treatment. Dr. Richardson noted that the Petitioner's humerus fracture had healed and maintained position, but he reported that she had complete stiffness and immobility of the glenohumeral joints.

The Petitioner acknowledged that after the incident at Wal-Mart, she did not contact the Respondent about returning to work and that she applied for Social Security disability benefits thereafter.

The Petitioner testified that currently her ability to use her right arm is limited. She testified that she cannot wash or comb her hair and has to use an extension comb. She cannot eat and holds her fingers differently. She has difficulty holding pens and pencils. She drives, but uses her left arm to start the car. She does not drive long distances now, although

she did not drive that far prior to the injury. She testified she uses a computer with her left hand and only for games. She testified that she does not get much sleep because she cannot get comfortable.

The testimony of Dr. Sipe was admitted into the record as Petitioner's Exhibit 1. Dr. Sipe testified as to the treatment he rendered to the Petitioner for her humeral head fracture. Dr. Sipe opined that the Petitioner's humeral head fracture was caused by the work injury and that the Petitioner's shoulder pain and end stage arthritis and degenerative joint disease might or could have been aggravated by the work injury. Dr. Sipe acknowledged, however, that the Petitioner needed to undergo a total shoulder replacement prior to her work injury solely as a result of her pre-existing degenerative condition. Dr. Sipe also acknowledged that the Petitioner's humeral head fracture had completely healed and that she was at maximum medical improvement from the fracture by the time he last saw her on August 11, 2010.

At the request of the Respondent, the Petitioner was examined by Dr. James Cohen on two occasions, April 13, 2010 and April 21, 2011. The testimony of Dr. Cohen was admitted into the record as Respondent's Exhibit 1. Dr. Cohen testified as to his examination findings and he testified that the Petitioner's right shoulder arthritis pre-existed the February 26, 2010 injury, and that she had marked limitations in her right shoulder prior to the accident. Dr. Cohen testified that in his opinion, the Petitioner's rheumatoid arthritis had deteriorated to the point that before the injury, she was a prime candidate for a shoulder joint replacement. Dr. Cohen testified that he saw no evidence of an aggravation, acceleration or exacerbation of the Petitioner's underlying rheumatoid arthritic condition from the February 20, 2010 injury and that the Petitioner's arthritic condition was so severe before this injury that it had reached end-stage. He testified that the Petitioner needed the shoulder replacement surgery before the February 20, 2010 accident and that there was nothing that occurred from the work accident that changed or accelerated that need. The doctor concluded that the fracture in February 2010 did not aggravate, accelerate, or exacerbate the Petitioner's pre-existing rheumatoid arthritis and that the need for shoulder joint replacement was the rheumatoid arthritis.

CONLCUSIONS:

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

The Petitioner sustained a fractured humerus from her fall on February 26, 2010. The testimony and records of Dr. Sipe and the opinions of Dr. Cohen establish that the fracture completely healed and that the Petitioner was at maximum medical improvement, was released to and resumed her regular job, and required no further treatment. Specifically, the Arbitrator finds the humeral neck fracture completely healed without surgery and that the Petitioner failed to prove that any recommendation or need for shoulder replacement surgery was caused, aggravated or accelerated by the February 26, 2010 injury. The Arbitrator notes

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that pursuant to these physicians' testimony, the fracture was to the arm and not the shoulder, the proposed right shoulder replacement did not address the fracture and no surgery was recommended for the fracture as of May of 1010.

The Arbitrator notes the Petitioner was at maximum medical improvement for the work injury no later than August 11, 2010, a month before she fell and injured herself while shopping at at Wal-Mart. Dr. Sipe testified that the Petitioner had reached maximum medical improvement from her humeral head fracture as of his August 10, 2010 visit when she was discharged from his care. He released her to return to regular duty work. The Petitioner's job was sedentary which she was able to return to without any difficulty. Dr. Cohen agreed with this determination. She did not receive any treatment subsequent to her discharge by Dr. Sipe on August 10, 2010 and prior to her fall at Wal-Mart on September 11, 2010.

The Arbitrator further notes that the Petitioner sustained a second and far more serious humerus fracture injury to her right arm after falling at the Wal-Mart on September 11, 2010. This fracture was stabilized with plate and screws and involved radial nerve injury. After this incident, the Petitioner had additional and increased complaints including a right wrist drop and loss of use of her right hand. These additional problems prevented her from resuming her regular job. At his deposition, Dr. Sipe testified that all the Petitioner's complaints and disability after the injury at Wal-Mart were related to that accident. Dr. Cohen similarly testified that all the Petitioner's complaints and restrictions after the accident at Wal-Mart are causally connected to that fall and not to the February 26, 2010 work accident.

Moreover, the physician opinion evidence including that of Dr. Richardson, the treating physician after the September 11, 2010 Wal-Mart injury, indicates that the Petitioner needed bilateral shoulder replacements for her severe, end-stage and pre-existing rheumatoid arthritis. The Arbitrator finds that any need or recommendation for shoulder replacement to either shoulder is most likely due to the Petitioner's pre-existing rheumatoid arthritis and certainly not to the February 26, 2010 work injury. The Arbitrator further finds that there is no evidence that the rheumatoid arthritis was in any way accelerated, exacerbated or aggravated by the injury in February 26, 2010.

For the foregoing reasons, the Arbitrator finds that the Petitioner failed to prove that her current condition of ill-being is causally connected to the work accident of February 26, 2010. The Arbitrator finds that the Petitioner sustained a right humeral head fracture, which was treated conservatively and was noted to be completely healed, and that she reached maximum medical improvement from that injury by August 10, 2010. The Petitioner's fracture healed completely and, given the Petitioner's pre-existing condition, it is difficult to determine how much permenent disability resulted from that injury. The Petitioner did, nonetheless, sustain a humeral head fracture and, thus, some permanent disability clearly resulted from that injury. Based upon the entirety of the credible evidence adduced at hearing, and being mindful of the prior awards of the Commission for similar injuries, the Arbitrator finds that the Petitioner's work injury resulted in a 15% disability to her right arm.

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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 Petitioner submitted evidence of medical expenses and the only claimed outstanding medical expenses are charges from OSF Medical Center and an ambulance service.

The Payment Ledger from the Flanagan Graymount Emergency Ambulance (Page three of Pet. Ex. No. 10 – medical bills) shows that on April 12, 2010 the provider received payment of $399.03 with a Workers Compensation adjustment of $25.07 and that there was a "0" balance. Further, the Respondent has paid the ambulance service for date of service of February 26, 2010 (check no. 0692661). (Resp. Ex. No. 8). Nothing further is owed for the ambulance bill.

The Respondent is responsible for certain charges of the OSF Medical Center. The OSF medical bills are contained in Petitioner's Exhibit No. 8.

The Respondent is responsible for the charges from Dr. Sipe's office that are compensable for date of service of February 27, 2010 charged in the amount of $1,206.00 for CPT Codes 23600 and 99253 are reduced under the Medical Fee Schedule to $981.71.

The Respondent is responsible for the charges from Dr. Lemmert that are compensable for dates of service of February 27, 2010 and February 28, 2010 charged in the amount of $483.00 for CPT Codes 99223 and 99232 are reduced under the Medical Fee Schedule to $294.78.

The Respondent is responsible for the charges from Dr. Patel that are compensable for dates of service of March 1, 2010 and March 5, 2010 charged in the amount of $707.00 for CPT Codes 99232 and 99239 are reduced under the Medical Fee Schedule to $306.19.

The Respondent is responsible for the charges from Dr. Canty that are compensable for date of service of March 9, 2010 charged in the amount of $280.00 for CPT Code 99306 and are reduced under the Medical Fee Schedule to $212.80.

The Respondent is responsible for the charges from Dr. Sipe that are compensable for date of service of March 15, 2010 charged in the amount of $299.00 for CPT Codes 99214 and 73030 are reduced under the Medical Fee Schedule to $254.82.

The Respondent is not responsible for the charges from Dr. Sipe for date of service of April 14, 2010 charged in the amount of $280.00 for CPT Code 99307 as that was paid for by the Respondent's group carrier and the Respondent is indemnifying the Petitioner under Section 8(j).

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The Respondent is not responsible for the charges from Dr. Sipe for date of service of May 3, 2010 charged in the amount of $123.00 for CPT Code 73030 as that was paid for by the Respondent's group carrier and the Respondent is indemnifying the Petitioner under Section 8(j).

The Respondent is not responsible for the charges from Dr. Canty for date of service of May 11, 2010 charged in the amount of $117.00 for CPT Code 99308 as that was paid for by the Respondent's group carrier and the Respondent is indemnifying the Petitioner under Section 8(j).

The Respondent is not responsible for the charges from Dr. Sipe for date of service of June 2, 2010 charged in the amount of $106.00 for CPT Code 99213 as that was paid for by the Respondent's group carrier and the Respondent is indemnifying the Petitioner under Section 8(j).

The Respondent is responsible for the charges from Dr. Sipe that are compensable for date of service of July 21, 2010 charged in the amount of $106.00 for CPT Codes 99213 and 73030 are reduced under the Medical Fee Schedule to $90.29.

All bills after August 10, 2010 are unrelated to the work injury.

The Arbitrator finds the Respondent is responsible for payment of $2,140.56 to OSF Medical Center.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tamara McLaughlin,
Petitioner,
vs.

14IWCC1079

NO: 09 WC 895

City of Springfield,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 6, 2014 is hereby affirmed and adopted.

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

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

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: DEC 12 2014
KWL/vf
O-12/1/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

14IWCC1079

McLAUGHLIN, TAMARA
Employee/Petitioner

Case# **09WC000895**

CITY OF SPRINGFIELD
Employer/Respondent

On 5/6/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.45% 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:

1816 LAW OFFICE OF FREDERIC W NESSLER
MATTHEW V KENNEDY
536 N BRUNS LN SUITE 1
SPRINGFIELD, IL 62702

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

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC1079

Case # 09 WC 895

Consolidated cases: _____

TAMARA MCLAUGHLIN,
Employee/Petitioner

v.

CITY OF SPRINGFIELD,
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 **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **4/16/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **6/25/08**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned **$34,195.72**; the average weekly wage was **$657.61**.

On the date of accident, Petitioner was **45** years of age, *married* with **0** dependent children.

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

Respondent shall be given a credit of **$00** for TTD, **$00** for TPD, **$00** for maintenance, and **$00** for other benefits, for a total credit of **$00**.

Respondent is entitled to a credit of **$00** under Section 8(j) of the Act.

ORDER

The arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her right shoulder due to repetitive work activities that arose out of and in the course of her employment by respondent that manifested itself on 6/25/08. Petitioner's claim for compensation is denied.

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

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

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

Signature of Arbitrator

5/1/14
Date

ICArbDec19(b)

MAY - 6 2014

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 45 year old Account Tech I, alleges she sustained an accidental injury to her right shoulder due to repetitive work activities that arose out of and in the course of her employment by respondent and manifested itself on 6/25/08. Petitioner works for CWLP (City Water, Light and Power). For the past 12 years she has worked as an Account Tech I. She has worked for respondent for 19 years. Prior to becoming an Account Tech I she was a Cashier I and II.

Petitioner's duties include doing petty cash each morning. To do this task she would roll a vault with two handles out, unlock it, and pull out the metal box inside that had the bills. She opened the metal box and counted the cash. She would retrieve a folder from an overhead cabinet. After she filled out the form she put it back in the folder and replaced the folder in the overhead cabinet. Petitioner then locked up the petty cash and placed the vault back.

After petty cash, petitioner would unlock the drive up door and go get the mail from the overnight drop box. She would put them all in the same order so that she could place them in the slicing machine. The slicing machine opened the envelopes. Petitioner did not do this by hand. Petitioner would do some sorting, turn on the remittance processor and put the checks in that machine. The machine would read the MICR line and take a picture of the check. If the machine could not read the amount on the check she would manually enter it.

Petitioner would then get the mail. She would go through it, and bring it to the cashiers to process. She would process some of it herself.

Petitioner would also file check stubs into a box. The machine would process 250 check stubs at a time. Petitioner would rubber band the stack of 250 and put them in the file box. Petitioner would do this in the morning and again in the afternoon. At the end of the day she would put the file box on a table that may have boxes stacked up to 4 high. She may have to lift the box up to shoulder height once a day. If requested, petitioner may have to pull a file box to get out a check stub.

Each week petitioner would rotate the check stub file boxes so that the mailroom only took the older boxes to PNC. She would keep a month's worth of file boxes on the shelf by date.

Petitioner processed mail and no stub batches. With the no stub batches petitioner would enter the account number off a sheet into the computer by hand. She also might have to look up an account number of a check that was received without a stub.

At her workstation petitioner had the computer to the right, work area in front of her, and a calculator to the left of her. Petitioner entered big accounts by hand. Petitioner testified that she would rotate from the computer to the calculator to make sure everything balanced.

Petitioner was also responsible for the NSF returned. She would make a copy of the them, look up their account numbers, and determine what letter template she was going to write. She would enter the name and address in the letter template, print it out, and then copy it.

When a cashier called in sick petitioner might have to work in the cashier lane for no more than an hour on any given day. This job required her to reach all the way into the drawer of the drive through. She would work on 2 computers in the drive thru. Petitioner did not state how many transactions she processed while working at the cashier lane.

Petitioner also processed LIHEAP for those who qualified for utility assistance. She testified that this a batch payment, and she would enter in 11 pages of LIHEAP and 4 pages of sewer rebates. She also does rebates for rain barrels, city lights, heat pumps, and energy audits at her desk once a month.

Petitioner testified that her right shoulder is most painful when she uses the NCR machine. She testified that petty cash caused her the least amount of pain.

Petitioner first experienced pain in her right shoulder in late 2007. She reported that she felt numbness and popping.

On cross examination petitioner testified that most of her activities are performed at table or desk height. She stated that she counts petty cash at this level; the remittance processor is at this level; machine mail opener is at table level; her assistant does 90% of the work on the remittance processor; she only fills one stub box a day, and when she lifts it, it weighs no more than 15 pounds; petitioner only rotates boxes once a week; performs LIHEAP, and lease payments and license payments sporadically and at desk level; spends 1/2 hour a day doing NSF letters; and only reaches overhead for a folder for the petty cash twice a day. Petitioner admitted that she performs several different activities a day, and works on different machines in different work areas each day.

Today, petitioner testified that she is more fatigued when she works than when she claimed her injury 6 1/2 years ago. She agreed that Dr. Watson was of the opinion that her condition was essentially the same for the past 6 1/2 years. Petitioner has never complained to her supervisor, Mr. Smith, about her right shoulder. She never asked for any work restrictions. She stated that she does her job and does not complain.

Petitioner filed a FMLA for chronic flareups of shoulder pain and takes days off when necessary.

Today, petitioner still complains of throbbing pain in her right shoulder. She stated that she is still working, but not as fast. She testified that she fatigues easily. She complains of pain in her right shoulder every day. When petitioner gets off work on Friday her pain level is an 8 or 9 out of 10. By Monday morning it is only a 2 or a 3 out of 10 after resting on the weekend.

On 6/25/08 petitioner first presented to Dr. Michael Watson at the Watson Clinic. She complained of a one year history of right-sided shoulder pain with popping. Her pain was in the subacromial area and also deep within the glenhumeral joint. She stated medications have not helped. She stated that she spends a lot of her day working with her arms at CWLP. She denied any specific injury. She felt her symptoms were worsening. Dr. Watson examined petitioner and assessed some supraspinatus impingement. He could not rule out some deeper pathology in the glenohumeral joint such as labral tearing. Dr. Watson injected her subacromial space.

On 8/7/08 petitioner returned to Dr. Watson with a recurrence of her right-sided shoulder pain. She reported relief for one month following the injection. Examination was unchanged. He prescribed a rehab program. On 9/9/08 petitioner began a course of physical therapy. On 9/11/08 petitioner returned to Dr. Watson with worsening pain in her right shoulder. She stated physical therapy was not helping, and in fact stated that it was worse. Dr. Watson ordered an MRI of the right shoulder.

On 9/16/08 petitioner underwent an MRI of the right shoulder. The impression was mild inferior angulation of the acromion and some increased signal seen within the supraspinatus consistent with tendonitis/tendinosis. No full thickness rotator cuff tear was present.

On 9/22/08 petitioner returned to Dr. Watson with the results of the MRI. He noted that it was consistent with her impingement. Dr. Watson recommended an arthroscopic decompression. Petitioner stated that she wanted to run this through Workers' Compensation.

On 10/23/08 petitioner returned to Dr. Watson with persistent pain in her right shoulder. He recommended a right shoulder arthroscopic subacromial decompression. She attributed her symptoms to her work for respondent including a lot of repetitive activity with her upper extremities. Petitioner left a detailed description of her daily job duties. On 11/13/08 petitioner's condition was unchanged. Dr. Watson gave her no restrictions.

On 3/12/09 respondent's attorney, Dennis O'Brien sent an email to petitioner's attorney, Mr. Connor, informing him that respondent was denying petitioner's claim regarding her right shoulder injury due to repetitive work activities.

On 3/12/09 petitioner also returned to Dr. Watson. She complained of persistent pain in her right shoulder. She reported very little change since November of 2008. She complained of a little bit of numbness radiating down to her hands particularly when she is sleeping on the right side at night. Other than that her examination was unchanged. She reported some temporary relief from the cortisone injection. Dr. Watson reinjected petitioner's right shoulder.

On 8/25/09 an 2/17/10 petitioner returned to Dr. Watson. On 2/17/10 Dr. Watson reinjected her right shoulder. On 4/8/10 and 4/9/10 Dr. Watson authorized petitioner off work due to severe shoulder pain. On 4/12/10, 8/18/10, 11/24/10, 3/8/11, 7/12/11, 1/24/12, 7/2/12, 1/8/13, and 5/29/13 Dr. Watson again reinjected petitioner's right shoulder.

On 8/12/10 petitioner presented to Physician Groups Associates. She complained of right shoulder pain for the past 5 days. Petitioner was given a medrol dose pack.

On 3/27/13 Matthew Kennedy, petitioner's attorney, drafted a letter to Dr. Watson requesting a narrative report. He reported to Dr. Watson that petitioner was an employee of respondent's for 19 years. He stated that her job duties include: keeping stubs everyday -open, process, put in box, and place on shelf (5-15 lbs); petty cash folder - lifting the lid out of the filing cabinet; data entry - running a NCR machine for check processing and reaching around to 4 different pockets; putting away storage boxes full of daily work; counting currency; opening mail; running mail processor; and, running commercial mail. He also asked Dr. Watson to consider other work activities as described by petitioner.

On 4/22/13 Dr. Watson drafted a narrative report in response to attorney Kennedy's letter. Dr. Watson based his opinions on the job description as described by attorney Kennedy. Dr. Watson opined that petitioner's work duties as described by attorney Kennedy are sufficient to cause the diagnosis of right shoulder chronic impingement syndrome. He stated that he was not aware of any preexisting conditions, and therefore he believed her work-related injury caused a previously asymptomatic condition became symptomatic. He stated that petitioner should undergo an arthroscopic subacromial decompression along with a diagnostic shoulder arthroscopy. He believed she would be at maximum medical improvement three months after the surgery. In the interim he recommended pain management

and anti-inflammatory medications. He noted that she was working without restrictions and he had not placed any restrictions on her.

On 8/27/13 the evidence deposition of Dr. Watson, an orthopedic surgeon, was taken on behalf of the petitioner. Dr. Watson testified that petitioner gave him a history of her job duties. He stated that she gave him a job description that she starts at 6:45 am, walks to the drive thru and picks up all the mail dropped the night before. After doing this she would count the petty cash. She did this by walking to the filing cabinet and reaching up on her tiptoe and opening the envelope. She counted the money and then for 3-5 hours she would open mail, which required the use of her right and left hand. She used the right side more than her left. She would open the mail by constantly reaching out in front of her and twisting at the same time to reach certain trays. In between this time she put data into a computer and into an adding machine. She spent about 1/2 hour typing letters to customers. She stated that when this was done her right hand and shoulder were fatigued and she started to get a burning sensation in her right shoulder. She stated that every day there was a storage box she had to pick up and put on a shelf that was taller than her, stretch out her arm on her tiptoes to support the box that weighed 4-10 pounds. After opening mail she would enter more data into the machine and type letters, which she said was painful.

Dr. Watson opined that the work as described by petitioner either caused or was a major contributor to her shoulder pathology. He opined that his treatment was reasonable and necessary.

On cross-examination Dr. Watson was of the opinion that all the things petitioner did over the course of a day likely contributed to her problem. He stated that each thing by itself would be a major contributor. He did not know how long she had been performing the duties she described. He assumed it was for at least a year based on her complaints. Dr. Watson was of the opinion that the majority of petitioner's day was spent with her arms at or below shoulder level, with some occasional overhead work. He testified that the only two things she did overhead were to get the petty cash envelope and lift a 4-10 pound box once a day. He believed working with her arms in front of her could put pressure or stress on the shoulder joint if done repetitively. Dr. Watson believed that petitioner does several different activities using her hands, elbow and arm in varying ways during the workday, and stated that this tends to decrease the risk of repetitive trauma to any of these areas. He was also of the opinion that using different machines in different fashions would also tend to decrease the risk of repetitive trauma to any of these body parts. Dr. Watson noted that his opinions were based almost completely on petitioner's job description. He was also of the opinion that other things can cause stress to the subacromial space and

shoulder in general. Dr. Watson noted that petitioner's physical examination did not change much from the first day he saw her to the most recent date.

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

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case … where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming an injury to her right shoulder due to repetitive work activities, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury "manifested itself". These dates could be based on one or more of the following, depending on the facts of the case:

1. The date the petitioner first seeks medical attention for the condition;
2. The date the petitioner is first informed by a physician that the condition is work related;
3. The date the petitioner is first unable to work as a result of the condition;
4. The date when the symptoms became more acute at work;
5. The date that the petitioner first noticed the symptoms of the condition.

In the case at bar the petitioner is alleging that she sustained an accidental injury to her right shoulder due to repetitive trauma that arose out of an in the course of her employment by respondent and manifested itself on 6/25/08. On 6/25/08 petitioner first presented to Dr. Michael Watson at the Watson Clinic. She complained of a one year history of right-sided shoulder pain with popping. Her pain was in the subacromial area and also deep within the glenhumeral joint. She stated medications have not helped.

She stated that she spends a lot of her day working with her arms at CWLP. She denied any specific injury. She felt her symptoms were worsening. The arbitrator finds 6/25/08 is the date that petitioner first sought medical attention for her condition.

That said, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities. Petitioner stated that she counts petty cash at desk level; the remittance processor is at desk level; machine mail opener is at table level and her assistant does 90% of the work on the remittance processor; performs LIHEAP, and lease payments and license payments sporadically and at desk level; spends 1/2 hour a day doing NSF letters; and only reaches overhead for a folder for the petty cash twice a day, and lifts the stub box, weighing no more than 15 pounds, overhead once a day. Petitioner only rotates boxes once a week. Petitioner admitted that she performs several different activities a day, and works on different machines in different work areas each day.

Petitioner testified that she has continued to work her full duty job since her alleged date of accident and agreed with Dr. Watson that he condition was essentially the same for the past 6 1/2 years. Although petitioner testified that she feels more fatigued when she works today, she admitted that she was 6 1/2 years older than when she alleged her accident. Dr. Watson has continued petitioner on full duty work and petitioner has never asked for any restrictions. Petitioner is able to complete her work duties, but stated that it takes longer than it used to.

The only doctor petitioner has seen thus far for her alleged complaints is Dr. Watson. When asked by Dr. Watson what she attributed her symptoms to, she attributed them to her work for respondent, that included a lot of repetitive activity with her upper arms. Petitioner left a detailed description of her daily job duties with Dr. Watson. Dr. Watson understood petitioner's job duties to be 1) keeping stubs everyday - open, process and put in box and place on shelf (5-15 lbs); 2) petty cash folder - lifting the lid out of the filing cabinet; 3) data entry - running an NCR machine for check processing and reaching around to 4 different pockets; 4) putting away storage boxes full of daily work; 5) counting currency; 6) opening mail; 7) running mail processor; 8) running commercial mail.

Petitioner testified that she accesses the petty cash, counts currency and puts away storage boxes only once a day. She further testified that activities such as opening mail, running mail processors, running commercial mail and running an NCR machine for check processing are automated activities.

Petitioner does do some data entry with some daily activities, but did not specify how long she performs these tasks every day.

When Dr. Watson was deposed he opined that petitioner's activities are causally related to her repetitive work activities as she described them. However, petitioner told him that she counted money and then would open mail for 3-5 hours a day, which she admitted at trial was not accurate. Petitioner testified that she put the mail in the same order, and the mail opening machine sliced open all the mail. This mail was then distributed to all the cashiers, and herself for processing. Petitioner did not describe how much mail was processed a day. Petitioner only spent 1/2 hour a day filling in data on letter templates to send to customers.

On cross examination, Dr. Watson admitted that he did not know how long petitioner had been performing the duties she described. Dr. Watson admitted that only 2 of petitioner's multiple activities she performed each day required her to lift overhead once. Dr. Watson was of the opinion that petitioner did several different activities using her hands, elbows and arm in varying ways during the workday, and opined that this tends to decrease the risk of repetitive trauma to any of these areas. He also opined that using different machines in different fashions would also tend to decrease the risk of repetitive trauma to any of these body parts. Dr. Watson opined that his opinions were based almost completely on petitioner's job description which the petitioner admitted at trial was not totally accurate. Dr. Watson was also of the opinion that other things can cause stress to the subacromial space and shoulder in general.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her right shoulder due to repetitive work activities that arose out of and in the course of her employment by respondent that manifested itself on 6/25/08. The arbitrator bases this finding on the fact that petitioner had a multitude of activities that she did with her arms in varying ways during the workday; that only 2 of her many activities involved lifting overhead only once; that petitioner did not provide Dr. Watson with an accurate history of her work activities; and that petitioner's condition has remained essentially the same since she reported her injury 6 1/2 years ago, despite the fact that she has continued to work her full duty job without restriction.

The arbitrator finds the petitioner has failed to place into evidence specific and detailed information concerning her work activities, including the frequency, duration, manner of performing, etc. The arbitrator further finds that Dr. Watson, the medical expert, did not have a detailed and accurate understanding of the petitioner's work activities.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?
K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

Having found the petitioner failed to prove by a preponderance of the credible evidence that she sustained an accidental injury due to repetitive work activities that arose out of and in the course of her employment and manifested itself on 6/25/08, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jerry Pratt,

Petitioner,

vs.

NO: 13 WC 24006

14IWCC1080

Vactor Manufacturing Inc/Federal Signal Corp.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 3, 2014, is hereby affirmed and adopted.

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

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

14IWCC1080

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 Circuit Court.

DATED: DEC 12 2014
TJT:yl
o 12/1/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PRATT, JERRY
Employee/Petitioner

Case# **13WC024006**

VACTOR MANUFACTURING INC/FEDERAL SIGNAL CORP
Employer/Respondent

14IWCC1080

On 4/3/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1097 SCHWEICKERT & GANASSIN LLP
SCOTT J GANASSIN
2101 MARQUETTE RD
PERU, IL 61354

1120 BRADY CONNOLLY & MASUDA PC
MARK F VUZZA
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSalle)

14IWCC1080

☐ 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 PRATT
Employee/Petitioner

v.

VACTOR MANUFACTURING. INC./FEDERAL SIGNAL CORP.
Employer/Respondent

Case # 13 WC 24006

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 **Ottawa**, on **2/26/2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC1080

FINDINGS

On 8/19/2012, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $44,716.80; the average weekly wage was $859.94.

On the date of accident, Petitioner was 52 years of age, *single* 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 $0 for TTD, $0 for TPD, $0 for maintenance, and $3,921.55 for other benefits, for a total credit of $3,921.55.

ORDER

The Petitioner's claim for temporary total disability benefits is denied as the petitioner's current condition of ill-being is not causally related to any accident arising out of and in the course of his employment with respondent.

The Petitioner's claim for medical benefits is denied as the petitioner's current condition of ill-being is not causally related to any accident arising out of and in the course of his employment with respondent.

Respondent shall be given a credit of $3,921.55 for other benefits paid for a total credit of $3,921.55.

Petitioner's Petition for Penalties and Attorney's Fees is denied as the Petitioner failed to prove that the respondent's conduct was unreasonable or vexatious.

Respondent shall pay Petitioner permanent partial disability benefits of $515.96 for 10.75 weeks because the injuries sustained caused the 5% loss of the 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

3/26/14
Date

APR 3 - 2014

FINDINGS OF FACT

The Petitioner testified that he has been employed by the Respondent for 22 years this June. He is employed as a welder. On August 19, 2012, he was making air pipes for one of the trucks. He was moving around a table to do the welding, there was a pallet on the ground, and he tripped and fell hitting his right knee on the concrete. He testified he had no problems with his right knee before this incident. He experienced a burning, sharp pain. The parties do no dispute that the Petitioner sustained an accident arising out of and in the course of his employment stemming from the August 19, 2012 incident.

Petitioner did not see a doctor until October 16, 2012. He was having pain in the right knee. He was seen at St. Mary's Hospital and x-rays were taken. He then treated with Dr. Syed, his family doctor on October 26, 2012. He was seen at Newsome Physical Therapy and then Dr. Syed sent him to ATI. He was seen for pain management by Dr. Estiloo on December 17, 2012. He had injections in his knee through February 2013. He also had an MRI of his low back, but his low back pain is gone. On March 19, 2013, Dr. Syed referred him to Dr. Chudik. He was complaining of pain in his knee at that time.

On May 24, 2013, Petitioner saw Dr. Chudik. He was having pain and swelling, the doctor took him off work, and surgery was performed June 13, 2013. He had a functional capacity evaluation on August 27, 2013, that found he could do his regular job. After that, he felt he was still having problems with his leg and he saw Dr. Rhode.

On September 19, 2013, Petitioner saw Dr. Rhode. Dr. Rhode prescribed medication and told him he could continue to do his normal job. He saw Dr. Rhode three more times, the last being February 20, 2014.

His knee now aches in cold weather, and when he stands on concrete it is painful. He can only walk about three blocks and can only go up three or four steps. He testified that the pain in his right knee is in the front of the knee but sometimes goes to the sides. The pain has always been in the same spot in his knee. It has not changed. After the accident and until he saw a doctor in October 2012, he continued to do his regular job and worked voluntary overtime. After his return to work full duty after the surgery, he has continued to work full time, not missing any time, and has continued to work voluntary overtime.

Vanco Decker testified he is retired from Vactor Manufacturing. He was a co-worker of the Petitioner. On August 19, 2012, he was helping the Petitioner build pipes, and he saw the petitioner trip and fall and strike his knee on the concrete.

Art Zimmerman testified he is the Petitioner's supervisor and that from the date of accident through the time he went off for surgery, the Petitioner did his job and never had any trouble doing his job. Since his return to work full duty after the surgery, he has continued to do his job and has not had any problems doing his job.

Roy Snyder testified that he is the Safety Director at Vactor Manufacturing. He had a conversation with the Petitioner and he asked the Petitioner where he was having problems with his knee. In response to Snyder's question, the Petitioner pointed to the top of his shin below his kneecap. He did not indicate any other areas of pain.

On November 21, 2012, the petitioner was examined by Dr. Breslow for an independent medical evaluation. Dr. Breslow's reports were entered into evidence in this matter. Dr. Breslow also reviewed various medical records and x-rays. He found that the Petitioner had no effusion and no instability of the right lower extremity. There was no jointline tenderness and he had 5/5 motor with dorsiflexion, plantar flexion and EHL. He had a

small centimeter palpable mass in the subcutaneous tissues anterior to his patella. There was a small scar anterior to this. He had no erythema and really minimal discomfort with palpation. He had full extension and flexion. Dr. Breslow diagnosed a right knee contusion related to the accident of August 19, 2012. He recommended over-the-counter anti-inflammatory medications and massaging the indurated area to help break up the scar tissue. He found that the Petitioner was at maximum medical improvement and needed no formal treatment and did not require surgery. Dr. Breslow issued an addendum reported dated June 26, 2013 (Respondent's Exhibit 2) after reviewing the MRI of the right knee. The right knee showed no evidence of a meniscus tear and found no evidence of any significant chondral wear. He found that the petitioner did not need surgery. Dr. Breslow issued a third report dated November 6, 2013. (Respondent's Exhibit 5) There was no jointline tenderness and the doctor found that there was no exacerbation of underlying conditions, specifically the arthritis. He found that there was definitely not a permanent aggravation of a minimally symptomatic knee at that time. He found he had no findings or symptoms related to arthritis at the time of his evaluation. (Respondent's Exhibit 5) He found that the surgery performed by Dr. Chudik was unrelated to the accident of August 19, 2012. (Respondent's Exhibit 5)

Dr. Chudik examined the Petitioner and diagnosed him with a right knee lateral meniscus tear. (Petitioner's Exhibit 7) Subsequent to that, Dr. Chudik performed surgery and found that the petitioner did not have a meniscus tear. (Petitioner's Exhibit 7) Dr. Chudik performed a right chondroplasty with abrasionplasty of the medial femoral condyle and a right chondroplasty with abrasionplasty of the lateral tibial plateau. (Petitioner's Exhibit 7) He found grade II and grade III chondromalacia. (Petitioner's Exhibit 7) After physical therapy, the petitioner was allowed by Dr. Chudik to return to work full duty. After a second opinion with Dr. Rhode, the petitioner was once again allowed to return to work full duty.

CONCLUSIONS OF LAW

1. Regarding the issue of causation, the Arbitrator finds that the Petitioner's current condition of ill-being is not causally related to the incident from August 19, 2012. In support of this finding the Arbitrator is persuaded by the opinions of Dr. Breslow when compared to those of Dr. Chudik. Dr. Chudik prior to surgery diagnosed the petitioner with a tear of the lateral cartilage of the meniscus knee current and old bucket handle tear of the medial meniscus. (Petitioner's Exhibit 7) Once Dr. Chudik performed arthroscopic surgery, he found that diagnosis was incorrect. He then performed a right chondroplasty with abrasionplasty. (Petitioner's Exhibit 7) At no time prior to the operation did Dr. Chudik ever diagnose the petitioner with chondromalacia. Dr. Chudik found the petitioner had persistent lateral right knee pain and swelling. (Petitioner's Exhibit 7) Even after review of the MRI prior to the surgery, Dr. Chudik did not diagnose chondromalacia. As stated by Dr. Breslow, the Petitioner had a contusion of the knee. It was only when Dr. Chudik did arthroscopic surgery to repair the meniscus and found that there was no tear to the meniscus that he performed a chondroplasty of the grade II-III chondromalacia that he found. There is no evidence that the Petitioner's chondromalacia was caused by the accident of August 19, 2012. Also, there is no evidence that the Petitioner's chondromalacia was permanently aggravated by the accident of August 19, 2012. It is apparent that the Petitioner suffered a contusion and had an increase in pain in the right knee. However, there was no indication that the chondromalacia as found by Dr. Chudik was caused or aggravated by the accident. The petitioner gave a history to Newsome Physical Therapy at the functional capacity evaluation that he scraped his right knee which eventually developed into a bump or a cyst. Again, this notes that the Petitioner suffered just a contusion of the knee in the accident of August 19, 2012. When seen by Dr. Rhode on September 19, 2013, Dr. Rhode indicated he was unclear as to what condition the Petitioner was suffering from at the time of the injury. (Petitioner's Exhibit 11) Even on February 20, 2014, Dr. Rhode noted all of the Petitioner's subjective complaints, however felt he could return to full duty and only needed oral medication.

14IWCC1080

Based upon the medical evidence, it is apparent the Petitioner suffered a bruise/contusion to the right knee in the accident of August 19, 2012. The Petitioner's current condition of ill-being is not causally related to that accident.

2. With regard to the issue of medical expenses, the Arbitrator finds that the Petitioner's treatment with Dr. Syed was reasonable and necessary. Respondent shall pay for any reasonable, related and necessary medical expenses incurred by Dr. Syed pursuant to the fee schedule and subject to Sections 8(a) and 8.2 of the Act and shall receive credit for any expenses it has already paid to this provider. However, the Arbitrator further finds that the surgery as performed by Dr. Chudik was not related to the accident arising out of and in the course of the Petitioner's employment on August 19, 2012. As such, the medical bills submitted by the Petitioner for treatment in 2013 and 2014 are not related to any accident arising out of and in the course of the Petitioner's employment with the Respondent and medical bills submitted into evidence by the Petitioner as Petitioner's Exhibit 1 are found not to be related to any accident arising out of and in the course of the Petitioner's employment with the respondent, and therefore are not the responsibility of the Respondent.

3. The Arbitrator finds that the Petitioner is not entitled to payment of any temporary total disability. The Petitioner did not lose any time from work as a result of the accident arising out of and in the course of his employment with the Respondent on August 19, 2012. The Petitioner testified that he only lost time from the time of the surgery through August 19, 2013. The Arbitrator has previously found that the need for the surgery was not related to any accident arising out of and in the course of the petitioner's employment with the respondent, therefore the Petitioner is not entitled to any temporary total disability benefits.

4. The Arbitrator finds that the Petitioner's claim for penalties and attorney fees is denied. There has been no evidence presented that the Respondent has been unreasonable and vexatious in any way. Based upon the evidence presented to the Arbitrator, the Arbitrator finds that the Respondent's defense of this claim and its refusal to pay benefits was reasonable and legally supported.

5. Respondent shall receive a credit for $3,921.55 pursuant to Section 8(j) of the Act and in accordance to the stipulation of the parties as evidence in Arbitrator Exhibit 1. This amount represents short term disability benefits paid as referenced in Respondent Exhibit 14.

6. Pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. Applying this standard to this claim, the Arbitrator first notes that there was no evidence of any impairment rating presented by either party. Petitioner is a welder, who was 52 years old at the time of the injury, with no evidence of loss of any future earning capacity. Petitioner continues to do the job he had prior to his injury with no medical restrictions. With regard to any evidence of disability corroborated by the medical records, Petitioner sustained a knee contusion, but testified that he still had complaints of aches and weakness, noted with walking and using stairs. However, as noted above, the Petitioner underwent a surgery to his right knee for a condition that was not related to his original injury and it is very likely that some of the Petitioner's current complaints stem from that unrelated condition and surgery. Taking the above factors into consideration, Respondent shall pay the petitioner the sum of $515.96/week for a further period of 10.75 weeks, as provided in Section 8(e) of the Act, as the injuries sustained caused the permanent loss of use the petitioner's right leg to the extent of 5% thereof.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANDRZEJ GORNICKI,

Petitioner,

14IWCC1081

vs.

NO: 12 WC 16385

HALINA'S RESIDENTIAL PLACEMENT,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, medical expenses, medical fee schedule, and Section 8.1(b), and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Based upon a review of the record as a whole, and taking into account the factors of Petitioner's age, the impact on his ability to earn wages in the future, the AMA rating provided by Dr. Bernat, the occupation of the Petitioner, and evidence of disability contained in the medical records, the Commission modifies the Arbitrator's permanent partial disability award from 35% loss of use of each hand to 20% loss of use of the left hand and 25% loss of use of the right hand under Section 8(e) of the Act.

Furthermore, the Commission finds the Arbitrator erroneously awarded permanent partial disability under Section 8(d)2 and 8(c) for the same injury to Petitioner's forehead. The Petitioner is not entitled to an award under both Section 8(d)2 and 8(c) for the same injury. Wargo v. Industrial Commission, 31 Ill.2d 143(1964). The Commission finds no basis upon which a Section 8(d)2 award would be appropriate in this matter. Therefore, the Commission vacates the Arbitrator's award of 5% loss of use of the man as a whole under Section 8(d)2, and affirms the Arbitrator's award of 3 weeks of disfigurement as compensation for serious and

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permanent disfigurement to Petitioner's forehead, pursuant to Section 8(c) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 22, 2014, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $653.33 per week for a period of 39-4/7 weeks, from April 11, 2012 through January 11, 2013, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $588.00 per week for a period of 95.25 weeks, as provided in §8(e) and §8(c) of the Act, for the reason that the injuries sustained caused the Petitioner 20% loss of use of the left hand and 25% loss of use of the right hand, and for the reason that the injuries sustained caused the Petitioner disfigurement to the forehead to the extent of 3 weeks.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $19,920.06 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of 5% man as a whole under §8(d)2 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.

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

DATED: DEC 12 2014
KWL/kmt
11/18/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC1081

Case# 12WC016385

GORNICKI, ANDRZEJ
Employee/Petitioner

HALINA'S RESIDENTIAL PLACEMENT SERVICES LLC
Employer/Respondent

On 1/22/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2291 BELLAS & WACHOWSKI
PETER C WACHOWSKI
115 N NORTHWEST HWY
PARK RIDGE, IL 60068

0560 WIEDNER & McAULIFFE LTD
JAMES W STEVENSON JR
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Andrzej Gornicki
Employee/Petitioner

v.

Halina's Residential Placement Services, LLC
Employer/Respondent

Case # **12** WC **16385**

Consolidated cases: **N/A**

14IWCC1081

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Falcioni**, Arbitrator of the Commission, in the city of **Geneva & New Lenox**, on **10/09/2013; 11/13/2013; 11/20/2013, and 12/20/2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ 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 **04/11/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.
On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.
On this date, Petitioner ***did*** 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 $N/A; the average weekly wage was **$980.00**.
On the date of accident, Petitioner was **53** years of age, ***married*** with **0** dependent children.
Petitioner ***has*** received all reasonable and necessary medical services.
Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.
Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$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 $653.33 /week for 39 2/7 weeks, commencing 04/11/2012 through 01/11/2013, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $19,920.06, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $588.00/week for 143.50 weeks, because the injuries sustained caused the 35% loss of each of the right and left hands, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $588.00/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 for the head injuries sustained.

Respondent shall pay Petitioner permanent partial disability benefits of $588.00/week for 3 weeks, because the injuries sustained caused the disfigurement of the forehead, as provided in Section 8(c) of the Act.

Respondent shall pay to Petitioner penalties of $0, as provided in Section 16 of the Act;$ 0, as provided in Section 19(k) of the Act; and $0, as provided in Section 19(l) of the Act.

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

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

Signature of Arbitrator

January 7, 2014
Date

JAN 22 2014

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

Attorney No. 2291

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION OF THE STATE OF ILLINOIS

Andrzej Gornicki,
Employee/Petitioner

v.

Halina's Residential Placement Services, LLC
Employer/Respondent

14IWCC1081

Case No. 12 WC 16385

MEMORANDUM OF DECISION OF ARBITRATOR

I. PROCEDURAL BACKGROUND

The Application for Adjustment of Claim was timely filed on May 10, 2012 and listed the head and both wrists as the injured body parts with an accident date of April 11, 2012.

Petitioner filed his request for hearing on July 17, 2013. A trial date of October 9, 2013 was set. On October 9, 2013 the parties appeared before the Honorable Falcioni in Geneva, at which time the Petitioner presented his testimony. The trial was continued to November 13, 2013 in New Lenox, then to November 20, 2013 in New Lenox, and proofs were closed on December 20, 2013.

The request for hearing stipulation sheet was marked as Arbitrator's Exhibit 1 and was received into evidence.

II. TESTIMONY AND EVIDENCE

A. TESTIMONY OF PETITIONER ANDRZEJ GORNICKI

Petitioner testified that his name is Andrzej Gornicki and that he lives at 6N418 Tucker Avenue in Saint Charles, Illinois. His date of birth is November 23, 1958, and on the date of accident, April 11, 2012, he was 53 years of age, and was married with no dependent children.

Petitioner testified that at the time of the accident he was employed by Halina's Residential Placement Services.

Petitioner testified that in addition to the work outlined in the work description provided by the Respondent, he was charged with performing "odd jobs" as requested by the employer, such as snow removal, painting, cleaning of gutters, cleaning, fixing things, and other handyman tasks around the premises.

The Petitioner stated that he spoke with his employer, Daniel Migo, the day before the accident. The Petitioner stated that on April 10, 2012 the Respondent directed him to cut the limbs and branches off various bushes, trees, and pine trees. He stated that they walked around the property and that Daniel Migo specifically showed him which branches, bushes, and trees needed to be trimmed and cut. The Petitioner stated that he used a small pocket knife to put markings on the branches, bushes, and trees where cutting was supposed to be done. The Petitioner stated that he had cut branches in his life before, but never had trimmed any trees for Daniel Migo.

Petitioner testified that he went and got a ladder and an electric chainsaw from his mother's home in St. Charles. The place of accident was also in St. Charles. The Petitioner stated that this was done following the conversation with Daniel Migo where Daniel Migo had instructed him to cut the branches in question. Petitioner testified that he saw landscapers at the property that would cut grass, but never saw any tree-cutters cutting any sorts of trees.

The Petitioner testified that on April 11, 2012 between 2:00pm and 3:00pm, he fell from a ladder while cutting a large branch off of a tree, thereby sustaining bilateral wrist fractures and a concussion to his head.

The Petitioner looked at pictures and specifically referred to Respondent's Exhibit Numbers 2 and 3 as the tree that he was told, by Daniel Migo, to cut. Respondent's Exhibits 2 and 3 are pictures of the tree from which the Petitioner fell while standing on a ladder, which caused the injuries in question.

Petitioner testified as to 25 photographs that comprised Petitioner's Exhibit Number 18. Petitioner testified that the 25 photographs truly and accurately depict the pine trees that were trimmed and to the height to which they were trimmed, which shows that it was several feet off the ground. The Petitioner testified that it shows the branch in question that was cut, which caused the accident. Petitioner also testified that Group Exhibit Number 18 shows the thickness of branches and bushes that were cut. It should be noted that they range in diameter from what appears to be an inch and a half to as much as three inches. Clearly, these sized branches could not be broken off by hand, and it must have been contemplated by Daniel Migo that a power saw would be used.

Respondent supplied an "Incident Report" which was admitted as Respondent's Exhibit Number 1. The Petitioner testified that with regard to Respondent's Exhibit Number 1, that he did not sign the document. He stated that he wanted to take the document and read it and have it interpreted so that he knew what it meant. He stated that both he and his wife do not speak English, and would always speak with Daniel Migo in Polish. He did not authorize his wife to sign the document on his behalf, and in fact, the document was not signed by the Petitioner.

The Petitioner testified that he never contacted nor threatened Daniel Migo.

The Petitioner testified that his injuries are serious and that he has a 50 pound weight restriction, and believes that this is more than he can actually lift. He testified that he has not worked since the accident. He stated that he has bumps on his wrists now that were not there prior to the accident, which show deformity.

Petitioner testified that he treated in Poland for this accident. In fact, he showed an MRI, which was translated from Poland which is dated on December 12, 2012 (Petitioner's exhibit number 11). Petitioner also testified with regard to Petitioner's Exhibit Number 16, which was admitted, but not provided for the truth of the matter asserted. Petitioner testified that he treated on June 29, 2012, July 20, 2012, July 23, 2012, July 3, 2012, June 8, 2012, and October 9, 2012 with a neurologist in Poland (Petitioner's Exhibit Number 16).

B. TESTIMONY OF MARIA GORNICKI

Mrs. Maria Gornicki testified that she is the wife of the Petitioner, Andrzej Gornicki. At the time of the accident, Mrs. Gornicki was also employed by the Respondent.

She stated that her husband performed various odds and end jobs when he lived with her at the residence where Halina's was located. She indicated that Halina's was like an old people's home where they lived and were on duty full-time. She testified that the Petitioner would perform cleaning, painting, he would fix small things around the house. He would cut and trim bushes. He would go grocery shopping with her.

Maria Gornicki indicated that Daniel Migo would tell her husband to do various things around the home. He would tell him how to do things.

She indicated that on the date before the accident, April 10, 2012, she overheard and saw through an open window Daniel Migo specifically tell her husband that he wanted him to trim the branch which the Petitioner was trimming when he had his accident.

On April 10, 2012, Daniel was overheard telling the petitioner that he planned to put a couch for the residents to sit at the location up against the building in the area under which the branch in question was situated and that he wanted it cut.

She testified that on April 11, 2012, the Petitioner was cutting trees and branches from 9:00am until 11:00am and that at 11:00am, he helped her to prepare lunch for the residents at the place of accident. She indicated that at 1:30pm after lunch, he went back to cutting trees and bushes and that shortly thereafter is when the accident occurred.

The Petitioner's wife indicated that the Petitioner has not worked since the accident. Specifically, he has not worked any jobs whatsoever and has not worked as a mechanic since the accident.

Maria Gornicki did concede that Daniel Migo "did not force the Petitioner to cut the trees". She also agreed that the Petitioner did not want to sign Respondent's Exhibit Number 1 and that she did not understand what it meant and that all she thought and was told that it meant by Daniel Migo was that he did not force the Petitioner to cut the trees. She does not read or speak English and that is why she signed her husband's name to the document.

C. TESTIMONY OF DANIEL MIGO

Daniel Migo testified that he has been with Halina's for the last 13 years. He indicated that Halina's is in the residential home care business and that Halina's owns four homes that are all in the St. Charles area. He testified that he is the co-owner of the company and that Halina's employed Maria Gornicki and Andrzej Gornicki.

Daniel Migo indicated that there was a written job description of what the exact job duties for the Petitioner were (Respondent's Exhibit Number 4).

Daniel Migo stated that the Petitioner was hired to perform all sorts of odds and ends jobs. His duties did not only include taking care of the residence. He repaired locks and doors and performed various types of handyman types of chores. Daniel Migo testified that Respondent's Exhibit Number 4 indicated supposedly what the job duties were to be of the Petitioner. He admitted that nowhere in Exhibit Number 4 was there anything about snow removal, or painting, or wall board repairs, or handyman projects which Petitioner performed. There was also nothing which indicated that gutters were to be cleaned or repaired, or that downspouts needed to be cleaned or repaired, which tasks Petitioner also performed. When asked if the Petitioner would have used a ladder to clean the gutters and downspouts, Daniel Migo admitted that it was possible, but thought it could be done from a chair.

Daniel Migo testified that there are trees on the property where the accident happened. He indicated that those are his trees. He indicated that he walked around with the Petitioner and showed him which bushes and trees he wanted cut. (Petitioner's Exhibit Number 18 shows which branches were cut). Daniel Migo stated to the Petitioner that he wanted the branch in question cut, but allegedly did not want the Petitioner to cut the branch in question. Daniel Migo testified that there are certain days when branches are picked up by the village. He indicated that the Petitioner used his own ladder and brought his own tools to cut the branches in question.

Daniel Migo admitted that on April 10, 2012, he spoke to the Petitioner about cutting bushes. He also stated that he wanted the Petitioner to cut branches on pine trees. He admitted that the bushes and pine trees in question were involved in the business of Halina's and were on the grounds of Halina's. Daniel Migo testified that he believed that the Petitioner should cut the branches in question using his hands because they're really just weeds.

Daniel Migo testified that he told the Petitioner not to cut the branch in question. He allegedly told the Petitioner that he was going to have a tree service or a landscaping

company do it because he thought it was unsafe to have the Petitioner cut the branch in question. He testified that the Petitioner specifically told him that he wanted to cut the branch for him.

He could not produce any receipts from any landscaper for any of the landscaping or, specifically, for any tree cutting that was done.

Daniel Migo stated that he came to the accident scene shortly after the accident occurred. He stated that he witnessed the Petitioner trembling, and had asked what happened. The Petitioner told him that the saw got jammed and he fell off the ladder.

With regard to Respondent's Exhibit Number 1, Daniel Migo indicated that he prepared the document. He stated that he was sitting at the dining room table with the Petitioner and the Petitioner's wife, and that he translated the document. He stated that the Petitioner indicated that he wanted to get back with him, but then the wife decided to sign it. He stated that he slid it over to her for a signature and never threatened them to sign it.

With regard to Respondent's Exhibit Number 1 Daniel Migo testified that the document does not say anywhere on it that he told the Petitioner not to cut the branch in question. He admitted that the document was signed by the wife of the Petitioner and that it was not signed by the Petitioner. He admitted that he always spoke Polish to both Andrzej Gornicki and Maria Gornicki. He stated that the Petitioner was hired to assist Maria Gornicki.

Daniel Migo stated that he never called the Petitioner to ask him if he needed help. He indicated that he never asked him if he could help him in any way. He indicated that the Petitioner called him four times, and that it was not until the fourth call that he picked up, where he was threatened by Petitioner in an effort to get Respondent to pay Peitioner's medical bills. He indicated that he received a telephone call from the Petitioner, and that the Petitioner demanded that his bills be paid and that he be paid $25,000, otherwise he would kill the family of Daniel Migo.

Daniel Migo indicated that he could accommodate the Petitioner with a 50 pound lifting restriction.

A. MEDICAL RECORDS AND ITEMIZED BILLS OF DELNOR COMMUNITY HOSPITAL

Petitioner's Exhibit 2 and 3 are the medical records and itemized bills of Delnor Community Hospital.

The records indicate that, "the patient fell earlier today from ladder landing on concrete outstretched arm, lacerated forehead six to eight centimeters in length. Bleeding controlled" (Petitioner's exhibit number 2 page 6). The Petitioner was diagnosed with fracture and head injury (Petitioner's exhibit number 15 page 6). The history indicated a fall from a ladder and head trauma (page 17 of Petitioner's exhibit number 2). The right wrist radiograph showed a comminuted impacted fracture distal radial metaphysis with

the fracture line involving the articular surfaces with the distal radial ulnar joint. There is positive ulnar variance (Petitioner's exhibit number 2 page 18). The left wrist radiograph showed a comminuted transverse and vertically oriented fracture of the distal radial metaphysis. The fracture lines involve the radius surface. Fracture line also appears to involve the radial ulnar joint articular surface. There is slight positive ulnar variance. There is a questionable navicular fracture. Two metallic density structures were noted within the soft tissues between the first and second metacarpals posteriorly and on the palmar aspect of the fourth metacarpal (Petitioner's exhibit number 2 page 19).

The records indicate "patient has evidence for a closed head injury and because of the extent and depth of his forehead laceration, a CT scan of his brain was ordered. He did have full-thickness laceration of the frontal scalp (Petitioner's exhibit number 2 page 21).

The diagnoses for the Petitioner were as follows:

1. Closed head injury without loss of consciousness;

2. Forehead laceration;

3. Bilateral wrist fracture (Petitioner's exhibit number 2 page 22).

The records from Delnor indicate that the Petitioner was placed in bilateral casts (Petitioner's exhibit number 2 page 30). Petitioner also complained of headache (Petitioner's exhibit number 2 page 39).

The total amount incurred at Delnor Community Hospital by the Petitioner in relation to this accident is $13,182.42.

B. MEDICAL RECORDS, MEDICAL OPINIONS, ITEMIZED BILLS, AND DEPOSITION OF ALLEN U. VAN, M.D./VAN ORTHOPAEDIC & SPINE SURGERY, S.C.

Petitioner's Exhibits 4 and 5 are the medical records and bill of Allen U. Van, M.D. of Van Orthopaedic & Spine Surgery, S.C.

Petitioner's Exhibit 6 are the medical opinions of Dr. Van dated January 16, 2013. Pursuant to Dr. Van, the injuries that the Petitioner sustained on April 11, 2012 are a direct result of his accident at work and that the accident did cause the bilateral distal radius fractures. Furthermore, it was Dr. Van's opinion that the above injuries occurred as a result of the injuries that arose out of and in the course of the Petitioner's employment.

According to Dr. Van, all treatments that the Petitioner has received to this point has been appropriate. Dr. Van released the Petitioner to work as of January 11, 2013 with a 50lbs lifting restriction opining that 50 lbs lifting may be the Petitioner's likely permanent restriction.

Petitioner's Exhibit 7 is the deposition transcript of Dr. Van.

The total amount of Dr. Van's bills amounts to $4,136.50.

C. **TESTIMONY OF DR. ROBERT BERNAT, AMA EVALUATION REPORT AND DEPOSITION.**

Dr. Robert Bernat testified that the petitioner is at the absolute highest level of disability allowed pursuant to the AMA for the injuries sustained which totals 8% MAW.

III. FINDINGS OF LAW AND FACT

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

The Arbitrator notes that the parties presented directly contradictory testimony on the question of whether Respondent directed Petitioner to trim the branch in question or forbade him from doing so. A careful examination of the record reveals no other evidence present in this case to enable the Arbitrator to determine which witness may be the more credible, and it is impossible to determine same. Therefore, the Arbitration decision will be rendered without reference to whether or not respondent requested or forbade Petitioner to conduct the activity which led directly to his injury as alleged herein. Based on the record as a whole, and as set forth more fully below, the Arbitrator finds that Petitioner did sustain an accident that arose out of and in the course of his employment with Respondent, and that there is a causal connection between said accident and his current condition of ill being.

In *Sekora v. Industrial Commission*, 198 Ill.App.3d 584, 556 N.E.2d 285, 144 Ill.Dec. 818 (2d Dist. 1990), an automobile salesman was performing the daily task of taking all vehicles displayed outside the building, including motorcycles, into the garage. Before bringing a motorcycle into the garage, the employee took a ride in an adjoining field and, on his way back, sustained an injury. The employer denied compensation, pointing to its rule that stated that the motorcycles should be rolled into the building without starting them. The appellate court affirmed the Industrial Commission's denial of compensation, stating that "if an employee voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, a resulting injury will not be within the course of employment unless the employer had knowledge of or acquiesced in such unreasonable conduct." 556 N.E.2d at 289. When an injury resulted while the employee was performing an act of a personal nature for his own convenience, even employer acquiescence cannot convert that personal risk into an employment risk. *Orsini v. Industrial Commission*, 117 Ill.2d 38, 509 N.E.2d 1005, 109 Ill.Dec. 166 (1987).

When the "employee voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties," any resulting injury will be outside the course of his employment unless the employer "has knowledge of or has acquiesced in

such a practice." *Broadway v. Industrial Commission of Illinois*, 124 Ill.App.3d 983, 464 N.E.2d 1139, 1141, 80 Ill.Dec. 156 (4th Dist. 1984), quoting *Segler v. Industrial Commission*, 81 Ill.2d 125, 406 N.E.2d 542, 543, 40 Ill.Dec. 536 (1980). In the present case, the Petitioner was within the reasonable exercise of his duties. The employer told him to cut some branches. If there was a "misunderstanding" or not, and the Petitioner was cutting a branch that Respondent did not want him to cut, it still was for the benefit of the employer. There was no benefit for Petitioner whatsoever. The Arbitrator insupport of his decision notes the following case law.

Where the violation of a rule or order of the employer takes the employee entirely out of the sphere of his employment and he is injured while violating such rule or order it cannot be then said that the accident arose out of the employment, and in such a case no compensation can be recovered. If, however, in violating such a rule or order the employee does not put himself out of the sphere of his employment, so that it may be said he is not acting in the course of it, he is only guilty of negligence in violating such rule or order and recovery is not thereby barred. It does not matter in the slightest degree how many orders the employee disobeys or how bad his conduct may have been, if he was still acting in the sphere of his employment and in the course of it the accident arose out of it. *Chadwick v. Industrial Commission*, 179 Ill.App.3d 715, 534 N.E.2d 1000, 128 Ill.Dec. 555 (4th Dist. 1989) 534 N.E.2d at 1001, quoting *Republic Iron & Steel Co. v. Industrial Commission*, 302 Ill. 401, 134 N.E. 754, 755-756 (1922). See also *Gerald D Hines Interests v. Industrial Commission* 191 Ill.App.3d. 913, 548 N.E.2d. 342, 138 Ill.Dec. 929 (1st Dist. 1989).

The *Chadwick* court noted that if the employee is doing permitted work in a prohibited manner, compensation will be awarded. Because the decedent was where he was supposed to be and doing what he was hired to do, though in an obviously negligent manner, the safety violation occurred while acting within the scope of his employment, rendering the unreasonableness of the risk immaterial. 534 N.E.2d at 1002.

"Work being performed at the time of the injury was performed within the purposes for which [the claimant] was hired and was so enmeshed with the usual business of the employer that the injuries suffered are compensable." *Harry Fleming Washer Service v. Industrial Commission*, 36 Ill.2d 272, 222 N.E.2d 490, 491 – 492 (1966).

In this instance, the Petitioner's work performed at the time of the injury was performed within the purposes for which he was hired and was enmeshed with the usual business of the employer. The person in authority, Daniel Migo, directed him to perform the task of cutting limbs and branches off of bushes and trees for his private benefit; the task of cutting the branch in question undoubtedly advanced the Respondent's interests as is clear from the photographs of the branch and it's proximity to the structure on Respondent's property, and lastly, the Petitioner has undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered.

For all of the above reasons, the Arbitrator finds that the Petitioner's accident arose out of and in the course of Petitioner's employment by Respondent.

J. **Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all the appropriate charges for all reasonable and necessary medical services?**

The Arbitrator finds that the credible evidence and testimony prove that the medical treatment as provided in Petitioner's exhibits was clearly reasonable and necessary. The Arbitrator further finds that Respondent has not paid all appropriate charges for all reasonable and necessary medical services. The following bills have not been paid by Respondent and it is Respondent's obligation to immediately pay said bills for treatments that were reasonably required to cure and relieve the Petitioner from the effects of his accidental injury as recommended on behalf of Petitioner by his treating physicians:

Provider	Amount of Bill	Credit	Amount Due Petitioner
Petitioner's Exhibit 3 Delnor Community Hospital:	$13,182.42	0	$13,182.42
Petitioner's Exhibit 5 Allen U. Van, M.D. / Van Orthopaedic & Spine Surgery	$4,136.50	0	$4,136.50
Petitioner's Exhibit 8 Valley Emergency Care Management	$1,580.00	0	$1,580.00
Petitioner's Exhibit 9 Valley Emergency Care, Inc.:	$310.00	0	$310.00
Petitioner's Exhibit 10 Tri City Radiology S.C.:	$590.00	0	$590.00
Petitioner's Exhibit 13 Out-of-Pocket Prescriptions:	$121.14	0	$121.14
	Total		$19,920.06

K. What temporary benefits are in dispute?

Total Temporary Disability (TTD)

Petitioner is entitled to total temporary disability (TTD) benefits for 04/11/2012 through 01/11/2013, representing 39 2/7 weeks at a TTD rate of $653.33 for a total amount due of $25,666.54, as provided in Section 8(b) of the Act.

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

In making findings regarding Nature and Extent of the injury, the Arbitrator notes that he has considered the factors of Petitioner's age, the impact on his ability to earn wages in the future, the AMA rating provided by Respondent the occupation of Petitioner and the evidence of disability contained in the medical records. Based on the record as a whole, the Arbitrator finds as follows.

Respondent shall pay Petitioner permanent partial disability benefits of $588.00/week for 143.50 weeks, because the injuries sustained caused the 35% loss of each of the right and left hands, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $588.00/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 for the head injuries sustained.

Respondent shall pay Petitioner permanent partial disability benefits of $588.00/week for 3 weeks, because the injuries sustained caused the disfigurement of the forehead, as provided in Section 8(c) of the Act.

M. Should penalties or fees be imposed upon Respondent?

The Arbitrator finds that a legitimate legal basis for dispute exists in this case and therefore declines to award penalties and attorney fees as requested by Petitioner.

Arbitrator Robert Falcioni _____ Date

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William Wilson,

Petitioner,

14IWCC1082

vs.

NO: 13 WC 37803

Pro-Built Buildings,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 30, 2014 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,000.00. 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: DEC 12 2014
KWL/vf
12/2/14
42

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

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

14IWCC1082

WILSON, WILLIAM
Employee/Petitioner

Case# **13WC037803**

PRO-BUILT BUILDINGS
Employer/Respondent

On 6/30/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1539 DRUMMOND LAW OFFICE
PETE DRUMMOND
PO BOX 130
LITCHFIELD, IL 62056

2593 GANAN & SHAPIRO PC
TIM STEIL
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC1082

Case # 13 WC 37803

WILLIAM WILSON,
Employee/Petitioner

v.

Consolidated cases: _____

PRO-BUILT BUILDINGS,
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 **Maureen Pulia**, Arbitrator of the Commission, in the city of **Urbana**, on **5/28/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **8/13/13**, 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 as it relates to his lumbar spine ***is not*** causally related to the accident.

Petitioner's current condition of ill-being as it relates to his right knee ***is*** causally related to the accident only through 10/22/13.

In the year preceding the injury, Petitioner earned **$47,718.32**; the average weekly wage was **$917.66**.

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

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

Respondent shall be given a credit of **$5,818.51** for TTD, **$325.60** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$6,144.11**.

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 $611.77/week for 9-1/7 weeks, commencing 8/14/13 through 9/5/13,and 9/13/13 through 10/22/13as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $0.00, as provided in Sections 8(a) and 8.2 of the Act. Having found petitioner's current condition of ill-being as it relates to his lumbar spine is not causally related to the accident he sustained on 8/13/13, the arbitrator denies petitioner's claim for medical expenses related to his treatment with Dr. Gornet since that treatment was related to petitioner's lumbar spine.

The petitioner has failed to prove by a preponderance of the credible evidence that he is entitled to any prospective medical care as a result of the injury he sustained on 8/13/13. Petitioner's claim for prospective medical care is denied since it is related to his lumbar spine and the petitioner's lumbar spine condition is not causally related to the accident on 8/13/13.

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.

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

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

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

Signature of Arbitrator

6/17/14
Date

ICArbDec19(b)

JUN 30 2014

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 54 year building estimator, sustained an accidental injury that arose out of and in the course of his employment by respondent on 8/13/13. Petitioner was employed by respondent for 3 to 4 years. Petitioner is 6'2", and weighs 280 pounds. Respondent's owners are the Lessman's and Vogel's.

Petitioner testified that as an employee for respondent he did everything. He testified that he met with some customers, drafted contracts, ordered material, unloaded material that came into the shop, went out on site visits, did repairs on-site, handled the day-to-day operations regarding scheduling work at the buildings, and setting up work for the crews.

On 8/13/13 petitioner met the crews in the morning at the warehouse. After the crews left for work he went to the office which was at another location in Hillsboro. While at the office petitioner got a call from the crew stating that they needed additional material and that they were going to send Philip Cunningham over to get the materials since they would fit in the back of his truck. Petitioner told Cunningham to call him when he got close to town and he would help him load the materials at the warehouse. Petitioner left the office and went to the warehouse and opened the doors for Cunningham. When Cunningham arrived petitioner climbed onto the forklift, backed it out and loaded the material on it, and brought it back to Cunningham's truck. Petitioner stepped off the forklift to help Cunningham put the materials in the back of the truck. Petitioner testified that after the truck was loaded he got back on the forklift and pulled it into the shed. Once in the shed petitioner testified that he jumped off the forklift onto the concrete floor and hurt his right knee. Petitioner testified that he had immediate pain in his right knee to the ankle. He testified that when he hit the concrete he doubled over in pain. Petitioner testified that he got Cunningham's attention. When Cunningham came over to the door by the shed petitioner told him what he did. Petitioner told Cunningham that he would need to lock up the building and secure it. Petitioner testified that he hobbled over to the truck and went back to his office.

As petitioner arrived back at the office he saw two people on the concrete, Tracy and Wayne Wilson. He opened the door to the truck and got his legs out and asked Tracy to get him a 3 foot piece of pipe to help him walk. Petitioner used that pipe to help himself walk into the office. Once in the office petitioner called Becky Myers, who handles workers compensation, and reported the accident. He then met with her and filled out an accident report. After that he sought treatment with Dr. Bonutti, who had performed a prior knee replacement 5 to 6 years ago, and performed a fusion to his back 25 years ago. Petitioner denied any treatment for his back or his right knee since undergoing the fusion and knee replacement.

Dean Lessman completed the Illinois Form 45: Employer's First Report Of Injury on 8/13/13. How the accident occurred was described as "stepping off forklift". The injury or illness identified was "something popped in right knee".

On 8/13/13 petitioner presented to Bonutti Orthopedic Clinic. He reported that something had popped in his right knee while at work that day. Petitioner was seen by Dr. Bonutti's physician's assistant Williams. Petitioner reported that when he stepped off the forklift today he had a sharp shooting pain in the medial aspect of his knee. Petitioner had no bruising or swelling, but did have some tenderness. He was using a cane to walk. He reported no numbness or tingling. Petitioner demonstrated increased tenderness with weight-bearing, but was able to bear weight. An examination revealed no ecchymosis or significant effusion. Petitioner had tenderness with extension, but was able to fully extend his knee. He had marked tenderness over the medial joint line. No tenderness of the lateral joint line was noted. The tenderness was mostly within the joint line. X-rays of the right knee showed a normal tracking patella. Williams diagnosed right knee pain. Williams took petitioner off work until 8/16/13 and told him to take ibuprofen. Petitioner was returned to work without restrictions as of 8/16/13. Petitioner made no complaints regarding his low back at this visit.

On 8/15/13 petitioner started experiencing numbness in his right leg that radiated into his foot. He testified that that night he could feel nothing in his right leg. On 8/16/13 petitioner called Dr. Bonutti to tell him what was going on. He testified that since the date of injury his symptoms had been worsening. Dr. Bonutti ordered a CT scan of the right leg.

On 8/19/13 petitioner gave a recorded statement to respondent's insurer. When asked what happened on 8/13/13 petitioner stated "I pulled into the I was driving the forklift I pulled into the bay ah which is the area where we parked the lift inside the building and ah turn the truck off and just step down off the fork truck and when I did I had a shooting pain go into my lower part of my leg right, right in the left side of the, the knee my right knee cap". Petitioner stated that he stepped onto his right leg first. He stated that he did not think he twisted anything when he stepped down. He just had sharp pain that went into his knee. He stated that he doubled over from the pain. Petitioner stated that he did not fall down. He also stated that the only body part that he injured was his right knee. Petitioner stated that he could not say that his knee was not a little better, but every once in a while he still had shooting pain in his right knee. Petitioner testified that when he had his surgery 5 to 6 years ago there was no specific trauma that caused the surgery. He stated that his knee just wore out after undergoing three prior arthroscopic surgeries.

On 8/20/13 petitioner was restricted to sedentary duty beginning 8/21/13. Petitioner's complaints were limited to his right knee. On 8/22/13 petitioner was authorized off work until 8/27/13.

On 8/22/13 petitioner underwent a CT of the right knee. Petitioner gave a history of an injury at work and a history of a prior right knee joint replacement. The impression was intact knee arthroplasty. No acute prosthesis was noted. There was no definite evidence of prosthesis loosening, fracture or joint effusion.

On 8/27/13 petitioner was examined by Dr. Bonutti. Petitioner's chief complaint was right knee pain. He rated his pain at a 6/10. He stated that the pain was constant and occurs with activity and while sleeping at night. The quality of his pain was identified as stabbing and burning. Dr. Bonutti noted that petitioner was status post right total knee replacement in 2007 and revision on 11/10/08. The petitioner reported that he stepped off a forklift approximately 2 1/2 feet and torqued his right leg. He reported that he felt immediate sharp medial knee pain after he stepped off the forklift on 8/13/13. Since that point he has reported discomfort. Petitioner was still using a cane to get around. Petitioner complained of some numbness to his back and thighs. Dr. Bonutti noted that petitioner has a long history of back problems following a spinal fusion approximately 20 years ago. Dr. Bonutti noted that petitioner was now having back pain. Petitioner reported posterior thigh and posterior calf pain due to limping and pain in his knee. Petitioner reported that his knee was somewhat better but he still had discomfort. Petitioner was taken off work.

Dr. Bonutti examined petitioner and noted that he was significantly overweight. He noted decreased spine extension and positive straight leg raise. He noted some numbness in petitioner's left great toe subjectively and to light touch. Petitioner's knee showed a trace of MCL laxity, and he had some tenderness along the MCL. Petitioner was able to flex to approximately 120°, and the LCL showed approximately 3 mm of laxity with good endpoint. Petitioner had no patellofemoral crepitus or major effusion. Hip motion was full. Dr. Bonutti diagnosed a sprain of medial collateral ligament of knee, right knee pain, and lumbago. Dr. Bonutti suggested therapy and a hinge brace stabilization. Petitioner requested an injection. Dr. Bonutti injected Depo-Medrol into the right knee. Dr. Bonutti noted that petitioner's knee did not appear to be his primary problem. Petitioner's primary problem appeared to be his spine. Dr. Bonutti was concerned about his radicular symptoms. Dr. Bonutti discussed a short course of therapy and Mobic, and possibly adding prednisone. Dr. Bonutti took petitioner off work for two weeks to see how he would respond to therapy.

On 9/10/13 petitioner was restricted to 4 to 6 hours of work for the rest of the week.

On 9/12/13 petitioner underwent an MRI of his low back. The impression was laminectomy changes and posterior fusion at L5 – S1; moderate spinal stenosis at L3 – L4; and no significant interval changes since the last MRI and 2/5/08. Petitioner was authorized off work on 9/13/13 through 9/16/13

On 9/17/13 petitioner was re-examined by Dr. Bonutti. Petitioner complained of right knee pain and low back pain. He stated that the right knee brace helps him, and his right knee was better. He stated that his low back pain was severe. He stated that he twisted his back and had increasing discomfort. Petitioner was unable to sit, stand, or walk. He stated that he cannot work, cannot sit, and requires a cane for ambulation. Dr. Bonutti noted that petitioner has chronic back discomfort and leg pain. Dr. Bonutti placed him on Valium. An examination revealed decreased range of motion in all planes. Dr. Bonutti noted that petitioner was markedly overweight. Petitioner had hamstring spasms bilaterally. His right knee showed trace MCL laxity. Petitioner was able to flex two 125° and had good extension; had slight patellofemoral crepitus; an intact ACL; and no meniscal findings or major effusion. Dr. Bonutti reviewed the MRI of the lumbar spine and noted that it showed motion artifact. He was of the opinion that it was fairly poor in quality. He noted that it showed a prior fusion at L5 – S1 and some stenosis at L3 – L4. Dr. Bonutti saw no acute pathology other than degenerative disc disease and facet hypertrophy with stenosis at L3 – L4. Dr. Bonutti added spinal stenosis to petitioner's prior diagnoses. Dr. Bonutti questioned significant secondary issues of pain. He noted that petitioner could not work and could not sit/stand. He recommended that petitioner remain off work until he was evaluated by a spine surgeon. Dr. Bonutti saw no acute spinal pathology. He noted that petitioner's right knee appeared to be stable, and that he was wearing a hinge brace. He was of the opinion that petitioner may have trace MCL laxity, but otherwise the right knee was stable. Dr. Bonutti could not explain the petitioner's right knee pain or back pain. He could not explain why it became markedly worse. Dr. Bonutti was of the opinion that petitioner needs to work on weight reduction and undergo a conditioning program, since he was significantly deconditioned. He suggested that petitioner continue bracing and undergo conservative treatment with therapy for his right knee. For his spine he suggested a follow-up with a spine surgeon.

On 10/8/13 petitioner was seen by physician assistant Williams. Petitioner requested a right knee injection. Petitioner's right knee was injected with Depo – Medrol. Williams released petitioner on an as needed basis with respect to his right knee. He stated that petitioner was still treating with Dr. Bonutti with regards to his back.

On 10/18/13 petitioner presented to the Springfield Clinic. He was examined by Dr. Cady. Petitioner gave a history of hopping off a forklift on 8/13/13 and feeling immediate sharp pain in his right

knee. He testified that he developed right leg numbness 1 to 2 days after the event. He stated that the physical therapy for his knee did not improve his leg numbness. Petitioner reported that since the MRI for his lumbar spine he has had increased back pain and would like a referral to a back specialist. Petitioner stated that he takes Tramadol for his back pain, and that it is somewhat effective. Petitioner complained of pain in his back that feels like a hot poker radiating down into the right leg. He stated that his back pain is worse when he is upright/standing, or after sleeping on his right side. Petitioner was examined and assessed with spinal stenosis. Dr. Cady ordered physical therapy evaluation and treatment. Dr. Cady advised petitioner to return at his convenience to follow-up on his diabetes and education/strategy for weight loss.

On 10/22/13 petitioner underwent a Section 12 examination performed by Dr. Richard Lehman. Dr. Lehman evaluated petitioner's right knee and low back. Dr. Lehman reviewed petitioner's records. Petitioner complained of excruciating lumbar spine pain and radiating pain down his leg. Petitioner stated that initially after the accident he was having only numbness, and is now having pain and numbness since the MRI evaluation. He reported that his pain was going down into his leg and he has pain in his back. Petitioner gave a history of injuring his right knee and back. He stated that his injury occurred when he stepped off of a forklift and felt a sharp pain in his knee. He stated that the pain was initially in his knee, and later he had discomfort in his back. Petitioner told Dr. Lehman that he had a right knee replacement in 2008, and low back surgery in 1987.

Following a physical examination and record review Dr. Lehman was of the opinion that petitioner had symptom magnification significant throughout his evaluation. He noted that petitioner's right knee evaluation showed no loosening, no fracture, no lucencies, and his total knee appeared to be in excellent condition. Dr. Lehman was of the opinion that petitioner's severe complaints of back pain did not appear to be in concert with what the MRI identified, the mechanism of the injury, or the timing. Dr. Lehman's diagnosis was intact total knee replacement, degenerative arthritis, and spinal stenosis at L3 – L4. He did not believe petitioner had a significant knee injury. He was of the opinion that petitioner had a mild soft tissue strain, and has no issues with his total knee replacement. He did not believe petitioner's significant complaints of back pain were in any way related to his jumping up the forklift. Dr. Lehman was of the opinion that the timing of petitioner's complaints appeared to be inconsistent as they relate to the complaints after the MRI. Dr. Lehman believed that petitioner had typical degenerative arthritis above his spinal fusion consistent with the natural progression of degenerative changes once someone has a spinal fusion. Although he believed the treatment to date had been reasonable, it was not necessary as it

relates to the work injury. Dr. Lehman believed that the condition of petitioner's right knee had reached an end of healing and he was at maximum medical improvement. He also believed petitioner should see a spine surgeon for his subjective complaints of back pain. Dr. Lehman believed that petitioner was able to work in a sedentary position, primarily seated, with no repetitive lifting over 20 pounds, no squatting, and no kneeling. Dr. Lehman did not believe that petitioner's objective findings were consistent with his subjective complaints, and again his symptoms appeared to be in excess of what one would expect after identifying his history and the testing provided.

On 12/5/13 petitioner presented to Dr. Gornet at the Orthopedic Center of St. Louis, on the referral of Dr. Cady. Petitioner complained of low back pain to both sides, both buttocks, hips, right leg worse than left, and down his right leg to his anterolateral calf, then to his knee, heel, and ankle. He stated that his current problem in its level of magnitude and severity began on 8/13/13. He stated that he was on a forklift approximately 3 feet up, jumped off the forklift, and had sudden pain in his right knee. He stated that this incident was reported immediately and he has had essentially not worked since then. Petitioner reported that he had progressive increasing pain in his low back after he returned to work. Petitioner gave a history of his prior back fusion. He stated that he had done well after his fusion and did not recall any significant treatment, although he did have an MRI of his lumbar spine in 2008. Petitioner reported that his symptoms were constant and severe, and he was ambulating with a cane. He reported that his symptoms are worse with bending, lifting, prolonged sitting or standing, and are relieved to some extent by lying down. His prominent pain was in his right leg. He reported occasional left leg symptoms. He stated that he has numbness and weakness in his right leg. Following an examination, review of diagnostic tests, and based on petitioner's history, Dr. Gornet was of the opinion that petitioner's current symptoms are causally connected to his work related injury as he described it. Dr. Gornet was of the opinion that petitioner was capable of working light duty with no lifting greater than 10 pounds, alternating between sitting and standing positions as needed, and no repetitive bending or lifting. Dr. Gornet's general treatment plan was to first remove petitioner's hardware to better evaluate him without the artifact of stainless steel, which limits the ability to image him from both CT and MRI. Dr. Gornet was of the opinion that once the hardware was removed and they had a clear picture of the pathology in petitioner's back, he could better understand what areas need to be treated. His working diagnosis was aggravation of some pre-existing arthritis in his facets at either L3 – L4 or L4 – L5, or a disc injury at L3 – L4 or L4 – L5 coupled with symptomatic stenosis at L3 – L4.

On 4/7/14 the evidence deposition of Dr. Lehman was taken on behalf of respondent. Dr. Lehman stated that the majority of his practice involves performing surgery. He stated that he spends less than 1% performing independent medical exams. Dr. Lehman stated that with respect to petitioner's symptom magnification petitioner showed positive Waddell signs for flexion of his hip creating knee pain. During the sensory component of his exam petitioner also sat in a hunched over posture, unable to sit up, which would not be expected since the load would be taken off the back at that point. Dr. Lehman did not believe that you can sprain your knee stepping off or decelerating your body weight off a forklift, and have a completely normal MRI. As such, Dr. Lehman felt it would be very difficult to relate petitioner's subjective complaints to stepping off of a forklift in face of an MRI that showed no fluid, no bone marrow edema, and nothing acute. Dr. Lehman also felt that petitioner's back complaints were not related to stepping off of the forklift, because objectively there didn't appear to be an acute process that occurred. Dr. Lehman stated that his opinions would be the same even if petitioner had jumped off the forklift, because the diagnostic tests showed no acute process. Dr. Lehman was of the opinion that petitioner's diagnostic findings in February of 2008 were the same as those in August 2013. Dr. Lehman was of the opinion that the changes seen on his lumbar spine appeared to be long-term and chronic.

Dr. Lehman was of the opinion that when he examined petitioner's complaints of pain they were in excess of what you would expect for someone who's got spinal stenosis. Dr. Lehman was of the opinion that the MRI showed clearly what the pathology in petitioner's lumbar spine entailed. Dr. Lehman opined that it would not be necessary to remove the hardware at L5-S1 to evaluate levels L3 – L4, and L4 – L5, because you're still going to have stainless steel artifact. Dr. Lehman agreed with Dr. Gornet that petitioner has pre-existing arthritis primarily at L3 – L4, but did not believe that taking the hardware out was going to help better evaluate L3 – L4 or L4 – L5. Dr. Lehman opined that petitioner's pain was coming from his spinal stenosis at L3 – L4, and had been emanating from their since 2008 as was evident on the MRI scan dated 2/5/08. Dr. Lehman opined that petitioner did not suffer any injury to his back on the date of the accident. He based this on the fact that there was no focal areas of abnormal signal within the bone marrow. He stated that the first thing that's going to happen to you if you have any type of trauma is that there are going to be changes in the bone marrow, some type of fluid. He also noted that the MRI scan following the injury was unchanged from the 2/5/08 lumbar spine MRI. Dr. Lehman was of the opinion that if the petitioner sustained an acute back injury as a result of stepping off the forklift he would have hurt immediately after he stepped off the forklift. Dr. Lehman opined that stepping off of a forklift would not put enough stress to create a trauma. Dr. Lehman opined that when you decelerate your body weight in a controlled manner to step down there is no significant stress to the lumbar spine.

Respondent offered into evidence certified records from the Bonutti Clinic from 2006 to present. Following his knee replacement on 12/17/07 petitioner underwent a course of physical therapy. When he was discharged from therapy on 12/15/08 petitioner stated that he was doing much better, but felt only about 80%. He reported that he continued to have difficulty standing for long periods of time or sitting for a long time. He stated that if he is able to change the position of his knee he does better. Petitioner reported that he was having trouble sleeping at night and was unable to lie on his back because he would awaken. He rated his knee pain at a 4/10. He stated that the best it gets is 2/10. Petitioner was noted as having a slight decrease in strength and range of motion. On 2/24/06 petitioner underwent an arthroscopy with arthroscopic debridement of the medial meniscus; debridement of the lateral femoral condyle; and meniscus repair using three Stinger darts. On 9/18/06 petitioner underwent an arthroscopy with partial lateral meniscectomy. On 8/2/07 petitioner's complaints included back pain. On 8/22/07 petitioner underwent an arthroscopy, chondroplasty lateral femoral condyle, posterior horn medial meniscectomy for a radial tear, and chondroplasty of the trochlear groove. On 12/17/07 petitioner underwent a right total knee replacement. On 2/5/08 petitioner underwent an MRI of the lumbar spine that showed spinal stenosis at L3 – L4 that was moderate to severe and exacerbated by mild facet joint hypertrophy. On 2/5/08 petitioner reported that he had severe back problems following a prior fusion of the spine. Petitioner had a positive straight leg raise at that time. Dr. Bonutti was of the opinion that petitioner's spine was his primary problem. On 2/12/08 Dr. Bonutti noted that petitioner had pain in his back and legs, and was of the opinion that some of the pain was consistent with back and lumbar conditions, but some of it also seemed to be related to his hamstring tendons or his region of the pes anserine towards the knee. On 11/10/08 petitioner underwent a revision of his right total knee replacement. On 1/9/09 Dr. Bonutti stated that petitioner was doing well but that he may have some permanent restrictions with range of motion, and risk for aching of the anterior knee.

Petitioner offered into evidence a picture of the forklift that he was working on at the time of the injury. The distance from the ground to the foot platform was 30 inches, and the distance from the ground to the seat platform was 47 inches.

Dean Lessman testified on behalf of respondent. Lessman is one of respondent's owners. Lessman testified that he observed that petitioner had back problems prior to 8/13/13 by the way he walked. He further testified that a few times petitioner told him his back and knees were bothering him. Lessman did not record any of these discussions. He did however state that he shared them with his partner Rick Vogel several times.

Philip Cunningham, a carpenter for respondent, was called as a witness by respondent. Cunningham testified that he did not witness the accident. However he stated that prior to the accident he noticed that petitioner walked with a limp. He further testified that in the week prior to the injury he had conversations with petitioner about his physical complaints.

Petitioner testified that he has not returned to work for respondent, and has not been released from care. Petitioner's currently on Public Aid, and has been so for about a month. Petitioner stated that he has not had any medical treatment recently because he did not have insurance until a month ago. Petitioner stated that currently, on a day-to-day basis, he has shooting pains from his back into his right hip, and down his leg into his ankle. He stated that at times he even has the shooting pains while he's lying in a recliner. With respect to his knee, petitioner stated that he cannot put full weight on it. He stated that when walking up and down stairs he must take one step at a time. Petitioner experiences pressure on the outside of his knee with some shooting pains under his knee. Petitioner takes Tramadol for his pain. Petitioner's currently receiving unemployment benefits.

Petitioner testified that a few weeks prior to his accident he had discussions with Dean Lessman about his misuse of fuel, taking excessive smoke breaks, and underestimating certain job bids. Petitioner denied that he ever underestimated a job it. Petitioner stated that he was not concerned about his job status on the date of injury.

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

Petitioner claims his current condition of ill-being as it relates to his right knee and low back are causally related to the injury he sustained on 8/13/13. Petitioner testified that following his right knee replacement and fusion surgery he had no further treatment or ongoing problems. The arbitrator finds the credible evidence does not support this claim.

With respect to his right knee, on 2/24/06 petitioner underwent an arthroscopy with arthroscopic debridement of the medial meniscus; debridement of the lateral femoral condyle; and meniscus repair using three Stinger darts. On 9/18/06 petitioner underwent an arthroscopy with partial lateral meniscectomy. On 8/22/07 petitioner underwent an arthroscopy, chondroplasty lateral femoral condyle, posterior horn medial meniscectomy for radial tear, and chondroplasty of the trochlear groove. On 12/17/07 petitioner underwent a right total knee replacement. On 11/10/08 petitioner underwent a revision of his right total knee replacement. When he was discharged from therapy on 12/15/08 petitioner stated that he was doing much better, but felt only about 80%. He reported that he continued to have difficulty standing long times or sitting a long time. He stated that if he is able to change the

position of his knee he does better. Petitioner reported that he was having trouble sleeping at night and was unable to lie on his back because he would awaken. He rated his knee pain at a 4/10. He stated that the best it gets is 2/10. Petitioner also noted a slight decrease in strength and range of motion. On 1/9/09 Dr. Bonutti stated that petitioner was doing well but that he may have some permanent restrictions with range of motion, and risk for aching of the anterior knee.

With respect to his low back petitioner underwent a spinal fusion at L5-S1 in 1987. On 8/2/07 petitioner's complaints included back pain. On 2/5/08 petitioner underwent an MRI of the lumbar spine that showed spinal stenosis at L3 – L4 that was moderate to severe and exacerbated by mild facet joint hypertrophy. On 2/5/08 petitioner reported that he had severe back problems following a prior fusion of the spine. Petitioner had a positive straight leg raise at that time. Dr. Bonutti was of the opinion that petitioner's spine was his primary problem. On 2/12/08 Dr. Bonutti noted that petitioner had pain in the back and legs, and was of the opinion that some of the pain was consistent with back and lumbar conditions, but some of it also seemed to be related to his hamstring tendons or his region of the pes anserine towards the knee.

On 8/13/13 petitioner claims he injured his right knee when he "stepped" off the forklift. The accident was not witnessed by anyone. Petitioner was seen that day and reported that he "stepped" off the forklift and had a sharp shooting pain in the medial aspect of his right knee. An examination showed no swelling or bruising, numbness or tingling. Petitioner was able to fully extend his right knee. Petitioner was diagnosed with right knee pain. Petitioner had no low back complaints.

Petitioner claimed that he started experiencing numbness in his right leg radiating to his foot on 8/15/13. A CT scan was ordered that showed an intact knee arthroplasty. There was no definite evidence of prosthesis loosening, fracture or joint effusion.

Petitioner gave a recorded statement to the insurance representative on 8/19/13. He stated that he just "stepped down off the forklift and did not twist anything when he stepped down".

When petitioner presented to Dr. Bonutti on 8/27/13 he again gave a history of "stepping down off the forklift". Despite telling the insurer that he did not twist his knee, on this date he told Dr. Bonutti that he torqued his right leg. Dr. Bonutti noted that petitioner had a long history of back problems following a spinal fusion approximately 20 years ago, and was again experiencing back problems. Petitioner reported that his right knee was better, but he still had some discomfort. Dr. Bonutti noted that petitioner was significantly overweight. On examination Dr. Bonutti noted no patellofemoral crepitus or major effusion.

He diagnosed a sprain of the medial collateral ligament of the right knee, right knee pain and lumbago. Dr. Bonutti did not believe petitioner's knee was his primary problem, and that it appeared to be his back.

Petitioner underwent an MRI of the lumbar spine. Moderate spinal stenosis was noted at L3-L4. It was also noted that there were no interval changes since the last MRI on 2/5/08.

On 9/17/13 petitioner stated that he twisted his back in the MRI machine and had increasing discomfort. Dr. Bonutti noted that petitioner had no meniscal findings or major effusion. Dr. Bonutti saw no acute pathology other than degenerative disc disease and facet hypertrophy with stenosis at L3-L4. Dr. Bonutti also questioned petitioner's significant secondary issues of pain, given the fact that he saw no acute spinal pathology and had no report that there was any problem when petitioner was at the MRI. Dr. Bonutti was of the opinion that petitioner's right knee appeared to be stable, even though he was wearing a brace. Dr. Bonutti could not explain the petitioner's right knee pain or the back pain. He recommended a weight reduction and conditioning program.

When petitioner presented to Dr. Cady on 10/18/13 he gave a different accident history. He reported that he "hopped" off a forklift and had immediate sharp pain in his right knee followed by right leg numbness 1-2 days later. He also reported increased pain in his lumbar spine since the MRI. He requested a referral to a spine doctor. He was assessed with spinal stenosis.

On 10/22/13 petitioner was examined by Dr. Lehman. He gave a history of injuring his right knee and back after "stepping" off a forklift, and experiencing immediate pain in his right knee, that was later followed by discomfort in his low back. Dr. Lehman examined petitioner and was of the opinion that petitioner had significant symptom magnification throughout his evaluation. He noted that petitioner's knee evaluation showed no loosening, no fracture, no lucencies, and his total knee replacement appeared in excellent condition. He also noted that petitioner's severe back complaints did not appear to be in concert with the MRI findings, mechanism of injury, or the timing. He assessed a mild soft tissue strain of the right knee. He further assessed that petitioner's significant complaints of back pain were not in any way related to him getting off the forklift. He opined that petitioner had typical degenerative arthritis above his spinal fusion consistent with the natural progression of degenerative changes once someone has a spinal fusion. Dr. Lehman was of the opinion that petitioner was at maximum medical improvement as it relates to his right knee. He was further of the opinion that petitioner should see a spine surgeon for his subjective complaints, even though it is not related to the work accident. Dr. Lehman did not believe the petitioner's objective symptoms were consistent with his subjective complaints. He also believed that

petitioner's symptoms appeared to be in excess of what one would expect after identifying his history, and the testing provided.

On 12/5/13 petitioner presented to Dr. Gornet for examination of his spine. He gave a history of "jumping" off the forklift and experiencing immediate pain in his knee. He also reported that he had progressively increasing pain in his low back after he returned to work. Petitioner stated that he did well after the fusion despite an MRI of the low back in 2008, which was done as a result of his complaints of severe pain. Based on petitioner's history Dr. Gornet was of the opinion that petitioner's current symptoms are casually connected to his work related as he described it.

In his deposition Dr. Lehman opined that it would be really difficult to relate petitioner's subjective complaints to stepping off of a forklift in face of an MRI that showed no fluid, no bone marrow edema and nothing acute. He also opined that petitioner's back complaints were not related to stepping off the forklift because objectively there did not appear to be an acute process that occurred. He also noted that petitioner's diagnostic testing results in February of 2008 were the same as those taken after the 8/13/13 accident. He opined that the changes on the MRI in 2008 and 2013 were long term and chronic. Dr. Lehman opined that if a trauma occurred you would see focal areas of abnormal signal within the bone marrow which were not present after the injury of 8/13/13. He was of the opinion that if petitioner had injured his back on 8/13/13 he would have had pain immediately after he stepped off the forklift. He opined that when you decelerate your body weight in a controlled manner step down there is no significant stress to the lumbar spine.

Based on the above, as well as the credible evidence, the arbitrator adopts the opinions of Dr. Lehman and Dr. Bonutti and finds the petitioner's current condition of ill-being as it relates to his lumbar spine is not causally related to the accident on 8/13/13. The arbitrator finds the petitioner sustained a strain of his right knee causally related to the accident, that resolved as of 10/22/13. The arbitrator bases this finding on the opinions of Dr. Bonutti and Dr. Lehman that petitioner's subjective complaints were not consistent with his objective findings, and he had significant symptom magnification. The arbitrator also bases this finding on petitioner's prior treating records that show petitioner was never without problems or treatment to his right knee and low back following his surgeries, and in 2009 petitioner was told he would have permanent restrictions and a risk for aching of the anterior knee.

The arbitrator finds it significant that the results of the lumbar spine MRI in 2013 were unchanged from the results of the MRI in 2008, and petitioner had a positive straight leg raise at that time and pain in the back of his legs that Dr. Bonutti thought might be related to his hamstring tendons or his region of the

pes anserine towards the knee. Additionally, there were no diagnostic studies taken after the injury on 8/13/13 that showed any acute findings. In fact, examinations most contemporaneous with the injury showed no effusion or ecchymosis.

The arbitrator finds it significant that Dr. Gornet, the only doctor who opined that a causal connection existed between the injury on 8/13/13 and petitioner's current condition of ill-being, based his opinion on an inaccurate accident history. Dr. Gornet based his findings on an opinion that petitioner had "jumped" off the forklift, when in fact petitioner had stated within days of the accident that he "stepped" off the forklift and did not twist his knee, and Dr. Lehman opined that stepping off of a forklift would not put enough stress to create a trauma to the lumbar spine.

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 that as a result of the injury on 8/13/13 petitioner did not sustain an injury to his lumbar spine, and that petitioner only sustained a strain to his right knee that resolved by 10/22/13, the arbitrator finds the medical services petitioner received for his right knee from 8/13/13 through 10/22/13 were reasonable and necessary to cure or relieve petitioner from the effects of his injury on 8/13/13. The arbitrator further finds the treatment to petitioner's lumbar spine was not reasonable or necessary to cure or relieve petitioner from the effects of his injury, based on a finding that petitioner's current condition of ill-being as it relates to his lumbar spine is not causally related to the accident on 8/13/13.

Based on the above, as well as the credible evidence, since the petitioner is only claiming an unpaid medical bill from Dr. Gornet in the amount of $245.00 for treatment to his lumbar spine, and the arbitrator has found the petitioner's lumbar spine is not causally related to the injury on 8/13/13, the arbitrator finds the petitioner is not entitled to payment of the medical bill from Dr. Gornet in the amount of $245.00 pursuant to Sections 8(a) and 8.2 of the Act.

K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

Having found petitioner's current condition of ill-being as it relates to his lumbar spine is not causally related to the accident petitioner sustained on 8/13/13, and petitioner's right knee condition is only casually related to the injury on 8/13/13 through 10/22/13, the arbitrator finds the petitioner is not entitled to any prospective medical care as it relates to his lumbar spine. The petitioner's claim for prospective medical care as recommended by Dr. Gornet for his lumbar spine is denied.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Having found the petitioner reached maximum medical improvement with respect to his right knee on 10/22/13, the arbitrator finds the petitioner is not entitled to any temporary total disability benefits after that date. The respondent shall pay petitioner temporary total disability benefits from 8/14/13 - 9/5/13 and 9/13/13 - 10/22/13, a period of 9-1/7 weeks. Having found petitioner's current condition of ill-being as it relates to his lumbar spine not causally related to the accident on 8/13/13, the arbitrator finds the petitioner is not entitled to any temporary total disability benefits as a result of his lumbar spine condition.

Based on the above as well as the credible record, the arbitrator finds the petitioner is entitled to temporary total disability benefits for the periods 8/14/13-9/5/13 and 9/13/13-10/22/13, a period of 9-1/7 weeks, pursuant to Section 19(b) of the Act. Respondent is entitled to a credit for the $5,818.51 it has already paid in temporary total disability benefits pursuant to Section 19(b) of the Act. Respondent is also entitled to a credit of $325.60 for temporary partial disability benefits it has paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronnie Keenon,

Petitioner,

14IWCC1083

vs.

NO: 10 WC 005448
11 WC 027991
11 WC 016996
11 WC 027992
11 WC 034484

Southwest Airlines,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes again before the Illinois Workers' Compensation Commission ("Commission") pursuant to the May 14, 2014, Order of Judge Carl Anthony Walker of the Circuit Court of Cook County, Illinois. In said Order, the matter was remanded to the Commission with instructions to articulate the reasoning for affirming and adopting the September 11, 2012, 19(b) Decision of the Arbitrator.

Petitioner filed five applications for adjustment of claim with the Commission, alleging five separate and distinct injuries to various body parts that had occurred on five separate occasions. Respondent disputed each of these claims and specifically contested the issues of accident, causation, past medical bills, prospective medical care, temporary total disability and penalties and fees. These five claims were consolidated and heard by Arbitrator Milton Black on February 22, 2012.

Arbitrator Black, having the benefit of ascertaining Petitioner's credibility in person, found Petitioner to be credible when testifying as to the issues of accident and causation. The Commission did not have the opportunity to view Petitioner's live arbitration testimony and was forced, therefore, to determine Petitioner's credibility through the arbitration hearing transcript. In judging Petitioner's testimony against the evidentiary record, the Commission found no cause to doubt Petitioner's veracity and, therefore, his credibility with respect to accident and causation. Accordingly, the Commission affirmed and adopted Arbitrator Black's finding of Petitioner successfully carried his statutory burden of proving both that his accidents arose out of and in the course of his employment and that those accidents were responsible, at least in part, for his current condition of ill-being.

Liability for Petitioner's past medical bills was an issue decided in his favor. Respondent contested its liability for these bills on the basis that Petitioner suffered no compensable accidents under the Act. Arbitrator Black found to the contrary as noted in the paragraph above. The Commission agreed with Arbitrator Black on accident and causation. It, therefore, follows that the Commission also agreed with him concerning Respondent's liability for the medical bills that resulted Petitioner treating the aftereffects of these accidents.

The Commission found the prescribed medical care, specifically, the L4-5 microlaminectomy and discectomy surgery as recommended by Dr. Mark Chang, Petitioner's treating physician, to be a reasonable and necessary step to address Petitioner's continuing complaints. Dr. Chang noted the September 1, 2010, MRI revealed a moderate-sized bulge at L4-5 that caused some, albeit, mild nerve impingement. Dr. Andrew Zelby, Respondent's examining physician, reviewed the same MRI and found no neural impingement that would result in a radiculopathy. It is noted that Dr. Zelby, on an earlier occasion, reviewed the results of an EMG Petitioner undertook and found it suggestive of a right S1 radiculopathy, though without clinical correlation. The Commission, in reviewing Dr. Zelby's independent medical examination reports, finds Dr. Zelby, when faced with conflicting test results, recommended doing nothing but releasing Petitioner back to full-duty work. The Commission found this position unreasonable.

Arbitrator Black found Petitioner entitled to temporary total disability benefits after finding Respondent liable for Petitioner's injuries. These benefits were meant to compensate Petitioner for time lost after the injuries that occurred on January 19, 2009, October 31, 2009, December 14, 2009 and June 7, 2010, respectively. Petitioner's medical records indicate that, after each injury, he was medically prevented from working immediately thereafter. The Commission relied on those medical records in determining that Petitioner was entitled to the temporary total disability benefits awarded to him by Arbitrator Black.

Arbitrator Black awarded penalties in the amount of $309.92 pursuant to Section 19(k) and attorney's fees in the amount of $123.97 for Respondent's failure to pay the $619.84 in medical charges that resulted from Petitioner's August 26, 2010, visit to the emergency room at St. Margaret Mary Hospital. The record from that visit indicated Petitioner presented due to and

was treated for chronic back pain. Though there was no direct attribution to this visit being the result of any of Petitioner's workplace injuries, it is not unreasonable to conclude that Petitioner's back pain was related to his June 7, 2010, workplace injury, an injury so severe Petitioner has, to date, not returned to work because of it. The Commission found Respondent's failing to pay the August 26, 2010, medical bills from Petitioner's August 26, 2010, emergency room visit to be unreasonable and the imposition of penalties and fees warranted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 11, 2012, 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 $14,000.00. 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: DEC 12 2014
KWL/mav
O: 04/16/13
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Thomas J. Tyrrell

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on April 16, 2013, before a three-member panel of the Commission including members Thomas J. Tyrrell, Daniel R. Donohoo and Kevin W. Lamborn, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Daniel R. Donohoo from the panel on January 14, 2014, a majority of the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three-member panel and the Commission Decision issued on June 13, 2013.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the majority in this case, I have reviewed the Decision worksheet showing how Commissioner Donohoo voted in this case, the Commission Decision issued on June 13, 2013, and the provisions of the Supreme Court in Ziegler v. Industrial Commission, 51 Ill.2d 137, 281 N.E.2d 342 (1872), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Michael J. Brennan

DISSENT

I respectfully dissent from the decision of the majority. The reason for this is threefold. First, the evidence shows Petitioner provided multiple scenarios to explain how he came to be purportedly injured on August 31, 2008, and made no attempt to reconcile the discrepancies found in said scenarios. Second, Petitioner's medical record reveals a pattern of his treating with a number of physicians until released to return to work and then abandoning continuing treatment with that particular physician only to resume treatment with another, new physician. Lastly, Petitioner exhibited behavior that indicated his motivation for treatment was to obtain narcotic pain medication rather than to address any complained-of ill-condition. Evidence of this is twofold. Petitioner repeatedly abandoned treatment from one physician in favor of another, as noted above, and, as a result, repeatedly obtain new prescriptions for narcotic pain medication. Also, Petitioner failed to inform his then-treating physician, Dr. Chang, on August 31, 2010, of his visit to the emergency room of St. Margaret Mary Health Center only five days earlier, a visit that resulted in Petitioner leaving that institution with a prescription for hydrocodone. For these reasons, the Commission should have found there to be too many questions raised that went unanswered to allow for a finding that Petitioner proved that his current condition of ill-being is causally related to any of the claimed workplace accidents and should have reversed the arbitration decision.

Kevin W. Lamborn

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT L. COOKSEY, JR.,

Petitioner,

14IWCC1084

vs.

NO: 10 WC 04792

STATE OF ILLINOIS/
DEPARMENT OF CORRECTIONS,
BIG MUDDY CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issue of 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 correctional officer, injured his left shoulder and both his cervical and lumbar spine on January 11, 2010, after an inmate jumped onto his back and pulled his left arm behind his left shoulder. There was no dispute that this incident is compensable under the Act, and there is no dispute that Respondent properly compensated Petitioner during his period of temporary total disability and paid all related medical bills. The only contested issue was as to the nature and extent of Petitioner's permanent partial disability, and the arbitration hearing on this issue was heard on March 6, 2014, by Arbitrator Brandon Zanotti.

On May 15, 2014, Arbitrator Zanotti filed an arbitration decision in which he found Petitioner's January 11, 2010, injuries merited an award of 52½% loss of use of a person as a whole. He specifically found the injury to Petitioner's left shoulder resulted in the 12½% loss of use of the person as a whole and the injuries to his cervical and lumbar spine resulted in the 40%

loss of use of the person as a whole. The Commission finds no reason to disturb the permanency award as it applies to Petitioner's left shoulder, but it finds the balance of the award excessive.

Arbitrator Zanotti, in his arbitration decision, noted Petitioner had previously sustained compensable injuries in 2005 when he fell from a guard tower but opined that Petitioner's most recent compensable injuries and resultant aftereffects were worse. The Commission disagrees and finds Petitioner's January 11, 2010, accident resulted in the aggravation of his pre-existing cervical and lumbar condition.

As a result of Petitioner's 2005 fall, he underwent a L5-S1 decompression and fusion on May 16, 2007, after previously attempting to resolve his lumbar spine complaints through conservative treatment. Despite the surgery, a vocational assessment recommended that he not resume his career as a correctional officer. At his request, his treating physician released him to return to work full-duty and without restrictions, and he resumed his career as a correctional officer. Though working full duty during the arbitration hearing on this 2005 fall, Petitioner testified that he still had difficulty with his lumbar spine that, after work, he treated it with a combination of Vicodin and a whisky cocktail. He indicated that he retires to bed early on days he works. He also testified to having continued difficulty with his neck, diminished strength, endurance and range of motion in both his lumbar spine. Petitioner acknowledged that he never returned to his pre-accident physical health subsequent to his 2005 accident. That Petitioner had made a less than complete recovery from this accident is evidenced by his being assigned the less taxing position of a gym officer. It was in this position Petitioner was working when he was called upon to relieve an absent correctional officer to work the chow line on January 11, 2010.

It is axiomatic that Respondent took Petitioner in the condition he was in on January 11, 2010. That condition was status post left shoulder surgery and status post L5-S1 decompression surgery with active pain medication treatment for residual pain complaints and diminished use of arms bilaterally and lumbar spine. Following the January 11, 2010, accident, the condition of Petitioner's left shoulder worsened demonstrably and permanently but the same cannot be found to be true of Petitioner's cervical and lumbar spine.

Petitioner testified that he treated at Trinity Neuroscience Institute, but records from that facility indicate Petitioner was only there three times in 2012. He was seen initially on May 14, 2012, for a consultation, then on June 7, 2012, for a functional capacity evaluation and then, last on August 28, 2012, for a follow-up visit. The record from the August 28, 2012, visit indicates Petitioner was to be seen again for an epidural steroid injection, but there is no record that Petitioner visited Trinity Neuroscience Institute again. Petitioner also testified that he underwent physical therapy for his lumbar spine and chiropractic therapy for both his cervical and lumbar spine. The record indicates Petitioner's cervical and lumbar spine treatment was had over approximately thirteen visits at Alternative Health Care & Laser Center between August 18, 2011, and October 17, 2011. No separate treatment record for Petitioner's cervical spine was found. The only active treatment Petitioner received was in the form of pain medication, as evidenced by his pharmacy records.

The Commission finds the injuries to Petitioner's cervical and lumbar spine from the January 11, 2007, accident to have been aggravations of the injuries sustained in 2005.

14IWCC1084

Therefore, the Commission does not adopt the opinion of Arbitrator Zanotti that the injuries sustained in 2007 were worse than those sustained in 2005. The treatment that resulted from the 2005 accident was therapy and medication for Petitioner's cervical and decompression and fusion at L5-S1 that was followed by therapy and medication. Whereas the 2007 injuries to his cervical and lumbar spine resulted only in therapy and medication, Petitioner treated the pain that resulted from the 2005 accident with Vicodin and whiskey and the pain from the 2007 accident with hydrocodone. The most significant difference between the two injuries was that Petitioner was able to resume his career as a correctional officer following the 2005 accident retired after the 2007 accident. The Commission recognizes this by compensating Petitioner for the 25% loss of use of the person as a whole for the sprains and strains sustained to his cervical and lumbar spine on January 11, 2010.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $635.90 per week for a period of 187.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 37½% loss of use of the person as a whole.

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

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

DATED: DEC 12 2014
KWL/mav
O: 10/21/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC1084

COOKSEY JR, ROBERT L
Employee/Petitioner

Case# **10WC004792**

SOI DEPT OF CORRECTIONS-BIG MUDDY RIVER CORRECTIONAL CENTER
Employer/Respondent

On 5/15/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

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

4948 ASSISTANT ATTORNEY GENERAL
WILLIAM H PHILLIPS
201 W POINTE DR SUITE 7
SWANSEA, IL 62226

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

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

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

MAY 15 2014

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

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

14IWCC1084

ROBERT L. COOKSEY, JR.
Employee/Petitioner

v.

STATE OF ILLINOIS DEPT. OF CORRECTIONS – BIG MUDDY RIVER CORRECTIONAL CENTER
Employer/Respondent

Case # 10 WC 4792

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **March 6, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC1084

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned **$55,111.16**; the average weekly wage was **$1,059.83**.

On the date of accident, Petitioner was **59** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$101,040.50** for TTD (all TTD has been paid), **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$101,040.50**.

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

ORDER

Respondent shall pay for reasonable and necessary medical services set forth in Petitioner's Exhibit 1 (and as delineated in the Memorandum of Decision of Arbitrator), pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall have a credit for all medical bills paid by it or its group insurance carrier.

Respondent shall pay Petitioner the sum of $635.90/week for a period of 262.5 weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the 52.5% loss of use to the 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

05/05/2014
Date

MAY 15 2014

STATE OF ILLINOIS)
) SS
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ROBERT L. COOKSEY, JR.
Employee/Petitioner

14IWCC1084

Case # 10 WC 4792

v.

STATE OF ILLINOIS DEPT. OF CORRECTIONS –
BIG MUDDY RIVER CORRECTIONAL CENTER
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On January 11, 2010, Petitioner, Robert Cooksey, was working unrestricted duty as a correctional officer with Respondent, the Big Muddy River Correctional Center in Ina, Illinois, when his duties required him to break up a fight between inmates. In so doing, he subdued his inmate combatant, taking him forcefully to the ground. The other inmate combatant broke free from another correctional officer in an effort to harm the inmate combatant Petitioner had on the floor. That inmate combatant pounced onto Petitioner's back and fought Petitioner to get to the inmate Petitioner had subdued. In so doing, the other inmate combatant landed with both knees onto Petitioner's lower back, which had previously been fused, causing Petitioner to experience immediate pain, something akin to being stabbed. Petitioner fought to hold down his inmate with his right arm and fought off the other inmate with his left arm. The other inmate combatant, however, grabbed Petitioner's left arm, wrenching it back and over his shoulder. Petitioner felt popping in his left shoulder.

After the incident and after other correctional officers subdued both inmate combatants, Petitioner said he could not stand up straight due to back pain and had pain and dysfunction in the left shoulder. Petitioner was transported to the Franklin Hospital the day of the assault, where he was examined, treated, and discharged. (PX 1 Red Tab 5.)[1] He followed with his primary care physician, Dr. Dale Blaise, where Petitioner complained of neck, back and left shoulder pain. (PX 1 Red Tab 1, Records of Dr. Blaise). Due to ongoing symptoms, Dr. Blaise referred Petitioner to Southern Illinois Orthopedic Center, where he was evaluated and treated for the left shoulder injury. (PX 1 Red Tab 7).

Ultimately, Petitioner underwent surgical repair for a labral tear, supraspinatus tear, subscapularis tear, and extensive biceps tendon tearing. (PX 1 Red Tab 7).

[1] PX 1 is a group exhibit, divided by blue tabs and red tabs.

Post-operatively, the supraspinatus tendon did not fully heal. (PX 1 Red Tab 7, office note of September 29, 2010). Although a candidate for additional surgical correction, Petitioner declined an additional surgery. (See PX 2 for analysis of the same issue).

Petitioner was under active medical and surgical management for his left shoulder for much of 2010. All that while, Dr. Blaise managed Petitioner's back and neck pain medically. In the spring of 2011, Dr. Blaise referred Petitioner to Neurosurgical Associates in Paducah, Kentucky. (PX 1 Red Tab 1.) Respondent, however, would not approve additional evaluation and treatment until approved by an examining physician of its choosing pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq*. (hereafter the "Act"). (PX 1 Red Tab 9). Respondent had Petitioner examined by Dr. David Robson. Dr. Robson established causation and the need for further evaluation and treatment for Petitioner's ongoing symptoms. (PX 3).

In consequence to the Section 12 exam, Petitioner was then permitted to treat for back and neck complaints with Trinity Neuroscience, Alternative Healthcare and Laser Center. Despite therapy, injections, and medications, however, the symptoms in Petitioner's back, shoulder and neck did not relent. (PX 1 Red Tabs 1, 10, 13 and 14). Ultimately, Petitioner was sent for a functional capacity evaluation (FCE). (PX 1 Red Tab 12). The FCE found that Petitioner tested only in the light physical demand level and did not qualify for the demands of a job as a correctional officer. (PX 1 Red Tab 11). His shoulder surgeon concurred. (PX 1 Red Tab 7, office note of September 29, 2010).

CONCLUSIONS OF LAW

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 following medical bills are outstanding:

- Dr. Dale Blaise: $3,910.00 (PX1 Blue Tab 1)
- Southern Orthopedic Associates: $333.00 (PX1 Blue Tab 7)
- Neurosurgical Associates $140.00: (PX1 Blue Tab 9)
- Alternative Health Care & Laser Center: $2,720.00 (PX1 Blue Tab 10)
- SI Neurology & Sleep Medicine: $3,345.00 (PX1 Blue Tab 14)

In addition, Petitioner has paid the following medical bills and should be reimbursed for the same:

- Dr. Marie Falcone $20.00: (PX1 Blue Tab 4)
- Kroger Pharmacy $17.55: (PX1 Blue Tab 15)

Respondent asserted that all medical bills have been paid or are pending payment. (See Arbitrator's Exhibit 1). Respondent thus shall have a credit for all medical bills at issue paid by it or through its group insurance carrier.

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

Given the FCE (PX 1 Red Tab 11), the opinion of Petitioner's shoulder surgeon (PX 1 Red Tab 7, office note of September 29, 2010), and the monthly disability reports issued by Dr. Blaise (PX 1 Red Tab 1), the

weight of objective evidence supports the conclusion that Petitioner sustained an injury that cost him his job as a correctional officer.

This evidence could be challenged based upon three factors – one: the last disability report Dr. Blaise issued about Petitioner states that he could return to unrestricted work; two: Petitioner did in fact return to work at the facility on October 18, 2013; and three: after a 2005 injury, Petitioner had been judged to be unable to return to his job as a correctional officer, but against doctor's advice, Petitioner returned to unrestricted work in order to serve an additional fourteen months and thus vest for retirement.

The Arbitrator turns to factors one and two discussed immediately above: Petitioner explained that while his condition had not improved, on or around October of 2013, he asked Dr. Blaise to issue him an unrestricted duty release so that he could at least try to return to work, reasoning that he was able to work despite the opinions of his doctors last time and wanted a chance to try that again. This time, however, Petitioner could not stand the rigors of his return on October 18, 2013, and he notified human resources at the end of his shift on October 18, 2013, that he intended to retire. Petitioner did not return to the prison, and Dr. Blaise once again provided full duty restrictions for the days needed to complete his retirement paper work. Turning to factor three, it is true that Petitioner sustained significant injuries in a 2005 work related incident, where he suffered a fall from a guard tower. (See RX 1, Case Number 10 IWCC 469). It is true that as here, Petitioner had been judged to be disabled from the duties of a correctional officer, but Petitioner returned, intending at least initially to last an additional fourteen months to reach eligibility for retirement.

Respondent did permit Petitioner to return after the 2005 injury. Petitioner did work unrestricted duty, and he did receive an assignment in the gym, which he could manage, given his condition. Indeed, the evidence is clear that his warden and supervisors cooperated with him, assigning him to work in the gym, because it was less physically demanding.

According to Petitioner, however, returning to duties after his 2005 injuries led to significant improvement in his condition and outlook. The gym assignment allowed him to vary his routine and allowed him to exercise. Consequently, he gradually began to feel better; gradually his strength returned; and gradually he began to consider delaying retirement. He contemplated delaying retirement because he preferred a life of work over the alternative; because he preferred to be at the facility where his wife also works, feeling as if his presence protected her from potential inmate violence; and because he could maximize his retirement benefits by working an additional number of years.

The Arbitrator finds Petitioner's demeanor sincere and his explanation credible. In accord, Petitioner's mindset was to continue to work beyond the fourteen months previously contemplated, and this was his mindset on January 10, 2011, when he was placed in another area of the prison to cover for another correctional officer who had missed work. It was at this assignment that the inmate fight led to his current disability.

While Respondent implies that Petitioner was not truly capable of unrestricted duties during his "fourteen" month return, it is undeniable that the inmate violence did not take place in the gym, where he was "accommodated." Rather, the violence took place in an area of the prison where a truly unrestricted correctional officer was required. The prison obviously thought well enough of Petitioner's fitness to place him in the area where the violence occurred. Moreover, by all accounts, Petitioner had his combatant inmate subdued, while another inmate combatant escaped the grasp of a fellow correctional officer and injured him.

It is important to note that Petitioner's subjective desires to work or retire are not dispositive. The objective facts are these: Petitioner was working unrestricted duty as a correctional officer in an area where an unrestricted correctional officer was required, and the injuries he sustained left him with only a light physical demand level and a proven objective and subjective inability to work as a correctional officer. Petitioner was judged to be 30% disabled pursuant to Section 8(d)2 of the Act as a result of his 2005 injury. (See RX 1). After that disability, he returned to light duty for three months and then full unrestricted duty for 10 months before the inmate violence at issue occurred.

In contrast, Petitioner's attempted return this time lasted only one day. By undisputed subjective report and as evidenced by his medical records, Petitioner's disability from the inmate violence is significantly worse than the disability incurred from the fall from the guard tower.

The medical records indicate that Petitioner has an internally deformed left shoulder, for which he is a candidate for additional surgical repair, should he elect it. He has lumbar and cervical radiculopathy. He has a lumbar injury superimposed over a surgically fused lumbar spine. He is reliant on Hydrocodone and Naproxyn to function, Valium to sleep, and additional medications to deal with the stomach and esophageal upset those medications cause. Without medications, his functional disability is nearly full, and he presently and in the future will require pain management to sustain his partial disability. The shoulder injury alone warrants a permanency award of 12.5% to the person as a whole pursuant to Section 8(d)2 of the Act. *See Will County Forest Preserve Dist. v. Ill. Workers' Comp. Comm'n*, 2012 IL App (3d) 110077WC, 970 N.E.2d 16 (3d Dist. 2012) (holding that shoulder injuries should be rated for permanency purposes pursuant to Section 8(d)2 of the Act). Petitioner's back and neck injury, the impact on his function and lack of sleep, is certainly worse than the 30% person as a whole award finding in his last case. Thus, a permanency award of 40% to the person as a whole pursuant to Section 8(d)2 of the Act is warranted for Petitioner's neck and back injuries at issue. Therefore, combined, the total permanent partial disability award granted to Petitioner is 52.5% loss of use to the person as a whole pursuant to Section 8(d)2 of the Act.

The Arbitrator makes special note of Petitioner's credibility in this matter, particularly in that Petitioner was a very credible witness at trial. He testified in an open and forthcoming manner, and appeared to be endeavoring to give the full truth during his testimony. The Arbitrator also places great weight on Petitioner's credibility when determining the award at issue.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSE ZACARIAS,

Petitioner,

vs. NO: 04 WC 18475

UNIVERSITY OF ILLINOIS,

Respondent.

14IWCC1085

DECISION AND OPINION ON REMAND
FROM THE CIRCUIT COURT OF COOK COUNTY

This case comes before the Commission on remand from the Circuit Court of Cook County in case number 13 L 50986. On November 2, 2012, Arbitrator Cronin issued a decision denying Petitioner's L3-4 fusion surgery but awarding prospective medical treatment as outlined by Dr. Bauer and Dr. Kurzydlowski. On September 27, 2013, the Commission issued a decision amending the Arbitrator's decision. The Commission awarded Petitioner prospective medical treatment in the form of continued conservative treatment and a spinal cord stimulator.

Petitioner timely appealed his case to the Circuit Court of Cook County. On May 1, 2014, Judge Harmening issued a decision reversing and remanding the Commission's decision. Judge Harmening specifically reversed the Commission's award of a spinal cord stimulator and wrote:

"Dr Bauer's April 16, 2012, letter states in the concluding paragraphs:

> My recommendation would be blood test to rule out infection to include a CBC, sed rate, CRP. If there is no evidence of infection, I would recommend the use of Neurontin and/or Lyrica for pain control. I would further recommend a functional capacity evaluation to be followed by work hardening and return to work

> with a conclusion subsequent that [Plaintiff] has reached maximum medical improvement.
>
> The possibility of a spinal cord stimulator would exist if [Plaintiff]] continues to have pain despite these measures.

The record is unambiguous. The recommendation of a spinal cord stimulator is one subsequent to attempting the procedures listed above in Dr. Bauer's letter. And even then, the doctor states that the procedure is a 'possibility.' The Commission is given great deference when determining entitlement to medical benefits. However, the Commission's determination of a spinal cord stimulator is premature based upon Dr. Bauer's opinion. Plaintiff argues an infection does not exist and Neurontin and/or Lyrica treatment has not been successful. Still, the record is devoid of any evidence that a functional capacity evaluation or work hardening took place. The manifest weight of the evidence is clear, a spinal cord stimulator was to be contemplated only after the previous procedures and actions have been attempted and pain persists. Therefore, the Commission's order, awarding future medical treatment in the form of a spinal cord stimulator, is against the manifest weight of the evidence."

Therefore, based on the Opinion and Order from the Circuit Court, the Commission reverses its previous decision filed on September 27, 2013. The Commission awards Petitioner prospective medical treatment as recommended by Dr. Bauer, specifically a functional capacity evaluation and work hardening.

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 Decision of the Commission filed on September 27, 2013 is reversed as stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for Petitioner to undergo perspective medical treatment as recommended by Dr. Bauer under §8(a) of the Act.

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

14IWCC1085

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

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

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

DATED: DEC 12 2014
TJT: kg
R: 10/21/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES MULLEN,

Petitioner,

vs. NO: 07 WC 57765

FREEMAN UNITED COAL MINING COMPANY, 14IWCC1086

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 occupational disease, causation and permanent partial disability benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator awarded Petitioner permanent partial disability benefits of 20% loss of the person as a whole. We amend the Arbitrator's Decision and find that Petitioner was permanently partially disabled to the extent of 15% of the person as a whole.

Petitioner's breathing issues continue to affect his activities of daily living to an extent. Petitioner has found alternative employment where he is not exposed to coal mine dust or diesel fumes. Several tests showed that Petitioner's lung capacity was not diminished. However, he suffers from multiple respiratory issues, including occupationally related coal workers pneumoconiosis, asthma, chronic bronchitis and rhinitis/sinus issues. Petitioner testified that his respiratory issues affect his activities of daily living and that he cannot walk for long distances or climb many stairs without being short of breath. Petitioner is entitled to permanent partial

14IWCC1086

disability benefits for 15% loss of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $617.57 per week for a period of 75 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the permanent partial disability of 15% person as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $46,400.00. 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: DEC 12 2014
TJT: kg
O: 11/3/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MULLEN, JAMES M
Employee/Petitioner

Case# **07WC057765**

FREEMAN UNITED COAL MINING CO
Employer/Respondent

14IWCC1086

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

If the Commission reviews this award, interest of 0.07% 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:

0755 CULLEY & WISSORE
BRUCE R WISSORE
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH WERTS
PO BOX 1545
MT VERNON, IL 62864

14IWCC1086

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

JAMES M. MULLEN
Employee/Petitioner

v.

FREEMAN UNITED COAL MINING CO.
Employer/Respondent

Case # 07 WC 57765

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **December 16, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did a disease occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other: Was Petitioner's disability timely under Section 1(f) of the Act? Was there exposure?

14IWCC1086

FINDINGS

On **August 29, 2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$53,522.51**; the average weekly wage was **$1,029.28**.

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

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

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

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

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $617.57/week for 100 weeks, because the injuries sustained caused the 20% 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

02/21/2014
Date

MAR 3 - 2014

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

14IWCC1086

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JAMES M. MULLEN
Employee/Petitioner

v.

Case # 07 WC 57765

FREEMAN UNITED COAL MINING CO.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, James Mullen, was born on February 1, 1956, and was 57 years old on the day of trial. Petitioner worked at Respondent, Freeman Coal Company's Crown II Mine in Virden, Illinois for just over 30 years. All of his mining work was underground. His last exposure occurred on August 29, 2007. On that day he was a miner operator, a person who runs the continuous miner machine which cuts the coal and loads it onto equipment called coal haulers. The machine cuts the coal from the face. Physically, Petitioner was about 30 feet away from the machine while it was cutting the coal. In addition to coal dust, Petitioner was exposed to silica dust, rock dust, diesel fumes, and roof bolting glue fumes. Petitioner stated that the diesel fumes caused a blue haze in the air.

The Crown II Mine closed down, and Petitioner never returned to mining because after being out of the mines his breathing improved. Petitioner eventually found work for Central Subsurface Contracting of Girard, Illinois. Once he took that job he severed his rights to be on a panel for the Crown II Mine. However, he could work at other coal mines. He could also go back on the panel and stop his pension. Other Crown II miners who had less seniority were called back to the Crown II Mine. He initially signed up on the panel to keep his options open should he fail to find another job. During the last two to three years of mining, it was getting harder to breathe when performing laborious work, such as moving miner cables and other heavy lifting-type work.

Petitioner felt he had an asthma-type problem, and his physician prescribed breathing medicine for him in the form of Symbicort and Albuterol inhalers to use four times a day and with asthma attacks. Petitioner would get nebulizer treatments in Dr. Dennis Yapp's office when his breathing problems were bad. Petitioner stated that dust, glues, and fumes bothered his asthma, and he would become short of breath and cough. He would leave the work area and use his inhalers, returning after sitting out for a bit. During these episodes Petitioner felt like he could not get enough air, but his inhalers helped him cough up phlegm. Petitioner had co-workers help him finish his job when he was having breathing problems. Petitioner stated that since leaving the mines his asthma issues have decreased substantially and he has cut down on doctor visits. Petitioner worked over 9 hours each day, six days a week.

Currently, Petitioner felt able to walk about 800-900 feet before becoming short of breath. He can climb 18 steps to the top of his stairway at home, but is out of breath once he reaches the top. He could not climb the stairs or walk as far when having an asthma attack. Petitioner has never smoked. He has high cholesterol and high blood pressure, but has no other health issues. He would not go back to the mines today if offered a job because his asthma issues and breathing have improved since leaving mining. On cross-examination Petitioner stated that in his current job he operates a backhoe outside in an air-conditioned and heated cab.

At his attorney's request, Petitioner was examined on November 24, 2010 by pulmonologist/B-reader, Dr. Robert Cohen, the Medical Director of the National Black Lung Clinics Program. Dr. Cohen does not receive any personal income for his exam, deposition, or records' review. Charges are paid to the Hospital's Occupational Medical Research Fund. (PX 1, pp. 5-7). Dr. Cohen also reviewed two treatment chest x-ray reports of March 20, 2009 and August 26, 2006, an April 3, 2009 CT report, and treatment records from the Springfield Clinic. (PX 1, Dep. Exh. 2, pp. 3-4). Dr. Cohen reported a ten-year history of shortness of breath. Petitioner had been diagnosed as an asthmatic ten years prior and took inhalers for 7-8 years. Petitioner's shortness of breath began with heavy exertion. Dr. Cohen noted that it currently caused problems when Petitioner was picking up heavy objects, or if he climbed two flights of stairs. He was noted to be able to walk on level ground without difficulty. It was also noted that Petitioner had a home nebulizer for infections. For the past ten years, Petitioner was noted to have wheezed with heavy exertion, which was treated with inhalers. It was noted he had had a cough since the early 1980s. (PX 1, Dep. Exh. 2, p. 1).

Dr. Cohen interpreted Petitioner's October 15, 2007 chest film as positive for coal workers' pneumoconiosis (CWP), category 1/0. Pulmonary function testing was within the range of normal. Exercise testing was submaximal with a mildly reduced work capacity. There was significant resting and exercise hypertension. Petitioner's pulmonary function, blood gas, and exercise testing data showed he was not totally disabled from his last job. (PX 1, Dep. Exh. 2, pp. 2-4).

Dr. Cohen explained that CWP causes scarring and emphysema in the affected lung tissue. (PX 1, pp. 9-10). The CWP-damaged tissue cannot function, and by definition there is impairment at the site of the damaged tissue. (PX 1, p. 11). Minimal CWP can present without measurable impairment. (PX 1, p. 12). A person can lose an entire lung lobe and still generate normal pulmonary function testing. (PX 1, pp. 13-14). In this case Petitioner has impairment according to Dr. Cohen, it is just not measurable. (PX 1, p. 32). The doctor testified that a person can have CWP with normal pulmonary function testing, normal blood gas testing, a normal physical exam, and no symptoms. (PX 1, p. 36). Dr. Cohen noted that CWP is permanent and has no cure. (PX 1, p. 13). Dr. Cohen believed that Petitioner should avoid exposure to coal mine dust to help prevent progression of the disease. (PX 1, p. 20).

Dr. Cohen stated that as a roof bolter for 26 years, Petitioner would have been exposed to roof bolting glue, which can cause or aggravate reactive airways disease, such as asthma. (PX 1, p. 28). It is possible to have reactive airways disease with normal pulmonary function testing. (PX 1, p. 29). Dr. Cohen did not diagnose reactive airways disease, although Petitioner had a significant history of it. (PX 1, p. 57). Dr. Cohen stated that most treatment x-rays are read for acute illnesses, and the readers do not use the ILO standards for detecting CWP, a chronic, not an acute condition. (PX 1, p. 30).

On September 5, 2013, Dr. Cohen provided a supplemental report after reviewing treatment records from Dr. Yap and the Springfield Clinic, the deposition and opinion letter of Dr. Yap, and the deposition and report of Dr. James Castle. Dr. Cohen concluded that Petitioner had chronic bronchitis, asthma, and rhinitis, all connected to his mining exposures. (PX 10). At his supplemental deposition, Dr. Cohen stated that a

Methacholine test is performed to measure airway hyper-reactivity. If the FEV1 falls by 20%, the test is considered positive. (PX 12, pp. 6-7).

Petitioner's treating physician, Dr. Yap, testified that he has treated Petitioner for between five to ten years. (PX 9, p. 10). Dr. Yap stated that Petitioner has chronic bronchitis and asthma that was caused in part or made worse by his coal mining exposures. Continuing to work in that environment would risk worsening these conditions according to Dr. Yap. The doctor had no opinion on CWP because he lacked expertise in it. (PX 9, pp. 12-14). Dr. Yap also opined that Petitioner had rhinitis, which is caused and/or aggravated by working in coal mines, and which could become worse with additional mining exposures. (PX 9, p. 15). The same was true concerning Petitioner's cough, shortness of breath, and wheezing over the years. Dr. Yap felt that Petitioner's respiratory diseases and symptoms limit him from a pulmonary standpoint. (PX 9, p. 16). On cross-examination, Dr. Yap opined that Petitioner probably had asthma all his life. An allergist in 2004 noted he had sinusitis two to three times a year. (PX 9, p. 19).

Dr. Yap felt that Petitioner was not a "complainer" and only came to him when he was having trouble. Dr. Yap testified that the fact that Petitioner had childhood asthma does not mean that mining exposures would not cause it to worsen; rhinitis and sinusitis can be multi-factorial in etiology. (PX 9, pp. 33-34).

Medical records were introduced by both parties. While there were many occasions where Petitioner was not experiencing problems, there are numerous entries documenting asthma issues, including wheezing and shortness of breath, bronchitis issues, sinusitis/rhinitis issues, and pneumonia. Petitioner was prescribed inhalers, antibiotics and other medication depending on the severity of his symptoms. In Dr. Yap's records submitted by Petitioner, the following dates reflect such problems: May 22, 2009 (PX 4, pp. 5-6); April 3, 2009 (PX 4, pp. 19-20); March 20, 2009 (PX 4, pp. 22-23); March 20, 2008 (PX 4, pp. 26-27); July 26, 2007 (PX 4, p. 30).

Physician's Group Associate's Records submitted by both parties also showed similar treatment on the following dates: February 24, 2012 (PX 5, p. 4); February 17, 2012 (PX 5, p. 7); January 13, 2012 (PX 5, p. 11); December 31, 2011 (PX 5, pp. 22-23); January 17, 2013 (RX 4, pp. 12-14). Pulmonary function testing with Methacholine from January 16, 2012 had no comment or interpretation. (RX 4, pp. 38-44).

Springfield Clinic records also reflect pulmonary and nasal problems and concerns. A CT with contrast of April 3, 2009 reported multiple calcified mediastinal lymph nodes including a large subcarinal lymph node. The right upper lobe had some minimal ground glass opacity. There was mild benign biapical pleural thickening. (PX 8, pp. 42-43). A chest film of March 20, 2009 for cough and chest congestion noted normal pulmonary vasculature. Calcified mediastinal lymph nodes and biapical pleural thickening was seen. There were no acute findings or significant changes since the prior films of August 25, 2006. (PX 8, pp. 50-51). The August 25, 2006 x-ray report noted calcified mediastinal lymph nodes with no acute disease and no change since March 2001. (PX 8, p. 52). The chest film of December 9, 2000 showed a left basilar infiltrate. (RX 3, p. 223). A chest x-ray of December 28, 2000 showed a clearing of focal pneumonia. (RX 3, p. 220). A chest film of May 30, 1995 showed very prominent subcarinal post inflammatory calcifications. There were no interim changes since May 11, 1995. (PX 8, p. 96). X-rays from November 19 and 23 of 1992 showed no infiltrate; there were post-inflammatory calcifications with a large calcified subcarinal lymph node. There was no change since the prior chest exam of August 24, 1992. (RX 3, pp. 259-260).

Other entries reflect pulmonary and nasal symptoms. (See PX 8, March 7, 2007, p. 56; May 19, 2006, p. 59; July 26, 2004, p. 62; December 2, 2003, p. 63; November 25, 2003, p. 64; June 24, 2003, p. 66; February

25, 2003, p. 67; March 18, 2003, p. 67; February 20, 2003, p. 68; January 3, 2000, p. 70; March 9, 1998, p. 73; November 4, 1997, p. 74; December 20, 1995, p. 76; RX 3, March 12, 2009, pp. 76-77; March 15, 2008, p. 88; March 2, 2004, pp. 182-184; February 9, 2004, pp. 185-186; January 08, 2004, pp. 191-193, 197; November 28. 2003, p. 204; December 11, 2003, p. 205; July 22, 2001, p. 215; March 4, 2001, pp. 216-217; February 27, 2001, p. 218; December 28, 2000, p. 221; December 9, 2000, p. 224; October 26, 1997, p. 243; July 7, 1996, p. 245; March 29, 1995, p. 252; March 25, 1995, p. 254; December 20, 1993, p. 256; January 25, 1993, p. 257; December 9, 1992, p. 258; November 22, 1992, p. 261; November 18, 1992, p. 262; August 24, 1992, p. 264).

Respondent also introduced negative NIOSH x-ray interpretations from a March 10, 1998 film. The two B-readers, whose names appear to have been written in the margin by someone else, saw no abnormalities of any type. (RX 5).

Dr. Cohen's radiological interpretations were also submitted. Dr. Cohen interpreted the chest x-rays of October 15, 2007, March 20, 2009, and August 25, 2006 as positive for CWP, category 1/0 in all lung zones. Dr. Cohen also noted a large, calcified lymph node on all films. (PX 3). Dr. Cohen reviewed Petitioner's April 3, 2009 CT scan and again saw the calcified lymph node. He found opacities of CWP throughout the upper lobes. (PX 3).

Petitioner submitted radiographic interpretations from B-reader/radiologist Dr. Henry Smith. Dr. Smith interpreted chest x-rays of October 15, 2007, March 20, 2009, and August 25, 2006 as positive for CWP, category 1/0 in all lung zones. There was a large calcified right lymph node from an old healed granulomatous process. (PX 2). Dr. Smith also interpreted the chest CT of April 3, 2009 as showing diffuse interstitial fibrosis with small opacities throughout all lung zones. He noted a slight predominance of ground glass opacity in the right upper lobe, and the large right lymph node related to old granulomatous disease. (PX 2). Petitioner asked B-reader/radiologist Dr. Michael Alexander to interpret a CT scan of April 3, 2009, but the doctor stated that the exam, which was 5mm with mediastinal windows, could not be used to make a CWP determination. (PX 7).

Dr. Christopher Meyer is a B-reader/radiologist who examined radiology at Respondent's request. Dr. Meyer issued a report on a chest CT from April 3, 2009, which discussed the CT's quality for purposes of CWP interpretation. (RX 6). Dr. Meyer discussed his experience in academia, and his affiliation with the University of Cincinnati Hospital. He became a B-reader at the behest of Dr. Jerome Wiot, whose longtime testimony and B-reading for coal companies is well known. (RX 1, pp. 20-23). *See Lefler v. Freeman United Coal Mining Co*, 08 IWCC 1097 (2008); *See also Cross v. Liberty Coal Co.*, 08 IWCC 1260 (2008). Dr. Meyer agreed that qualified B-readers can disagree about whether the small opacities of CWP are present. (RX 1, pp. 55-56). Dr. Meyer stated that the average standard radiologist's reading of an x-ray for purposes other than CWP is not as valuable as a B-reading for CWP. (RX 1, p. 57).

Dr. Meyer described a CWP macule as a collection of inflammatory cells or a conglomerate of white blood cells with coal in it. He was unsure of whether there would be associated emphysema, and stated there may be mild fibrosis around the macule. (RX 1, pp. 61-62). There is a change of lung function in the lung area where CWP is present. (RX 1, p. 63). Dr. Meyer stated that the only treatment for CWP is removal from any further dust exposure. (RX 1, pp. 64-65). Dr. Meyer provided that CWP first appears radiographically or pathologically, and causes pulmonary function or clinical abnormalities as it progresses. (RX 1, pp. 65-66, 68). He agreed that in certain occupations, such as roof bolting, there is more silica exposure. (RX 1, p. 71). He felt CWP is a very slow and insidious disease. (RX 1, p. 73). Dr. Meyer opined that ground glass opacities are associated with other exposures, and that "the thing that's hard here is defining what you're going to score as coal worker's pneumoconiosis versus other dust exposures or other potential environmental exposures." (RX 1,

p. 76). Dr. Meyer agreed that a CWP macule can be the same size as a granuloma, and can become calcified. (RX 1, p. 77).

On re-direct examination, Dr. Meyer testified that he reviewed chest films of October 15, 2007, March 20, 2009 and August 25, 2006. He also reviewed an April 3, 2009 CT scan. He concluded that there was no CWP, but several findings consistent with prior granulomatous disease. (RX 1, p. 41). He agreed that a ground glass opacity can result from certain dust exposures, inasmuch as it is an overall density on the CT. He would not expect it to be a result of Petitioner's coal mine exposure. (RX 1, pp. 83-84). Dr. Meyer failed the B-reader exam the first time he took it. (RX 1, p. 84).

Dr. Castle, a B-reader/pulmonologist, reviewed materials prepared for litigation, medical records from Springfield Clinic, and medical records from a Dr. Lynch, who apparently treated Petitioner for an unrelated ACL tear. He did not examine Petitioner. The litigation material submitted consisted of three x-ray reports and one CT report from Dr. Meyer, one x-ray report from Dr. Smith, and Dr. Cohen's initial report and x-ray interpretation. Dr. Castle reviewed three x-rays and a chest CT and concluded that Petitioner did not have CWP or any respiratory disability from any pulmonary process. (RX 2, Dep. Exh. C). Dr. Castle no longer practices and devotes his time to "medico/legal" exams and reviews. (RX 2, pp. 12-13). He began conducting such exams and reviews in 1985, after he became a B-reader. (RX 2, p. 16). Dr. Castle stopped performing exams for the U.S. Department of Labor in the 1990s. His exams and records or film reviews are now performed for coal companies. (RX 2, pp. 19-20).

Dr. Castle agreed that recent studies indicate that 50% of long term coal miner autopsies show CWP that was not seen radiographically during their lifetime. Dr. Castle acknowledged that qualified B-readers can disagree on x-ray interpretations. Dr. Castle agreed that Petitioner has asthma, but did not know if there were isocyonates in roof bolting glues. He admitted that such chemicals can sensitize a person to asthma and that diesel fumes can aggravate asthma. (RX 2, pp. 44-45). Dr. Castle did not know if the adhesives used in coal chute repair contain TDI. He felt that any TDI in the adhesives would not necessarily mean it would cause or aggravate asthma. (RX 2, p. 46). Dr. Castle agreed that repeated exacerbations of asthma can make it worse and cause airways remodeling. (RX 2, p. 47). The doctor testified that advising a person who has asthma to stay away from the things that triggered it is a "relative determination"; if a person could find work away from such triggers, that would be desirable. (RX 2, pp. 51-52). Dr. Castle conceded that the American Thoracic Society found that the most common type of occupational asthma is found in workers with pre-existing asthma that becomes aggravated or made worse by the work environment. (RX 2, p. 62). He stated that asthma and reactive airways disease wax and wane and cause different spirometry measurements on different dates. (RX 2, p. 64).

CONCLUSIONS OF LAW

Issue (C): Did Petitioner suffer disease which arose out of and in the course of his employment by Respondent?

The Arbitrator resolves the conflicting CWP evidence in Petitioner's favor based on Dr. Cohen's superior credentials and the lack of remuneration for his services. Dr. Cohen's CV and testimony demonstrates impressive familiarity, practice, and research on the occupational diseases of coal miners. Respondent's experts, while qualified, appear to have a financial interest in performing examinations for coal companies, something which goes to the weight of their opinions. *See Opp v. Pryor*, 294 Ill. 538, 545-46, 128 N.E. 580, 582-583 (1920). Dr. Cohen's opinions on CWP were backed by B-reader/radiologist Dr. Smith, who has been a B-reader since 1987 and a consultant to multiple occupational clinics. (PX 2, pp. 2, 5).

The Arbitrator also concludes that Petitioner had occupationally related asthma, chronic bronchitis, and rhinitis/sinus issues. Petitioner's medical records support asthma, and rhinitis/sinusitis issues, and the medical testimony indicated that exposures in the mines would contribute to and/or aggravate these problems. The testimony of Dr. Yap and Dr. Cohen support occupational causation of asthma, chronic bronchitis, and rhinitis/sinusitis. Petitioner's testimony also indicated that his pulmonary health improved once he left the mines. Petitioner was a credible witness, and this was evidenced by his forthcoming testimony and his endeavoring to give the full truth. The Arbitrator notes that Dr. Castle's records review omitted many of the pertinent medical record entries mentioned herein. Dr. Castle did not examine Petitioner, and based his opinion solely on the material provided. The Arbitrator therefore gives his opinion less weight.

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

Dr. Cohen stated the lung tissue scarred by CWP cannot function and that by definition there necessarily is impairment of function at the damage site. A person can lose an entire lung lobe and still generate normal pulmonary function testing. In this case Petitioner's impairment is simply not measurable. Dr. Meyer agreed that there is a change of lung function in the CWP-affected lung area. The Commission has recognized that even in the absence of measurable impairment, a CWP diagnosis equates to disability under the Act. *See Eubanks v. Consolidation Coal Co.*, 08 IWCC 1515 (2008); *Samuel v. FW Electric*, 08 IWCC 1296 (2008); *Cross v. Liberty Coal Co.*, 08 IWCC 1260 (2008); *Brooks v. Consolidation Coal Co.*, 07 IWCC 1693 (2007); *Chrostoski v. Freeman United Coal Mining Co.*, 07 IWCC 226 (2007). Furthermore, Petitioner cannot return to mining without risking progression of his CWP. He has proven disablement. *See Sims v. Freeman United Coal Mining*, 12 IWCC 413 (April 20, 2012). The *Sims* case was recently affirmed by the Appellate Court of Illinois. *See Freeman United Coal Mining Co. v. Ill. Workers' Comp. Comm'n*, 2013 IL App (5th) 120564WC (5th Dist. 2013). The medical testimony also indicated that exposures in the mines would aggravate Petitioner's asthma, sinus and bronchitis problems.

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

The Arbitrator finds that Petitioner suffers from occupationally related CWP, asthma, chronic bronchitis, and rhinitis/sinus issues. Petitioner's breathing issues that are the result of the foregoing affect his activities of daily living. Based on the above findings, Petitioner is permanently and partially disabled under Section 8(d)2 of the Act to the extent of 20% of the person as a whole.

Issue (O): Was Petitioner's disability timely under Section 1(f) of the Act? Was there exposure?

Exposure was proven by Petitioner's un-rebutted and credible testimony. Petitioner's last injurious exposure was August 29, 2007. Drs. Cohen and Smith interpreted radiology taken within the two year period as showing CWP. Timely symptoms were also established by Petitioner's un-rebutted testimony, the medical records, and the patient histories of Dr. Yap and Dr. Cohen. Again, Dr. Castle did not examine Petitioner and was not able to personally take a patient history.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Barbara Gibbs,

Petitioner,

vs.

NO: 14 WC 580

14IWCC1087

Carle Hospital,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Petitioner filed a review in this case on April 29, 2014, arguing that penalties and fees should be awarded against Respondent because its review of the Arbitrator's decision was frivolous and for purposes of delay. She also filed a Petition for Penalties and Fees on April 29, 2014. The parties indicated that the Respondent stipulated that, if the Arbitrator found that the Petitioner had sustained an accident arising out of and in the course of her employment, the Petitioner's condition was causally related to the accident. In exchange, Petitioner agreed to withdrawal its pre-trial petition for penalties and fees.

14IWCC1087

The Commission finds that the Respondent had a reasonable basis to review the Arbitrator's determination with regard to the issue of accident. There was no pre-trial stipulation as to the disputed accident issue. It was the key issue at hearing, and remained the key issue for Respondent on appeal. There is nothing in the record that would indicate that the review was frivolous or for purposes of delay. The Petitioner's Petition for penalties and fees is denied.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Petitioner's post-hearing petition for penalties and fees pursuant to §§19(k) and 16 are hereby denied.

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

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

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

DATED: DEC 12 2014
TJT:yl
o 11/3/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

GIBBS, BARBARA
Employee/Petitioner

Case# **14WC000580**

CARLE FOUNDATION HOSPITAL
Employer/Respondent

1417CC1087

On 3/18/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

3269 SPIROS LAW PC
MATTHEW D PINNER
2807 N VERMILLION ST SUITE 3
DANVILLE, IL 61832

0522 THOMAS MAMER & HAUGHEY LLP
JOHN STURMANIS
30 E MAIN ST SUITE 500
CHAMPAIGN, IL 61820

14IWCC1037

STATE OF ILLINOIS)
)SS.
COUNTY OF Champaign)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

BARBARA GIBBS
Employee/Petitioner

v.

CARLE FOUNDATION HOSPITAL
Employer/Respondent

Case # 14 WC 580

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Springfield**, on **2/21/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

14IWCC1087

On the date of accident, **12/2/13**, 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 **$69,977.06**; the average weekly wage was **$1,345.71.**

On the date of accident, Petitioner was **72** 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 will be credited for amounts paid under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary partial disability benefits of $897.14/week for 11 4/7 weeks, commencing 12/3/13 through 2/21/14, as provided in Section 8(a) of the Act which totals $9,341.15, pursuant to the stipulation of the Parties.

Respondent shall pay reasonable and necessary medical services of $5,611.00, as provided in Section 8(a) of the Act.

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

Respondent shall authorize and pay for Petitioner's arthroscopic surgery with Dr. Bane.

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

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

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

Signature of Arbitrator

March 18, 2014
Date

ICArbDec19(b)

MAR 18 2014

STATEMENT OF FACTS

On December 2, 2013, Petitioner, Barbara Gibbs, was working for Respondent, Carle Foundation Hospital, as a registered nurse. Her job responsibilities included post partem and ante partem patient care on the maternity floor.

After completing her work, but before clocking out, Petitioner was in the employee break room. It was usual and customary for employees to gather his/her belongings in the break room prior to clocking out and officially ending their shift.

The break room is a restricted access room. It is not made available to the public. To enter the break room, employees must swipe his/her employee badge to gain access.

The break room contains a set of lockers, a large table, chairs and a couch. Petitioner was assigned one of the lockers by Respondent. Petitioner has had the same locker assignment since she began her employment with Respondent. Petitioner's locker is depicted in Petitioner's exhibit number 8(b), on the far left side of the photograph, third down from the top.

Employees are required to store their belongings in the break room prior to beginning their shift. They are not allowed to bring personal items onto the patient floor. At the time of the accident, personal items that would not fit in the employee's assigned locker were placed on the couch, table, floor or a chair.

Petitioner placed her scrub jacket in her locker and got her purse. Petitioner turned to get her coat and she felt something impede her right leg. She tripped and fell due to an item on the floor and landed awkwardly injuring her right shoulder, wrist, and little finger. (PX1) After her fall, Petitioner discovered that her foot became caught in the handle of a fellow employee's tote bag. The bag was too large to fit into a locker.

On Cross-Examination, Petitioner agreed that she did not slip on water or something else on the floor and there was no defect on the floor where she fell. Petitioner was not carrying any work related items at the time of the fall.

Petitioner sought medical treatment immediately following the injury at Carle Foundation Hospital Emergency Room. (PX1) She was subsequently referred to the department of occupational medicine and had an MRI of the right shoulder on December 18, 2013. After undergoing the MRI, she was referred to Dr. Robert Bane, an orthopedic surgeon. Dr. Bane read the MRI as revealing "a full thickness defect within the distal supraspinatus tendon." for which he has recommended surgical intervention. Said surgery is presently scheduled for March 18, 2014. Petitioner wishes to undergo the surgery so she can return to work.

Petitioner denied prior right shoulder pain or problems and she has not had subsequent injury to her right shoulder.

CONCLUSIONS OF LAW

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

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

It is clear that Petitioner's injury occurred in the course of Petitioner's employment. In the course of relates to the time, place and circumstances of the accident. Here, Petitioner had finished her shift on the floor, but had not punched out. She was retrieving personal items from the break room (a restricted access room where nurses are required to store their personal items, obviously for patient and employee safety and to avoid infection). Thus, Petitioner was in the course of her employment by Respondent at the time of the accident.

The issue to be determined is whether the accidental injuries arose out of Petitioner's employment. For an injury to arise out of the employment, Petitioner must show that it is the result of a risk incident to her employment. An accident arises out of the employment when it occurs in a place under the control of the employer where Petitioner was required to be, provided that the risk of injury was not inherent to the general public. *Springfield Urban League v. Illinois Workers' Compensation Commission,* 2013 IL App (4th) 120219.

In *Springfield Urban League,* the employee was injured when he tripped and fell on a bunched up floor mat that was placed in front of a door used by employees to enter and exit the employer's building. In that case, the Commission and the Court found that the risk of tripping on the mat was not inherent to the general public because the employee was exposed to the danger in an area where she was required to be by virtue of her employment and in an area under the control of the employer.

In the present case, Petitioner and other employees were required by Respondent to use the break room where she was injured. The danger of tripping on a coworker's tote bag was not a risk to which the general public was equally exposed because the break room was only accessible by Respondent's employees. Respondent's employees were required to put their personal belongings in the break room and the bag in question did not fit in the lockers that were provided by the Respondent.

The Arbitrator finds that Petitioner's fall arose from a risk incident to her employment. Therefore, Petitioner has proved that she sustained accidental injuries, arising out of and in the course of her employment by Respondent.

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

Petitioner asserted that Respondent was liable for payment of the following medical bills at trial:

CARLE FOUNDATION HOSPITAL	$	3,835.00
CARLE PHYSICIAN GROUP	$	1,776.00
TOTAL	**$**	**5,611.00**

Respondent's only objection to the aforementioned bills was its liability for the same. Based on the Arbitrator's findings in "C" above, the Arbitrator orders that Respondent pay the said medical bills pursuant to the Fee Schedule. At trial, the Parties stipulated that if liability is found, Respondent would pay all reasonable and necessary medical expenses in accordance with the Act, whether or not the bills were submitted at the hearing. Respondent is entitled to a credit for all bills paid through group, pursuant to Section 8 (j) of the Act.

K. Is Petitioner entitled to prospective medical care?

Dr. Bane has recommended that Petitioner undergo an arthroscopy with subacromial decompression, distal clavicle resection, rotator cuff repair and biceps tenotomy in order to treat Petitioner's right shoulder injury. (PX5) This procedure is scheduled for March 18, 2014.

The Arbitrator finds the treatment recommended by Dr. Bane to be reasonable and necessary and orders respondent to approve and pay for Petitioner's surgery.

L. What amount of compensation is due for temporary partial and temporary total disability?

The evidence shows that Petitioner was given work restrictions by her medical providers from December 3, 2013 to February 21, 2014.

Despite these restrictions Petitioner worked light duty at her employer's flu clinic for 38.25 hours at the rate of $22 an hour. Petitioner also attended committee meetings for a total of 21.5 hours while on restrictions, for which she was paid $33.88 an hour. Other than the committee meetings and flu clinic Petitioner was not offered any other light duty work from December 3, 2013 to February 21, 2014.

The parties have stipulated that if Petitioner's accident is found to be compensable then Petitioner is entitled to TPD benefits of $897.14 per week for 11 4/7 weeks, totaling $9,341.15.

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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Sanchez,

Petitioner,

vs.

NO. 06 WC 50283
07 WC 25168

14IWCC1088

Illinois Valley Urban Lumberjacks
Frank and Sheila Bray and 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, medical expenses, prospective medical, benefit rates, employment, jurisdiction, notice, causal connection, 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 January 31, 2014 is hereby affirmed and adopted.

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

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

No bond is required for removal of this cause to the Circuit Court.

14IWCC1088

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: DEC 12 2014
SJM/sj
o-10/22/2014
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SANCHEZ, JOSE
Employee/Petitioner

Case# **06WC050283**
07WC025168

14IWCC1088

ILLINOIS VALLEY URBAN LUMBERJACKS FRANK AND SHEILA BRAY AND INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 1/31/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

5122 PORRO NIERMANN & PETERSEN
MICHELLE PORRO
821 W GALENA BLVD
AURORA, IL 60506

0252 HARVEY & STUCKEL CHTD
DAVID W STUCKEL
101 S W ADAMS ST SUITE 600
PEORIA, IL 61602

3201 ASSISTANT ATTORNEY GENERAL
MONICA J KIEHL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

14IWCC1088

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

Jose Sanchez
Employee/Petitioner

v.

Illinois Valley Urban Lumberjacks, Frank and Sheila Bray and Injured Workers Benefit Fund
Employer/Respondent

Case # **06** WC **50283**

Consolidated cases: **07 WC 25168**

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 **George Andros**, Arbitrator of the Commission, in the city of **Ottawa**, on **August 26, 2013, and December 3, 2013.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC1088

FINDINGS

On **October 28, 2006**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

ORDER

PETITIONER FAILED TO PROVE THAT HE SUSTAINED AN INJURY ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT AND THEREFORE 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.

#01 George J. Cristos
Signature of Arbitrator

January 9th, 2014
Date

JAN 31 2014

Sanchez v. Illinois Valley Urban Lumberjacks, Frank & Sheila Bray and Injured Workers Benefit Fund
06 WC 50283 and 07 WC 25168
FINDINGS OF FACT

C. Accident

Jose Sanchez claims that he was injured while working as a tree trimmer for Illinois Valley Urban Lumberjacks on October 28, 2006, when he fell 6 to 8 feet, landed on his right foot and broke it. He stated he was working near Bloomington at the time and was taken to a local hospital but nothing was done for him there and later said in his direct examination that he did not go to a hospital in Bloomington. He did go to a hospital in Ottawa where he seen in the emergency room.

Mr. Sanchez stated that he reported the work accident to Glenda who he identified as the sister of Frank Bray. Mr. Sanchez testified that Glenda told him not to say that he was injured at work. At the hospital Mr. Sanchez gave a history of having fallen off a stair at his house. (Resp. Ex. 1). Mr. Sanchez agreed on cross-examination that there are stairs in his house. He also claimed to have told another version to a doctor when first at the hospital. The following exchange took place on cross-examination:

"A. I told him I had fallen from the roof 4 to 6 or 6 to 8 feet.
Q. The roof at home?
A. Yes, that's the truth.
Q. That is the truth of what happened, isn't it?
A. Yes, sir."
(Tr. p. 44).

Mr. Sanchez changed his history when he visited the hospital on 11-2-06 as shown in a handwritten statement that he said was written by a nurse at the hospital based on what he told her. In this statement he said that he fell out of tree 10-12 feet at work on October 28 at about 4:00 p.m. (Resp. Ex. 2). Mr. Sanchez claimed that his first history was wrong because he was told by Glenda Cervantes not to tell the truth at the hospital.

Mr. Sanchez also testified that he was working on a crew with Chuck Bray at the time he was injured and that Mr. Bray took him to the company offices after he fell. Further, he claimed that he had a telephone conversation with Frank Bray the same day in which Mr. Bray yelled at him while Petitioner was in Ottawa Hospital.

Glenda Hernandez, formerly known as Glenda Cervantes, testified she remembered receiving a phone call from Petitioner in which he asked about company insurance but did not tell her he was hurt at work. She did not ask why he needed insurance but told him the company did not carry insurance. This was the only time she talked to Mr. Sanchez about the events of October 28.

The calendar shows that October 28, 2006, was a Saturday; all the witnesses agreed that Mr. Sanchez claims he was hurt while working on a Saturday. This is a crucial fact because of the denials of all Respondent witnesses about working on Saturdays.

Charles Bray testified he worked for Respondent in October 2006 as a crew chief. He is the brother of Frank Bray. Charles Bray testified that he did not work on October 28 because it was a Saturday and the company did not perform work on Saturdays for Corn Belt Energy which was the job where Petitioner claims he was injured. Charles Bray also said that Mr. Sanchez was not a member of his crew in October 2006 and never reported any injury to him at any time.

Greg Snell testified that he is employed as a crew chief or foreman for Respondent plus Mr. Sanchez was a member of his crew in October 2006. Mr. Snell also testified he did not work on Saturdays because the company was not allowed to perform work for Corn Belt on Saturday. He never received any report of a work injury from Mr. Sanchez.

Frank Bray testified that he is an employee of Respondent but not an owner. The sole owner is Sheila Bray. There is no evidence to contradict Mr. Bray's testimony on ownership. Mr. Bray bids work for the company plus visits job sites to see that the work is being done according to the requirements of Corn Belt Energy. He forthrightly subject to insightful cross examination explained that Corn Belt does not allow tree trimming work on Saturdays. Thus, it's a fact Mr. Sanchez would not have worked on a Saturday. He also testified about a single conversation with Petitioner that took place several days after the claimed injury and that he has never heard from Petitioner since that date. Petitioner has never asked to return to work for Respondent according to Frank Bray.

Respondent provides a safety program with monthly meetings and provides safety equipment for its workers. Frank Bray described the safety harness that climbers wear and that it has two positive fastening points so that even if one were to fail a person could not fall out of a tree.

Conceivably if the only evidence in this case was Petitioner's testimony and Respondent's contradiction, Petitioner could prevail under the burden of preponderance of the evidence. However, that is not the case in the matter at bar. In fact, Petitioner gave a recorded history of injury at the hospital which indicates an injury at home. He later tried to recant that history but his explanations for the difference are not persuasive.

After hearing all witnesses and particularly listening and watching the Petitioner react and "talk over " the questions with his responsive answers I find that any of these discrepancies are caused by a language barrier. While Petitioner obviously speaks Spanish as a first language, his repeated answers to questions during the hearing without waiting for the interpreter to translate or even begin a spoken word shows that Petitioner engages by listening at least a verbal, fundamental understanding of English plus can communicate in day to day settings. His admission on cross-examination that the truth is he fell from a roof at home coupled with all other evidence contradicting his testimony shows that he did not have an accident arising out of and in the course of his employment as required by the Worker's Compensation Act.

CONCLUSIONS OF LAW

C: Whether Petitioner Sustained an Accident in the Course and Scope of the Employment with the Respondents, the Arbitrator Finds as follows:

Based upon the totality of the evidence and a preponderance thereof, the Arbitrator finds as a matter of fact and as a conclusion of law that the Petitioner herein did not sustain an accident as alleged in the case at bar.

The Arbitrator adopts all the evidence presented in making this conclusion of law. The Arbitrator highlights the adopted facts infra per the Act.

Given the above, the Arbitrator need not make conclusions of law on the other issues presented in the stipulations.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James St. Cerny,

Petitioner,

vs.

NO. 12 WC 39049

14IWCC1089

Caterpillar, 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 medical expenses, causal connection, 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 4, 2014 is hereby affirmed and adopted.

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

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

No bond is required for removal of this cause to the Circuit Court.

14IWCC1089

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: DEC 12 2014
SJM/sj
o-10/23/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

ST CERNY, JAMES
Employee/Petitioner

Case# **12WC039049**

CATERPILLAR INC
Employer/Respondent

14IWCC1089

On 4/4/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4707 LAW OFFICE OF CHRIS DOSCOTCH
2708 N KNOXVILLE AVE
PEORIA, IL 61604

5035 CATERPILLAR INC
DARCY GIBSON
100 N E ADAMS ST
PEORIA, IL 61629-4340

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

James St. Cerny
Employee/Petitioner

Case # 12 WC 39049

14IWCC1089

v.

Caterpillar, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Peoria**, on **February 20, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **September 30, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$56,160.00**; the average weekly wage was **$1,080.00**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **0** dependent children.

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

ORDER

As the Arbitrator has found that the Petitioner failed to prove that the surgical treatment prescribed for him by Dr. Mulconrey is reasonable and necessary medical treatment which is causally related to his work injury, no benefits are awarded herein.

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

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

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

Arbitrator Anthony C. Erbacci

March 25, 2014
Date

12 WC 39049
ICArbDec19(b)

APR 4 - 2014

14IWCC1089

FACTS:

On September 30, 2011, the Petitioner sustained undisputed accidental injuries arising out of and in the course of his employment with the Respondent as a machine repairman. The Petitioner testified that he was performing his normal work duties when he lifted a tool bag weighing 40-50 lbs and felt something pop in his neck. He reported the incident and was initially seen at the Caterpillar Medical Clinic. The Petitioner was eventually referred to Midwest Orthopaedic Center where he began treating with Dr. Daniel Mulconrey. During his treatment with Dr. Mulconrey, the Petitioner was also referred to Illinois Regional Pain Institute for conservative treatment including injections. At this facility he saw Dr. Feathers, Dr. Li and Dr. Henry. The Petitioner also continued to follow up with Dr. Dea in the Caterpillar Medical Clinic.

Dr. Mulconrey eventually recommended an MRI and a discogram. This first discogram was carried out on June 6, 2012 and was reported to be positive at C4-5 and C5-6. On July 18, 2012, the Petitioner underwent an anterior cervical decompression and fusion from C4 to C6. There is no dispute that this surgery was reasonable, necessary, and causally related medical treatment.

Following the surgery, the Petitioner continued to follow up with Dr. Mulconrey. On August 13, 2012, the Petitioner was noted to be doing fairly well with some mild swelling and difficulty. On September 10, 2012, the Petitioner was noted to be doing well, but had complaints of thoracic spasms. Physical therapy was recommended. On November 19, 2012, the Petitioner was noted to be doing well, but he still had complaints of mid thoracic pain.

On January 2, 2013, the Petitioner reported that he was 50% improved. The Petitioner testified that his headaches and 50% of his upper neck pain had resolved but he continued to have pain in his lower neck and shoulders. The exam notes from this date reflect that the Petitioner continued to complain of cervical and thoracic based pain. The Petitioner was given light duty restrictions, physical therapy was continued, and the Petitioner was instructed to follow up with Dr. Li for medications.

The Petitioner returned to see Dr. Mulconrey on March 12, 2013. The record of that visit reflects that the Petitioner reported that he was happy with his first surgery but that he continued to notice significant cervicothoracic pain which was limiting his ability to return to work. It was noted that the Petitioner was being seen at the pain clinic by Dr. Li, but it was not helping with the pain.

The Petitioner testified as to a physical altercation he had with his stepson on April 8, 2013. The Petitioner testified that he did not sustain any injury to his neck in that altercation and that there was no change in his condition after the altercation. The Petitioner also testified that he had an increase of symptoms, muscle tightness and pain, after dealing with his flooded basement in April 2013.

On April 15, 2013, the Petitioner reported that he had gotten some new medications

that were helping with significant pain relief, but he indicated that he was interested in further investigation of the origin of his pain. Dr. Mulconrey recommended another discogram and this was carried out on May 22, 2013 by Dr. Henry.

Dr. Henry reported that the Petitioner's May 22, 2013 discogram demonstrated what appeared to be a normal disk at C6-7, with 5 out of 10 non-concordant right shoulder pain, and what appeared to be a normal disk at C7-T1, with no pain on injection. The discogram was reported to be "negative" at both of those levels.

On June 12, 2013, the Petitioner returned to see Dr. Mulconrey who noted that the discogram was negative and that the Petitioner's pain at C6-7 was described as non-concordant. The Petitioner testified that the pain he felt during the discogram was the same type of pain that he had been experiencing and complaining about previously and that he explained this to Dr. Mulconrey. Dr. Mulconrey noted that the discogram results were not as strongly positive as the results of the Petitioner's prior discogram.

At the request of the Respondent the Petitioner was seen by Dr. Michael Kornblatt on June 27, 2013. After examination and review of the Petitioner's medical records, Dr. Kornblatt reported that the Petitioner presented without abnormal objective findings on physical examination and no cervical radiculopathy or myelopathy. Dr. Kornblatt did not recommend any further treatment other than work hardening and a functional capacity evaluation. Dr. Kornblatt opined that due to the longevity of inactivity and the Petitioner's deconditioned state, the work hardening and functional capacity evaluation would get the Petitioner back to gainful employment. Dr. Korblatt opined that subsequent to the work hardening and functional capacity evaluation, the Petitioner would be at maximum medical improvement from his work injury. Dr. Kornblatt then viewed the films of the Petitioner's preoperative MRI, CT and discogram and the Petitioner's post-operative CT and discogram. In a supplemental report, Dr. Kornblatt opined that, based on his review of the films, the Petitioner did not warrant further surgical treatment for his subjective complaints. Dr. Kornblatt reported that, clinically, the Petitioner did not present with any surgical lesions, clinical cervical radiculopathy, cervical herniated disc or cervical spinal stenosis.

On July 15, 2003, the Petitioner returned to see Dr. Mulconrey and reported continued complaints of axial neck pain radiating into his right shoulder. Dr. Kornblatt's recommendation for work hardening and a functional capacity evaluation was discussed and another MRI was recommended. That MRI was completed on July 19, 2013 and was reported to demonstrate shallow posterior disc displacement at C6-7.

The Petitioner underwent the recommended course of work hardening, and a functional capacity evaluation was performed on August 23, 2013. The functional capacity evaluation was reported to demonstrate that the Petitioner was capable of performing at the light physical capacity level.

On September 16, 2013, the Petitioner returned to work for the Respondent in a light duty capacity. The Petitioner has continued to work in a light duty position for the Respondent

through the trial date.

The Petitioner returned to Dr. Mulconrey on September 20, 2013 and Dr. Mulcroney noted that the "[Petitioner] underwent a discogram in which subjectively he felt the C6-7 did re-create his pain." Dr. Mulcroney also noted that the Petitioner was concerned about continuing to work with his current pain level. Dr. Mulconrey recommended that the Petitioner undergo an anterior cervical decompression and fusion at C6-7.

The Petitioner testified that he currently continues to experience constant neck pain which he rated at 6 to 8 out of 10 and that the pain is made worse by quick movement and activity, and twisting. The Petitioner testified that he wants to have the surgery prescribed for him by Dr. Mulconrey.

The deposition testimony of Dr. Mulconrey was admitted into the record as Petitioner's Exhibit 3. Dr. Mulconrey confirmed his recommendation that the Petitioner undergo surgical fusion at C6-7 and he opined that considering the Petitioner's complaints, diagnostic interpretation, and the failure of surgery and conservative treatment to resolve the Petitioner's neck pain, the proposed C6-7 fusion is reasonable, necessary and causally related to the Petitioner's initial work accident. He testified that the trapezius based pain the Petitioner is currently having has been present since before the first surgery and it is evidenced in the medical records as early as November 2011. Dr. Mulconrey testified that the fusion at C6-7 was not done with the first fusion because the first discogram was negative at C6-7. He further testified that he did not know why the Petitioner had reproduction of his neck pain and right shoulder pain on the second discogram but not on the first discogram. Dr. Mulconrey acknowledged that Dr. Henry reported the discogram as "negative" but he indicated that the Petitioner reported concordant pain during the discogram and "due to the discrepancy between the discogram report by Dr. Henry and what the patient was telling me that's what led to the MRI." Dr. Mulconrey acknowledged that the MRI did not demonstrate any pathology that would correlate the Petitioner's pain to that disc level any more than the discogram did and he further acknowledged that his surgical recommendation is primarily based on the Petitioner's report that the pain reproduced with the second discogram is the pain he was experiencing regularly.

The deposition testimony of Dr. Michael Kornblatt was admitted into the record as Respondent's Exhibit 3. Dr. Kornblatt opined that the Petitioner was not currently a surgical candidate because he failed to present with any abnormal objective findings at the level below his fusion and/or any level, his post-operative workup did not reveal any clinical herniated disc or spinal stenosis, and the evaluation did not reveal a cervical radiculopathy or instability of the cervical spine. He testified that the Petitioner had "zero indications for surgical treatment." Dr. Kornblatt testified that he reviewed the post discogram CT scan, and there was nothing abnormal at the C6-7 level. He opined that performing the surgery solely because of the Petitioner's subjective complaints was not appropriate.

14IWCC1089

CONCLUSIONS:

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

It is undisputed that the Petitioner suffered accidental injuries that arose out of and in the course of his employment with the Respondent on September 20, 2011. He reported the injury, treated with the Respondent's medical clinic and continued his treatment with Dr. Mulconrey, an orthopedic surgeon, and Dr. Li, Dr. Henry and Dr. Feathers, for pain management. The Petitioner underwent a two level cervical fusion from C4 through C6 performed by Dr. Mulconrey on July 18, 2012. There is no dispute that this surgery was reasonable, necessary, and causally related medical treatment.

Following the surgery, the Petitioner continued his treatment with Dr. Mulconrey and he continued to have pain in the base of his neck into his shoulder although his headaches and 50% of his neck pain were relieved with the surgery. Dr. Mulconrey's testimony and records show that the Petitioner's complaints of cervical/trapezius symptoms date back to November 2011, even before the surgery. Despite the Petitioner's complaints regarding these symptoms, Dr. Mulconrey did not include the C6-7 level in the surgery because of the negative initial discogram.

The Petitioner continued to complain of pain in the base of his neck into his shoulder and Dr. Mulconrey ordered another discogram. That discogram was reported to be negative at C6-C7 and C7 T1, although it was noted that the Petitioner complained of "non-concordant" shoulder pain when the C7 disc was injected. Dr. Mulconrey testified that he could not medically explain the change between the Petitioner's first and second discograms and he acknowledged that his recommendation for surgery is primarily based on the Petitioner's statement that the second discogram reproduced his regular pain. Dr. Kornblatt testified that there are no objective findings to support the need for surgery and the surgery should not be performed based only on subjective complaints.

While the Arbitrator notes the opinions and recommendations of Dr. Mulcroney, the Petitioner's treating physician, the Arbitrator finds that, in the instant matter, the opinions of Dr. Kornblatt, the Respondent's examining physician, are credible, reliable, and more persuasive than those of Dr. Mulcroney. In so finding the Arbitrator notes that Dr. Mulcroney did not really dispute that there was a lack of objective findings which supported his recommendation for surgery and he acknowledged that his recommendation for surgery is primarily based on the Petitioner's subjective report that the second discogram reproduced his regular pain. Dr. Henry, the physician who performed the discogram, reported the results to be "negative" and the Petitioner's complaints of shoulder pain to be "non-concordant". While the MRI of July 19, 2013 was reported to demonstrate shallow posterior disc displacement at C6-7, Dr. Mulconrey acknowledged that the MRI findings did not demonstrate any pathology that would correlate the Petitioner's pain to that disc level any more than the discogram findings did. Dr. Kornblatt opined, and the medical records demonstrate, that there was a lack of objective physical

14IWCC1089

findings to support the need for surgery. Additionally, the Arbitrator notes that Dr. Mulcroney provided no explanation as to what or how the proposed surgery would be of benefit to the Petitioner.

Dr. Kornblatt opined that the Petitioner would reach maximum medical improvement from his injury after he completed a course of work hardening and a functional capacity evaluation. The Petitioner underwent that recommended course of work hardening and participated in a functional capacity evaluation on August 23, 2013. The functional capacity evaluation was reported to demonstrate that the Petitioner was capable of performing at the light physical capacity level and the Petitioner returned to work for the Respondent in a light duty capacity on September 16, 2013. The Petitioner has continued to work in a light duty position for the Respondent through the trial date. Dr. Mulconery has made no recommendations for treatment other than the surgery he has prescribed for the Petitioner. As the Arbitrator has found the opinions of Dr. Kornblatt to be credible, reliable, and more persuasive than those of Dr. Mulcroney, based upon the opinions of Dr. Kornblatt, the Arbitrator finds that the Petitioner reached maximum medical improvement from his work injury as of September 16, 2013, the date he returned to light duty work with the Respondent.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the work injury of September 30, 2011. The Arbitrator further finds, however, that the Petitioner failed to prove that the cervical fusion prescribed for him by Dr. Mulconrey is reasonable and necessary medical treatment which is causally related to the work injury of September 30, 2011.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Enrique Jaimes,

Petitioner,

vs.

NO. 12 WC 30115

14IWCC1090

RG Construction Services, Inc.

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 4, 2014 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $42,800.00. 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: DEC 12 2014
SJM/sj
o-11/06/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

JAIMES, ENRIQUE
Employee/Petitioner

Case# **12WC030115**

RG CONSTRUCTION SERVICES INC
Employer/Respondent

14IWCC1090

On 3/4/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1037 ALAN A BLUM PC
312 GRAND AVE
WAUKEGAN, IL 60085

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT T NEWMAN
10 S RIVERSIDE PLZ SUITE 2290
CHICAGO, IL 60606

14IWCC1090

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)

Enrique Jaimes
Employee/Petitioner

v.

RG Construction Services, Inc.
Employer/Respondent

Case # **12 WC 30115**

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 **November 19, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **August 10, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$80,568.54**; the average weekly wage was **$1,549.39**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of **$36,152.54** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$36,152.54**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$1,032.93**/week for **68** weeks, commencing **August 11, 2012** through **November 19, 2013**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **August 11, 2012** through **November 19, 2013**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of **$36,152.54** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$282.00** to **Dr. Ronald Silver**, and **$8,352.05** to **Prescription Partners**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for physical therapy as recommended by Dr. Ronald Silver.

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 4, 2014
Date

MAR 4 - 2014

FACTS

Petitioner testified that on August 10, 2012, while carrying a box of ceiling tiles, he tripped on an electrical pipe on the floor, fell holding the box of tiles, and hit both shoulders against the box. He felt immediate pain in both shoulders but worked through the rest of the day. Petitioner testified that he had never injured nor had treatment nor for either shoulder prior to or after the accident.

That evening, he went to the emergency room at Christ Hospital complaining of bilateral shoulder pain. He was given medication upon discharge with a recommendation to follow up with an orthopedic surgeon if his condition did not improve. Petitioner did not return to work. Petitioner was examined by Dr. Ronald Silver, an orthopedic surgeon, on August 22, 2012. Petitioner has remained under Dr. Silver's care, which has included cortisone injections, medications, physical therapy, and diagnostic imaging. Dr. Silver has authorized Petitioner to remain off work.

Dr. Silver testified at an evidence deposition. Dr. Silver opined that Petitioner's bilateral shoulder conditions are causally related to accident. Dr. Silver testified that surgery to either shoulder would not be a reasonable option due to the extensive bilateral tearing and that surgery would not likely be successful. Dr. Silver testified that Petitioner needs additional physical therapy over and above the physical therapies already received, that Petitioner has not reached maximum medical improvement, and that Petitioner has not been given a chance to reach maximum medical improvement.

Dr. Prasant Atluri, an orthopedic surgeon, examined Petitioner at Respondent's request, issued reports, and testified at an evidence deposition. Dr. Atluri's ultimate opinion was that Petitioner has sustained a temporary aggravation of bilateral arthritic pre-existing shoulder conditions and is able to return to full duty. Dr. Atluri opined that Petitioner may need bilateral shoulder surgery but that the surgery would not be related to the August 10, 2012 accident.

Jeff Lister, Respondent's superintendent testified that he called Petitioner on April 11, 2013 and offered work but that Petitioner replied that he would need to speak to his treating doctor before he could return to work. Mr. Lister testified that Respondent would have accommodated Petitioner's restrictions.

Respondent offered video surveillance and the testimony of two investigators. For the most part, the video shows Petitioner walking, talking, standing, or driving. At one point Petitioner is scratching his head with his left arm, lifting it up over his shoulder, and using his right arm to speak on a cell phone.

Petitioner has not returned to work.

CAUSATION

The Arbitrator finds that Petitioner's current condition of ill being is causally related to his accident. Petitioner testified that he had never injured nor had treatment for either shoulder prior to the accident. There is no evidence of any injury to his shoulders following the accident. The medical records are corroborative. Dr. Silver's opinion is persuasive. Dr. Atluri's opinion is not persuasive.

MEDICAL

The Arbitrator finds that Petitioner's medical treatment has been reasonable, necessary, and related to the accident. Therefore the claimed medical bills are awarded.

TEMPORARY TOTAL DISABILITY

Respondent's defense on this issue is based upon Petitioner's declining a return to work offer until Petitioner had spoken with his doctor. Dr. Silver had not recommended any return to work. Respondent proposes that the Arbitrator must be forced to draw the conclusion that Petitioner did not cooperate when the Respondent offered work. However, Petitioner's reliance upon his doctor's advice does not equate to lack of cooperation.

Therefore, the claimed temporary total disability is awarded.

PROSPECTIVE MEDICAL CARE

Dr. Silver has recommended additional physical therapy so that Petitioner may be given a chance to reach maximum medical improvement. Based upon the evidence adduced in this matter, Petitioner should be given that chance.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Addis Butler,

Petitioner,

vs. NO. 01WC 46074

Roadway Express,

14IWCC1091

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 14, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00.

14IWCC1091

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: DEC 12 2014
SJM/sj
o-11/6/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BUTLER, ADDIS
Employee/Petitioner

Case# **01WC046074**

ROADWAY EXPRESS
Employer/Respondent

14IWCC1091

On 5/14/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

0393 THOMAS R LICHTEN
53 W JACKSON BLVD
MONADNOCK BLDG SUITE 1634
CHICAGO, IL 60604

0766 HENNESSY & ROACH PC
JASON D KOLECKE
140 S DEARBORN 7TH FL
CHICAGO, IL 60603

14IWCC1091

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

Addis Butler
Employee/Petitioner

v.

Roadway Express
Employer/Respondent

Case # **01** WC **046074**

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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **02/27/2013 and 03/27/2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [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 [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other: **vocational rehabilitation, maintenance and application of the "law-of-the-case" doctrine**

FINDINGS

On the date of accident, **01/19/2001**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current cervical spine and left shoulder conditions of ill-being are causally related to the work accident. Petitioner failed to establish causation as to his claimed right shoulder condition of ill-being, for which he underwent surgery in 2012. The Commission's decision of November 7, 2011, which neither party appealed, precludes a finding of causation as to any current lumbar spine or left knee condition of ill-being. The Commission found that the work accident resulted in lumbar spine and left knee strains that resolved in 2001.

In the year preceding the injury, Petitioner earned **$60,712.08**; the average weekly wage was **$1,167.54**.

On the date of accident, Petitioner was **38** years of age, ***married*** with **1** 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 $ for TTD, $ for TPD, $ for maintenance, and $ 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

Temporary Total Disability/Vocational Rehabilitation/Maintenance/Prospective Care

For the reasons set forth in the attached conclusions of law, the Arbitrator declines to award temporary total disability benefits, vocational rehabilitation, maintenance and prospective care, as requested by Petitioner.

Medical Benefits

For the reasons set forth in the attached conclusions of law, the Arbitrator awards none of the medical expenses claimed by Petitioner other than the $225.00 bill from Neurology Associates, Ltd. for Petitioner's visit to Dr. Fagan on January 10, 2013. PX 11.

Permanency

For the reasons set forth in the attached conclusions of law, the Arbitrator finds it appropriate to award permanency as opposed to the interim benefits Petitioner seeks. With respect to Petitioner's cervical spine condition of ill-being, the Arbitrator awards permanency equivalent to 35% loss of use of the person as a whole under Section 8(d)2, or 175 weeks of compensation, at the applicable maximum rate of $516.15 per week. With respect to Petitioner's left shoulder condition of ill-being, the Arbitrator awards **additional** permanency equivalent to 15% loss of use of the person as a whole under Section 8(d)2, or 75 weeks of compensation, at the applicable maximum rate of $516.15 per week. The Arbitrator's permanency award thus totals 250 weeks at the rate of $516.15 per week.

14IWCC1091

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 E Mason
Signature of Arbitrator

5/13/13
Date

ICArbDec

MAY 14 2013

Addis Butler v. Roadway Express
01 WC 46074

14IWCC1091

Procedural Background

This claim arises out of a work-related motor vehicle accident that occurred more than twelve years ago. On January 19, 2001, Petitioner, a truck driver, was sitting in the cab of his disabled vehicle, waiting for assistance, when another vehicle rear-ended him. Petitioner underwent treatment for various claimed injuries following this collision. In August of 2001, he saw Dr. Ferguson of CINN for neck, left shoulder and other complaints. Later the same month, he began seeing Dr. Chmell, an orthopedic surgeon. At Dr. Chmell's recommendation, Petitioner underwent MRIs of his cervical spine, lumbar spine and left shoulder on September 5, 2001. On October 11, 2001, Dr. Ferguson recommended cervical spine surgery. On March 6, 2002, following a Section 12 examination by Dr. Goldberg, Petitioner underwent an anterior cervical discectomy and fusion at C4-C5, performed by Dr. Ferguson. Petitioner continued to see Dr. Ferguson following the surgery. He also continued seeing Dr. Chmell. In June of 2002, following Dr. Ferguson's retirement, Petitioner began seeing Dr. Ferguson's partner, Dr. Stadlan. On August 5, 2002, Dr. Goldberg re-examined Petitioner from a cervical spine perspective. He recommended that Petitioner undergo a CT scan of C3 through T1 and indicated Petitioner should not drive until he (Dr. Goldberg) and Dr. Ferguson had had an opportunity to review this scan. Dr. Goldberg also recommended that Petitioner undergo a functional capacity evaluation once his fusion healed completely. On September 30, 2002, another Respondent examiner, Dr. Cole, attributed Petitioner's left shoulder complaints to his cervical condition and deferred work restrictions to a cervical spine specialist. On November 18, 2002, Dr. Chmell found Petitioner incapable of working.

In April of 2003, Petitioner returned to work in a light duty capacity. Petitioner underwent the recommended CT scan on May 5, 2003. On July 23, 2003, Petitioner attended a meeting with Respondent's human resources manager. Petitioner subsequently claimed he re-injured his neck while attempting to leave this meeting. [Petitioner filed a second claim, numbered 04 WC 16184, arising out of this incident. The Commission affirmed the Arbitrator's denial of this claim. No further appeals were taken.]

In September of 2003, Petitioner underwent a two-day functional capacity evaluation, with the evaluator noting inconsistent effort and targeting Petitioner's left shoulder as the most limiting factor in terms of lifting ability. Following left shoulder injections by Dr. Chmell and a re-examination by Dr. Cole, with Dr. Cole recommending a diagnostic arthroscopy, Dr. Chmell performed a left rotator cuff repair, acromioplasty and lateral clavicle resection on October 21, 2004.

Petitioner continued seeing Dr. Chmell thereafter. Petitioner also underwent Section 12 examinations by Dr. Ghanayem and Dr. Holmes in 2005 for lumbar spine and right great toe conditions which he attributed to the 2001 work accident. In his report of September 2, 2005, Dr. Ghanayem found an excellent range of left shoulder motion and no neurological deficits.

He described Petitioner's left shoulder range of motion as even better than that of the non-operated right shoulder. He found Petitioner to have reached maximum medical improvement. He also found Petitioner capable of full duty. Petitioner continued seeing Dr. Chmell on a regular basis after September 2, 2005.

On October 1, 2010, former Arbitrator, now Commissioner, DeVriendt conducted a Section 19(b) hearing in Chicago. At that hearing, the parties placed the following issues in dispute: causal connection, medical, temporary total disability, prospective care, penalties/fees and credit. In his decision of November 24, 2010, the Arbitrator addressed causation as follows:

> "This Arbitrator finds that Petitioner's cervical and left shoulder are the only conditions causally related to the accident on January 19, 2001. This Arbitrator finds that Petitioner's right foot condition, lumbar spine condition and left knee condition are not causally related to the accident."

Consistent with these findings, the Arbitrator denied Petitioner's claim for prospective right foot and lumbar spine treatment. The Arbitrator found that Petitioner was temporarily totally disabled only during those intervals of disability to which Respondent stipulated, with Respondent receiving credit for the benefits it paid. The Arbitrator found that Petitioner reached maximum medical improvement on September 2, 2005. The Arbitrator declined to award penalties and fees. Arb Exh 2, 2/27/13 hearing.

Petitioner filed a timely review thereafter. The review was assigned to former Commissioner, now Arbitrator, Mason [the Arbitrator authoring this decision]. On September 7, 2011, the parties presented oral arguments to former Commissioner Mason and her panel members, Commissioners Lindsay and Dauphin. Former Commissioner Mason drafted the majority's decision before being appointed to serve as an Arbitrator on October 14, 2011. On November 7, 2011, the Commission issued a Decision and Opinion on Review. The majority, Commissioners Dauphin and Tyrrell (with Commissioner Tyrrell signing pursuant to Zeigler v. Industrial Commission, 51 Ill.2d 137 (1972)), clarified and modified the Arbitrator's Decision in various respects and remanded the case to the Arbitrator. The Commission affirmed the Arbitrator's finding that Petitioner established causation as to his cervical spine and left shoulder. The Commission also affirmed the Arbitrator's finding that Petitioner failed to establish causation as to his right foot, albeit based on different reasoning. The Commission found that Petitioner did establish causation as to his left knee and lumbar spine but only as to strains that resolved on February 7, 2001 and September 5, 2001, respectively. The Commission awarded medical expenses relating to the left knee and lumbar spine through those two dates. The Commission awarded an additional period of temporary total disability, from August 12, 2002 through April 22, 2003, based, in part, on the opinions Dr. Goldberg expressed on August 5, 2002. The Commission also awarded certain penalties and fees, based on its finding that Respondent acted in an objectively unreasonable manner in failing to pay temporary total disability benefits during certain intervals. The Commission affirmed the

Arbitrator's finding that Petitioner reached maximum medical improvement on September 2, 2005. Arb Exh 2, 2/27/13 hearing.

Neither party appealed the Commission's Decision and Opinion on Review. T. 2/27/13, p. 5.

On June 6, 2012, Petitioner underwent surgery on his right shoulder. Dr. Chmell performed this surgery.

Based on the age of the case and its longtime "red line" status, the Arbitrator set the case for hearing on August 27, 2012. At Petitioner's request, this hearing was continued, with the Arbitrator ultimately setting a final hearing date of November 5, 2012. On October 4, 2012, Petitioner took Dr. Chmell's deposition. The November 5th hearing was continued, over Petitioner's objection, so that Respondent could obtain a Section 12 examination with a new examiner, Dr. Gleason. Dr. Gleason conducted this examination on October 30, 2012. The Arbitrator subsequently granted Respondent's amended application for a dedimus allowing Dr. Gleason's deposition. Respondent took this deposition on January 29, 2013. RX 1. On February 21, 2013, Dr. Chmell issued a report in which he responded to some of the opinions Dr. Gleason voiced at his deposition. PX 3 [rejected exhibit – see further discussion below.]

A second hearing was held on February 27, 2013, with Petitioner's counsel indicating he was again proceeding pursuant to Section 19(b). Respondent took the position that the unappealed decision of November 7, 2011, in which the Commission affirmed the Arbitrator's finding as to maximum medical improvement, was the "law of the case" and that the Arbitrator should thus address permanency. T. 2/27/13 at 8-9.

At the February 27, 2013 hearing, Petitioner testified he is right-handed. He has continued to see Dr. Chmell every month or two since the October 1, 2010 hearing. T. 2/27/13 at 23. He most recently saw Dr. Chmell on February 7, 2013. Since October 1, 2010, he has been taking Vicodin ES per Dr. Chmell's prescription. T. 2/27/13 at 23-24.

The Arbitrator allowed Petitioner to testify as to his right shoulder condition and treatment, over Respondent's standing objection as to relevancy and waiver. T. 2/27/13 at 24-27.

Petitioner testified he complained of problems with various body parts, including both shoulders, when he saw Dr. Chmell on October 15, 2011. T. 28, 30.

Records in evidence include multiple treatment notes authored by Dr. Chmell concerning visits between August 28, 2010 and October 15, 2011. The most prevalent complaint recorded in these notes is that of right bunion pain. The note dated February 17, 2011 is the first that mentions a right shoulder complaint. On February 17, 2011, Dr. Chmell recorded the following, relative to Petitioner's neck and upper extremities:

> "Mr. Butler continues to experience neck pain which radiates down his left arm. He states that with overhead work he gets pain in the left shoulder and sometimes the right shoulder."

Dr. Chmell noted cervical spasm and tenderness, "left side much more than right," and "some diminished overhead movement" in both shoulders when he examined Petitioner on February 17, 2011. He continued to keep Petitioner off work, as he had since August 28, 2010.

The next note that mentions the right shoulder is the one dated October 15, 2011. On that date, Dr. Chmell recorded the following history:

> "Mr. Butler is seen in follow-up. He states that he is having some progressive pain in the right shoulder. He states that the right shoulder was hurting him before but he put it off and ignored it because the pain was not that bad as compared to his other painful areas. But now, Mr. Butler states that the right shoulder feels the same way the left shoulder felt before I did the surgery on him. He states that most things are done with his right arm and shoulder because of the restrictions he has with his left shoulder and arm and this has caused him to overstress it."

On examination of Petitioner's right shoulder, Dr. Chmell noted "some crepitus with impingement." He also noted that Petitioner lacked "about 20 degrees of flexion and abduction." He also noted some cervical spasm and tenderness and some left shoulder crepitus, with elevation to 100 degrees. He refilled Petitioner's Vicodin ES prescription and instructed Petitioner to stay off work. He scheduled Petitioner for a re-check on December 1, 2011.

The doctor's chart contains no note dated December 1, 2011. On January 28, 2012, Petitioner complained of "cervical pain radiating into his arms" and "bilateral shoulder pain," as well as pain in his low back and right foot. On cervical spine examination, Dr. Chmell noted a positive Spurling's bilaterally, some crepitus and impingement at the right shoulder and limited motion of the left shoulder. He refilled Petitioner's Vicodin ES prescription and continued to keep Petitioner off work. He scheduled a return visit for April 7, 2012.

On April 7, 2012, Dr. Chmell noted that Petitioner complained of a "lot of" right shoulder pain as well as right foot pain. On right shoulder examination, Dr. Chmell noted a positive impingement test, an equivocal drop test, a positive crossover test, elevation limited to 120 degrees and diminished strength in external rotation. With respect to the right shoulder, he diagnosed "derangement, rule out torn rotator cuff." He refilled Petitioner's Vicodin ES prescription and prescribed a right shoulder MRI. The MRI, performed without contrast on

April 20, 2012, demonstrated rotator cuff tendinopathy and a small partial-thickness tear involving the anterior fibers of the supraspinatus tendon. T. 2/27/13 at 30-31.

On May 5, 2012, Dr. Chmell noted that Petitioner was now describing his right shoulder as more painful than his right foot. On right shoulder examination, the doctor noted positive impingement and drop tests, as well as crepitus. He reviewed the MRI and scheduled Petitioner to undergo right shoulder surgery on June 6, 2012. He continued to keep Petitioner off work.

On June 6, 2012, Dr. Chmell operated on Petitioner's right shoulder at 25 East Same Day Surgery. T. 2/27/13 at 31. The surgery consisted of a rotator cuff repair, bursectomy, acromioplasty/partial acromionectomy and partial AC joint excision/debridement. In his operative report, Dr. Chmell indicated that Petitioner's right shoulder "just wore out with degeneration and rotator cuff tearing as a consequential result of the left-sided and cervical problems."

Petitioner continued to see Dr. Chmell postoperatively. At the doctor's direction, he progressed from passive exercises to strengthening activities. On September 6, 2012, he reported improvement and indicated he was now ready to turn the focus back to his right foot. When Dr. Chmell examined Petitioner's right shoulder that day, he noted 115 degrees of elevation and no crepitus or impingement. He scheduled right foot surgery and instructed Petitioner to remain off work.

At Respondent's request, Petitioner submitted to a Section 12 examination by Dr. Gleason on October 30, 2012. See below for a discussion of Dr. Gleason's examination findings and opinions.

On November 21, 2012, Petitioner underwent MRIs of his brain, left knee and lumbar spine at Dr. Chmell's direction. T. 2/27/13 at 33-34. PX 4. Following the MRIs, Petitioner returned to Dr. Stadlan, who he had not seen since 2005. Petitioner saw both Dr. Stadlan and the doctor's assistant, Sheila O'Neill, PA-C, on December 14, 2012. O'Neill's history reflects that Petitioner complained of "intermittent low back pain" and anterior thigh pain that was "not present at time of exam." O'Neill indicated that Petitioner "states he is not having problems right now, but wants his most recent MRIs to be evaluated to make sure there is 'nothing new' happening." Dr. Stadlan noted he had seen Petitioner in the past. He described his examination findings as "unchanged." He interpreted the recent lumbar spine MRI as showing "some degenerative disc disease." He did not recommend surgery. He suggested that Petitioner see "pain service or physiatry" in follow-up and instructed Petitioner to return to him as needed. He referred Petitioner to Dr. Fagan for headaches. PX 10.

Petitioner returned to Dr. Chmell on December 27, 2012 and complained of pain in his neck, right foot, right shoulder and low back. On examination, Dr. Chmell noted 115 degrees of elevation in the right arm and cervical muscle spasm, tenderness and reduced motion. He continued to keep Petitioner off work. PX 2.

On January 10, 2013, Petitioner saw Dr. Fagan. The doctor noted that Petitioner had been involved in a motor vehicle accident more than a decade earlier and had undergone cervical spine surgery a year after this accident. He noted that Petitioner reported "some improvement in his neck discomfort" following this surgery.

Dr. Fagan noted current complaints of headaches "that vary between once or twice a month and perhaps a dozen times a month." He also noted that Petitioner "does not complain much of pain at the base of the neck." He further noted a "variety" of "orthopedic abnormalities" involving both rotator cuffs, the right foot and the left knee.

On examination, Dr. Fagan noted tenderness to pressure over the occipital notch, right greater than left, tightness of the neck muscles and normal strength in all extremities "other than some give away from his various orthopedic problems." Dr. Fagan did not record any measurements relative to cervical spine range of motion.

Dr. Fagan diagnosed occipital neuralgia. He offered to send Petitioner to physical therapy but indicated Petitioner preferred to do neck exercises on his own. He obtained cervical spine X-rays, after noting that Petitioner expressed "concern about his previous spine surgery." The X-rays demonstrated the previous fusion as well as mild facet joint degenerative changes, mild left foraminal stenosis at C6-C7 and mild right foraminal narrowing at C6-C7. Px 12, 13.

Dr. Fagan instructed Petitioner to return to him as needed. PX 12.

Petitioner returned to Dr. Chmell on February 7, 2013 and complained of cervicalgia with radiation up into the occipital area as well as pain in both shoulders, the low back and the right foot. On examination, Dr. Chmell noted cervical muscle spasm and tenderness, as well as some diminution in shoulder motion bilaterally. PX 2.

Petitioner saw O'Neill and Dr. Stadlan again on March 14, 2013 "to get his last office note and for left-sided neck pain." O'Neill recorded the following complaints:

> "Pt states his neck freezes when he turns his head to the left. Does not take medication. He has to wait until it loosens up before he can move it again. He has refused PT several times from his PCP, and Dr. Stadlan, but has started to do some exercises that give him relief, and is now open to trying it. Denies BLE symptoms. States low back gives him pain occasionally, not now."

Dr. Stadlan noted that Petitioner complained of "difficulty turning his neck due to it 'hanging up' on the left side." He described his examination findings as unchanged. He noted no

neurological abnormalities. He indicated that physical therapy "could be helpful" but that "at this point, [Petitioner] does not want it." He again released Petitioner on a "PRN" basis. PX 10.

At the hearing, Petitioner testified he has not worked since the October 1, 2010 hearing. He is receiving Social Security disability benefits. T. 2/27/13 at 33.

Petitioner testified he struck the back of his head twice in the 2001 motor vehicle collision. T. 2/27/13 at 37. He complained of pain near the center top of his head, radiating to his forehead, and at the back of his head. He also complained of neck pain and difficulty turning his head. When he turns his head to the left, he feels a "snag" and has to wait until that "snag" ends before he can resume moving his head. He has been experiencing this sensation for years. T. 2/27/13 at 52. He testified he performs the neck exercises that Dr. Fagan prescribed. He refused the formal therapy that Drs. Stadlan and Fagan recommended because he still has neck pain and does not want anyone "poking around" his neck. T. 2/27/13 at 39-41. The exercises relieve a lot of tension but do not alleviate the pain. He is scheduled to return to Dr. Chmell on March 28, 2013. Dr. Chmell is continuing to prescribe Vicodin ES for him. He obtains this medication from the Injured Workers' Pharmacy. T. 2/27/13 at 41-42. He has not spent any money for this medication. He takes Vicodin ES "anywhere from two to four times a day" as needed for pain. T. 2/27/13 at 50. He and Medicare have paid other medical bills. T. 2/27/13 at 41. He pays Dr. Chmell $21.00 at every visit. He made payments to 25 East Same Day Surgery and Metro Anesthesia in connection with his right shoulder surgery. T. 2/27/13 at 45. He paid Dr. Fagan $100.00. T. 2/27/13 at 45-46.

Under cross-examination, Petitioner identified his signature on the Application for Adjustment of Claim he filed on August 17, 2001. The Application reflects that he injured his "entire body, head, spine, left leg and left arm." The Application does not specifically mention the right arm. T. 2/27/13 at 54-55. Petitioner acknowledged complaining of right shoulder pain while undergoing therapy at Community Hospital in late 2004 and early 2005. T. 2/27/13 at 55. Those complaints lasted more than three months. In his opinion, those complaints stemmed from the 2001 accident. He did not recall mentioning his right shoulder when he testified at the October 1, 2010 hearing. T. 2/27/13 at 56. He has been experiencing headaches since the 2001 accident. Dr. Chmell has not prescribed any physical therapy. T. 2/27/13 at 56-57. Dr. Stadlan did not prescribe medication for his cervical spine condition. T. 2/27/13 at 58. He saw Dr. Ghanayem in September of 2005 for a Section 12 examination, at Respondent's request. He has not looked for work since that examination. He has never looked for any type of work. He drove to the February 27, 2013 hearing. He drives 45 minutes each way when he sees Dr. Chmell. T. 2/27/13 at 59. As far as he knows, Dr. Chmell is the only physician who currently has him off work. T. 2/27/13 at 59-60.

On redirect, Petitioner clarified that Dr. Stadlan did, in fact, prescribe physical therapy. Dr. Fagan also prescribed therapy. Petitioner declined to undergo formal therapy but has been performing the neck exercises that Dr. Fagan prescribed. He has been seeing Dr. Chmell since August of 2001. Dr. Chmell treats his neck and other body parts. Dr. Chmell prescribes Vicodin for his neck and other body parts. T. 2/27/13 at 61-62.

Under re-cross, Petitioner testified that Dr. Fagan prescribed physical therapy for his headaches. He refused this therapy. T. 2/27/13 at 64-65.

At the conclusion of the hearing, Petitioner's counsel stipulated that he did not file a new 19(b) petition and/or a petition pursuant to Section 8(a) after the 19(b) hearing of October 1, 2010. Nevertheless, Petitioner's counsel viewed the February 27, 2013 hearing as falling under Section 19(b) due to Petitioner's "ongoing disability." He is seeking a functional capacity evaluation and vocational rehabilitation on behalf of Petitioner. Arb Exh 1. T. 2/27/13 at 70. Respondent's counsel indicated he objected to proceeding pursuant to Section 19(b) based, in part, on the wording of the Commission's decision. T. 2/27/13 at 71.

Over Respondent's objection, the hearing was continued to March 27, 2013, at which time proofs were closed.

In addition to the treatment records previously discussed, Petitioner offered into evidence Dr. Chmell's evidence deposition of October 4, 2012. Dr. Chmell testified he has been board certified in orthopedic surgery for twenty-five years. PX 1 at 3-4. He is a "general" orthopedic surgeon. He takes care of shoulder, back and foot problems. PX 1 at 5. He sees about one hundred patients per week. He teaches residents at the University of Illinois, where he is on staff. He also performs medical-legal consultations on an occasional basis. PX 1 at 5. He has treated Petitioner since 2001. He last saw Petitioner on September 6, 2012. PX 1 at 6. He previously gave a deposition in this case on July 23, 2010. PX 1 at 6. He identified Chmell Dep Exh 2 as the treatment records and bills he produced to Petitioner's counsel pursuant to subpoena. PX 1 at 6.

Dr. Chmell testified that, since his last deposition, Petitioner has been unable to perform his usual truck driving duties. Even if one were to remove Petitioner's right foot condition from his clinical picture, Petitioner would still have been unable to work based on his cervical and left shoulder conditions of ill-being and his Vicodin ES intake. PX 1 at 8, 10, 13-15, 17-20, 23-24, 28, 36, 39 He has been prescribing Vicodin ES for Petitioner since the last deposition. It is "really" due to the cervical spine and left shoulder conditions that he prescribes this medication. PX 1 at 9. Vicodin ES is a narcotic opioid. It is a mixture of Hydrocodone and Tylenol. PX 1 at 10. Vicodin ES comes with certain warnings because it "interferes with the ability to concentrate and stay on task." For example, a person taking Vicodin ES should not operate machinery. A person who is taking Vicodin ES cannot obtain a license to drive a truck. PX 1 at 11.

Dr. Chmell testified that, on October 15, 2011, Petitioner complained of worsening right shoulder pain. Petitioner, who is right-handed, performs most activities with his right arm, "especially because of the problems he has with the left side." Petitioner also complained of neck and left shoulder stiffness, as he had at many previous visits. PX 1 at 21. Dr. Chmell testified he documented positive Spurling's on both the right and left sides on January 28, 2012. On April 7, 2012, Petitioner complained of a "lot of" right shoulder pain. Dr. Chmell testified he recommended a right shoulder MRI at that point. He later reviewed the films and the report

concerning this MRI, which was performed on April 20, 2012. He interpreted the films as showing rotator cuff tendinopathy, a rotator cuff tear and arthritis of the AC joint. Tendinopathy is a "wearing away of the" rotator cuff tendon. PX 1 at 26. After reviewing the MRI, he recommended right shoulder surgery. PX 1 at 27. He performed this surgery on June 6, 2012. During the surgery, he repaired a rotator cuff tear, debrided arthritis at the AC joint, partially removed that joint and performed a bursectomy. PX 1 at 28-29. Chmell Dep Exh 3.

Dr. Chmell opined that the right shoulder condition for which he performed surgery was related to the 2001 motor vehicle accident. He agrees with Petitioner that the right shoulder "wore out" over a period of time. In fact there are two causative factors, the first of which was overuse. Petitioner was using his left shoulder less due to the left shoulder injury and subsequent surgery. The second factor was that Petitioner's cervical spine condition caused "altered mechanics" of both shoulders. PX 1 at 29-30. At every visit, Petitioner has exhibited "very prominent cervical spasm and tenderness," as well as positive Spurling's. When a person's trapezius and levator scapulae muscles are in spasm and tight, the scapula, or shoulder blade, cannot move normally. The shoulder blade constitutes one half of the shoulder. "Over a period of over 10 years of [these] abnormal mechanics, the rotator cuff of the right shoulder thinned, [developed] tendinopathy and eventually tore." PX 1 at 29-30.

Dr. Chmell testified that, by the post-operative visit of June 21, 2012, Petitioner was "doing reasonably well." The surgical incision was clean and dry. PX 1 at 31. Over the next few visits, Petitioner's right shoulder pain gradually subsided and he started on a rehabilitation program, using Thera-bands and pulleys. PX 1 at 33. By September 6, 2012, Petitioner could elevate his right shoulder to 115 degrees. PX 1 at 34-35.

Dr. Chmell testified that a functional capacity evaluation would be helpful in determining whether Petitioner could perform a job with restrictions. PX 1 at 40. He does not envision Petitioner ever improving to the point where he could resume driving a truck. PX 1 at 40-41. Petitioner's neck and left shoulder symptoms have persisted for a long time.

Under cross-examination, Dr. Chmell testified he recommended a functional capacity evaluation in response to an inquiry from Petitioner's counsel as to whether the 2003 evaluation was still valid. PX 1 at 45. Dr. Chmell testified that, since his previous deposition in 2010, the treatment he has rendered to Petitioner with respect to the left shoulder, cervical spine, low back and left knee has consisted solely of pain medication. He considers Petitioner to be at maximum medical improvement with respect to the left shoulder. PX 1 at 46. He would wait until after Petitioner undergoes contemplated right foot surgery to have Petitioner undergo a functional capacity evaluation. PX 1 at 47. Petitioner cannot walk, stand or climb right now due to his right foot so he would "flunk" a functional capacity evaluation if he underwent one now. PX 1 at 48. In the many years he has been treating Petitioner, Petitioner has not undergone a left knee MRI, let alone therapy, injections or surgery. On October 23, 2010, Petitioner exhibited a left knee effusion, or swelling. PX 1 at 50-52. Dr. Chmell testified he has been prescribing Vicodin for Petitioner for seven years, "intermittently, at least." PX 1 at 53. It is a "good thing" for a patient who is in moderately severe to severe pain to take this

medication but there is a possibility of addiction. PX 1 at 53. He has not recommended any repeat cervical spine surgery to Petitioner. PX 1 at 54. He recommended a repeat cervical spine MRI on October 14, 2002 but it was never approved. PX 1 at 55. Since his July 2010 deposition, he has not recommended any diagnostic exams, therapy or injections for Petitioner's left shoulder or cervical spine condition. PX 1 at 57. He has not recommended treatment because these conditions are permanent and "there is no way to get them better." PX 1 at 57. It is his opinion that Petitioner cannot return to truck driving. He also believes Petitioner needs to get his foot fixed and undergo a functional capacity evaluation to see what type of restricted job he could perform. PX 1 at 58. Petitioner has not been using his right arm since he has been off work but disuse is part of the problem. Petitioner's right rotator cuff "wore out and thinned and eventually tore." It is possible that it would have worn out regardless of the 2001 injury. PX 1 at 59. Since Petitioner is right-handed, it stands to reason he would use his right hand and arm to perform most activities. PX 1 at 59-60. When Petitioner told him, on February 2, 2011, that he was experiencing right shoulder pain "with overhead work," Petitioner probably meant he was "combing his hair" or "changing a light bulb," and not actually working. Petitioner could have been working in his yard. If Petitioner was cutting branches on a tree, that would be an activity he would not want Petitioner to perform. Raking leaves or hitting a nail would be okay. PX 1 at 61. As of 2004, Petitioner's right shoulder was close to normal, if not normal. PX 1 at 62. Petitioner's right shoulder examination was normal on August 27, 2001. That is the only occasion prior to 2011 on which Petitioner complained to him of his right shoulder. PX 1 at 63. Chmell Dep RX 1, a physical therapy note dated November 10, 2004, reflects that Petitioner's right shoulder flexion was 165 degrees and abduction was 170 degrees. These measurements were less than normal. Normal would be 180 degrees. PX 1 at 64-65. Petitioner's right shoulder strength was 4/5, or slightly diminished. PX 1 at 65. Chmell Dep RX 1 shows that Petitioner's right shoulder was "starting to be affected" as of November 10, 2004. The same exhibit also shows the cervical muscle problems Petitioner was starting to have at that time. PX 1 at 67. Dr. Chmell testified he did not impose any restrictions relative to the right shoulder while Petitioner was recovering from the left shoulder surgery. PX 1 at 68-69. By October of 2004, three months after the left shoulder surgery, Petitioner's active range of left shoulder motion and left shoulder strength were "close" to that of the non-injured right shoulder. PX 1 at 72-74. At that point, Petitioner had diminished strength by one grade and some diminution of motion in the left shoulder. PX 1 at 73. Dr. Chmell testified it was on May 5, 2012 that he first cited the right shoulder as one of the conditions affecting Petitioner's ability to work. PX 1 at 77-78. The term "hallux rigidus," as used in his bills, refers to Petitioner's right bunion. PX 1 at 78-79. There are several reasons why Petitioner cannot resume working as a truck driver. One reason is his narcotic pain medication. Another is he would be unable to pass a driving test because he cannot turn his head to the left side satisfactorily. Petitioner has "trouble looking around." Petitioner is capable of driving a car "on some days." On other days, he has to get a ride. PX 1 at 80.

On redirect, Dr. Chmell reviewed a therapy note dated December 20, 2004, documenting right shoulder soreness. He testified that this note is "supportive of the right shoulder condition developing as a consequence of [Petitioner's] cervical and left shoulder injuries." PX 1 at 82. Petitioner's right shoulder condition worsened over time. It was normal

in 2001 and progressively worsened thereafter to the point where his rotator cuff tore. PX 1 at 82

Under re-cross, Dr. Chmell acknowledged that about seven years passed between the right shoulder complaints recorded during therapy in 2004 and those he recorded in 2011. Petitioner's right rotator cuff "didn't spontaneously tear." Rather, it "wore out and got thinner." The right rotator cuff got thinner despite the fact Petitioner was not working per his restrictions. PX 1 at 84-85.

On further redirect, Dr. Chmell testified that he did not restrict Petitioner's use of his right shoulder because you cannot tell someone to stop living his life simply because there is a risk of a problem developing. PX 1 at 85-86.

Under further re-cross, Dr. Chmell testified it is possible Petitioner's right rotator cuff tore due to everyday activities. PX 1 at 86.

Respondent offered into evidence Dr. Gleason's deposition of January 29, 2013. The Arbitrator overruled the various objections Petitioner raised to Dr. Gleason's Section 12 examination and deposition. At the doctor's deposition, Petitioner's counsel claimed he had been "blindsided" by Respondent seeking "yet another" Section 12 examination by a different examiner after Dr. Chmell's deposition of October 4, 2012. RX 1, pp. 4-5. The Arbitrator is mystified by this claim. Indeed, the Arbitrator is mystified by the lengthy timeline associated with this case. Hearings in all workers' compensation cases are to be "simple and summary." The hearings held in this case have been anything but "simple and summary." The first trial, guised as an "emergency" 19(b) hearing, was held more than nine years after the accident. The subsequent hearings, held in February and March of 2013, were held months after the original August 2012 trial setting, despite the Arbitrator's best efforts at "red line" monitoring. With Petitioner, in 2012, claiming a new right shoulder condition deriving from a left shoulder injury sustained in 2001, and with Dr. Chmell's deposition not proceeding until early October 2012, it is difficult to see how Petitioner could be arguing that Respondent was not entitled to another Section 12 examination.

Dr. Gleason is a fellowship-trained board certified orthopedic surgeon. He has been in private practice since 1985. RX 1 at 6-7. He performs between 320 and 350 surgeries annually. RX 1 at 8.

Dr. Gleason testified he devotes about 5 to 10 percent of each work week to medical-legal consulting. RX 1 at 9.

Dr. Gleason acknowledged having no personal recollection of Petitioner. RX 1 at 12. He relied on his report while testifying. He obtained a history of the work accident and subsequent treatment solely from Petitioner. RX 1 at 17. Petitioner reported experiencing increased right shoulder pain after his left shoulder surgery. RX 1 at 16. Petitioner complained of neck pain and "clicking," a limited range of neck motion and pain and stiffness in both shoulders. RX 1 at

17-18. On cervical spine examination, Petitioner exhibited a normal range of motion. RX 1 at 19-20. On bilateral shoulder examination, Petitioner exhibited abduction on the right to 150 degrees and on the left to 160 degrees. Abduction was "slightly diminished" relative to normal, with normal generally being between 160 and 170 degrees. RX 1 at 21-22. Otherwise, Petitioner's shoulder range of motion was "absolutely acceptable." RX 1 at 21. Impingement and crossover testing were negative. RX 1 at 24-25. O'Brien's was also negative, meaning there was no suggestion of a labral tear. RX 1 at 25. Nor was there any suggestion of instability. RX 1 at 26. Cervical spine X-rays showed a healed fusion at C4-5, with the fusion in good alignment, and cervical spondylosis minimally at C5-6 and more moderate at C6-7. RX 1 at 26. Multiple shoulder X-rays showed no evidence of fracture, dislocation, bone or joint pathology. RX 1 at 27.

Dr. Gleason testified he routinely reviews shoulder MRIs and performs shoulder surgery in the course of his practice. RX 1 at 28, 29. He interpreted Petitioner's right shoulder MRI as showing tendinopathy involving the rotator cuff with a suggestion of partial tearing of the supraspinatus tendon, as well as subchondral cystic changes and arthritic changes to the AC joint. RX 1 at 27.

From a neck and shoulder perspective, Dr. Gleason felt that Petitioner was capable of resuming full-time work, "restricted with respect to his neck and shoulders only insofar as activities that might involve heavy lifting and excessive overhead use." RX 1 at 31. He encouraged Petitioner to perform home exercises. He felt that occasional use of over-the-counter medication or alternative nonsteroidal anti-inflammatory medication might be beneficial. RX 1 at 31.

Dr. Gleason testified he is familiar with the concept of "maximum medical improvement." It is possible that a person who has reached maximum medical improvement might need therapy or medication from time to time. RX 1 at 31-32.

Dr. Gleason testified that, in his opinion, Petitioner's right shoulder condition is in no way a result of the 2001 accident. RX 1 at 32. He based that opinion on his examination, his review of Petitioner's records and his knowledge and experience. He noted that Petitioner did not voice right shoulder complaints at the time of the accident and that Dr. Ghanayem did not note any right shoulder complaints when he examined Petitioner in 2005. RX 1 at 32-33.

Dr. Gleason testified that he does not believe Petitioner suffers from overuse syndrome. Nor does he agree with Dr. Chmell's "altered motion" theory. He cannot fathom how "some neck pain which [Petitioner] had would cause alteration in the right shoulder motion to the degree where years later he would require surgery to his right shoulder." RX 1 at 34-35. Petitioner improved following his cervical spine surgery. He cannot see how a successful cervical spine surgery resulting in a normal range of motion is going to cause abnormal motion of the right shoulder resulting in the need for surgery. RX 1 at 35.

Dr. Gleason expressed agreement with Dr. Ghanayem's finding of maximum medical improvement. RX 1 at 37-38. Based on the job description Petitioner provided, Petitioner is capable of resuming his former truck driving duties. RX 1 at 38.

Under cross-examination, Dr. Gleason testified that adult spinal problems and joint replacement surgery are two of his special interests. RX 1 at 39. Only about 1 to 2 percent of the surgeries he performs involve the shoulder. RX 1 at 40-41. About 70 percent of his medical legal work is performed at the request of defendants. RX 1 at 42.

Dr. Gleason testified that Petitioner did not dictate any part of his history into a recording device. RX 1 at 54.

Dr. Gleason testified he knows Dr. Chmell from a professional standpoint. He does not know anything critical of Dr. Chmell. RX 1 at 59-60. Dr. Chmell obtained an excellent result from the two shoulder surgeries he performed on Petitioner. RX 1 at 60. Dr. Gleason testified he has no criticism of the treatment Petitioner underwent. RX 1 at 60.

Dr. Gleason acknowledged it is possible that some doctors would characterize Petitioner's neck range of motion as limited. RX 1 at 64.

Dr. Gleason acknowledged he saw Petitioner on only one occasion, on October 30, 2012, with his examination lasting no more than 30 minutes. RX 1 at 68. He does not find Petitioner's right forearm and elbow circumference measurements to be significant. People who are right-handed often have somewhat larger muscles in their dominant extremities. RX 1 at 69-70. Petitioner was cooperative with his examination and did not try to fake anything. RX 1 at 72. He charged Respondent $491 for his examination and $300 for his review of additional records. RX 1 at 72. He also charged $382 for the X-rays he took and $100 for a telephone conversation he had with Respondent's counsel. RX 1 at 72-73. During at least the last ten years, he has given two to three depositions per month. RX 1 at 73-74. He cannot say how many of these depositions were taken in workers' compensation cases. RX 1 at 74.

Dr. Gleason acknowledged he did not review the physical therapy records from December of 2004 and January of 2005. RX 1 at 83. The complaints of right shoulder pain noted in those records did not prompt him to alter his previously stated causation opinion, given the passage of time between the accident and the complaints and because the therapist indicated Petitioner did not link the complaints to any specific activity. RX 1 at 84. In his opinion, the right shoulder complaints that led to the need for surgery in 2012 stemmed from the natural aging processes in addition to the activities of daily life. RX 1 at 86-88. Petitioner was 49 years old as of his Section 12 examination. People of that age "frequently have abnormal findings in their shoulders which could include either a partial tearing or partial-thickness wearing of tendons . . . as well as arthritic changes." RX 1 at 88.

Dr. Gleason testified he might have had an occasion to complete DOT paperwork but he could not specifically recall when he last did this. He is not familiar with DOT regulations. He

has no opinion as to whether a person who is taking Vicodin would not pass a DOT physical. RX 1 at 90.

On redirect, Dr. Gleason testified he has performed hundreds of shoulder surgeries over the course of his career. RX 1 at 92. The 2004 and 2005 therapy notes do not affect his opinions because they document "only a couple of complaints unrelated to any activity four years after the injury to the other shoulder and neck over a period of a week which got better." RX 1 at 94. He does not believe that Petitioner requires Vicodin. If, for some reason, Petitioner did need Vicodin, and took this medication at night, it should not affect his performance during the day. RX 1 at 94-95.

Under re-cross, Dr. Gleason testified that, since he is "detached and completely objective," he is in as good a position as anyone to comment on causation and treatment. RX 1 at 96. He does not know whether Dr. Chmell is "completely objective" since he has treated Petitioner over a ten- to eleven-year period. RX 1 at 96-97. In terms of his objectivity, he gets paid for his time regardless of who is paying the bill. RX 1 at 97-98.

Arbitrator's Conclusions of Law

Is Petitioner barred from seeking benefits for his claimed right shoulder condition of ill-being by virtue of the "law-of-the-case" doctrine? If not, did Petitioner establish a causal connection between his work accident of 2001 and his current right shoulder condition of ill-being?

Respondent maintains that Petitioner is barred from seeking benefits relative to his claimed right rotator cuff condition of ill-being by virtue of the "law-of-the-case" doctrine. Specifically, Respondent argues that the Arbitrator is bound by the Commission's previous findings that Petitioner established causation only as to his cervical spine, left shoulder, left knee and lumbar spine and that Petitioner reached maximum medical improvement on September 2, 2005. Respondent correctly points out that Petitioner opted not to appeal these findings and that the Commission's decision thus became final.

Petitioner maintains the "law of the case" doctrine does not act as a bar because his right rotator cuff tear was not diagnosed until after the 19(b) hearing held in 2010 and because that tear stemmed from a condition that the Commission found to be causally related to his 2001 work accident, i.e., his cervical spine condition.

Under the law-of-the-case doctrine, the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit. Miller v. Lockport Realty Group, Inc., 377 Ill.App.3d 369 (2007). The Appellate Court has held that principles underlying the law-of-the-case doctrine should be applied to matters resolved in proceedings held before the Commission. Irizarry v. Industrial Commission, 337 Ill.App.3d 598 (2003).

The Arbitrator finds that the law-of-the-case doctrine does not bar Petitioner from claiming benefits relative to his claimed right rotator cuff tear. The Commission could not have addressed, let alone settled, the question of whether the work accident of 2001 caused this tear because the tear was not diagnosed until April of 2012, well after the 2010 19(b) hearing. [While there is evidence indicating Petitioner complained of right shoulder pain while undergoing left shoulder therapy in late 2004 and early 2005 (PX 10 [19(b) hearing], Chmell Dep RX 1), six years before the 19(b) hearing, there is no evidence indicating any physician recommended diagnostic testing or care at that time.] In Weyer v. IWCC, 387 Ill.App.3d 297 (1st Dist. 2008), the Court held that the law-of-the-case doctrine does not prohibit the litigation of new legal and factual issues. Specifically, the Court held that the Commission's unappealed decision, affirming an arbitrator's finding of causation as to a left shoulder condition, did not bar the arbitrator from finding, at a second 19(b) hearing that a later diagnosed left shoulder SLAP tear did not stem from the work accident. In the instant case, the Arbitrator views the issues attendant to the claimed right rotator cuff tear to be "new." The Arbitrator also views the Commission's finding of maximum medical improvement to be applicable only to those body parts (i.e., the cervical spine, left shoulder, lumbar spine and left knee) specifically found to be causally related.

The Arbitrator turns to the issue of whether Petitioner established causation as to his right rotator cuff condition. The Arbitrator finds that Petitioner failed to meet his burden of proof on this issue. Dr. Chmell espoused two causation theories: 1) Petitioner's right shoulder worsened over time due to overuse and eventually "gave out"; and 2) Petitioner's cervical spine condition caused "altered shoulder mechanics" and those "altered mechanics" resulted in thinning, and eventually tearing, of the right rotator cuff. The "overuse" theory does not make much sense for two reasons. First, Petitioner claims to have not worked in any capacity for many years. He was thus presumably not being called upon to use his shoulders in a taxing way. Second, Petitioner would have always tended to use his right arm more than his left, given that he is right-handed. Neither of Dr. Chmell's theories is supported by Petitioner's testimony or treatment records. Petitioner did not testify that his right shoulder complaints developed gradually. In fact, he did not offer any testimony on direct examination as to when, or in what context, he began noticing right shoulder symptoms. Under cross-examination, he testified he has experienced right shoulder complaints "since the crash." The treatment records are not consistent with this testimony. A physical therapist noted intermittent right shoulder complaints in late December 2004 and early January 2005, about four years after the accident, unrelated to any specific activity. The therapist was rendering care pursuant to Dr. Chmell's prescription but there is no indication Dr. Chmell viewed the right shoulder complaints as significant. He did not prescribe any right shoulder care at that time. Petitioner continued seeing Dr. Chmell on a regular basis thereafter. To the extent that Dr. Chmell documented shoulder complaints prior to February 27, 2011, those complaints were left-sided. On February 27, 2011, Dr. Chmell noted a complaint of "some right shoulder pain" relative to a specific activity, "overhead work." The note does not describe the nature of the "work" Petitioner was alluding to. When Dr. Chmell next noted right shoulder pain, in October of 2011 and April of 2012, the pain was significant, with Petitioner comparing it to the pain he experienced when he tore his left rotator cuff. By the time Dr. Chmell made these notations, more than ten years

had passed since the 2001 work accident and about ten years had passed since the 2002 cervical fusion. In support of his "altered mechanics" theory, Dr. Chmell testified that he noted a positive Spurling's maneuver each time he saw Petitioner. This testimony is not borne out by the doctor's records.

As noted earlier in this decision, the Arbitrator rejected Dr. Chmell's supplemental report of February 21, 2013 (PX 3). The Arbitrator acknowledges the Commission may not agree with her decision to reject this report. Even when PX 3 is taken into consideration, the Arbitrator's conclusion is the same. The fact that Dr. Chmell and Dr. Gleason reach different conclusions as to Petitioner's cervical spine range of motion does not make Dr. Chmell's overuse or "altered mechanics" theories any more plausible, in the Arbitrator's view.

Is Petitioner entitled to medical expenses?

Petitioner seeks an award of medical expenses stemming from treatment rendered by Dr. Chmell and other providers since the first hearing. Respondent maintains that Petitioner is entitled to no medical expenses, citing the Commission's finding of maximum medical improvement and its arguments as to Petitioner's claimed right shoulder condition of ill-being.

The Arbitrator has previously found that Petitioner failed to establish causation as to his claimed right shoulder condition of ill-being. Consistent with that finding, the Arbitrator declines to award the Community Healthcare right shoulder MRI bill of $3,027.00 (PX 5), the 25 East Same Day Surgery bill for the right shoulder surgery of June 6, 2012 (PX 7), the Metro Anesthesia bill for services rendered on June 6, 2012 (PX 8), the SyMed arm sling bill of $70.00 (PX 9) and Dr. Chmell's right shoulder surgery fee of $4,026.00 (PX 2).

The Arbitrator also declines to award Dr. Chmell's surgery fee of $1,805.00 for the right bunion surgery he performed on October 31, 2012 (PX 2). The Commission did not find causation as to Petitioner's claimed right foot condition of ill-being.

The Arbitrator also declines to award the $5,400.00 bill from Tinley Park MRI for the brain, left knee and lumbar spine MRI scans Petitioner underwent on November 21, 2012 per Dr. Chmell. PX 4. The Commission found that Petitioner established causation as to his claimed left knee and lumbar spine conditions but only as to sprains and only through two dates in 2001. The Commission did not find causation as to a head or brain injury and Petitioner failed to establish any clear relationship between his cervical spine condition and the need for the brain MRI, which proved to be negative. Dr. Chmell did not prescribe the brain MRI until October 31, 2012, after he gave his deposition. Dr. Chmell did not draw any link between the work accident and Petitioner's complaint of headaches in his note of October 31, 2012. PX 2. Nor did Dr. Chmell address the origin of Petitioner's headaches in his supplemental report of February 21, 2013. PX 3. [As noted previously, the Arbitrator rejected PX 3 based on objections raised by Respondent at the March 27, 2013 hearing but nevertheless addresses PX 3 in the event the Commission disagrees with the Arbitrator's evidentiary ruling.]

The Arbitrator also declines to award the outstanding balance of $461.92 from the Injured Workers' Pharmacy (PX 6) and the various bills relating to Petitioner's visits to Dr. Chmell. The pharmacy balance relates to Hydrocodone prescribed by Dr. Chmell from April 9, 2012 through February 22, 2013. In the Arbitrator's view, Petitioner failed to establish the reasonableness and necessity of Dr. Chmell's routine, repeated doling out of Hydrocodone. At his deposition, Dr. Chmell acknowledged he has been prescribing this medication for Petitioner for seven years. When Respondent's counsel inquired as to the reasonableness of this practice, the doctor merely indicated that he views narcotic opioids as a good method of addressing moderate to severe pain. He went on to acknowledge the addictive properties of such opioids. Petitioner testified to taking Vicodin ES two to four times per day (T. 2/27/13 at 50) but he did not testify that he derives any relief from this medication.

The Arbitrator also declines to award the Northshore University Healthsystem bill of $113.00 stemming from Petitioner's December 13, 2012 visit to Dr. Stadlan. The records in PX 10 reveal that Petitioner saw Dr. Stadlan and his assistant on December 13, 2012 due to low back complaints. With respect to the lower back, the Commission found that Petitioner established only a strain, with causation ending in 2001. It was not until his next visit to Dr. Stadlan, on March 14, 2013, that Petitioner voiced complaints relative to his cervical spine. PX 10 does not contain any bill relating to the March 14, 2013 visit.

The Arbitrator awards Petitioner only one medical bill, namely the Neurology Associates bill of $225.00 for Petitioner's visit to Dr. Fagan on January 10, 2013. In awarding this bill, the Arbitrator has considered the effect of the Commission's finding as to maximum medical improvement. In the Arbitrator's view, this finding, while final, does not preclude a subsequent award of expenses relating to medical monitoring of a permanent condition. Respondent's examiner, Dr. Gleason, conceded it is possible for a patient with a permanent condition to require periodic care. One of Petitioner's purposes in seeing Dr. Fagan was to obtain repeat cervical spine X-rays. Given that Petitioner has surgical hardware in his neck, and given his ongoing neck complaints, the Arbitrator finds it reasonable for him to want to make sure that his fusion is intact. Dr. Fagan also prescribed a home exercise program for Petitioner's neck condition. The Arbitrator finds Petitioner's visit to Dr. Fagan to be reasonable and necessary, as well as related to a condition that the Commission linked to the work accident.

Is Petitioner entitled to temporary total disability benefits? Is Petitioner entitled to vocational rehabilitation and maintenance? If not, is Petitioner entitled to permanency?

The Commission found that Petitioner established causation as to four body parts (with causation as to the left knee and lumbar spine ending in 2001) and reached maximum medical improvement as to his cervical spine and left shoulder on September 2, 2005. Arb Exh 2, 2/27/13 hearing. Petitioner did not appeal this finding. Petitioner now claims temporary total disability benefits running from October 23, 2010 (the first date on which Petitioner saw Dr. Chmell after the first hearing) through the second hearing of February 27, 2013. Petitioner's claim for these benefits is premised, to a large extent, on his claimed right shoulder condition of ill-being, for which he underwent surgery in 2012. The Arbitrator has already found that

Petitioner failed to establish a causal connection between his undisputed work accident of 2001 and his right shoulder condition of ill-being. Alternatively, Petitioner claims he is entitled to benefits by virtue of Dr. Chmell's many "off work" notes and ongoing treatment. However, Dr. Chmell freely acknowledged that Petitioner is only "off work" in the sense he cannot resume truck driving. He also acknowledged that Petitioner's current cervical spine and left shoulder treatment regimen essentially consists of supplying Petitioner with Hydrocodone. When more active treatment, in the form of physical therapy recommended by Drs. Stadlan and Fagan, became an option, Petitioner declined it.

The Arbitrator views Petitioner's causally related cervical spine and left shoulder conditions as having stabilized long ago. The Arbitrator declines to award temporary total disability benefits, as requested by Petitioner. Interstate Scaffolding v. IWCC, 236 Ill.2d 132 (2010).

The Arbitrator also declines to award "prospective care," in the form of a repeat functional capacity evaluation, or vocational rehabilitation, as requested by Petitioner. The first hearing in this case took place in October of 2010, more than nine years after the accident and long after Petitioner began receiving Social Security disability benefits. In National Tea v. Industrial Commission, 97 Ill.2d 414 (1983), the Supreme Court held that vocational rehabilitation should not be awarded if there appears to be little chance it will lead to employment. The Arbitrator does not view vocational rehabilitation as a realistic goal in this case, given Petitioner's multiple health conditions and testimony that he has not worked in any capacity in a decade.

Based on the Commission's finding as to maximum medical improvement, the foregoing finding that Petitioner failed to establish causation as to his right shoulder condition and the very protracted nature of this litigation, the Arbitrator finds it appropriate to make permanency awards relative to Petitioner's cervical spine and left shoulder conditions of ill-being. [The Arbitrator declines to award permanency for the left knee and lumbar spine conditions based on the Commission's unappealed finding that those conditions amounted to strains that resolved at two different points in 2001.] With respect to the cervical spine condition of ill-being, the Arbitrator awards permanent partial disability benefits equivalent to 35% loss of use of the person as a whole, or 175 weeks of compensation, at the applicable maximum rate of $516.15 per week. In making this award, the Arbitrator notes that Petitioner underwent a cervical discectomy and fusion in 2002, that this surgery did not resolve his neck discomfort and that he continues to experience difficulty turning his head to the left. The Arbitrator also notes that, while Respondent's examiner, Dr. Gleason, found Petitioner capable of full-time work, he conceded Petitioner should avoid performing heavy lifting and excessive overhead activities. RX 1 at 31. With respect to the left shoulder condition of ill-being, the Arbitrator awards additional permanent partial disability benefits equivalent to 15% loss of use of the person as a whole under Section 8(d)2, or 75 weeks of compensation, at the applicable maximum rate of $516.15 per week. In making this award, the Arbitrator notes that Petitioner underwent a left rotator cuff repair, acromioplasty and lateral clavicle resection in October of 2004 and that

Respondent's shoulder examiner, Dr. Cole, recommended significant restrictions on March 14, 2005, despite the fact he viewed Petitioner's complaints as disproportionate.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Andrea Ospina,

Petitioner,

vs.

NO: 10 WC 19154

14IWCC1092

Mercy Hospital,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Arbitrator found that the work-related injuries Petitioner sustained caused the loss to the extent of 35% of use of the right leg and the loss of use of the left leg to the extent of 30%. The Commission views the evidence as to the permanency of the left leg differently and finds that the Petitioner's injuries caused loss of use to the extent of 17.5% of the left leg.

The evidence shows that the Petitioner fell at work on April 9, 2010. Her left leg twisted and went underneath her when she fell. She was seen in the Respondent's emergency department where clinical examination of the left leg revealed tenderness but no swelling or limited range of motion. Bilateral x-rays revealed degenerative joint disease but no effusion.

On May 26, 2010 Petitioner was seen by Dr. Michael Maday, an orthopedic surgeon at Mercy Hospital who recommended surgery on the left knee to address meniscal changes and degeneration in Petitioner's left knee which had been identified in an MRI on April 26, 2010. This surgery was not performed due to the recent placement of a stent in Petitioner's heart.

Petitioner was not given medical clearance and was advised to wait. At no time in the course of events that followed was left knee arthroscopy again recommended or performed.

By July 15, 2010 when seeking medical care from her primary care physician for an unrelated medical issue the Petitioner expressed no left knee complaints. Petitioner began expressing complaints of right knee pain beginning in August, 2010. In October, 2010 Petitioner reported to Dr. Craig Westin that she was experiencing more pain in the right leg than the left. Her right knee pain presented as the predominant complaint over the following months.

Petitioner underwent arthroscopic surgery on her right knee on November 23, 2010. Dr. Westin performed partial medial and lateral meniscectomies, debridement of a grade 3 chondromalacia of the medial trochlea and medial femoral condyle and removal of a loose body.

Petitioner remained off duty following her right knee surgery until December 27, 2010. She was declared as having reached maximum medical improvement on February 28, 2011 and released from treatment by Dr. Westin.

On April 4, 2011 Petitioner complained of pain in both knees upon returning to full duty employment. Complaints of bilateral knee pain were expressed by Petitioner throughout the spring and summer of 2011.

Petitioner returned to see Dr. Westin for knee complaints on October 31, 2011. At that time he injected the right knee and recommended intermittent rest periods while working. He stated that he would consider injection of the left knee depending upon the relief obtained from the right knee injection.

On June 3, 2013 Petitioner reported to Dr. Westin, her treating orthopedist that she is experiencing more pain in the right leg than in the left. He injected the right knee with cortisone. Dr. Westin discussed right knee replacement surgery.

On September 23, 2013 Dr. Westin documented that right knee replacement was again discussed. The Petitioner has opted not to undergo right knee replacement.

The pain in Petitioner's left leg has been intermittent over the course of time following Petitioner's work-related fall. The majority of complaints, treatment and work restrictions have been related to Petitioner's right leg. It appears from the medical records that the Petitioner's on-going right leg problems, the need for surgery and the intractable pain that has followed has been the genesis of most of Petitioner's disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $334.29 per week for a period of 12 1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

14IWCC1092

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $300.29 per week for a period of 75.25 weeks, as provided in §8 (e) of the Act, for the reason that the injuries sustained caused the loss of use of 35% of the right leg totaling $22,596.82 and that Respondent shall pay the Petitioner the sum of $300.29 per week for a further period of 37.625 weeks, as provided in Section 8 (e) of the Act, for the reason that the injuries sustained caused the loss of use of 17.5% of the left leg totaling $11,298.41.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner for reasonable and necessary medical services reflected in Petitioner's Exhibits 2 through 6 and identified in AX1 pursuant to the medical fee schedule as provided in Sections 8 (a) and 8.2 of the Act, less $9,765.11, the Respondent's Section 8 (j) credit.

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 $57,300.00. 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: DEC 12 2014
SM/msb
o-11-13-14
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC1092

OSPINA, ANDREA
Employee/Petitioner

Case# **10WC019154**

MERCY HOSPITAL & MEDICAL CENTER
Employer/Respondent

On 3/25/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0328 LEWIS & DAVIDSON LTD
ANN-LOUISE KLEPER
ONE N FRANKLIN ST SUITE 1850
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
KAREN HAARSGAARD
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

14IWCC1092

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

ANDREA OSPINA
Employee/Petitioner

v.

MERCY HOSPITAL & MEDICAL CENTER
Employer/Respondent

Case # 10 WC 19154

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **01/21/2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

ANDREA OSPINA
10 WC 19154

FINDINGS

On **04/09/2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$26,074.88**; the average weekly wage was **$501.44.**

On the date of accident, Petitioner was **61** years of age, ***single*** with **no** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services, **as explained** ***infra.***

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services, **as explained** ***infra.***

Respondent shall be given a credit of **$2 days salary** for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $2 days salary.

Respondent is entitled to a credit of $9,765.11 under Section 8(j) of the Act for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims or liabilities that may be made against her by reason of having received such payments only to the extent of the credit.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $334.29/week, from April 10, 2010, through April 26, 2010, and from October 18, 2010, through December 26, 2010, a period of 12 3/7 weeks, less two days for which she received full salary, for a total period of 12 1/7 weeks as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner for reasonable and necessary medical services reflected in Petitioner's Exhibits 2 through 6 and identified in AX1 pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act, less $9,765.11, the Respondent's Section 8(j) credit.

Respondent shall pay Petitioner permanent partial disability benefits of $300.86/week for 139.75 weeks because the injuries sustained caused the 35% loss of the right leg and the 30% loss of the left leg under 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.

14IWCC1092

FINDINGS OF FACT

On the oral motion of Petitioner, case number 09 WC 46062 has been voluntarily dismissed. The disputed issues in the subject matter are: 1) accident; 2) causal connection; 3) medical bills; 4) temporary total disability; and 5) the nature and extent of Petitioner's disability. *See,* AX1.

Petitioner, who as of April 9, 2010, was 61 years of age, began working in Respondent's housekeeping department on June 1, 1992. Her job duties included cleaning and mopping patients' rooms and bathrooms on the eighth floor.

While she was setting up her cart at the start of her shift on April 9, 2010, Petitioner noticed that her mop stick was bent. She called her supervisor, Renee Scott, who directed her to come down to the housekeeping office in the basement to exchange the damaged stick for a new one. Petitioner took the elevator to the basement and start walking down the hall, carrying the stick from which the mop head had been detached. She testified that she suddenly felt something slippery on the floor, lost her balance and fell on both knees, with her left knee twisted under her. She felt an immediate onset of pain.

Petitioner testified that Michael Madden, who worked in the respondent's engineering department, witnessed the fall and came to her assistance. He was joined by Pablo, one of Petitioner's co-workers, Renee Scott, their supervisor; Robin White, the manager of the housekeeping department; and Thelma, a secretary in the department. Petitioner was assisted into a wheelchair and taken to the emergency room, in the hospital, by Pablo. She testified that she noticed that her knees and buttocks were wet and that she was wearing the gym shoes that she always wore for work.

In the emergency room, Petitioner gave a history of a fall about ten minutes earlier in the hospital when she lost her balance while carrying a boom stick, twisting her left leg under her. She complained of severe pain in her left knee, but both knees were examined. The left knee was found to be tender, with limited extension secondary to pain, and note was made of a hematoma. Petitioner was described as a 61-year old female with bilateral knee pain, and bilateral x-rays were ordered. She was discharged with a prescription for Norco, instructions to rest and ice the left knee; she was given an immobilizer, crutches and directions to follow up at Mercy Works within one to two days. (PX6).

While Petitioner was in the emergency room, she was given a copy of an accident report which had been completed by her supervisor which she testified was inaccurate. She requested and was given an Employee Incident Report, which she prepared, signed and delivered to the housekeeping department when she left the emergency room. (PX1).

Petitioner testified that she had sustained previous minor injuries to her knees but had never required any significant treatment and had experienced no injuries to or problems with her knees for several years, prior to fall on April 9, 2010.

On April 12, 2010, Petitioner presented to Mercy Works, where she gave a history of falling in the hospital basement and landing on both knees. She reported that the left knee was hurting more than the right. The assessment was a meniscal tear of the left knee, and an MRI was ordered. She was kept off work until April 26, when she was to return for her next appointment; until then, she was directed to continue wearing the immobilizer. (PX3).

Petitioner testified that when she heard nothing further regarding an MRI, she contacted Mercy Works and was advised that no further treatment was authorized; and that she should follow-up with her own physician. On April 19, 2010, she saw her primary care physician, Dr. Pedro Lopez, who was affiliated with Mercy Hospital. He ordered an MRI, which was performed on April 26, 2010 and demonstrated degenerative changes and tearing of the medial meniscus. Dr. Lopez ordered physical therapy, which was performed at Mercy Hospital. (PX6) & (PX7).

On May 26, 2010, Petitioner was examined by Dr. Michael Maday, of Midland Orthopedic Associates; to whom she was referred by Dr. Lopez. Dr. Maday noted that since her fall, Petitioner had been having increased pain as well as catching and locking symptoms in the left knee, while the right knee was less symptomatic. In view of the fact that she had been asymptomatic prior to the fall and had now experienced two months of symptoms, including catching and locking, he recommended arthroscopic surgery to address the meniscal pathology. Petitioner wanted to proceed with the surgery but had to secure approval from her cardiologist, who had placed a stent in her heart, in February 2010. He advised her to wait. (PX8).

During the spring and summer of 2010, Petitioner continued to experience significant pain in her left knee, and gradually began experiencing worsening pain in her right knee. On September 9, 2010, she reported to Dr. Lopez that she had been experiencing swelling in the right knee for approximately two weeks. He ordered x-rays of the right knee which were performed the next day. No acute abnormality was noted, and an MRI was suggested if the problem persisted. Petitioner saw Dr. Lopez on September 29, at which time he injected the right knee with Depo-Medrol. On October 18, 2010, he took Petitioner off work. (PX7) & (PX9).

Petitioner's testimony at trial regarding her accident is consistent with what she told the representative from Xchanging, Respondent's third-party administrator, when he called her at home, on April 14, 2010. He took a recorded statement from her. The records of the emergency room where she treated immediately after the fall; the Employee Incident Report she completed and submitted on the date of the accident; and the history she gave to her doctors are consistent. (PX1) (PX9-11) (RX4).

On October 23, 2010, Petitioner presented to the emergency room at Mercy Hospital because of severe pain in her right knee. The notes indicate that she was limping and unable to bear weight on her right leg. X-rays were taken; an MRI of the knee was performed; and pain medication was prescribed. The MRI was read to demonstrate a complex tear of the posterior horn of the medial meniscus, extending to both articular surfaces. (PX7).

Petitioner was examined by Dr. Craig Westin, of Illinois Bone & Joint, on October 25, 2010, upon referral of Dr. Lopez. He recommended arthroscopic surgery for the meniscal tear, which he attributed to her fall in April 2010. He restricted her to minimal lifting over ten pounds, no prolonged standing, and no bending, squatting or crawling. Respondent was not able to accommodate her restrictions. (PX11).

Dr. Westin ordered weight-bearing x-rays of both knees, which were performed at Mercy Hospital on October 29. They indicated mild to moderate osteoarthritis of the medial knee joint compartments. (PX11).

After obtaining pre-operative clearance, including blood work and an EKG at Mercy Hospital, Petitioner underwent arthroscopic surgery on her right knee on November 23, 2010. Dr. Westin performed partial medial and lateral meniscectomies, debridement of grade 3 chondromalacia of the medial trochlea and medial femoral condyle; and removal of a loose body, which the operative report indicated probably originated from the trochlea, which was consistent with a blow to the anterior aspect of the knee. (PX11).

Following surgery, Petitioner remained off work, at the direction of Dr. Westin, whom she saw for the first time after surgery on November 29, 2010. He prescribed physical therapy at Mercy Pulaski and released her to return to work, on a regular basis, on December 27, 2010, so she would not lose her job. (PX11).

Petitioner made progress in physical therapy in terms of range of motion, strength and physical therapy, but her return to full duty work aggravated her pain in the right knee. Dr Westin prescribed Celebrex. (PX11).

On February 28, 2011, Dr. Westin discharged Petitioner from treatment and she was told to return as needed. She continued with physical therapy through April 4, 2011. The therapist noted that she had made progress but continued to have knee pain aggravated by prolonged standing at work, as well as an antalgic gait. She also noted Petitioner's complaints of increased pain in the left knee. (PX11).

During the spring and summer of 2011, Petitioner experienced increasing pain in both knees. She consulted Dr. Lopez on June 23, 2011, at which time he recommended that she return to the orthopedic surgeon. Petitioner consulted Dr. Westin on October 31, 2011, complaining that both

knees were equally sore, and that she had to sit down to rest approximately every forty-five (45) minutes. Dr. Westin stated that the strategy would be to delay knee replacement. He injected her right knee and said that depending upon the result, he would consider injecting the left knee, as well. Petitioner testified that the injection only provided temporary relief. (PX9) (PX11).

Petitioner returned to see Dr. Westin on June 3, 2013, complaining of pain in both knees with the right worse than the left. The doctor again discussed total knee replacement, but Petitioner was reluctant to proceed with that surgery. He again injected the right knee but not the left because of concerns about the effects of Cortisone interacting with Petitioner's diabetic condition. When Petitioner saw Dr. Westin on July 1, he did not administer another Cortisone injection because the last had provided only short-term relief while negatively affecting her blood sugar level. Instead, he injected both knees with Synvisc, which provided no longer-lasting relief than the cortisone. Dr. Westin prescribed Tramadol to use at night for pain. (PX11).

Although Dr. Westin has encouraged Petitioner to retire, she testified that she cannot afford to do so. He has offered no treatment options other than a slight increase in pain medication and total knee replacement, which Petitioner remains reluctant to consider. (PX11).

Petitioner testified that currently, she continues to experience severe pain in both knees. The pain is aggravated by walking and standing, and it causes her to limit her driving and all other activities. She used to walk for exercise; now she has intense pain after walking just a block.

CONCLUSIONS OF LAW

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

A decision by the Commission cannot be based upon speculation or conjecture. *Deere and Company v Industrial Commission*, 47 Ill.2d 144, 265 N.E. 2d 129 (1970). A petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d 236, 369 N.E.2d 853 (1977). Where a petitioner fails to prove by a preponderance of the evidence that there exists a casual connection between work and the alleged condition of ill-being, compensation is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v Industrial Commission*, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

The burden is on the Petitioner seeking an award to prove, by a preponderance of credible evidence, all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs. Industrial Commission*, 91 Ill.2d 288, 63 Ill.Dec.

1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956). It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

Petitioner testified in a straightforward and credible, unrebutted manner regarding the circumstances leading to her fall at work. She was on her way to the housekeeping department office to exchange a bent mop handle for a new one, after having been instructed to do so by her manager, when she slipped and fell on an unknown substance on the floor. She acknowledged that she had not observed anything on the floor as she walked down the hall but said that she had not been looking down as she proceeded to the office. She landed on both of her knees with her left leg twisted under her. Afterward she noticed that her pants were wet.

No evidence or testimony was adduced by Respondent to contradict Petitioner's testimony, and the statement of Petitioner's supervisor on the Employee Incident Report in response to the question as to what unsafe act or hazardous condition contributed to the injury that there were "(n)o visible water spills or Hazzards (sic.) in surrounding area of the fall" is not necessarily inconsistent with Petitioner's account of the accident. Based upon Petitioner's credible, unrebutted testimony, the Arbitrator concludes that Petitioner sustained accidental injuries, which arose out of and in the course of her employment by Respondent on April 9, 2010.

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

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

It is established law that at hearing, it is the employee's burden to establish the elements of his claim by a preponderance of credible evidence. *See, Illinois Bell Tel. Co. v. Industrial Comm'n.*, 265 Ill. App. 3d 681; 638 N.E. 2d 307 (1st Dist. 1994). This includes the issue of whether Petitioner's current state of ill-being is causally related to the alleged work accident. *Id.* A claimant must prove causal

connection by evidence from which inferences can be fairly and reasonably drawn. *See, Caterpillar Tractor Co. v. Industrial Comm'n.*, 83 Ill. 2d 213; 414 N.E. 2d 740 (1980). Also, causal connection can be inferred. Proof of an employee's state of good health prior to the time of injury and the change immediately following the injury is competent as tending to establish that the impaired condition was due to the injury. *See, Westinghouse Electric Co. v. Industrial Comm'n*, 64 Ill. 2d 244, 356 N.E.2d 28 (1976). Furthermore, a causal connection between work duties and a condition may be established by a chain of events including Petitioner's ability to perform the duties before the date of the accident and inability to perform the same duties following that date. *See, Darling v. Industrial Comm'n*, 176 Ill.App.3d 186, 193 (1986).

Both the mechanism of injury and the medical evidence establish that Petitioner's current condition of ill-being is causally related to her accident of April 9, 2010.

Petitioner, who had no significant history of knee problems or treatment, testified that at the time of the accident she fell on both knees with the left leg twisted under the right. Initially, the left leg was the more painful. Petitioner's testimony is corroborated by what she wrote on the date of the accident in her Employee Incident Report.

The records of the emergency room, where Petitioner treated immediately after her fall, focus primarily upon the injury to the left knee, but both knees were examined, bilateral X-rays of the knees were ordered, and she is described as having bilateral knee pain. When Petitioner presented to Mercy Works on April 12, 2010, three days after the accident, she gave a history of falling in the hospital basement and landing on both knees and reported that the left knee was hurting more than the right. The assessment was a meniscal tear of the left knee and an MRI was ordered.

On April 19, 2010, Petitioner reported to Dr. Lopez that she had fallen on both knees. He referred her Dr. Maday, whom she saw on May 26, 2010. The intake information completed by Petitioner for the appointment indicated that both knees had been hurting since her fall at work on April 9, and that walking made the pain worse. The doctor's office note indicates that the left knee was more painful than the right, and that it had been locking and catching. He reviewed the MRI performed on April 26, and diagnosed a meniscal tear with degenerative changes. He stated that in light of the fact that she had been asymptomatic prior to the fall and had experienced nearly two months of symptoms including locking and catching, he recommended arthroscopic surgery to address the meniscal pathology. Clearly, he found a causal connection between the accident of April 9 and the condition of ill-being in Petitioner's left knee.

Petitioner testified that throughout the spring and summer of 2010, she continued to experience significant pain in her left knee, and gradually experienced worsening pain in her right knee. On September 9, 2010, she reported to Dr. Lopez that she had been experiencing swelling in the right knee for approximately two weeks. On October 23, 2010, Petitioner was seen in the emergency room

at Mercy Hospital because of severe pain in her right knee. An MRI taken on that date demonstrated a complex tear of the posterior horn of the medial meniscus, extending to both articular surfaces.

When Petitioner was examined by Dr. Westin, he noted that the meniscal tear was consistent with a fall, and that it appeared to him, to a reasonable degree of medical certainty, that her condition of ill-being was caused by her work injury. In the operative report, he identified the probable origin of the loose body found in Petitioner's knee as the trochlea, and he noted that it was consistent with a blow to the anterior aspect of the knee.

No medical opinions were offered by Respondent to contradict those of Drs. Maday and Westin. Respondent relies upon Petitioner's recorded statement to the representative of Xchanging, who called her five days after the accident in which, when asked what she injured, she spoke only of her left knee and did not mention the right. The Arbitrator affords little weight to that omission in view of: 1) Petitioner's testimony that her left knee was hurting more than the right, 2) her obvious concern about having an MRI scheduled for that knee, and 3) in light of her statements to all of her medical providers that she had fallen on both knees and was having pain in both knees.

Base upon the chronology, Petitioner's credible testimony and the uncontroverted opinions of her treating doctors, the Arbitrator concludes that Petitioner's condition of ill-being, in both knees, is causally related to her accident of April 9, 2010.

J. Were the medical services that were provided to Petitioner reasonable and necessary, and has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The respondent's objection to the medical bills introduced in evidence was based solely on liability.

According to Petitioner's exhibits 2-6 and Petitioner's testimony, the Arbitrator finds that Petitioner incurred the following bills for medical treatment necessary to cure or relieve her of the effects of her accidental injuries:

Mercy Hospital & Medical Center	$16,108.00
MercyWorks Occupational Medicine	$259.25
Midland Orthopedic Associates	$10.00
Illinois Bone & Joint	$12,431.00
Hanger Prosthetics Orthotics	$251.00

In view of the Arbitrator's conclusions regarding accident and causal connection, the Arbitrator concludes that Petitioner is entitled to receive payment, from Respondent, for the above-cited bills, subject to the fee schedule of Section 8.2 of the Act and Respondent's credit under Section 8(j).

K. What temporary benefits are in dispute?

Petitioner testified and the medical records confirm that she was taken off work by the emergency room doctor, on the date of accident, April 9, 2010; and that she was kept off work by the doctors at Mercy Works through April 26, 2010. During this period, Petitioner was paid two days of salary for April 12 and 13. She was again taken off work on October 18, 2010, by Dr. Lopez, who released her to return to work on October 25, 2010, with the same restrictions imposed by Dr. Westin that day. As Respondent could or would not accommodate those restrictions, Petitioner remained off work through her surgery on November 23, 2010 and until December 27, 2010, when Dr. Westin, at her request, released her to unrestricted work.

In view of the Arbitrator's conclusions regarding accident and causal connection, the Arbitrator concludes that Petitioner is entitled to compensation for 12-3/7 weeks of compensation for temporary total disability, and after credit for two days of full salary, is entitled to have and receive from Respondent 12 1/7 weeks of compensation for temporary total disability.

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

As a result of her April 9, 2010 accident, Petitioner sustained a radial tear of the posterior horn of the medial meniscus as well as undersurface tearing. The injury caused her immediate pain and swelling, locking and catching. Surgery was recommended but could not be performed at the time because of unrelated cardiac issues.

Petitioner also sustained complex tears of the posterior half of the medial meniscus and of the middle and lateral portions of the lateral meniscus of the right knee. She underwent arthroscopy and partial meniscectomies were performed.

In addition to the meniscal injuries, Petitioner also experienced a worsening of what had been asymptomatic but pre-existing arthritis in her knees. X-rays taken before the accident in 2006 were negative bilaterally for significant abnormalities. X-rays taken on the day of the accident showed only mild degenerative changes bilaterally. By October 27, 2010, x-rays showed mild to moderate osteoarthritis bilaterally, worse on the left but still fairly good on the right according to Dr. Westin. By October 31, 2011, Dr. Westin described the arthritis in both knees as "significant".

Dr. Westin released Petitioner to return to full duty work on December 27, 2010, at her request so that she would not lose her job. By the time she completed physical therapy, in April 2011, she had functional range of motion and strength but continued to have pain aggravated by prolonged standing at work and she walked with an antalgic gait. Petitioner testified to ongoing severe pain in both knees which is aggravated by walking and standing and which causes her to limit virtually all of her activities

including driving. The medical records indicate that injections and oral medications have afforded only limited relief. Dr. Westin has encouraged her to stop working.

Based upon the medical records and the testimony of Petitioner, the Arbitrator concludes that Petitioner has sustained the permanent partial loss of use of her right leg to the extent of 35% thereof and the permanent partial loss of use of her left leg to the extent of 30% thereof.

14IWCC1092

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
10WC19154
SIGNATURE PAGE

L. Thompson Smith
Signature of Arbitrator

March 25, 2014
Date of Decision

MAR 25 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Saineghi,

Petitioner,

vs.

NO. 12 WC 39022

Demar Logistics,

14IWCC1093

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue(s) of causal connection,nature and extent and correctness of wage differential benefits awarded pursuant to Section 8(d)1 of the Act 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 due to a clerical error the Arbitrator overlooked several of the paystubs admitted into evidence as Exhibit 13. The inclusion of these paystubs results in a downward adjustment in the Petitioner's current average weekly rate. The corrected average weekly rate is $51.48 per week. The stipulated AWW is $1,038.32 - $51.48 = $986.84 x 66-2/3 = $657.66 per week.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $692.21 per week for a period of 129 5/7ths 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 the Petitioner the sum of $650.97 per week for 14 3/7ths weeks, that being the period of temporary partial disability as provided in Section 8(a) of the Act. Respondent shall receive credit for

14IWCC1093

amounts paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $94,782.58 to Rush Copley, $40.00 to Valley Imaging and $889.00 to Dr. Milani/Rush Copley, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for amounts paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner $608.00 for reimbursement for the initial vocation evaluation pursuant to Section 8(a).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent partial disability payments in the sum of $657.66 per week for the duration of disability, as provided in §8(d)1 of the Act, for the reason that the injuries sustained caused the loss of earnings.

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. 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: DEC 12 2014
SJM/sj
o-10/02/2014
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SAINEGHI, JOHN
Employee/Petitioner

Case# **12WC039022**

DEMAR LOGISTICS
Employer/Respondent

14IWCC1093

On 3/4/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

5122 PRESBREY NIERMANN & PETERSEN LLC
MICHELLE D PORRO
821 W GALENA BLVD
AURORA, IL 60506

1120 BRADY CONNOLLY & MASUDA PC
BEVERLY MASUDA
10 S LASALLE ST SUITE 900
CHICAGO, IL 60602

14IWCC1093

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

John Saineghi
Employee/Petitioner

v.

Demar Logistics
Employer/Respondent

Case # 12 WC 39022

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Chicago**, on **2/6/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☒ TPD Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **8(d)1 wage differential, reimbursement for initial voc eval $608.00.**

FINDINGS

On **2/3/11**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$53,992.64**; the average weekly wage was **$1,038.32**.

On the date of accident, Petitioner was **65** 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 **$84,217.48** for TTD, **$6,616.69** for TPD, **$0** for maintenance, and **$-0-** for other benefits, for a total credit of **$90,834.17**.

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 **$692.21**/week for **129-5/7 weeks**, commencing **5/4/11**/ through **10/27/13**, as provided in Section 8(b) of the Act. Respondent shall receive credit for amounts paid.

Respondent shall pay Petitioner temporary partial disability benefits of **$650.97**/week for **14-3/7ths** weeks, commencing **10/28/2013** through **2/6/2014**, as provided in Section 8(a) of the Act. Respondent shall receive credit for amounts paid.

Respondent shall pay reasonable and necessary medical services of **$94,782.58 to Rush Copley**, $40.00 to **Valley Imaging**, and $ 889.00 to **Dr. Milani/Rush Copley**, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for amounts paid.

Respondent shall pay Petitioner **$608.00** for reimbursement for the initial vocation evaluation pursuant to Section 8(a).

Respondent shall pay Petitioner permanent partial disability benefits, commencing **2/7/2014**, of **$650.97**/week for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

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.

Carolyn Doherty
Signature of Arbitrator

3/4/14
Date

MAR 4 - 2014

FINDINGS OF FACT

The Arbitrator initially notes that the parties stipulated to the issues of accident and notice. ARB EX 1. At trial, Petitioner testified that he began working 43 years ago for the company known for the last 10 years as Demar Logistics. On the date of accident, 2/3/11, Petitioner worked for the Respondent Demar Logistics. His job duties included making and pulling palettes which required him to lift over 50 pounds on a regular basis.

The parties stipulated that on 2/3/11, Petitioner was assigned to clear off the top of trailer trucks. While performing his duties, Petitioner slipped on a patch of ice on the ground in the yard. Petitioner testified that he fell on all fours and rolled over on his left side. He subsequently noticed discomfort in his left shoulder and reported the accident to George McCardy.

Petitioner was treated in February and March 2011 at Alexian Brothers Hospital and then at Castle Orthopedics through May 2011. Petitioner's treating physician Dr. Saleem diagnosed Petitioner with an acute on chronic massive rotator cuff tear of the left shoulder. PX 2. He determined that the only long term solution for Petitioner was a shoulder replacement. Dr. Saleem referred Petitioner to Dr. Romeo for an opinion in August 2011. Dr. Romeo offered possible options including off work, nsaids and PT to see if it could increase strength and decrease pain over time, r/c repair and joint resurfacing which would have a "low chance of success", or the reverse shoulder arthroplasty. PX2. Dr. Saleem recommended against the r/c repair, and Petitioner opted to have the reverse shoulder replacement. PX2. On 10/10/11 Dr. Pomerance, Respondent's Section 12 examining physician, indicated that none of the procedures would allow Mr. Saineghi to return to lifting as lifting would dramatically shorten the life expectancy of the prosthetic components installed during either shoulder procedure. PX2

Petitioner underwent a total reverse shoulder arthroplasty performed by Dr. Saleem at Rush Copley on 4/30/12. PX 2. Dr. Saleem gave Petitioner permanent shoulder restrictions in November 2012 of no lifting more than 5 to 10 pounds with left arm, no work at or above shoulder level and no reaching or forceful pulling or pushing with that arm. Petitioner was also restricted from repetitive use of the left arm. PX 2. These restrictions were given again on 5/2/13 by Dr. Saleem. PX 7. Petitioner testified that he is not treating currently for his shoulder, has no follow up treatment scheduled and is not taking any medication for his left shoulder. Respondent stipulated at trial that Petitioner is not capable of returning to his old job for Respondent. T. 30.

Dr. Saleem had Petitioner off work from 5/5/11 through 10/27/13. In January 2013, Petitioner began working with Steve Blumenthal and receiving vocational rehabilitation services. PX 9. Mr. Blumenthal indicated that given these services Petitioner could obtain part time employment as an usher or cashier where reaching is limited and earn between $8.73 to $9.22 per hour. PX 9. Petitioner ultimately found a job with McDonald's on his own. T. 29. Petitioner currently works at McDonalds earning $8.25 per hour and the 65 year old Petitioner works 6 hours per week on average. T. 20. Petitioner began this job on 10/28/13. T. 20. Petitioner was paid TTD from 5/4/11 through 9/23/12 and 11/8/12 through 10/27/13 when he found the job at McDonalds. Petitioner was not paid TTD during the 6 week period of 9/24/12 through 11/7/12 and that period remained unpaid at trial. Petitioner requested penalties under Section 19(l) for this unpaid period of TTD. Petitioner was paid TPD for the period of 10/28/13 through 1/7/14 and is requesting additional TPD through trial. ARB EX 1.

On cross exam, Petitioner testified that his TTD benefits were temporarily terminated on 9/23/12 based on Petitioner's failure to accept a volunteer position with Habitat for Humanity. T. 30. Petitioner testified that he did not start the proffered position as he was told by the adjustor Rhonda Harding that his TTD payments would terminate if he took the position. Petitioner was not represented by an attorney at that time. T. 32. Subsequently while in vocational rehab, Petitioner applied for a volunteer spot at Rush Copley Medical Center. T. 34.

Petitioner testified that he found the job at McDonalds on his own and not through vocational rehab. T. 29. PX 10. When he was hired part time he understood that he would work three to four hour shifts and up to 20 hours per week for $8.25 per hour. T. 34. Petitioner testified that it is possible he could work up to 20 hours and that if it was offered he would work 20 hours. T. 38-39. However, he has never been offered 20 hours. The most Petitioner has worked is 11 hours per week. T. 44. PX 13 shows that Petitioner worked 62.09 hours between 10/28/13 through 12/24/13, an 8-2/7 week period wherein he earned a total of $512.25 and an average weekly wage of $61.86.

Petitioner testified that he still feels a pinching in his left shoulder which keeps him up at night. The feeling requires him to dangle his arm off the bed at night to loosen his muscle. T. 26. His shoulder is uncomfortable in the cold. Petitioner is unable to return to driving a semi truck which he did for his entire career. He is not able to lift his grand children or catch a ball. Petitioner is right handed.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

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

The petitioner testified that on February 3, 2011 he sustained an injury to his left shoulder at work when he slipped on ice while trying to clear snow off the tops of trailers. He did not seek treatment immediately and continued to work. Initial treatment was at the Alexian Brothers Occupational Health Clinic on February 23, 2011 after which the petitioner chose to treat at Castle Orthopaedics. On April 27, 2011, Dr. Saleem of Castle Orthopaedics opined that Petitioner had a chronic rotator cuff tear which was exacerbated by his work injury. PX 2. Dr. Saleem referred the petitioner to Dr. Anthony Romeo of Midwest Orthopedics at Rush who, on August 9, 2011, made treatment recommendations, including a reverse total shoulder arthroplasty. Petitioner underwent this procedure on April 30, 2012 which was performed by Dr. Saleem. Post-operatively, Petitioner underwent 5 months of physical therapy after which, on November 18, 2012, Dr. Saleem imposed permanent restrictions of no lifting over 10 pounds, no work at or above shoulder level, no reaching or forceful pushing/pulling with the left arm, and no repetitive use of the left arm.

Based on the foregoing, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the work injury of February 3, 2011.

J. Has Respondent paid the reasonable and necessary medical services?

Based on the Respondent's liability objection and on the Arbitrator's finding of causal connection, the Arbitrator further finds that Respondent is to pay Petitioner the reasonable and necessary medical

expenses incurred in connection with the care and treatment of his injuries. Specifically, Respondent shall pay the bill of Rush-Copley Medical Center in the amount of $94,782.58 (P.X. 5); the bill of Valley Imaging Consultants in the amount of $40.00 (P.X. 6); and the bills of Dr. Milani in the amounts of $386.00 and $503.00 (P.X. 16) pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid. ARB EX 1. The Arbitrator finds that Respondent shall pay the bill of Steve Blumenthal in the amount of $608.00 for the dates of service January 2 and 3, 2013 (P.X. 8).

K. What temporary benefits are in dispute? TTD/TPD M. Should penalties or fees be imposed on Respondent?

At trial, Petitioner requests TTD benefits for the unpaid period of 9/24/12 through 11/7/12, a period of 6-3/7 weeks. Respondent suspended payment of benefits during this period when Petitioner did not accept the volunteer nonpaid position with Habitat for Humanity. The Arbitrator notes that Petitioner was still under restrictions during the unpaid period at issue, Respondent did not offer accommodated work, and Respondent's sole reason for the TTD termination during this period was Petitioner's refusal to take the volunteer position. It is not lost on the Arbitrator that the proffered position was light duty and within Petitioner's restrictions. However, the Arbitrator notes that the position does not fall within the category of light duty work yielding temporary partial disability payment in lieu of TTD payments under the Act as the position was unpaid. In addition, the volunteer position is not the equivalent of an offer of accommodated duty as the position was again, unpaid and not offered by Respondent. Finally, the Arbitrator finds that Respondent's obligation to pay TTD benefits during that period continued regardless of Petitioner's reasons for not taking the volunteer position. Although an individual who is temporarily and totally disabled may benefit on many levels from involvement in a volunteer position within his restrictions, failure to do so does not obviate the need for continued TTD benefits during a period of restricted duty unaccommodated by Respondent. Accordingly, the Arbitrator finds that Respondent shall pay Petitioner TTD for the 6-3/7 week period commencing 9/24/12 through 11/7/12 pursuant to Section 8(b) of the Act.

The Arbitrator notes that the parties stipulated to the TTD periods of 5/4/11 through 9/23/12 and 11/8/12 through 10/27/13. Including the TTD period awarded above, the Arbitrator finds that Respondent shall pay Petitioner TTD for a period of 129-5/7 weeks commencing 5/4/11 through 10/27/13 pursuant to Section 8(b) of the Act. Based on the above, the Arbitrator further finds that Petitioner is not entitled to the requested 19(l) penalties or fees under Section 16 of the Act as Respondent's conduct was not so unreasonable so as to justify the imposition of penalties or fees in this instance.

Finally, the Arbitrator finds that Petitioner shall receive TPD benefits for the period of 10/28/13 through 2/6/14 at the rate of $650.97. Petitioner began his job with McDonalds on 10/28/13 and continued to work in that position at trial. PX 13 represents Petitioner's actual earnings for the 8-2/7 week period of 10/28/13 through 12/24/13. Petitioner worked 62.09 hours between 10/28/13 through 12/24/13, an 8-2/7 week period wherein he earned a total of $512.25 and an average weekly wage of $61.86. Petitioner's stipulated average weekly wage at the time of injury was $1038.32 and his TPD rate is calculated as $1,038.32-$61.86 = $976.46 x 2/3 = $650.97. The Arbitrator notes that PX 13 and Petitioner's testimony regarding his scheduled work hours at McDonalds at the time of trial provides a sufficient basis to award TPD benefits through the date of trial.

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

The Arbitrator notes the parties stipulate that Petitioner cannot pursue his usual and customary line of employment as a semi-truck driver. On October 28, 2013, the petitioner secured suitable employment as a part-time team member at a McDonald's restaurant. When he was hired part time he understood that he would work three to four hour shifts and up to 20 hours per week for $8.25 per hour. T. 34. Petitioner testified that it is possible he could work up to 20 hours and that if it was offered he would work 20 hours. T. 38-39. However, he has never been offered 20 hours. The most Petitioner has worked is 11 hours per week. T. 44. PX 13 shows that Petitioner worked 62.09 hours between 10/28/13 through 12/24/13, an 8-2/7 week period wherein he earned a total of $512.25 and an average weekly wage of $61.86. The Arbitrator finds that PX 13 as buttressed by Petitioner's testimony at trial regarding his work schedule at McDonalds provides a sufficient basis for an award of a wage differential under Section 8(d)(1) of the Act.

Accordingly, the Arbitrator finds that the petitioner is entitled to a wage differential based on two-thirds of the difference between $1,038.32 which is the average amount he earned in the full performance of his occupation as a semi-truck driver, and $61.86 which represents the amount he is able to earn as a team member of a McDonald's restaurant calculated as $1,038.32-$61.86 = $976.46 x 2/3 = $650.97 per week for the duration of the disability.

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

John Welch,
Petitioner,

vs.

NO: 12 WC 40700

Aramark, Inc.,
Respondent.

14IWCC1094

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, 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 January 23, 2014, is hereby affirmed and adopted.

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

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

14IWCC1094

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $16,900.00. 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: DEC 15 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-12/02/14
drd/wj
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

WELCH, JOHN
Employee/Petitioner

Case# **12WC040700**

ARAMARK
Employer/Respondent

14IWCC1094

On 1/23/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0071 BONIFIELD & ROSENSTENGEL PC
JON ROSENSTENGEL
16 E MAIN ST
BELLEVILLE, IL 62220

0560 WIEDNER & McAULIFFE LTD
MARY C SABATINO
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

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
CORRECTED ARBITRATION DECISION

Case # 12 WC 40700

Consolidated cases: ____

14IWCC1094

John Welch
Employee/Petitioner

v.

ARAMARK
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 October 29, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 14IWCC1094

On May 17, 2011, Respondent was operating under and subject to the provisions of the Act.

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

On this date, Petitioner did sustain an accident, but did not sustain a repetitive trauma injury that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $72,703.49; the average weekly wage was $1,398.14.

On the date of accident, Petitioner was 65 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 $5,592.54 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $5,592.54.

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 4, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary total disability benefits of $932.09 per week for six weeks commencing July 16, 2012, through August 27, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $669.64 per week for 25 weeks because the injury sustained caused the five percent (5%) loss of use of the body as a whole, as provided in Section 8(d)2 of the Act.

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

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

William R. Gallagher, Arbitrator
ICArbDec p. 2

January 17, 2014
Date

JAN 23 2014

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on May 17, 2011. According to the Application, Petitioner was pulling a cage of uniforms and he sustained a hernia with the surgery and mesh. Respondent disputed liability on the basis of accident and causal relationship.

Petitioner work for Respondent for 38 years and his job duties consisted of driving a truck and delivering uniforms, shop towels, mats, various paper products, etc. Petitioner used two types of wheeled carts in making these deliveries, a small cart that, when empty, weighed 30 to 40 pounds; and a large cart that, when empty, weighed 100 pounds. When full, the carts could weigh between 300 and 400 pounds depending on what they contained.

On May 17, 2011, Petitioner was in the process of attempting to move a cart that had become stuck in a wheel well. The carts was loaded and weighed approximately 300 pounds. Petitioner leaned over the cart to push and pull on it and, when he did so, he felt a sudden pull in his lower abdominal area. Petitioner reported the accident to his supervisor, Keith Grote, and Petitioner noted that he had an area of redness in his lower abdominal area and a small bubble/protrusion which he estimated to be the size of his thumb. When Petitioner reported the accident to Grote, he offered to show him this area, but Grote declined the opportunity to observe it.

Keith Grote testified on behalf of the Respondent. Grote confirmed that Petitioner reported the accident to him and that he declined the opportunity to view Petitioner's lower abdomen. Grote completed the First Report of Injury (Respondent's Exhibit 2).

Petitioner testified that he had two prior hernia surgeries performed, the first of which took place in 1979. Petitioner testified that the first hernia surgery was between his belly button and the bottom of his rib cage. Petitioner recovered from this procedure without any particular problems or difficulties.

On May 24, 2002, Petitioner was seen by Dr. L. Michael Brunt, a surgeon, who diagnosed him with bilateral inguinal hernias. Dr. Brunt performed surgery on July 11, 2002, which consisted of mesh repair of the bilateral inguinal hernias. Petitioner recovered from this procedure and was able to return to work without restrictions.

Subsequent to the accident of May 17, 2011, Petitioner did not immediately seek medical treatment. Petitioner testified that he deferred seeking medical treatment because of the demands of work and the fact that he was close to retirement age. He also testified that the bulge persisted and that there were occasions in which he would put elastic around his midsection whenever it felt sore.

Petitioner was seen by Dr. Brunt (the same physician who performed the surgery in July, 2002) on May 22, 2012. At that time Petitioner informed Dr. Brunt that approximately nine months prior, he had lifted a heavy object at work and felt a strain in his upper abdomen that had persisted.

Dr. Brunt performed surgery on July 16, 2012, the surgical procedure consisted of repair of recurrent epigastric hernia with mesh. Subsequent to the surgery, Dr. Brunt saw Petitioner on August 14, 2012, and stated that the repair was secure. He restricted Petitioner from doing any heavy lifting for four weeks and stated that Petitioner could return to work at that time. Dr. Brunt saw Petitioner again on October 19, 2012, and noted that Petitioner's condition was continuing to improve although Petitioner still had some soreness/discomfort. Petitioner has not seen Dr. Brunt since that time and he has not sought any other medical treatment for this condition.

On September 14, 2012, the adjuster for Respondent's insurer sent Dr. Brunt a letter requesting his medical records which also stated "Please forward them at your earliest opportunity along with a letter addressing whether you feel Mr. Welch's work activities were the cause of the reoccurrence of his new symptoms or whether they were caused by natural progression following the previous abdominal surgeries." (Respondent's Exhibit 10).

In response to the letter from Respondent's adjuster, Dr. Brunt prepared a report dated October 16, 2012, in which he stated "At the time of the initial consultation, Mr. Welch did report that he had a work injury lifting a heavy object nine months prior with pain that had persisted since that time. However, whether this single event was the cause of the herniation can't be determined. While Mr. Welch's previous surgeries did increase his risk for recurrence, it is impossible to project whether his recurrence was related to an isolated incident vs a natural progression over time." (Respondent's Exhibit 1).

Petitioner testified that he retired shortly after the surgery was performed so he did not return to work for Respondent. Petitioner testified that he did not have any particular problems as a result of the surgery and is able to perform all of the activities that he engaged in prior to the injury. He did state that he can feel the area where the surgery was performed and that it feels thick. He also stated that it is awkward for him to do any lifting or tree climbing, the latter activity which he engages in when he goes hunting.

Conclusions of Law

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

The Arbitrator concludes that Petitioner sustained an accidental injury arising out of and in the course of his employment for Respondent on May 17, 2011.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony about the accident of May 17, 2011, was corroborated by the testimony of his supervisor and Respondent's witness, Keith Grote.

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

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of May 17, 2011.

In support of this conclusion the Arbitrator notes the following:

Subsequent to the accident Petitioner noted an area of redness in the lower abdominal area and a small bubble/protrusion about the size of his thumb. Petitioner offered to show this area to Keith Grote at the time he reported the accident, but Grote declined the opportunity to observe same.

Petitioner testified that he had prior hernia surgeries performed in 1979 and 2002, but that he fully recovered and was able to return to work without restrictions.

Petitioner's treating physician, Dr. Brunt, described the hernia as being "recurrent." Respondent's basis for disputing causality is based on the letter from Dr. Brunt wherein he opined that it was impossible to determine whether the recurrence was related to an isolated incident or a natural progression over time. This was in direct response to a letter from the adjuster which inquired whether Petitioner's work activities were the cause of the recurrence or a natural progression. The question presented to Dr. Brunt is not the standard for causality which does find a causal relationship in the event of an aggravation of a pre-existing condition. Sisbro v. Industrial Commission, 797 N.E.2d 665 (Ill. 2003).

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills associated therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 4, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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

The Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of six weeks commencing July 16, 2012, through August 27, 2012.

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

The Arbitrator concludes that Petitioner has sustained permanent partial disability to the extent of five percent (5%) loss of use of the body as a whole.

In support of this conclusion the Arbitrator notes the following:

Petitioner sustained a recurrent hernia which required surgical repair and mesh. While Petitioner was able to resume all of the activities he performed prior to the accident, he retired subsequent to the surgery. Petitioner testified that the area where the surgery was performed feeds thick and that he feels awkward when doing any heavy lifting or tree climbing.

William R. Gallagher, Arbitrator

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

Shon E. Murphy,
Petitioner,

vs. NO: 13 WC 15004

14IWCC1095

Wal-mart Associates, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total 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. 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 November 4, 2013, 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.

14IWCC1095

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 $7,300.00. 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: DEC 15 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-12/02/14
drd/wj
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

MURPHY, SHON E
Employee/Petitioner

Case# **13WC015004**

WALMART
Employer/Respondent

14IWCC1095

On 10/4/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.04% 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:

2412 BEATTY MOTIL & JONES
ADAM E BERRY
78 E MAIN ST PO BOX 730
GLEN CARBON, IL 62034

0560 WIEDNER & MCAULIFFE LTD
MATTHEW ROKUSEK
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Case # 13 WC 15004

Shon E. Murphy
Employee/Petitioner

Consolidated cases: _____

v.

Wal-Mart
Employer/Respondent

14IWCC1095

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 August 9, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On 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 accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $11,700.00; the average weekly wage was $225.00.

On the date of accident, Petitioner was 32 years of age, single with 1 dependent child(ren).

Petitioner has not received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $7,480.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $7,480.00.

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 pursuant to the stipulation entered into by the parties at trial, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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

Respondent shall pay Petitioner temporary total disability benefits of $225.00 per week for 65 3/7 weeks commencing May 9, 2012, through August 9, 2013.

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)

September 30, 2013
Date

OCT 4 - 2013

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on May 8, 2012. According to the Application, Petitioner was lifting and carrying (40 pound) boxes from a delivery truck and sustained injuries to the upper back, low back and numbness in the right and left legs. This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of temporary total disability benefits and medical expenses as well as prospective medical treatment. Respondent disputed liability on the basis of accident and causal relationship.

Petitioner worked for Respondent as a truck unloader and his job required him to remove boxes of merchandise from a delivery truck. Once Petitioner removed the boxes from the truck, he had to walk across various pallets that were several inches off of the ground while carrying the boxes. Petitioner testified that on May 8, 2012, he was in the process of lifting some boxes that he believed contained laundry detergent, each of which weighed 20 to 25 pounds. While Petitioner was carrying two of these boxes and walking across the pallets, he felt what he described as a "jolt" in his low back and left hip. Petitioner testified that he was only able to work for another 10 to 15 minutes then had to stop because of the intensity of the pain in his back and left hip. Petitioner reported the accident to Respondent on that date but did not seek any medical treatment at that time but he did have someone drive him home.

Petitioner returned to the Respondent's place of business the following day and was directed to call Medcor. The Medcor record was received into evidence at trial and it indicated that while Petitioner was unloading two chemical boxes, he felt a jarring motion to his back and left hip when he put a foot on the pallet (Respondent's Exhibit 1). Petitioner was directed to go to Gateway Occupational Medicine. Neither counsel for Petitioner nor Respondent tendered any medical records from that provider into evidence at trial; however, Petitioner testified that he was referred from Gateway Occupational Medicine to Dr. Rajinder Mahay, who saw Petitioner on May 11, 2012.

Petitioner testified that when he was 15 years old he sustained a back injury as a result of a slip and fall. He described the location of the injury as being to the middle back, not the same area of the back that was injured as a result of the accident of May 8, 2012. Petitioner further testified that he was treated for a brief period of time and that this prior injury completely resolved.

On January 12, 2012, (approximately four months prior to the accident) Petitioner was evaluated by Elizabeth Mincy, a Nurse Practitioner associated with Granite City Physicians Corp (Dr. Mahay is a physician in that same office). NP Mincy's record of that date stated that Petitioner was "...having neck and shoulder and hip and leg pain for some time, worried that he has some kind of arthritis." (Petitioner's Exhibit 2). Petitioner testified that at the time of the January, 2012, consultation that he was experiencing overall soreness and back pain and suspected that he may have had arthritis or gout. Petitioner testified that his pain symptoms at the time of the accident were not like the symptoms he experienced in January, 2012, in particular, that he did not have any radiation of the pain into his legs. Further, Petitioner testified that following the January, 2012, consultation that he did not lose any time from work.

When Petitioner was seen by Dr. Mahay on May 11, 2012, he informed Dr. Mahay that he had pain in the back and left hip for three days and that it started while working and doing heavy labor at Wal-Mart. Petitioner denied any radiation of the pain. Dr. Mahay prescribed some medications and physical therapy and referred Petitioner to Dr. Timothy Penn, an orthopedic surgeon, who initially saw Petitioner on May 16, 2012. Petitioner informed Dr. Penn that he injured himself at work while unloading a truck. Dr. Penn examined Petitioner and opined that he had left buttock and leg pain secondary to a disc herniation.

Dr. Mahay saw Petitioner on May 18, 2012, and recommended that Petitioner have an MRI performed. An MRI was performed on May 30, 2012, which the radiologist opined revealed disc bulging at L4-L5 and L5-S1 as well as a left sided disc herniation at L4-L5 and a central to the right midline disc herniation at L5-S1. On May 31, 2012, Petitioner was seen by NP Mincy, who made note of the MRI results and referred Petitioner to Dr. Christopher Heffner, a neurosurgeon.

While still under Dr. Mahay's care, Petitioner was seen at Gateway Regional Medical Center for a physical therapy evaluation on May 24, 2012. The record from that date stated that Petitioner had "...back spasms while he was working around the 3rd and 4th of May. He continued to work and on 05/08/12 when he was loading a pallet he felt pain that was excruciating in his low back." (Petitioner's Exhibit 2).

At the direction of the Respondent, the MRI of May 30, 2012, was reviewed by Dr. Gregory Christoforidis, a radiologist, on June 15, 2012. Dr. Christoforidis did not examine the Petitioner, he only reviewed the MRI scan. Dr. Christoforidis' reading of the MRI scan was consistent with that of the radiologist who initially reviewed it; however, he also opined that the findings were indicative of a chronic condition and not likely related to a traumatic incident.

Dr. Heffner saw Petitioner for the first time on June 21, 2012. At that time, Petitioner informed Dr. Heffner that he injured his low back lifting heavy boxes and pulling pallet jacks. Dr. Heffner examined Petitioner and reviewed the MRI scan and opined that Petitioner had a herniated lumbar disc and back and leg pain. Dr. Heffner noted that the disc herniations related to the lifting injury of about six weeks prior. He recommended initially trying epidural injections and a TENS unit but, if Petitioner did not respond, that disc surgery at L4-L5 and L5-S1 might be indicated.

Dr. Heffner referred Petitioner to Dr. Anthony Anderson, who examined Petitioner on July 27, 2012. Petitioner informed Dr. Anderson that he sustained a work-related injury on May 8, 2012, after lifting a load of chemical boxes. Dr. Anderson examined Petitioner and reviewed the MRI scan and opined that Petitioner's symptoms were consistent with disc herniations at L4-L5 and L5-S1. He recommended Petitioner have a series of epidural steroid injections.

Dr. Heffner saw Petitioner on August 31, 2012, after Petitioner had undergone two epidural injections which Petitioner stated did not provide him with any relief. At that time, Petitioner's pain complaints were greater on the right than on the left side of the back. Dr. Heffner recommended some additional physical therapy and, if Petitioner did not improve, he would order a myelogram and a post-myelogram CT. A lumbar myelogram and CT lumbar myelogram were obtained on October 9, 2012. Dr. Heffner saw Petitioner on October 19, 2012, and

reviewed the diagnostic studies and opined that Petitioner had a central/left disc protrusion at L4-L5 and a central/right disc protrusion at L5-S1. Dr. Heffner recommended Petitioner have disc surgery at both levels but noted that there was an element of risk because of Petitioner's obesity.

At the direction of the Respondent, Petitioner was examined by Dr. David Robson, an orthopedic surgeon, on December 18, 2012. Petitioner informed Dr. Robson he began having low back pain after stepping onto a pallet with heavy boxes and that this was not the first time he had low back pain but that it was the worst it had ever been. Petitioner also informed Dr. Robson that he had experienced mid and low back pain when he was 15. Dr. Robson reviewed medical records provided to him as well as the diagnostic studies and examined the Petitioner. Dr. Robson opined that Petitioner had degenerative disc disease, herniated discs with calcification, congenital lumbar stenosis, all of which pre-existed the accident of May 8, 2012. He further opined that Petitioner's current symptoms and need for treatment were not causally related to the accident of May 8, 2012, that Petitioner was at MMI and that he could return to work to full duty as it related to his injury of May 8, 2012. Dr. Robson agreed Dr. Heffner's treatment recommendations were appropriate.

Petitioner was seen by Dr. Heffner on May 9, 2013, and Petitioner's symptoms had not improved. Dr. Heffner recommended another MRI scan be performed. When Dr. Heffner saw Petitioner on July 18, 2013, he reviewed the new MRI scan (that MRI report was not tendered into evidence) and opined that its findings were similar to those of the prior diagnostic studies. Dr. Heffner offered Petitioner the option of additional conservative treatment including epidural injections or disc surgery at two levels but he again cautioned Petitioner about the risks of surgery due to his obesity.

Dr. Robson was deposed on August 1, 2013, and his deposition testimony was received into evidence at trial. Dr. Robson's deposition testimony was consistent with his narrative medical report and he reaffirmed his opinions that Petitioner's low back condition was not related to the accident of May 8, 2012, and that all the various conditions were pre-existing. Dr. Robson's opinion was based on the history he obtained from Petitioner which indicated that he had prior low back symptoms and his review of the various diagnostic studies which he opined revealed chronic pre-existing changes that were not related to the accident. On cross-examination, Dr. Robson agreed that if Petitioner's symptoms at the time of the January, 2012, consultation were the same as those that he experienced subsequent to May 8, 2012, that it would have been very hard for Petitioner to perform his work duties of loading/unloading boxes. Further, Dr. Robson agreed that it was possible for an "acute injury" to set off a chronic condition. Dr. Robson also agreed that he could not, with a reasonable degree of medical certainty, attribute Petitioner's current back condition to the prior injury Petitioner sustained when he was 15 years old. (Respondent's Exhibit 6, pp 37-38, 49-50).

Three witnesses testified at trial on the half of the Respondent. Gregory Phelps testified that he was the assistant manager of the Respondent's store in Granite City and that Petitioner reported to him that he experienced pain while unloading boxes. He confirmed that Petitioner would have to walk on pallets as part of his regular duties but that he was not present when the accident occurred.

Ricky Vernoy, a co-worker of the Petitioner, testified that he did not observe anything occur on that date but that Petitioner had complained about his back being sore a few days before the accident. He also stated that he previously observed Petitioner walking with a limp but that Petitioner had always done so because one leg esd shorter than the other. Vernoy only saw the Petitioner working for about five to 10 minutes because he was working in the truck itself moving the boxes and only became aware of the fact that Petitioner was unable to perform his work duties after he departed the area.

Gerald Floyd, Petitioner's supervisor, also testified at trial and stated that he was not working on May 8, 2012, but became aware of the fact that Petitioner was claiming to have sustained a low back injury sometime thereafter. He did agree that Petitioner informed him that his back began to hurt after he had moved some boxes.

Petitioner testified that he still has significant back symptoms and wants to proceed with the surgery recommended by Dr. Heffner. He has not been able to return to work since the accident. At trial, the parties stipulated that if the Petitioner's case was found to be compensable that Respondent would pay all related medical bills pursuant to the appropriate provisions of the Act.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner sustained an accidental injury arising out of and in the course of his employment for Respondent and that his current condition of ill-being is causally related to same.

In support of this conclusion the Arbitrator notes the following:

Petitioner credibly testified about the circumstances of the accident and the symptoms he experienced immediately thereafter. There was no dispute that Petitioner's job duties required him to move heavy boxes out of a delivery truck and walk with them on pallets. None of the three witnesses that testified on behalf of the Respondent specifically denied that Petitioner sustained an accident in the manner in which he described.

The fact that Petitioner had a prior back injury when he was 15 years old is of no particular significance. Petitioner's unrebutted testimony was that he was treated for a brief period of time and recovered from the injury. Respondent's Section 12 examiner, Dr. Robson, agreed that he could not state with a reasonable degree of medical certainty that Petitioner's current back condition was related to that prior injury.

While Petitioner did seek medical treatment in January, 2012, approximately four months prior to sustaining the accident, the treatment was not limited to the low back but included neck, shoulder, hip and leg pain as well. Subsequent to that January, 2012, evaluation, Petitioner did not have any diagnostic studies performed nor did he lose any time from work until after he sustained the accident of May 8, 2012.

The Arbitrator is not persuaded by the opinions of either Dr. Christoforidis, who only reviewed an MRI scan, or Dr. Robson, Respondent's Section 12 examiner. Even though Petitioner did have pre-existing degenerative conditions in his back, the symptoms he experienced were not significant. Petitioner did not seek extensive medical care or treatment, have diagnostic studies performed or receive a recommendation for surgery. Dr. Robson even conceded that an "acute injury" could make such a pre-existing chronic condition symptomatic.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of all the medical bills associated therewith.

Respondent shall pay reasonable and necessary medical services pursuant to the stipulation entered into by the parties at trial, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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

The Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the treatment recommendations of Dr. Heffner.

In support of this conclusion the Arbitrator notes the following:

There is no dispute as to the necessity of the treatment recommendation of Dr. Heffner because Respondent's Section 12 examiner, Dr. Robson, agree the recommended treatment is appropriate.

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

The Arbitrator concludes Petitioner is entitled to payment of temporary total disability benefits for 65 3/7 weeks commencing May 9, 2012, through August 9, 2013.

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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Teresita Maranan,
Petitioner,

vs. NO: 10 WC 22385

Alexian Brothers Medical Center,
Respondent.

14IWCC1096

DECISION AND OPINION ON REVIEW

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

After considering the entire record, the Commission affirms the Arbitrator's decision that Petitioner proved by a preponderance of the evidence that she sustained an accident that arose out of and in the course of her employment for Respondent on May 1, 2009, that timely notice was given and that Petitioner proved her current condition of ill-being is causally related to the accident. In addition to the findings of the Arbitrator in his August 14, 2013 Decision, the Commission makes the following findings of facts and conclusions of law:

To establish causation under the Act, a Petitioner must prove that some act or phase of employment was a causative factor in the ensuing injury. *Land and Lakes Co. v. Industrial Comm'n*, 834 N.E. 2d 583 (2d Dist. 2005). It is not necessary to prove that the employment was the sole causative factor or even that it was the principal causative factor, but only that it was a causative factor. *Republic Steel Corp. v. Industrial Comm'n*, 185 N.E.2d 877 (1962). Whether a causal connection exists between a Petitioner's condition and his employment is an issue of fact to be decided by the Commission. *Tower Automotive v. Illinois Workers' Compensation*

Comm'n, 943 N.E.2d 153 (1st Dist. 2011). In resolving questions of fact, it is within the province of the Commission 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. *Hosteny v. Illinois Workers' Compensation Comm'n*, 928 N.E.2d 474 (1st Dist. 2009). Resolution of conflicts in medical testimony is also within the province of the Commission. *Sisbro, Inc. v. Industrial Comm'n*, 797 N.E.2d 665 (2003).

Bearing these general principles in mind and turning to the facts of this case, the Commission finds it apparent from the record that the Petitioner's current condition of ill-being is causally connected to the May 1, 2009 work accident. Respondent argues that Petitioner failed to prove causal connection existed between the work accident and her current condition of ill-being regarding the left shoulder after May 4, 2009. Respondent argues that Petitioner suffered a prior injury to her left shoulder in a fall in August 2003 and presented to her primary care physician on three occasions that month. Petitioner continued to work full duty during August of 2003 until the work accident of May 1, 2009. The Commission gives little weight to the left shoulder injury in 2003 as Petitioner continued to work full duty and required a minimal amount of conservative care for the left shoulder with no active medical treatment for a six year period prior to the May 1, 2009 work accident.

After the May 1, 2009 accident, Petitioner immediately treated in the Alexian Brothers Emergency Department for left shoulder pain. Petitioner followed up at the Alexian Brothers Occupational Health Center on May 4, 2009 with some improvement in her complaints. She was to continue with Tylenol and home exercises and was released to return to work full duty. Petitioner treated one more time at the Occupational Health Center on May 8, 2009, at which time it was noted that her left shoulder was doing better but she still had pain with stretching and reaching. Petitioner did not treat again for left shoulder complaints until January 30, 2010, at which time she presented to Dr. Subharni. Petitioner testified that she continued to work her full duties as a CNA for Respondent from May 2009 through January 2010 but that she required Tylenol up to three times a day and ice and heat at night for the continued left shoulder complaints. Petitioner testified she did not seek medical treatment in that time period because she was taking over-the-counter pain relievers and hoped the symptoms would go away. Petitioner testified she had no intervening injuries to the left shoulder. An MRI was ordered and performed on April 30, 2010. The MRI showed a 2 mm partial thickness tear of the supraspinatus tendon with diffuse tendinopathy.

Petitioner was referred for treatment with Dr. Lopez for her continuing left shoulder pain and initially treated with him on May 27, 2010. The intake form Petitioner completed stated she had experienced pain in her left shoulder that began gradually after the May 2009 work accident, and the symptoms had been worsening with swelling, aching, and trouble reaching behind her back. Dr. Lopez diagnosed left shoulder impingement with partial or possible full thickness damage to the rotator cuff. Petitioner was given light duty restrictions, a corticosteroid injection, and a prescription for Mobic. Petitioner's complaints continued through the summer of 2010 and Dr. Lopez continued work restrictions and provided additional steroid injections. In the office note of November 15, 2010, Dr. Lopez recommended surgery, as Petitioner had failed conservative care. Dr. Lopez performed an arthroscopic left rotator cuff repair, superior glenoid labral debridement and subacromial decompression with distal clavicle excision on May 20, 2011.

Dr. Coe provided a Section 12 report on behalf of Petitioner dated August 2, 2011. Dr. Coe opined that Petitioner suffered a contusion and strain injury to her left shoulder on May 1, 2009. Dr. Coe opined that the injury caused an internal derangement of the left shoulder with rotator cuff and glenoid labral tearing and aggravation of preexisting degenerative arthritis at the AC joint causing symptomatic left shoulder impingement syndrome. Petitioner did not have significant injury or symptoms in the left shoulder prior to the May 1, 2009 accident and while she continued to work full duty after her accident, she continued to have pain and stiffness and difficulty with her work duties. Dr. Coe noted that at the time he examined Petitioner, she was continuing to recover from the May 20, 2011 surgery with complaints of residual tenderness over the left shoulder joints and associated decreased range of motion. Dr. Coe opined, based on a reasonable degree of medical certainty, that the injury of May 1, 2009 caused Petitioner's current syndrome, need for treatment, and permanent disability to the left arm.

Dr. Hennessy provided a record review dated May 2, 2012 on behalf of Respondent. Dr. Hennessy opined Petitioner did suffer a left shoulder contusion on May 1, 2009 that was treated appropriately with a short period of time off work and medications. Petitioner worked for over a year after the accident at full duty and this fact supported his opinion that Petitioner reached maximum medical improvement for the left shoulder injury on May 4, 2009. Dr. Hennessy opined that no further treatment was necessary for the work related left shoulder contusion and that Petitioner suffered no permanent restrictions to the left shoulder from the work injury. Dr. Hennessey opined that Petitioner was able to work 10 months at full duty with full range of motion, and the treatment Petitioner received in 2010 was related to chronic degenerative processes that were neither altered nor accelerated by the work injury. Dr. Hennessey reiterated his opinions in his October 14, 2012 report after review of additional records and examination of Petitioner.

The Commission finds Dr. Coe's opinions more credible then those of Dr. Hennessey given the lack of intervening accidents and Petitioner's credible testimony regarding ongoing complaints after the work related accident that required regular and continued use of over-the-counter medication. The Commission adopts the opinions of Dr. Coe regarding causation.

After surgery to the left shoulder consisting of rotator cuff repair, debridement of grade 1 SLAP lesion, distal calvulectomy, subacromial decompression and bursectomy and ligament release, Petitioner had extensive therapy and permanent work restrictions placed by Dr. Lopez. Petitioner is able to work a light duty job for Respondent as a unit secretary with her current work restrictions. Petitioner testified she has diminished strength in the left shoulder and difficulty lifting heavier items and also lifting overhead. The last treatment visit with Dr. Lopez in the record on April 23, 2012 noted continued difficulty with reaching up and behind the back with the left arm, but improving range of motion. Petitioner testified she takes Tylenol occasionally to relieve her pain in addition to ice and heat. Petitioner testified she is not actively treating for her left shoulder. For the foregoing reasons, the Commission finds the Arbitrator's award of permanent partial disability is appropriate and is affirmed.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 14, 2013, is hereby affirmed and adopted with additional reasoning.

14IWCC1096

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $538.65 per week for a period of 14-2/7 weeks, 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 pay to Petitioner the reasonable and necessary medical expenses of $55,738.53, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $484.79 per week for 100 weeks, because the injuries sustained caused the 20% loss of use of the body as a whole, as provided in Section 8(d)2 of the Act.

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

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

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: DEC 15 2014

Daniel R. Donohoo

Charles J. DeVriendt

o-10/21/14
drd/adc
68

DISSENT

I would reverse the Decision of the Arbitrator as Petitioner failed to prove causal connection between the May 1, 2009 left shoulder contusion which resolved several days later and the need for arthroscopic surgery on May 20, 2011. Petitioner was examined on the date of accident in the emergency room and also the occupational health department. Although her shoulder was mildly sore, no clinical or diagnostic evidence of underlying structural injury was found. On May 4, 2009, Petitioner returned to the occupational health department and requested a full release to work. She reported some improvement in her symptoms with rest and medication. Petitioner's left shoulder was re-checked one final time on May 8, 2009. Again, Petitioner reported that her shoulder was improving.

The medical records taken as a whole do not support Petitioner's claim that her symptoms persisted after the May 1, 2009 accident. The record shows that Petitioner made no complaints and sought no treatment for the left shoulder through the rest of the year, despite returning to full duty work within several days of the accident. Petitioner did seek medical treatment for unrelated issues during that time. Petitioner suddenly began to complain of left shoulder pain and symptoms beginning in early 2010. Dr. Lopez examined Petitioner on May 27, 2010 on referral from Petitioner's primary care doctor. Petitioner reported a gradual onset of pain and symptoms since December of 2009. Furthermore, the records of Dr. Lopez do not reference the May 1, 2009 accident or describe the mechanism of injury. Petitioner was examined by Dr. Coe at the request of her attorney for a causal connection opinion. Petitioner relayed to Dr. Coe that an IV pole fell on her left shoulder on May 1, 2009 and that her left arm "jerked with the impact." Dr. Coe relied on Petitioner's history of no prior left shoulder problems. Dr. Coe did not address the large gap in treatment. He found causal connection between the contusion and strain sustained on May 1, 2009 and the need for surgery on May 20, 2011.

Petitioner admitted at hearing that she did in fact sustain a prior injury to the left shoulder, although she denied any prior left shoulder injuries on several occasions, including during her examination by Dr. Coe. Petitioner was diagnosed with a left shoulder sprain in 2003 subsequent to a fall; however the injury was not serious. There was no evidence of left shoulder treatment for several years prior to the accident on May 1, 2009. At the request of Respondent, Dr. Hennessy conducted a record review and a §12 examination. Dr. Hennessy discussed Petitioner's overall condition and his opinion that the contusion sustained was not causally related to the need for surgery. Dr. Hennessy opined that the gap in treatment with return to full duty work supports his conclusion that she reached maximum medical improvement for the left shoulder with full range of motion and no deficits by May 4, 2009. He opined that Petitioner's shoulder condition was the result of the normal progression of degeneration in a 57-year-old woman with diabetes and osteoarthritis. I would agree with the opinion of Dr. Hennessy as I believe it is supported by the facts of this case. Respectfully, I dissent from the majority opinion affirming and adopting the Decision of the Arbitrator.

Ruth W. White

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MARANAN, TERESITA
Employee/Petitioner

Case# **10WC022385**

ALEXIAN BROTHERS MEDICAL CENTER
Employer/Respondent

14IWCC1096

On 8/14/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0009 ANESI OZMON RODIN NOVAK KOHEN
JENNIFER J C KELLY
161 N CLARK ST 21ST FL
CHICAGO, IL 60601

0075 POWER & CRONIN LTD
BRIAN RUDD
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Teresita Maranan
Employee/Petitioner

v.

Alexian Brothers Medical Center
Employer/Respondent

Case # **10** WC **22385**

14IWCC1096

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 27, 2013 and July 23, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 1, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$42,014.96**; the average weekly wage was **$807.98**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$538.65**/week for **14 2/7^{ths}** weeks, commencing **May 20, 2011** through **August 29, 2011**, as provided in Section 8(b) of the Act.

Respondent shall pay **$55,738.53** for medical services, as provided in Section **8(a)** of the Act. Respondent is to pay any unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule or the negotiated rate and shall provide documentation with regard to said fee schedule or negotiated rate calculations to Petitioner. Respondent is to reimburse Petitioner directly for any out-of-pocket medical payments.

Respondent shall pay Petitioner permanent partial disability benefits of **$484.79**/week for **100** weeks, because the injuries sustained caused the **20%** 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

August 13, 2013
Date

ICArbDec p. 2

AUG 14 2013

STATEMENT OF FACTS

Petitioner is a certified nursing assistant for Respondent medical center. Presently, she works as a nursing unit secretary. On August 12, 2003, she sustained multiple contusions, including on her left shoulder, when she slipped and fell on a wet floor at work. She presented to Dr. Subhani, her primary care physician, and was treated for that condition until August 23, 2003. On May 1, 2009, she was struck on her left shoulder, at work, by a falling intravenous pole. She described the pole as holding pumps and intravenous bags. She noticed immediate pain and was sent to the emergency room. Petitioner was released to return to restricted work duties. She followed up at the occupational health clinic and with Dr. Subhani. On May 4, 2009 she returned to her regular work duties. On May 8, 2009, Dr. Galassi at occupational health cleared her return to regular work and told her to return for medical treatment as needed.

Petitioner returned to her regular work duties, but her left shoulder symptoms persisted. She testified that on January 30, 2010 she was examined by Dr. Subhani. A left shoulder MRI indicated a "tiny partial thickness tear of the supraspinatus tendon present on a background of diffuse tendinopathy". Dr. Subhani referred Petitioner for orthopedic evaluation.

Petitioner came under the care of Dr. Eugene Lopez at Midwest Sports Medicine. Dr. Lopez's impression was "work-related left shoulder impingement with partial possible full-thickness damage to the rotator cuff and left hand carpal tunnel syndrome". Dr. Lopez ordered a course of physical therapy, limited Petitioner to light duty work, and administered a left shoulder steroid injection. Petitioner received additional steroid injections into the left shoulder on July 15, 2010 and August 19, 2010. During this time, Dr. Lopez continued to restrict her to light duty work. Petitioner testified that she was able to work for Respondent in a modified capacity during this time. Eventually, Dr. Lopez recommended left shoulder surgery.

On May 20, 2011, Petitioner underwent left shoulder surgery consisting of (1) arthroscopically assisted repair of left shoulder rotator cuff tear, (2) debridement of grade 1 SLAP lesion, (3) a 10 millimeter distal

clavulectomy, (4) subacromial decompression and bursectomy, and (5) coracoacromial ligament release and resection (PX5,pp112-113).

Following surgery, Dr. Lopez completely restricted Petitioner from working. Petitioner remained off of work from May 20, 2011 through August 29, 2011. Petitioner did not receive any temporary total disability benefits from Respondent while she was off of work. Dr. Lopez released Petitioner to light duty work on August 29, 2011, and she was able to resume working in a modified job with Respondent.

Dr. Lopez ordered physical therapy, and Petitioner did so at Accelerated Rehabilitation. Petitioner's final visit with Dr. Lopez was on April 23, 2012, at which time significant improvement in the left shoulder symptoms was noted. However, Petitioner reported ongoing pain when trying to reach up and behind her back. Dr. Lopez imposed permanent work restrictions of no repetitive work, no pushing and pulling and no overhead work. He also restricted her lifting to 20 pounds and recommended light office work only, and he ordered additional physical therapy.

At her attorney's request, Petitioner was evaluated by Dr. Jeffrey Coe. He opined that there is a causal relationship between Petitioner's work injury of May 1, 2009 and her left shoulder symptoms and medical treatment.

At Respondent's request, Dr. Ryon Hennessy performed a record review on April 2, 2012 and performed a Section 12 evaluation on October 19, 2012. He opined that Petitioner sustained a left shoulder contusion secondary to the work injury of May 1, 2009, for which she reached maximum medical improvement on May 4, 2009. He further opined that any medical treatment to the left shoulder beginning in February or March 2010 is unrelated to the contusion from May 1, 2009.

Petitioner testified that following her light duty release on August 29, 2011, she has returned to work as a unit secretary, which is a desk position. Petitioner testified that her current job as a unit secretary is light duty. Petitioner testified that at the present time her left shoulder is not as strong as it was previously. She has

difficulty and pain lifting. Petitioner refrains from doing certain activities to avoid reinjuring herself. Petitioner's self medicates with over-the-counter pharmaceuticals as well heating pads and ice packs.

CAUSATION

Petitioner gave a credible description of her accident, medical history, and symptoms on direct examination. On cross examination she was confronted with medical records that indicated among other things, a denial of a prior left shoulder injury and a gradual onset of symptoms. However, she explained during cross examination and redirect testimony that she never denied a prior injury and that her gradual symptoms developed after the injury of May 1, 2009.

The Arbitrator finds that Petitioner sustained a traumatic injury on May 1, 2009 and that her current condition of ill being is causally to that accidental injury.

The Arbitrator bases this finding on Petitioner's credible account of her accidental injury, medical history, and physical symptoms. The Arbitrator notes that Petitioner has no control over each and every medical entry by each and every medical professional. The Arbitrator further notes that the sequence of events is consistent with a pre-existing healthy and functional left upper extremity which was seriously and traumatically injured on May 1, 2009.

MEDICAL

Respondent's defense on this issue is premised on liability. Therefore, Petitioner is entitled to the claimed medical expenses.

TEMPORARY TOTAL DISABILITY BENEFITS

Respondent's defense on this issue is premised on liability. Therefore, Petitioner is entitled to the claimed temporary total disability benefits.

NATURE AND EXTENT OF THE INJURY

Based upon the testimonial and medical evidence, the Arbitrator finds that Petitioner sustained the 20% loss of the person as a whole.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Israel Morin,

Petitioner,

vs.

NO: 12 WC 19427

Ceco Concrete Construction,

14IWCC1097

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 29, 2013, is hereby affirmed and adopted.

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

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

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

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

DATED: DEC 15 2014
CJD:yl
o 10/21/14
49

Daniel R. Donohoo

Ruth W. White

DISSENT

I must respectfully dissent and would find that Petitioner should be awarded the laminectomy and fusion at L4-5 as recommended by Dr. Singh. Petitioner underwent a course of conservative medical care. This course of care has not alleviated Petitioner's low back pain. Dr. Singh opined in his deposition that Petitioner's current radicular symptoms are consistent with and related to the disc herniation at L4-5. Further, Dr. Singh listed the bases of his recommendation as: he has had two and a half months of physical therapy, two epidural steroid injections with transient relief, half a grade motor weakness on his right side, strength testing, and films that correlate with the pain complaints. (Pet. Ex. #2). Based on Petitioner's response to this treatment, Dr. Singh opined that Petitioner has failed conservative care and requires surgery.

Respondent's second Section 12 examiner, Dr. Zelby, testified via evidence deposition in this case. Dr. Zelby simply opined that Petitioner sustained a lumbar sprain and did not require further medical care. Dr. Zelby opined that there was no disc herniation at L4-5, despite the radiologist interpretation and Dr. Singh's reading of the scan. Dr. Zelby essentially opined that Petitioner had no lumbar spine condition based on his subjective examination. This flies in the face of the objective medical evidence and the opinions of every other doctor in this case. Accordingly, Petitioner should be awarded the lumbar laminectomy and fusion as recommended by Dr. Singh.

Based on the above, I would find that Petitioner has not reached maximum medical improvement and is entitled to temporary total disability benefits from November 27, 2012 until June 12, 2013. Petitioner worked light duty, in good faith, for Respondent following his May 22, 2012 work injury. His pain symptoms became progressively worse until he could no longer work due to his pain. He has been in an off work status since November 27, 2012 pursuant to his physician's recommendations.

Charles J. DeVriendt

NOTICE OF 19(b) DECISION OF ARBITRATOR

MORIN, ISRAEL
Employee/Petitioner

Case# **12WC019427**

14IWCC1097

CECO CONCRETE CONSTRUCTION
Employer/Respondent

On 8/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
162 W GRAND AVE SUIT E1810
CHICAGO, IL 60654

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
JENNIFER RIZK
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Israel Morin
Employee/Petitioner

v.

Ceco Concrete Construction
Employer/Respondent

Case # 12 WC 19427

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Wheaton**, on **6/12/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **5/22/12**, 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 **$73,216.00**; the average weekly wage was **$1,408.00**.

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

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

Respondent shall be given a future credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$10,436.70 (representing 3% loss of use of the man as a whole)** for other benefits, for a total credit of **$10,436.70**.

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

ORDER

Compensation for temporary total disability benefits and for prospective medical benefits is denied. The petitioner failed to prove that his need for prospective medical treatment, is causally related to his work accident.

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

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

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

Signature of Arbitrator

08-29-13
Date

ICArbDec19(b)

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AUG 29 2013

STATEMENT OF FACTS

Petitioner Israel Morin is employed as a laborer by Ceco Concrete Construction. He was employed there on the alleged date of accident, May 22, 2012. Petitioner testified that he was hired by Ceco Construction in 1998.

Petitioner described his typical job tasks as a laborer as picking up wood, pulling nails, and reusing the wood. He stated that his duties included concrete construction and pulling down what carpenters had previously constructed. Petitioner testified that he had suffered a work-related accident in 2000 while working for Ceco Concrete, incurring an injury to his foot.

Petitioner presented testimony on direct examination that is inconsistent with his testimony on cross-examination. Further, petitioner presented significant direct testimony which was inconsistent with medical records he offered.

Petitioner testified that he had been working a construction job at the University of Iowa for approximately one and a half months prior to May 22, 2012. He testified that on that date, a beam weighing roughly 1,300 pounds fell 16 feet and struck him on the left side of his forehead. He testified that he had been wearing a hardhat, and the force of the impact knocked him to the ground. He testified that his supervisor, Matt Tansey, drove him to the emergency room at the University of Iowa Hospitals within a half hour of the incident. Petitioner testified that he was not alert when he was taken to the emergency room, and that he was not thinking clearly.

Petitioner testified that he knew the weight of the beam that struck him because he is required to know this type of information. He further testified that Ceco Concrete uses the same or similar materials at every construction job. He testified that he was familiar

with the height from which the beam fell because he had been working on the construction site for many weeks.

Contrary to petitioner's testimony, records from the emergency department reveal that petitioner was ambulatory, and that he had not experienced a loss of consciousness following the accident. His only complaints were of a left-sided frontal headache, left facial pain, and mild tingling at the area of the laceration. At that time, he denied knowing the weight of the aluminum beam. The records also reveal that petitioner had a normal mental status on repeated examination, and no neurological deficits. (Px.1)

He denied numbness, tingling, and weakness in his extremities, as well as any pain in his neck and back. On physical examination, he was noted to have a 6cm laceration involving skin, subcutaneous tissue, and muscle. His cervical, thoracic, and lumbar spine were non-tender, and he had full strength and range of motion in all extremities. Petitioner's laceration was sutured, and he was discharged. He was noted to be calm with an appropriate affect. (Px.1)

Petitioner testified that he was injured on a Tuesday, and that he did not return to work the Wednesday following the accident. He testified that he could not sleep the night of the accident, and therefore felt he should not be in the workplace. He testified that he returned to work that Thursday on light duty; his only duty being monitoring equipment from the ground to ensure that materials did not fall. He did not work Friday or the following Monday, as it was a holiday weekend.

Petitioner testified that he returned to Chicago for the Memorial Day holiday weekend, and that he was advised to stay home for one week by Ceco Concrete, in order to rest and recover from the accident. Petitioner testified that he sought treatment with Dr.

Michael Foreman while in Chicago during the short period of time he was off work immediately following the accident.

Petitioner testified on cross-examination that he began experiencing radiating pain in his left leg on May 25, 2012, confirming that date twice. He testified that he began experiencing symptoms in the right leg two weeks later, and that the pain in his right leg was worse.

Petitioner presented to Dr. A. Sharma at South Holland Medical Center on May 25, 2012 with complaints of injuries to his head, neck, and low back. Petitioner denied numbness, tingling, or weakness his lower extremities. He reported tenderness in the cervical and lumbar spine, but was ambulatory and alert. Dr. Sharma diagnosed a concussion without loss of consciousness, head and facial lacerations, and acute cervical and thoracolumbar strains. (Px.4)

Petitioner was evaluated by Dr. Foreman at South Holland Medical Center on May 29, 2012, at which time petitioner reported feeling unable to work. He made no complaints regarding his lower extremities. Dr. Foreman recommended physical therapy, referred petitioner to a neurologist, and placed him off work pending a reevaluation on June 18, 2012. (Px.4) Despite this off-work order, petitioner testified that he returned to Iowa to complete the construction job on June 4, 2012. He began physical therapy on May 31, 2012, and continued to undergo this treatment until August 2, 2012. Petitioner consistently reported improvement in his symptoms to the physical therapist. (Px.4)

Petitioner testified that an MRI of his lumbar spine was performed on July 16, 2012. This MRI revealed a 3 to 4mm disc protrusion or herniation without spinal stenosis

at the L4-L5 level with early desiccation changes. The scan was otherwise unremarkable. (Px.3)

Petitioner testified that he was referred to Dr. Amit Mehta for pain management after undergoing this MRI. Dr. Foreman authored a note dated August 9, 2012 in which he refers to his most recent evaluation of petitioner on August 6, 2012. Dr. Foreman's August 6, 2012 note is not included in the medical records submitted by petitioner. However, the August 9, 2012 addendum indicates that petitioner had consulted with a specialist regarding the MRI of his lumbar spine, who referred him to a pain specialist. (Px.4) No such specialist is identified in the evidence of record, neither by petitioner's testimony nor by the records submitted.

When petitioner was initially examined by Dr. Mehta at Instant Care Medical Group on August 15, 2012, he complained of pain in his lower back radiating into his buttocks with some numbness and tingling. He rated his back pain 7/10. He did not report any radiation into his lower extremities. Dr. Mehta noted decreased range of motion in petitioner's lumbar spine. Petitioner exhibited a normal gait, was able to toe and heel walk, and had full strength and sensation to light touch in his lower extremities. Dr. Mehta recommended that petitioner undergo an L4-L5 interlaminar epidural steroid injection. Petitioner was advised that he could continue working at light duty. (Px.3)

Petitioner received an interlaminar epidural steroid injection at the L4-L5 level on August 21, 2012. (Px.3) Petitioner was then examined by Dr. Arpan Patel at Instant Care Medical Group on August 27, 2012. Petitioner reported that his back pain had worsened following the injection, but now rated his pain at only 5/10. He described axial low back pain without radiation into his lower extremities. The lumbar and cervical spine were

tender, and petitioner had a slow but symmetric gait. He continued to exhibit full strength, and normal motor and sensory examinations. Dr. Patel advised against a second injection, as petitioner was unresponsive to the first. He informed petitioner that his pain was likely secondary to a cervical and lumbar sprain. Dr. Patel recommended that petitioner undergo a course of work hardening followed by a functional capacity evaluation, after which he should be at maximum medical improvement. Dr. Patel stated that petitioner is not, in his opinion, a candidate for lumbar surgery. (Px.3)

On September 4, 2012, petitioner underwent an evaluation for work conditioning at Associated Medical Centers of Illinois (AMCI). On that date, he was able to walk 30 minutes on a treadmill without using side guards. He participated in two more work conditioning sessions, on September 5 and 6, 2012, and was again able to walk 30 minutes on a treadmill. (Px.3)

Dr. Rajeev Khanna performed an independent medical examination on September 10, 2012 at Respondent's request. (Rx.2) Petitioner's report to Dr. Khanna that the beam that struck his head on May 22, 2012 fell 12 feet is inconsistent with his testimony that it fell 16 feet. Furthermore, contrary to his initial medical records, petitioner reported to Dr. Khanna that he had, in fact, lost consciousness. He complained of continued headaches, dizziness, blurred vision, and occasional vomiting. He described neck and back pain. Petitioner again denied any upper or lower extremity radiculopathy, numbness, or tingling.

Dr. Khanna reviewed all of petitioner's medical records and personally performed a physical examination of petitioner. Petitioner had limited range of motion in the lumbar spine, positive straight leg raise tests bilaterally, but no evidence of elicited

radiculopathy. Petitioner had no evidence of lower extremity sensory loss to light touch and full strength in the lower extremities. Petitioner also had limited range of motion in the cervical spine, but no evidence of sensory loss and full grip strength bilaterally.

Dr. Khanna diagnosed petitioner with improving concussive-like symptoms, a cervical strain, and a lumbar disc protrusion, with muscle spasms in the cervical and lumbar spine. He opined that petitioner's injuries were causally related to his work accident of May 22, 2012. He recommended that petitioner undergo a series of 2 additional epidural steroid injections, to be performed at two-to-three week intervals. He advised that petitioner should then undergo a 2 week course of physical therapy, followed by a 2 week course of work conditioning. Dr. Khanna anticipated that petitioner would reach maximum medical improvement within six to eight weeks following the appropriate treatment. He further opined that petitioner was capable of continuing to perform light duty work, with a 10 pound lifting restriction, and occasional bending and squatting. (Rx.2)

Petitioner did not continue the 4 week work conditioning program as recommended by Dr. Patel, and did not present to Dr. Mehta for reevaluation following his IME with Dr. Khanna until October 2, 2012. (Px.3) Petitioner first complained of pain radiating into his right leg at this time. He told Dr. Mehta that the initial injection had helped "some," but that he continued to have symptoms. He told Dr. Mehta that the doctor who performed the IME recommended that he discontinue his work conditioning program, and that he had therefore not returned to it. He also reported that the doctor had recommended a series of two additional epidural injections in the lumbar spine. Dr. Mehta recommended a second epidural injection at the L4-L5 interlaminar space. He

recommended considering a series of three injections in the event that petitioner obtained relief from the second. Petitioner was advised to continue working at light duty. (Px.3)

Petitioner testified that he underwent a second injection with Dr. Mehta, but that it helped with his pain for only a matter of days. Dr. Mehta performed this injection on October 9, 2012. (Px.3) At his next appointment on October 23, 2012, a full two weeks later, petitioner reported a 65% improvement in his lower back symptoms. Dr. Mehta recommended an epidural injection in the cervical spine due to petitioner's complaints of worsened neck pain. Dr. Mehta noted that petitioner was doing well following his second lumbar injection, and continued his light duty work restrictions. (Px.3) Two weeks after that, on November 6, 2012, petitioner again reported a 65-70% improvement in his lumbar spine symptoms following the second epidural injection. (Px.3) On cross-examination, petitioner denied reporting this type of improvement to Dr. Mehta.

Due to increased complaints of neck pain, petitioner was sent for an MRI of the cervical spine. This MRI was performed on October 2, 2012. It revealed 3-4mm disc herniations indenting the left sides of the thecal sac with spinal stenosis. Petitioner received an epidural injection at the C6-C7 level on November 13, 2012. He reported 50% improvement in his cervical symptoms on November 27, 2012 and has received no treatment for this condition since that time. (Px.3)

The Arbitrator notes that both Dr. Khanna and Dr. Mehta recommended pursuing further epidural injections in the event of positive results. Despite this, petitioner did not pursue further injections. Rather, Dr. Mehta referred petitioner for an orthopedic evaluation during his November 27, 2012 evaluation due to complaints that his lower back pain had returned. This is also the first date of treatment in which petitioner

complains of bilateral lower extremity symptoms. Dr. Mehta placed petitioner off work. (Px.3)

Petitioner was then evaluated by Dr. Kern Singh at Midwest Orthopedics at Rush on December 6, 2012. Petitioner reported that he was able to sit, stand, and walk for 5 minutes at a time. He reported that physical therapy and injections had provided only minimal relief. On physical examination, Dr. Singh noted full motor strength in petitioner's upper extremities. He noted full strength in the lower extremities other than a half-grade loss of strength in the right tibialis anterior. Petitioner had a positive straight leg raise test on the right. Dr. Singh reviewed the MRI of petitioner's lumbar spine dated July 16, 2012. He diagnosed petitioner with degenerative disc disease at L4-L5 and spondylolisthesis. He recommended a laminectomy and transforaminal lumbar interbody fusion at the L4-L5 level. (Px.3, Exh.2)

Dr. Singh testified that he reviewed the MRI film on December 6, 2012. (Px.2, p12) He testified that this film revealed that the L4-L5 disc had collapsed resulting in stenosis, which is pressure on the nerve root. (Px.2, p10) He testified that his diagnoses of petitioner are degenerative and chronic conditions which are not caused by trauma, but that petitioner experienced an aggravation of pre-existing conditions on May 22, 2012. (Px.2, pp21, 32)

Dr. Singh testified that a positive straight leg raise test and half-grade loss of muscle strength, both subjective findings, are significant enough to warrant a lumbar fusion procedure. (Px.2, pp30-31) Dr. Singh also testified that he receives many referrals from Dr. Mehta, and that he is provided with medical records that he reviews prior to his initial examination of patients. He testified that he had reviewed petitioner's medical

records from Dr. Mehta, but also testified that he believed Dr. Mehta had diagnosed spinal stenosis, and that petitioner had experienced no relief from either epidural injection. (Px.2, pp27, 37, 21) Dr. Singh's testimony is inconsistent with the medical records he testified to reviewing.

Petitioner presented to Dr. Mehta on December 26, 2012 with complaints of radiating pain into his leg, though he failed to indicate which extremity he was referring to. On physical examination, Dr. Mehta found no gross weakness in motor testing. The only positive finding was tenderness to palpation in the lumbosacral region. (Px.3)

Petitioner had complained of bilateral lower extremity symptoms to Dr. Mehta on November 27, 2012. He then reported symptoms in only one leg on December 26, 2012. On February 19, 2013, petitioner presented with lower back pain and complaints of radiation into the left lower extremity. Petitioner's physical examinations remained largely normal throughout this period. Dr. Mehta found full strength in petitioner's lower extremities at all times. (Px.3)

Petitioner was evaluated by Dr. Andrew Zelby at the request of Respondent on March 11, 2013 for an Independent Medical Examination. Petitioner reported that physical therapy and injections had provided no relief. He had complaints of pain radiating into his bilateral extremities, the left worse than the right. (Rx.1, Exh.2)

Dr. Zelby reviewed all of petitioner's medical records and personally performed a physical examination of petitioner. He noted that petitioner reported severe pain, at 9/10, but that he exhibited no consistent pain behaviors to substantiate that report. Petitioner alleged that he was able to sit and stand for less than one hour, and that he could walk less than 2 blocks. (Rx.1, Exh.2)

Dr. Zelby performed a detailed and complete physical examination of petitioner's cervical and lumbar spine. He noted that petitioner exhibited tenderness to palpation in both regions even with non-physiologic light touch. He testified that this indicated that petitioner's reports of pain are not related to the presence or absence of an infirmity associated with the spine or nervous system. (Rx.1, Exh.2)

Dr. Zelby also noted that petitioner exhibited an inconsistent antalgic gait; he had initially favored the right leg, but later favored the left when Dr. Zelby confirmed his pain was worse on the left side. Dr. Zelby performed straight leg raise testing in both the supine and sitting positions. (Rx.1, Exh.2) He testified that these tests should produce consistent findings in both positions. However, petitioner had a positive straight leg test in the laying position and negative test while sitting, which Dr. Zelby noted as a further inconsistency. (Rx.1, p18)

Petitioner also reported diminished vibratory sensation in the left upper and lower extremities with testing. Dr. Zelby testified that this is completely "nonanatomic." He testified that there is no condition that would result in this finding. (Rx.1, p19)

Overall, Dr. Zelby found that petitioner exhibited 4 out of 5 Waddell's signs, or inconsistent behavioral responses. (Rx.1, Exh.2) Dr. Zelby testified that this indicates symptom magnification. (Rx.1, p20) Furthermore, Dr. Zelby noted that petitioner had exhibited a decreased range of motion in the lumbar spine upon testing. However, when demonstrating the path of radiating pain in the left lower extremity, petitioner demonstrated normal forward flexion. Therefore, Dr. Zelby concluded that petitioner had normal range of motion in the lumbar spine, and that petitioner was attempting to deceive him. (Rx.1, p21)

Dr. Zelby diagnosed petitioner with a scalp laceration, mild post-concussion syndrome, a cervical strain, and a lumbar strain. He found that these conditions were causally related to petitioner's May 22, 2012 accident. He opined that petitioner's post-concussive syndrome and cervical strain had resolved within 4 months of the accident. (Rx.1, Exh.2)

Regarding petitioner's complaints of radiculopathy in the lower extremity, Dr. Zelby opined that there was no evidence of radicular symptoms on examination. (Rx. 1, Exh.2) Furthermore, the MRI of July 16, 2012 had no abnormality that would result in radiculopathy. The MRI revealed no suggestion of impingement, no loss of disc space, and no disc collapse. Petitioner's physical examination revealed no symptoms suggestive of impingement. (Rx.1, pp25-26, 38) He testified that petitioner has "a constellation of subjective complaints that cannot be supported by the objective medical evidence." (Rx.1, p38)

Dr. Zelby testified that there is no reason to consider surgery in petitioner's case, given the mild degenerative findings and nature of his complaints. He testified that, even with no consideration of the inconsistencies he noted, petitioner's complaints are not indicative of corrective surgical intervention. (Rx.1)

Dr. Zelby testified that the significant symptom magnification exhibited by petitioner suggests that his symptoms are not related to the presence or absence of an infirmity in the spine. He testified that this amplification also predicts a poor outcome with treatment. (Rx.1, pp26-27) Based on petitioner's physical examination and medical records, Dr. Zelby felt that petitioner was capable of returning to unrestricted vocational and avocational activities. (Rx.1, Exh.2)

Dr. Zelby and Dr. Singh testified that petitioner's body mass index of 33 classifies him as obese. (Rx.1, p14; Px.2, p35) Dr. Zelby recommended that petitioner maintain a healthier body weight for general health of the spine. He testified that pre-existing back conditions can be exacerbated by obesity. (Rx.1, p29) Dr. Singh testified that pre-existing back conditions are not exacerbated by obesity. (Px.2, p35)

Petitioner was re-evaluated by Dr. Singh on March 18, 2013, at which time he complained of worsened pain and symptoms in both lower extremities. His physical examination of petitioner and recommendations for surgery remained unchanged. (Px.3) Dr. Singh testified that petitioner had complained of symptoms in only one lower extremity previously, and that his complaint of bilateral lower extremity pain is consistent with the progression of his condition. (Px.2, p15)

Dr. Mehta noted 4/5 motor strength in petitioner's bilateral lower extremities on March 19, 2013; one day after Dr. Singh had noted only a half-grade loss of strength in only the tibialis anterior of the right lower extremity. (Px.3) On April 16, 2013, Dr. Mehta found full strength in petitioner's lower extremities. (Px.3) Dr. Singh last saw petitioner just days later, on April 22, 2013. He again noted a half-grade loss of muscle strength in the lower portion of petitioner's right leg. He continues to recommend surgery and continues to place petitioner off work. (Px.3)

Petitioner provided inconsistent descriptions regarding the accident. He reported that he had not lost consciousness while in the emergency room and to Dr. Foreman, but reported a loss of consciousness to Dr. Mehta, Dr. Khanna, Dr. Singh, and Dr. Zelby. He also testified to a loss of consciousness, and explained that he had not been thinking clearly while in the emergency room when he denied it. However, he was noted to be

alert and with a normal mental status in the emergency room. Petitioner testified the beam fell from 16 feet, and that he knew this to be accurate because of his familiarity with the work site; however, he reported to Dr. Khanna that the beam had fallen 12 feet.

Petitioner's testimony with regard to his concussive symptoms was inconsistent with the record of evidence. On cross-examination, petitioner testified that he never became physically ill or vomited at the workplace while on light duty. He testified that he never experienced symptoms of vertigo while working. Petitioner testified that he recalled treating with neurologist, Dr. Edward Herba, for his concussive symptoms. In his testimony, he denied reporting to Dr. Herba on October 3, 2012 that he was experiencing almost daily episodes of vomiting while in the workplace. He testified that he reported to Dr. Herba that these episodes occurred at home. Dr. Herba noted that petitioner complained of almost daily episodes of vomiting, associated with perspiring, which occurred "while at work at his light duties." (Px.3)

Petitioner testified that he has never driven since May 22, 2012. He testified that his father drove him to and from Iowa and work in Chicago, and that his fiancee drove him to each and every doctor's appointment and physical therapy session. Respondent's witness, Mr. Roger Tommeraasen, petitioner's supervisor while working light duty at Ceco Concrete, testified that petitioner's father worked at Ceco Concrete for many years, and that petitioner rode to work with him at times. However, Mr. Tommeraasen testified that petitioner's father retired while petitioner was working light duty, and that petitioner drove to work unaccompanied after this. He testified that he had personally seen petitioner do so and was able to identify the make and model of petitioner's vehicle.

Furthermore, petitioner admitted that he was able to drive to Dr. Zelby at his March 11, 2013 examination. (Rx.1, p11; Rx.1, Exh.2)

Petitioner testified on cross-examination that his duties while under Mr. Tommeraasen's supervision consisted of sorting plastic and metal materials. He testified that he had physical difficulties performing this work, as it required bending down frequently. He further testified that he was permitted to sit when needed. Mr. Tommeraasen testified that this light duty sorting position could sometimes require bending, but further testified that petitioner did not request any alteration to his duties and failed to complain of increased pain while working.

Mr. Tommeraasen testified that petitioner was recognized as a dedicated worker. He testified that he had performed his light duty job within his restrictions at all times. He also testified that petitioner was given the latitude to leave work early when needed for doctor's appointments. Mr. Tommeraasen testified that, had petitioner become physically ill while working, he would have been notified. To his knowledge, petitioner had never become ill or vomited while working under his supervision since July 2012. Petitioner had never complained to Mr. Tommeraasen of physical difficulties performing his light duty position. He never requested a less physically demanding position. Mr. Tommeraasen testified that petitioner did not provide an off-work slip to him; rather, sometime in late November 2012, petitioner simply stopped coming to work. Mr. Tommeraasen confirmed that the light duty position provided to petitioner continued to be available.

Petitioner testified inconsistently regarding his current application for workers' compensation benefits. On cross-examination, petitioner testified that he was familiar

with workers' compensation procedures, having filed an application in 2000 for a foot injury. He further testified on cross-examination that he had filed his current application on June 5, 2012, and that he had indicated neck and back pain in addition to head trauma on this application. On re-direct, petitioner testified that he had never actually seen his application, and that he was not familiar with workers' compensation applications. The Arbitrator personally confirmed petitioner's signature on his current application, and that despite testifying that the application bore his signature, petitioner continued to claim that he had never seen the application before.

CONCLUSIONS OF LAW

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator makes the following findings and conclusions:

The Arbitrator finds that petitioner has proved that his current condition of ill-being is causally related to the accident, but not to the extent alleged at trial. In making this conclusion, the Arbitrator notes the many inconsistencies in the record, in petitioner's testimony, and in Dr. Singh's findings. The Arbitrator is not persuaded by the testimony of Dr. Singh. The Arbitrator is persuaded by the opinions of Drs. Zelby, Khanna and Patel.

The Arbitrator further notes that he is not required to give more weight to a treating physician's opinion over another examining physician's opinion. *Prairie Farms Dairy v. The Industrial Commission*, 279 Ill.App.3d 546 (5th Dist. Ind. Comm. Div. 1996). In this case, petitioner was examined by two non-treating physicians, Dr. Khanna and Dr. Zelby. These doctors reviewed petitioner's medical records, including the MRI of petitioner's lumbar spine, performed physical examinations of petitioner, and failed to

identify symptoms or objective findings suggestive of surgical intervention. In fact, one of petitioner's treating physicians, Dr. Patel, also opined that petitioner is not a surgical candidate. It may be inferred that if Dr. Foreman thought the Petitioner was a surgical candidate, he would have referred his patient to an orthopedic surgeon and not a pain management specialist.

Dr. Singh is the only physician recommending a surgical procedure. Within his own medical records, Dr. Singh indicates that petitioner has a largely normal physical examination. Dr. Singh is also the only physician who discerns stenosis and spondylolisthesis in the July 16, 2012 MRI of petitioner's lumbar spine. Dr. Zelby reviewed the films and found that there was no evidence of impingement, disc space loss, or disc collapse.

Furthermore, Dr. Singh's testimony regarding the need for surgical intervention is not credible. Dr. Singh testified that he reviewed the medical records provided to him by Dr. Mehta prior to his examination of petitioner. These records indicate that petitioner experienced almost two months of relief after his second epidural injection, yet Dr. Singh testified that this treatment failed. Overall, the Arbitrator finds the opinions of Dr. Khanna and Dr. Zelby more credible than that of Dr. Singh. Dr. Khanna and Dr. Zelby opined that petitioner required only conservative treatment and that he is now at maximum medical improvement.

The Arbitrator further concludes that petitioner's testimony lacked some credibility. Petitioner testified inconsistently with his medical records on some occasions. He testified that he lost consciousness upon being struck in the head with the beam, yet his medical records reveal that he reported no loss of consciousness at the emergency

room immediately following the accident. He also reported no loss of consciousness to Dr. Foreman. Only later did he report that he had lost consciousness. The medical records from the University of Iowa show treatment for a 4.5 cm laceration only. No head CT was performed, due to normal mental status, no neurological deficits, no loss of consciousness.

Petitioner's inconsistencies continued with his testimony regarding his lower extremity symptoms. He testified that he began experiencing radiation into his left lower extremity on May 25, 2012, followed by symptoms in the right lower extremity 2 weeks later. However, the medical records reveal that petitioner specifically denied radiation of symptoms into his extremities on several occasions, and that he first complained of radiation into his lower extremities over 4 months after the date of injury, on October 2, 2012. Furthermore, petitioner's complaints in the vary from his left leg, right leg, and bilateral legs throughout the record.

While the record reveals that petitioner did in fact sustain a minor injury to his lumbar spine on May 22, 2012, he has presented to each physician with significant subjective reports of pain. His physical examinations and objective findings are mild and largely normal. Petitioner's subjective complaints are inconsistent with these findings. For example, petitioner testified that he is unable to sit for 5 minutes; however, the Arbitrator notes that he was able to testify while seated for greater than one hour without asking to stand or change positions.

Furthermore, petitioner reported to Dr. Singh and Dr. Zelby that the epidural injections he received provided little to no relief. He testified that he experienced pain

relief for only a matter of days. The medical records, however, reveal that petitioner experienced nearly 2 months of relief following this second injection.

Petitioner testified that he has not driven since the accident on May 22, 2012. However, petitioner's supervisor, Mr. Tommeraasen, testified that petitioner drove to work, and was even able to identify the make and model of the car petitioner drove. The Arbitrator finds that Mr. Tommeraasen was a wholly credible witness, while petitioner was often inconsistent. Therefore, the Arbitrator finds that Mr. Tommeraasen's testimony regarding petitioner driving to work more credible than petitioner's testimony that he never drives. Finally, it would seem unlikely that his fiancé took him to every medical appointment, especially when the two adults are responsible for two children under the age of twelve.

Petitioner also testified that he was not familiar with the application for workers' compensation benefits filed in this case, and that he therefore was not aware of the injuries alleged therein. Even given the opportunity to review his current application, and with confirming his own signature, petitioner testified that he had never seen the document before.

Petitioner testified that a beam weighing 1,300 pounds fell from a distance of 16 feet before striking him on the head. The Arbitrator finds that this, too, is an exaggeration. It is incredible that a beam of such great weight, falling from such great height, should strike an individual on the head without rendering him unconscious and severely incapacitated, or, worse, dead. Please review the initial treatment records and note the physical exam where no bruise, swelling or eccymosis was noted. There was no

skull x-ray taken. There is no indication whatsoever of the Petitioner sustaining a severe blow as reported to his subsequent medical treaters and this court.

Despite the above, the Arbitrator finds causal connection for the head laceration, cervical bulge and low back protrusion, but with the understanding that any benefit of the doubt on these injuries has gone to the Petitioner and is largely based upon Respondent's first Section 12 exam with Dr. Khanna.

The Arbitrator is persuaded by Dr. Zelby's opinions of significant symptom amplification, and that petitioner has reached MMI. The Arbitrator finds that petitioner's current condition is causally connected to his work accident of May 22, 2012, but not to the extent claimed at trial. Petitioner's claim for future benefits is denied.

In support of the Arbitrator's decision with respect to (J) Medical Expenses, the Arbitrator makes the following findings and conclusions:

The Arbitrator finds that the medical expenses submitted by petitioner are not reasonable, necessary or causally related to the accident alleged. The Arbitrator finds that petitioner has undergone unreasonable and unnecessary medical care following the IME of Dr. Khanna.

Pleaser recall that Dr. Khanna recommended a conservative course of treatment, including injections and physical therapy, which petitioner only partially completed. While in physical therapy, petitioner exhibited improvement in symptomatology. After a second epidural injection, petitioner reported significant and sustained improvement. This suggests that his symptoms would have continued to improve had petitioner continued with Dr. Khanna's recommendation for another injection followed by physical therapy.

The Arbitrator finds that any and all treatment petitioner has undergone with Dr. Singh has been unnecessary and unreasonable. Any treatment beyond October 2, 2012, after petitioner's second epidural injection, was also unreasonable and unnecessary. As such, Respondent is not liable for any medical services provided to petitioner beyond that date.

In support of the Arbitrator's decision with respect to (K) Prospective Medical Care, the Arbitrator makes the following findings and conclusions:

The Arbitrator finds that petitioner is not entitled to prospective medical care, specifically the surgical procedure recommended by Dr. Singh on December 6, 2012, as petitioner's current condition of ill-being is not causally related to his alleged accident.

Dr. Zelby found that petitioner's condition is not indicative of surgical intervention. Dr. Mehta, Dr. Khanna, Dr. Zelby, and the interpreting radiologist did not appreciate any significant stenosis in petitioner's lumbar spine upon reviewing the July 16, 2012 MRI. Dr. Singh remains the only physician who discerns any significant pathology in this MRI. The Arbitrator notes that Dr. Singh has questionable credibility, and that his recommendation for surgery in this case appears to rest solely on subjective complaints. Furthermore, petitioner's subjective complaints have varied with respect to his lower extremity symptoms and the severity of his back pain, while his objective findings remained largely unremarkable throughout treatment.

In support of the Arbitrator's decision with respect to (L) TTD benefits, the Arbitrator makes the following findings and decisions:

As the Arbitrator finds that petitioner has failed to prove that his current condition of ill-being is causally related to the accident alleged, he awards no TTD to petitioner.

Mr. Tommeraasen testified that petitioner was able to perform the light duty position provided to him from July 2012 through November 2012 without complaint or report of exacerbation in his symptoms. Mr. Tommeraasen personally observed petitioner performing his duties without difficulty. This position continues to be available.

Moreover, Dr. Zelby has released petitioner to full duty work with no restrictions. Therefore, the Arbitrator finds that petitioner would have been able to continue working within his light duty restrictions since November 27, 2012, and in fact should have returned to full duty work. As such, no TTD benefits are awarded since that date.

In support of the Arbitrator's decision with respect to (M) Penalties and Fees, the Arbitrator makes the following findings and conclusions:

Petitioner has requested that penalties and fees be assessed on Respondent under sections 19(k), 19(l), and 16 of the Act. As petitioner's current condition of ill-being is not causally connected to his alleged accident, petitioner has not been awarded any lost time benefits. As the Respondent is not liable for payment of any benefits to petitioner, petitioner is not entitled to penalties in this matter. Moreover, the evidence is overwhelming that Respondent's actions in this matter have been reasonable.

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

Roosevelt Green,

Petitioner,

vs.

Chicago Transit Authority,

Respondent.

14IWCC1098

NO: 08 WC 48942
08 WC 48943

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 the denial of the Motion to reinstate 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, 2014 is hereby affirmed and adopted.

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

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

DATED: DEC 15 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 12/11/14
45

STATE OF ILLINOIS)
)
COUNTY OF Cook)

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

JUL 22 PM 1:03

ILLINOIS WORKERS' COMPENSATION COMMISSION
DECISION

14IWCC1098

Roosevelt Green
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # 08 WC 048942

08 WC 48943

The *petitioner* filed a petition or motion for **reinstatement** on **May 8, 2014**, and properly served all parties. The matter came before me on **July 3, 2014** in the city of **Chicago**. After hearing the parties' arguments and due deliberations, I hereby *deny* the petition. A record of the hearing *was* made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Petitioner's original filing was nearly six years ago. His alleged subsequent injury in 2013 has no relation to the '08 filings as they were never consolidated. The '08 claims have always been disputed. Despite that fact, no 19(b) or 8(a) hearing has occurred. The status of the claims has not advanced since the time of dismissal. As a result of the above, the Petitioner's motion to reinstate is denied.

Unless a *Petition for Review* is filed within 30 days from the date of receipt of this order, and a review perfected in accordance with the Act and the Rules, this order will be entered as the decision of the Workers' Compensation Commission.

Signature of arbitrator

07-03-14
Date

JUL 22 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cathy Araos,

Petitioner,

14IWCC1099

vs.

NO: 09 WC 23684

Costco Wholesale,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 6, 2014 is hereby affirmed and adopted.

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

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

14IWCC1099

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 15 2014

DLG/gaf
O: 12/11/14
45

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ARAOS, CATHY
Employee/Petitioner

Case# **09WC023684**

14IWCC1099

COSTCO WHOLESALE
Employer/Respondent

On 5/6/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.45% 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:

0190 LAW OFFICES OF PETER F FERRACUTI
KYLE P JEFFERSON
110 E MAIN ST
OTTAWA, IL 61350

0210 GANAN & SHAPIRO PC
AMY TURNBAUGH
210 W ILLINOIS ST
CHICAGO, IL 60654

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

14IWCC1099

CATHY ARAOS
Employee/Petitioner

Case #09 WC 23684

v.

COSTCO WHOLESALE
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on April 18, 2014. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

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

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

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

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

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On December 22, 2008, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- On this date, the petitioner sustained injuries that arose out of and in the course of employment.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $33,969.00; the average weekly wage was $653.25.
- At the time of injury, the petitioner was 27 years of age, *married* with no children under 18.

ORDER:

- The respondent shall pay the petitioner the sum of $391.95/week for a further period of 12.65 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 5% loss of use of her right arm.
- The respondent shall pay the petitioner compensation that has accrued from December 22, 2008, through April 18, 2014, and shall pay the remainder of the award, if any, in weekly payments.
- The medical care rendered the petitioner for her right arm and hand from Ingalls Memorial Hospital, Ingalls Occupational Health and Dr. Fanto through her discharge from physical therapy on July 9, 2009, was reasonable and necessary. The medical care rendered the petitioner for her right arm and hand after July 9, 2009, was not reasonable or necessary and is denied. The respondent shall pay the medical bills in accordance with the Act and the medical fee schedule. The respondent shall be given credit for any

amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act, and any adjustments, and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.

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

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

Robert E. Williams

Signature of Arbitrator

May 6, 2014
Date

MAY - 6 2014

FINDINGS OF FACTS:

The petitioner, a cashier assistant, felt right arm pain while performing her work duties on December 22, 2008. On January 2, 2009, she sought medical care at Ingalls Occupational Health and reported worsening symptoms since December 22nd that was now radiating up her forearm. She reported right wrist and forearm pain and numbness in four fingers. The assessment was right arm myopathy and neuropathy. The petitioner sought emergency care at Ingalls on January 5th for right hand numbness and right forearm pain. She started care with Dr. Salvatore Fanto on January 6th for right hand numbness and tingling. His diagnosis was right carpal tunnel syndrome for which he recommended an NCV study, an MRI, splinting, occupational therapy and work restrictions. An EMG study on February 19th revealed electrical evidence consistent with mild right median sensory neuropathy across her palm and wrist and mild right carpal tunnel syndrome.

Dr. Michael Cohen evaluated the petitioner pursuant to Section 12 of the Act on April 23rd and found no clinical symptoms consistent with carpal tunnel syndrome or epicondylitis. The petitioner reported a significant reduction in numbness and tingling in her right hand while off of work with current occurrences approximately only twice a week. Her main complaint was pain in her palmar and dorsal forearm just distal to her elbow. Dr. Cohen opined that the examination was a normal exam with full range of motion at the elbow, forearm, wrist and hand and no tenderness over her medial or lateral epicondylar region or over the forearm musculature. The Tinel sign and compression test were negative. His diagnosis was forearm muscular pain. The petitioner received physical therapy from June 3rd through her discharge on July 9, 2009, and treated with Dr. Fanto

periodically through March 11, 2010, however his notes are handwritten, illegible and subject to misinterpretation.

On July 2, 2010, the petitioner started care with Dr. Urbanosky and reported right hand numbness and tingling. An EMG/NCV study on July 23rd was negative for electrical evidence of any pathology or neuromuscular disease. Dr. Urbanosky noted on August 16th that the testing was negative for carpal tunnel syndrome but that the petitioner reported bilateral hand numbness and tingling, primarily on the right and injected her right carpal tunnel. The petitioner had physical therapy at ATI from August 24 through September 24, 2010. At her last visit with Dr. Urbanosky on September 27th, the doctor noted that the visit was for right carpal tunnel syndrome and lateral epicondylitis with no signs of improvement. Dr. Urbanosky opined that the petitioner's lateral epicondylitis was secondary to over grasping due to the carpal tunnel symptoms and recommended a carpal tunnel release and lateral epicondylar injection.

At the respondent's request, the petitioner was re-evaluated by Dr. Michael Cohen on October 11, 2010, and complained of numbness and tingling in the median distribution of her right hand. Dr. Cohen noted a good range of motion of the petitioner's elbow, forearm, wrist and hand, full strength, 3-mm two-point discrimination in all her fingers and a positive Tinel test. He opined that the positive Tinel and her subjected complaints indicated some evidence of current carpal tunnel syndrome. He felt surgery was not warranted and reiterated that the petitioner was at MMI for any work-related condition with respondent when she completed therapy in July 2009.

The petitioner sought chiropractic treatment with Dr. Verchota at Active Body on December 9, 2010, for complaints of bilateral pain and discomfort of her wrist, forearms

and upper arms. She was discharged at MMI on April 7, 2011. The petitioner elected to be evaluated by Dr. Lacart on August 24, 2011, who noted that the petitioner had no complaints of numbness, tingling or pain in her right elbow, forearm, wrist or hand after resolution of her symptoms with chiropractic care at Active Body. Dr. Lacart opined that the petitioner's right carpal tunnel syndrome had resolved.

The petitioner returned to Dr. Verchota on July 17, 2013, with complaints of flare-ups of pain and discomfort in the right forearm with pulling her children in a wagon with her right arm. She treated through September 28, 2013.

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

The medical care rendered the petitioner for her right arm and hand from Ingalls Memorial Hospital, Ingalls Occupational Health and Dr. Fanto through her discharge from physical therapy on July 9, 2009, was reasonable and necessary. The medical care rendered the petitioner for her right arm and hand after July 9, 2009, was not reasonable or necessary and is denied.

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

Based upon the testimony and the evidence submitted, the petitioner proved that her current condition of ill-being with her right hand and forearm through July 9, 2009, is causally related to the work injury. The petitioner failed to prove that her current condition of ill-being with her right lateral epicondylitis and her current condition of ill-being with her right hand and forearm after July 9, 2009, is causally related to the work injury. The petitioner did not complain of any symptoms with her right lateral epicondyle nor was she treated for lateral epicondyle complaints prior to September 27, 2010. After

her discharge on July 9, 2009, the petitioner did not seek medical care again until July 2, 2010, when she saw Dr. Urbanosky for right hand numbness and tingling. An EMG/NCV study was negative for any pathology or neuromuscular disease. She was then working at Panera Bread and was caring for a child born in May 2010. The petitioner is awarded the cost of her medical care at Ingalls Memorial Hospital, Ingalls Occupational Health and Dr. Fanto through July 9, 2009.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner complains of arm pain with daily activities. She avoids lifting, grasping and holding. She has pain using a whisk. She is not able to give massages. She is currently employed as a paraprofessional at a high school.

The respondent shall pay the petitioner the sum of $391.95/week for a further period of 12.65 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 5% loss of use of her right arm.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Czuprynski,

Petitioner,

vs.

14IWCC1100

NO: 12 WC 03616
12 WC 31362
13 WC 35670

Continental Tire North America,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 16, 2014 is hereby affirmed and adopted.

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

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.

14IWCC1100

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $9,300.00. 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: DEC 15 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 12/11/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CZUPRYNSKI, ROBERT
Employee/Petitioner

Case# **12WC003616**

12WC031362

13WC035670

CONTINENTAL TIRE NORTH AMERICA
Employer/Respondent

14IWCC1100

On 6/16/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

0299 KEEFE & DePAULI PC
NEIL A GIFFHORN
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

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
NATURE AND EXTENT ONLY

14IWCC1100

Robert Czuprynski
Employee/Petitioner

v.

Continental Tire North America
Employer/Respondent

Case # **12** WC **03616**

Consolidated cases: **12 WC 31362**
13 WC 35670

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **April 9, 2014**. By stipulation, the parties agree:

On the date(s) of accident, **11/04/11, 07/09/12, 08/20/13, respectively**, 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 **$45,094.40**, and the average weekly wage was **$867.20**.

At the time of injury, Petitioner was **47** years of age, ***married*** with **2** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of $- for TTD, $- for TPD, $- for maintenance, and **$17,947.44 (PPD advance)** for other benefits, for a total credit of **$17,947.44 (PPD advance)**.

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.

FACTS

The Parties stipulated that Petitioner sustained accidental injuries, respectively, on November 4, 2011 (repetitive), July 9, 2012 (left index finger and left thumb cut) and August 20, 2013 (left index finger cut). (AX1; AX2). Petitioner is an extruder sidewall operator. (T.8). His job involves managing a crew of four and loading rubber weighing 30 to 40 lbs. onto slab loaders, as well as changing toolings and die inserts that weigh approximately 50 lbs. (T.9). Petitioner testified that in the course of these duties, he began developing pain in his left wrist. (T.9). He reported his symptoms to Respondent, who referred him to Dr. David Brown of the Orthopedic Center of St. Louis. (T.10).

Based on Petitioner's radiographs, Dr. Brown diagnosed Petitioner with a TFCC defect consistent with a degenerative type lesion, and a cyst within the carpal bones including the capitate, hamate and lunate. (PX5, 01/16/12). Petitioner received conservative treatment by way of splinting, medication and injection. (PX5). Petitioner sought evaluation with Dr. Stephen Young, who diagnosed ulnar carpal impaction with degenerative TFCC tearing. (PX5; PX7). Based upon his findings, Dr. Young recommended an ulnar shortening osteotomy and wrist arthroscopy with potential replacement of the distal ulna. (PX7). Dr. Brown reviewed Dr. Young's recommendation, and disagreed with the required procedure. (PX5, 06/25/12). Dr. Brown expressed concern that an ulnar shortening osteotomy would not address the findings at Petitioner's distal radial ulnar joint and recommended that Petitioner manage this conservatively. *Id.* While this worked for a time, Petitioner's condition ultimately failed conservative treatment and required surgery. (PX5, 10/15/12).

On November 15, 2012, Dr. Brown performed a left wrist arthroscopic debridement of Petitioner's radial-sided TFCC tear, synovectomy of the left wrist and a hemiresection of the distal ulnar with interpositional arthroplasty. (PX8). Petitioner testified that the surgery only partially improved his condition, as reflected in Dr. Brown's notes. (T.12-13; PX5, 04/16/13, 04/30/13). He received additional injections following surgery. (PX5, 04/30/13, 07/08/13). On the last visit with Dr. Brown, Petitioner reported continued ulnar sided wrist pain primarily with heavy lifting at work or at home. (PX5, 12/04/13). Dr. Brown placed Petitioner at maximum medical improvement and recommended that he continue symptomatic control with non-steroidal anti-inflammatory medication. *Id.*

Petitioner testified that he still has swelling in his left wrist depending upon his level of activity, as well as fatigue. (T.13). Petitioner testified that he wears a brace when his pain gets severe and that he has noticed considerable loss of strength. (T.14). He notices his lack of strength the most while performing changeovers and reported a concurrent onset of soreness. (T.14-15). Petitioner also notices soreness while engaging in hobbies and fatigue in his left wrist while driving. (T.16). He takes over-the-counter medication for his symptoms. (T.14).

Respondent had Petitioner evaluated by Dr. Richard Howard, who found that Petitioner suffered from a chronic TFC tear secondary to ulnar impaction as a result of his work. (RX1). Dr. Howard's AMA evaluation concluded that Petitioner suffered a 3% disability based on loss of range of motion. *Id.* His disability rating gave no consideration to Petitioner's pain, swelling or the physical demands of Petitioner's job. *Id.*

Pursuant to §8.1(b) of the Act, the Arbitrator hereby considers the five statutory factors in the evaluation of Petitioner's permanent partial disability:

(i) **Impairment Rating:** Respondent had Petitioner evaluated by Dr. Richard Howard, who found that Petitioner suffered from a chronic TFC tear secondary to ulnar impaction as a result of his work. (RX1). Dr. Howard's AMA evaluation concluded that Petitioner suffered a 3% disability based on loss of range of motion. *Id.* His disability rating gave no consideration to Petitioner's pain, swelling or the physical demands of Petitioner's job. *Id.*

The Arbitrator notes that impairment does not equate to permanent partial disability under the Act; the AMA guidelines candidly acknowledge same, even going as far as to say that most physicians are not trained in making comprehensive disability determinations. *AMA Guides, 6th Edition,* p.5; *see also Frederick Williams v. Flexible Staffing, Inc.*, 13 I.W.C.C. 0557 (2013). Specifically, the AMA guidelines fail to take into consideration the full impact the injury has on employment, which is the very substance of permanent partial disability, and only considers its impact on "ADLs" or activities of daily living. The divergence can be illustrated by the scenario in which a pianist and a truck driver both lose a finger; while the AMA rating would be nearly identical for both, the disability rating clearly would not be. Additionally, the physician performing the evaluation is wholly free to ignore a patient's subjective symptoms if they feel those symptoms are magnified or they are not supported by objective testing. This is troubling considering that patients often continue to have significantly disabling symptoms after a surgery that often are not readily identifiable through objective testing. Dr. Howard took no note of Petitioner's pain, swelling, or job demands, only loss of range of motion. Thus, while taking into consideration the rating as required by the Act, the Arbitrator declines to simply adopt the AMA rating as the disability rating.

(ii) **Occupation:** Petitioner continues to be employed at Continental Tire North America performing the strenuous job duties of an extruder sidewall operator. Petitioner's job requires repetitive heavy lifting, which places significant strain on his left wrist and exacerbates his symptoms.

(iii) **Age:** Petitioner was 47 years old at the time of his injury. He has diminished healing capacity as a result thereof.

(iv) **Earning Capacity:** While there is no direct evidence of reduced earning capacity contained in the record, based on the severity of Petitioner's injuries, the extent of surgical intervention required, the need for additional injections following surgery, and his testimony of swelling and pain with the performance of his job duties which is mirrored in the records of Dr. Brown, it is reasonable to conclude that such repercussions will manifest in the near future.

(v) **Disability:** Petitioner's account of his disability is identical to that reflected in the medical records. On the last visit with Dr. Brown documented Petitioner's continued ulnar sided wrist pain primarily with heavy lifting at work or at home. (PX5, 12/4/13). Petitioner testified that he still has swelling in his left wrist depending upon his level of activity, as well as fatigue. (T.13). Petitioner testified that he wears a brace when his pain gets severe and that he has noticed considerable loss of strength. (T.14). He notices his lack of strength the most while performing changeovers and reported a concurrent onset of soreness. (T.14-15). Petitioner also notices soreness while engaging in hobbies and fatigue in his left wrist while driving. (T.16). He takes over-the-counter medication for his symptoms. (T.14).

Based upon the aforementioned factors, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in the 25% loss of his left hand.

With regard to Petitioner's cuts on his left index finger and thumb, the Arbitrator awards 1% disfigurement for the left index finger, and 1% disfigurement for the left thumb.

ORDER

Respondent shall pay Petitioner the sum of **$520.32**/week for an additional period of **16.75** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **25% loss of the left hand (51.25 weeks),** an additional **$8,718.96** in compensation beyond the **$17,947.44** in advance permanent partial disability benefits paid by Respondent.

Respondent shall pay Petitioner permanent partial disability benefits of **$520.32**/week for **1.19** weeks, because the injuries sustained caused the disfigurement of the **left index finger (0.43 weeks) and the left thumb (0.76 weeks)**, as provided in Section 8(c) of the Act.

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

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

Edward Lee
Signature of Arbitrator

6/14/14
Date

JUN 16 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jesus Linares,
Petitioner,

vs.

Castwell Products, LLC,
Respondent,

NO: 11 WC 16437

14IWCC1101

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 21, 2014 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $38,600.00. 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: DEC 16 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
O:11/6/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LINARES, JESUS (JESSE)
Employee/Petitioner

Case# **11WC016437**

14IWCC1101

CASTWELL PRODUCTS LLC
Employer/Respondent

On 3/21/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0147 CULLEN HASKINS NICHOLSON ET AL
JOSE RIVERO
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

1454 THOMAS & ASSOCIATES
DANA DJOKIC
500 W MADISON ST SUITE 2900
CHICAGO, IL 60606

14IWCC1101

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

Jesus (Jesse) Linares
Employee/Petitioner
v.

Castwell Products, LLC
Employer/Respondent

Case # **11WC016437**

Consolidated cases: **none**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ketki Steffen**, Arbitrator of the Commission, in the city of **Chicago**, on **February 7, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **02/25/2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$44,430.88**; the average weekly wage was **$854.44.**

On the date of accident, Petitioner was **77** 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 **$20,750.44** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$20,750.44.**

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

ORDER

Respondent shall pay reasonable and necessary medical services contained in Petitioner's Exhibit 6, as provided in Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit for amounts paid on account pursuant to its payment ledger

Respondent shall pay Petitioner temporary total disability benefits of $569.63/week for 36-3/7 weeks, commencing June 2, 2010 through July 27, 2010 and March 9, 2012 through September 23, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $ 512.66/week for 75 weeks, because the injuries sustained caused the 15% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator — Date: 3/20/14

ICArbDec p. 2

MAR 21 2014

PROCEDURAL HISTORY

This matter was presented for a hearing on the merits before Arbitrator Ketki Steffen on February 7, 2014. Both parties were represented by counsel and have entered into several stipulations that are contained as Arbitrator's Exhibit No. 1 ("AX1") for the trial record. The only disputed issue is the nature and extent of the injuries. Although, technically, AX1 indicates that TTD is in dispute, the parties have stipulated that Petitioner is entitles to and has been paid all TTD. The issue essentially is that Respondent seeks credit for $20,099.45 that was paid and Petitioner does not dispute the same. Essentially the parties are in agreement as to the amount and payment of said TTD. The case relates to an accident date of January 22, 2010; a date which predates the September, 2011 AMA guidelines amendment to the Act.

FINDINGS OF FACT

After entering into a stipulation (AX1) on all issues, except, nature and extent, the Petitioner, Jesus Linares, testified that he had worked for the Respondent, Castwell Products, LLC, for 25 years. His position at the time of the undisputed injury on February 25, 2010 was that of a supervisor and he was 77 years old with no dependents. He testified that his duties as supervisor required supervising employees, preparing the assembly lines and occasionally operating a forklift and the production machines. The Petitioner testified that his job duties also included occasional lifting of up to 50 pounds.

The Petitioner testified that on February 25, 2010, he was walking with another supervisor on the floor of his workplace which was covered in ice and he slipped and

fell on the ice and fell onto his left shoulder. He testified that he immediately felt a lot of pain in his left shoulder.

Petitioner initially treated with the company clinic, Advocate Occupational Health Center in Niles on March 11, 2010. He was diagnosed with an acute sprain/strain to the left shoulder. X-rays of the left shoulder taken at that facility were negative. The Petitioner was prescribed medication and physical therapy for two weeks, three times a week. (Petitioner's Exhibit, 1, "PX 1"). The Petitioner was returned to regular duty on March 26, 2010 by the physician at Advocate Occupational Health. He participated in six sessions of therapy but had continued pain so an MRI of the left shoulder was ordered by the physician at Advocate Occupational Health. (PX 1).

The Petitioner had an MRI of the left shoulder done on April 3, 2010 and this revealed degenerative changes most pronounced at the left acromioclavicular ("AC") joint; a rather large near-complete to complete tear of the rotator cuff at the level of the supraspinatus tendon superiorly and extending laterally with associated moderate rotator cuff tendinitis/tendinosis; a partial tear of the superior glenoid labrum; and a glenohumeral joint effusion with a ganglion cyst anterior to the glenohumeral joint extending medially. (PX 2).

The Petitioner was referred for an orthopedic consult and saw Dr. George Firlit of North Suburban Orthopeadics on April 27, 2010. Dr. Firlit reviewed the left shoulder MRI dated April 3, 2010 and diagnosed a supraspinatus tear for which he recommended arthroscopic repair. Surgery was performed by Dr. Firlit on June 2, 2010 consisting of a left shoulder arthroscopy, left subacromial decompression, debridement of the glenoid labral tear and repair of the rotator cuff tear. The Petitioner participated

in post-operative physical therapy and was eventually released to light duty on July 27, 2010. (PX 2 & 5).

The Petitioner testified that he was off work from June 2, 2010 through July 27, 2010. He was ultimately released from care by Dr. Firlit on November 17, 2010 with permanent restrictions of no over head lifting of more than 10 pounds. (PX 2).

The Petitioner testified that when he returned to work, he still noted pain in his left shoulder and had limitations with lifting. He returned to see Dr. Firlit on June 6, 2011 with complaints of increasing pain during the previous month with overhead reaching. (PX 2). Dr. Firlit ordered a repeat MRI of the left shoulder and that was done on November 16, 2011. This second MRI revealed that there had been a prior rotator cuff surgery. It also revealed mild atrophy of the supraspinatus and infraspinatus muscles similar to the prior exam (MRI dated April 3, 2010). The second MRI also revealed that a large supraspinatus defect which was seen on the prior exam was ***no longer evident***. The MRI was negative for joint effusion and subacromial bursal fluid. Degenerative changes were again seen at the AC joint. Most importantly, the labral tear which was seen on the prior exam was ***not demonstrated*** on the second exam. (PX 2).

Dr. Firlit reviewed the second MRI (November 16, 2011) and his review concluded that there was no full thickness tear of the infraspinatus tendon, but a partial thickness tear. He recommended another arthroscopic procedure for diagnostic purposes and likely repair of the tear. (PX 2).

The Petitioner sought a second opinion by Dr. Daniel Newman of the Illinois Bone & Joint Institute on February 21, 2012. Dr. Newman concurred with the possible need for a repeat surgery to Petitioner's left shoulder but expressed the need to review

the actual MRI film dated November 16, 2011. After reviewing the MRI, Dr. Newman performed surgery on the Petitioner's left shoulder on March 9, 2012 consisting of manipulation under anesthesia, arthroscopy, acromioplasty, tenotomy of the biceps tendon, mini open repair of the rotator cuff due to left shoulder pain. The intra-operative findings were adhesive capsulitis, a re-tear of the rotator cuff, biceps tendinopathy and impingement. (PX 3).

After the surgery the Petitioner was authorized off work from March 9, 2012 through September 23, 2012. During that time he participated in physical therapy at Total Rehab and then participated in a work condition program at United Rehab. He was released with permanent restrictions of no repetitive lifting with the left arm and no lifting over 30 pounds by Dr. Newman on December 4, 2012. (PX 3).

The Petitioner testified that he returned to his regular position as a supervisor for the Respondent and that the Respondent has accommodated and is currently accommodating his permanent restrictions. The Petitioner admitted that his regular job duties do not necessarily require the use of his left arm/shoulder. He testified he is right-hand dominant.

On cross-examination, the Petitioner testified that he can now perform all of his job duties as a supervisor as well as he had prior to the injury of February 25, 2010. He testified that he sometimes feels pain in his bicep and takes Advil or Tylenol to alleviate this pain. The Petitioner testified that since his release in December of 2012, he had returned to Dr. Newman with complaints of pain in his left shoulder which Dr. Newman opined was consistent with mild impingement and that this was to be expected after the procedures the Petitioner had. Dr. Newman performed an injection into Petitioner's left

shoulder which provided temporary relief. (PX 3). Petitioner denied having sustained any intervening accidents since his injury of February 25, 2010.

ANALYSIS AND FINDINGS

With respect to Issue (K), whether the Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

Petitioner was temporarily and totally disabled from June 2, 2010 through July 27, 2010 and again from March 9, 2012 through September 23, 2012 consisting of 36-3/7 weeks. The parties have stipulated that the TTD rate is $569.63 (AX1) and that the Respondent has paid to the Petitioner $20,099.45 in temporary total disability benefits on account. The Arbitrator finds that the Respondent is liable to the Petitioner for the 36- 3/7 weeks of TTD at the stipulated rate towards witch a credit of $20,099.45 is to apply for past payment by the Respondent to the Petitioner.

With respect to Issue (J), whether the medical expenses rendered to Petitioner were reasonable and necessary, the Arbitrator finds as follows:

Petitioner offered bills that it claims remains outstanding in Petitioner's Exhibit Number 6 ("PX6"). The Respondent does not dispute liability towards those expenses but rather offered a ledger of payments made to many of those providers and same is introduced into evidence as Respondent's Exhibit 1 ("RX1). Accordingly, the Arbitrator finds that Respondent is liable to the Petitioner for the medical expenses presented into evidence at part of Petitioner's Exhibit 6. Respondent's liability for these bills is subject to the limitations in Section 8(a) and 8.2 of the Act. Respondent is entitled to a credit for amounts paid on account as indicated in Respondent's payment ledger also introduced as RX1 and attached and included as Arbitrators Opinion, Attachment. A.(7 pages) Respondent shall receive credit for any and all amounts previously paid but

shall hold Petitioner harmless pursuant to 8(j) of the Act, for any group health carrier reimbursement requests for such payments...

With respect to Issue (L), what is the nature and extent of the Petitioner's injury, the Arbitrator finds as follows:

Petitioner underwent two surgeries for his left arm rotator cuff tear. The last one consisted of a mini-open repair. Petitioner was released with permanent restrictions of no overhead lifting and an overall 30 pound lifting restriction. Petitioner has returned to work for the Respondent in his regular position as a supervisor. He continues to experience pain in his left arm for which he takes Tylenol and Advil. Petitioner has returned to Dr. Newman who has administered an injection to alleviate his pain. Otherwise, Petitioner has fully returned back to his old work duties as a supervisor without any restrictions. He testified that he is capable of and does perform all or his work duties that he had responsibility for, prior to the accident.

Based on the nature and extent of the Petitioner's injury and his subsequent full duty return to work, the Arbitrator finds that the Petitioner's has reached maximum medical improvement. Based on a review of the medical history and the Petitioner's testimony as to his current condition and limitations and his age, it is the Arbitrator's finding that Petitioner sustained an injury equivalent to 15 % loss of use of man as a whole[1]. The award translates to a payment of $512.66/week for a period of 75 weeks.

Arbitrator Ketki Steffen

March 28, 2014
Date

[1] Award is written as man as a whole based on Will County Forest Preserve District v. Illinois Workers' Compensation Commission,2012 IL App (3d) 110077WC, holding that a shoulder is not part of the arm for purposes of awarding permanent partial disability, but rather part of the person as a whole.

14IWCC1101 Arbitrator's Attachment A.

Jesus Linares

JESUS LINARES
Claim # 710-675870
D/A: 2/25/10

2/6/2014

Pay To	Trans Date	Amount Paid	Original Amount	Service Date From-To	Bill Received Date
ILLINOIS BONE AND JOINT INSTIT	10/10/2013	$50.87	$86.00	07/11/2013 - 07/11/2013	10/4/2013
ILLINOIS BONE AND JOINT INSTIT	10/10/2013	$98.55	$424.00	10/09/2012 - 11/06/2012	10/4/2013
ILLINOIS PHYSICIANS NETWORK	5/23/2013	$249.26	$485.00	08/21/2012 - 08/21/2012	5/7/2013
ILLINOIS BONE AND JOINT INSTIT	4/5/2013	$98.55	$212.00	12/04/2012 - 12/04/2012	4/4/2013
ILLINOIS PHYSICIANS NETWORK	11/16/2012	$498.52	$970.00	08/20/2012 - 08/22/2012	11/5/2012
ILLINOIS PHYSICIANS NETWORK	11/15/2012	$747.78	$1,455.00	09/07/2012 - 09/10/2012	11/5/2012
ILLINOIS PHYSICIANS NETWORK	11/15/2012	$373.65	$730.00	08/15/2012 - 08/17/2012	11/5/2012
ILLINOIS PHYSICIANS NETWORK	11/15/2012	$747.78	$1,455.00	08/28/2012 - 08/30/2012	11/5/2012
ILLINOIS PHYSICIANS NETWORK	11/15/2012	$950.28	$1,785.00	08/16/2012 - 08/24/2012	11/5/2012
ILLINOIS BONE AND JOINT INSTIT	10/31/2012	$98.55	$212.00	10/09/2012 - 10/09/2012	10/22/2012
ADVOCATE HEALTH	10/8/2012	$94.36	$94.81	05/25/2011 - 05/25/2011	9/25/2012
ILLINOIS BONE AND JOINT INSTIT	9/27/2012	$98.55	$212.00	09/11/2012 - 09/11/2012	9/24/2012
ILLINOIS PHYSICIANS NETWORK	9/14/2012	$194.28	$453.00	07/30/2012 - 07/30/2012	8/30/2012
ILLINOIS PHYSICIANS NETWORK	9/14/2012	$194.28	$453.00	07/31/2012 - 07/31/2012	8/30/2012
ILLINOIS PHYSICIANS NETWORK	9/14/2012	$194.28	$453.00	07/23/2012 - 07/23/2012	8/30/2012
ILLINOIS PHYSICIANS NETWORK	9/11/2012	$194.28	$453.00	07/26/2012 - 07/26/2012	8/30/2012
ILLINOIS PHYSICIANS NETWORK	9/10/2012	$194.28	$453.00	08/08/2012 - 08/08/2012	8/30/2012
ILLINOIS PHYSICIANS NETWORK	9/10/2012	$149.86	$357.00	08/06/2012 - 08/06/2012	8/30/2012

Respondent's
Trial Exhibit No. 1

ILLINOIS PHYSICIANS NETWORK	9/10/2012	$194.28	$453.00	08/01/2012 - 08/01/2012	8/30/2012
ILLINOIS PHYSICIANS NETWORK	9/10/2012	$194.28	$453.00	07/25/2012 - 07/25/2012	8/30/2012
ST JOSEPH HOSPITAL	8/28/2012	$15,152.85		03/09/2012 - 03/09/2012	7/27/2012
ILLINOIS BONE AND JOINT INSTIT	8/27/2012	$98.55	$212.00	08/08/2012 - 08/08/2012	8/20/2012
VHS OF ILLINOIS INC	8/16/2012	$21.32	$26.00	03/06/2012 - 03/06/2012	7/3/2012
ILLINOIS PHYSICIANS NETWORK	8/13/2012	$194.28	$453.00	07/11/2012 - 07/11/2012	7/30/2012
ILLINOIS PHYSICIANS NETWORK	8/9/2012	$194.28	$453.00	07/05/2012 - 07/05/2012	7/30/2012
ILLINOIS PHYSICIANS NETWORK	8/9/2012	$194.28	$453.00	07/16/2012 - 07/16/2012	7/30/2012
ILLINOIS PHYSICIANS NETWORK	8/7/2012	$194.28	$453.00	07/18/2012 - 07/18/2012	7/30/2012
ILLINOIS PHYSICIANS NETWORK	8/7/2012	$194.28	$453.00	07/17/2012 - 07/17/2012	7/30/2012
ILLINOIS PHYSICIANS NETWORK	8/7/2012	$194.28	$453.00	07/09/2012 - 07/09/2012	7/30/2012
ILLINOIS PHYSICIANS NETWORK	8/7/2012	$194.28	$453.00	07/10/2012 - 07/10/2012	7/30/2012
ILLINOIS PHYSICIANS NETWORK	8/7/2012	$194.28	$453.00	07/03/2012 - 07/03/2012	7/30/2012
ILLINOIS PHYSICIANS NETWORK	8/7/2012	$198.78	$409.00	06/04/2012 - 06/04/2012	7/27/2012
ILLINOIS PHYSICIANS NETWORK	8/3/2012	$194.28	$453.00	07/02/2012 - 07/02/2012	7/27/2012
ILLINOIS BONE AND JOINT INSTIT	7/31/2012	$98.55	$212.00	07/11/2012 - 07/11/2012	7/23/2012
ILLINOIS PHYSICIANS NETWORK	7/24/2012	$194.28	$453.00	06/25/2012 - 06/25/2012	7/12/2012
ILLINOIS PHYSICIANS NETWORK	7/24/2012	$194.28	$453.00	06/26/2012 - 06/26/2012	7/12/2012

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ILLINOIS PHYSICIANS NETWORK	7/24/2012	$194.28	$453.00	06/27/2012 - 06/27/2012	7/12/2012
ILLINOIS PHYSICIANS NETWORK	7/18/2012	$194.28	$453.00	06/14/2012 - 06/14/2012	7/5/2012
ILLINOIS PHYSICIANS NETWORK	7/18/2012	$194.28	$453.00	06/13/2012 - 06/13/2012	7/5/2012
ILLINOIS PHYSICIANS NETWORK	7/18/2012	$194.28	$453.00	06/20/2012 - 06/20/2012	7/5/2012
ILLINOIS PHYSICIANS NETWORK	7/17/2012	$194.28	$453.00	06/18/2012 - 06/18/2012	7/5/2012
ILLINOIS PHYSICIANS NETWORK	7/16/2012	$194.28	$453.00	06/19/2012 - 06/19/2012	7/5/2012
ILLINOIS PHYSICIANS NETWORK	7/16/2012	$194.28	$453.00	06/11/2012 - 06/11/2012	7/5/2012
ILLINOIS PHYSICIANS NETWORK	7/13/2012	$194.28	$453.00	06/08/2012 - 06/08/2012	7/5/2012
ILLINOIS PHYSICIANS NETWORK	7/11/2012	$194.28	$453.00	05/24/2012 - 05/24/2012	6/26/2012
ILLINOIS PHYSICIANS NETWORK	7/10/2012	$194.28	$453.00	06/06/2012 - 06/06/2012	6/26/2012
ILLINOIS PHYSICIANS NETWORK	7/10/2012	$194.28	$453.00	05/21/2012 - 05/21/2012	6/26/2012
ILLINOIS PHYSICIANS NETWORK	7/10/2012	$194.28	$453.00	05/17/2012 - 05/17/2012	6/26/2012
ILLINOIS PHYSICIANS NETWORK	7/10/2012	$194.28	$453.00	05/30/2012 - 05/30/2012	6/26/2012
ILLINOIS PHYSICIANS NETWORK	7/5/2012	$194.28	$453.00	05/23/2012 - 05/23/2012	6/26/2012
ILLINOIS PHYSICIANS NETWORK	7/5/2012	$194.28	$453.00	05/31/2012 - 05/31/2012	6/26/2012
ILLINOIS PHYSICIANS NETWORK	7/3/2012	$194.28	$453.00	05/14/2012 - 05/14/2012	6/20/2012
ILLINOIS PHYSICIANS NETWORK	6/29/2012	$194.28	$453.00	05/16/2012 - 05/16/2012	6/20/2012

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ST JOSEPH HOSPITAL	6/26/2012	$2,850.00		03/09/2012 - 03/09/2012	6/5/2012
ILLINOIS PHYSICIANS NETWORK	6/1/2012	$194.28	$453.00	04/25/2012 - 04/25/2012	5/24/2012
ILLINOIS PHYSICIANS NETWORK	6/1/2012	$198.78	$409.00	05/02/2012 - 05/02/2012	5/24/2012
ILLINOIS PHYSICIANS NETWORK	6/1/2012	$194.28	$453.00	05/03/2012 - 05/03/2012	5/24/2012
ILLINOIS PHYSICIANS NETWORK	6/1/2012	$194.28	$453.00	05/07/2012 - 05/07/2012	5/24/2012
ILLINOIS PHYSICIANS NETWORK	5/31/2012	$194.28	$453.00	04/30/2012 - 04/30/2012	5/24/2012
ILLINOIS PHYSICIANS NETWORK	5/31/2012	$194.28	$453.00	04/26/2012 - 04/26/2012	5/24/2012
ILLINOIS PHYSICIANS NETWORK	5/31/2012	$194.28	$453.00	05/10/2012 - 05/10/2012	5/24/2012
ILLINOIS PHYSICIANS NETWORK	5/31/2012	$156.21	$409.00	05/09/2012 - 05/09/2012	5/24/2012
ILLINOIS PHYSICIANS NETWORK	5/22/2012	$194.28	$453.00	04/18/2012 - 04/18/2012	5/11/2012
ILLINOIS PHYSICIANS NETWORK	5/18/2012	$194.28	$453.00	04/19/2012 - 04/19/2012	5/11/2012
ILLINOIS PHYSICIANS NETWORK	5/17/2012	$261.30	$580.00	04/04/2012 - 04/04/2012	5/8/2012
ILLINOIS PHYSICIANS NETWORK	5/17/2012	$194.28	$453.00	04/11/2012 - 04/11/2012	5/8/2012
ILLINOIS PHYSICIANS NETWORK	5/16/2012	$194.28	$453.00	04/16/2012 - 04/16/2012	5/8/2012
ILLINOIS PHYSICIANS NETWORK	5/16/2012	$194.28	$453.00	04/09/2012 - 04/09/2012	5/8/2012
ILLINOIS PHYSICIANS NETWORK	5/16/2012	$194.28	$453.00	04/12/2012 - 04/12/2012	5/8/2012
ILLINOIS PHYSICIANS NETWORK	5/16/2012	$194.28	$453.00	04/05/2012 - 04/05/2012	5/8/2012
ILLINOIS BONE AND JOINT INSTIT	4/24/2012	$4,875.18	$16,114.00	03/09/2012 - 03/09/2012	3/22/2012

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ST JOSEPH HOSPITAL	4/19/2012	$594.21	$38,836.25	03/09/2012 - 03/09/2012	3/22/2012
LINCOLN PARK ANES NOIC	4/4/2012	$1,735.93	$3,240.00	03/09/2012 - 03/09/2012	3/26/2012
MCNEAL HOSPITAL	3/27/2012	$140.95	$278.90	03/06/2012 - 03/06/2012	3/19/2012
ILLINOIS BONE AND JOINT INSTIT	3/14/2012	$111.60	$212.00	02/21/2012 - 02/21/2012	3/5/2012
NORTH SUBURBAN ORTHOPAEDIC	2/21/2012	$66.37	$125.00	02/06/2012 - 02/06/2012	2/13/2012
TRI STATE EMERGEMCY	1/24/2012	$135.07	$135.07	09/05/2011 - 09/05/2011	1/9/2012
ADVANCED RADIOLOGY CONSULTANTS	1/10/2012	$198.44	$398.00	11/16/2011 - 11/16/2011	1/3/2012
NORTH SUBURBAN ORTHOPAEDIC	1/4/2012	$99.09	$175.00	12/16/2011 - 12/16/2011	12/27/2011
LUTHERAN GENERAL HOSPITAL	12/8/2011	$1,417.02	$2,121.00	11/16/2011 - 11/16/2011	11/28/2011
NORTH SUBURBAN ORTHOPAEDIC	11/14/2011	$66.37	$125.00	10/21/2011 - 10/21/2011	11/7/2011
NORTH SUBURBAN ORTHOPAEDIC	10/28/2011	$141.55	$175.00	06/24/2011 - 06/24/2011	10/24/2011
NORTH SUBURBAN ORTHOPAEDIC	10/13/2011	$280.20	$495.00	09/09/2011 - 09/09/2011	9/23/2011
NORTH SUBURBAN ORTHOPAEDIC	8/25/2011	$141.55	$175.00	07/22/2011 - 07/22/2011	8/19/2011
NORTH SUBURBAN ORTHOPAEDIC	7/12/2011	$140.13	$175.00	11/17/2010 - 11/17/2010	7/5/2011
NORTH SUBURBAN ORTHOPAEDIC	7/6/2011	$267.37	$353.00	06/06/2011 - 06/06/2011	6/27/2011
ATHLETICO LTD	10/22/2010	$188.92	$280.00	09/09/2010 - 09/09/2010	9/22/2010
NORTH SUBURBAN ORTHOPAEDIC	10/20/2010	$140.13	$175.00	09/22/2010 - 09/22/2010	10/4/2010
ATHLETICO LTD	10/12/2010	$188.92	$280.00	09/14/2010 - 09/14/2010	9/27/2010
ATHLETICO LTD	10/7/2010	$141.69	$210.00	08/31/2010 - 08/31/2010	9/13/2010
ATHLETICO LTD	10/1/2010	$188.92	$280.00	09/07/2010 - 09/07/2010	9/17/2010

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ATHLETICO LTD	9/28/2010	$141.69	$210.00	09/02/2010 - 09/02/2010	9/15/2010
ATHLETICO LTD	9/24/2010	$141.69	$210.00	08/26/2010 - 08/26/2010	9/10/2010
BETHANY HOSPITAL - ER	9/14/2010	$60.02		03/31/2010 - 03/31/2010	7/19/2010
ATHLETICO LTD	9/8/2010	$164.46	$240.00	08/12/2010 - 08/12/2010	8/26/2010
ATHLETICO LTD	9/8/2010	$211.69	$310.00	08/13/2010 - 08/13/2010	8/25/2010
ATHLETICO LTD	9/8/2010	$211.69	$310.00	08/10/2010 - 08/10/2010	8/20/2010
ATHLETICO LTD	9/7/2010	$209.96	$305.00	08/03/2010 - 08/03/2010	8/16/2010
ATHLETICO LTD	8/31/2010	$211.69	$310.00	08/06/2010 - 08/06/2010	8/19/2010
ATHLETICO LTD	8/31/2010	$213.42	$315.00	07/30/2010 - 07/30/2010	8/12/2010
ATHLETICO LTD	8/27/2010	$211.69	$310.00	08/05/2010 - 08/05/2010	8/16/2010
ATHLETICO LTD	8/26/2010	$211.69	$310.00	07/29/2010 - 07/29/2010	8/12/2010
ATHLETICO LTD	8/20/2010	$211.69	$310.00	07/27/2010 - 07/27/2010	8/9/2010
ATHLETICO LTD	8/20/2010	$164.46	$240.00	07/23/2010 - 07/23/2010	8/5/2010
ATHLETICO LTD	8/20/2010	$164.46	$240.00	07/22/2010 - 07/22/2010	8/2/2010
ILLINOIS SPORTS MEDICINE & ORT	8/16/2010	$15,495.68	$28,558.50	06/02/2010 - 06/02/2010	7/19/2010
NORTH SUBURBAN ORTHOPAEDIC	8/16/2010	$1,339.74	$5,300.00	06/02/2010 - 06/02/2010	7/9/2010
ATHLETICO LTD	8/11/2010	$164.46	$240.00	07/20/2010 - 07/20/2010	7/30/2010
ATHLETICO LTD	8/10/2010	$155.73	$225.00	07/17/2010 - 07/17/2010	7/30/2010
NORTH SUBURBAN ORTHOPAEDIC	8/10/2010	$6,698.69	$10,600.00	06/02/2010 - 06/02/2010	7/9/2010
SPECIALTY MEDICAL SERVICE INC	7/26/2010	$85.50	$95.00	06/02/2010 - 06/02/2010	7/19/2010
PARK RIDGE ANESTHESIOLOGY	7/2/2010	$1,743.84	$2,420.00	06/02/2010 - 06/02/2010	6/18/2010
NORTH SUBURBAN ORTHOPAEDIC	6/30/2010	$124.56	$178.00	06/04/2010 - 06/04/2010	6/22/2010
ADVOCATE OCCUPATIONAL HLTH	5/27/2010	$90.47	$154.65	03/31/2010 - 03/31/2010	4/22/2010

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NORTH SUBURBAN ORTHOPAEDIC	5/27/2010	$415.18	$503.00	05/03/2010 - 05/03/2010	5/17/2010
ADVOCATE OCCUPATIONAL HLTH	5/26/2010	$85.31	$93.86	04/23/2010 - 04/23/2010	5/10/2010
ADVANCED RADIOLOGY CONSULTANTS	5/20/2010	$224.53	$398.00	04/13/2010 - 04/13/2010	5/10/2010
ADVOCATE OCCUPATIONAL HLTH	5/3/2010	$85.31	$93.86	04/02/2010 - 04/02/2010	4/22/2010
ADVOCATE OCCUPATIONAL HLTH	4/30/2010	$90.47	$154.65	04/02/2010 - 04/02/2010	4/22/2010
ADVOCATE LUTHERAN GEN HOSP	4/29/2010	$1,501.50	$2,002.00	04/13/2010 - 04/13/2010	4/22/2010
ADVOCATE OCCUPATIONAL HLTH	4/20/2010	$90.47	$154.65	03/26/2010 - 03/26/2010	4/9/2010
ADVOCATE OCCUPATIONAL HLTH	4/19/2010	$191.82	$289.57	03/19/2010 - 03/19/2010	4/9/2010
ADVOCATE OCCUPATIONAL HLTH	4/19/2010	$90.47	$154.65	03/22/2010 - 03/22/2010	4/9/2010
ADVOCATE OCCUPATIONAL HLTH	4/19/2010	$101.95	$114.66	03/26/2010 - 03/26/2010	4/9/2010
ADVOCATE OCCUPATIONAL HLTH	4/19/2010	$101.95	$114.66	03/18/2010 - 03/18/2010	4/9/2010
ADVOCATE OCCUPATIONAL HLTH	4/19/2010	$90.47	$154.65	03/29/2010 - 03/29/2010	4/9/2010
ADVOCATE OCCUPATIONAL HLTH	4/2/2010	$237.11	$366.81	03/11/2010 - 03/11/2010	3/22/2010

Respondent's
Trial Exhibit No. 1

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dortina Johnson,
Petitioner,

vs.

NO: 08 WC 09439

Illinois Department of Human Services, Fox D.C.,
Respondent,

14IWCC1102

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 permanent partial disability, causal connection and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 20, 2014 is hereby affirmed and adopted.

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

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

No bond or summons for State of Illinois cases

DATED: DEC 16 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:11/6/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JOHNSON, DORTINA
Employee/Petitioner

Case# **08WC009439**

14IWCC1102

IL DEPT OF HUMAN SERVICES FOX D C
Employer/Respondent

On 2/20/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

1293 VITELL & SPITZ LTD
EDWARD SPITZ
155 N MICHIGAN AVE SUITE 600
CHICAGO, IL 60601

4980 ASSISTANT ATTORNEY GENERAL
COLIN KICKLIGHTER
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

FEB 20 2014

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Will)

14IWCC1102

☐ 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

Dortina Johnson
Employee/Petitioner

v.

Illinois Dept. of Human Services, Fox D.C.
Employer/Respondent

Case # **08WC09439**

Consolidated cases: **None**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **12/11/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

14IWCC1102

On **12/25/07**, 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 $28,294.76; the average weekly wage is $544.13

On the date of accident, Petitioner was **61** years of age, ***Married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and $442.48 (Service Connected leave) for other benefits, for a total credit of **$442.48**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $11,726.21, as provided in Sections 8(a) and 8.2 of the Act. By stipulation of the parties shall be credited for payment already made.

Respondent shall pay Petitioner permanent partial disability benefits of $326.48/week for 50 weeks, because the injuries sustained caused the permanent partial disability of said Petitioner to the extent of 10%, 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

2/18/14
Date

ICArbDec p. 2

FEB 20 2014

STATEMENT OF FACTS:

On December 25, 2007, Dortina Johnson, hereinafter know as "Petitioner" was employed as a Mental Health Technician by the State of Illinois, Department of Human Services at the Fox Developmental Center, hereinafter known as "Respondent". Her duties included assisting residents with daily life including bathing, lifting, administering medications, and transporting individuals as needed.

Petitioner testified that on December 25, 2007, she was lifting a 200 lbs patient from his wheelchair to his bed. Petitioner testified that she felt immediate pain at the right side of her neck down to her shoulder blade. Petitioner reported the occurrence to her supervisor and was sent to the on-site doctor at the facility.

The next day, December 26, 2077, Petitioner presented to her primary care physician, Dr. Margo Wolf, at the Family Practice Consultants, Ltd., with complaints of pain in the upper back and the inability to move her neck without pain. Associated symptoms included tingling in he left arm. Petitioner reported the pain began the previous day after a lifting incident at work. After obtaining x-rays and performing an examination of her neck, left shoulder and back, Dr. Wolf diagnosed neck muscle sprain/pain and spasm of the neck. Petitioner was prescribed Vicodin, Ibuprofin, and Flexeril and taken off work. (PX 1, pgs 22, 23 and 40)

Petitioner returned to Dr. Wolfe on December 28, 2007, wherein an examination revealed right upper paraspinal muscle tenderness and subacromial bursa tenderness in both shoulders. The doctor's assessment was unchanged. (PX 1, pg. 21) Petitioner testified that Dr. Wolf returned her to restricted work on January 1, 2008.

Petitioner continued treating with Dr. Wolf. (PX1) The doctor referred Petitioner to physical therapy at ATI Physical Therapy in Joliet Illinois. Petitioner attended physical therapy at ATI from January 15, 2008 through February 29, 2008. (PX 1, pg 29) On January 25, 2008, Dr. Wolf noted Petitioner had right middle paraspinal muscle tenderness at the shoulder blade. Petitioner was advised to continue with her medication and physical therapy. She was also to return to work no lifting. (PX 1, pg 19)

Petitioner testified that she decided to seek a second opinion. On February 28, 2008 she presented to MK Orthopaedic Surgery and Rehabilitation where she was initially seen by Dr. Anuj Puppala. Petitioner complained of shoulder pain surrounding the right scapula and leading up into her neck. Petitioner also reported that she had been in physical therapy but had not seen much relief. After an examination, Dr. Puppala felt Petitioner had some mild instability in the shoulder that was being compensated by her periscapular and accessory muscles in the shoulder. The doctor prescribed an MRI arthrogram and returned Petitioner to restricted duty. (PX 2, pgs 47 and 55)

The MRI arthrogram was performed on March 5, 2008 and was read to show mild rotator cuff tendinosis and mild biceps tendinosis. There with no evidence of a rotator cuff tear or labral tear. (PX 2, p58)

On March 6, 2008, Dr. Anuj Puppala reviewed MRI films stating, "I do see some fluid extravasating anterior to the labrum which makes me suspicious for a capsular tear off of the glenoid. She does have quite a bit of tenderness on exam anteriorly but this is where she was injected with the dye as well so I cannot correlate these two findings. She does still have periscapular tenderness … I would like to get her into physical therapy that is more focused on her periscapular region. Ms. Johnson is actually requesting a different therapy site then there

and wishes to pursue a different option." Petitioner's work status remained with no overhead lifting. (PX 2, p54)

On March 18, 2008, Petitioner started physical therapy with MK Orthopaedic Surgery and Rehabilitation. On April 8, 2008, Dr. Puppala prescribed a cervical MRI and an EMG. (PX 2, p53) Petitioner underwent the MRI study on April 14, 2008 which was read to show herniated discs at the C5-C6 C6-C7 levels. Also noted was several stenotic neural foramina on the right. (PX 3, p12)

On April 17, 2008, Dr. Puppala noted the MRI findings and referred to Petitioner Dr. Anthony Rivera, at Health Benefits Pain Management Services, for possible cortisone injections. (PX 2, p53)

On April 21, 2008, Petitioner saw Dr. Rivera for the first time. Petitioner's chief complaint was neck pain. The doctor noted Petit Petitioner had a sharp, burning, deep ache sensation over the posterior upper back which was predominately located in her shoulder blade, right side worse than left. After reviewing the April 14, 2008 MRI and performing an examination, Dr. Rivera's impression was 1.) right sided radiculopathy; 2.) cervical disc herniation at C5-C6, C6-C7; 3.) cervical facet arthropathy; 4.) neuropathic pain; and 5.) muscle spasm. Dr. Rivera prescribed medications. Possible trigger point injections and epidural injections were also discussed. (PX 3, pgs 10-11). Petitioner decided to defer the injections and continue conservative.

Petitioner followed up with Dr. Rivera on May 12, 2008. The doctor noted Petitioner noticed improvement with her symptoms. Trigger point injections were discussed which Petitioner again wanted to defer. Dr. Rivera recommended continued physical therapy noting that if she continued to improve he would return her to work full duty. (PX 3, p8)

On May 22, 2008, Petitioner was discharged from physical therapy. The discharge report indicates Petitioner showed significant improvement in strength around the shoulder and scapula of the right extremity as well as improved range of motion. Also noted was that her problems with her neck was effecting her more than the shoulder. It was felt she had reached maximum medical improvement relative to her shoulder. (PX 2, p29)

On May 27, 2008, Dr. Puppala discharged Petitioner from his care and deferred any further treatment to Dr. Rivera. (PX 2, p52)

On June 9, 2008, Petitioner returned to Dr. Rivera who wrote, "The patient has shown improvement with conservative measures. Will continue medication regimen as is for now. Discussed the option of pursuing trigger point injections. At this time, the patient is still hesitant. She states that she is afraid of needles. The patient will continue her medications and home exercise program and hope for the symptoms to continue to improve. Will return the patient back to work full duty. If symptoms become more severe, instructed the patient to call my clinic and come in for trigger point injections, which she agreed. (PX 3, p6)

Petitioner testified that she still has problems with her neck. She testified that she has pain when turning her neck far to the right, has pain in her neck all the time and that weather affects her neck. She takes over the counter medication to help her. During cross examination, Petitioner stated that she has not pursued more treatment because she believed that her only options were shots in her neck and she feared doing that.

Petitioner testified to the best of her knowledge and belief the following medical bills, noted in Petitioner's Exhibit # 2-8, have not been paid by Respondent:

1. Family Practice Consultants, Ltd. $850.00

2. Illinois Physicians Network, LLC $3,096.13
3. Health Benefits Physicians Services LLC $279.08
4. Illinois Pharmacy Management LLC $2,236.00
5. Joliet Radiological Services, Corp. $51.00,
6. MK Orthopaedics Surgery & Rehabilitation $5,214.00

The parties stipulated that Respondent may have paid some of these medical bills and to the extent that these bills were paid, Respondent shall receive a credit.

In regards to Issue "F', Is the Petitioner's present condition of ill being causally related to the injury?, the Arbitrator finds as follows:

Petitioner credibly testified as to the mechanism of injury. She initially received medical care at Respondent's facility immediately thereafter. Petitioner, within one day of the accident, sought and received medical care through her primary care physicians and other physicians. Petitioner pursued all treatment recommended to her by her doctor's with the exception of possible trigger point injections or epidural injections into her neck which she testified that she feared. Petitioner's testimony is buttressed by Dr, Rivera who upon discharging Petitioner on June 9, 2008, stated that he hoped her symptoms will improve and if not to return for shots. Petitioner stated that she has pain in her neck, can't turn her neck too far and is trying to get by with over the counter medication. She has not pursued more treatment because she believed that her only options were shots in her neck and she feared doing that.

Based on the sequence of events, the resultant injury and treatment and Petitioner's credible testimony, the Arbitrator finds that Petitioner's conditions of ill being relating to her right shoulder and cervical spine are causally related to her accident of December, 25, 2007.

In regards to Issue "K", Were the medical services that were provided to the petitioner reasonable and necessary? Has respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Petitioner testified to the best of her knowledge and belief the following medical bills have not been paid by the Respondent:

1. Family Practice Consultants, Ltd. $850.00
2. Illinois Physicians Network, LLC $3,096.13
3. Health Benefits Physicians Services LLC $279.08
4. Illinois Pharmacy Management LLC $2,236.00
5. Joliet Radiological Services, Corp. $51.00,
6. MK Orthopaedics Surgery & Rehabilitation $5,214.00

These medical services were rendered to Petitioner immediately and following her injury and are directly related to her injury. The parties stipulated that Respondent may have paid some of these medical bills and to the extent that these bills were paid, Respondent shall receive a credit.

Based on the foregoing, the Arbitrator finds, that the medical services rendered were reasonable and necessary and that Respondent shall pay for these services per the fee schedule. Furthermore, Respondent shall receive a credit for medical services already paid by Respondent per the stipulation of the parties.

In regards to issue "L", what is the nature and extend of the injury, the Arbitrator finds as follows:

Petitioner suffered an injury at work to her neck and right shoulder on December 25, 2007. Petitioner was treated conservatively and her condition initially did not improve. A MRI arthrogram of the shoulder was performed on March 5, 2008 and was read to show mild rotator cuff tendinosis and mild biceps tendinosis. On April 14, 2008, Petitioner had an MRI of her neck. The MRI reflected that Petitioner suffered herniated discs at C5-C6 and C6-C7. Petitioner continued to receive conservative treatment for both conditions of ill-being. On May 22, 2008, Petitioner was discharged from physical therapy with respect to her shoulder. The discharge report noted that her problems with her neck were effecting her more than the shoulder. Dr. Rivera who treated Petitioner for her cervical condition diagnosed 1.) right sided radiculopathy; 2.) cervical disc herniation at C5-C6, C6-C7; 3.) cervical facet arthropathy; 4.) neuropathic pain; and 5.) muscle spasm. Ultimately, Dr. Rivera prescribed trigger point injections which Petitioner rejected due to fear. Dr, Rivera, when discharging the Petitioner on June 9, 2008, stated that he hoped her symptoms will improve and if not to return for injections. Petitioner testified that she was not aware that she could receive different treatment and believed that injections were the only treatment that remained available. Petitioner, due to fear, has never had the injections and has self medicated with over the counter medication. At trial, Petitioner testified that she has constant pain and soreness in her neck, can't turn her head too far to the side and is affected by weather.

Based on the foregoing, the Arbitrator finds that Petitioner has suffered injuries to her right shoulder and cervical spine causing a 10% loss of the total person pursuant to Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Keith Dowty,

Petitioner,

vs.

NO: 13 WC 13180

Elgin Motor Services,

14IWCC1103

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses both incurred and prospective 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 November 5, 2014, is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $12,300.00. 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: DEC 17 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

HSF
O: 10/21/14
049

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

DOWTY, KEITH
Employee/Petitioner

Case# **13WC013180**

ELGIN MOTOR SERVICES
Employer/Respondent

14IWCC1103

On 11/5/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

4642 O'CONNOR & NAKOS LTD
MATT WALKER
120 N LASALLE ST SUITE 3500
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
VALERIE J PEILER
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

14IWCC1103

STATE OF ILLINOIS)
)SS.
COUNTY OF Kane)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Case # 13 WC 13180

Consolidated cases: n/a

Keith Dowty
Employee/Petitioner

v.

Elgin Motor Services
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **Geneva**, on **October 10, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC1103

FINDINGS

On the date of accident, **12-10-12**, 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 **$39,780.00**; the average weekly wage was **$765.00**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **2** dependent children.

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

Respondent shall be given a credit of **$1500.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1500.00**.

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

ORDER

Respondent shall pay Petitioner temporary partial disability benefits of $509.95/week for 19weeks, commencing 12/11/12 through 1/6/13 & from 6/27/13 through 10/10/13, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services of $1,420.00, as provided in Sections 8(a) and 8.2 of the Act. Respondent to receive credit for all sums previously paid hereunder.

Respondent shall authorize an MRI of the right shoulder per the recommendations of Petitioner's treating surgeon, Dr. Russell Bodner.

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.

Nhell E Dhm
Signature of Arbitrator

October 31, 2013
Date

ICArbDec19(b)

NOV - 5 2013

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

In order for an injury to be compensable under the Workers' Compensation Act, the injury must "arise out of" and "in the course of" the employment. The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. *See Orsini v. Industrial Commission,* 117 Ill.2d 38, 44 (1987). The Illinois Supreme Court has recognized that accidental injuries sustained on an employer's premises within a reasonable time before and after work are generally deemed to arise in the course of the employment. *See Jones v. Industrial Commission,* 78 Ill.2d 284,286 (1980).

For an injury to "arise out of" the employment its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *See Caterpillar Tractor Co. v. Industrial Commission,* 129 Ill.2d 52, 58 (1989). If an employee is exposed to a risk common to the general public to a greater degree than other persons, the accidental injury is also said to arise out of his employment. *Id.* However, if the injury results from a hazard to which the employee would have been equally exposed apart from the employment, or a risk personal to the employee, it is not compensable. *See Material Services Corp. v. Industrial Commission,* 53 Ill.2d 429 (1973).

On December 10, 2012, Petitioner finished his route and returned to the yard. Petitioner testified that he signed himself out at 4:30 p.m. This paperwork was completed in the office trailer. Respondent offered into evidence a time card corroborating Petitioner's testimony. *See Respondent's Exhibit #2.* His boss, Scott Harney, arrived shortly thereafter. Petitioner was waiting to be picked up from work, and the two briefly discussed the schedule for the following

day. Shortly after that discussion, Petitioner testified that Mr. Harney asked Petitioner to come take a look at the changes Mr. Harney had made to the supply trailer, which was also located on the premises, a short distance from the office trailer. Harney, however testified that it was Petitioner who requested to see the changes in the trailer.*See Respondents Exhibit #3.*

Both the Petitioner and his employer testified that the supply trailer housed items used to maintain the Respondent's trucks. Those items included an air compressor, tools and fluids such as anti-freeze and motor oil. Petitioner testified that he had been in the trailer prior to December 10, 2012 on a handful of occasions to procure motor oil and other items for use in maintaining the trucks. Scott Harney testified that while he himself did most of the mechanical work, he did not do all of it. He stated that while it was not normal for drivers to go into the supply trailer, it did happen.

The supply trailer is a semi-trailer that is approximately 3-4 feet off the ground. In order to enter the supply trailer, Petitioner and his boss had to climb a set of stairs. On the date of the accident, the stairs did not have handrails, and did not extend the full width of the trailer. There were no guardrails on the trailer and no warnings for workers exiting the trailer as to where the stairs were located. When they entered the trailer, Scott Harney showed Petitioner the new lights and pointed out where things were kept. He specifically noted the location of the air compressor.

As they were leaving the trailer, Scott Harney turned off the lights. Petitioner turned to exit the trailer and stepped off the trailer in an area devoid of stairs. He fell onto the pavement, striking his right shoulder.

Scott Harney escorted Petitioner back to the office trailer. He attempted to render what first aid he could on the premises, and asked Petitioner if he would be going to the emergency

room immediately, or if he was going to wait until the next morning. Petitioner advised that he would seek treatment the next morning if necessary.

Scott Harney testified that Petitioner left the supply trailer to go home around 5:45 p.m. However, Mr. Harney also testified that 1 ½ hours passed from the time Petitioner left the premises and the time Mr. Harney was closing the trailer at 6:30 p.m. That would place the time of Petitioner's leaving the premises at around 5:00 p.m. The Form 45 indicated an accident time of 5:45 p.m., but was written by Robyn Henry, who was not present at the time of the accident and was merely recording information provided to her second hand by her husband, Scott Harney. *See Respondents Exhibit #1.*

The Form 45 states that that Petitioner was "[o]ff work waiting on girl friend to pick him up. Was looking at a work trailer Scott Harney was redoing. When steeping of (sic) trailer missed step and stepped off back falling onto pavement." The Form 45 states the date of the report was December 10, 2012. This is inaccurate, as Robyn Harney testified she filled out the report the day after the accident, or December 11, 2012.

The Petitioner's injuries were sustained in the course of his employment. The accident occurred within a reasonable time after Petitioner signed himself out, and the accident occurred on the employer's premises. After clocking out, he had discussions with his employer about the schedule for the following day, and accompanied Scott to take a look at the changes made to the supply trailer. There is disagreement as to who requested the trip to the trailer, but the Arbitrator finds that this disagreement is immaterial. The supply trailer contained tools and fluids used to maintain the Respondent's trucks. Harney testified that while it was not normal for drivers to go into the trailer to obtain supplies such as motor oil or antifreeze, it did happen. As such it was a

benefit to the employer for the drivers to know what changes had been made to the supply trailer, as these involved rearranging the places where and the manner in which the various supplies were stored. Based on the record as a whole, the Arbitrator finds that Petitioner was still in the course of his employment with Respondent when the accident as alleged herein occurred.

Based on the record as a whole, the Arbitrator further finds that Petitioner's injuries also arose out of his employment with the respondent. His injuries resulted from a hazardous condition on the Respondent's premises. No evidence was presented that the general public was ever exposed to the hazard of the guardrailess stairs or even allowed on the premises owned by Respondent. As set forth above, the entire purpose of the visit to the trailer was job related, ie to familiarize Petitioner with the changes that had been made to the supply trailer, a trailer that Petitioner would on occasion have to utilize to replace various fluids or parts on his truck. Because the visit was job related, the sequelae of the visit, meaning the fall off the stairs as Petitioner exited, was also job related, as leaving the trailer was as necessary a part of the visit to the trailer as entering it was.

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

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land & Lakes Co. v. Industrial Commission,* 359 Ill. App. 3d. 582, 592 (2005). 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 Commission,* 797 N.E.2d 665, 673 (2003).

On May 2, 2013, Dr. Bodner recorded the history of accident as described by the Petitioner. The history provided to Dr. Bodner is the same history Petitioner provided to the doctors at Provena St. Joseph's the day after the incident, and coincides with the description on the Form 45 filled out by the Respondent the day after the work accident. Dr. Bodner opined in his chart note dated May 2, 2013 that "[m]y impression is that he has a rather large rotator cuff tear, now chronic, from this fall five months ago."

Petitioner did suffer another non-work related accident on March 21, 2013. Petitioner was struck by a vehicle while in the crosswalk. Dr. Bodner treated Petitioner for the injury to his left knee. Dr. Bodner was aware of the accident that occurred on March 21, 2013, and was still of the opinion that Petitioner's right shoulder injury was related to the industrial accident that occurred on December 10, 2012. Respondent offered no medical opinions to the contrary.

Petitioner testified without rebuttal that he has suffered from consistent and ongoing complaints since the date of the accident, all to his right shoulder.

Wherefore, based on the record as a whole, the Arbitrator finds that Petitioner's right shoulder injury is casually related to the work accident that occurred on December 12, 2010.

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

Petitioner's medical treatment for his right shoulder has been minimal. Petitioner testified that he does not have health insurance now, nor was he provided with health insurance

when he was working for the Respondent. Petitioner is pending an MRI of the right shoulder, with additional recommendations including possible surgery to follow once Dr. Bodner has the opportunity to review the MRI.

In this case, the Petitioner's records document his right shoulder injury, the deficits and pain associated with the right shoulder injury, as well as the tests and medical procedures his doctors believe are necessary and appropriate to treat his pain and his injuries. Both the doctors at St. Joseph's Hospital and Petitioner's treating surgeon, Dr. Bodner, have indicated that Petitioner is in need of additional testing and treatment. The employer has presented no evidence suggesting that these treatments are not necessary to cure or relieve the effects of Petitioner's injury. Petitioner's medical treatment to date has been reasonable, necessary and conservative in nature. The Arbitrator awards the following medical bills to be paid in accordance with the Illinois Workers' Compensation Act fee schedule:

Provena St. Joseph Hospital:	$1,030.00
Midwest Orthopedic Institute:	$ 390.00

K. Is Petitioner entitled to any prospective medical care?

Petitioner initially treated at Provena St. Joseph's Hospital. *See Petitioner's Exhibit #1.* On December 11, 2012, an MRI of Petitioner's right shoulder was requested. A note dated December 11, 2012 references a phone conversation with Scott Haney in which the hospital advises Mr. Haney that Petitioner needed a right shoulder MRI.

Petitioner followed up at Provena St. Joseph's Hospital on December 14, 2012. It was noted that the right shoulder MRI was still pending approval.

Petitioner was seen by Dr. Russell Bodner on May 2, 2013. *See Petitioner's Exhibit #3.* At that time, Dr. Bodner charted a history of the work accident, and recommended an MRI scan to confirm the extent of Petitioner's rotator cuff tear, associated with the fall five months prior to the May 2, 2013 visit. Dr. Bodner indicated that a surgical reconstruction of the shoulder would likely be necessary but did not specifically prescribe same as of the date of hearing.

As stated noted in paragraph J, the employer has presented no evidence suggesting that prospective medical care as recommended by Provena St. Joseph and Dr. Bodner is not necessary to cure or relieve the effects of Petitioner's injury.

Wherefore, the Arbitrator orders Respondent to authorize the right shoulder MRI recommended by Dr. Bodner but not the surgical procedure recommended by Dr. Bodner, that being a surgical reconstruction of Petitioner's right shoulder, as Doctor Bodner has not yet definitively ordered same, pending outcome of the MRI.

L. What temporary benefits are in dispute? TTD

A claimant is temporarily and totally disabled from the time an injury incapacitates him from 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. Industrial Commission,* 138 Ill.2d 107 (1990). To be entitled to TTD benefits, it is a claimant's burden to prove not only that he did not work, but also that he was unable to work. *Interstate Scaffolding, Inc. v. Industrial Commission,* 236 Ill2d 132, 148 (2010).

The duration of disability is controlled by the claimant's ability to work and his continuation in the healing process. Neither the ability to do light work nor the nonreceipt of

medical treatment precludes a finding of temporary total disability. *Zenith Company v. Industrial Commission,* 91 Ill.2d 278 (1982).

An employer's obligation to pay TTD benefits to an injured employee does not cease because the employee had been discharged – whether or not the discharge was for "cause." When an injured employee has been discharged by his employer, the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily, totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits. *See Interstate Scaffolding v. Illinois Workers' Compensation Commission,* 923 N.E.2d 266, 276 (Ill. 2010).

The Arbitrator notes that it appears that Petitioner's right shoulder condition has not stabilized. Dr. Bodner has recommended a right shoulder MRI, which he speculates will reveal injuries requiring surgical reconstruction of the shoulder. Petitioner was off work from December 11, 2012 through January 6, 2013. He returned to work on January 7, 2013 but testified that he had to drive and shift using only his left hand. He testified that he had excessive difficulties closing and opening the trailer doors, and had to rely on assistance in order to complete his job duties. He was terminated on March 4, 2013 when it was learned that he was no longer legally allowed to drive, as his medical certificate had expired due to an eye condition. *See Petitioner's Exhibit #4.* Respondent's witnesses both testified that Petitioner was working full duty without complaints from January7, 2013 through March of 2013, when it was learned that his IDOT medical card had expired due to an eye problem. Both witnesses testified that work was still available to Petitioner but that he could not legally work without his medical card.

Petitioner testified that he had done nothing in the interim to address the problem of his medical card.

Thereafter, on June 27, 2013 Dr. Bodner charted that "I think he needs to get his shoulder evaluated and probably fixed. He will follow up with me in one month's time. He is certainly unable to return to any work." *See Petitioner's Exhibit #3.* This statement of Dr. Bodner was unrebutted and uncontradicted by any evidence introduced by Respondent. As noted in this decision, Petitioner has been unable to seek more extensive medical treatment for his right shoulder due to a lack of health insurance.

Wherefore, in light of the testimony and the medical records, the Arbitrator awards TTD benefits in the amount of $509.95 per week from December 11, 2012 through January 6, 2013 and again from June 27, 2013 through the date of hearing on October 10, 2013 for a total of 19 weeks. Respondent shall be given credit for $1500.00 in weekly benefits paid between December 11, 2012 and January 5, 2013.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Roche,

Petitioner,

vs.

NO: 08 WC 41977

Martin Petersen Company,

14IWCC1104

Respondent.

DECISION AND OPINION ON REVIEW

This matter comes before the Commission on timely petitions for review filed by the parties herein and the parties' agreed motion to issue a final Commission decision, with due notice given. The Commission, after considering the issues at bar 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. Further, the Commission finds that both of its decisions in this matter are now final and appealable.

On July 22, 2013, the Arbitrator filed a decision in this matter awarding temporary total disability benefits, maintenance benefits, medical expenses and wage differential benefits pursuant to section 8(d)1 of the Act. On October 24, 2014, the Commission issued a (second corrected) decision and opinion on review modifying the method of wage differential calculation and remanding the matter to the Arbitrator for a determination of permanent partial disability benefits pursuant to sections 8(d)1 or 8(d)2 of the Act, at Petitioner's election.

On November 10, 2014, the Arbitrator filed a decision stating that Petitioner elected a wage differential award pursuant to section 8(d)1, and the parties stipulated that on the date of the original arbitration hearing Petitioner would have been able to earn $1,350.00 per week in the full performance of his duties as an apprentice plumber. The Arbitrator awarded wage differential benefits in accordance with the parties' stipulation and the Commission's directions on remand.

14IWCC1104

The parties timely filed their respective petitions for review of the Arbitrator's November 10, 2014, decision in order to preserve their respective rights to judicial review of the Commission's interlocutory decision issued October 24, 2014. Contemporaneously, the parties filed an agreed motion to issue a final Commission decision.

The Commission hereby affirms and adopts the Arbitrator's decision filed November 10, 2014. Further, the Commission finds that both of its decisions in this matter are now final and appealable.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed November 10, 2014, is hereby affirmed and adopted.

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

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

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

DATED: DEC 18 2014
SM/sk
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROCHE, MICHAEL
Employee/Petitioner

Case# **08WC041977**

MARTIN PETERSEN CO INC
Employer/Respondent

14IWCC1104

On 11/10/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4788 HETHERINGTON KARPEL BOBBER ET AL
PETER BOBBER
120 N LASALLE ST SUITE 2810
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
JESSICA MILLER
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

14IWCC1104

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 ON COMMISSION REMAND

MICHAEL ROCHE
Employee/Petitioner

v.

MARTIN PETERSON CO., INC.
Employer/Respondent

Case # **08** WC **41977**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Chicago**, on **November 5, 2014**. After receiving the Second Corrected Decision and Opinion on Review from the Commission dated 10/24/14 remanding this matter to the Arbitrator for findings consistent with the Commission Decision, a hearing was held on 11/5/14 and the Arbitrator hereby makes the following findings and attaches those findings to this document. SEE ARB EX 1.

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?
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. xxx Other **Findings consistent with Second Corrected Decision and Opinion on Review**

FINDINGS

On **07/23/2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$27,235.98**; the average weekly wage was **$866.60**.

On the date of accident, Petitioner was **39** 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 **$45,393.07** for TTD, **$0.00** for TPD, **$29,959.43** for maintenance, and **$0.00** for other benefits, for a total credit of **$75,352.50**.

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

ORDER

At hearing on 11/5/14, the parties appeared before the Arbitrator to address the Commission's remand order in its Decision dated 10/24/14. In its Decision, the Commission affirmed the Arbitrator's award of a wage differential under Section 8(d)(1) of the Act but found that the Arbitrator erred in the calculation of the award. Specifically, the Commission found that the wage differential should be based on the average weekly wage of an apprentice union plumber rather than on the average weekly wage of a journeyman union plumber thus yielding lower weekly sums under Section 8(d)(1). ARB EX 1. In light of this finding, the Commission requested further clarification on whether Petitioner is requesting an award under Section 8(d)(1) or a loss of trade award pursuant to Section 8(d)(2) of the Act. ARB EX 1. The Commission remanded the matter to the Arbitrator for "a determination of a permanent disability award consistent with our Decision." ARB EX 1.

At hearing on 11/5/14 the parties appeared with an agreed stipulation indicating an agreement that on the date of the Arbitration hearing of 6/11/13, Petitioner would have been able to earn $1,350 per week in the full performance of his duties as an apprentice plumber. ARB EX 2. In further accordance with the Commission Decision, at the 11/5/14 hearing, Petitioner clearly indicated that he is requesting a permanent disability award under Section 8(d)(1) of the Act and is not electing an award under Section 8(d)(2) of the Act.

Based on the above, Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid.

Respondent shall pay Petitioner temporary total disability benefits of **$577.33**/week for 108-1/7ths weeks, commencing **10/2/2008** through **10/28/2010**, as provided in Section 8(b) of the Act. Respondent shall receive credit for amounts paid.

Respondent shall pay Petitioner maintenance benefits of **$577.73**/week for 69-6/7ths weeks, commencing **10/29/10** through **2/29/2012**, as provided in Section 8(a) of the Act. Respondent shall receive credit for amounts paid.

Respondent shall pay Petitioner permanent partial disability benefits as provided in Section 8(d)(1) of the Act as follows:

a. $740.00 per week from March 1, 2012 through April 29, 2012 totaling 8 4/7ths weeks;
b. $515.46 per week from April 30, 2012 through December 31, 2012 totaling 35 1/7th weeks; and
c. $466.67 per week from January 1, 2013 through June 11, 2013, the arbitration hearing date, totaling 23-1/7ths weeks and ongoing for the duration of petitioner's disability. SEE ARB EX 2.

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.

Carolyn D Merdy
Signature of Arbitrator

11/6/14
Date

NOV 10 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cynthia Halsey Hodges,
Petitioner,
vs.
University of Illinois,
Respondent,

NO: 10 WC 46983

14IWCC1105

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 permanent partial disability, temporary total disability, statute of limitations, accident, notice, medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 14, 2014 is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 19 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:11/6/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HALSEY-HODGES, CYNTHIA
Employee/Petitioner

Case# **10WC046983**

14IWCC1105

UNIVERSITY OF ILLINOIS
Employer/Respondent

On 4/14/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0926 LEONARD LAW GROUP LLC
JOSEPH J LEONARD ESQ
300 S ASHLAND AVE SUITE 101
CHICAGO, IL 60607

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

1408 HEYL ROYSTER VOELKER & ALLEN
DANA HUGHES
120 W STATE ST 2ND FL
ROCKFORD, IL 61105

0902 UNIVERSITY OF IL/CLAIMS MGMT
CHUCK HUTCHISON
1737 W POLK ST M/C 940 STE B
CHICAGO, IL 60612

0904 STATE UNIVERSITY RETIREMENT SYS
PO BOX 2710 STATION A*
CHAMPAIGN, IL 61825

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

APR 14 2014

RONALD A.RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
X None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Cynthia Halsey-Hodges
Employee/Petitioner

v.

University of Illinois
Employer/Respondent

Case # 10 WC 46983

14IWCC1105

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 Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **February 24, 2014 and March 19, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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

14IWCC1105

On **October 14, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$40,521.00**; the average weekly wage was **$779.25**.

On the date of accident, Petitioner was **49** years of age, *single* 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 **$0.00** 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 $ **see ORDER below** under Section 8(j) of the Act.

ORDER

Based on the attached conclusions of law and stipulation of the parties, Respondent is entitled to credit under Section 8(j) for all carpal tunnel surgery related medical bills paid by group. Respondent shall keep Petitioner safe and harmless from any and all claims or liabilities against her by reason of this award and having received such payments pursuant to Section 8(j) of the Act.

Based on Dr. Hall's records (PX 3, 7), the Arbitrator finds that Petitioner was temporarily totally disabled from August 17, 2011 (the date of the right carpal tunnel release) through September 4, 2011 and from October 5, 2011 (the date of the left carpal tunnel release) through October 30, 2011, a total of 6 3/7 weeks.

Based on the attached conclusions of law, and the stipulated average weekly wage of $779.25, Respondent shall pay Petitioner permanent partial disability benefits of $467.55/week for a total of 41 weeks because the injuries sustained caused 10% loss of each hand (20.5 weeks x 2 = 41 weeks), as provided in section 8(e) of the Act.

Based on the attached conclusions of law, the Arbitrator declines to award penalties and fees on either unpaid awarded benefits or unreimbursed lost wages. The Arbitrator orders Respondent to reimburse Petitioner for the approximate five hours of wages she lost secondary to attending a Section 12 examination by Dr. Pomerance.

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 Mora

Signature of Arbitrator

April 14, 2014
Date

APR 14 2014

14IWCC1105

Cynthia Halsey-Hodges v. University of Illinois
10 WC 46983

Arbitrator's Findings of Fact

Petitioner, a customer service representative, alleges bilateral carpal tunnel syndrome secondary to repetitive trauma. Petitioner's Application, filed on December 8, 2010, alleges a manifestation date of October 14, 2010.

Petitioner testified she worked as a data entry clerk for Respondent from 1989 until 2002. During this period, she spent at least six hours per day on a computer, applying charges and direct deposits to students' accounts. She lacked wrist supports and had to place a ream of paper under the computer modem in order to adjust the screen to the proper height.

Petitioner testified she moved to a different Respondent office in 2002, at which point she began working in customer service. She again lacked wrist supports and had to make the same adjustment to her computer modem.

Petitioner indicated that, between 2002 and 2010, her job consisted of inputting patient data. She obtained some of this data directly from the patients, via telephone. She averaged 45 patients per workday. She had to complete 10 screens for each patient, filling in such information as appointment times, insurance verification and employer contacts. She had to call certain patients to verify information that she then inputted during the call.

Petitioner testified she keyboarded for at least 6 hours per workday between 2002 and 2010. She was allotted a one-hour lunch break along with bathroom breaks.

Petitioner testified that, in 2010, she began using a chair that was too low for her. Her wrists rested directly on the desktop. She typed with her hands flexed.

Petitioner acknowledged having some problems with her hands and wrists prior to October 14, 2010. Records in RX 1 reflect that, in early 2005, Petitioner was subject to work restrictions and underwent therapy for left wrist tendinitis. Other records in the same exhibit reflect that, in December of 2005, Dr. Asgar, Petitioner's primary care physician, diagnosed right carpal tunnel syndrome and took Petitioner off work pending EMG/NCV testing. At Dr. Asgar's referral, Petitioner saw a neurologist, Dr. Naveed, on January 16, 2006 and reported bilateral hand numbness and tingling (right worse than left) of two months' duration. Dr. Naveed noted that Petitioner "is a clerk whose job is typing all day." He noted positive Tinel's at the wrist and performed EMG/NCV testing, which showed "no clear-cut evidence of a mononeuropathy or a radiculopathy." RX 1. On January 19, 2006, Dr. Asgar released Petitioner to part-time restricted duty and prescribed four weeks of occupational therapy. PX 1. RX 1. Four days later, the evaluating occupational therapist described Petitioner as presenting with "symptoms of tennis elbow and carpal/cubital tunnel syndrome." He recommended braces and "a worksite evaluation if necessary." On February 23, 2006, Dr.

Asgar noted that Petitioner reported improvement and expressed a desire to return to full-time work. On wrist examination, Dr. Asgar noted positive Tinel's and Phalen's bilaterally. On right elbow examination, he noted tenderness and a decreased range of motion. He assessed carpal tunnel syndrome and possible lateral epicondylitis. He prescribed Motrin and instructed Petitioner to return in two weeks. Petitioner returned to Dr. Asgar on multiple occasions thereafter but the records that follow February 23, 2006 and pre-date October 2010 do not mention wrist complaints or carpal tunnel syndrome. PX 1. RX 1.

Petitioner testified that, as of October 14, 2010, her work situation remained the same in term of her chair and desk configuration. On that date, she told her supervisor, Paula Blagorovich, she was experiencing swelling and numbness in her hands. Blagorovich sent her to employee health services.

Records in RX 1 reflect that Petitioner underwent a work ability/fitness evaluation at University Health Services on October 14, 2010. It is not clear whether Petitioner saw a physician or nurse on that date. The history reflects that Petitioner complained of left-sided neck pain and stiffness of two weeks' duration along with left upper arm pain that had started that day "while keyboarding." The history also reflects that Petitioner complained of numbness in all of her fingertips and "states she feels she's developing CTS." The examining provider described Tinel's as negative and Phalen's as equivocal. Petitioner was released to full duty and instructed to follow up with her primary care physician. RX 1.

On October 18, 2010, Petitioner saw Dr. Asgar for bilateral wrist pain. On examination, the doctor noted tenderness in both wrists and paresthesias with full range of motion. He recommended a neurological evaluation. PX 1.

On October 20, 2010, Petitioner saw Dr. Stephens, a neurologist associated with MetroSouth Medical Center. He noted a complaint of bilateral wrist pain, left worse than right. He conducted EMG/NCV testing. He found the test results to be consistent with bilateral carpal tunnel syndrome. He recommended that Petitioner see a hand surgeon. PX 2-3.

On October 26, 2010, Petitioner returned to University Health Services and saw Dr. Marder. Dr. Marder noted that Petitioner had undergone EMG/NCV testing and had been referred to a hand surgeon. He released Petitioner to full duty. RX 1.

Petitioner saw Dr. Hall, an orthopedic surgeon, on November 3, 2010. Petitioner testified that workers' compensation authorized her to see Dr. Hall.

A handwritten history dated November 3, 2010 reflects that Petitioner "works @ UIC Medical Center" where she "types all day." The history also reflects that Petitioner reported hand problems "to her job" on October 16, 2010 and subsequently underwent an EMG.

Dr. Hall's typed progress note of November 3, 2010 sets forth the following history:

"Patient is a 50-year-old right-handed female who works as a registration clerk at UIC. She has worked there for 21 years. She has had bilateral hand numbness, waking up at night, and some weakness with pinch which is worse in the last several months. The patient had reported to the workman's comp that she had symptoms on and off previous to this. Past medical history: significant for hypertension. She denies diabetes, any thyroid, kidney, liver or stomach problems. She came in with an EMG which shows severe carpal tunnel in both hands, left slightly more significant than the right."

On examination, Dr. Hall noted a positive Phalen's at 15 seconds on the left and 24 seconds on the right, thenar atrophy in both hands, slightly more significant in the left, decreased sensation in the median nerve distribution of both hands, positive Tinel's in both wrists, negative Tinel's at the elbow for both hands and no triggering.

Dr. Hall obtained bilateral hand X-rays. He saw no arthritis or bony abnormalities on review of the films.

Dr. Hall diagnosed bilateral carpal tunnel syndrome, left more symptomatic than right. He viewed surgery as Petitioner's only option, given the thenar atrophy and positive Phelan's and Tinel's. He informed Petitioner that her hand weakness was permanent but that he could try to prevent the weakness from worsening by doing surgery.

Dr. Hall addressed causation as follows: "This is related to her work, repetitive motion. She types all day and has been doing that for 21 years." PX 3.

Petitioner testified she resumed her regular customer service duties after seeing Dr. Hall on November 3, 2010.

The next record in Dr. Hall's chart is a handwritten note dated November 29, 2010 documenting a telephone call from "Craig at U of I medical insurance" indicating Petitioner was not authorized to return to Dr. Hall pending the results of an IME had been set up for December 4, 2010. PX 7. It is not clear whether Petitioner attended an IME on that date. Petitioner filed her Application for Adjustment of Claim on December 8, 2010.

Petitioner returned to University Health Service on December 13, 2010 and saw a certified nurse practitioner, Trinnette Zahakaylo, APN/CNP. Zahakaylo noted that Petitioner complained of left arm and shoulder pain and was "independently" undergoing treatment for carpal tunnel syndrome. She described Petitioner's job functions as "mainly telephonic and computer entry." She noted that Petitioner did not have a headset and typically cradled her telephone receiver between her chin and her shoulder. On left upper extremity and cervical spine examination, she noted a slightly restricted range of motion with lateral bending and reproduction of pain with palpation of trapezius muscles and scapulae. She assessed "left arm

and shoulder pain." She indicated Petitioner "needs an ergonomic assessment of her work site." She sent an E-mail to various individuals, including Respondent's witness, Keith Hronek, the same day, stating, with reference to Petitioner: "the employee needs an ergonomic evaluation of her work site and a headset for her telephonic work." RX 1.

Petitioner testified that, in December 2010, a man visited her at work to perform an ergonomic consultation. Petitioner testified she showed this man her work set-up and how she positioned herself while typing. The man did not videotape her. Petitioner further testified that the man agreed her set-up needed to be changed. Petitioner indicated that, following this consultation, Respondent provided her with a new chair, a telephone earpiece, wrist pads and a mouse pad that she could rest her wrists on.

Keith Hronek conducted an ergonomic assessment of Petitioner's work station on December 20, 2010. In his report of December 22, 2010, Hronek noted that Petitioner "was referred by Health Services." He described Petitioner as currently using an adjustable chair and "a monitor that has wrist rests for the keyboard and mouse." He indicated that Petitioner described her duties as including "data entry and answering the phone throughout the work day." He indicated that Petitioner denied any current "fatigue symptoms." He recommended that Petitioner's computer monitor be raised. He indicated he placed a ream of paper under the monitor to elevate it but suggested a monitor riser as a long term permanent solution. He also recommended Petitioner use a document holder and an adjustable telephone headset "to help alleviate pressure on the neck and shoulders" while "talking to customers and entering information into the computer." RX 5.

At Respondent's request, Petitioner saw Dr. Pomerance, a hand surgeon, for a Section 12 examination on March 1, 2011. Dr. Pomerance described Petitioner as a 50-year-old right-handed woman who reported a gradual onset of bilateral hand/wrist pain and numbness, along with tingling in all her fingers, sometime in 2009. Dr. Pomerance indicated that Petitioner reported having similar symptoms in 2005, at which point she underwent nerve conduction testing, X-rays and therapy. Petitioner indicated the X-rays showed some findings at the base of her thumb.

Dr. Pomerance also noted that Petitioner managed her "most recent symptoms" at home until October 14, 2010, "when her pain complaints significantly increased." He indicated Petitioner had been treated by employee health services, her primary care physician, a neurologist and an orthopedic surgeon thereafter. He also noted that surgery had been recommended but not performed.

Dr. Pomerance indicated that Petitioner was continuing to perform her regular patient registrar duties. He described those duties as entering patient data into a computer and fielding calls. He noted Petitioner previously used a conventional telephone but reported recently receiving a headset.

Dr. Pomerance noted that Petitioner complained of bilateral hand pain, rated 9/10, with numbness and tingling in all of her fingers. He further noted that Petitioner reported waking at night secondary to these symptoms.

Dr. Pomerance noted no abnormalities on bilateral elbow, wrist and hand examination other than reported diminished sensation to light touch in all of the fingers of her right hand and the radial fingers of her left hand.

Dr. Pomerance indicated he reviewed records, including the 2010 EMG/NCV. He noted he had not been provided with a job analysis and/or video, X-rays or any records relating to the treatment rendered in 2005. He indicated it would be helpful to have this information. He noted that the cover letter he received described Petitioner as a "receptionist with typing duties." He stated that, based on the available information, he presently had no reason to relate a diagnosis of carpal tunnel syndrome to Petitioner's work. He described Petitioner as having "various factors in her medical history which are known to be associated with the development of carpal tunnel syndrome," namely age, gender and body habitus. He described Petitioner as well above her ideal body weight at 5 feet, 9 inches tall and about 190 pounds. He saw no reason to impose work restrictions.

Dr. Pomerance found Petitioner's nerve conduction studies, but not her pain complaints, consistent with bilateral carpal tunnel syndrome. He indicated Petitioner's complaints of 9/10 pain "may signify symptom magnification." He indicated that surgery is the best option for patients whose carpal tunnel syndrome is confirmed by neurologic studies. RX 2.

Petitioner testified she lost almost five hours of work due to attending the March 1, 2011 examination by Dr. Pomerance. She was reimbursed for her travel expenses but not for her lost wages.

On May 19, 2011, Dr. Fernandez, a fellowship-trained hand surgeon (Fernandez Dep Exh 1), evaluated Petitioner. [See below for a summary of the doctor's deposition testimony.]

Petitioner returned to Dr. Hall on June 8, 2011, with the doctor noting she had not been seen for over six months. Petitioner complained of numbness in both hands that was causing her to wake at night. She indicated she had seen a doctor for workers' compensation who agreed she needed carpal tunnel surgery but did not view her carpal tunnel syndrome as work-related.

On examination, Dr. Hall again noted thenar atrophy and decreased sensation in the median nerve distribution of the hand. He again recommended carpal tunnel surgery, noting that the thenar atrophy would otherwise continue to worsen. He indicated Petitioner expressed a desire to have her right hand addressed first. He further indicated Petitioner could continue working preoperatively, so long as she was allowed to take breaks to allow for the numbness to subside. He requested that workers' compensation "send the evaluation back to"

Dr. Pomerance so that he could explain why Petitioner's carpal tunnel is not work-related, given Petitioner's history of typing at a computer terminal all day. He commented that "this should definitely be a workman's comp injury." PX 7.

Dr. Hall performed a right carpal tunnel release on August 17, 2011. Preoperatively, he noted positive Phalen's at 15 seconds, no triggering and mild thenar atrophy. PX 4, 7.

Dr. Hall removed Petitioner's sutures on August 29, 2011 and noted no grip strength abnormalities. He instructed Petitioner to return to work the following week. He noted that Petitioner expressed a desire to undergo a left-sided release as well. PX 3. On September 9, 2011, he noted that Petitioner complained of shooting pain up her arm when writing or making a fist. He also noted that Petitioner wanted to postpone having left-sided surgery. PX 7.

Dr. Hall performed a left carpal tunnel release on October 5, 2011. PX 4. Two weeks later, he removed the sutures and recommended home exercises. He noted that Petitioner complained of "some soreness with grip at the base of her thumb." He recommended that Petitioner take Advil twice a day after eating. He released Petitioner to full duty as of October 31, 2011 and instructed her to return to him in three weeks. On November 16, 2011, he noted Petitioner was back to full duty and experiencing some swelling in the volar part of her wrist when working. He again recommended Advil. He also recommended that Petitioner apply ice at the end of the day. On examination, he noted full motion in both hands, good strength to abduction of the fingers and good grip strength. He instructed Petitioner to return to him in two months. At the next visit, on January 25, 2012, he noted that Petitioner was working and experiencing no numbness or tingling but that she complained of pain and swelling at the base of her right thumb. He diagnosed right basal joint synovitis and prescribed Motrin and ice applications. PX 7.

Dr. Fernandez testified by way of deposition on September 7, 2012. Dr. Fernandez obtained board certification in orthopedic surgery in 1998. He was re-certified in 2008. Fernandez Dep Exh 1. He underwent fellowship training in hand and microsurgical reconstruction from 1995 to 1996. Fernandez Dep Exh 1.

Dr. Fernandez testified he is affiliated with Midwest Orthopaedics at Rush. He sees between five and six thousand patients per year. He performs over one thousand surgeries per year. About one-fifth of the patients he sees have carpal tunnel syndrome. Of the workers' compensation evaluations he performs, the majority are for respondents. PX 10 at 7.

Dr. Fernandez testified he saw Petitioner on May 19, 2011 for purposes of a second opinion rather than a Section 12 examination. PX 10 at 8, 10. In connection with his evaluation, he reviewed a summary prepared by Petitioner's counsel along with medical records, Dr. Pomerance's report and a Customer Service Representative II job description. PX 10 at 8. Petitioner completed a history form at his office. On this form, Petitioner attributed her October 14, 2010 injuries to her occupation. PX 10 at 10.

Dr. Fernandez indicated he reviewed records reflecting Petitioner underwent conservative care for carpal tunnel syndrome in 2005. PX 10 at 11.

Dr. Fernandez testified Petitioner indicated she developed numbness and tingling in both hands in October 2010. Petitioner indicated these symptoms worsened at night and with data entry and driving. PX 10 at 13. Petitioner indicated she worked as a customer service agent eight hours per day. Petitioner's November 2010 EMG was consistent with bilateral carpal tunnel syndrome. PX 10 at 13-14, 16. Petitioner is a 50-year-old non-smoker. She is 5 feet, 9 inches tall and weighs about 198 pounds. PX 10 at 13-14.

Dr. Fernandez testified that Petitioner demonstrated how she positioned her hands and arms while performing data entry. Petitioner's demonstration "revealed a hyperflexion posture of about 30 degrees through the wrist." PX 10 at 15. Petitioner indicated she had worked for Respondent for 22 years. PX 10 at 15.

Dr. Fernandez testified that, on examination, he noted irritability of the median nerve at the wrist, with positive Tinel's, median nerve compression and Phalen's testing bilaterally, right worse than left. He also noted irritability of the ulnar nerve at the elbow with positive Tinel's and elbow flexion testing bilaterally. PX 10 at 15. He further noted some swelling around the wrist and some mild swelling at the elbow. PX 10 at 15. Petitioner had a "well retained range of motion." PX 10 at 16.

Dr. Fernandez testified he obtained bilateral hand X-rays which showed only age-appropriate changes; i.e., "slight arthritis in the small joints of the fingers."

Dr. Fernandez testified Petitioner's "primary diagnosis was one of bilateral carpal tunnel syndrome which was EMG-positive severe." Petitioner also had a "milder diagnosis of bilateral elbow cubital tunnel syndrome, which was EMG negative." PX 10 at 16. He recommended bilateral carpal tunnel releases and non-surgical care of the cubital tunnel syndrome. PX 10 at 16.

Dr. Fernandez opined that Petitioner's condition was work-related, "primarily because of the positional factors." With either hyperflexion or hyperextension, pressure inside the carpal tunnel rises significantly. Increased pressure on the nerve at the level of the wrist causes ischemia which leads to edema which, in turn, leads to increased pressure and more ischemia. PX 10 at 18. This is a "very well recognized, not controversial" phenomenon. PX 10 at 18. Dr. Fernandez also found the lengthy duration of Petitioner's employment to be significant. PX 10 at 18. Petitioner is at risk for carpal tunnel syndrome by virtue of genetics, gender, age and weight but the positional factor while keyboarding was "also a valid and contributory causal factor." PX 10 at 19.

Dr. Fernandez testified he reviewed Dr. Hall's operative reports prior to the deposition. He views Petitioner's situation as an "open and shut case [of] carpal tunnel syndrome, treated well with a good outcome." PX 10 at 20. He sees no basis for imposing work restrictions on

Petitioner. PX 10 at 20. Nor is there any basis for additional care for the carpal tunnel syndrome. He has no opinions regarding the possible need for cubital tunnel care since he has not seen Petitioner since 2011. PX 10 at 20.

Under cross-examination, Dr. Fernandez testified that Petitioner's counsel referred Petitioner to him for a second opinion. PX 10 at 21-22. Based on Petitioner's thenar atrophy and the November 20, 2010 EMG, which showed severe carpal tunnel syndrome, it is likely Petitioner's carpal tunnel syndrome predated October 2010. PX 10 at 24-25. After reviewing the University of Illinois Health Service note of October 14, 2010, which he had not previously seen, Dr. Fernandez testified the note documented complaints relative only to the left arm, neck and shoulder. Those complaints were of two weeks' duration. PX 10 at 26. When he saw Petitioner in May of 2011, her complaints were bilateral. On that date, Petitioner indicated her recent symptoms started on approximately October 14, 2010. PX 10 at 27. He never saw Petitioner perform her job. Nor did he examine Petitioner's work station. PX 10 at 27. He relied on what Petitioner told him about having to hyperflex her wrists. PX 10 at 28. If the actual biomechanics of Petitioner's job were different than those Petitioner described, his causation opinion could change. PX 10 at 28. He has previously opined that simple keyboarding, in and of itself, does not cause or contribute to the development of carpal tunnel syndrome. PX 10 at 29. However, "there are valid positional factors which do occur and they're not common." PX 10 at 29. They can be associated with keyboarding and data entry in certain cases. PX 10 at 29. There is a "gray zone" with respect to the degree and duration of flexion. Petitioner definitely has the duration, since she has worked for Respondent for over twenty years. The amount of flexion, i.e., 30 degrees, Petitioner described is also reasonable. If Petitioner had demonstrated only 10 degrees of flexion, he would have probably said the flexion was not a causative factor. PX 10 at 31. Petitioner was not literally in a hyperflexed position eight hours per day. She performed other tasks, such as faxing and filing, as documented in the job description. PX 10 at 31-32. Even if Petitioner performed keyboarding only four hours per workday, he would stand by his causation opinions. PX 10 at 32. His opinions would also stand even if Petitioner keyboarded in short intervals. PX 10 at 32-33.

On redirect, Dr. Fernandez testified that wrist position remains a causative factor regardless of an individual's age, weight, etc. but it would be less of a factor if Petitioner were a 500-pound diabetic 80-year-old. PX 10 at 34. The term "syndrome" is used because carpal tunnel is multi-factorial. PX 10 at 35. A very young male individual who keyboards for ten years with his wrists flexed at 50 degrees might never develop carpal tunnel syndrome because of a "genetically robust nerve." PX 10 at 35. The wrist position is not the primary cause of Petitioner's carpal tunnel; rather, it is an "aggravating factor." PX 10 at 35.

Under re-cross, Dr. Fernandez acknowledged that, given her other risk factors, Petitioner could have developed carpal tunnel syndrome regardless of her job duties. PX 10 at 36. There is a normal incidence of carpal tunnel syndrome even in people who do not work. PX 10 at 37.

Dr. Pomerance testified by way of deposition on February 15, 2013. Dr. Pomerance testified he is board certified in orthopedic surgery, microsurgery and hand surgery. He is underwent fellowship training at New York University and Bellevue Hospital. RX 4 at 5. Pomerance Dep Exh 1. He routinely cares for patients who have carpal tunnel syndrome. RX 4 at 5-6. He keeps current with medical literature, including literature pertaining to carpal tunnel syndrome. RX 4 at 6. To the best of his knowledge, no articles have been published in the last ten, possibly fifteen, years that have drawn any connection between keyboarding and the development of carpal tunnel syndrome. RX 4 at 6. Dr. Szabo of the University of California published a study showing that the pressures in the carpal canal increase as the wrist is brought into a hyperflexed or hyperextended position, with hyperflexion/hyperextension defined in that study as a motion greater than 65 to 70 degrees. Another type of positioning that can lead to carpal tunnel syndrome is "high-force grip impact use of the palm of the hand" such as that involved in operating a jackhammer. RX 4 at 7.

Dr. Pomerance testified he examined Petitioner on March 1, 2011. He issued a report in connection with that examination. Pomerance Dep Exh 2. Petitioner described a gradual onset of bilateral hand and wrist pain, along with numbness and tingling in all of her fingers and neck discomfort, in 2009. RX 4 at 9. Petitioner attributed these symptoms to her job, which she described as entering patient-related data into a computer. Petitioner indicated she had recently been given a headset. RX 4 at 9-10. Petitioner did not describe anything unusual with respect to her positioning. RX 4 at 10.

Dr. Pomerance testified he noted no thenar atrophy when he examined Petitioner. Petitioner reported diminished sensation in all of the fingers of her right hand and the radial fingers of her left hand. RX 4 at 13. Petitioner's EMG was consistent with bilateral carpal tunnel syndrome. Dr. Pomerance testified he agrees with this diagnosis but felt Petitioner's pain complaints were higher than expected. RX 4 at 14. Petitioner reported having previously undergone another EMG in approximately 2005. RX 4 at 15.

Dr. Pomerance testified that, based on the job information he had, there was no reason to relate Petitioner's carpal tunnel syndrome to her work duties. RX 4 at 16. He would need to review the records from 2005 in order to make any additional comments concerning causation. RX 4 at 16. In his report, he asked for the opportunity to review these records "rather than speculate as to what" the records said. RX 4 at 17. Based on the job duties Petitioner described, it would not matter, causation-wise, how long Petitioner performed those duties. RX 4 at 19. If, hypothetically, a causal relationship existed, you would expect to see a dose-related response. RX 4 at 20.

Dr. Pomerance testified he would not consider thirty degrees of hyperextension to be extreme. Thirty degrees would be a "mid-range posture." This posture is typically used in various post-operative protocols, such as wrist splinting. RX 4 at 21. In biomechanic studies, 30 degrees of wrist extension does not increase carpal canal pressure. RX 4 at 21.

Under cross-examination, Dr. Pomerance testified he has no paper file concerning his evaluation of Petitioner. His file is electronic. RX 4 at 22. He performs five or fewer examinations for Respondent's counsel per month. RX 4 at 23. He devotes five to ten percent of his practice to independent medical examinations. RX 4 at 24. He did not reference Dr. Szabo's study in his report because he was not asked to prepare an annotated bibliography. RX 4 at 27. When he examined Petitioner, the only job information available to him was the information Petitioner provided. RX 4 at 28. Dr. Szabo used normal, healthy volunteers when he conducted his study. RX 4 at 29. No study has been done to determine whether individuals who are at risk for carpal tunnel syndrome by virtue of their age, gender, etc. would experience increased pressure in the carpal tunnel canal with wrist flexion or extension of less than 65 to 70 degrees. RX 4 at 29. Dr. Pomerance testified that, absent such a study, he could not render an opinion on the issue of whether less flexion or extension could be a causative factor for such individuals. RX 4 at 30. It could be that some individuals in Dr. Szabo's study were predisposed to carpal tunnel syndrome. RX 4 at 30-31. He is unwilling to speculate, absent a specific study. RX 4 at 32, 57.

Dr. Pomerance acknowledged he was not provided with any records from 2005. Respondent's counsel summarized those records for him. RX 4 at 34. He has no opinions as to Petitioner's diagnosis in 2005. RX 4 at 34. He did not review any job video or ergonomic studies. RX 4 at 36. If a study was done and showed Petitioner's work station to be ergonomically incorrect, he would want to see that study. RX 4 at 37, 41-42. He has never performed an ergodynamic study. RX 4 at 40. Petitioner is at increased risk for developing carpal tunnel syndrome because of her obesity, gender and age. Women's carpal canals are naturally smaller than men's. RX 4 at 47, 50. All three factors are contributing causes, in Petitioner's case. RX 4 at 50. It is just a coincidence that Petitioner experiences symptoms while working. RX 4 at 52. He believes that Petitioner is not providing a complete history as to when she experiences symptoms. RX 4 at 54-56.

Dr. Pomerance testified Respondent's counsel specifically asked him about studies referencing wrist hyperextension and hyperflexion about five minutes before the deposition started. RX 4 at 65-66. He did not discuss this specific issue in his report. RX 4 at 66. There should be 10, not 30, milliliters of mercury pressure inside a normal wrist. If Dr. Fernandez indicated there are 30 milliliters of mercury pressure inside a normal wrist, he has his data wrong. RX 4 at 74-75. No study has been performed to determine whether there is a correlation between the size of a person's carpal canal and the amount of pressure the canal can withstand. RX 4 at 79.

On redirect, Dr. Pomerance testified that the smaller size of a woman's carpal canal may be offset by the smaller size of her flexor tendons. RX 4 at 79. Another risk factor women face is dropping estrogen levels. As a woman ages, her estrogen level drops. The incidence of carpal tunnel syndrome goes up in direct proportion to the levels of estrogen. RX 4 at 79. Thirty degrees of wrist flexion or extension "is still considered within a range of what is called a wrist-neutral posture." RX 4 at 81.

Under re-cross, Dr. Pomerance testified that he knows Dr. Carroll but cannot vouch for his level of competence because he has never practiced with him. He is not aware of any report from Dr. Carroll concerning an evaluation he performed of Petitioner's co-worker. RX 4 at 82.

Petitioner filed a Petition for Penalties and Fees on April 30, 2013. PX 12. Respondent filed a Response on May 20, 2013. RX 7.

On October 1, 2013, Dr. Pomerance issued a supplemental report, after reviewing "multiple ergonomic assessments" relating to Petitioner. He addressed these assessments as follows:

> "In reading through the documents, suggestions are made in order to alter [Petitioner's] work station. Based on all of the current, within the last 7-10 years, literature in the orthopedic and hand surgical journals, there is not any peer-reviewed published information which would support a relationship between a diagnosis of carpal tunnel syndrome and her job duties as described. The ergonomic work assessments appear to be minor adjustments and the completion of work duties as outlined in all the job information, including the verbal descriptions applied by [Petitioner] during my prior opportunity to evaluate her does not have factors which would be related to a diagnosis of carpal tunnel syndrome. She has numerous factors in her medical history and demographics which were outlined in the original report which have been shown to be factors in the development of carpal tunnel syndrome in multiple orthopedic and hand surgery journals and textbooks."

RX 3.

Petitioner testified she has not returned to Dr. Hall since January 25, 2012. She resumed full duty for Respondent on October 30, 2011 and was still working as a customer service representative as of the hearing. She testified the volume of calls has increased. She continues to perform keyboarding about six hours each workday. The man who conducted an ergonomic assessment in 2010 performed another assessment in 2012. She continues to experience occasional numbness in her hands. She has no medical training. None of the providers who treated her in 2005 and 2006 told her that her carpal tunnel syndrome was work-related. No one recommended she undergo carpal tunnel surgery until after October 14, 2010. All of her medical bills were paid under group insurance. She showed Dr. Fernandez how she positioned her hands while keyboarding. She also demonstrated keyboarding to Dr. Pomerance but not in the same manner she demonstrated this to Dr. Fernandez.

Under cross-examination, Petitioner testified the job she performed between 2002 and 2010 involved answering questions via telephone in addition to typing. Certain computer screens came up automatically. If the information on a screen was correct, she could click through that screen. She was allotted a 30-minute break and a 30-minute lunch period each workday. She usually took these breaks together. She started work at 7 AM, took a break between 11 AM and noon and left work at 3 PM. The typing she performed before 2002 was not quota-related. Each day, she handled a schedule of 45 patients plus "live" calls that were "off schedule." The hand problems she had in 2005 were not severe. She attributed those problems to work. At that time, she experienced numbness and tingling in both hands and pain and swelling in both wrists. She underwent occupational therapy in 2005. She did not file a claim in connection with the hand complaints she experienced in 2005. The instant claim is the first hand claim she has filed. She did not undergo any hand treatment between 2005 and 2010. She continued experiencing occasional pain and numbness during that time but the symptoms were less severe. She would experience pain and numbness occasionally after typing all day at work and/or while driving at night. In 2010, her right-sided complaints were worse than her left. If her records from 2010 state that her left-sided complaints were worse, she would disagree with those records. When she went to Employee Health Services, she was released to full duty. Employee Health Services recommended an ergonomic assessment. She did not request such an assessment. She did not know she could make this kind of request. The man who performed the assessment was from Respondent. He asked her questions about her physical complaints. She complained to him of low back pain, shoulder pain (secondary to tilting her head to cradle her phone) and wrist numbness. She showed him how she positioned herself while typing. After her surgeries, she returned to the same job. She has no upcoming appointments concerning her hands. She is not currently taking any pain medication.

Keith Hronek testified on behalf of Respondent. Hronek testified he has worked for Respondent since 2002. He handles environmental and safety issues. He graduated from the University of Wisconsin, where he majored in occupational health. He then worked as an industrial hygienist for Fermilab for eight years. During this time, he attended a 30-hour OSHA training class. In 2006, he became the safety officer for Respondent's medical center. He and a co-worker perform ergonomic assessments. He performs such assessments based on E-mail requests he receives from Respondent's three work assessment nurses. To date, he has performed about 30 ergonomic assessments of Respondent's customer service employees. None of those assessments involved claimed carpal tunnel syndrome. There are about 50 work stations in Respondent's customer service department. When he performs an assessment, he asks the employee about his or her job duties and then has the employee demonstrate work tasks to him. He then makes recommendations as to work station modifications and what items to purchase. He sends his report to both the worker and the worker's supervisor.

Hronek testified he performed an ergonomic assessment of Petitioner in 2010. He identified RX 5 as the report he wrote on December 22, 2010 concerning this assessment. Per this report, Petitioner did not complain of her hands or wrists. Petitioner's computer monitor was too low but her work station was otherwise in proper alignment. Petitioner performs quite a bit of data entry. He suggested she use a document holder while typing. Petitioner had a

conventional phone. He recommended a headset. Petitioner had wrist rests and he made no recommendations concerning keyboarding. Petitioner's work station was ergonomically correct in terms of hand and wrist positioning. He performed another ergonomic assessment of Petitioner in 2012.

Under cross-examination, Hronek testified he performed an assessment of Petitioner in December 2010 per an E-mail he received from Trinette, one of Respondent's nurses. Trinette did not tell him which body parts were involved. No one mentioned that carpal tunnel syndrome was at issue. He asked Petitioner to show him what she does at work. He did not take any measurements in terms of wrist flexion or extension. He made notes on paper during the assessment. He no longer has those notes. He sent his assessment to Petitioner and Petitioner's supervisor, Ms. Velez. Petitioner already had wrist rests when he conducted his assessment. He disagrees with Petitioner's testimony that she received wrist rests and a new chair after his December 2010 assessment. He makes recommendations as to items to purchase but purchasing is not one of his duties. He did not recommend a new computer "mouse" or mouse pad for Petitioner. His assessment was intended to address neck, shoulder and back complaints. He does not know what Petitioner complained of when she was seen at Employee Health Services.

On redirect, Hronek testified he customarily evaluates a worker's hand usage at a work station. If he had seen something incorrect about Petitioner's hand positioning, he would have made a note of it. He relies strictly on the worker when he conducts an assessment. He gave Petitioner a copy of his report. Petitioner did not contact him thereafter.

Petitioner was then recalled. Petitioner testified that Romanita was her supervisor at the time that Hronek conducted his assessment in December 2010. Romanita walked Hronek over to her desk and then left. Hronek did not make any notes. His assessment lasted five or ten minutes. He did not use a ruler or take any measurements. She received a new chair about a month after the assessment. Initially, she was provided with a rented chair to see if she liked it. The chair had longer arm rests than the chair she previously used. She used the rental chair for about six months. Then her department moved and all new chairs were ordered. Before she received the rental chair, Romanita gave her wrist pads and a computer "mouse." The pads were not in a box but the mouse was. She then set up these items at her work station. She never filed a workers' compensation claim before. She has never been reprimanded at work. She has never been arrested for fraud or dishonesty. It is her supervisor who would have purchased items for her to use at her desk.

Under cross-examination, Petitioner acknowledged she did file other workers' compensation claims in the past. None of those claims involved her hands. She did not receive a copy of Hronek's report concerning his assessment. She had no recollection of receiving this report via E-mail. RX 5.

[CONT'D]

Cynthia Halsey-Hodges v. University of Illinois
10 WC 46983

Arbitrator's Credibility Assessment

Petitioner alleges carpal tunnel syndrome secondary to repetitive trauma with a manifestation date of October 14, 2010.

Respondent maintains that Petitioner's alleged carpal tunnel syndrome manifested long before October 14, 2010 and that this claim is thus barred by the statute of limitations. Respondent views Petitioner as seeking care for neck and left upper extremity problems, not carpal tunnel syndrome, on October 14, 2010. While the University Health Services note of October 14, 2010 reflects complaints relative to the neck and left arm, it also clearly states: "[Petitioner] states she feels she's developing CTS." The fact that Petitioner was directed to "see PCP" and that subsequent notes describe Petitioner as "treating independently" for her carpal tunnel prompts the Arbitrator to conclude that Respondent compartmentalized Petitioner's complaints. Respondent's witness, Keith Hronek, acknowledged he took his directions from Trinette Zahakaylo, the certified nurse practitioner who described Petitioner as "treating independently" for her "CTS." Under cross-examination, Hronek acknowledged he did not know carpal tunnel syndrome was an issue when he conducted his first ergonomic assessment on December 20, 2010.

When Petitioner was recalled to the stand, after Hronek testified, she maintained she received wrist pads, a new chair and a computer "mouse" from her supervisor, Romanita, following the December 20, 2010 assessment. The Arbitrator finds this testimony credible. Hronek acknowledged he has no involvement in purchasing.

Is Petitioner's claim barred by the statute of limitations? If not, did Petitioner establish repetitive trauma and causal connection?

As a preliminary matter, the Arbitrator finds that the instant claim is not barred by the statute of limitations. In Durand v. Industrial Commission, 224 Ill.2d 53 (2006), the Illinois Supreme Court emphasized that the setting of a manifestation date in repetitive trauma claims is to be governed by principles of flexibility and fairness. The Court also emphasized that "faithful employees" should not be punished for opting to work through symptoms. The Arbitrator views Petitioner as one such "faithful employee," given her 20+ years of service for Respondent.

Petitioner acknowledged seeking treatment for hand symptoms in 2005 and 2006. Those symptoms were variously diagnosed as tendinitis and right carpal tunnel syndrome but an EMG performed on January 16, 2006 proved to be negative. RX 7. Dr. Asgar imposed some hand-related work restrictions in late 2005 and early 2006 but, in February 2006, noted that Petitioner felt ready to resume full duty. Petitioner performed her regular data entry duties for

Respondent thereafter until October 14, 2010. There is no evidence indicating she resumed treatment for, or lost time secondary to, hand symptoms at any point between February 2006 and October 14, 2010.

In arguing that this claim is time-barred, Respondent relies primarily on Petitioner's testimony, under cross-examination, that she attributed the hand symptoms she experienced in 2005 and 2006 to work. The Arbitrator notes that the claimant in Durand made very similar admissions. In fact, the claimant in Durand insisted she reported her symptoms to her supervisor in 1997, several years before she filed her claim. Nevertheless, the Court found her claim timely. The Arbitrator further notes that Petitioner, like the claimant in Durand, would have had difficulty establishing compensability had she elected to bring a claim in 2005 or 2006. While Petitioner's symptoms at that time were suggestive of carpal tunnel, at least on the right side, her EMG proved to be negative.

The Arbitrator further finds that Petitioner established repetitive trauma injuries and causal connection. In so finding, the Arbitrator relies in part on Petitioner's and Hronek's testimony that Petitioner's job consisted largely of data entry. The Arbitrator further relies on Petitioner's description of her work station and wrist positioning while typing. The Arbitrator finds Drs. Hall and Fernandez more credible than Dr. Pomerance on the issue of whether Petitioner's job duties and wrist positioning contributed to the development of symptomatic carpal tunnel syndrome manifesting on October 14, 2010. The Arbitrator questions Dr. Pomerance's reliance on the Szabo study and his statement that it was purely a coincidence that Petitioner experienced hand symptoms while working.

Did Petitioner establish timely notice?

The Arbitrator finds that Petitioner provided Respondent with timely notice of her October 14, 2010 repetitive trauma injuries. In so finding, the Arbitrator relies on Petitioner's testimony and Dr. Hall's records.

Petitioner testified that, on October 14, 2010, she told her supervisor, Paula Blagorovich, she was experiencing swelling and numbness in her hands. Petitioner further testified she sought treatment at University Health Services that day, at Blagorovich's direction. Respondent did not call any witness to contradict this testimony. The October 14, 2010 University Health Services note reflects that Petitioner complained of carpal tunnel/fingertip numbness as well as neck and left arm problems. RX 1. Petitioner further testified that workers' compensation approved her initial visit to Dr. Hall. This visit took place on November 3, 2010, within the 45-day notice period. Petitioner's testimony on this point finds support in Dr. Hall's records, which reflect that "Craig" of Respondent contacted the doctor's office on November 29, 2010 to advise that no additional treatment would be authorized pending an IME. PX 3.

Is Petitioner entitled to temporary total disability benefits?

Petitioner claims temporary total disability benefits running from August 17, 2011 (the date of her right carpal tunnel release), through October 30, 2011, the date on which Dr. Hall released her to full duty following her October 5, 2011 left-sided surgery. Arb Exh 1.

Having found in Petitioner's favor on the issues of accident and causal connection, and in reliance on Dr. Hall's records (PX 3, 7), the Arbitrator finds that Petitioner was temporarily totally disabled from August 17, 2011 through September 4, 2011 (2 5/7 weeks) and from October 5, 2011 through October 30, 2011 (3 5/7 weeks). These two intervals total 6 3/7 weeks. The Arbitrator declines to award the lengthier period claimed by Petitioner because, on August 29, 2011, Dr. Hall released Petitioner to return to work the following week. PX 3.

Is Petitioner entitled to reasonable and necessary medical expenses?

Having found in Petitioner's favor on the issues of accident, notice and causal connection, and noting the parties' Section 8(j) stipulation (Arb Exh 1), the Arbitrator finds that Respondent is entitled to credit under Section 8(j) for the medical expenses paid by its group carrier, with Respondent holding Petitioner harmless against any claims made by said carrier.

Is Petitioner entitled to permanent partial disability benefits?

The Arbitrator has found in Petitioner's favor on the issues of accident, notice and causal connection. Respondent's examiner, Dr. Pomerance, did not dispute Petitioner's carpal tunnel syndrome diagnosis. He also did not question the need for surgery. While Petitioner was able to resume full duty following her bilateral carpal tunnel releases, she credibly testified to occasional bilateral hand numbness. The Arbitrator finds that Petitioner is permanently partially disabled to the extent of 10% loss of use of each hand, or a total of 41 weeks (20.5 weeks x 2), under Section 8(e) of the Act. The Arbitrator awards permanency at the rate of $467.58 per week based on the stipulated average weekly wage of $779.25. Arb Exh 1.

Is Respondent liable for penalties and fees?

The Arbitrator declines to award penalties and fees on unpaid awarded benefits, as requested by Petitioner. While the Arbitrator has elected not to rely on Respondent's examiner, Dr. Pomerance, the Arbitrator cannot conclude that Respondent acted in an objectively unreasonable manner in disputing liability in this case.

The Arbitrator also declines to award Section 19(l) penalties based on Respondent's failure to reimburse Petitioner for the wages she lost in connection with Dr. Pomerance's Section 12 examination. Section 19(l) comes into play only if an employer or its carrier unreasonably fails or refuses to pay benefits under Section 8(a) or Section 8(b) of the Act. In the Arbitrator's view, wages lost as a result of attending a Section 12 examination do not

constitute either medical expenses under Section 8(a) or temporary total disability benefits under Section 8(b). The Arbitrator orders Respondent to reimburse Petitioner for the approximate five hours of wages she lost due to attending the examination.

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

Sandra Lenington,

Petitioner,

vs.

NO: 10 WC 34240

Hucks Convenience,

14IWCC1106

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, medical expenses, permanent partial disability, 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 December 18, 2013 is hereby affirmed and adopted.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 19 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:10/22/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LENINGTON, SANDRA
Employee/Petitioner

Case# **10WC034240**

10WC034239

HUCKS CONVENIENCE
Employer/Respondent

14IWCC1106

On 12/18/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1824 STRONG LAW OFFICES
TODD A STRONG
3100 N KNOXVILLE AVE
PEORIA, IL, 61603

3227 HOLECEK & ASSOC
ANTHONY A ENRIETTI
215 SHUMAN BLVD SUITE 206
NAPERVILLE, IL 60563

14IWCC1106

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

SANDRA LENINGTON,
Employee/Petitioner

v.

HUCKS CONVENIENCE,
Employer/Respondent

Case # 10 WC 34240

Consolidated cases: 10 WC 34239

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 consolidated with case no. 10 WC 34239, and heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Peoria**, on **August 28, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other: _____

FINDINGS

On **October 14, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was not* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the alleged accident.

In the year preceding the injury, Petitioner earned **$19,500.00**; the average weekly wage was **$375.00**.

On the date of accident, Petitioner was **42** years of age, *married* with **no** dependent children under 18.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **0.00** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **0.00**.

Respondent is entitled to a credit of $ **0.00** under Section 8(j) of the Act.

ORDER

Petitioner failed to prove that she sustained an accidental injury that arose out of and in the course of her employment by Respondent on October 14, 2009.

Petitioner further failed to prove that the conditions of ill-being complained of were caused by an alleged accidental injury that occurred on October 14, 2009 at work.

All claims for compensation made by Petitioner in this case are thus hereby denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator **JOANN M. FRATIANNI**

December 13, 2013
Date

DEC 18 2013

14IWCC1106

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

F. Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner filed an Application for Adjustment of Claim in this case alleging repetitive trauma to both hands and arms that manifested themselves on or about October 14, 2009. Petitioner claims these injuries were caused by her work performed on behalf of Respondent.

Petitioner claims bilateral carpal tunnel syndrome, right cubital tunnel syndrome and right shoulder pain.

Petitioner testified she was working as an assistant manager for Respondent on October 14, 2009. Petitioner introduced into evidence her job description (Px3), which was signed and dated September 27, 2010. Petitioner testified she worked as a cashier, stocked coolers, shelving, mopped floors, bagged ice and lifted and moved store inventory between 2008 into 2010. Petitioner further testified she would go to work at different stores for Respondent.

Petitioner testified she sought initial medical care for her symptoms with Dr. Carter, of Proctor First Care. This visit took place on October 14, 2009. Dr. Carter is her family physician. Dr. Carter recorded a history of complaints of right elbow pain, lower back pain and ear pain. The records of Dr. Carter in evidence for that visit do not reflect a history of any numbness and tingling of the hands and arms, nor any mention of any work activities that may have contributed to her conditions. Dr. Carter did not prescribe any diagnostic testing to her hands or arms.

Petitioner testified that she then continued to work for Respondent and had continuing complaints of numbness and tingling in her hands until January 26, 2010, when she fell from a ladder while replacing a sign. (See findings of this Arbitrator in 10 WC 34239, which was consolidated and heard with this matter.)

Petitioner initially treated for her ladder injury, and the medical records following January 26, 2010 make no reference to any numbness or tingling in both hands and arms.

Petitioner then saw Dr. Blair Rhode, on referral by Dr. Carter. Petitioner saw Dr. Rhode on September 1, 2010. Dr. Rhode recorded a history of performing cash register duties. Dr. Rhode prescribed an EMG/NCV study, which was performed by Dr. Trudeau on September 13, 2010. This revealed bilateral median neuropathies of the wrists and ulnar neuropathy at the right elbow. Dr. Rhode testified by evidence deposition (Px16) that he was of the opinion that Petitioner's conditions were causally related to her work activities. Dr. Rhode testified that following the EMG/NCV study, he prescribed surgery. He peformed bilateral wrist surgical releases as well as to the right elbow.

Dr. Rhode testified he had not seen the document Petitioner prepared concerning her job description (Px3) prior to his testimony. Petitioner did not fill out a handwritten history of injury when first seen by him. Dr. Rhode further testified that he did not know how many hours per week Petitioner worked. He also only knew that she operated a cash register at work and had no other understanding of what else she performed at work.

Respondent arranged for Petitioner to be examined by Dr. Camilla Frederick. This examination took place on August 11, 2010. Dr. Frederick testified by evidence deposition that there was no mention of a repetitive motion injury during her examination. In addition, she testified that when she was examining Petitioner, there was no mention of any repetitive motion injury in any of the medical records of treatment she reviewed. Petitioner also denied numbness and tingling in her hands until one month prior to Dr. Frederick's examination date.

Based upon the above, the Arbitrator finds that Petitioner failed to prove that she sustained a repetitive type of traumatic injury to both hands and her right elbow in this matter, which may have manifested on or about October 14, 2009. This is based on the lack of history and diagnosis until after fall off the ladder on January 26, 2010, which is the subject matter of the companion case consolidated with this one. In addition, Petitioner's job duties as described in the job description she prepared was not completed until almost a year after the alleged injury date of October 14, 2009.

The Arbitrator further finds that the current conditions of ill-being as complained of are not causally related to any work activities which may have manifested on October 14, 2009.

E. Was timely notice of the accident given to Respondent?

Petitioner testified she informed her supervisor, Bill Starr, and her assistant store manager, Charlotte, of this injury.

Based upon the above, the Arbitrator finds that timely notice was given concerning this alleged accident, as defined by the Act.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, all claims for medical expenses made by Petitioner in this case are hereby denied.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, all claims for temporary total disability benefits made by Petitioner in this case are hereby denied.

L. What is the nature and extent of the injury?

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, all claims for permanent partial disability benefits made by Petitioner in this case are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Derek Flatt,
Petitioner,
vs.

NO: 13 WC 08344

State of Illinois Pinckneyville Correctional Center,
Respondent,

14IWCC1107

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 expenses, the nature and extent of the petitioner's permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 27, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

No bond or summons for State of Illinois cases.

DATED: DEC 19 2014

MB/mam
o:10/23/14
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FLATT, DEREK
Employee/Petitioner

Case# **13WC008344**

14IWCC1107

SOI-PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

On 5/27/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0969 THOMAS C RICH PC
#6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
KENTON J OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

MAY 27 2014

RONALD A.RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

14IWCC1107

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

DEREK FLATT
Employee/Petitioner
v.
STATE OF ILLINOIS – PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

Case # 13 WC 8344

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Herrin**, on **April 2, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On **January 5, 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 **$58,708.00**; the average weekly wage was **$1,129.00**.

On the date of accident, Petitioner was **42** 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 for TTD paid (all TTD benefits owed were paid by Respondent through extended benefits), **$0** for TPD, **$0** for maintenance, and **$0** for other benefits.

Respondent is entitled to a credit for all medical bills paid under Section 8(j) of the Act.

ORDER

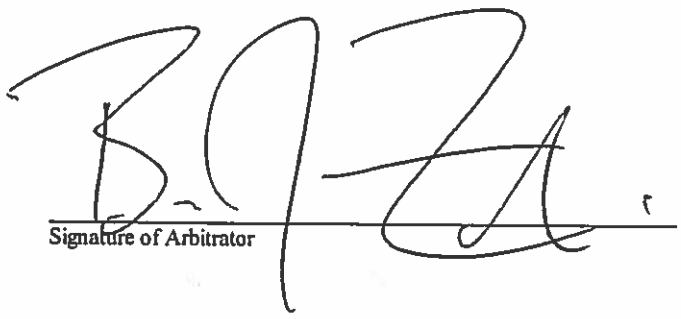
Respondent shall pay reasonable and necessary medical services as outlined in Petitioner's Exhibit 1 (as delineated in the Memorandum of Decision of Arbitrator), and as provided in Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit for all medical bills paid under Section 8(j) of the Act.

Petitioner is entitled to the sum total of temporary total disability benefits for the periods he was taken off work per his treating physician, and said total amount of benefits owed were paid by Respondent through extended benefits.

Respondent shall pay Petitioner permanent partial disability benefits of $677.40/week for 53.75 weeks, because the injuries sustained to his knee caused the 25% loss of use to the 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

05/15/2014
Date

MAY 27 2014

14IWCC1107

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DEREK FLATT
Employee/Petitioner

v. Case # 13 WC 8344

STATE OF ILLINOIS –
PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

At the time of the stipulated injury, Petitioner, Derek Flatt, was a 43-year-old correctional officer for Respondent at its Pinckneyville facility. On January 5, 2013, Petitioner was involved in an inmate altercation which resulted in a wrestling brawl that took both he and another sergeant to the ground. Petitioner struck and injured his left knee during the takedown. Petitioner had no claims, care or treatment for his left knee prior to the January 5, 2013 incident. Respondent does not dispute accident.

Promptly following the accident, Petitioner reported to the Franklin Hospital emergency room, where he was noted to be suffering from "Altercation Lt. Knee Pain" and physical examination findings showed moderate tenderness, swelling and limited range of motion. (Petitioner's Exhibit (PX) 3). X-rays were negative, but Petitioner was referred to Rose Grunert, FNP, for follow-up care. (PX 3; PX 4, 1/6/13). On his first visit with FNP Grunert, Petitioner gave a consistent history of his work injury. Petitioner reported a stabbing pain to his patella with weight bearing or bending along with regional cramping. Petitioner was able to walk, but not without pain. Petitioner was given medication and advised to use crutches. (PX 4, 1/6/13).

Petitioner returned to FNP Grunert with reports of continued pain in his left knee (mistakenly referred to as right knee during office visit) when walking or bearing weight. Petitioner was instructed to return following an appointment with a specialist for an MRI, but he testified that he attempted without success to obtain the MRI for six months. (PX 4, 1/11/13). He testified that there was a "mix-up" in Springfield that prevented him from getting the exam, but he called Respondent everyday and talked to Warden Gates and Major Stiller in an attempt to make matters straight, get his treatment, and return to work.

Petitioner ultimately sought treatment with Dr. Nathan Mall. (PX 5, 7/15/13). Petitioner testified without rebuttal that he did not sustain any injuries between the time of his work accident and the time he saw Dr. Mall for his left knee. Dr. Mall noted that Petitioner injured his left knee while breaking up an inmate fight, and

noted persistent pain and swelling in the left knee with activity. Petitioner reported that his pain was worse with stairs and that he also had giving way symptoms and a clicking sensation. Physical examination showed medial joint line tenderness with a positive McMurray's test inducing pain on the medial side of the left knee. Dr. Mall also noted swelling. Dr. Mall's assessment was possible left knee meniscus tear and possible cartilage defect of the patellofemoral joint. Dr. Mall believed that Petitioner sustained a meniscal tear with the spinning/twisting type action performed while subduing the inmate, and that Petitioner jammed his knee and caused cartilage damage during the fight as well. Dr. Mall stated that Petitioner's swelling with activity was a sign of an intraarticular problem and not just patellofemoral pain. Thus, he recommended an MRI. Dr. Mall stated that the inmate fight would cause both a meniscus tear or a patellofemoral cartilage defect, and stated the following: "In terms of causation it is clear that [Petitioner] has suffered an injury at work and this injury is directly related to his knee symptoms." (PX 5, 7/15/13).

Petitioner returned to Dr. Mall following the MRI, which demonstrated and confirmed Dr. Mall's diagnosis of a medial meniscus tear and cartilage defect of the patella and potentially a trochlear defect. (PX 5, 7/17/13; PX 6). Dr. Mall noted that the majority of Petitioner's symptoms and swelling were likely related to his patellar cartilage injury and recommended surgery based on Petitioner's lack of functional improvement and continued symptoms. (PX 5, 7/17/13, 8/12/13).

On September 26, 2013, Petitioner underwent left knee arthroscopy, partial medial meniscectomy and chondroplasty of the patella. Petitioner's postoperative diagnosis was left knee medial meniscus tear and patellar cartilage defect. (PX 8). Petitioner subsequently engaged in therapy (PX 7), and was eventually returned to work full duty. (PX 5).

In support of its dispute of causation, Respondent tendered an exhibit regarding Petitioner's hobby of playing tennis. (RX 2). Regarding his ability rating of 3.0, Petitioner testified as follows:

Q: And I notice there's some numbers in these tennis records. What do those numbers mean when you're talking about – let's say next to your name is a 3.0?

A: Yeah, that's my rating, sir. You're rated on your abilities. A pro would be a seven five. A good college player would be a five zero or a five five. I'm a three zero currently, so that just means I can basically hold a racket. I know the rules, and I'm better than the average player. I'm a bad club player is what I am.

(Transcript, pp. 17-18).

With regard to the match record, he testified that his brother, his partner in doubles, won the matches:

Q: What was your record?

A: Not very good. I won one singles match, and that was against Kroker (phonetic) who actually was sick that day, so that – and the other one's doubles which again is not like what you see on TV. I basically stand in the corner, and my brother wins the match for us

> because it's usually older gentlemen, and he and I aren't quite as old. I won some with doubles, but my brother won those basically.

(Transcript, p. 18).

Petitioner testified that he has never injured his left knee playing tennis.

Petitioner testified that despite his improvement from surgery, he still experiences symptoms. Petitioner testified to aching with changes in the weather and stabbing pains with increased activity followed by soreness and a swollen sensation. Petitioner job requires him to climb stairs. His sports hobbies have been negatively affected. Petitioner takes over-the-counter medication for his symptoms. The final record of Dr. Mall corroborates Petitioner's testimony of improvement, but continued left knee complaints with activity. (PX 5, 10/14/13). Respondent did not have Petitioner examined.

CONCLUSIONS OF LAW

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

Circumstantial evidence, especially when entirely in favor of the claimant, is sufficient to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Industrial Comm'n,* 260 Ill. App. 3d 92, 96–97, 631 N.E.2d 724 (4th Dist. 1994); *International Harvester v. Industrial Comm'n,* 93 Ill.2d 59, 63-64, 442 N.E.2d 908, 910-911 (1982). A doctor's testimony is not required to establish causation and the extent of disability when there is a clear causal chain and the medical reports in the record corroborate the employee's testimony. *Gubser v. Industrial Comm'n,* 42 Ill.2d 559, 564, 248 N.E.2d 75 (1969); *see also Union Starch & Refining Co. v. Industrial Comm'n,* 37 Ill.2d 139, 144, 224 N.E.2d 856 (1967). In the case at bar, Petitioner presented both circumstantial evidence and an expert medical opinion to prove causation.

Dr. Mall opined without rebuttal that in terms of causation it was clear that Petitioner suffered an injury at work and that this injury was directly related to his knee symptoms. Petitioner testified that he informed Dr. Mall of his tennis playing activities. Petitioner testified that he has never injured his left knee playing tennis. Petitioner had no claims, care or treatment for his left knee prior to the January 5, 2013 incident. The record is void of any evidence or allegations to the contrary. Furthermore, the Arbitrator found Petitioner a very credible witness at trial. He testified in an open, pleasant, and forthcoming manner, and appeared to be endeavoring to give the full truth, including during cross-examination.

While Petitioner lacked treatment for some time before he saw Dr. Mall, this was not the fault of Petitioner. The unrebutted testimony shows that there was a "mix-up" in Springfield that prevented Petitioner from obtaining an MRI; however, he called his supervisors daily to move the matter forward and return to work. Respondent did not dispute, question, or rebut Petitioner's testimony. The ultimate issue is not whether there is a gap in treatment, but rather whether the initial accident was a causative factor in the condition of ill-being which was produced. *See Gordon v. State of Illinois DOT Joliet Yard,* 07 IWCC 1599 (Dec. 7, 2007). Vital to the issue of causal connection is whether the symptoms and findings later in treatment match up to the

symptoms immediately following the incident. *Id.* Petitioner's symptoms and complaints are consistent throughout the record.

The Arbitrator finds that Petitioner engaging in his normal routine of tennis playing does not rise to the standard of an intervening accident. The Illinois Workers' Compensation Act does not require complete dysfunction from accidental injury, and even if non-employment factors contribute to a compensable injury, the chain of causation is not broken. *Fierke v. Industrial Comm'n*, 309 Ill. App. 3d 1037, 1040, 723 N.E.2d 846 (3d Dist. 2000), citing *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 610 N.E.2d 1 (1st Dist. 1994) and *Lasley Const. Co., Inc. v. Industrial Comm'n*, 274 Ill. App. 3d 890, 655 N.E.2d 5 (5th Dist. 1995). Merely experiencing symptoms following a work-related injury while performing other activities does not rise to the standard of intervening cause. *See Lasley Const. Co.*, cited *supra*; *see also Vogel v. Ill. Workers' Comp. Comm'n*, 354 Ill. App. 3d 780, 821 N.E.2d 807, 812-813 (2d Dist. 2005). Courts have consistently held that for an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition; as the Court in *Lasley Const. Co.* aptly put it, "The fact that other incidents, whether work related or not, may have aggravated claimant's condition is irrelevant." *Lasley Const. Co., Inc. v. Industrial Comm'n*, 274 Ill. App. 3d at 893; *see also Teska v. Industrial Comm'n*, cited *supra* (finding no intervening accident since there would have been no aggravation due to bowling "but for" the original work related accident and the initial injury). Similarly, the Supreme Court of Illinois has held that the work 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. Industrial Comm'n*, 207 Ill.2d 193, 797 N.E.2d 665 (2003).

Based on the foregoing, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the 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?

Petitioner is entitled to recover reasonable medical expenses that are causally related to the accident and that are required to diagnose, relieve, or cure the effects of claimant's injury. *Plantation Mfg. Co. v. Industrial Comm'n*, 294 Ill. App. 3d 705, 691 N.E.2d 13 (2d Dist. 1997).

As a result of his accidental work injury, Petitioner sustained a medial meniscus tear and patellar cartilage defect. Dr. Mall specifically noted that Petitioner had failed conservative treatment prior at the time he recommended surgery. Prior to submitting to surgery, Petitioner attempted to resolve his condition with crutching, medication and therapy, to no avail. Despite these modalities, Petitioner still suffered from left knee pain, medial joint line tenderness and swelling. Following surgery, Petitioner's complaints of pain, although not completely resolved, were much improved, and Petitioner was able to return to work full duty. Dr. Mall opined without rebuttal that Petitioner's symptoms which necessitated surgery were the direct result of Petitioner's undisputed work injury.

Based upon the foregoing, the Arbitrator finds that the medical services rendered to Petitioner were related, reasonable and necessary in the quest to relieve Petitioner of the effects of his undisputed work accident of January 5, 2013. Respondent shall therefore pay the sum of the following medical expenses, found in Petitioner's Exhibit 1:

Franklin Hospital	$	775.00
Dr. Grunert/Family Healthcare Clinic	$	210.00
Dr. Nathan Mall/Regeneration Orthopedics	$	4,457.00
MRI Partners of Chesterfield	$	2,000.00
Nova Care Rehabilitation	$	5,050.00
St. Louis Surgical Center	$	10,704.00
Ballas Anesthesia	$	1,000.00
TOTAL:	**$**	**24,196.00**

Respondent shall have credit for any amounts paid by it or through its group carrier, for which credit may be allowed under Section 8(j) of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq.* (hereafter the "Act").

Issue (K): What temporary benefits are in dispute? (TTD)

Respondent does not dispute the fixation of Petitioner's period of disability, only liability for same as it pertains to causal connection. Respondent paid extended benefits to Petitioner during his period of temporary total disability (TTD). Based upon the above findings regarding causation, the Arbitrator hereby awards the benefits previously paid by Respondent for the claimed period of TTD, as Petitioner's current condition of ill-being is causally related to his undisputed accidental injury.

Issue (L): What is the nature and extent of the injury?

Petitioner's date of accident falls after September 1, 2011, and therefore Section 8.1b of the Act shall be discussed concerning the permanent partial disability (PPD) award being issued. It is noted when discussing the permanency award being issued that no PPD impairment report pursuant to Sections 8.1b(a) and 8.1b(b)(i) of the Act was offered into evidence by either party. This factor is thereby waived.

Concerning Section 8.1b(b)(ii) of the Act (Petitioner's occupation), Petitioner was employed as a correctional officer at the time of his injury and continues to be employed in that capacity. Respondent's "Demands of the Job" form indicates that Petitioner is required to spend between four-to-six hours on his feet and up to two hours of his day climbing stairs. (PX 9). The Arbitrator thus finds Petitioner's operated knee to be critical, given the extensive ambulatory requirements of Petitioner's employment. Therefore, significant weight is afforded this factor when determining the PPD award.

Concerning Section 8.1b(b)(iii) of the Act (Petitioner's age at the time of the injury), Petitioner was 42 years old at the time of his injury. The Arbitrator considers Petitioner to be a somewhat younger individual and concludes that Petitioner's PPD will be moderately greater than that of an older individual because Petitioner

will have to live and work with the consequences of the injury for a longer period of time. The Arbitrator gives weight to the factor of age in determining the PPD award.

Regarding Section 8.1b(b)(iv) of the Act (Petitioner's future earning capacity), there was no direct evidence of reduced earning capacity contained in the record, and therefore no weight is given to this factor when determining the permanency award.

With regard to Section 8.1b(b)(v) of the Act (evidence of disability corroborated by Petitioner's treating medical records), Petitioner sustained a medial meniscus tear and patellar cartilage defect. Petitioner's account of his injury was consistent with the reports of his treating surgeon. Petitioner testified that despite his improvement from surgery, he still experiences symptoms. Petitioner testified to aching with changes in the weather and stabbing pains with increased activity followed by soreness and a swollen sensation. Petitioner's job requires him to climb stairs up to two hours per day and to stand and/or walk between four-to-six hours per day. His sports hobbies have been negatively affected. Petitioner takes over-the-counter pain medication for his symptoms. The final record of Dr. Mall corroborates Petitioner's testimony of improvement, but continued left knee complaints with activity. Lastly, the Arbitrator notes Petitioner's credibility as discussed above. The Arbitrator gives great weight to the foregoing factor when determining the PPD award.

Based upon the aforementioned factors, the Arbitrator finds that Petitioner sustained injuries that resulted in the 25% loss of use to the left leg pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Eileen E. Osborn,
Petitioner,

vs.

Myerscoff Payroll Service d/b/a Stadium Grill,
Respondent,

NO: 09 WC 10812

14IWCC1108

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, causal connection, temporary total disability, permanent partial disability, mileage, temporary partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 4, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

There is no bond, because the credit is greater than the award. 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: DEC 19 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:10/22/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

OSBORN, EILEEN E
Employee/Petitioner

Case# **09WC010812**

14IWCC1108

MYERSCOFF PAYROLL SERVICE D/B/A STADIUM GRILL
Employer/Respondent

On 4/4/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0834 KANOSKI BRESNEY
CHARLES EDMISITON
129 S CONGRESS
RUSHVILLE, IL 62681

1256 HOLTKAMP LIESE ET AL
JOHN P KAFOURY
217 N 10TH ST SUITE 400
ST LOUIS, MO 63101

STATE OF ILLINOIS)
)SS.
COUNTY OFCHAMPAIGN)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

14IWCC1108

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Eileen E. Osborn
Employee/Petitioner

Case # 09 WC 10812

v.

Myerscoff Payroll Service d/b/a Stadium Grill
Employer/Respondent

An Application for Adjustment of Claim was filed in this matter, and a Notice of Hearing was mailed to each party. The matter was heard by the Honorable Molly Dearing, Arbitrator of the Commission, in the city of Urbana on January 30, 2014. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☒ TPD ☒ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Mileage**

FINDINGS 14IWCC1108

On **October 8, 2008**, Respondent **was** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship **did** exist between Petitioner and Respondent.

On this date, Petitioner **did** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident **was** given to Respondent.

Petitioner's current condition of ill-being with regard to the left knee **is not** causally related to the accident.
Petitioner's current condition of ill-being with regard to the right knee **is** causally related to the accident.

In the year preceding the injury, Petitioner earned **$15,143.96**; the average weekly wage was **$291.23**

On the date of accident, Petitioner was **25** 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 **$26,040.42** for TTD, **$9,052.38** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$35,092.80**. Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

All medical services, temporary partial disability benefits, maintenance benefits, and permanent partial disability benefits are denied with respect to Petitioner's left leg treatment and condition.

Respondent shall pay all reasonable and necessary medical services related to Petitioner's right leg, pursuant to Section 8(a) and 8.2 of the Act, and subject to the medical fee schedule. Respondent is entitled to a credit for medical benefits previously paid.

Respondent shall pay maintenance and temporary partial disability benefits of varying weekly amounts, taking into consideration amounts previously paid by Respondent during the applicable time periods, for 20 1/7 weeks, commencing July 20, 2012 through October 26, 2012 and April 25, 2013 through June 5, 2013, pursuant to Section 8(a) of the Act and as related to Petitioner's right leg. Respondent is entitled to a credit for temporary partial disability benefits and maintenance benefits previously paid.

Respondent shall pay Petitioner permanent partial disability benefits of $206.67 per week for 96.75 weeks because of the injury sustained for 45% loss of use of the right leg, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner mileage incurred from October 22, 2008 through October 6, 2011 during treatment for her right leg only at a rate of 50.5 cent per mile.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

March 31, 2014
Date

APR 4 - 2014

14IWCC1108

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Eileen Osborn,
Employee/Petitioner

v. Case # 09 WC 10812

Myerscoff Payroll Service d/b/a Stadium Grill,
Employer/Respondent.

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On the date of accident, Petitioner was twenty five years of age (Arb. X 1), and employed by Respondent as a bartender and server. Prior to working for Respondent, Petitioner primarily worked in the restaurant industry as a bartender and server. Petitioner testified that she obtained her GED and attended some college at Lakeland College in Mattoon.

On October 8, 2008, Petitioner was carrying dishes into the kitchen when she slipped on water and dislocated her right knee. Petitioner immediately noticed extreme right knee pain. Petitioner was then taken by ambulance to Sarah Bush Lincoln Health Center, where she underwent radiographs of the right knee, which revealed some effusion, but were negative for a fracture. Dr. Shane Cline, the emergency room physician, felt that Petitioner may have a ligamentous injury and advised Petitioner in the use of crutches and an immobilizer, and prescribed Vicodin for pain. Petitioner was ordered to rest, apply ice, elevate her leg, and follow up with her family physician, Dr. Wochner. PX 2.

Petitioner presented to Dr. Wochner on October 13, 2008, at which time he diagnosed a lateral dislocation of the right patella and referred Petitioner to Dr. Sandercock for an orthopedic evaluation. PX 1. Petitioner saw Dr. Sandercock on October 16, 2008. Upon examination, Dr. Sandercock noted a moderate to large effusion in the right knee, a markedly positive apprehension sign, and significant tenderness along the medial patellar border. Dr. Sandercock diagnosed patellar instability and recommended a patellar stabilizing knee brace and physical therapy, which Petitioner underwent at Sarah Bush Lincoln Health Center. PX 2, 6.

Petitioner returned to Dr. Sandercock on November 20, 2008 reporting some improvement with the patellar stabilizing brace, but without complete relief. Dr. Sandercock noted a positive apprehension sign and tenderness along the medial aspect of the right patella on examination, as well as marked quadricep atrophy. Dr. Sandercock recommended continued use of the brace and strengthening. PX 6.

Petitioner continued physical therapy at Sarah Bush Lincoln Health Center (PX 2) and returned to Dr. Sandercock on January 5, 2009. PX 6. Petitioner reported some improvement, but Dr. Sandercock noted a continued positive apprehension sign. He indicated improvement in the tone in her right quadriceps muscle, but not as good as her left. Dr. Sandercock recommended continued therapy and directed Petitioner to follow-up as needed. PX 6. Petitioner was discharged from therapy on February 4, 2009. PX 2.

On January 20, 2009, Petitioner presented to Dr. Timothy Gray of the Bonutti Clinic in Effingham. She reported persistent pain over the inner aspect of her knee and difficulty walking. Petitioner was pregnant, and Dr. Gray advised her to return after she delivered her baby. PX 5.

Petitioner returned to Dr. Sandercock on February 16, 2009, reporting some improvement, but with continued complaints of kneecap dislocations on a regular basis followed by discomfort for a day or so afterwards. Upon examination, Dr. Sandercock noted that Petitioner had a positive apprehension sign and continued to have quadricep and VMO weakness, with more tone in her left leg than her right. Dr. Sandercock noted that due to Petitioner's pregnancy, her treatment was at an impasse, and directed Petitioner to return on an as needed basis. Dr. Sandercock released her to return to work with restrictions of no lifting over five pounds, limit bending and twisting, no standing more than ten minutes of each hour, no prolonged walking, climbing or weight bearing, and limited kneeling and squatting. PX 6.

Petitioner deferred further treatment for her right knee until after her child was delivered on September 3, 2009. Petitioner returned to Dr. Gray on September 23, 2009, reporting continued right knee pain and irritation, and knee dislocation. Dr. Gray recommended an MRI to evaluate her knee and limited her to sedentary duty. The MRI revealed intact tendons, ligaments and menisci, and thinning of the articulating cartilage in the lateral patellar facet. PX 5.

Petitioner was examined by Dr. Leo Ludwig pursuant to Section 12 of the Act on September 24, 2009. Dr. Ludwig concluded that Petitioner had sustained a lateral dislocation of her right patella and was presenting with recurrent instability of the right patella, which he opined was causally related to her work injury. Dr. Ludwig noted that Petitioner had been through an unsuccessful course of conservative treatment, and that she required surgical stabilization of the right patella. He opined that she could perform light duty work primarily sitting and could be on her feet for short periods of time, but recommended restrictions of no lifting more than twenty and utilization of her brace. PX 4, RX 1.

Petitioner returned to Dr. Gray on October 1, 2009. Dr. Gray performed a right knee arthroscopy with excision of the plica and lateral release on November 2, 2009 at St. Anthony's Memorial Hospital in Effingham. Petitioner followed up with Dr. Gray after surgery on November 4, November 11 and November 23, 2009, during which time he kept her off work. Post-surgically, Petitioner reported to Dr. Gray feelings of right knee instability, achy, pulling and sliding sensations in her right knee, difficulties ambulating, but some improvements with therapy. Physical examinations revealed an antalgic gait, mild effusion, and positive apprehension of her patella. Dr. Gray kept her off work through December 23, 2009, and recommended a home exercise program. Dr. Gray recommended a second opinion from a knee

specialist, noting that Petitioner may require a realignment procedure. PX 5. Petitioner testified that Dr. Gray ultimately referred her to Dr. Gordon Allan.

Petitioner presented to Dr. Gordon Allan on March 26, 2010. He noted persistent complaints to Petitioner's right knee, as well as low back pain. Upon examination, Dr. Allan noted a very unstable patella that was sublux-able. Dr. Allan diagnosed Petitioner with Grade II and III chondromalacia, and he recommended Petitioner undergo a right knee patellofemoral ligament reconstruction with tibialis and posterior allograft, which was performed on June 22, 2010 at Memorial Medical Center in Springfield. Dr. Allan took Petitioner off of work at the time of surgery and directed that she remain off work until July 12, 2010, at which time she could return to sedentary duty. PX 4.

Petitioner returned to Dr. Allan on July 8, 2010, and was advised to wear the immobilizer on her knee and have no range of motion of the knee. Dr. Allan subsequently took Petitioner out of the brace once her knee appeared stable on examination, and he ordered physical therapy for range of motion, conditioning and gait training. PX 4.

On September 16, 2010, Petitioner underwent a second examination with Dr. Ludwig pursuant to Section 12 of the Act. On that date, Dr. Ludwig noted that Petitioner's right patella was much more stable, but with continued crepitation of the patellofemoral joint and pain with patellofemoral joint compression. He also noted that she had atrophy of her quadriceps related to her surgery and immobilization. Dr. Ludwig felt that her diagnosis was unchanged, being lateral dislocation of her right patella and recurrent instability, though the instability had been solved by the reconstructive surgery. Dr. Ludwig felt that Petitioner should continue her course of physical therapy. He opined that she was unable to return to her former employment because she was limited in squatting and lifting, and opined that it could be three to six months after the ligament reconstruction before she could return to work activities. RX 1.

Petitioner returned to Dr. Allan on September 18, 2010 and October 30, 2010 with continued findings of crepitance in the right knee, despite undergoing physical therapy and remaining on sedentary restrictions. Dr. Allan recommended functional capacity testing to determine the necessity of further treatment. Petitioner underwent a functional capacity examination on November 8 and 9, 2010. PX 4.

Petitioner returned to Dr. Allan on December 18, 2010 reporting pain with swelling in her right knee. Dr. Allan noted marked patellofemoral crepitance on examination, and felt she had significant patellofemoral arthritis. He considered a Fulkerson osteotomy, but wanted to obtain a second opinion before proceeding. Petitioner remained on sedentary duty. PX 4.

Petitioner was seen by Dr. Rodney Herrin on January 24, 2011 at Dr. Allan's request for consultation. Dr. Herrin noted significant pain with palpation of the patellofemoral joint with some apprehension. He felt Petitioner's right knee was stable. Dr. Herrin recommended an MR arthrogram to further evaluate the right knee, and Petitioner remained on sedentary duty. PX 4.

On March 7, 2011, Petitioner presented to Dr. Wochner with a history of slipping on ice and falling on both knees and hands. She stated that her left knee hurt more than her right. Petitioner reported a history of her October 8, 2008 incident and history involving her right knee,

as well as the history of injury to her left knee when she was thirteen. Petitioner related to Dr. Wochner that she has a transplant in her left knee and that "[f]or whatever reason her left knee will not track. She said that since her fall she has been bearing weight but it very uncomfortable, she has pain primarily with flexion." PX 1. Petitioner presented to Sarah Bush Lincoln Health Center for radiographs of the left knee, which revealed lateral subluxation of the patella in relationship to the patellofemoral groove which was thought to be maltracking. PX 2. At Arbitration, Petitioner acknowledged slipping on ice in a Wal-Mart parking lot in March 2011.

A right leg MR arthrogram was performed on March 18, 2011 at Terra Haute Regional Hospital, showing moderate patellar tendinopathy and a medial plica. PX 4. Petitioner returned to Dr. Herrin on March 31, 2011 continuing to complain of pain without instability. Dr. Herrin did not feel that the arthrogram showed significant problems with the articular cartilage and felt that it was unlikely that surgery would help her symptoms. He acknowledged that the knee could be evaluated arthroscopically, and if deemed appropriate after that examination, she could undergo anteriorization with some slight medialization of the tibial tubercle to try and offload the patellofemoral joint, though he was uncertain of the outcome of such a procedure. PX 4.

On April 29, 2011, Dr. Allan recommended an arthroscopy with chondroplasty of the right knee to allow him an opportunity to better assess the extent of degenerative changes. PX 4.

On May 12, 2011, Petitioner was examined for a third time by Dr. Ludwig pursuant to Section 12 of the Act. He noted that her ligament reconstruction had resolved the instability in her knee, but she continued to experience pain with grinding and crepitation. Upon examination, Petitioner's right patella tracked more normally than previously and she had a minimal apprehension sign on stress testing of the patella. Dr. Ludwig noted crepitation or grinding and associated pain with patellofemoral compression, as well as minimal effusion. Petitioner's left knee showed obvious apprehension of the patella with some lateral subluxation. He diagnosed Petitioner's condition as dislocation of the right patella with recurrent instability that was resolved by ligament reconstruction and also chondromalacia patella. Dr. Ludwig noted that Petitioner was pre-exposed to a dislocation of her right patella because of her anatomy, as illustrated by previous problems with her left knee "as a child and continues to have difficulties with that." He agreed with Dr. Allan's recommendation for arthroscopy to evaluate Petitioner's knee, as it could help Dr. Allan assess whether she was a candidate for a tibial tubercle osteotomy. Dr. Ludwig opined that Petitioner could return to work with restrictions against squatting, crawling, kneeling or lifting more than fifteen to twenty pounds. PX 4, RX 1.

Petitioner thereafter underwent an arthroscopic procedure with Dr. Allan on August 2, 2011 at Memorial Medical Center. During surgery, Dr. Allan found a fairly prominent medial synovial plica and significant synovial and fat pad hypertrophy deep to the patellar tendon, which was debrided. Dr. Allan inspected the patella and noted some fissures going across the patella but it did not seem unstable or require debridement. A small amount of fraying to the lateral meniscus was also debrided.

Post-operatively, Petitioner was noted to have significant stiffness and swelling following two days of shopping. A venous doppler study was ordered, which was negative, and Petitioner was advised to ice, elevate and use a sleeve on her knee. Dr. Allan noted that Petitioner's patella "was fine". Although Petitioner complained of lateral swelling, Dr. Allan felt this was related to

her previous lateral release. Dr. Allan prescribed Relafen, and ordered Petitioner to work on conditioning. PX 4.

Petitioner testified that on September 8, 2011, while walking in a park and in stepping off of a hard surface into a grassy area, her left knee buckled and she fell to the ground. She thereafter Petitioner presented to Sarah Bush Lincoln Health Center on the same date, complaining of a dislocation of her left knee when she stepped down into a grassy area at a park. She indicated that she had undergone surgery on her right knee a month prior, and that she was "able to ambulate on this knee however places most of her weight on the right side." Radiographs of her left knee were negative for any acute fractures though her patella was somewhat off to the left. Petitioner was placed in a knee immobilizer, prescribed crutches, and advised not to bear weight on the left leg. As she had recently had surgery on her right knee, Petitioner was advised to limit her mobility to only what was necessary. She was to follow up with Dr. Mendella. PX 2.

Petitioner presented to Dr. Mendella at the Sarah Bush Lincoln Medical Office Pavilion on September 12, 2011. He noted that she had been under treatment for her right knee and Petitioner advised that her left leg had been bearing the brunt of her weight as she was convalescing from surgery. Petitioner reported that she had an arthroscopy to her left knee many years before, but had done well up until recently. She also reported a fall on ice in March with slight aggravation of her left knee, in which she "seemed to convalesce from that and never really quite got to baseline since that fall." On examination, Dr. Mendella noted a small effusion, and lateral subluxation of the patella in the trochlear groove upon radiograph. Dr. Mendella diagnosed Petitioner with patellofemoral pain syndrome with noted subluxation, placed her in a patellar stabilizing brace, and ordered physical therapy for strengthening. PX 6.

During a physical therapy evaluation on September 12, 2011, Petitioner reported that following approximately three years of treatment for her right knee, she was beginning to have pain in the left knee from favoring the right, and she noted a history of left knee surgery at age thirteen. Petitioner also reported that in March 2011, "she fell on ice and landed on the left knee and has had problems w/subluxation ever since." PX 2.

Petitioner returned to Dr. Allan on September 24, 2011, reporting improvement in her right knee with less grinding. She was still unable to squat or crawl. Dr. Allan noted that Petitioner reported her left knee giving out and seeing Dr. Mendella, who had her left knee in a brace. Petitioner reported bruising her right knee when she went down. Dr. Allan noted less crepitation in Petitioner's right knee on examination. He prescribed Celebrex. Dr. Allan stated that Petitioner was close to maximum medical improvement, referred Petitioner to Dr. Fawcett to ascertain work restrictions, and advised Petitioner to return as needed. PX 4.

Petitioner saw Dr. Fawcett on October 6, 2011. Dr. Fawcett reviewed and summarized Petitioner's accident and lengthy course of treatment to her right knee. Dr. Fawcett agreed that Petitioner had reached maximum medical improvement. He felt that her ongoing pain was best managed with ice and nonsteroidal medications. He directed her to continue her home exercise program. Dr. Fawcett recommended permanent restrictions of no kneeling, crawling or squatting, no climbing of ladders, limit standing and walking to thirty percent of the work shift and no lifting, pushing or pulling more than twenty five pounds. PX 4.

Petitioner underwent an MRI of her left knee on September 28, 2011, which showed a lateral subluxation of the patella with approximately fifty percent of the lateral patellar facets articular surface uncovered, as well as moderate chondromalacia involving the apex of the patella. Petitioner returned to Dr. Mendella on October 5, 2011, reporting that her patella in her left leg continued to try to give out on her. Dr. Mendella reviewed the MRI, and recommended an arthroscopy with lateral retinacular release, which was performed at Sarah Bush Lincoln Health Center on October 27, 2011. Intraoperatively, Dr. Mendella found patella maltracking with lateral tilt and maltracking laterally within the trochlear groove, hyperplastic trochlea, chondromalacia grade II and III to the undersurface of the patella, a small radial tear in the later meniscus, and tricompartmental synovitis. PX 6.

Following surgery, Petitioner was prescribed medication, directed to physical therapy, and fitted with a patella stabilizing brace. Dr. Mendella also aspirated synovial fluid from the left knee. Petitioner was released to return on an as needed basis on March 7, 2012. PX 6.

Dr. Mendella testified via evidence deposition on January 9, 2013. Presented with a hypothetical involving Petitioner's history of accident of October 8, 2008 and multiple surgeries to the Petitioner's right knee, and noting Petitioner's own history of having to bear the brunt of her weight on her left leg, Dr. Mendella opined that the undue stress placed upon her left leg by the Petitioner's prolonged limited use of her right leg clinically correlated with her episode of buckling of the left knee and subluxation of the left kneecap. He stated that the injuries to the right leg were a contributing cause of the injuries that he treated in the left leg, in that her placement of undue stress onto her left leg was a contributing case of the buckling episode in September 2011. Dr. Mandella related the undue stress of her left side to the period of time in which she was on crutches and protecting her operative side. PX 7, Pgs. 36, 38, 39. He stated that "I think the real issue is she was protecting her right knee, not placing as much stress across it with her activities of daily living...If you've ever seen somebody walk with a limp, I would contest that they don't [place their full body weight on each step as one walks]. If somebody is using crutches they don't, or using an assistive device then they won't." PX 7.

Dr. Mendella testified that he did not place Petitioner at maximum medical improvement as of the last visit on March 7, 2012. He noted that because she had suffered changes to the articular cartilage, it would not be unreasonable for her to have intermittent pain and discomfort. Petitioner was wearing a brace on her left side at that time and he would expect her to continue to wear it if she had additional episodes of instability. On cross-examination, Dr. Mendella testified that he reviewed radiographs from Petitioner's emergency room visit of September 2011, but did not review any report from that date of treatment. He also had not reviewed any medical records concerning Petitioner's right leg treatment. Dr. Mendella was aware that Petitioner has undergone an arthroscopic procedure for her left knee in 1997. He acknowledged that the procedure she underwent at that time, namely a debridement and lateral retinacula release, primarily treated conditions due to maltracking of the patella. Dr. Mendella was also aware of an incident in March 2011 in which Petitioner reported she fell on ice and aggravated her left knee, after which time she indicated she never returned to her baseline left knee condition, but reported no issues of instability prior to September 8, 2011. Dr. Mendella believed the chondromalacia and patella alta present in Petitioner's left knee was traumatically induced, though he acknowledged the hypoplastic trochlea also present was congenital. PX 7.

On August 9, 2012, Petitioner underwent a fourth examination pursuant to Section 12 of the Act with Dr. Ludwig. Dr. Ludwig recorded Petitioner's history of dislocation of the patella of her left knee in September 2011 while walking in the park with her daughter and subsequent surgery, and noted that Petitioner reported that she had less pain after the surgery but was having some recurrent episodes of dislocation in the left knee. Dr. Ludwig reiterated his earlier opinions that the condition suffered in the Petitioner's right knee was causally related to her work related injury. Dr. Ludwig opined that the condition in the Petitioner's left knee, however, was not related to her work injury and was more likely related to her long term history of patellar instability that started at age thirteen. He stated that the "injury that occurred on October 8, 2008, to the right knee has no causal relationship to her current left knee complaints and has no causal relationship to the treatment that she received on her left knee dating back to September 9, 2011." Dr. Ludwig stated that surgery was not presently indicated for Petitioner's knees, and that she should continue a home exercise program and use over the counter medications for pain relief. Dr. Ludwig concurred with Dr Fawcett's work restrictions with regard to Petitioner's right knee and testified that they should be considered permanent. PX 4, RX 1.

Dr. Ludwig testified by way of evidence deposition on February 14, 2013. Dr. Ludwig acknowledged that the injury that Petitioner suffered to her right knee would place some additional load on her left knee during the time periods in which she was wearing a brace or utilizing crutches, which he indicated could have aggravated her left knee. However, he stated that any such aggravation would be temporary and reversible. Dr. Ludwig testified that Petitioner's left leg giving way on September 8, 2011 was a result of the anatomy of her knee, which increased her risk for developing patella instability, and not the result of any unloading onto the left leg from her right knee injury. He explained that because of Petitioner's anatomic and physiologic composition, Petitioner's bilateral knees have lax ligamentous structures, which put her at risk for developing lateral dislocations of her patellas. Dr. Ludwig noted that upon his first examination of Petitioner on September 24, 2009, she indicated to him that she had some ongoing issues with her left knee subsequent to the injury she sustained as a child, and his physical examination of her revealed issues with her left leg even at that time, as he noted a positive apprehension sign on the left side, and subluxation of her patella fifty to seventy five percent of its diameter. RX 1.

Petitioner returned to Dr. Allan for further treatment for her right knee on February 20, 2013. Petitioner reported right medial knee pain, which Dr. Allan described as a new complaint. She had stopped using her anti-inflammatory medication and reported that her knee had been flaring up, especially in cold weather. Dr. Allan opined that Petitioner may have a meniscus tear. He prescribed Naprosyn and recommended an MRI to evaluate the Petitioner's meniscus. Petitioner returned to Dr. Allan on March 15, 2013. Dr. Allan noted that the MRI showed a small tear of the lateral meniscus, which he stated could be consistent with her complaints. He offered Petitioner an arthroscopic procedure, and Celebrex was prescribed. Dr. Allan performed an arthroscopy on April 25, 2013, during which substantial anterior compartment fibrosis was debrided, but only minor lateral meniscus fraying was found. Petitioner followed up with Dr. Allan post-operatively, and was eventually released from his care on June 5, 2013. PX 4.

Dr. Allan testified by way of evidence deposition on October 30, 2013. He testified that Petitioner would have been completely unable to work for "a day or two to a couple of weeks" following her fourth right knee procedure, and that in the future, the arthritis and effects of aging

in the Petitioner's right knee could be accelerated because of the accident and multiple surgeries. Dr. Allan testified that in his note of June 5, 2013, he did not recommend any work restrictions for Petitioner at that time, but that his indications of advancing as tolerated in her activities was merely "a life thing". PX 8. Dr. Allan agreed that Petitioner's limitations would be "close" to Dr. Fawcett's restrictions in 2011, but he also stated that he would generally recommend restrictions when releasing a patient if the circumstances warranted them. PX 8.

Respondent obtained a report from Dr. Ludwig pursuant to Section 12 of the Act dated September 17, 2013. Based upon a review of the records of Dr. Allan's treatment and surgery in 2013, Dr. Ludwig confirmed that the chondromalacia and substantial anterior compartment fibrosis, or scar tissue, was causally related to the Petitioner's work injury of October 8, 2008. He recommended Petitioner continue her home exercise program, anti-inflammatory medication, and continued weight loss. RX 2.

At Arbitration, Petitioner testified that as a result of her right knee condition, she utilized crutches for a period of time, which forced her to place significant weight on her left leg for weight bearing purposes and for ascending and descending stairs. Petitioner testified that she weighed seventy pounds more at the time of her injury than she did at trial. Petitioner acknowledged that she had suffered a previous dislocation of her left knee in 1997 when she was thirteen years old, but following arthroscopic surgery, she testified that she had no problems or treatment for same.

Petitioner testified that she presently experiences soreness and swelling in her right knee, and tiredness and achiness in her left knee, particularly when she is on her feet for long periods of time as in her current employment. Petitioner is careful about how she walks to avoid re-injury. She testified to a constant level of pain in her right knee of 4/10, which may increase to 10/10 with activity. Petitioner is unable to squat, get down on one knee, run, climb a ladder, or swim, and she has difficulty with steps, getting up from the floor, and carrying her daughter as a result of her right knee. During long car trips, Petitioner must frequently stretch her leg, and must change positions during prolonged sitting. Her right knee pain awakens her while sleeping.

Petitioner acknowledged receiving temporary total disability benefits from the date of accident until she was returned to part-time, light duty work for Respondent on February 12, 2009, after which Petitioner received temporary partial disability benefits. Petitioner testified that her light duty work for Respondent consisted of rolling silverware into napkins, which was not typically a separate job within the establishment. Generally, servers would roll silverware during down time from other duties. Petitioner resumed light duty work for Respondent on November 9, 2011, which continued through July 2013. The parties stipulated that Respondent ceased payment of temporary partial disability/maintenance benefits in July 2012.

Petitioner testified that she actively sought alternative employment while working part-time for Respondent after being released from care on October 6, 2011. Petitioner began working for Unique Suites Hotels on October 27, 2012 until December 22, 2012, during which time she earned $2,896.96. She was terminated from that employment over a dispute with her supervisor concerning how she handled an injured patron following an incident. Petitioner subsequently continued to look for work, and she became employed by Cody's Roadhouse as a server and bartender in November 2013, where she continued to work at the time of trial.

CONCLUSIONS OF LAW

In regard to disputed issue (F), Respondent disputed the causal relationship for Petitioner's left knee condition only. Arb. X 1.

The Arbitrator finds that Petitioner's left knee condition is not causally related to Petitioner's work accident of October 8, 2008 and/or her right knee injury. In so concluding, the Arbitrator findings the causation opinions of Dr. Mendella concerning Petitioner's left knee to be unreliable, in part, because his opinions are based upon a flawed history of Petitioner's instability and subluxation issues that is inconsistent with the record. Dr. Mendella, based upon a history taken from Petitioner, was of the impression that Petitioner sustained "a slip on the ice [in March 2011] where she had gotten not quite back to baseline but never had any episodes of instability...So I do think, at least as of recent, her instability was secondary to the fall just prior to me seeing her in September cause she had not had any episodes of instability, to my knowledge, prior to that on the left side." PX 7. However, the preponderance of the evidence indicates that Petitioner suffered from left knee instability and subluxation issues following the left knee injury she sustained when she was thirteen, and also as a result of her fall in March 2011. By Petitioner's own history to her physical therapist on September 12, 2011, her subluxation issues had been present since her fall in March 2011. PX 2. Petitioner similarly reported to Dr. Ludwig that she has continued to suffer with recurrent problems with her left patella giving out and dislocating following her fall in March 2011, but she also related to him that she suffered with issues of instability in her left knee since her left knee dislocation in 1997. RX 1. A physical examination of Petitioner's left leg in 2009 by Dr. Ludwig revealed positive apprehension signs indicative of a patella subluxation condition even at that time. RX 1. Petitioner reported to Dr. Wochner, her primary care physician, on March 7, 2011, six months prior to her left leg incident at issue, that "[f]or whatever reason her left knee will not track. She said that since her fall she has been bearing weight but it very uncomfortable, she has pain primarily with flexion." PX 1.

In light of the inconsistent histories Petitioner gave to her treating medical professionals and to Dr. Ludwig regarding her left knee instability and subluxation issues following the incidents of 1997 and March 2011, and because the left leg history Petitioner provided to Dr. Mendella, upon which his opinion is based, is inconsistent with the record, the Arbitrator is disinclined to rely upon Dr. Mendella's causation opinion with regard to Petitioner's left knee condition.

In addition, Dr. Mendella's opinions are based upon less complete information that Dr. Ludwig's. Dr. Mendella acknowledged only reviewing the radiograph from the September 8, 2011 incident but no other reports, and he denied reviewing any medical records pertaining to Petitioner's right leg treatment. These records are significant relative to the issue of causation, particularly the history contained in the emergency room report of September 8, 2011 and the records of Dr. Allan. Dr. Allan's records lack any mention of left leg issues resultant from Petitioner's right leg condition, which is instructive, given that she regularly and frequently saw Dr. Allan for treatment. Dr. Ludwig, on the other hand, had reviewed those records, and therefore, his opinions are more well-founded than that of Dr. Mendella.

Dr. Ludwig's opinions regarding the temporary relationship between her right knee injury and that on the left are corroborated with the records and Petitioner's testimony. Dr. Ludwig's opinion that Petitioner's right knee injury may have caused some temporary, reversible aggravation to her left knee while she was utilizing a brace and crutches is consistent with Petitioner's testimony that when she was putting additional weight onto her left leg as a result of utilizing crutches during her right leg recovery, her left leg oftentimes became fatigued. The medical evidence indicates Petitioner last utilized crutches and/or an immobilizer brace for her right leg in September 2010, a year prior to her left leg incident. Subsequent to that time, the lack of any findings of Petitioner ambulating with an antalgic gait and the lack of any left leg treatment relative to overuse or unloading at or near the time of her September 8, 2011 substantiates Dr. Ludwig's opinion that any aggravation experienced from overloading her left leg while utilizing crutches and/or a brace during treatment for her right knee condition was temporary in nature, and resolved prior to the incident of September 8, 2011.

Similarly, Dr. Ludwig's opinions concerning the cause of Petitioner's left knee instability is also supported by the record. Dr. Ludwig testified that Petitioner's left leg giving way on September 8, 2011 was a result of the anatomy of her knee, which increased her risk for developing patella instability, and not any unloading onto the left leg resultant from her right knee injury. He explained that Petitioner's anatomical and physiological composition of her bilateral knees have lax ligamentous structures, which puts her at risk for developing lateral dislocations of her patellas. Petitioner's lax bilateral knee structures as noted by Dr. Ludwig are illustrated in the record, given the dislocation of Petitioner's left knee when she was thirteen which required surgical intervention, Petitioner's dislocation of her right knee during the work accident at issue which necessitated multiple surgeries, the dislocation of her left knee for a second time in a park on September 8, 2011 which again resulted in surgery, Petitioner's reports during physical therapy on September 20, 2011 that she had fallen the day prior when her knee gave out going upstairs, and her reports of October 5, 2011 that she dislocated her left knee three times since undergoing a MRI for her left knee. PX 2. Petitioner also reported on October 5, 2011 that her left knee can dislocate while she is turning over in bed (PX 2), which coincides with Dr. Ludwig's opinion that any unloading onto Petitioner's left leg would not increase the risk of dislocation of her left leg in light of her anatomy, and undermines any notion of a relationship between bearing weight on her left leg and its dislocation. RX 1.

In light of the aforementioned, the Arbitrator places greater weight on the opinions of Dr. Ludwig. The Arbitrator concludes that Petitioner has failed to prove that her current condition of ill-being in her left knee is a result of the work accident of October 8, 2008 and/or her right knee injury, and further concludes that, although Petitioner's left leg may have become tired and fatigued while undergoing treatment for her right knee condition, any aggravation to her left knee/leg as manifested as tiredness and/or fatigue in that member would have been temporary in nature, would not have caused her left knee to buckle or give way on September 8, 2011, and did not necessitate any treatment. The Arbitrator finds instead that the anatomy of Petitioner's knee, as noted by both Dr. Ludwig and Dr. Mendella, and as evidenced by Petitioner's multiple bilateral patella dislocations, is the sole cause of Petitioner's left knee dislocation on September 8, 2011.

In regard to disputed issue (J), Respondent disputed medical expenses related to the left knee only based upon its causation dispute. Arb. X 1. In light of the Arbitrator's findings with respect to disputed issue (F), medical expenses relative to Petitioner's left knee condition are denied. Respondent shall pay all reasonable and necessary medical services relative to Petitioner's right knee condition, as provided in Sections 8(a) and 8.2 of the Act, and subject to the fee schedule. Respondent shall be given a credit for any medical payments that have been paid by group health insurance pursuant to Section 8(j) of the Act, if any, 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 also be given a credit for all medical payments previously made.

In regard to disputed issue (K), the parties stipulated that Respondent previously paid $26,040.42 in temporary total disability benefits, and $9,052.38 in temporary partial disability benefits representing time periods of temporary disability prior to July 19, 2012 (Arb. X 1), and the parties stipulated that no benefits are owed prior to that date. Respondent disputed liability for payment of benefits thereafter. Petitioner sought maintenance benefits from March 8, 2012 through February 19, 2013, temporary partial disability benefits from February 20, 2013 through June 5, 2013, and maintenance benefits from June 6, 2013 through December 1, 2013. Arb. X 1.

The Arbitrator finds Petitioner's light duty, part time position with Respondent rolling silverware to be legitimate, gainful employment. Petitioner testified that rolling silverware was a duty of servers, and was generally performed at the end of each shift. Petitioner was employed by Respondent as a bartender and server, and as such, the Arbitrator reasonable infers that rolling silverware was a job duty of which Petitioner performed while employed by Respondent prior to her work accident. Although rolling silverware was not a separate position, independent of other serving duties, rolling silverware is nonetheless a legitimate job task that was a usual and customary duty of a server. Even though the light duty position was only for approximately fifteen hours per week, the Arbitrator finds that this fact alone does not render the job a sham.

The Arbitrator awards Petitioner maintenance benefits from July 20, 2012 through October 26, 2012. During this time period, Petitioner remained under permanent work restrictions by Dr. Fawcett (PX 4), and Petitioner testified that she continued to look for work. Although Petitioner did not tender any job searches or application logs for 2012, her efforts are evidenced by successfully gaining employment at Unique Suites Hotel on October 27, 2012 in which she earned more than she was earning for Respondent at the time of her October 8, 2008 injury. *See Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506 (5th Dist. 2004)(an award of maintenance was proper where the evidence showed that the claimant's self-created vocational program increased his earning capacity as demonstrated by the positive results of his job search). Therefore, the Arbitrator awards benefits for this time period.

The Arbitrator denies maintenance benefits from October 27, 2012 through December 22, 2012, the time period in which Petitioner was employed with Unique Suites Hotel. Petitioner testified that, according to her W-2 from Unique Suites Hotel, she earned $2,896.89 over an eight week period. Given that her wages for Unique Suites Hotel over 8 1/7 weeks is $355.76 per week, Petitioner earned more per week than she was earning at the time of her accident. In addition to earning $355.76 per week working for Unique Suites Hotel, Petitioner also received

temporary partial disability benefits from Respondent during the same time period, as enumerated in Petitioner's Exhibit 10. Therefore, Petitioner is not entitled to an award of maintenance benefits from October 27, 2012 through December 22, 2012.

The Arbitrator denies maintenance benefits from December 23, 2012 through February 19, 2013. The Arbitrator finds that Petitioner's position as a manger with Unique Suites Hotel was a return to gainful employment within her restrictions. Although she was terminated after approximately eight weeks, Petitioner's position with Unique Suites Hotel was unsuccessful for reasons personal to her and wholly unrelated to Petitioner's accident, treatment, restrictions, or right leg condition. Petitioner presented no evidence to indicate that Petitioner was on a probationary period with Unique Suites Hotel or that the employment as a manger was meant to be temporary in nature. Therefore, maintenance benefits for this time period are denied.

The Arbitrator denies temporary partial disability benefits from February 20, 2013 through April 24, 2013. Although Petitioner resumed treatment with Dr. Allan on February 20, 2013 for her right knee, nothing in Dr. Allan's records indicate that he believed she was temporally and totally disabled at that time, as his treatment record of that date does not take her off work nor was any separate work slip offered. PX 4. In order to be eligible for temporary total disability benefits, a Petitioner must prove not only that she did not work but also that she was unable to work. *City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996). Given that Dr. Allan had consistently noted Petitioner's off work status during prior treatment, the Arbitrator finds it probative that he makes no mention of restricting Petitioner's work as of February 20, 2013. Dr. Allan testified, however, that following Petitioner's fourth right knee procedure on April 25, 2013, Petitioner would have been unable to work for "a day or two to a couple of weeks". Therefore, the Arbitrator denies temporary partially disability benefits from February 20, 2013 through April 24, 2013, but finds that Petitioner was temporarily partially disabled from April 25, 2013 through June 5, 2013, when Petitioner was released from care, and awards such benefits for that time period.

The Arbitrator denies maintenance benefits subsequent to June 5, 2013. As the Arbitrator concluded that Petitioner's employment with Unique Suites Hotel on October 27, 2012 represented a successful return to work, the Arbitrator finds that Petitioner is not entitled to any maintenance benefits thereafter. Although Petitioner continued to engage in a self-directed job search after being terminated from Unique Suites Hotel, set forth in Petitioner's Exhibit 13, given that no evidence was presented to indicate that Petitioner's position was meant to be temporary or probational, and that she was terminated for reasons independent of her work injury, it is reasonable to infer that Petitioner would have continued in her employment with Unique Suites Hotel earning more per week than she did for Respondent at the time of her injury of October 8, 2008. Therefore, Petitioner has failed to prove that she is entitled to maintenance benefits after June 5, 2013.

Further, with respect to the time period subsequent to June 5, 2013, the Arbitrator notes that there is limited evidence to suggest that Petitioner's work was restricted after June 5, 2013 when she was released from Dr. Allan's care. In his note of June 5, 2013, Dr. Allan states that Petitioner can advance as tolerated in her activities. He testified that he did not recommend any work restrictions for Petitioner at that time, but that his indications of advancing as tolerated was

merely "a life thing". PX 8. Dr. Allan agreed that Petitioner's limitations would be "close" to Dr. Fawcett's restrictions in 2011, but he also stated that he would generally recommend restrictions when releasing a patient if the circumstances warranted them (PX 8), which the Arbitrator finds probative given the lack of any restrictions set by Dr. Allan in either his notes or his deposition testimony. Indeed, Dr. Allan had consistently issued slips regarding Petitioner's work status during Petitioner's treatment with him in 2010 and 2011. PX 4. While Petitioner had permanent restrictions imposed by Dr. Fawcett resultant from her third right knee treatment in 2011 (PX 4), there is no evidence to indicate that Dr. Allan believed those restrictions were appropriate or necessary following her fourth procedure nearly eighteen months after Dr. Fawcett's restrictions were initially imposed, as certainly, Dr. Allan could have been of the opinion that Petitioner's fourth procedure changed her condition so as to warrant a change in restrictions. Dr. Allan himself pointed out that Dr. Fawcett's restrictions were "some time before" Petitioner's fourth procedure, and that Dr. Fawcett's restrictions "had nothing to do with real physical restrictions, it had to do with meshing what she could do and what – apparently to allow her to do at work." PX 8. No testimony was elicited from Petitioner concerning her work status after June 5, 2013. Simply put, absent from the record are definitive restrictions placed on Petitioner subsequent to being released on June 5, 2013. While there is a singular indication from Dr. Allan that he may have believed Petitioner should have had restrictions "close" to her previous ones, the Arbitrator is disinclined to speculate as to what Petitioner's restrictions would have been, if any. Without more, and in conjunction with the Arbitrator's aforementioned conclusions, the Arbitrator finds that Petitioner has failed to prove she is entitled to maintenance benefits subsequent to June 5, 2013.

Based upon the foregoing, Respondent shall pay maintenance and temporary partial disability benefits of varying weekly amounts, taking into consideration amounts previously paid by Respondent during the applicable time periods, for 20 1/7 weeks, commencing July 20, 2012 through October 26, 2012 and April 25, 2013 through June 5, 2013, pursuant to Section 8(a) of the Act. Respondent shall be given a credit for benefits previously paid.

In regard to disputed issue (L), given the Arbitrator's conclusions as to disputed issue (F), permanent partial disability benefits relative to Petitioner's left leg condition are denied. Regarding Petitioner's right leg, as a result of her work injury, Petitioner suffered a dislocation and chondromalacia of the right patella, which was surgically treated in four procedures. Dr. Fawcett placed work restrictions on Petitioner of no kneeling, crawling, squatting, or climbing ladders, limited standing and walking to thirty percent of a work shift, and no lifting, pushing or pulling over twenty five pounds on October 6, 2011. PX 4. Petitioner obtained employment within her restrictions with Unique Suites Hotel, and later with Cody's Roadhouse, where she performs job duties similar to those in her former position with Respondent, and earns the same or more than she did working for Respondent at the time of her accident. Petitioner testified to continued complaints and functional limitations following her accident that are reasonable in light of her condition and resultant treatment, and supported by her treating medical records. She takes approximately six Aleve tablets everyday for pain relief. Given Petitioner's significant and extensive treatment received as a result of her work injury to her right knee, and her continued complaints and limitations, the Arbitrator finds that Petitioner has sustained accidental injuries that caused 45% loss of use of the right leg, pursuant to Section 8(e) of the Act.

In regard to disputed issue (O), or mileage, Section 8(a) of the Workers' Compensation Act provides, in part:

> The employer shall provide and pay . . . for all the necessary first aid, medical and surgical services reasonably required to cure or relieve from the effects of the accidental injury . . . The employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, *including all maintenance costs and expenses incidental thereto.* 820 ILCS 305/8(a)(*emphasis added*).

The Commission has previously interpreted Section 8(a) of the Act, and has held that "[w]e are of the opinion that the reasonable expense incurred for travel or transportation to obtain such medical treatment is an expense incidental to treatment necessary for the physical rehabilitation of the employee...These are expenses that Petitioner would not have had he not sustained a work-related injury...and it would be inconsistent with the provisions and purpose of the Act to find such expenses non-compensable." *Ron Smith v. Roy Stinde & Daughters Excavating*, 5 IWCC 208, *1-2 (March 18, 2005). In that case, the Commission awarded all travel expenses incurred by the employee, a resident of Centralia, Illinois for his travel to physicians twenty five miles away in Mt. Vernon, Illinois, and also awarded mileage to his treating physicians in Edwardsville, Illinois, 60 miles away from his home. *Id.* In awarding the mileage, the Commission reasoned that the visits to the treating physicians in both Mt. Vernon and Edwardsville "were reasonably required in the diagnosis and treatment of Petitioner's condition, and consequently to his physical rehabilitation...." *Id.*

The Workers' Compensation Division of the Appellate Court has held similarly to the Commission. In *General Tire and Rubber Company*, 221 Ill.App.3d 641 (5th Dist. 1991), the Court upheld the Commission's award of $1,588.00 in travel expenses for the petitioner who resided in Mt. Vernon, Illinois and traveled approximately 100 miles to see his physician in Evansville, Illinois and Wood River, Illinois. *Id.*

In this case, Petitioner's Exhibit 9 reflects mileage incurred by Petitioner for travel to and from medical treatment for her right knee from her date of accident through October 6, 2011. Petitioner testified that she was sent for treatment in Springfield because physicians in the Mattoon and Charleston area were unable to provide the treatment required for her right knee. Given that Respondent sent Petitioner for Section 12 examinations with Dr. Ludwig at the Orthopedic Center of Illinois in Springfield, one may infer that it was reasonable and necessary for Petitioner to travel for treatment with Dr. Allan at the same facility. Further, as Petitioner's physical therapy treatment was available within thirty miles of her home roundtrip, the Arbitrator finds same to be reasonable travel for treatment required in her physical rehabilitation. Based upon the foregoing, the Arbitrator finds the mileage incurred by Petitioner to be reasonable and necessary expenses incidental to her medical treatment. Respondent shall pay Petitioner mileage incurred from October 22, 2008 through October 6, 2011for treatment to her right knee only at the State of Illinois mileage reimbursement rate in effect at the time of Petitioner's accident on October 8, 2008 of 50.5 cents per mile. Respondent is not liable for any mileage relative to Petitioner's left knee condition.

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

Jose A. Pina,

Petitioner,

vs.

NO: 13 WC 19817

Chicago Meat Authority,

14IWCC1109

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, medical expenses, prospective medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 20, 2014 is hereby affirmed and adopted.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 19 2014

MB/mam
o:11/6/14
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Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

PINA, JOSE A
Employee/Petitioner

Case# **13WC019817**

14IWCC1109

CHICAGO MEAT AUTHORITY
Employer/Respondent

On 5/20/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0009 ANESI OZMON RODIN NOVAK KOHEN
JENNIFER KELLY
161 N CLARK ST 21ST FL
CHICAGO, IL 60601

2999 LITCHFIELD CAVO LLP
JONATHAN E BARRISH
303 W MADISON ST SUITE 300
CHICAGO, IL 60606

14IWCC1109

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)

Jose A. Pina
Employee/Petitioner
v.
Chicago Meat Authority
Employer/Respondent

Case # 13 WC 19817

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **September 17, 2013 and October 11, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC1109

FINDINGS

On the date of accident, **May 23, 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 the 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 **$24,805.04**; the average weekly wage was **$477.08**.

On the date of accident, Petitioner was **30** years of age, ***married*** with **2** dependent children.

ORDER

The Petitioner has failed to prove, by a preponderance of the evidence, that on May 23, 2013, he sustained an accident that arose out of his employment by Respondent. Therefore, compensation is hereby denied. All other issues are moot.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

May 19, 2014
Date

MAY 20 2014

ICArbDec19(b)

14IWCC1109

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose A. Pina, Petitioner, v. Chicago Meat Authority, Respondent.	)	Case No. 13 WC 19817

Statement of Facts

The Petitioner testified that his injury occurred when he slipped and fell on a bathroom floor while working for the Respondent, Chicago Meat Authority, on May 23, 2013. (T. 18) He further testified that the reason he fell was that the floor was wet. (T. 54) On redirect examination, the Petitioner testified that from the date of his injury onward "they would always put salt down . . . they would put salt in the whole company everywhere . . . On all the floors, on all the floors." (T. 65)

The Petitioner further testified that his right leg slipped, his left foot twisted and he hit his head and jaw on a urinal. He then hit his shoulder. (T. 55-56) After the Petitioner fell, he testified, he did not know what was going on for five seconds. Then "a dark skinned man" came in and asked if he needed help. (T. 19) The Petitioner asked if the man would help him. After feeling the effects of his fall, the Petitioner opened the door to the bathroom and saw two men sitting near lockers. The Petitioner told them that he had hit his head and they called his Production Manager, Jose Casas. (T. 20)

Jose Casas testified that on May 23, 2013, an employee called him and told him that the Petitioner wanted to see him in the men's locker room. (T. 81) When Mr. Casas arrived at the locker room at a little past 7:00 a.m., he saw the Petitioner sitting on a bench. (T. 81) The Petitioner said that he had fallen. (T. 82) Mr. Casas then called the Plant Manager, Lee Koepke. (T. 82)

When Mr. Koepke came to the locker room he asked the Petitioner what had happened and the Petitioner told Mr. Koepke that he had fallen. Both Mr. Casas and Mr. Koepke testified that immediately after the Petitioner told Mr. Koepke in Mr. Casas' presence that the Petitioner fell in the bathroom, Mr. Casas and. Mr. Koepke went to inspect it. (T. 83 & 135 – 136) Mr. Casas testified that there was nothing on the bathroom floor. It was not wet and it was clean. He saw nothing on the floor that would cause an accident. (T. 83 – 84)

Mr. Koepke testified that when he examined the bathroom, he walked the floor by pacing back and forth and shuffling his feet to see if it was slippery. He also inspected the floor visually. (T. 136-137) The floor was dry and free of debris. (T. 137) Mr. Koepke neither felt any wetness on the floor with his feet nor saw anything wet on the floor. (T. 138) As the bathroom floor was dry and not slippery, Mr. Koepke also testified that he had no reason to believe that the condition of the floor had played any role in causing the Petitioner's injury. (T. 159)

After Mr. Casas and Mr. Koepke examined the bathroom, they returned to where the Petitioner was sitting. Mr. Koepke then instructed Mr. Casas to take

the Petitioner to the medical clinic. (T. 57-58, 84 & 139) Mr. Casas took the Petitioner to MercyWorks. (T. 20-21)

In the May 23, 2013 MercyWorks records, the Petitioner described the injury in his own words. The parties have stipulated to the following English translation (Px3) of the Petitioner's Spanish description (Px3):

> "I went to the washroom like I normally do and when I was getting ready to leave my right leg bent and I slipped a little, and I hit the left side of my head, my left shoulder, my left leg, my knee and the bottom of my foot, and my jaw snapped."

The MercyWorks typewritten records of May 23, 2013, EMPLOYEES DESCRIPTION OF INJURY, contain the following history:

> "The patient is a 30-year-old Hispanic male, a butcher who states that he was walking to the men's bathroom, he slipped and fell, hurting his left scalp, left side of the face, neck, left shoulder, left upper arm, lumbosacral spine, left hip, left lateral thigh, left knee, left ankle, and left foot."

The Petitioner was treated at MercyWorks for injuries to his left scalp, the left side of his face, his neck, his left shoulder, left upper arm, lumbosacral spine, left hip left lateral thigh, left knee, left ankle and left foot. X-rays were taken of

the Petitioner's left shoulder and spine and showed no fractures. The Petitioner was diagnosed with contusions of the left scalp, left side of the face, neck, left shoulder, left upper arm, lumbar spine, left hip, left lateral thigh, left knee, left ankle, left foot, sprains of the neck and lower back, a sprain of the left ankle, and abrasions of the left upper arm and left knee status post a fall. (Px1- Printed Treatment Record of May 23, 2013)

When the Petitioner was discharged from MercyWorks on May 23, 2013, Mr. Casas picked up the Petitioner and drove him back to Chicago Meat Authority. (T. 58, 85) The Petitioner testified that when he returned to Chicago Meat Authority, he had a conversation with Mr. Casas. He could not remember if Mr. Koepke was also present for this conversation. (T. 58)

Mr. Casas and Mr. Koepke testified they were both present when the Petitioner returned to Chicago Meat Authority and that all three of them had a conversation in the production office. (T. 86, 140) Mr. Koepke testified that he took the Petitioner to the bathroom and asked him to demonstrate how his accident occurred. Each testified that the Petitioner never mentioned that the floor was wet. (T. 87, 141) The testimony of Mr. Casas and Mr. Koepke contradicts the testimony of the Petitioner when he stated that he told Jose Casas and "whoever asked me" that the floor on which he fell was wet. (T. 61)

When Mr. Casas and Mr. Koepke were asked how the Petitioner responded when they asked him what caused his fall, both testified that the Petitioner said he tripped on his own feet. (T. 87, 141)

During questioning by his own attorney on rebuttal, the Petitioner testified that he said to either Jose Casas or Lee Koepke that he tripped over his own feet at the time of the fall. (T. 171)

On May 23, 2013, the Petitioner authored the following employee statement in Spanish:

"Fui al bano como normalmente al salir me tropiese con mi pie y cueso se doblo. Para el lado requiardo y cai por unos cuantos segundos no supe de my y dos p despues me labante y lla me abia golpeado la cabeza, el hombro pierna mandibula y radilla y el pie." (Rx1)

Mr. Casas provided an English translation of this statement. (Rx1)

Mr. Casas testified that on the day of the Petitioner's injury, May 23, 2013, he completed an Investigation Report after he returned with the Petitioner from the clinic. (T. 117-118) Such report bears the Respondent's letterhead, but is neither dated nor signed. Mr. Casas testified that the information he filled in in the "Accident Description" section of the Investigation Report was based upon information that the Petitioner had given him. (T. 92- 93) It states:

"He said that when he went to the bathroom he finish [sic] doing No. 1 he turned to go out and his left foot twisted or he tripped over

his own feet he can't remember causing him to fall, hitting his left side of his head, left shoulder, knee, and left foot." (Rx2)

When Mr. Casas was asked why his Investigation Report makes no mention about the condition of the bathroom, he said that he would only have noted the condition of the bathroom in the section of the report entitled "Corrective Action." But because the floor was not wet and there was nothing else wrong with the floor, no corrective action needed. Therefore, he testified, there was nothing for him to write in this report about the condition of the bathroom. (T. 131-132). Accordingly, Mr. Casas' Investigation Report that he completed just hours after the Petitioner's injury occurred corroborates his testimony and Mr. Koepke's testimony.

In response to a request from Sandy of Human Resources at Chicago Meat Authority, Mr. Casas prepared a second document. Such document was signed and dated June 10, 2013, was admitted into evidence as Respondent's Exhibit 3, and states:

"After Jose Pina [sic] accident occurred on 5/23/13 around 7:00 am Lee and I went to inspect the area that [sic] the accident occurred and the bathroom was in a very good condition it was clean and dry."

Conclusions of Law

In support of his decision with regard to issue (C) "Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?", the Arbitrator makes the following findings of fact and conclusions of law:

The Arbitrator concludes that the Petitioner's injury occurred in the course of his employment by the Respondent, but did not arise out of such employment.

The Arbitrator notes that on September 17, 2013, the Petitioner testified with the aid of an interpreter. However, on October 11, 2013, the Petitioner testified without the aid of an interpreter.

On rebuttal, the Petitioner testified that he said to either Jose Casas or Lee Koepke that he tripped over his own feet at the time of the fall.

The burden is on the party seeking an award to prove by a preponderance of credible evidence the elements of the claim, particularly the prerequisites that the injury complained of arose out of and in the course of the employment. Hannibal, Inc. v. Indus. Comm'n, 38 Ill.2d 473, 231 N.E. 409, 410 (1967); Illinois Institute of Technology v. Indus. Comm'n, 68 Ill.2d 236, 369 N.E.2d 853, 12 Ill. Dec. 146 (1977)

A claimant's testimony standing alone may be accepted for the purposes of determining whether an accident occurred. Caterpillar Tractor Co. v. Indus. Comm'n, 83 Ill. 2d 213 (1980). However, a claimant's testimony must be considered with all of the facts and circumstances that might not justify an award. Neal v. Indus. Comm'n, 141 Ill. App. 3d 289 (1st Dist. 1986). Moreover, a claimant's testimony will support an award of benefits only if consideration of all

the facts and circumstances support the decision. Gallentine v. Indus. Comm'n, 201 Ill. App. 3d 880 (2d Dist. 1990).

The Arbitrator finds that the most compelling pieces of evidence are the Petitioner's own handwritten statements, which he completed in Spanish. The Petitioner's first statement is the first documented history, which he completed for MercyWorks in Spanish. The parties stipulated to the following English translation (Px3):

> "I went to the washroom like I normally do and **when I was getting ready to leave my right leg bent and I slipped a little**, and I hit the left side of my head, my left shoulder, my left leg, my knee and the bottom of my foot, and my jaw snapped." (Emphasis added)

The Petitioner's next statement (Rx1), which he completed in Spanish and submitted to Chicago Meat Authority on May 23, 2013, is as follows:

> "Fui al bano como normalmente **al salir me tropiese con mi pie y cueso se doblo**. Para el lado requiardo y cai por unos cuantos segundos no supe de my y dos p despues me labante y lla me abia golpeado la cabeza, el hombro pierna mandibula y radilla y el pie." (Emphasis added)

The Arbitrator notes that the only evidence that the floor was wet was the Petitioner's testimony at trial. Accordingly, in order to find that the Petitioner's accident arose out of his employment with the Respondent, the Arbitrator must find the Petitioner to be credible. There are several facts and circumstances in this case that call the Petitioner's credibility into question.

The Arbitrator notes that the Petitioner's testimony regarding the timing of his fall was inconsistent. The Petitioner was employed by Respondent, Chicago Meat Authority, as a butcher. (T. 11) On May 23, 2013, he started work at 6:00 am. The Petitioner testified that at about 7:20 a.m. that same day he went to the bathroom. (T. 18) On direct examination the Petitioner testified that he slipped on his way into the bathroom. (T. 18) In rebuttal the Petitioner testified that he was already in the bathroom when he fell and that he slipped after he, "finished do a pee." [sic] (T. 179)

The Petitioner's testimony was also inconsistent about the liquid on which he slipped. On direct examination the Petitioner testified that there was water, "and I think urine" on the floor. (T. 18) On cross-examination the Petitioner testified that he slipped on water or urine. (T. 54) In rebuttal the Petitioner first testified he said that he slipped on "pee" (T. 182), a term he defined as urine. (T. 189) Later he testified that he slipped on two puddles one consisting of "pee" (T. 182) and another consisting of water. (T. 183)

The Arbitrator notes that Respondent's Exhibit 3 corroborates Mr. Casas' and Mr. Koepke's testimony about the condition of the bathroom and contradicts that of the Petitioner that the bathroom floor was wet.

Although the Petitioner had to wear a variety of clothing for his work including a helmet, a frock, and work boots, (T. 12, 105-106) he did not testify that any of these items caused him to fall. Rather, the Arbitrator notes that when the Petitioner was asked by both Respondent's and Petitioner's Attorneys what caused him to fall, the only cause he identified was the wet floor. (T. 54, 169, 175, 182) Thus, in order to find the Petitioner's accident to be compensable, the Arbitrator must find that Petitioner's testimony to be credible.

The MercyWorks records of May 23, 2013 reflect that the Petitioner was not dizzy and his neurological exam showed him to be "alert and oriented times three." (Px1- Mercy Works Record of May 23, 2013) The Arbitrator finds that the only logical inference that can be drawn from this medical evidence is that the Petitioner was capable of remembering what just happened to him. Nonetheless, there is no documentation from May 23, 2013 that the Petitioner slipped on a wet floor.

The Arbitrator finds credible Mr. Koepke's unrebutted testimony that as plant manager, he is familiar with the rhythms of the plant. He testified that the bathroom in question gets the most use during break times between 8:15 am and 8:45 and between 11:00 a.m. and noon. (T. 165) He further testified that by 7:00 a.m., the bathroom that is the subject of this case typically has not gotten a lot of use. (T. 164)

A crew would have cleaned the bathroom at 5:00 a.m.

The Arbitrator therefore finds that it would not be reasonable to infer that the bathroom floor on which the Petitioner fell was wet from heavy use by about

7:20 a.m. on May 23, 2013, which is when the Petitioner went to the bathroom. (T. 18)

Mr. Koepke testified that the bathroom floor is covered with an epoxy paint and a granular mixture. (T. 157)

The Arbitrator finds the testimony of Jose Casas and Lee Koepke to be more credible than that of Jose Pina.

The Arbitrator concludes that the Petitioner's fall can be explained by his lack of sure-footedness: his right leg bent and then slipped, or he tripped with his foot.

As the Arbitrator has found that the Petitioner failed to prove by a preponderance of the evidence that an accident arose out of his employment with the Respondent, he denies compensation.

All other issues in dispute are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeremy Barrow,
Petitioner,

vs.

NO: 12 WC 08796
12 WC 08798
12 WC 17676

Logan County Paramedics,
Respondent,

14IWCC1110

DECISION AND OPINION ON REVIEW

Petitioner filed three Applications for Adjustment of Claim contending the dates of accidents are as follows: December 10, 2011, January 9, 2012 and February 13, 2012. The Applications for Adjustment of Claim show Petitioner claims all three alleged dates of accident are related to the same body part and the same incident. The Arbitrator issued one decision with all three claim numbers affixed to the decision.

Petitioner and Respondent appeal the decision of Arbitrator Dollison finding Petitioner sustained an accidental injury arising out of and in the course of his employment on January 9, 2012. As a result Petitioner was temporarily totally disabled from February 2, 2012 to April 2, 2012 for 8-5/7 weeks, was temporarily partially disabled from April 2, 2012 through September 6, 2012 for 22-3/7 weeks, is entitled to $127,276.41 in medical expenses and is permanently partially disabled to the extent of 25% man as a whole. Respondent is entitled to a credit of $5,945.23 for payment of temporary total disability benefits and $64,068.70 per §8(J) of the Illinois Workers' Compensation Act.

The Issues on Review are whether Petitioner sustained an accidental injury that arose out of and in the course of his employment on December 10, 2011, January 9, 2012 or February 13, 2012, whether a causal relationship exists between the alleged accident dates and Petitioner's

present condition of ill-being, and if so, the extent of Petitioner's temporary total disability, and the nature and extent of Petitioner's permanent disability.

The Commission, reviewed the entire record, and finds that Petitioner failed to prove he sustained accidental injuries that arose out of and in the course of his employment on December 10, 2011, January 9, 2012 or February 13, 2012.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner testified he has worked as a paramedic since 1999 and has worked for Respondent since April of 2005. He works approximately 96 hours every two weeks. He works 24 hour shifts. His job entails responding to 911 calls and assisting in patient transports from nursing homes. He would characterize his work as heavy at times. His equipment consists of a 120 pound cot for transport, a 50 pound jump bag and a 20 pound cardiac monitor. He averages 16-18 calls on a 24 hour shift. He and his partner have to transport their equipment and the cot into a house and subsequently remove the equipment, cot and patient from the house and into the ambulance. They have to then transport the patient from the ambulance into the hospital and shift the patient from the cot onto a stretcher using a blanket. Petitioner testified that nursing homes are treated almost exactly like the 911 calls.

2. Petitioner testified that December 10, 2011 was a particularly heavy call day. Instead of the normal 18 calls, they had 20-24 calls. After the call volume subsided, he laid down at work that evening and he experienced pain in his right shoulder. He first sought care for his right shoulder on December 16, 2011. The more he worked the more severe the pain began. It also started radiating down his arm. On cross-examination, Petitioner testified he cannot remember a specific incident that caused the pain he experienced on December 10, 2011. Petitioner testified he reported to Steve Stiltman that his pain started on December 10, 2011 after the busy night and Steve wrote up the incident report which said an accident occurred on December 10, 2011 at 1900 hours at Lincoln Memorial Hospital. Petitioner denies that he reported to Steve that a specific accident, such as the one Steve documented occurred. He also does not ever recall saying he just woke up with pain.

3. On December 16, 2011 Petitioner was seen at Springfield Clinic by Dr. Sagins. The doctor noted that Petitioner is here for right shoulder pain that has been going on for about the last four days. He noticed one night that he was having trouble getting comfortable when he was trying to go to sleep. He did not have any trauma or injury that he was aware of. Dr. Sagins opined that Petitioner probably had an impingement syndrome. He recommended treatment in the form of a shoulder injection and oral

prednisone. Petitioner said he told Dr. Sagins that he noticed the pain while he was trying to go to sleep at work. He does not recall telling Dr. Sagins on December 16, 2011 that he had right shoulder pain for about the about the past four days. He does not believe he worked on December 12th.

4. On December 27, 2011 Petitioner followed up at the Springfield Clinic and he saw Dr. Borowiecki at that time. The doctor noted that Petitioner reports his arm pain started about two weeks ago. He just woke up with it. He does not recall ever having an injury to his shoulder. The symptoms that he has start at the area of the superior shoulder. It hurts a little bit in the front and back of the shoulder region, but most of the pain and symptoms are actually numbness and paresthesias that go down the anterolateral arm onto the extensor forearm almost down to the fingers. His right shoulder x-ray is unremarkable. The doctor noted that Petitioner does not really seem to have pain in the shoulder and he does not have any impingement signs. He stated that he thinks Petitioner probably has more of a radiculopathy condition. He referred Petitioner to Dr. Narla, a neurologist.

5. Petitioner saw Dr. Narla on January 9, 2012, which is the second claimed date of accident. Dr. Narla noted Petitioner is complaining of pain on right side in the shoulder area and reports it is radiating down to the upper arm. He reported that the pain started one month ago and now it radiates down the forearm to the wrist. Petitioner denied having any significant amount of neck pain. Dr. Narla noted that Petitioner has previously been seen by Dr. Borowiecki and he rightly thought that the pain was coming from the neck rather than the shoulder. Dr. Narla ordered a cervical MRI. The January 13, 2012 cervical MRI showed severe right neural foraminal stenosis at C6-7 secondary to a moderate sized right neural foraminal disc protrusion. On February 13, 2012, which is the third claimed date of accident, Petitioner followed up with Dr. Narla who noted that Petitioner reports that since last Thursday, he was experiencing pain going down his left side as well. Dr. Narla ordered an EMG/NCV. The February 13, 2012 EMG/NCV showed acute denervation potentials only in pronator teres, which could be indicative of an acute denervation going on in the C7 nerve root area. He has minor bilateral carpal tunnel syndrome. Dr. Narla opined that since the pain is spreading to the neck area the source of the pain is likely coming from a C6-7 foraminal disc protrusion and narrowing producing C7 radiculopathy. On February 16, 2012, Dr. Russell recommended Petitioner have a cervical epidural. It was subsequently given on February 22, 2012.

6. On February 19, 2014 Petitioner authored a "To Whom It May Concern" letter in which he stated he was providing a summary of events. He specifically stated that while work on his shift on Saturday, December 10, 2011 he woke in the early morning to answer a call and noticed his shoulder was a little sore. He stated he did not think too much about it immediately and he proceeded on with his normal functions without experiencing any limitation. A few days passed and the soreness was still persistent in his right shoulder so

he made contact with his doctor. On February 20, 2012 , Steve Siltman, the CEO of the company prepared a Form 45 form in which he noted that Petitioner sustained an accident on December 10, 2011 at 1930 hours. Petitioner reported that he was lifting/pulling a patient from cot to cot at Lincoln Memorial Hospital when he felt the pain. The Petitioner reported he injured the C6-7 level of his cervical spine.

7. On February 29, 2012, Petitioner was seen by Dr. Russell who noted that Petitioner has given this some thought over the last couple of months and he has now unfortunately decided to change his insurance to Workers' Compensation. He originally thought he had pulled his shoulder at work and he did not think too much about it, but as the condition has gone on he has been advised to turn it in as a Workers' Compensation claim. Petitioner cannot recall any one specific event that may have initiated his symptoms. He only knows that he woke with pain the following day.

8. On February 8, 2012 Petitioner underwent surgery consisting of an anterior cervical disckectomy and interbody fusion and resulting in a post-surgical diagnosis of cervical disc disease with radiculopathy.

9. During a June 5, 2012 follow up visit with Dr. Russell he noted that Petitioner is three months post surgery. On physical examination, his flexion-extension views failed to show any abnormal motion, but he reports over the last week or so he had been having more pain in his right upper extremity extending posterolaterally and involving the index and middle fingers. Dr. Russell opined that this pain pattern seems to fit a S1 distribution and he commented that hopefully Petitioner just has some nerve root irritation. A repeat July 2, 2012 cervical MRI was performed and it was found to be unremarkable with no definite acute findings. On August 1, 2012 Dr. Russell noted that Petitioner's repeat MRI failed to show any evidence of a recurring disc. He ordered an EMG that was conducted on August 9, 2012 and it showed mild bilateral carpal tunnel syndrome along with mild chronic right C7 radiculopathy.

10. On August 26, 2012, Dr. Russell indicated that he was planning to let Petitioner return to work next week without any restrictions. During an October 31, 2012 visit with Dr. Russell, Petitioner reported that his neck still hurts but he is taking Gabapentin and it seems to help somewhat. Dr. Russell noted that Petitioner is now six months post surgery. His strength has improved but he still has some residual numbness in his arms and into his hands. He has been able to get back to work. He is on Gabapentin and thinks it may help a little. He talked to Petitioner about tapering off the medication. Dr. Russell noted that Petitioner is free to continue with his present level of activities and he should return in six months for a recheck.

11. Petitioner testified that the first time he was definitely told that the problem he was having in his shoulder was caused by his neck was during his follow up visit with Dr. Narla, which was after the February 7, 2013 EMG. Petitioner said that was the day on which he knew for certain that he had a problem with his neck.

12. Dr. Russell, a board certified neurologist, was deposed on April 26, 2013. He first saw Petitioner on February 16, 2012 based on a referral from Dr. Narla. Petitioner reported that about 2-1/2 months prior to his visit he woke up one morning with right shoulder pain. He was referred to Dr. Borowiecki who did not think his pain related to his shoulder and that's how he was referred to Dr. Narla. On physical examination, Petitioner had some numbness and tingling into his index and middle finger, which suggested a C7 nerve root irritation. His MRI reports showed severe right neural foraminal stenosis due to spurring and a moderate sized herniated disc at C6-7. There is no way to date the herniation but when one looks at it along with his weakness it is something that is probably more acute. Even if the cervical nerve root fully recovers, one can still find some chronic changes on an EMG even years after the surgery. Chronic spurring is obviously from doing repetitive things over a long time. An acute herniation can occur with lifting, but sometimes it could even occur with coughing, sneezing, twisting, and bending. Petitioner's attorney asked the doctor to assume Petitioner worked as an EMT for 7 years. He worked approximately 60 hours a week with 24 hours on duty and 48 hours off duty and that a lot of his work involved lifting patients and he asked could that work have caused or contributed to the development of a herniated cervical disc. Dr. Russell answered in the affirmative. However, on cross examination Dr. Russell noted that Petitioner did not give a history of a specific trauma. He noted that Petitioner did a lot of lifting of patients and could not identify one particular event. As he stated early on, he just thought it was a pulled muscle in his shoulder and thought it would go away. Over a couple of months, it apparently did not go away. It is his suspicion that the cervical condition was caused by a traumatic event. Though in all honestly, he does not have a description of one particular event that may have caused it. The doctor testified that he did not know when the actual disc herniation occurred and he testified that Petitioner never reported to him that his job duties were causing or aggravating his pain. The Petitioner could not think of any one particular event. He just knew that he had done a lot of lifting and he woke one morning with the arm pain and thought it was contributing to his condition. There is no way to know whether his job duties or everyday living is more of a factor in the aggravation of his condition. Dr. Russell testified that they depend a lot on the history that the patients give us. We know Petitioner worked for an ambulance company. There is no description of any one event in the records. Rather, he only mentioned that he thought it was related to work. He cannot recall any one specific event that may have initiated his symptoms. He only reported that he awoke with pain the following day. He stated that he thinks Petitioner had spurring in his neck and that was repetitive and that probably has been going on for several years but he thinks

that something more acute happened to Petitioner where he ruptured a piece of disc and started to develop the weakness and pain in his arm. He suspects it was due to lifting at work, but he does not have a good history since Petitioner could not provide a good history. Dr. Russell opined that both the repetitive nature of his job and a traumatic injury contributed to his condition. He thinks, overall, there was wear and tear from lifting over several years and then there was something that happened a couple of months ago when he started getting shoulder pain. The last time he saw him was on October 31, 2012. Petitioner reported that his neck still hurt but the Gabapentin and medicine seemed to be helping somewhat.

13. Dr. Fardon, a board certified orthopedic surgeon who concentrates primarily in adult spine care, was deposed on December 16, 2013. He cannot state with any reasonable degree of medical certainty that Petitioner's cervical disc herniation was related to a job injury or his job duties. He based his opinion on Petitioner's medical records, upon what Petitioner told him, upon his examination along with his long experience with taking care of this problem. When he saw him, the Petitioner felt in retrospect that his complaints had been brought on by a long, difficult day at his job. The records did not support any specific stress at work and did not support that any of his job duties caused his condition. Petitioner said he had been a paramedic since he was 17 years old. He did not record any specifics as to what he did in that job. Dr. Fardon testified that he does have a general familiarity with what paramedics do for a living.

14. Petitioner testified that initially after the surgery he experienced relief but then the arm pain came back as was just as bad as it was prior to the surgery. The post surgical EMG showed continued right C7 radiclopathy. Currently, he takes Gabapentin and he does not have as much neuropathy in his arm. He notices that if he misses a medication dose the pain comes back immediately. On September 12, 2012, Dr. Russell released him to return to work without any restrictions and he has been working without restrictions since. He has a follow up visit scheduled with Dr. Russell. When he performs his job now, he experiences a slight weakness on his right side. He testified that his right arm is not as strong as it used to be.

Based on the evidence above, the Commission finds Petitioner failed to prove he sustained an accidental injury that arose out of and in the course of his employment on December 10, 2011, January 9, 2012 or February 13, 2012 and failed to prove a causal relationship exists between the alleged accident dates and Petitioner's present condition of ill-being. All the parties are in agreement that Petitioner did not provide a history of a specific trauma. As such he needs to prove up a repetitive trauma that manifested itself on a specific work date that is casually related to work. Petitioner provided two initial histories. One being that he noticed he had trouble getting comfortable when he was trying to sleep and he had had right shoulder pain for the last four days. The second

history being that he just woke up with right shoulder pain. The second history is repeated again in his summary of events statement some two months late. Of interest, is the fact that while the company's CEO noted a specific history, Petitioner did not provide a specific history of a work accident. However some two months removed from one of three alleged manifestation dates, the Petitioner reports to Dr. Russell that he wanted to have the workers' compensation carrier as opposed to his group insurance provide coverage for this claim. He specifically stated that he has "given this some thought over the last couple of months" and "it has been advised to him to turn it into a workers' compensation claim".

As in most repetitive trauma cases, the best individual to provide a causation opinion is the doctor. The Commission notes that while Dr. Russell provides a positive causation opinion, it was elicited only after a hypothetical question had been posed by Petitioner's attorney. While hypotheticals can be used to elicit causation opinions, the Commission finds by and large that they are only used when the doctor is provided with less than the necessary information needed in which to independently reach a supportable causation opinion. While Dr. Russell ultimately provides a positive causation opinion after a hypothetical is posed by Petitioner's attorney, he also rightly indicates that his position is only as good as the foundation upon which it is based upon. The Arbitrator notes that Dr. Russell explained that there was probably one episode that was not identified that caused the extrusion of the disc material through the tear in the annulus and Petitioner's repetitive work activities would continue to be a causative factor in the development of that herniation. What Dr. Russell also stated is that an acute herniation can occur with lifting, but sometimes it could even occur with coughing, sneezing, twisting and bending. Dr. Russell further testified that there is no way to know whether Petitioner's job duties or everyday living is more of a factor in aggravation of his condition. He testified that doctors rely a lot on the patient's history and in this case there was no description of any one event. There was only a mention that Petitioner thought it was work related.

Dr. Fardon found that the medical records do not support any specific stress at work and do not support that any of Petitioner's job duties caused this condition. The Commission notes that it is not sufficient to find that a claimant is in the course of his employment, he must also show, even in repetitive trauma cases, that the injury arose from his employment. Here Petitioner provided histories indicating he just felt "uncomfortable when he was trying to sleep"/ "woke up with" pain and down the line he switched the coverage status from non-work related to being work related. He claims three potential dates of accident. Based on the evidence it appears that the histories of feeling uncomfortable while trying to sleep and/or woke up with pain related to the alleged December 10, 2011 date and the remaining two allege dates are treatment dates. Based on the evidence as a whole, the Petitioner's testimony and the histories he

14IWCC1110

provided to the doctors the Commission finds that Petitioner failed to prove he sustained a repetitive trauma arising out of his work on any of the alleged dates of accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on December 10, 2011, January 9, 2012 and February 13, 2012, his claim for compensation is hereby denied.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to file for Review in Circuit Court.

DATED: DEC 19 2014

MB/jm

O: 10/23/14

43

Mario Basurto

David L. Gore

Stephen Mathis

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SANDRA SULLIVAN,

Petitioner,

vs.

NO: 12 WC 32608

CITY OF NORTH CHICAGO,

14IWCC1111

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, causal connection, 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, with the clerical corrections noted below.

The Commission notes that the decision contains several clerical errors related to the surveillance video. On page 5 (number 10), we correct the third to last sentence in that paragraph to read, "It **does not** demonstrate blood on her elbow." On page 12, we correct the first paragraph to read:

> The arbitrator also notes the video of the petitioner shown leaving the ladies' bathroom and walking down the hall to HR and then back down the hall towards the Fire Department, does **not** indicate the petitioner is stressed nor appear to be in pain. Further, the video does **not** show blood on the petitioner's elbow as she had described in her testimony. Nor was any blood on her elbow mentioned in the Fire Department report or Emergency Room report.

All else is affirmed and adopted.

14IWCC1111

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 14, 2013, is hereby affirmed and adopted with the clerical corrections noted above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 19 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

SE/
O: 11/12/14
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

SULLIVAN, SANDRA
Employee/Petitioner

Case# **12WC032608**

CITY OF NORTH CHICAGO
Employer/Respondent

14IWCC1111

On 11/14/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0152 LINN CAMPE & RIZZO LTD
JOHN J RIZZO
215 N MARTIN L KING JR AVE
WAUKEGAN, IL 60085

2337 INMAN & FITZGIBBONS LTD
JUDY NASH
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

14IWCC1111

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
19(b)

Case # 12 WC 32608

Consolidated cases: _____

Sandra Sullivan
Employee/Petitioner

v.

City of North Chicago
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Waukegan**, on **June 24, 2013, September 24, 2013 and October 2, 2013.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **June 20, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$36,825.36**; the average weekly wage was **$708.18**.

On the date of accident, Petitioner was **54** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid any charges for medical services.

ORDER

The petitioner bears the burden of proving all of the elements of her claim by a preponderance of the credible evidence. Based upon the foregoing, the Arbitrator finds that Petitioner has failed to prove by a preponderance of credible evidence that she sustained accidental injuries which arose out of and in the course of her employment by Respondent. Petitioner's claim for compensation is, therefore, denied. See attached.

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

11/13/13
Date

ICArbDec19(b)

NOV 14 2013

Sandra Sullivan v. City of North Chicago
No. 12 WC 32608

RIDER TO ARBITRATION DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The issues in dispute are accident, causal connection, medical expenses, Section 8(j) credit and temporary total disability benefits pursuant to Section 19(b) of the Act.

After hearing the proofs and allegations of the parties on June 24, 2013, September 24, 2013, and October 2, 2013, and after conducting an on-site inspection of the location of the alleged accident and having made careful inquiry in this matter, **the Arbitrator finds:**

ACCIDENT:

1. On June 20, 2012, the petitioner was a 53-year old records input operator working for the City of North Chicago records department of the Police Department when she alleged that she suffered an injury to her right shoulder when she slipped and struck her right elbow on a ledge in the ladies' room. The petitioner testified that she had been employed in this same position since 2003 and that her job duties required her to assist customers, type reports and deliver mail. (Tr., pg. 11)

2. The petitioner testified that on the morning of June 20, 2012, she began work at 8:00 a.m. Sometime between 8:15 and 8:30 a.m. she was in the process of delivering the mail. She had already delivered some of the mail, when she stopped in the ladies' bathroom located across from the payment center in the municipal building for the City of North Chicago. She described the ladies' room as having a "lobby" when you first enter the ladies room. The petitioner identified Respondent's Exhibit 7A as a photograph of the "lobby" area of the ladies' room. The petitioner put an "X" on the photograph to mark the spot where she alleged she tripped on a loose floor tile. (Tr. Pg. 38) The lobby of the ladies' room had two benches and a ledge or counter located below a wall mirror. (Tr., pg. 13-14) The next room had an open doorway that lead to an area where two bathroom stalls and a sink were located. (RX. 7, a-h).

3. The petitioner testified that when she went into the restroom that morning, she put down her cellphone, keys and paperwork on the counter under the mirror in the lobby and then went into the second room where the bathroom stalls were located. She testified that she then realized that she should not leave her phone, keys and paperwork in the first room because she thought the items might be stolen. She therefore went back out to the lobby or sitting room. The petitioner testified that as she went back out, she slipped on a loose title and hit the side of her right elbow on the ledge located below the mirror. (Tr., pg. 17) She testified that she stopped herself from falling with her left hand. The petitioner identified the spot where she bumped her elbow with a circle she added to the photograph marked as Respondent's Exhibit 7A.

4. The petitioner testified that after hitting her elbow, she had a lot of pain in her right shoulder and she had blood on her right elbow. (Tr., pg. 18) Immediately after striking her elbow, she picked up her items and went back into the bathroom stall. She shut the stall door and let out a scream due to pain. (Tr., pg. 19) She then left the ladies' room without using the bathroom stall facilities. (Tr., pg. 38)

The petitioner testified in response to cross-examination that she had some blood on her elbow. (Tr., pg. 67)

5. After leaving the ladies' room, the petitioner walked to HR (Human Resources), however, their offices were not open. The petitioner then decided to walk to the opposite end of the building to the Fire Department to seek medical treatment. The North Chicago Fire Department Patient Care report that was prepared by the paramedics reported that at 8:30 a.m., the petitioner walked over to the fire station and told the paramedics that she slipped in the bathroom and caught herself with her right arm and now she had limited movement in her shoulder. (RX3)

6. On June 21, 2012, the petitioner prepared a written injury report. (RX2) She wrote, "Slipped on something. Tile slippery." The petitioner identified a photograph that she had taken of the loose tile two days following the incident. (PX12) The petitioner did not initially report that a tile was loose as was depicted in Petitioner's Exhibit 12. The petitioner testified that at the time of the alleged incident, she could not recall if anyone else was in the room. (Tr., pg. 45) She admitted that there could have been another person in the room. Following the incident, the petitioner testified that she went to the north end of the building down the hallway to the HR department to report an injury but there was no one in the office at the time. Thereafter, she walked to the south side of the building to the Fire Department because she testified that she was in a lot of pain. She admitted that she did not report the injury to her Supervisor, Lt. Curtis Braim. It was normal procedure to report a work injury to an employee's immediate supervisor. The petitioner walked past the Police Department located on the first floor on the north end of the building and directly below the ladies' room, instead, she chose to walk to the far south end of the building to report her injury to the Fire Department. (Tr., pg. 46) The ladies' room was located across the hall from the payment center in the middle of the first floor of the City Hall for the City of North Chicago. (Tr., pg. 57) The petitioner identified Respondent's Exhibit 8 as a photograph of the outside of the building of the City Hall for the City of North Chicago. (Tr. 58)

7. Since the date of injury, the petitioner testified that she was able to drive a motor vehicle and had driven herself to doctor's appointments and therapy appointments yet she testified that she was not able to type or input data. (Tr., p. 73-74) The petitioner was released to return to work by the ER doctor on the date of injury and she was released return to work by her treating doctor, Dr. Nemickas on June 25, 2012.

8. Officer Wendy Lee testified that on the morning of June 20, 2012, she was asked by Lt. Brame to take photographs of the ladies' bathroom because someone had fallen in the ladies' room. She retrieved a camera from her squad car and went into the ladies' room and inspected the floor of the washroom and vestibule area and actual bathroom area and did not find anything out of the ordinary. She went out of the ladies' room and told Lt. Brame that she did not see anything out of the ordinary. She then went back into the ladies' room and took a couple of photographs of the rooms that showed that there was nothing out of the ordinary regarding the condition of the floor. She testified that Lt. Brame and possibly Sgt. Wilson walked into the ladies' room and took a look. Officer Lee was not sure if she gave the camera to Lt. Brame or Sgt. Wilson. The photographs were not produced at trial as they could not be located. Officer Lee reviewed the Petitioner's Exhibit No. 12 which was a photograph of a loose or moved tile in the ladies' room. Officer Lee testified in a clear and convincing manner that the condition of the ladies' room floor on the morning of June 20, 2012 was not as depicted in the photograph taken by the petitioner and marked as Petitioner's Exhibit No. 12. (Tr., pg. 90) Officer Lee testified that she did not see any paper, water or moved tiles or anything on the tiles that was out of the ordinary. (Tr. pg. 95) The photographs were not produced at trial as Lt. Brame testified that

the photographs could not be located in the computer system. Lt. Brame testified that the normal procedure for saving evidence photographs was for the officer to turn over the photographs to their commanding officer who would then down load the photographs into an evidence file. Officer Lee's commanding officer was Darcy Brown. Officer Brown was in a marriage union with the petitioner. (Tr., pg. 114-115) Lt. Brame testified that he never had the camera or the photographs in his possession. (Tr., pg. 116) Lt. Brame prepared a written statement, dated June 25, 2012, that was marked as Respondent's Exhibit No. 12.

9. Lt. Curtis Braim testified that he had been employed by the City of North Chicago for 28 years. In 1999 he was promoted to lieutenant and he had been the petitioner's supervisor since 2011 when he took over the role as supervisor of records. He testified that on June 20, 2012, he received a phone call from the Fire Chief advising that the petitioner reported she injured herself in the women's washroom and that the petitioner had been transported to Occupational Health of Lake Forest Hospital. (Tr., pg. 98) Lt. Brame testified that within minutes he had Officer Lee clear the ladies' room and after Office Lee made sure that no one was in the ladies' room, that both he and Officer Lee went into the ladies' room to look for anything that might be slippery. (Tr., pg. 99) Lt. Brame was shown Petitioner's Exhibit 12 and denied that the condition shown in the photograph was the condition of the floor of the ladies' room moments after the alleged injury. (Tr., pg. 100) He testified that the floor was completely dry and he did not see any tiles ajar or any condition like that depicted in Petitioner's Exhibit 12. (Tr., pg. 112-113) After his inspection of the ladies' room, Lt. Brame then checked the internal cameras located in the hallways of City Hall and he downloaded video footage to corroborate the incident at the time it occurred. (RX9) Lt. Brame also prepared a WC Supervisor Report on June 25, 2012. In the report he indicated that a check of the area did not reveal anything that could be a cause for the petitioner to slip as the area was clean and dry. He also reported that the petitioner did not report the injury to him. (RX12)

10. Respondent's Exhibit 9 consists of the video from the internal cameras located in the hallway outside of the ladies' room. The video was shown to the Arbitrator on a 42-inch TV screen on October 2, 2013. Lt. Brame testified that the video that was shown was a true and correct copy of the video that he downloaded. He testified that the video had not been altered in any regard. The video showed Ms. Akins enter the ladies' room while she was on a telephone. Moments later, it showed the petitioner exit the ladies' room as another employee entered the ladies room. The petitioner then walked down the hall in a northerly direction toward the HR Department and it showed the petitioner walk back past the ladies' room in a southerly direction down to the very farthest point in the building to the Fire Department to report her alleged work injury. It demonstrate blood on her elbo. The video next showed Ms. Akins leave the ladies room. The video included a running timer that reported the events as occurring between 8:20 a.m. and 8:25 a.m.

11. Maurice Brown testified in response to a subpoena that he is the Director of Information Technology for the City of North Chicago. In this role, he was in charge of the operation of the internal cameras located throughout the building. He testified that the timer on the cameras had been off by minutes on several occasions in the past year. This required Mr. Brown to reset the cameras to reflect the correct time. Therefore, he testified that it was possible that the timer on the video may have been off by several minutes. He also testified that when video from the camera is downloaded, that it is impossible to alter the images in any regard.

12. Lisa Akins testified that she is employed by Account Temps and has been assigned to work as a temporary employee for the City of North Chicago since March of 2012 as an accounts payable coordinator. (Tr., pg. 147) She worked in the payment center located across the hall from the ladies'

bathroom. On June 20, 2012, just after beginning work, Ms. Akins left her desk to take a personal phone call. Ms. Akins testified that she went into the ladies' room while on her phone call. She observed the petitioner come out of the stall and set down some items on a ledge by the mirror and then wash her hands. Ms. Akins testified that the petitioner acknowledged her in the room with a "half smile," as she left the ladies' room. Ms. Akins identified the bench that she was sitting on while taking the phone call from a photograph marked as Respondent's Exhibit 7E (Tr., pg. 152-153)

13. Ms. Akins testified that the petitioner definitely left the ladies' room before Ms. Akins did and that the petitioner had a half smile on her face and nodded at Ms. Akins as she was leaving the ladies' room. (Tr., pg. 162) Ms. Akins identified Respondent's Exhibit 10 as her written statement that she signed on July 2, 2012. In that statement, Ms. Akins reported that the petitioner was in the ladies' room at the time she entered the ladies' room. She observed the petitioner come out of the stall, place her items on the ledge and the petitioner proceeded to wash her hands, all while Ms. Akins was on her telephone call. Ms. Akins reported that there was no accident while she was in the ladies' room and that the petitioner did not appear to be upset or in pain when she left the ladies' room. Ms. Akins provided a copy of her telephone bill on June 20, 2012. (RX13) This bill showed that Ms. Akins had been on a telephone call with her boyfriend on June 20, 2012 from 8:15 a.m. for a total of 4 minutes.

14. An on-site inspection was conducted of the ladies' room in the City Hall for the City of North Chicago on September 24, 2013. The Arbitrator, petitioner's attorney, respondent's attorney and petitioner were present in the ladies' room during the inspection. The ledge in the ladies' room where petitioner alleged that she struck her right elbow was measured and was 3 feet, 6 inches off the floor. The tape was 3 feet, 3 inches and the tape measure was an additional 3 inches for a total of 3 feet, 6 inches. (RX8A & B) The Arbitrator noted that the ledge was located above the petitioner's elbow. According to the medical record of Dr. Rubinstein, the petitioner is 59 inches tall (4'9" tall). (RX5, p. 68)

15. Deputy Chief Wilson testified in response to a subpoena that on June 20, 2013, he was the Acting Shift Commander. He had recently been promoted to Deputy Chief of the North Chicago Police Department. On June 20 2013, his work shift was from 5:30 a.m. to 2:00 p.m. Deputy Chief Wilson testified that there was no police investigation file regarding the petitioner's worker's compensation claim. He testified that witness statements and any investigation of a worker's compensation claim are kept by the HR Department and he brought in a copy of the HR worker's compensation file which was reviewed by petitioner's attorney. Deputy Chief Wilson testified that he may have been present after the incident was reported but that he was sure that he did not enter the ladies' bathroom if he was present at that time.

16. The petitioner was examined by Dr. William Heller for an independent medical evaluation on February 8, 2013. Dr. Heller testified in a deposition on May 13, 2013 regarding his examination and his expert medical opinion. (RX1) Dr. Heller is a board certified orthopedic surgeon with a specialty in upper extremity orthopedic surgery. His medical practice is limited to the upper extremities. Dr. Heller testified that he treated approximately 20 to 30 patients per week for rotator cuff injuries and he performs an average of 2 or 3 rotator cuff repairs per week. (RX1, p. 6) Dr. Heller reviewed the medical records from Dr. Nemickas, the diagnostic studies, the ER records, the physical therapy reports and history forms prepared by the petitioner. Dr. Heller testified that the petitioner described her injury as occurring in the woman's washroom at work. She tripped over a tile falling towards a counter and her right elbow struck the countertop as she was falling and this caused an injury to her elbow and right shoulder. (RX1, p. 8) Dr. Heller testified that, considering the petitioner's description of injury wherein she reported she fell **onto** the counter, that the counter would have to be

below elbow level. (emphasis added) (RX, p. 9) Dr. Heller reported that the petitioner told him that this incident drove the arm bone, or humerous, upwards towards her shoulder. (RX1, p. 9-10) Dr. Heller reviewed Dr. Nemickas's record of June 25, 2012 and noted that radiographs demonstrated no fracture of dislocation, but that there was superior migration of the humeral head consistent with possible rotator cuff disease. A right shoulder MRI on July 9, 2012 demonstrated a large full thickness rotator cuff tear with retraction and atrophy. (RX1, p. 11) Dr. Heller reported that retraction and atrophy meant that the petitioner had a large complete tear that had been present for at least months based on the fact that it takes months for changes of atrophy like the petitioner's to occur. (RX1, pg. 12) Dr. Heller opined that it would take at least three months for the atrophy to occur. He further testified that a person could work and drive with the same condition that this petitioner's MRI demonstrated. (RX1, pg. 13) Dr. Heller reviewed the arthroscopic operative report from August 23, 2012 wherein Dr. Nemickas performed an anatomic repair without the need for tendon augmentation or grafting. Dr. Heller testified that he reviewed a physical therapy note on or about November 1, 2012 that stated that while the petitioner was carrying laundry down some stairs, she tripped or fell and struck her right shoulder against the wall and noticed an increase in pain and symptoms in her shoulder. (RX1, p. 15) Dr. Heller testified that the petitioner denied a past history regarding her right shoulder. Dr. Heller opined that the petitioner had Type 2 diabetes mellitus and morbid obesity and that both of these conditions can lead to shoulder tendinopathies or rotator cuff tearing. (RX1, p. 19) Dr. Heller conducted a physical examination of the petitioner and reported, in detail, the results of this examination. He also testified that basically, the petitioner gave subjective responses to his testing and that it was possible that symptom magnification affected her subjective responses. (RX 1, pg. 20-21)

17. It was Dr. Heller's expert medical opinion that the petitioner suffered a sprain or contusion to her right shoulder on June 20, 2012 and that she had a preexisting diagnosis of full thickness rotator cuff tearing. (RX1, p. 25) Dr. Heller did not believe that the findings he saw on the MRI were due to a fall on June 20, 2012. (RX1, p. 25-26) Dr. Heller opined that he felt the petitioner required revision surgery of her right shoulder; however, he recommended a tendon transfer rather than a rotator cuff repair or a reverse shoulder replacement. (RX1, p. 27-28). Dr. Heller testified that the petitioner could have continued working throughout her treatment and could perform clerical duties and drive a motor vehicle. Dr. Heller testified that the description of injury given by the petitioner could have caused a temporary aggravation of her pre-existing right shoulder condition. (RX1, 29-30) Dr. Heller's opinion was that the petitioner's need for a reverse total shoulder replacement would be due to her chronic rotator cuff tear with retraction and atrophy. It was unclear when her initial rotator cuff rupture occurred but he believed it was years prior to the incident of June 20, 2012. He believed she would have required the surgical procedure within a similar timetable regardless of the incident on June 20, 2012. (RX1, 42-43) Dr. Heller testified that if the fall on June 20, 2012 caused an aggravation of a preexisting condition, he could not conclude that the fall created the need for surgical intervention. (RX1, p. 50)

18. The Arbitrator notes that his review of the medical records from Dr. Nemickas reveal that the petitioner had a history of surgery for avascular necrosis and bone removal of the right leg in 1978, 1983 and 1998. She had a total right knee replacement in September of 2007. (RX5, p. 62) Dr. Nemickas' records included a report from a Fitness for Duty examination on July 29, 2009 after the petitioner sustained an injury to her left shoulder while riding a wave runner. (RX4, p. 36) The petitioner reported she worked as a data technician for the City of North Chicago and her job did not require her to lift much except for some files on occasion. An MRI revealed the presence of a full thickness tear of the anterior half of the supraspinatus of her left shoulder. The petitioner was released to return to data entry work and she was to avoid overhead motion or lifting beyond 5 pounds with her

left arm. (RX4, p. 38) Therefore, the Arbitrator notes that the petitioner had been working with a full thickness torn supraspinatus tendon of her left shoulder since July of 2009. This record was consistent with Dr. Heller's opinion that the condition of her right shoulder may have been present for months before her disputed alleged work injury on June 20, 2012, since it was documented that she had a similar injury to her left shoulder in 2009 and continued working her regular full duty job as a records input operator.

MEDICAL TREATMENT AFTER JUNE 20, 2012:

19. The paramedics transported the petitioner via ambulance to Lake Forest Hospital where she received treatment in the emergency room. The paramedics prepared a Patient Care Report that indicated at 8:30 a.m., the patient who was a city employee walked over to the fire station and said she hurt her shoulder. She reported she slipped in the bathroom and caught herself with her right arm and had limited movement in her shoulder. There was no mention of blood on her right elbow. (RX3)

20. The records from the ER of Lake Forest Hospital indicate that the petitioner presented following a fall. The diagnosis was contusion. The right shoulder was tender to palpation and she had decreased range of motion with no obvious deformity. (Pg. 3 of 3, RX4) Again, there was no mention of a bloody elbow in this record. The petitioner underwent an x-ray of her right shoulder, right humerus and right knee. The humerus x-ray was negative. (RX4, p. 13) The right knee x-ray revealed her prior right knee arthroscopy, ossification and a small knee joint effusion. No acute fracture was identified. (RX4, pg. 15) The right shoulder x-ray revealed some mild degenerative changes at the AC joint but no fracture or dislocation. (RX4, pg. 17) The petitioner was discharged and advised to return to the ER the following day at 1:00 p.m. (Tr., pg. 75) The petitioner testified that the next day, she worked for 20 minutes when Lt. Brame told her to go home. (Tr., pg. 79)

21. On June 21, 2012, the petitioner was next seen at Northwestern Lake Forest Hospital. She requested a referral to Dr. Nemickas. (RX4, p. 8) She was released to return to her regular work as of June 22, 2012. (RX4, pg. 10) She was given restrictions specific to her right shoulder of no use of the right shoulder. She was to take Tylenol and ice her shoulder.

22. On June 25, 2012 the petitioner presented to Dr. Nemickas for evaluation of her right shoulder. (RX5, pg. 136-137) The petitioner described to the doctor that she was working in her customary position when she was leaving the bathroom on Wednesday. She apparently slipped on some loose tiles. She landed awkwardly, impacting the counter with her right elbow. She had an acute onset of pain and discomfort localized to the region of the elbow as well as the shoulder and noted an immediate inability to move same. She was again authorized to return to her regular job with some restrictions.

23. Dr. Nemickas reported that due to her concurrent pain, the petitioner was taken via ambulance to the ER where she was diagnosed with a right shoulder strain and elbow contusion. She was recommended to return to work and follow-up with orthopedics. 2 days later while transcending the same area, she had an episode of feeling of slipping on the floor and looked down and noted that 2 of the tiles were indeed loose and displaced. Although she did not have another significant fall, the process jarred her shoulder and caused her increasing discomfort. She denied prior history to her right shoulder. The Arbitrator notes that the petitioner did not testify regarding this event two days after her alleged work injury.

24. The physical examination showed her to be in no acute distress. She had markedly positive impingement, negative crossover. X-rays showed evidence of a high-riding humeral head without

secondary acetabular rotation of acromial consistent with potential acute complete rotator cuff tear. Dr. Nemickas reported the petitioner appeared to have a rather significant rotator cuff tear based on her history, physical exam and x-rays. He asked her to return to work without use of her right upper arm and the plan was for her to obtain an MRI. She was to continue with pain medications. Dr. Nemickas noted that the petitioner had a noted physical dependence and addictive nature; therefore, she was prescribed Ultracet.

25. On July 12, 2012, Dr. Nemickas authorized the petitioner off work until her surgery; however, the doctor's note was inconsistent in that it also indicated that she could work with no work involving her right hand and wrist or arm. (RX5, pg.112)

26. The petitioner was next seen by Dr. Nemickas on July 25, 2012. (N132) The doctor reported petitioner had a lot of difficulties with the right shoulder and had no improvement. Dr. Nemickas ordered a home exercise program to maintain her joint immobilization pending surgery. The petitioner declined formal physical therapy. The doctor declined to renew her pain medication due to his concerns of her addictive nature.

27. Dr. Nemickas recommended the petitioner proceed with a diagnostic arthroscopy, arthroscopic subacromial decompression and rotator cuff repair. This surgery was performed on August 23, 2012.

28. On August 29, 2012, the petitioner was seen by Dr. Nemickas for follow-up of her right shoulder arthroscopy with rotator cuff repair that was performed on August 23, 2012. (RX5, pg. 131) She reported her pain had improved. She was wearing an abduction sling. She denied radiating pain or paresthesias in her right upper extremity. The petitioner was to continue wearing the sling at all times. She could perform minimal range of motion with the right upper extremity. She was to continue off work until her next appointment in 4 weeks.

29. On September 26, 2012, the petitioner returned for an evaluation with Dr. Nemickas. (RX5, pg. 129) Her pain was markedly improved. She had discontinued her sling and had been compliant with her home exercise program. The assessment was status post right shoulder arthroscopic reconstruction. The petitioner was to continue with her work restrictions and continue with physical therapy 2 to 3 times a week for the next 4 to 6 weeks.

30. On November 1, 2012, Dr. Nemickas reported the petitioner had an episode in which she was coming down the stairs and missed a step while carrying some laundry. (RX5, p.128) She fell forward striking her right shoulder into a wall. She had an acute onset of pain that seem to markedly increase compared to her baseline post-operative course which had abated to some degree. She continued with both formal therapies in a home exercise program. (RX5, p.128)

31. On December 6, 2012, the petitioner returned for an evaluation by Dr. Nemickas. (RX5, p. 125) She reported another issue in which she had stumbled, falling, and had hit her right shoulder. Her right shoulder pain had increased dramatically. She had significant difficulty regaining and restoring her functional motion. The doctor ordered an MRI.

32. On December 18, 2012, the petitioner had a right shoulder MR. (RX6, p.81-82) There was evidence of a prior supraspinatus repair with essentially full-thickness tear of the distal supraspinatus tendon, the torn tendon was positioned at the level of the acromioclavicular joint.

33. On December 20, 2012, the petitioner was next examined by Dr. Nemickas. (RX5, pg.122) the doctor reported she was doing a reasonably well. She had no appreciable pain or discomfort with negative impingement, negative crossover. If the petitioner had a recurrent disruption, her prognosis was guarded in that he did not feel that the tissue would be of significant integrity to allow for an attempt at revision and repair. He felt she may need a reverse shoulder prosthesis or consideration of latissimus-type transfer. The petitioner continued with physical therapy.

34. On January 10, 2013, Dr. Nemickas reported that the petitioner was making improvement in PT. The doctor was concerned about the residual repair due to tissue integrity. (RX6, p.86) Dr. Nemickas reported that the petitioner was not willing, able and amendable to following the postoperative instruction. (X6, pg.86) She was absolutely opposed to be compliant with recommendations following attempts at revision or repeat repair.

35. On February 25, 2012, the petitioner had participated in 22 PT sessions in the six months since her surgery. She required extensive cueing and gave up on reps rather quickly and needed constant encouragement. (RX6, pg. 45-46)

36. On February 27, 2013, the petitioner was seen by Dr. Nemickas for follow-up of right shoulder rotator cuff repair on August 23, 2012. (RX6, pg.44) She had been in PT since surgery and was not happy with her progress. She recalled an event after surgery when she reinjured her shoulder. She was carrying some laundry down the stairs when she slipped and struck her right shoulder on the wall. Since then her shoulder had not been the same. She felt she reinjured her shoulder at that time. An MR arthrogram in January, 2013 showed a retear of the supraspinatus tendon. His assessment was status post right shoulder rotator cuff repair with re-injury. (emphasis added)

37. On April 1, 2013, Dr. Nemickas reported he saw the petitioner who complained of a sore, achy and uncomfortable right shoulder. (RX6, pg.30) His assessment was of right shoulder pain status post arthroscopic rotator cuff repair **with presumed recurrent injury**. (emphasis added)

38. On April 9, 2013, the petitioner proceeded with hardware removal, extensive debridement of her right shoulder, an acromioplasty and complex revision of her rotator cuff tear performed by Dr. Nemickas at Northwestern Memorial Healthcare. (RX6, pg. 19-21)

39. On April 17, 2013, Dr. Nemickas reported the petitioner was seen and elected to discontinue her sling once again. (RX6, pg. 18) She was working on getting off her meds to over the counter pain medications. Assessment was of status post revision right shoulder rotator cuff repair. He discussed with her the importance of following his recommendations and noted that she could proceed on her own accord. He would monitor her closely and she would continue to taper off of pain meds. He would begin her on PT in one month.

40. The petitioner has made no effort to return to work since Lt. Brame told her to go home the day following her injury because she appeared to be in pain.

The Arbitrator heard this matter on the issues and heard the various witnesses and conducted an on-site inspection of the ladies' room, The Arbitrator renders findings on the following disputed issues:

C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

F. Is the petitioner's present condition of ill-being causally related to the injury?

J. Were the medical services that were provided to the petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
N. Is Respondent due any credit pursuant to Section 8(j) and what is the amount of the credit?

In support of the Arbitrator's decision relating to (C.) did an accident occur that arose out of and in the course of the petitioner's employment by the respondent, the Arbitrator finds the following facts:

The petitioner's testimony of how the un-witnessed injury occurred and her testimony of a defective condition causing her injury were contradicted by several credible witnesses. Specifically, Officer Lee, Lt. Brame and Lisa Akins all indicated that there were no loose tiles on the floor on the date of injury, nor was there any water, paper, or any condition of the floor that would cause the petitioner to slip.

The Arbitrator notes that the petitioner originally wrote in her statement that she slipped on a slippery floor with no mention of a loose tile. (RX2) The Petitioner changed her description of accident when she explained it to Dr. Nemickas.

The Arbitrator finds the uncontradicted testimony of Dr. Heller to persuasive in that the condition of her right shoulder pursuant to an MRI on July 9, 2012 demonstrated a large full thickness rotator cuff tear with retraction and atrophy. (RX1, p. 11) Dr. Heller reported that retraction and atrophy meant that the petitioner had a large complete tear that had been present for at least months based on the fact that it takes months for changes of atrophy like the petitioner's to occur. (RX1, pg. 12) (emphasis added) Dr. Heller opined that it would take at least three months for the atrophy to occur. He further testified that a person could work and drive with the same condition that this petitioner's MRI demonstrated. (RX1, pg. 13) Dr. Heller opined that the petitioner had Type 2 diabetes mellitus and morbid obesity and that both of these conditions can lead to shoulder tendinopathies or rotator cuff tearing. (RX1, p. 19) The Arbitrator notes that the petitioner had been working with a left shoulder torn rotator cuff she sustained in a wave runner accident since 2007 and was capable of working full duty since that time with this condition. (RX4, pg. 36)

The Arbitrator adopts the testimony of Dr. Heller who opined that the petitioner's description of injury was that she reported she fell onto the counter and that this meant that the counter would have to be located below her right elbow. Clearly the counter was located above the petitioner's elbow as was observed during the on-site inspection and considering that the petitioner is 4 feet 9 inches tall and the counter or ledge was 3 feet 6 inches up from the floor. Dr. Heller further testified that the petitioner described the incident as driving her arm bone upwards towards her shoulder. This was inconsistent with the petitioner's testimony at arbitration wherein she testified that she bumper her right elbow on the ledge.

The conflicts and inconsistencies between the Petitioner's testimony with that of the various witnesses and the testimony of Dr. William Heller and the video tape evidence, are sufficient to cause the Arbitrator to question the credibility and veracity of the Petitioner. The testimony of Officer Wendy Lee, Lisa Akins, and Lt. Brame directly contradicts the petitioner's testimony regarding accident and cause the Arbitrator to further question the credibility and veracity of the Petitioner.

The Arbitrator, having observed the demeanor and body language of the Petitioner throughout the hearing and having considered the totality of the evidence introduced into the records finds the Petitioner's testimony to be lacking in credibility and, therefore, unreliable.

The arbitrator also notes the video of the petitioner shown leaving the ladies' bathroom and walking down the hall to HR and then back down the hall towards the Fire Department, does indicate the petitioner is stressed nor appear to be in pain. Further, the video does show blood on the petitioner's elbow as she had described in her testimony. Nor was any blood on her elbow mentioned in the Fire Department report or Emergency Room report.

The petitioner bears the burden of proving all of the elements of her claim by a preponderance of the credible evidence. Based upon the foregoing, the Arbitrator finds that Petitioner has failed to provide by a preponderance of credible evidence that she sustained accidental injuries which arose out of and in the course of her employment by Respondent. Petitioner's claim for compensation is, therefore, denied.

In view of the Arbitrator's decision relating to the issue of accident, determination of the remaining disputed issues are moot.

Petitioner's claim for compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Carl Jones,

Petitioner,

vs. NO: 11 WC 40157

Orland Fire Protection District,

14IWCC1112

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 causal connection and nature and extent and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the Arbitrator's decision and awards the Petitioner 8% loss of use of the person as a whole.

Petitioner was injured at work on September 20, 2011. He first had pain in his ribs but as that settled down he felt pain in his cervical spine. (Transcript Pgs. 25-27) An MRI was performed on October 5, 2011 which showed a mild disc bulge at C5-C6 with a super-imposed central disk herniation resulting in a mild central spinal canal and mild right foraminal narrowing. (Petitioner Exhibit 3)

Petitioner was a firefighter paramedic and was returned to full duty on January 23, 2012. At his last visit to Dr. Tyndall, an orthopedic surgeon, on February 6, 2012, he was asymptomatic and had full range of motion. He had no evidence of discomfort. The Doctor found that he had resolved neck pain due to the disk and was at MMI. (Petitioner Exhibit 3)

14IWCC1112

Petitioner had an episode of marked tenderness in his left neck and saw Dr. Moisan. Moisan felt that Petitioner had cervical spondylosis and facet arthropathy. He prescribed a trial medrol dosepack. This visit occurred on July 12, 2013 and Petitioner has not been back to another doctor for his cervical spine since.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $695.78 per week for a period of 40 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the the complete and total loss of use of 8% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $28,000.00. 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: DEC 19 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

HSF
O: 10/21/14
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JONES, CARL
Employee/Petitioner

Case# **11WC040157**

ORLAND FIRE PROTECTION DISTRICT
Employer/Respondent

14IWCC1112

On 12/3/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% 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:

0147 CULLEN HASKINS NICHOLSON ET AL
CHARLES G HASKINS JR
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

RUSIN MACIOROWSKI & FRIEDMAN
MARK COSIMINI
2506 GALEN DR SUITE 108
CHAMPAIGN, IL 61821

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CARL JONES,
Employee/Petitioner

Case # 11 WC 40157

v.
ORLAND FIRE PROTECTION DISTRICT,
Employer/Respondent

Consolidated cases: N/A

14IWCC1112

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator Molly Dearing, Arbitrator of the Commission, in the city of Urbana, on October 21, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?

G. ☐ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD

L. ☒ What is the nature and extent of the injury?

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS 14IWCC1112

On ***September 20, 2011***, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** related to the accident.

In the year preceding the injury, Petitioner earned ***$101,534.26***; the average weekly wage was ***$1,952.58***.

On the date of accident, Petitioner was *33* years of age, ***married***, with *2* children under 18.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit for the full salary paid to Petitioner as temporary total disability benefits.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $695.78 per week for 30 weeks, because the injuries sustained caused the 6% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from September 20, 2011 through October 21, 2013, 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 of at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

November 15, 2013
Date

DEC 3 - 2013

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

14IWCC1112

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CARL JONES,
Employee/Petitioner

v. Case 11 WC 40157

ORLAND FIRE PROTECTION DISTRICT,
Employer/Respondent.

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, at the time of his accident, was thirty three years of age. He was employed by Respondent as a firefighter/paramedic, and had been employed by Respondent in that capacity since September 24, 2007. Petitioner holds a certification in technical rescue and is a member of the CART team, which facilitates technical rescues and retrieves patients from various situations.

On September 20, 2011, Petitioner was engaged in a training exercise for the CART team on the second day of a confined space class. Petitioner was performing line transfers, in which a simulated victim gets stuck on a rope, and the firefighter/paramedic retrieves the victim utilizing a harness, rope and locking device and returns the victim to the ground. After performing that exercise, Petitioner testified that he felt pain in his right ribs, and down into his stomach. He completed the training that day, but the pain became worse and disturbed his sleep that night. The following day, the pain continued in a stabbing and cramping sensation on his right side. He could not finish the training that day. Petitioner contacted an individual with Respondent, and he was instructed to go to the hospital.

On September 21, 2011, Petitioner presented to the Emergency Room at Carle Foundation Hospital. He was given morphine, and underwent a CT scan of his abdomen and radiographs of his ribs, both of which were negative. Petitioner was discharged with a diagnosis of blunt trauma of the left abdominal wall and left lower chest wall pain secondary to trauma, prescribed Vicodin for pain management, and advised to follow up with his primary care physician if needed. PX 1.

Petitioner followed up with Dr. Terrence C. Moisan the next day, at which time Dr. Moisan ordered another CT of the abdomen, which revealed a limited noncontrast study and no fluid collections to suggest rupture of solid organs. Dr. Moisan ordered Petitioner to be reevaluated in four days, and took Petitioner off work until his reevaluation. On September 26, Petitioner presented to Dr. Moisan with improved complaints of pain in the right abdominal muscles, but also with discomfort in his neck. Dr. Moisan noted that the CT scan failed to reveal any visceral

injury, indicated that Petitioner now has cervical spasms, but did not find any cervical spinal injury. Dr. Moisan allowed Petitioner to return to full duty as of September 29, 2011. PX 2.

Petitioner returned to Dr. Moisan on October 4, 2011, with complaints of neck discomfort and right arm numbness at the C5-C6 distribution. Dr. Moisan noted a sensory deficit at C6, and ordered Petitioner a Medrol Dosepack and a MRI of the cervical spine. Dr. Moisan's impression was that Petitioner suffered from cervical radiculopathy, and he gave Petitioner work restrictions of no carrying greater than fifty pounds until the results of the MR are obtained. Pet. Ex. 2.

The MRI of Petitioner's cervical spine, performed on October 5, 2011, revealed a disc bulge at C5-6 with a superimposed central disc herniation with mild central spinal canal and mild right foraminal narrowing. PX 3. An addendum to Dr. Moisan's notes of October 6 indicated that Dr. Moisan, after reviewing the MRI, referred Petitioner for an orthopedic opinion. PX 2.

Petitioner was evaluated by Dr. Dwight S. Tyndall, an orthopedic physician, on October 12, 2011. A physical examination showed diminished range of motion in the cervical spine, especially in extension, tenderness to palpation in the posterior cervical spine, and neurologically intact in the upper extremities with slight diminution on the right. Dr. Tyndall interpreted the cervical radiographs to show a diminished disc height at C5-6, and the MRI to be consistent with a small annular tear at C5-6 with a small posterior disc bulge. He diagnosed Petitioner with neck pain and C5-6 radiculopathy. Dr. Tyndall ordered Petitioner prescription medication, recommended physical therapy, and continued Petitioner's fifty pound weight restriction. PX 3.

Petitioner began a course of physical therapy on October 28, 2011 and continued through January 17, 2012. Petitioner's physical therapy records reflect continued improvement in Petitioner's pain levels and functional abilities. PX 3.

On January 12, 2012, Petitioner received a cervical epidural steroid injection by Dr. Rajive Adlaka at the referral of Dr. Tyndall. PX 4. On January 18, 2012, Petitioner presented to Dr. Tyndall with reports of improvement and no pain. On exam, Dr. Tyndall noted a full range of motion of the cervical spine. Petitioner was neurologically intact in the upper and lower extremities, and Petitioner had a normal gait. Dr. Tyndall's assessment was "resolved symptoms of a cervical disc herniation." Dr. Tyndall released Petitioner to return to work without restrictions, and he recommended Petitioner follow up with him in two weeks. PX 3. The following day, Petitioner returned to Dr. Moisan. Petitioner was feeling well, had adequate range of motion, and was neurologically intact. Dr. Moisan returned Petitioner to work full duty as of January 23, 2012. PX 2.

Dr. Tyndall's final visit with Petitioner was on February 6, 2012, at which time Petitioner indicated his neck pain had not returned since returning to work without restrictions. Petitioner was noted to be asymptomatic. He was not taking any medications, and he was doing well. Upon examination, Petitioner had a full range of motion of the cervical spine, and no evidence of discomfort. Dr. Tyndall's assessment was resolved neck pain due to a C5-6 disc bulge. He noted Petitioner could return to his normal activities. Dr. Tyndall placed Petitioner at maximum medical improvement. PX 3.

On July 24, 2012, Petitioner presented to Dr. Moisan with complaints of increasing pain in the cervical spine, especially on the left side (PX 2), as Petitioner testified he felt as if he suffered a flare-up of pain to the same area in his neck. Petitioner reported no new trauma and no radiculopathy. A physical examination revealed marked tenderness and pain at the left cervical region. Dr. Moisan diagnosed Petitioner with cervical spondylosis and facet arthropathy, and prescribed Petitioner a Medrol Dosepack. PX 2.

At the request of Respondent, Petitioner underwent a Section 12 evaluation by Dr. Michael Kornblatt on July 30, 2012. Petitioner advised Dr. Kornblatt he had some discomfort in his neck with pain between his shoulder blades, but denied any radicular symptoms. On physical examination, Petitioner had full range of motion of his cervical spine, but Dr. Kornblatt noted some central neck discomfort with left lateral bending and extension. Dr. Kornblatt opined that Petitioner injured his neck at work in September 2011 resulting in cervical disc syndrome and right cervical radiculopathy. Dr. Kornblatt noted that the diagnostic studies were consistent with mild degenerative disc disease at C5-6, which was temporarily exacerbated by the work injury, but had resolved. Dr. Kornblatt placed Petitioner at maximum medical improvement as of February 6, 2012. Dr. Kornblatt opined that the symptoms Petitioner experienced subsequent to that date, on July 24, 2012, for which he represented to Dr. Moisan, were unrelated to the work injury, but rather, related to cervical degenerative disc disease at C5-6. Dr. Kornblatt also determined Petitioner had an impairment rating of 4% of the whole person based upon the Sixth Edition of the AMA Guidelines. Dr. Kornblatt testified by way of evidence deposition on August 5, 2013. RX 3.

At Arbitration, Petitioner testified that prior to his work injury of September 20, 2011, that he had not had any neck pain. Since returning to work full duty in January 2012, he has been performing his regular job duties as a firefighter/paramedic. Petitioner indicated the job description, which was admitted into evidence as PX 5 and RX 1, was an accurate reflection of his job duties. Petitioner testified that the physical requirements of a firefighter/paramedic include the carrying of heavy equipment, including hoses and axes, and the movement of patients. The gear weighs approximately sixty five pounds, and EMS packs, which are the bags carried by first responders, weigh between forty and fifty pounds. When moving patients, he may have to kneel to retrieve patients from the floor, a bed, or moving them up or down stairs, before placing the patient on a cot and transporting them to the hospital. Petitioner feels that certain positions that he utilizes at work and in picking up his children cause pain and discomfort in his neck. Petitioner continues to engage in all of the same job duties following the accident as he did before. He is presently able to perform all of his training activities, including paramedic training, which may be strenuous.

Petitioner testified that PX 6 reflects his wages in the year preceding his accident. He worked a significant amount of overtime during the reflected time period. Since having returned to work, there have been some changes to the amount of overtime he has worked, in part due to a change in the amount of available overtime. Respondent has hired eleven new members in Petitioner's department. He is currently making more money than he was at the time of his work injury because of scheduled raises. Since returning to work full duty, Petitioner testified that he cannot state whether his injuries have had any affect on the amount of overtime he worked, as he cannot ascertain whether he has declined available overtime or whether he has not put in for it.

CONCLUSIONS OF LAW

In regard to disputed issue (F), Arbitrator finds that Petitioner's current condition of ill-being is related to the work accident of September 20, 2011. Despite having been placed at maximum medical improvement by Dr. Tyndall on February 6, 2012, Petitioner credibly testified to a recurrence in his neck pain for which he sought treatment with Dr. Moisan on July 24, 2012. Petitioner also credibly testified, which went unrebutted, that he did not suffer any new cervical injuries between the time in which he was placed at maximum medical improvement on February 6 and when he sought treatment with Dr. Moisan on July 24. Although Dr. Kornblatt found Petitioner's condition at the time of Dr. Kornblatt's examination to be related solely to Petitioner's degenerative disc disease, the Arbitrator finds that Dr. Kornblatt's opinion is undermined by the fact that he himself noted central neck discomfort with lateral bending and extension on examination in Petitioner's cervical spine, which is consistent not only with Petitioner's complaints to Dr. Moisan, and Dr. Moisan's findings of July 24, but also with the findings of Petitioner's treating physicians throughout the duration of his treatment. Dr. Kornblatt's opinion that Petitioner's current condition is related solely to his degenerative disc disease is further undermined by Petitioner's credible and unrebutted testimony that he did not suffer from any cervical spine complaints prior to his work injury. Given that Petitioner had not suffered any symptomatology in his neck prior to his work injury, it strains credulity to conclude that Petitioner's neck pain and physical examination findings of July 24, which were reasonably consistent throughout the duration of his treatment, are unrelated to his work injury. Therefore, the Arbitrator finds that Petitioner's current condition of ill-being is related to the work accident of September 20, 2011.

In regard to disputed issue (L), pursuant to Section 8.1b of the Act, in determining the level of permanent partial disability for accidental injuries that occur on or after September 1, 2011, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a) [obtained through the most current edition of the American Medical Association's "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. 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. 820 ILCS 305/8.1b(b).

Concerning Section 8.1b(b)(i) of the Act, the Arbitrator finds a percentage of impairment rating, pursuant to Sections 8.1b(a) and 8.1b(b)(i) of the Act, in the record offered by Respondent of 4% of the whole person. This rating went unrebutted by Petitioner, in that Petitioner did not provide an impairment rating. Petitioner, however, challenged the sufficiency of the rating during Dr. Kornblatt's deposition, at which time Petitioner questioned whether Dr. Kornblatt appropriately applied the modifiers enumerated in the AMA so as to deviate from the default rating of 6% impairment. RX 3. The Arbitrator places some weight on the impairment rating of 4% when making the permanency determination.

Concerning Section 8.1b(b)(ii) of the Act, Petitioner's present occupation, as it was at the time of injury, is a firefighter/paramedic, which, based upon Petitioner's testimony as to the physical requirements of his job and his job description admitted as PX 5 and RX 1, the Arbitrator finds to be a heavy demand job. Both Dr. Moisan and Dr. Tyndall released Petitioner to return to work full duty (Pet. Ex. 2, 5), which indicates that both physicians were of the opinion that Petitioner could return to the heavy physical demands of his work. The Arbitrator places some weight on this factor when determining permanency.

Concerning Section 8.1b(b)(iii) of the Act, Petitioner was thirty three years of age at the time of his accident. Arb. X 1. The Arbitrator considers Petitioner to be a young individual, who will likely live with any permanent partial disability and the consequences of his work injury for a greater number of years than would an older worker. The Arbitrator places significant weight on this factor when making the permanency determination.

Concerning Section 8.1b(b)(iv) of the Act, Petitioner tendered a wage statement as PX 6, and proffered testimony as to reduced overtime availability following his injury. Petitioner is currently making more money in totality than he was at the time of his work injury due to scheduled raises arising from a collective bargaining agreement. Since January 2012 when he returned to work full duty, Petitioner testified as to changes in the amount of overtime he worked, in part due to a change in the amount of available overtime. Respondent has hired eleven new members in Petitioner's department alone. Petitioner indicated that he cannot state whether his injuries have had any effect on the amount of overtime he worked, as he cannot ascertain whether he has declined available overtime, or not put in for it since being released to return to work. Therefore, the Arbitrator finds that Petitioner has not suffered any impairment in future earning capacity as a result of the accident of September 20, 2011. The Arbitrator places some weight on this factor in determining permanency.

Concerning Section 8.1b(b)(v) of the Act, Petitioner's treating records indicate that Petitioner suffered blunt trauma of his abdominal wall and chest pain that resolved, as well as neck pain and radiculopathy due to a disc bulge at C5-6 with a superimposed central disc herniation, which was treated conservatively with physical therapy and an epidural steroid injection. Petitioner testified to minimal residual complaints and limitations following his work accident. Specifically, Petitioner testified that he continues to suffer pain and discomfort when his neck is in certain positions, which is reasonably reflected in his treating records. PX 2. The Arbitrator places significant weight on this factor when making the permanency determination.

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all five factors as stated in the Act. After applying §8.1(b) of the Act and weighing all of the factors enumerated in same, the Arbitrator finds that Petitioner has sustained accidental injuries that caused 6% loss of use to his person as a whole, as provided in §8(d)2 of the Act.

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)
Remand for Two Decisions	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CRAIG ROBERTS,

Petitioner,

vs.

NO: 12 WC 16990
13 WC 36532

PEORIA ROOFING,

Respondent,

14IWCC1113

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, notice, benefit/wage rate, medical expenses, and temporary total disability, and being advised of the facts and law, remands the Decision of the Arbitrator with the instructions outlined below.

The Commission notes that the Arbitrator found accident and causal connection for both alleged dates of accident but the conclusions of law in the decision are very brief and does not adequately address the separate dates of injury or explain the rationale for the various issues. Therefore, since there are actually two separate body parts at issue and two distinct alleged manifestation dates, we reverse the Arbitrator's decision and remand this case with instructions to issue two separate decisions that more completely address the issues.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 2, 2014, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator to issue two separate decisions.

DATED: DEC 19 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

SE/
O: 12/2/14
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

ROBERTS, CRAIG
Employee/Petitioner

Case# **12WC016990**

13WC036532

PEORIA ROOFING
Employer/Respondent

14IWCC1113

On 6/2/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0225 GOLDFINE & BOWLES PC
ATTN: WORK COMP DEPT
124 S W ADAMS ST SUITE 200
PEORIA, IL 61602

2965 KEEFE CAMPBELL BIERY & ASSOC LLC
NATHAN BERNARD
118 N CLINTON ST SUITE 118
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CRAIG ROBERTS
Employee/Petitioner

v.

PEORIA ROOFING
Employer/Respondent

Case # 12 WC 16990

Consolidated cases: 13 WC 36532

14IWCC1113

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable STEPHEN MATHIS, Arbitrator of the Commission, in the city of PEORIA, IL, on 12/23/2013. After reviewing all of the evidence presented and the transcript of the testimony at trial, the Honorable Lynette Thompson-Smith, hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, January 31, 2011 & December 12, 2011, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $64,979.20 and his average weekly wage was **$1,249.60**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **3** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and 0.00 for other benefits, for a total credit of $0.00.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Petitioner's average weekly wage is $1,249.60.

Respondent shall pay Petitioner for medical treatment, in the amount of $4,052.06, as indicated in the medical bills attached as Petitioner's Exhibit 6, pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall pay for prospective medical treatment as recommended by Dr. Garst and any reasonable and necessary rehabilitative treatment, as needed, pursuant to Sections 8(a) and 8.2 of the Act

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

The disputes issues in this matter are: 1) employee-employer relationship; 2) accident; 3) causal connection, 4) notice; 5) earnings and average weekly wage; 6) reasonableness, necessity and liability of medical bills; and 7) prospective medical treatment. *See,* AX1.

Petitioner's testimony

Petitioner testified that he began his career as a union sheet metal worker on or about August 2003. He further testified that he worked his first month as a union apprentice in Bloomington and then was as hired by Respondent in 2003; and worked steadily for Respondent until 2011. He finished his apprenticeship while working for Respondent then continued to work for them as a journeyman.

He testified that his job duties did not change however; he had more responsibilities after he became a journeyman. Petitioner indicated that his sheet metal work required him to use a variety of hand tools on a regular basis; and the type of sheet metal work that he did at Peoria Sheet Metal was called architectural work, i.e. custom work.

Petitioner explained that some shops do mostly duct work and a sheet metal worker is able to use machines in the shop while custom architectural work requires high maintenance. Petitioner testified that his job duties would vary depending on the day however, he would have to use hand tools, such as caulking gun, seamer, rivet gun, and snips every day, and that these tools required forceful gripping.

As an example, Petitioner testified that he might use a seamer over a 200-foot section of roof, which he would have to go over, inch by inch with hand tools; to seal the metal so that it formed a tight seal. He testified that many times the metal would be 22 or 24 gauge; and he would have to go over that long seam twice, to ensure that it was sealed appropriately. This action required forceful gripping and squeezing.

When doing certain applications outdoor, he would use rivet guns to construct gutters and gutter heads. Petitioner also used tin snips on a daily basis and testified he used these snips so frequently; he wore out four pairs per year.

Petitioner's Exhibit 5 was a printout from Beverly Niswonger, the secretary at the sheet metal union hall. Petitioner reviewed this document, which contained his working hours from January 31, 2006 to July 31, 2013; and also indicated that he worked at Respondent from January 31, 2006 until January 31, 2011, with two (2) intermittent work periods in April and May 2011. Petitioner testified that he worked for Respondent from 2003 until January 14, 2011, when he was laid off.

Petitioner testified that he had no hobbies, such as playing a guitar, that required him to have frequent hand movements

On January 31, 2011, Petitioner presented to Dr. Garst with complaints of "paresthesias on the ring and little fingers...numbness and tingling". Petitioner testified that he had been having pain and numbness in both hands and arms prior to this day, however, this was the first time that it went all the way up to his shoulder and it scared him. On that date, Dr. Garst diagnosed him with probable right cubital tunnel and possible right carpal tunnel syndrome. Petitioner testified that he continued to work through the pain and discomfort but it continued to get worse. He went back to see Dr. Garst on February 12, 2011. At this point, he was making complaints of pain in both hands and elbows. Dr. Garst diagnosed him with possible bilateral carpal and cubital tunnel syndrome and had an EMG/NCV test performed on February 8, 2012, by Dr. Troung. The test was read as the petitioner having moderate to severe bilateral carpal tunnel syndrome, more pronounced on the left; and bilateral ulnar cubital tunnel syndrome, more severe on the left. .

On August 28, 2013, Dr. Garst testified that he initially recommended conservative care for Petitioner and after a course of physical therapy and splinting; Petitioner had not improved. Dr. Garst recommended that Petitioner undergo bilateral cubital and carpal tunnel surgeries. He stated he would like to do the left arm first, and Petitioner would be off work for about 4 to 6 weeks then Dr. Garst would do the right side; and Petitioner would be off work for another 4 to 6 weeks. He indicated that if light duty was available, Petitioner might only be off work for two (2) weeks after each surgery.

The petitioner was seen by Dr. Michael Bryan Neal, at the request of Respondent, for an independent medical examination ("IME"). Dr. Neal, an orthopedic surgeon, wrote a report regarding this matter stating that Petitioner did not have carpal tunnel syndrome; which contradicted of both Drs. Garst and Truong; and the EMG/NCV test results. Dr. Neal did believe Petitioner had bilateral cubital tunnel syndrome.

Dr. Neal was asked if the medical documentation supported a causal relationship between the accident and the injury. He opined that Petitioner does not have carpal tunnel and that his cubital tunnel symptoms were not caused by work. Further, Dr. Neal believed that the petitioner only worked for Respondent from October 30, 2010 through May 7, 2011.

When queried as to what types of activities can cause carpal tunnel syndrome, Dr. Neal stated that forceful, repetitive gripping and grasping, in extreme positions of flexion and extension; as well as activities where there is significant vibration exposure, would be the activities that were accepted by the majority of the medical world, as having an occupational causal relationship. In this particular instance, he opined that Petitioner did not have carpal tunnel and that the cubital tunnel symptoms he had were idiopathic.

Dr. Neal came to his conclusions even though Petitioner told him that when he did a lot of heavy cutting and grasping that would hurt and make his hands numb. The opinions of this doctor were

also based on information that the petitioner only worked for Respondent for six (6) months, i.e., October 30, 2010 through March 7, 2011. RX4, pgs.20-29.

Dr. Neal also testified that he believed that Petitioner's cubital tunnel was idiopathic. When he was asked on page 34 of his deposition, "where you do you think Petitioner's cubital tunnel come from (how to do you think he got it)", Dr. Neal indicated that Petitioner said he drank alcohol daily and that was the risk factor. In reviewing the record, Petitioner did indicate he drank one (1) beer per day. The doctor was asked several times during his deposition, whether Petitioner's drinking one beer per day caused Petitioner's cubital tunnel syndrome. Dr. Neal did not answer the question and only said that any alcohol can lead to peripheral neuropathies. Later, Dr. Neal admitted that carpal tunnel could be caused by sheet metal work. RX4, pgs.34-41.

Dr. Garst is Petitioner's treating orthopedic surgeon, who specializes in surgery of the hand and upper extremity. In his opinion, Petitioner's work activities with Respondent, caused the bilateral carpal and cubital tunnel syndromes that he diagnosed Petitioner as having. Dr. Garst was asked if Petitioner's primary job as a sheet metal worker, frequently using hand tools such as tin snips, pattering tools and riveters, would cause of the conditions of bilateral carpal and cubital tunnel syndrome that he diagnosed. Dr. Garst responded that within a reasonable degree of medical certainty Petitioner's conditions were work related. On cross-examination, Dr. Garst was asked a variety of questions about scientific studies, which he indicated could go either way, regarding the causes of carpal and cubital tunnel. However, he stated, "most of my opinion is based on the fact that I live in an area and practice in an area that's heavy with metal workers and my feeling is the frequency among them for compressive neuropathies is higher than the general population". Dr. Garst was unaware of any hobbies or activities that Petitioner had, which would require repetitive use of the hands. Further, both Drs. Garst and Neal agreed that repetitive, forceful use of hand tools could cause the petitioner's conditions. PX3; Dr. Garst Deposition, pp.13-14; PX4, pgs.13-14, 29.

Respondent's witness' testimony

Mike Boyle, Branch Manager for Respondent Peoria Roofing, testified Petitioner last worked the week ending January 15, 2011, after a lay of a few weeks of work in April and May 2011. Mr. Boyle also testified that the petitioner has worked for Respondent since 2008, as a metalworker. He further testified that those working in the field would use hand tools such as riveters however, those working in the shop would use automated equipment, i.e., auto shears and brakes to cut and bend the metal.

Mr. Boyle further testified that he received a letter alleging a work injury for petitioner however, he did not remember when he received it and that the petitioner was not working for Respondent at the time of the subject injury. Mr. Boyle testified he was aware of the unrelated right long finger extensor tendon laceration repair that Petitioner had in late 2010, but was never provided notice of any other claims as Petitioner was not employed with Peoria Roofing, at the time of the claims were alleged or

filed. Mr. Boyle testified that as branch manager, he would be the appropriate party to be given notice of any alleged work related claim. He further testified that Marty Craig was the petitioner's supervisor and that Marty "takes care of the sheet metal shop"; and if someone reports an accident to Marty then Marty is supposed to notify him. He also testified that he could have pressed a button and printed the petitioner's earnings for the fifty-two (52) weeks prior to the accident date but he thought that they just wanted what the petitioner's earning were in 2011. He agreed that sheet metal workers make $32.15 per hour and that the petitioner did work with the type of tools to which he testified. Tr. Pgs. 40-52.

Petitioner had previously sought medical treatment for a right, long finger, extensor tendon laceration repair. Treatment ended on January 18, 2011; when Dr. Jeffrey Garst recommended s full duty work release. Medical records during late 2010 and prior to January 31, 2011 reflected discomfort of the hand and fingers due to the casting involved in the unrelated right long finger extensor tendon laceration repair. Petitioner testified to right hand pain and numbness prior to January 31, 2011 but medical records, prior to January 31, 2011, make no mention of complaints of bilateral hand or elbow pain. The Arbitrator notes that the petitioner was relegated to one-armed or one-handed duty in November and December 2010. PX1.

The amended application 12 WC 16990 alleges a right upper extremity claim on January 31, 2011. The medical records document the first complaints of hand pain and numbness were when Petitioner returned to Dr. Garst January 31, 2011 and complained of right hand pain and numbness. Petitioner testified to ongoing pain complaints and Dr. Garst recommended an EMG January 31, 2011. Petitioner failed to appear for any scheduled appointments until almost a year later on December 12, 2011.

Application 13 WC 36532 alleges a bilateral, upper extremity claim from alleged repetitive trauma on a date of accident of December 12, 2011. Petitioner's medical records, of that date, state that he presented to Dr. Garst with "right hand pain and numbness with some left hand pain and numbness" that the petitioner "had been getting ulnar paresthesias and he had reported that previously". Dr. Garst reordered EMG/NCV testing. PX1.

Petitioner testified that on January 31, 2011, he had complaints related only to the right hand. Petitioner further testified to pain worsening in the right upper extremity; and additional symptoms in the left upper extremity, after January 31, 2011. This was his reason for filling an additional claim for alleged bilateral upper extremity complaints.

In a letter to Petitioner's counsel, dated November 5, 2012, Dr. Garst stated he had a rather vague understanding of the type of work Petitioner performed and that his knowledge of the Petitioner's work history was limited. With regards to work duties, Dr. Garst stated that he had not addressed that issue with Petitioner. He stated that he noted that Petitioner was a sheet metal worker and that

they do have repetitive jobs that are strenuous on their hands; and if this was the case with the petitioner, then the doctor opined that the compression neuropathies of carpal tunnel and cubital tunnel syndrome were related to his work. Dr. Garst also pointed out he had not physically examined Petitioner since July 3, 2012, in that Petitioner had cancelled his October 2012 appointment; therefore he was not recommending surgery, at that time however, if Petitioner's symptoms persisted, he thought surgery would be contemplated; and that if Petitioner continued to work, his compressive neuropathies would worsen over time. PX2.

At deposition, Dr. Garst indicated because of the ongoing nature of complaints, surgery may repair the various impingements but again he agreed that he did not have more than a very vague understanding of Petitioner's job duties, when he wrote the narrative report with his causation opinion. With more questioning on cross examination, Dr. Garst kept referring back to the duties as described during the hypothetical on direct examination as being a foundation for his opinion. However, Dr. Garst acknowledged he had not known of the specific job duties when he offered the opinion on causation, as memorialized in the November 5, 2012 narrative letter to Petitioner's counsel. Dr. Garst also stated that recent medical studies have not proven that carpal tunnel is caused by repeated hand movements while working. PX3.

After review of Petitioner's job description, in an IME report dated March 25, 2013 and addendum dated August 28 2013, Dr. Neal opined that Petitioner's work duties did not cause, contribute to or permanently aggravate Petitioner's conditions. Dr. Neal stated that Petitioner did not clinically express bilateral carpal tunnel regardless of EMG abnormalities. Dr. Neal also noted there was no bilateral finger triggering or complaints of same.

Dr. Neal further opined that if the petitioner had cubital or carpal tunnel syndrome, it was not related to his employment activities because Petitioner did not seek medical treatment or complain of any symptoms during employment with Respondent Peoria Roofing. RX2 & 3; PX2.

Petitioner testified to right, upper extremity pain, which worsened after January 31, 2011; and that he later developed left, upper extremity pain on or about December 12, 2011. However, Petitioner later testified all alleged symptoms occurred relatively at the same time, or within months of each other. Petitioner also provided a history at the IME, that all symptoms occurred at once, or within months, and Dr. Neal opined this suggested an intrinsic biological origin as opposed to an occupational relationship. RX2 & 3.

Dr. Neal noted Petitioner was working without restrictions and opined that he could continue to do so. He did not recommended surgery although he thought that conservative care, such as wrist splinting and elbow pads, may be beneficial. He reiterated that Petitioner's conditions were not related to work and further opined that Petitioner's consumption of one beer per day may have caused his cubital tunnel syndrome, as daily alcohol use contributes to cubital tunnel syndrome. PX2; Rx. 4.

CONCLUSIONS OF LAW

B. Was there an employee-employer relationship?

The Arbitrator concludes that the petitioner was an employer of Respondent. The Arbitrator relies on the testimonies of the petitioner and Mike Boyle; and the fact that the respondent agreed, on the Request for Hearing, that Petitioner and Respondent were operating under the Illinois Workers' Compensation Act and their relationship was one of employee and employer.

C. Did an accident occur that arose out of and in the course of the Petitioner's employment by the Respondent?

A claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. It is the function of the Commission to judge the credibility of the witnesses and resolve conflicts in medical evidence. *See, O'Dette v. Industrial Comm'n*, 79 Ill. 2d. 249, 253, 403 N.E.2d 221, 223 (1980). In deciding questions of fact, it is the function of the Commission to resolve conflicting medical evidence, judge the credibility of the witnesses and assign weight to the witnesses' testimony. *See, R & D Thiel*, 398 Ill. App.3d at 868; *See also, Hosteny v. Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009).

For an employee's workplace injury to be compensable to be compensable under the Workers' Compensation Act, he must establish the fact that the injury is due to a cause connected with the employment such that it arose out of said employment. *See, Hansel & Gretel Day Care Center v. Industrial Comm'n*, 215 Ill. App.3d. 284, 574 N.E.2d 1244 (1991). It is not enough that Petitioner is working when accident injuries are realized; Petitioner must show that the injury was due to some cause connected with employment. *See, Board of Trustees of the University of Illinois v. Industrial Comm'n*, 44 Ill.2d 207 at 214, 254 N.E.2d 522 (1969).

Based on the above, the Arbitrator concludes that an accident did occur that arose out of and in the course of the petitioner's employment with the respondent. The petitioner worked for the respondent from 2003 until 2011, in the capacity as a union sheet metal worker. During this time, he was required to do forceful and repetitive gripping and grasping. Petitioner testified that his arms and hands began to hurt a couple of years before he went to the doctor. The event that led him to go to the doctor was when he felt pain go all the way up his right arm into his shoulder. With this in mind, the Arbitrator concludes that an accident did arise out of and in the course of the petitioner's employment.

14IWCC1113

E. Was timely notice of the accident given to Respondent?

The petitioner testified that he gave his supervisor, Marty Craig, notice of these accidents. As Mr. Craig was not called as a witness to rebut Petitioner's testimony, the Arbitrator concludes that timely notice was given, pursuant to the Act.

F. Is Petitioner's current condition of ill-being causally related to the injury?

It is within the province of the Commission to determine the factual issues, to decide the weight to be given to the evidence and the reasonable inferences to be drawn there from; and to assess the credibility of witnesses. *See, Marathon Oil Co. v. Industrial Comm'n*, 203 Ill. App. 3d 809, 815-16 (1990). And it is the province of the Commission to decide questions of fact and causation; to judge the credibility of witnesses and to resolve conflicting medical evidence. *See, Steve Foley Cadillac v. Industrial Comm'n,* 283 Ill. App. 3d 607, 610 (1998).

It is established law that at hearing, it is the employee's burden to establish the elements of his claim by a preponderance of credible evidence. *See, Illinois Bell Tel. Co. v. Industrial Comm'n.,* 265 Ill. App. 3d 681; 638 N.E. 2d 307 (1st Dist. 1994). This includes the issue of whether Petitioner's current state of ill-being is causally related to the alleged work accident. *Id.* A claimant must prove causal connection by evidence from which inferences can be fairly and reasonably drawn. *See, Caterpillar Tractor Co. v. Industrial Comm'n.*, 83 Ill. 2d 213; 414 N.E. 2d 740 (1980). Also, causal connection can be inferred. Proof of an employee's state of good health prior to the time of injury and the change immediately following the injury is competent as tending to establish that the impaired condition was the cause by the injury.

The Arbitrator concludes that the petitioner present condition of ill-being is causally related to his work. The Arbitrator finds the opinions of Dr. Garst to be more persuasive than those of Dr. Neal.

G. What were Petitioner's earnings?

Petitioner testified, on an uncontested and unrebutted basis, that he had worked for Respondent from 2003, when he started as an apprentice, until 2011, when he was laid off. He stated that his rate of pay was $32.15 per hour. He also testified that his average weekly wage was $1,249.60. Petitioner called Mike Boyle, a manager for Respondent, to testify. Mr. Boyle testified that he was a roofer who became a manager and worked for Respondent. He was never a sheet metal worker. He read and agreed that the job duties that were provided in Respondent's Exhibit 1 corresponded with the Petitioner's testimony regarding his job duties. Mr. Boyle testified that he was never notified of the subject accidents, however, he did testify that Marty was Petitioner's supervisor; and that if there was an accident, that is something that Marty was supposed to tell him. In regards to the wage statement,

Mr. Boyle agreed that a person in Petitioner's position would make $32.15 per hour. Mr. Boyle bought a wage statement, which only consisted of Petitioner's last twelve (12) weeks of pay when he could have brought a wage statement showing the fifty-two (52) weeks of Petitioner's wages, prior to the accident date. The Arbitrator finds that Petitioner's testimony regarding his average weekly wage being $1,249.60, is credible.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Having found in favor of Petitioner concerning accident and causal connection, the Arbitrator now finds that the medical bills itemized in Petitioner's Exhibit 6, are reasonable and necessary; and represent office visits with Dr. Garst at Great Plains Orthopedics; and the EMG testing for Petitioner performed by Dr. Troung. The Arbitrator concludes that these bills were reasonable and necessary and Respondent shall pay to Petitioner the amount of these bills, pursuant to the medical fee schedule or the negotiated rate, whichever is less.

K. Is Petitioner entitled to any prospective medical care?

This Arbitrator finds Dr. Garst's opinions to be more persuasive than those of Dr. Neal; and that Dr. Garst's prospective medical treatment plan is reasonable and necessary. Therefore, the Arbitrator concludes that the petitioner is entitled to prospective medical care, as recommended by Dr. Garst; and any reasonable and necessary rehabilitative care, needed thereafter.

The petitioner has indicated, on the Request for Hearing, that TTD, TPD, maintenance; and the nature and extent of Petitioner's injuries is not at issue, therefore these issues will not be addressed.

14IWCC1113

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
12WC16990 & 13 WC 36532
SIGNATURE PAGE

Signature of Arbitrator

June 2, 2014
Date of Decision

JUN - 2 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PENNY LISOWSKI,

14IWCC1114

Petitioner,

vs.

NO: 11 WC 46150

HOME INSTEAD, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §8(a) and §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, and prospective medical treatment, 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 compensation of temporary total compensation or for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission concurs with the determinations of the Arbitrator regarding accident, causation, and the award of medical expenses both current and prospective. Accordingly, the Commission affirms and adopts those portions of the Decision of the Arbitrator. The Arbitrator also awarded Petitioner 107&2/7 weeks of temporary total disability benefits which spans the period from the day after the accident to the date of arbitration. The Commission modifies that aspect of the Decision of the Arbitrator.

Petitioner suffered an injury to her lumbar spine on November 26, 2011, while bathing an elderly client while working as a home caregiver. The next day she went to the emergency room at Silver Cross Hospital, which took her off work for two days. On December 8, 2011, Petitioner presented for treatment with Dr. Templin. He released her to work with restrictions of no lifting of over 10 pounds, no overhead activities, and twisting and bending only as tolerated. Basically, Dr. Templin continued those restrictions through August 10, 2012, which was the last time he saw her prior to arbitration. At that time they discussed the possibility of L5-S1 fusion surgery.

Petitioner then presented to Dr. Patel on January 8, 2013. He took her off work completely at that time. Petitioner continued to treat with Dr. Patel, who made no further reference to work restrictions in his treatment notes. Petitioner testified she did not fill out an accident report and did not testify that she ever presented her work restrictions, or returned to, Respondent since the accident. She also testified that she moved to Kentucky in July of 2013, where she works part-time helping an elderly woman deal with the personal effects of her deceased husband and does volunteer work at a local senior center. Petitioner also testified that she has not seen a doctor in Kentucky and that both Dr. Templin and Dr. Patel have indicated that she was capable of working restricted duty.

The Commission acknowledges that Petitioner's current work activities in Kentucky both for the individual woman and at the senior center is probably not as strenuous as her work as a home caregiver for Respondent. Nevertheless, Petitioner has acknowledged that both Dr. Templin and Dr. Patel have indicated she could return to restricted work. In addition, Petitioner did not establish that she presented any restrictions to Respondent or returned to Respondent to determine whether there was work within her restrictions available. She did testify that she did not fill out an accident report, which suggests that she did not return to Respondent at all. Therefore, Petitioner did not prove that Respondent was given the opportunity to accommodate Petitioner's restrictions, which was particularly true after Petitioner relocated to Kentucky. The Commission finds it appropriate to award Petitioner temporary total disability benefits from the date Dr. Patel first took her off work, January 8, 2013 to the time she relocated to Kentucky in July 2013 because Dr. Patel never specifically terminated his imposition of off-work status.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $220.00 per week for a period of 25 weeks, commencing January 8, 2013 through July 1, 2013, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of compensation of a further amount of temporary total compensation or for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $35.923.07 for medical expenses under §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for prospective medical treatment recommended by Dr. Templin.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 22 2014

Ruth W. White

Daniel R. Donohoo

Charles J. DeVriendt

RWW/dw
O-10/21/14
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC1114

LISOWSKI, PENNY
Employee/Petitioner

Case# **11WC046150**

HOME INSTEAD INC
Employer/Respondent

On 2/20/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

0924 BLOCK KLUKAS & MANZELLA PC
BRYAN L SHELL
19 W JEFFERSON ST SUITE 100
JOLIET, IL 60432

0532 HOLECEK & ASSOCIATES
KENNETH F SMITH
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

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)

14IWCC1114

PENNY LISOWSKI
Employee/Petitioner

v.

HOME INSTEAD, INC.
Employer/Respondent

Case # **11** WC **46150**

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 **Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **December 17, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

14IWCC1114

On the date of accident, **November 26, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$16,900.00**; the average weekly wage was **$325.00**.

On the date of accident, Petitioner was **48** 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 **$8,120.88** for TTD, **$0** for TPD, **$0** for maintenance, and **$0.00** for other benefits, for a total credit of **$8,120.88**.

Respondent is entitled to a credit of **$14,233.44** under Section 8(j) of the Act. Respondent shall hold Petitioner safe and harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $220.00/week for 107-2/7 weeks, commencing November 27, 2011 through December 17, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $35,923.07, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall further authorize the treatment recommendations prescribed by Dr. Templin.

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

12/19/14
Date

ICArbDec19(b)

FEB 20 2014

STATEMENT OF FACTS:

At the time of trial, Petitioner was 50 years old, and last employed by Respondent, Home Instead, Inc., as a care giver/home health care. Petitioner would work with one client per day providing home health care, which included shopping for the client, light cooking, light cleaning, assisting the clients with daily tasks as well as just being present for companionship.

Petitioner testified that over 5 years she worked in this capacity, until about one to two months prior to the alleged work injury. At that time, Petitioner was assigned to a client that was over ninety (90) years old, weighed approximately 200 pounds, and required more hands on care than her usual clients. Petitioner would care for this particular client 4 days per week, Mondays and Wednesdays for six hours per day and Saturdays and Sundays for back to back twelve (12) hour shifts. Petitioner testified that her duties changed with this client as she would have to lift the client while assisting her to get up, bathe the client, involving bending and lifting to assist the client in and out of the tub into a chair. At trial, there was some confusion as to the size of the bathtub and chair involved. The Arbitrator notes that it is a standard size bathtub with a shower chair that could accommodate the size of the client, as the testimony states the client was a shorter person who weighed in excess of 200 pounds. Petitioner provided that she would also have to assist the client change clothes, as well as apply ointment to her skin to keep it moist.

Petitioner testified that on November 26, 2011, she was bathing the client and in the process the client requested she wash ointment off the client's feet. To accomplish this task, Petitioner indicated she prepared several cloths, knelt on the floor and bent over the bathtub to wash the client's feet. Petitioner stated the client could not assist in this process as she could not hold her feet up. Petitioner provided that she had to bend over at the waist while kneeling to reach down to the client's feet. Petitioner testified that this was a lengthy process, at least eight to ten minutes of bending and washing, as she had to wash the ointment off with one cloth and then grab a fresh cloth to insure there was no ointment left on the client's skin.

Petitioner testified that after bending for a period of time, while washing the client's feet, she attempted to stand and in the process felt a sharp pain and heard an audible crunch in her back. She attempted to sit down immediately, but due to the client's walker covering the toilet in the bathroom she could only lean against the sink. Petitioner stated she told the client that she had hurt her back. Petitioner testified that after finishing the bath, she called her supervisor and informed her of the injury and asked to be replaced as she could not perform the duties required to care for the client. Petitioner was never replaced. Petitioner stated she finished her shift trying to do as much as possible to assist the client.

Petitioner testified that the next day she sought medical treatment at Silver Cross Hospital. On November 27, 2011, Petitioner was seen at Silver Cross Hospital with complaints of low back pain. Petitioner gave a history of taking care of a customer while lifting, bending over, and getting up when she felt the pain. X-rays were taken that revealed a degenerated lumbar spine. Petitioner was assessed with acute low back pain, referred to Dr. Cary Templin and given a work release form. (Pet. Ex. 2 at 5-12).

Petitioner began treatment at Hinsdale Orthopedics with Dr. Cary Templin, a board certified orthopedic spine surgeon, on December 8, 2011. Dr. Templin noted a history consistent with Petitioner's testimony and the history given to the Silver Cross Hospital physician's, in the Emergency Room where she was bending over washing the feet of a person she cares for, when she was coming back from a bent over position she experienced acute onset of lower back pain. Dr. Templin performed a physical examination, which revealed tenderness to palpation over the lumbar spine, some loss of normal range of motion and Waddell signs were

negative. Dr. Templin recommended that Petitioner should begin physical therapy and recommended work restrictions of no lifting greater than 10 pounds, with no overhead activities. (Pet. Ex. 2 at 3-4)

Petitioner began physical therapy with Total Rehabilitation on December 20, 2011 and attended until January 17, 2011. Throughout the treatment, including therapy and use of a TENS unit, she had minor improvements. Her pain ratings never dropped below 7/10. (Pet. Ex. 4) 14IWCC1114

Petitioner returned to Dr. Templin on January 18, 2012 and an MRI was ordered. (Pet. Ex. 3 at 5). The MRI, done at Chicago Ridge Radiology on January 23, 2012, revealed L4-5 changes. (*Id.* at 33). Dr. Templin reviewed the MRI on February 2, 2012 and diagnosed left-sided sacralization of L5, "what we are calling the L4-5 level." Additionally, there was a central annular tear causing some mild to moderate central canal stenosis. Dr. Templin recommended pain management, including facet blocks or epidural injections, as well as continuing her same work restrictions. (*Id.* at 6)

Petitioner saw Dr. Udit Patel of Health Benefits Pain Management Services on February 14, 2012, where she gave a consistent history of the work injury where she was bending washing the feet of her patient she cares for and had a sudden onset of back pain when attempting to get up from bent over position. Dr. Patel reviewed the MRI and his diagnosis was low back pain, lumbar osteoarthrosis and lumbar disc extrusion at L4-5. The doctor recommended a medial branch nerve block and noted that if there was no relief he would then try a bilateral transforaminal epidural steroid injection. (Pet. Ex. 5 at 4) A medial branch nerve block was done on February 21, 2012, which gave little relief. An epidural steroid injection was done on February 28, 2012, which provided significant relief (at least 70%) for a few days and the pain slowly returned. Another L5-epidural steroid injection was done on April 3, 2012. (Pet. Ex. 5 at 6-11)

Dr. Templin saw Petitioner on May 11, 2012. Petitioner reported that she received some benefit (50% better) from the recent injection. The doctor recommended another epidural injection and the commencement of physical therapy. Petitioner's work restrictions were continued at no lifting greater than ten (10) pounds and no bending, twisting, or overhead activity. (Pet. Ex. 3 at 10)

Petitioner underwent the additional epidural steroid injection by Dr. Patel on May 29, 2012. She then followed up with Dr. Templin on June 29, 2012. Dr. Templin recommended either continuation of physical therapy, work conditioning and going back to work versus a discogram to see if she was a surgical candidate. Her work restrictions were continued. (Pet. Ex. 3 at 13)

Petitioner had a discogram done on July 28, 2012 by Dr. Anis Alzoobi of Health Benefits Pain Management, which revealed L5-S1 significant concordant pain and grade III tear of the annulus fibers. (Pet. Ex. 3 at 24) Dr. Templin reviewed the discogram and CT scan results on August 10, 2012 and recommended a surgical fusion of L5-S1. Dr. Templin also continued Petitioner's work restrictions of no lifting greater than ten (10) pounds, no overhead lifting, bending and twisting to tolerance. (Pet. Ex. 3 at 15)

Petitioner continued to see Dr. Patel for pain management while awaiting approval of the L5-S1 fusion. Dr. Patel has prescribed Mobic, Zanaflex and Norco for her pain. Dr. Patel had given Petitioner light duty restrictions until January 8, 2013, when he took Petitioner off work. (Pet. Ex. 5 at 33-34)

Petitioner testified that she presently lives in Kentucky. Petitioner stated that in July 2013, she began working sporadically "with a lady." She provided that she works maybe 2 days a week for a few hours a day. The work involves light dusting and companionship. Petitioner also provided that she volunteers once a month at a Senior Citizen Center.

. . . Petitioner testified that because she has no insurance she has not treated since she saw Dr. Patel in January 2013. Petitioner continues to experience pain.

The deposition of Dr. Templin was taken on July 19, 2013. Dr. Templin testified that bending over for an extended period and coming up to a standing position is causally related to her work injury. Dr. Templin noted that Petitioner did not report a history of back problems. The doctor also stated that "most injuries don't occur with a trauma, they occur with, you know, just a small tweak to the back. Can be something as simple as lifting up, lifting 10, 20 pounds, twisting the wrong way, that sort of thing." When asked if this injury was a competent cause or could be a contributing factor to aggravate, accelerate or exacerbate her pre-existing condition, Dr. Templin answered in the affirmative. (Pet. Ex 14)

Respondent sent Petitioner for an examination pursuant to Section 12 of the Act with Dr. Daniel Troy who determined that Petitioner had advanced degenerative changes longstanding at the L4-5 level of her back. Dr. Troy explained that the "MRI demonstrated loss of normal disc height at the L4-L5 and L5-S1 levels, the L4-5 level demonstrated advanced degenerative changes with secondary Midoc endplate changes. Those are inflammatory changes." With respect to causal connection, Dr. Troy wrote in his report dated July 17, 2012, that causality was very weak. The doctor stated, "[t]he Claimant suffered no true injury at work. Her pain was only subjective in nature. Only her pain could have started either prior to work or after she returned back home that night while engaged in activities of daily living. Miss Lisowski has significant preexisting degenerative changes of the lumbosacral spine induced by her years of morbid obesity and tobacco use. Both factors are strong contributors to degenerative process in the lumbosacral spine." Dr. Troy added, "...[h]er significant preexisting degenerative process at the 4-5 level and from the standpoint of there was no fall or direct trauma, there is only the subjective statement of the patient saying that she bent forward for whatever questionable amount of time that was. I felt when you add up the factors, the factors of the morbid obesity and smoking were a much higher factor, and bending forward was a subjectively-based factor." Dr. Troy testified that although he felt her condition was not causally related to work, he agreed with the care recommended by Dr. Templin and felt it was reasonable and necessary. Dr. Troy also testified that it is possible that a degenerative condition, such as Petitioner's, can become symptomatic without any sort of traumatic event. (Resp. Ex1 and Dep Ex 1)

On cross-examination, Dr. Troy testified that his opinion regarding weak causality was "[s]ubjectively based. I mean she stated – I'm not going to call the woman a liar. She stated that she bent over. She hurt her back. That's where the factor comes from." The doctor also stated that he had no other history of injury, nor any other medical record that Petitioner had complained of pain for the five years she was employed working full duty with Respondent. (Resp. Ex. 1)

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 finds as follows:

The Arbitrator finds that the Petitioner sustained and accidental injury that arose out of and in the course of her employment with Respondent. The Arbitrator further finds she suffered an aggravation of her degenerative disc disease in her lumbar spine resulting from her work activities. Petitioner spent an extended period of time bending over while washing a clients feet which led to the need for medical treatment and prospective medical treatment possibly being an L5-S1 fusion.

When workers' physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *Sisbro v. Industrial Commission*, 207 Ill.2d 193, 797 N.E.2d 665, (2003).

According to *Caterpillar Tractor v. Industrial Commission*, 215 Ill. App. 3d 229, 574 N.E.2d 1198, 158 Ill. Dec. 805, (4th Dist. 1991), it is clear that the pleadings and the proceedings in Workers' Compensation cases are informal and are designed to expedite and to achieve a right result. Here the right result is clear. Petitioner had been an employee of Home Instead for over five years prior to the time of the injury. Petitioner testified that throughout these five years as an employee she had no complaints of back pain and never sought medical treatment for any back condition. Respondent provided no evidence or testimony of prior low back pain or medical treatment. It is undisputed that Petitioner was bending and washing her client's feet over an extended period of time and as she stood up felt extreme pain in her low back. In *Morgan v. Caterpillar, Inc.*, 06 ILWC 28175, the Commission affirmed and adopted the Arbitrator's finding that there is causal relationship where the Petitioner bent over to inspect an engine, stood up and her back started to hurt. In *Fessler v. Morris Hospital,* 04 ILWC 32381, Petitioner was bending over cleaning a glass window and as she stood up felt a sharp pain in the buttock shooting down her left leg. Petitioner needed to bend over at the waist to clean the other side of the wall. In *Interlake v. Industrial Commission,* 161 Ill.App. 3d 704, Petitioner was bending over to pick up a screw driver and the First District Appellate Court found that bending over was an injury that arose out of and in the course of employment, as well as citing several cases on point, in particular *Memorial Medical Center v. Industrial Commission,* 72 Ill.2d 275, where the Supreme Court of Illinois found that the act of bending over forward and the medical testimony that the act of bending forward, contributed to the employee's injury. In *Cottrell v. Heritage Manor,* 11 ILWC 28065, the Commission affirmed and adopted the Arbitrator's finding that Petitioner's injury was causally connected where she was bending over and rolling a patient who resisted.

All of the cases are similar to the case at bar where Petitioner is bending over to wash the feet of her client. An injury arises out of employment when a causal connection exists between the employment and the injury such that the injury has its origins in some risk incidental to the employment. The risk incidental to the employment in the case at bar is bending over to wash the feet of her client. Petitioner was clearly in the course of her employment and this risk was definitely incidental to her employment.

Throughout all of her treatment, Petitioner gave consistent histories to her doctor's including, Silver Cross Hospital, Dr. Cary Templin, Dr. Patel and Respondent's Section 12 examiner Dr. Troy. Petitioner had never had back pain until November 26, 2011 and after the work injury has had a consistent history of medical treatment documenting a lumbar spinal injury. No doctor found Petitioner to be malingering. Dr. Templin, Petitioner's treating physician used Waddell's testing and they were found to be negative. (Pet. Ex. 2 at 3).

The Arbitrator does not find the Section 12 report, or the testimony of Dr. Daniel Troy as it relates to causal connection persuasive. Dr. Troy's opinion on causality was that there is a causal connection, however it was weak considering the degenerative process in her spine and the speculation that her pain could have started prior to work or later the evening of the accident. Dr. Troy also states that it could be due to years of morbid obesity and tobacco use. Dr. Troy ignores the consistent medical histories Petitioner had given to her doctor's since November 27, 2011. Furthermore, the only evidence submitted was that Petitioner felt back pain after standing from a bent position where she was washing her client's feet. The Arbitrator notes that Respondent did not dispute notice given to the supervisor. Petitioner testified that she called her supervisor around 3 p.m. to be replaced as she had a work injury. The only known injury in this case is the November 26, 2011 injury. The Arbitrator finds that Petitioner was a credible witness.

The Arbitrator adopts the opinions and conclusions of Dr. Templin that bending for an extended period of time and coming to a standing position is a competent cause to aggravate, accelerate, or exacerbate a pre-existing condition. Dr. Templin testified that the injury could occur with a small tweak to the back. It can be something as simple as lifting up, lifting 10, 20 pounds, twisting the wrong way, that sort of thing. The Arbitrator also adopts the opinion of Dr. Troy that there is causal relationship based on her medical history. Petitioner's complaints to doctors were consistent throughout her treatment.

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" Is Petitioner entitled to any prospective medical care, the Arbitrator finds as follows:

Petitioner's medical bills were admitted as Petitioner's Exhibits 6-13 in the sum of $35,923.07. Respondent objected as to liability for the bills. After review of the medical records, the Arbitrator finds that Petitioner's treatment was usual and customary medical care, which was reasonable and necessary. Dr. Troy did not quarrel with the treatment provided or recommended. After finding the injury causally connected with the November 26, 2011 injury, the prospective surgery recommended by Dr. Cary Templin is reasonable and necessary and related to the November 26, 2011 work accident. Respondent is entitled to a credit of $14,233.44.

In Support of the Arbitrator's Decision regarding "L" What temporary benefits (TTD) are due, the Arbitrator finds as follows:

Petitioner has missed time from the work related injury starting November 27, 2011 and continuing to the date of the trial on December 17, 2013, or 102-2/7 weeks. Based upon the Arbitrator's findings as it relates to Causal Connection, Respondent is liable for payment of TTD benefits to Petitioner in accordance with the Act. Respondent is entitled to a credit for TTD paid in the amount of $8,120.88 representing 36-6/7 weeks (December 08, 2011 through August 03, 2012).

In Support of the Arbitrator's Decision regarding "M" Should penalties be imposed upon Respondent, the Arbitrator finds as follows:

The Arbitrator finds that legitimate disputes exist in this matter. As such, penalties are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jay T. Cooper,

14IWCC1115

Petitioner,

vs.

NO: 11WC 13764

AMP Rite,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent, herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 6, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

14IWCC1115

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $38,127.00. 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: DEC 22 2014
MJB/bm
o-12/16/14
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

COOPER, JAY
Employee/Petitioner

Case# **11WC013764**

14IWCC1115

AMP-RITE ELECTRIC
Employer/Respondent

On 9/6/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0293 KATZ FRIEDMAN EAGLE ET AL
CHRISTOPHER MOSE
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
DANIEL J UGASTE
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JAY COOPER
Employee/Petitioner

v.

AMP-RITE ELECTRIC
Employer/Respondent

Case # 11 WC 13764

Consolidated cases: _____

14IWCC1115

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Wheaton**, on **July 12, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **February 4, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$44,507.00**; the average weekly wage was **$1,271.62**.

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 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 **$6,621.20** under Section 8(j) of the Act.

ORDER

- Respondent shall pay the petitioner temporary total disability benefits of $847.74/week for 11-1/7 weeks, from 3/28/11 through 6/13/11 , which is the period of temporary total disability for which compensation is payable.
- Respondent shall pay the petitioner the sum of $664.72/week for a further period of 43 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused 20% loss of use of the left leg.
- Respondent shall pay the petitioner compensation that has accrued from February 4, 2010 and shall pay the remainder of the award, if any, in weekly payments.
- Respondent shall pay to Petitioner the reasonable and necessary medical expenses incurred in the care and treatment of the causally related injury pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid and shall hold Petitioner harmless for payments made 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.

Carolyn Doherty
Signature of Arbitrator

9/6/13
Date

SEP 6 - 2013

FINDINGS OF FACT

At trial, the parties stipulated that Petitioner sustained a work-related accident while at work for Respondent on 2/4/10. Petitioner testified that he worked as a journeyman electrician for Respondent Amp-Rite on 2/4/10 and that he was working on a job at Walmart. He has been a journeyman electrician for 18 years. Petitioner testified that on 2/4/10, he was walking on stairs at work when the stairs collapsed. Petitioner testified that he bumped his left knee on the third stair of 6 stairs on the trailer steps. He also testified that he struck his knee on the stair railing. Petitioner was shown photos of stairs but denied the photo depicted the set of stairs he fell on. The parties stipulated to timely notice of the accident. ARB EX 1.

Petitioner continued working at the job for Respondent while seeking treatment for his left knee from Dr. Semba. On 2/16/10, Dr. Semba noted Petitioner "... was carrying fixtures and his knee gave way. He twisted his knee and felt a pop in the knee and he had pain ... in the medial joint..." PX 3. A medial meniscal tear was suspected and an MRI was ordered. The MRI of 2/24/10 showed tricompartmental osteoarthritis, predominantly affecting the patellofemoral compartment where there is Grade IV chondromalacia. The MRI also showed mild linear intrasubstance degenerative signal within the anterior body of the medical meniscus without definite evidence of a tear. Petitioner was sent for injections and physical therapy.

On 4/22/10, Dr. Semba noted the continued anterior knee pain with activities and increased pain carrying heavy loads and climbing stairs. Dr. Semba noted that x-rays showed traumatic lateral patellar tilt with the formation of degenerative joint disease in the lateral facet. Dr. Semba recommended a lateral retinacular release due to the failure of conservative care. Petitioner advised he would think about having surgery given that he was currently "on an important job" and that he could possibly have the surgery at the end of summer 2010. Petitioner testified that in April 2010 he was able to continue working at the job for Respondent as he worked on the flat surface of a scissor lift and was not required to climb stairs other than 3 to 4 steps up on the scissor lift.

On 8/4/10, Dr. Semba drafted correspondence wherein he noted that Petitioner would need the recommended surgical repair of the left knee patella "at some time in the near future." He further opined that Petitioner's condition was the result of his work as an electrician which required him to climb, lift and carry heavy equipment.

Petitioner testified that he continued to work. Petitioner started another job for Respondent in November 2010 at a Costco location and continued working for Respondent because the job did not require extensive climbing. Petitioner testified that at first his left leg felt "good" while he worked but the pain worsened over time as Petitioner worked on the knee. Petitioner testified that his left knee would swell and that he experienced pain on the front of his left knee when he walked.

Petitioner attended a Section 12 exam with Dr. Monaco on 10/14/10. Dr. Monaco noted the significant preexisting condition of patellafemoral chondromalacia of Petitioner's left knee. Dr. Monaco determined that based on the mechanism of injury on 2/4/10 and Petitioner's lack of left knee symptoms prior to the accident date, Petitioner's trauma aggravated the preexisting left knee chrondromalacia and accelerated

the condition "beyond its normal progression." RX 1. At that time, he opined that Petitioner had not reached MMI from the injury that occurred on 2/4/10. Dr. Monaco further noted that Petitioner had not responded favorably to the cortisone injections or physical therapy he had received to date. However, he further opined that the surgery Petitioner discussed with Dr. Semba was not indicated at that time because the "direct blow to the kneecap sustained by Mr. Cooper at the time of the injury on February 4, 2010 aggravated the degenerative changes in the patellofemoral joint of his left knee and did not cause an acute traumatic subluxation or dislocation of the patella." The evidence of mild lateral subluxation of the left knee patella seen on X-ray was not, in Dr. Monaco's opinion, from "any acute injury to the medial retinaculum of the patellofemoral joint that would benefit" from surgery. He believes the subluxation is attributed to the degenerative process and "not an acute traumatic process." RX 1. Dr. Monaco recommended viscosupplementation.

Petitioner testified that the Costco job only lasted a few weeks and that he did not work for any other employers between November 2010 and March 2011 when he saw Dr. Farrell. Petitioner did attend physical therapy in the time between treating with Dr. Semba and Dr. Farrell. Petitioner testified that he was able to hunt deer both on the ground and in a blind in December 2010 but denies fishing during that period. Petitioner testified that he only walked 50 to 100 yards while deer hunting and that he transported the deer via 4 wheeler.

In March 2011, Petitioner saw Dr. Farrell who was at the same clinic as Dr. Semba. Petitioner saw Dr. Farrell's physician assistant on 3/15/11 who noted that Petitioner was being "... seen for a follow up visit status post a work related injury back in February of 2010. ... He is here today wishing to discuss the procedure, as well as scheduling this procedure with Dr. Farrell. Presently he states that his knee pain has been getting worse since December and most recently, last Friday approximately 4 days ago, he heard and felt a loud popping sensation in his left knee to the point where he was not able to bear weight on his left knee for a short period of time and has noted a bit of swelling around his knee, as well as in the posterior portion of his knee." PX 3. Petitioner testified that when he felt the knee pop in March 2011 he was simply walking to his car. He was not carrying anything and did not slip on any surface. Rather, he described a gradual worsening and ultimate collapse of his knee. X-rays obtained on 3/15/11 showed patellofemoral joint space narrowing and lateral patellar tilt. PX 3.

Petitioner underwent arthroscopy of the left knee with debridement of medial and patellofemoral compartment chondromalacia on 3/28/11. PX 5. Petitioner was kept off work and sent to physical therapy. PX 8. As of 6/28/11, Dr. Farrell noted some continued left knee discomfort but that Petitioner was back working full and regular duty as an electrician. Petitioner was released PRN on 6/28/11. PX 3.

Petitioner testified that after the surgery he "felt better." His knee condition has improved with surgery but Petitioner testified that he still has pain and instability in his left knee. He feels that the knee will "give out." Petitioner currently takes vicodin once per day for knee pain. Petitioner testified that he can still use a ladder on commercial jobs but it is not often required. Rather, the jobs involve kneeling and crawling which Petitioner performs.

Dr. Monaco issued an addendum report on 7/5/12 after reviewing the operative report, the records of Drs. Semba and Farrell, and the physical therapy records. RX 2. Dr. Monaco opined that the surgery was not necessary to "relieve Mr. Cooper of the temporary exacerbation of his preexisting condition of chondromalacia. He cited medical studies and reports to support his conclusion. He further opined that

G. What were Petitioner's earnings? AWW

On the issue of average weekly wage, Petitioner testified that in July 2009 he finished a job for Respondent and was asked to "sit" until another job started with Respondent so that Respondent could maintain the same work crew. Petitioner agreed to sit and did not work or earn income for 17 weeks until he returned to work for Respondent in October 2009. PX 1 is Petitioner's wage statement for the 52 weeks prior to his February 2010 accident. According to the statement, Petitioner worked 35 weeks during that 52 week period between February 9, 2009 and January 22, 2010, taking into account the 17 weeks he did not work during that 52 week period. During the 35 weeks worked, Petitioner earned straight wages of $44,507. When divided by 35 weeks worked the AWW is $1,271.62 and is subject to the max PPD rate of $664.72.

In so calculating the AWW in this matter, the Arbitrator looked to PX 1 and notes that Petitioner was employed by Respondent for the 52 weeks prior to this accident but worked during 35 of those weeks. Based on PX 1, the Arbitrator does not view Petitioner as having been employed by Respondent for a period less than 52 weeks and does not find that Petitioner's employment with Respondent "began" during the 52 week period.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Respondent's objection on the issue of medical expenses was based on liability. Based on the Arbitrator's findings on the issue of causal connection, the Arbitrator further finds that Respondent is to pay Petitioner the reasonable and necessary medical expenses incurred in the care and treatment of his causally related injury pursuant to Section 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid and shall hold Petitioner harmless for payments made by the group health carrier or other payments for which Section 8(j) credit is allowed. ARB EX 1.

K. What temporary benefits are in dispute? TTD

Respondent's dispute on the issue of TTD is again based on liability. Based on the Arbitrator's findings on the issue of causal connection, the Arbitrator finds that Petitioner was temporarily totally disabled for a period of 11-1/7 weeks commencing 3/28/11 through 6/13/11 pursuant to Section 8(b) of the Act. ARB EX 1. Respondent shall receive credit for amounts paid, if any.

L. What is the nature and extent of the injury?

Petitioner sustained a trauma which aggravated a previously asymptomatic condition of chondromalacia in his left knee. As a result he underwent surgery to debride the chondromalacia, but still experiences pain in his knee with activity or being on it for long periods of time.

Accordingly, the Arbitrator finds that Petitioner has sustained a loss of 20% of his left leg, pursuant to Section 8(e) of the Act. Respondent shall pay to the Petitioner the sum of $664.72 (the maximum rate for a date of injury of 2/04/10) for a period of 43 weeks.

the condition of ill-being for which Petitioner underwent surgery was not casually connected to any work accident or to his work as an electrician. This opinion appears based on Petitioner's ability to work between April 2010 and November 2010, a report of "worsening" pain since December 2010 after he was off work and the acute onset of pain in March 2011 unrelated to work activities. RX 2.

Dr. Farrell issued a narrative report as Petitioner's treating physician dated 10/29/12. In it, he indicated that Petitioner came under his care in March 2011 after conservative care failed to relieve persistent symptoms. Dr. Farrell stated that he "merely debrided what was aggravated with said injury in 2010. It is not unusual for exacerbation of symptom with any degree of contusion such as this individual sustained." He further states that Petitioner "sustained an injury to his left knee on 2/4/10 which is causally related to aggravation of a preexisting condition" and that it is more likely than not that surgery be necessary anyway based on persistence of symptoms from the 2010 episode." PX 6.

On the issue of average weekly wage, Petitioner testified that in July 2009 he finished a job for Respondent and was asked to "sit" until another job started with Respondent so that Respondent could maintain the same work crew. Petitioner agreed to sit and did not work or earn income for 17 weeks until he returned to work for Respondent in October 2009. PX 1 is Petitioner's wage statement for the 52 weeks prior to his February 2010 accident. According to the statement, Petitioner worked 35 weeks during that 52 week period between February 9, 2009 and January 22, 2010. During the 35 weeks worked, Petitioner earned straight wages of $44,507. When divided by 35 weeks worked the AWW is $1,271.62 and is subject to the max PPD rate of $664.72.

CONCLUSIONS OF LAW

F. Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator notes that Petitioner credible testimony that he did not have any problems with his left knee before his injury and that he had pain in the front of his left knee immediately after. This testimony is supported by the medical records. The Arbitrator further notes that Petitioner consistently treated for the left knee symptoms from the time of the accident through his release after surgery.

Petitioner continued to work on flat surfaces after the accident. Petitioner credibly testified that his knee pain worsened in December 2010 on a gradual basis and that by March 2011 he could no longer tolerate the increased pain. The Arbitrator finds no evidence in the record of an intervening accident or superseding cause sufficient to prevent a finding of causal connection between Petitioners's left knee condition and the accident of February 2010. In addition, the Arbitrator places greater weight on the records and opinion of Dr. Farrell than on the opinion of the examining physician Dr. Monaco. Based on the lack of prior symptoms, development of symptoms immediately after this accident, the continued treatment thereafter, and the opinion of Dr. Farrell, the Arbitrator finds that Petitioner's left knee condition is causally related to the work accident of 2/4/10. The work accident of 2/4/10 sufficiently aggravated the pre-existing chondromalacia such that symptoms developed requiring surgical repair.

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

Jose Elizondo,

Petitioner,

vs.

NO: 13WC 26610

ADT Home Security,

14IWCC1116

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent, herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 24, 2014, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

14IWCC1116

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $3,377.00. 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: DEC 22 2014
MJB/bm
o-12/16/14
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

ELIZONDO, JOSE
Employee/Petitioner

Case# **13WC026610**

ADT HOME SECURITY
Employer/Respondent

14IWCC1116

On 3/24/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0320 LANNON LANNON & BARR LTD
MICHAEL S ROLENC
180 N LASALLE ST SUITE 3050
CHICAGO, IL 60601

0075 POWER & CRONIN LTD
KIRK R CHRZANOWSKI
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JOSE ELIZONDO
Employee/Petitioner

v.

ADT HOME SECURITY
Employer/Respondent

Case # 13 WC 26610

Consolidated cases: D/N/A

14IWCC1116

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 Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **February 20, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **March 29, 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 left knee condition of ill-being *is* causally related to the accident. The Arbitrator makes no causation findings relative to the claimed right knee condition. At the hearing, the parties agreed Respondent preserved all defenses relative to that claimed condition.

In the year preceding the injury, Petitioner earned **$44,844.80**; the average weekly wage was **$862.40**.

On the date of accident, Petitioner was **39** years of age, ***married*** 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 **$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

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $574.93/week for 5/7 week, commencing November 15, 2012 through November 19, 2012, as provided in Section 8(b) of the Act. The Arbitrator declines to award benefits from November 12, 2012 (the date of the left knee arthroscopy) through November 14, 2012, as requested by Petitioner, because Petitioner lost fewer than fourteen days of work altogether.

Respondent shall authorize and pay for prospective care in the form of a return visit to Dr. Durodogan plus left total knee replacement surgery, assuming the doctor again recommends that surgery, as he did in November 2013. If the doctor instead recommends a series of left knee gel injections, as he did in December 2013, the Arbitrator awards that 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.

Molly C Mosa
Signature of Arbitrator

3/23/14
Date

MAR 24 2014

Jose Elizondo v. ADT Home Security
13 WC 26610

14IWCC1116

Prefatory Note

The parties agree that Petitioner injured his left leg while working for Respondent on March 29, 2012. They also agree that Petitioner provided Respondent with timely notice of this injury. Arb Exh 1. With respect to the left leg, the disputed issues include causal connection, temporary total disability and prospective care, with Petitioner seeking an award of a left total knee replacement.

Petitioner's original Application alleged only a left leg injury. The Amended Application, filed on September 27, 2013, alleged injuries to both legs. RX 3. T. 29-32. The right leg injury is completely disputed but, as of the February 20, 2014 hearing, Petitioner was not seeking any benefits relative to the right leg. The parties agree that Respondent has preserved any defenses it has to the right leg injury, in the event of another hearing.

Arbitrator's Findings of Fact

Petitioner testified he has worked for Respondent for about thirteen years. T. 12. As of 2012, he was an install technician. He installed security systems in residences. This required him to run wires in attics and crawl spaces.

Petitioner acknowledged undergoing bilateral knee treatment before his March 29, 2012 accident. He also acknowledged being diagnosed with bilateral knee osteoarthritis before this accident. T. 40. He injured his right knee in 2004 or 2005, while working for Brinks Home Security, and underwent a right knee arthroscopy thereafter. He subsequently entered into a settlement with Brinks. He did not recall filing a claim at the Commission prior to the settlement but the print-out in RX 6 shows that he did. T. 23-24, 35. RX 6. In 2010 and 2011, he underwent bilateral knee injections with Dr. Durodogan. T. 24. The last time he saw Dr. Durodogan before the March 29, 2012 accident was on May 20, 2011. On that date, Dr. Durodogan injected both of his knees. T. 24-25. Petitioner testified he did not experience left knee pain or seek additional left knee treatment between May 20, 2011 and March 29, 2012. T. 25. He was able to perform his regular duties for Respondent during that time. T. 25.

Records in PX 1 reflect that Petitioner saw Dr. Durodogan for right knee pain on June 18, 2009, with the doctor noting a history of a previous work injury and right knee arthroscopy in 2005. The doctor obtained bilateral knee X-rays that day, with the films showing "Grade 3 osteoarthritis bilateral knees genu valgus orientation, left less symptomatic than right." Dr. Durodogan recommended a right knee MRI and brace usage that day. Dr. Durodogan again recommended a right knee MRI on July 31, 2009. On August 14, 2009, Dr. Durodogan informed Petitioner the intervening MRI showed a right lateral meniscus tear. He discussed various treatment options with Petitioner, with Petitioner indicating he could not entertain surgery at that time. On October 22, 2009, Petitioner again complained of right knee pain. Dr. Durodogan

injected the right knee with cortisone. On January 22, 2010, Petitioner complained to the doctor of bilateral knee pain and indicated he was wearing sleeves on both knees. The doctor noted abnormalities on examination of both knees. He injected the right knee with cortisone and recommended Petitioner wear a sleeve on his right knee. On April 13, 2010, Petitioner complained of left knee pain, rated 5/10, and right knee pain, rated 7/10. Dr. Durodogan injected cortisone into both knees and directed Petitioner to return to him as needed. On July 16, 2010, Petitioner complained of 5/10 pain in both knees. Dr. Durodogan injected cortisone into both knees. On December 16, 2010, Dr. Durodogan noted complaints of moderate to severe pain in both knees. He also noted limping and bilateral knee weakness. He injected cortisone into both knees. On May 20, 2011, Petitioner complained of 5/10 left knee pain and 8/10 right knee pain. Dr. Durodogan noted localized swelling, patellar crepitus, medial tenderness and no instability on bilateral knee examination. He injected both knees with cortisone and indicated he discussed "orthopedic options" with Petitioner. PX 1.

Petitioner testified that, on March 29, 2012, he was descending stairs in a basement at a jobsite. The stairs turned and became more narrow at the bottom. T. 13. At one point, he stopped to warn his co-worker about a low ceiling. He then turned and stepped down, only to have his right foot slip off of a narrow step. His right leg and foot "skipped down three steps" to the basement floor but his left foot remained planted on the step, which was carpeted. He had to twist his left leg in order to disengage his left foot from the step. He began experiencing left knee pain immediately after this incident but managed to finish his workday. T. 13-14.

Early the next morning, Petitioner went to Respondent's office and completed accident-related paperwork, at his manager's direction. He then went to the Emergency Room at Elmhurst Memorial Hospital. He testified his manager sent him to this hospital. T. 13-14.

The history set forth in the Emergency Room records is fully consistent with Petitioner's account of the accident. The history states that Petitioner was descending carpeted stairs the previous afternoon when he lost his balance, with his right leg going down several steps and his left foot remaining planted. Petitioner denied any direct impact to his left knee. The Emergency Room records also reflect that Petitioner complained of left knee pain and denied any prior left knee injuries. At the hearing, Petitioner acknowledged he did not complain of right knee pain at the Emergency Room. T. 38.

On left knee examination, the Emergency Room physician, Dr. Jacobs, noted an effusion, tenderness over the anterolateral knee and limited flexion. He ordered left knee X-rays, which showed a "probable non-displaced fracture of the patella." Dr. Jacobs questioned this diagnosis, based on the mechanism of injury Petitioner described. He suspected internal derangement. He provided Petitioner with a knee immobilizer. He prescribed Hydrocodone for pain and instructed Petitioner to apply ice, keep his leg elevated and follow up with an orthopedic surgeon. PX 1.

Petitioner testified that, on April 2, 2012, he saw Dr. Crawford of Mid-American Orthopedics, at the Emergency Room's referral. T. 15.

Dr. Crawford's history of the work accident is fully consistent with Petitioner's testimony. Dr. Crawford noted that Petitioner complained of left knee pain and swelling. [At the hearing, Petitioner acknowledged he did not complain of right knee pain to Dr. Crawford. T. 38-39.] Petitioner reported that he was taking the prescribed Hydrocodone and using the brace he obtained at the Emergency Room.

Dr. Crawford noted a past history of right knee surgery.

On left knee examination, Dr. Crawford noted ecchymoses and edema along the lateral superior border and tenderness to palpation along the lateral border of the patella and quadriceps insertional site.

Dr. Crawford obtained new left knee X-rays. She interpreted the films as showing a "1 millimeter displacement of the patella fracture along the inferolateral pole of the patella." Based on her examination findings, she prescribed a left knee MRI. She also prescribed Lidoderm patches. She released Petitioner to sedentary office duty and instructed him to wear the brace at all times. PX 2.

Petitioner testified Respondent accommodated Dr. Crawford's restrictions as well as subsequent physicians' restrictions. T. 16. [Petitioner seeks temporary total disability benefits only for a brief post-operative period in November 2012. Arb Exh 1.]

Petitioner testified that, in early April 2012, he told Respondent he injured his right as well as his left knee. T. 36-37. He informed Respondent of this after learning that workers' compensation was only willing to cover his left knee. T. 36.

Petitioner testified he sought care at Southwest Orthopedics on April 9, 2012. He went to this facility because he had seen Dr. Durodogan there in the past. Dr. Durodogan was not available on April 9th so he saw the doctor's associate, Dr. Chandler, instead. T. 17.

Dr. Chandler's note of April 9, 2012 sets forth a consistent history of the March 29, 2012 work accident. The doctor noted that Petitioner complained of left knee pain that worsened with activity, stair usage and weather changes.

On left knee examination, Dr. Chandler noted an effusion, a positive fluctuation test, tenderness to palpation on the lateral aspect and patellofemoral region, decreased active flexion and a positive Apley's compression test.

Dr. Chandler reviewed the X-rays taken at the Emergency Room. He assessed Petitioner as having a left knee sprain, internal derangement of the left medial meniscus, a left knee contusion and a closed stellate fracture of the left patella, without displacement. He recommended a left knee MRI and a hinged left knee brace. He released Petitioner to restricted duty. PX 2.

The left knee MRI, performed without contrast on April 13, 2012, was "mildly limited due to motion artifact." The radiologist interpreted it as showing severe degenerative joint disease, a moderate size effusion, small loose joint bodies, a degenerative tear of the lateral meniscus, a Grade 1 sprain of the medial collateral ligament, and a relatively small medial meniscus body "which may be secondary to prior tear, surgery or normal variation for the patient." PX 3.

On April 20, 2012, Petitioner saw Dr. Durodogan. The doctor noted complaints relative to both knees. He also noted that Petitioner was limping and using a cane. After examining both knees and reviewing the MRI, he diagnosed a right knee contusion, osteoarthritis, a left knee sprain, a left knee contusion, a fracture of a spur off the lateral aspect of the left patella and internal derangement of the left medial meniscus.

Dr. Durodogan injected both knees with Celestone and Lidocaine. He prescribed a left knee brace and released Petitioner to restricted duty. PX 3.

At Dr. Durodogan's direction, Petitioner began a course of physical therapy on May 3, 2012.

On May 15, 2012, Petitioner returned to Dr. Durodogan and reported some left knee improvement secondary to the therapy. He was still utilizing the brace.

Dr. Durodogan obtained bilateral knee X-rays. He interpreted the films as showing moderate to severe degenerative joint disease in both knees with an associated osteophyte fracture of the left patella. He recommended bilateral knee braces and instructed Petitioner to continue physical therapy. PX 3.

At the next three visits, on July 17, July 25 and August 3, 2012, Dr. Durodogan administered Euflexxa injections into both knees. PX 3.

On August 23, 2012, Petitioner returned to Dr. Durodogan and complained of increased left knee pain secondary to a re-injury at work three days earlier. The doctor obtained new bilateral knee X-rays. He interpreted the films as showing "more significant degenerative changes relative to the left knee versus the right." He also noted that the previous left patellar fracture demonstrated increased callus and that the "diffuse osteophyte about the left knee continues to be problematic." He injected the left knee and continued the previous work restrictions.

Petitioner returned to Dr. Durodogan on September 14, 2012 and again complained of left knee pain. The doctor noted pain with range of motion testing. He also noted positive Apley's and McMurray testing. He discussed surgical options with Petitioner and recommended weight loss.

At Respondent's request, Petitioner saw Dr. Neal for a Section 12 examination on September 17, 2012. Dr. Neal's letterhead describes him as board certified in orthopedic surgery and fellowship-trained in hand surgery.

In his report of September 17, 2012, Dr. Neal indicated he reviewed the Emergency Room records, Dr. Crawford's note, Dr. Chandler's note, the left knee MRI report, various physical therapy notes and Dr. Durodogan's records. He did not indicate he reviewed the MRI film.

Dr. Neal's history of the March 29, 2012 work accident is consistent with Petitioner's testimony to the extent he indicated Petitioner's right leg went down, with his right foot landing on the floor, while his left foot stayed on a higher step. He indicated that Petitioner "describes a process where he simply fully flexed or hyperflexed his left knee as his right foot went forward missing several stairs and he landed, with his right foot, on the floor."

Dr. Neal also noted that Petitioner reported re-injuring his left knee at work "about three weeks ago," while moving items in his truck. He noted that Petitioner indicated his left knee began "locking" following this re-injury.

Dr. Neal indicated that Dr. Durodogan discussed several left knee surgical options with Petitioner on September 14, 2012, with the doctor recommending a partial knee replacement, according to Petitioner. He further indicated that Petitioner initially described his left knee as "fine" prior to March 29, 2012 but then admitted to undergoing three or four left knee cortisone injections before that date. Dr. Neal noted a history of a prior right knee work injury which required arthroscopy about five years earlier.

Dr. Neal described Petitioner as reporting a height of 5 feet, 9 inches and a weight of 288 pounds. Dr. Neal calculated a BMI of 42.5, which constituted obesity. He noted that Petitioner was wearing a hinged brace on his left knee and a sleeve without a patellar cut-out on his right knee.

Dr. Neal described Petitioner's gait as reciprocal. He noted no limp. He noted "excessive bilateral knee valgus alignment," worse on the right.

On knee examination, Dr. Neal noted incomplete extension, flexion to 125-130 degrees, an apparent patellar tilt, patellofemoral crepitus with patellofemoral manipulation, tenderness to palpation at both the medial and lateral joint lines, no collateral instability and a little more anterior translation of the anterior cruciate ligament than expected.

Dr. Neal diagnosed bilateral knee genus valgus and osteoarthritis. He attributed the osteoarthritis to the valgus deformity.

With respect to the left knee, Dr. Neal opined that the March 29, 2012 work accident caused a patellar spur fracture, rather than a patellar fracture. He further opined that this spur

fracture caused pain for a period of time, with Petitioner reporting 75% improvement before the recent re-injury.

Dr. Neal opined that the work accident did not alter Petitioner's pre-existing left knee osteoarthritis but might have temporarily exacerbated Petitioner's pre-existing right knee osteoarthritis.

Dr. Neal found Petitioner to be at maximum medical improvement with respect to the right knee. With respect to the left knee, Dr. Neal indicated Petitioner would probably require replacement surgery at some point in the future. He did not view the need for this surgery as related to the work accident. He also indicated that a left knee arthroscopy might afford some relief of Petitioner's symptoms. He found Petitioner capable of resuming full duty.

On October 16, 2012, Dr. Durodogan re-examined Petitioner and noted the recent Section 12 examination. He recommended a left knee arthroscopy to address Petitioner's "mechanical problems" but noted this might not relieve Petitioner's "concurrent arthritic problems."

On November 12, 2012, Dr. Durodogan performed a left knee arthroscopy at Little Company of Mary Hospital. In his operative report, he noted that Petitioner had osteoarthritis before his work injury but the injury made this condition worse. He documented a small medial meniscus tear and a "very large complex tear of the anterior horn of the lateral meniscus, with complete detachment anteriorly, extending around from the anterior 6 o'clock position to the posterior 2 o'clock position." He described the anterior and posterior cruciate ligaments as intact. He repaired the meniscal tears and performed an abrasion chondroplasty of all three compartments. At discharge, he instructed Petitioner to keep his left leg elevated. He indicated Petitioner could resume desk duty on November 20, 2012.

Petitioner testified that Respondent authorized the November 12, 2012 left knee surgery. He took eight days off work following this surgery. He used his available sick and vacation days during this period. He returned to work on November 20, 2012. T. 27.

Petitioner testified that the surgery relieved the popping and locking in his left knee but he still found it difficult to bend the knee or put pressure on it. The knee remained painful. He utilized a knee sleeve and continued seeing Dr. Durodogan.

On April 18, 2013, Dr. Durodogan noted that Petitioner was wearing a left knee sleeve and complained of being unable to kneel or crawl. Dr. Durodogan injected cortisone into Petitioner's left knee. He continued the light duty restrictions.

Dr. Durodogan administered additional left knee cortisone injections on May 16, 2013 and June 27, 2013. On July 11, 2013, he noted a complaint of "terrible" left knee pain. On examination, he noted positive anterior draw, Lachman, McMurray and Apley testing. He aspirated the knee and administered another cortisone injection. He suspected an anterior

cruciate ligament tear. He took Petitioner off work. He administered three Euflexxa injections in August 2013. On October 17, 2013, he noted that Petitioner complained of increased left knee pain secondary to having to use a compact car at work. He modified the work restrictions and indicated Petitioner should use a truck rather than a compact car "because of deep knee flexion restrictions."

On November 21, 2013, Dr. Durodogan noted complaints relative to both knees. With respect to the left knee, he addressed causation and treatment as follows:

> "The patient has done everything he possibly could have to continue working. His work-related left knee injuries have exacerbated his pre-existing osteoarthritic condition. He is contemplating total knee arthroplasty. Given the severity of his condition and despite his young age I do feel this is a reasonable procedure for him to hopefully help alleviate his painful condition."

At the next visit, on December 19, 2013, Petitioner complained of left knee swelling, pain and occasional buckling. He requested a left knee cortisone injection, which Dr. Durodogan administered. The doctor indicated he was considering a series of gel injections. PX 3. [Petitioner also saw Dr. Durodogan for right knee pain and a right knee injection on December 19, 2013. The doctor wrote two separate notes on that date. PX 3.]

At the February 20, 2014, hearing, Petitioner testified he last saw Dr. Durodogan about two weeks earlier. [That treatment note is not in evidence.] He indicated that the doctor's surgical recommendation remained unchanged. T. 23.

Petitioner testified he continues to experience left knee pain. He can walk on flat surfaces without too much difficulty but, when he uses stairs or accidentally steps on one of his children's toys, he feels pain shooting through his left leg. His left knee pain causes him to wake up at night. He is willing to undergo the replacement surgery Dr. Durodogan recommended if this surgery is awarded. T. 26-27.

Under cross-examination, Petitioner acknowledged he was wearing sleeves or braces on both of his knees at the time of the accident on March 29, 2012. T. 40.

Petitioner testified he was working Monday through Friday as of his November 2012 surgery. Following the surgery, he missed work Monday, November 12, 2012 through Friday, November 16, 2012 and Monday, November 19, 2012. He returned to work on Tuesday, November 20, 2012. T. 42. At one point during his 13-year tenure with Respondent, he had a five-month leave. He worked in sales for a different employer, Devcon Security, during that period, until resolution of a union-related matter allowed him to resume working for Respondent. T. 44. When he saw Dr. Neal, the doctor did not touch his knee. The doctor just

told him to sit on the examining table and put his legs out and then walk down a hall. He does not recall the doctor flexing his leg back and forth. T. 45.

No witnesses testified on behalf of Respondent.

Arbitrator's Credibility Assessment

Petitioner came across as a thoughtful and hard-working individual.

On direct examination, Petitioner acknowledged having left knee pain in the past but denied having left knee pain between his last pre-accident visit to Dr. Durodogan on May 20, 2011 and his undisputed work accident of March 29, 2012. Under cross-examination, he acknowledged he was wearing sleeves on both knees when that accident took place. Despite this potential inconsistency, the Arbitrator found Petitioner credible overall.

Did Petitioner establish a causal connection between the undisputed work accident of March 29, 2012 and his current left knee condition of ill-being? Did Petitioner establish causation as to the need for the left total knee replacement surgery Dr. Durodogan has recommended?

The Arbitrator finds that the undisputed work accident of March 29, 2012 is a cause of Petitioner's current left knee condition of ill-being and need for replacement surgery. In so finding, the Arbitrator relies in part on the following: 1) Petitioner underwent several left knee injections in 2010 and 2011, with the last taking place about ten months prior to the accident, but was able to continue performing his regular duties for Respondent thereafter, with those duties involving stair usage and work in confined areas such as crawl spaces; 2) there is no medical evidence indicating Dr. Durodogan recommended a left knee MRI prior to March 29, 2012; 3) Petitioner credibly described a dramatic mechanism of injury, with his right foot and leg dropping off a carpeted step to a significantly lower point while his left foot remained planted on the step; 4) the injury was significant enough to result in bony trauma – either a patellar fracture or a fracture of a patellar spur; 5) Dr. Crawford, who saw Petitioner shortly after the accident, noted objective evidence of trauma, i.e., ecchymoses; and 6) the left knee MRI showed a sprain as well as meniscal pathology.

The Arbitrator also relies on the causation-related opinions voiced by Dr. Durodogan. The Arbitrator assigns greater weight to the opinions of this physician than to those of Dr. Neal, Respondent's examiner. Dr. Durodogan has treated Petitioner over an extended period while Dr. Neal saw Petitioner once, before any left knee surgery was performed. Dr. Durodogan was familiar with the pre-accident condition of Petitioner's left knee. Dr. Durodogan had a basis for opining that the accident caused Petitioner's pre-existing left knee osteoarthritis to worsen. The Arbitrator finds it significant that Dr. Durodogan is, at least at this point, recommending replacement surgery only for the injured left knee, despite the fact that Petitioner has osteoarthritis in both knees. Dr. Neal conceded that Petitioner would require a replacement procedure at some point in the future.

The Arbitrator acknowledges that other factors, including excessive weight, the valgus deformity and a work re-injury in August 2012, may have contributed to Petitioner's left knee condition and the need for surgery. Under Illinois law, however, Petitioner need only show that the accident was a contributing cause. He need not eliminate all other possible causes. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193 (2003). Petitioner has met his burden of proving that the undisputed work accident of March 29, 2012 was a cause of his condition and need for surgery.

Is Petitioner entitled to temporary total disability benefits?

Petitioner claims temporary total disability from November 12, 2012 (the date of the left knee arthroscopy that Respondent's examiner, Dr. Neal, recommended) through November 19, 2012, a period of 1 1/7 weeks. On the Request for Hearing form, Respondent indicated it was disputing this claim because it paid Petitioner full salary from November 13, 2012 through November 17, 2012. Arb Exh 1. Petitioner did not testify to receiving his regular salary. Rather, he testified he used his available sick and vacation days while he was off work.

Since Petitioner was off work fewer than fourteen days, the Arbitrator awards no temporary total disability benefits for the first three days of lost time, pursuant to Section 8(b) of the Act. The Arbitrator finds that Petitioner was temporarily totally disabled from November 15, 2012 through November 19, 2012, a period of 5/7 week.

Is Petitioner entitled to prospective care?

Petitioner seeks prospective care in the form of the left total knee replacement surgery that Dr. Durodogan recommended on November 21, 2013. The Arbitrator notes that Petitioner saw Dr. Durodogan on at least two occasions after November 21, 2013. The doctor's left knee note of December 19, 2013 indicates that Petitioner should "consider gel injection series." It does not set forth a surgical recommendation. PX 3. Petitioner testified he last saw Dr. Durodogan about two weeks before the February 20, 2014 hearing. He testified the doctor again recommended replacement surgery at that visit but no notes concerning that visit are in evidence.

The Arbitrator has previously found that Petitioner established causation as to the need for a left total knee replacement. It is not entirely clear, however, whether Dr. Durodogan was still recommending that surgery as of the hearing. The Arbitrator awards prospective care in the form of a return visit to Dr. Durodogan plus a left total knee replacement if the doctor still finds that procedure to be warranted. If the doctor instead recommends a series of gel injections for the left knee, the Arbitrator awards that care.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTONIO MEDINA,

Petitioner,

vs.

NO: 08 WC 11442

FOX VALLEY PARK DISTRICT,

14IWCC1117

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of determination of medical expenses to be awarded per remand from the Commission, 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.

Specifically, the Commission notes that both parties agree and stipulate to the $99,534.42 for medical expenses, pursuant to the Act's Fee Schedule, that the Arbitrator awarded in his decision. We are therefore bound by the stipulation. See, Walker v. Indus. Comm'n (AmerenCIPS), 345 Ill. App. 3d 1084, 1091, 281 Ill. Dec. 509, 515, 804 N.E.2d 135, 140 (2004). Additionally, as the Arbitrator noted, the Commission adopts its Decision and Opinion on Review of August 9, 2012 herein as though it was fully set forth in this Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 7, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

14IWCC1117

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 22 2014
TJT: kg
O: 12/16/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

MEDINA, ANTONIO
Employee/Petitioner

Case# **08WC011442**

FOX VALLEY PARK DISTRICT
Employer/Respondent

14IWCC1117

On 6/7/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% 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:

1922 SALK, STEVEN B & ASSOC LTD
150 N WACKER DR
SUITE 2570
CHICAGO, IL 60606

0075 POWER & CRONIN LTD
JEFFREY B HUEBSCH
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
) SS. 14IWCC1117
COUNTY OF KANE)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTEDARBITRATION DECISION

Antonio Medina
Employee/Petitioner

Case # 08 WC 11442

v.

Consolidated cases:

Fox Valley Park District
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **New Lenox**, on **02/11/2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [ ] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [ ] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other Determination of Medical Expenses to be Awarded per Remand from Commission.

FINDINGS

The Illinois Workers' Compensation Commission entered its Decision and Opinion on Review herein on August 9, 2012, modifying the decision of the Arbitrator and remanding the case to the Arbitrator to calculate the award of medical expenses consistent with the Decision of the Commission.

The Parties appeared before the Arbitrator and tendered a revised bill of Marquee Medicos (Petitioner's Exhibit Number 1). The revised medical bills award calculation was entered as Petitioner's Exhibit Number 2. The Decision and Opinion on Review was Petitioner's Exhibit Number 3.

ORDER

The Arbitrator adopts the Decision and Opinion on Review of August 9, 2012 herein as though it was fully set forth in this Decision.

It is ordered that Respondent shall pay $99,534.42 for medical expenses, pursuant to the Act's Fee Schedule, under Section 8(a) and Section 8.2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

May 27, 2013
Date

JUN - 7 2013

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bobbie Showers,
Petitioner,
vs.

14IWCC1118
NO: 11 WC 11832

River Bluff Nursing Home,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, notice permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 31, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 22 2014
KWL/vf
O-12/16/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC1118

SHOWERS, BOBBIE
Employee/Petitioner

Case# **11WC011832**

RIVER BLUFF NURSING HOME
Employer/Respondent

On 12/31/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2489 LAW OFFICES OF JIM BLACK
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0563 WILLIAMS McCARTHY LLP
CAROL A HARTLINE
120 W STATE ST SUITE 400
ROCKFORD, IL 61105

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC1118

Case # 11 WC 11832

Consolidated cases: _____

Bobbie Showers,
Employee/Petitioner

v.

River Bluff Nursing Home.
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 **Edward Lee**, Arbitrator of the Commission, in the city of **Rockford**, on **October 24, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services? .
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **November 10, 2008**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was not* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the accident.

In the year preceding the injury, Petitioner earned **$21,062.60**; the average weekly wage was **$405.05**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **0** dependent children.

Petitioner N/A received all reasonable and necessary medical services.

Respondent N/A paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $N/A for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of $N/A under Section 8(j) of the Act.

ORDER

The Arbitator finds that the petitioner failed to prove by a preponderance of the evidence that she sustained an accident arising out of and in the course of her employment. Petitioner failed to prove that she timely reported an accident to the employer. Further, the petitioner failed to prove by a preponderance of the evidence that her conditions of ill-being were causally related to the alleged accident in the course of her employment. Wherefore, no benefits are awarded.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

12/23/13
Date

DEC 31 2013

FINDING OF FACTS

Petitioner, Bobbie Showers was employed with River Bluff Nursing Home on November 10, 2008 as a clothing aide. As such, in the performance of her job duties residents' personal clothing were brought to Petitioner in the laundry area where she would sort the items and place them on a cart. Petitioner testified that Respondent's video Exhibit 4 accurately depicts the type of cart she used during the course of her employment. Petitioner testified that after sorting she would take the cart from the laundry area up to the floors for distribution. In doing so she would push the cart. On the resident hall, Petitioner would take the personal items off the cart and put them away in the resident room.

Respondent's video Exhibit 4 depicts the movement of the cart; however Petitioner denies that the cart moved as easily as shown. Two prior employees of River Bluff Nursing Home testified that they believe the cart took more effort to push than what is depicted in the video. Neither of the employees testified that they witnessed or knew of any accident sustained by Petitioner. Lisa Petersen from Human Resources testified that she performs ergonomic studies for positions at River Bluff Nursing Home. She testified that she is familiar with the carts used on the premises. She took the video depicting the laundry cart in Respondent Exhibit 4. She did not alter it in any way. The cart was located in the laundry area. She is depicted in the video moving the cart around the laundry area. She also testified that she went to a residential floor and moved the same kind of cart there. Both carts moved as depicted in the video. Petitioner testified that she pushed the car on concrete or tiled floor, but there was one area, approximately 20 to 30 feet of carpet, that she would have to push the cart over to get to one or two of the resident halls.

Petitioner first testified that her right knee symptoms began on November 10, 2008, while performing her job duties of pushing a cart. She later testified to a different occurrence on November 10, 2008 when her knee gave out. Specifically, she testified that she had just put away some clothing items in a resident room, was walking out to the hall, and her knee gave out. She reached out to the laundry cart, and caught herself from falling. She was not pushing the cart. She testified that she continued working that day and the following days. Petitioner later testified that the right knee symptoms actually did not happen on November 10, 2008, but rather sometime in August of 2008 when she tripped over a chair at work. She testified later that she actually had right knee complaints due to her tripping over chairs at work, occurring about once a month.

On cross-examination, Petitioner admitted that she did not really know what caused the right knee symptoms. Further she agreed that she had provided Respondent leave of absence requests forms and treating physician's certifications (Respondent Exhibit 6 and 7) stating that she had fibromyalgia since 2004 and knee pain for approximately two years. Petitioner also testified that she signed Exhibit 6 indicating the knee condition was her own personal illness, and signed the physician's form.

Petitioner alleges that she told her supervisor, Nichols on November 10, 2008 about the incident involving her knee giving out, but did not fill out any accident report. Petitioner claimed she did not fill out an accident report because she was too busy. Supervisor Nichols testified that she had a good relationship with Petitioner, and over the years while the Petitioner worked for her Petitioner told Nichols about the ongoing fibromyalgia, but nothing about a knee injury at work. Nichols testified that had Petitioner reported the knee injury, she would have directed the Petitioner to fill out an incident report, which was the procedure.

Petitioner agreed that she knew the procedure for reporting accidents and injuries, which included filling out a written report. Petitioner agreed that on October 28, 2008 she filled out an incident report and an employee injury form (Respondent Exhibit 8 and 9) when her only injury was a cut on her middle finger that required a band aid. She was performing the same job at that time, and had the same hours. Petitioner testified that she also filled out an incident report on February 18, 2008 (Respondent Exhibit 12) when she had a minor sprain to her back. However, when she had prior non-work related injuries she needed time off work for she

filled out a leave of absence form (Respondent Exhibit 7), the same forms she filled out when she left work for the right knee injury. (Respondent Exhibit 5 and 6).

Human Resource representative Lisa Petersen testified that River Bluff Nursing Home filled out injury forms and incident reports for the February 18, 2008 and October 28, 2008 incidents reported by Petitioner. (Respondent Exhibits 10, 11, 12, and 13). Further, had Petitioner reported the November 10, 2008 incident, a form would have been completed. Respondent instead received leave of absence forms filled out by Petitioner. (Respondent Exhibit 5 and 6). On March 26, 2009 Petitioner resigned from her position. (Respondent Exhibit 14). She did not file an Application for Adjustment until March 28, 2011.

Petitioner testified that she went to her family physician for medical treatment initially. When seen by the family physician, Dr. Soufan on November 12, 2008 Petitioner made no mention of any accident or injury at work. (Respondent Exhibit 3). Dr. Soufan noted that the Petitioner has a known history of fibromyalgia, with generalized joint pain, but most prominently in the right knee. On examination the Petitioner had multiple muscular pains over her back, abdomen, chest and both lower extremities. Dr. Soufan noted at the time that Petitioner weighed 260 pounds. (Respondent Exhibit 3).

An MRI of the right knee was performed on November 15, 2008 and read as showing a degeneration of the medial meniscus. (Petitioner Exhibit 1). Petitioner saw Dr. McCarty, her treating orthopedic surgeon on November 25, 2008 without any mention of any accident. Dr. McCarthy noted right knee medial meniscus degenerative findings and a degenerative tear of the medial meniscus. She underwent right knee surgery on December 12, 2008 consistent with a resection of the anterior horn medial meniscus tear, chondroplasty of the medial femoral condyle, and microfracture for complete absence of the articular cartilage at the mid-segment of the medial right femur. (Petitioner Exhibit 1).

Petitioner testified that she was seen for follow up with Dr. McCarthy. She testified that she has since been unable to return to her job at River Bluff Nursing Home due to the injury to the knee. Further she testified that she must use a walker, and can only walk a short distance without the assisted device. Dr. McCarthy's medical records indicate that Petitioner was last seen on February 26, 2009. (Petitioner Exhibit 1). Dr. McCarty did not feel that any further surgery was warranted. Petitioner was to be seen for follow up four weeks later, but never did so. (Petitioner Exhibit 1). Petitioner has been seen by Dr. Soufan for several other ailments, but not for the knee. (Respondent Exhibit 3). Further, when Petitioner was seen in the emergency room on September 9, 2009 for a hernia, it specifically states that she had a steady gait and no mention of her using any sort of walker or assisted device. (Petitioner Exhibit 3, pg. 48).

Petitioner testified that on February 14, 2009 she fell at her home. She testified that the fall later led to her having surgery on September 16, 2009 to repair her pre-existing mesh implant from a prior hernia surgery. At the time of the fall, Petitioner did not seek any medical treatment relating to the area of the hernia. Petitioner was seen in the emergency room on September 9, 2009 related to the hernia, and ultimately underwent repair with Dr. Zanke on September 16, 2009. (Petitioner Exhibit 3, pg. 48). Dr. Koehler reviewed the medical records concerning the hernia and opined that the February 14, 2009 fall did not cause the treatment for the mesh repair. (Respondent Exhibit 2). Dr. Koehler points out that there is a significant delay in development of the symptoms. There is no mention of any related pain symptoms between February 14, 2009 and when seen in September of 2009. (Respondent Exhibit 2). Dr. Coe, Petitioner's expert also testified that he agreed that she did not seek any treatment for the abdomen at that time. (Petitioner Exhibit 3, pg. 44). He also agreed she did not report any symptoms related to the hernia to Dr. McCarthy at that time. (*Id.* at pgs. 44-45). Further the pain complaints Petitioner had in September were different that those claimed by the Petitioner after the fall in February at home. (*Id.* at pg. 50). Dr. Coe opined that the initial complaints after the fall did not correlate with the breakdown of her abdominal wall. (*Id.* at pg. 50). Dr. Coe testified that it was a tripping that caused the fall.

(*Id.* at pgs. 46, 50). He could not testify that the knee surgery caused the tripping incident. Rather the claimant reported that she tripped, causing her knee to bend. (*Id.*).

Dr. Weiss, an orthopedic surgeon reviewed records and performed an independent medical examination on February 24, 2012 at the request of Respondent. (Respondent Exhibit at deposition Exhibit 2). He pointed out that given Petitioner's weight and height (five feet four inches), she was considered morbidly obese. (Respondent Exhibit 1, pg. 13). He opined that the pushing the cart at work did not cause the condition of ill-being in the right knee. (*Id.* at pg. 27).

Dr. Coe performed an independent medical examination on October 19, 2011 and opined that Petitioner's job duties of pushing a cart in general caused the Petitioner's right knee complaints. (Petitioner Exhibit 3, pgs. 28-29). Petitioner never told Dr. Coe that she had any incident at work on November 10, 2008. She never told him that her knee gave out while at work. She never told him she tripped over a chair at work. Dr. Coe agrees that the findings in the right knee were degenerative in nature. (Petitioner Exhibit 1, pg. 36). He also agreed that her body habitus could have caused the degenerative findings in the right knee. (*Id.* at pgs. 41-42). He also agreed that if he took the history contained in Dr. Soufan's November 12, 2008 report as true, and the given her weight and height, and that no traumatic injury occurred at work, that the condition in the right knee could is simply degenerative and not caused by the performance of her job duties. (*Id.* at 42).

CONCLUSIONS

Under (C) ACCIDENT and (E) NOTICE the Arbitrator finds:

Regardless of Petitioner and prior employee testimony that it was more difficult to push the laundry cart than depicted in the video presented by the Respondent, Petitioner's evidence did not support an accident occurred arising out and in the course of the employment. Petitioner testimony regarding an accident occurring was not credible. She testified to several different scenarios as the cause of the right knee injury, however she ultimately admitted that she did not know what caused the knee condition. Further, it was not credible that she sustained an accident at work on November 10, 2008 involving the right knee and reported it as such to the employer based on the written documentation submitted by Petitioner to the employer. Petitioner alleges she reported the incident and simply did not have time to fill out an incident report. However, she admittedly provided leave of absence documents and medical provider forms to the employer indicating that the right knee injury was not related to any work accident on that date. Further, Petitioner had completed prior accident reports for alleged work related injuries, one being completed just fourteen days prior to the alleged incident in the case for a minor cut to her finger. None of the treating physician records have a history of accident or a history that Petitioner experiencing any right knee symptoms while performing job duties.

Wherefore, based on the totality of the evidence, the Arbitrator finds Petitioner failed to prove by a preponderance of the evidence that she sustained an accident arising out of and in the course of her employment with Respondent causing injury to the right knee. Further, Petitioner failed to prove by a preponderance of the evidence that she gave timely notice. Hence, the claim by Petitioner for the hernia condition is also denied.

Under (F) CAUSALCONNECTION, the Arbitrator finds:

Petitioner also fails to prove by a preponderance of the evidence that the right knee condition is causally related to any accident that occurred at work. Even if Petitioner's description of pushing a cart were taken as true, the treating physicians and the retained experts agree that Petitioner suffered from a degenerative condition in the right knee. Further, Dr. Weiss, an orthopedic surgeon reviewed records and performed an independent medical examination at the request of Respondent opined that the pushing the cart at work did not cause the condition of ill-being in the right knee, but rather Petitioner's body habitus would have aggravated the

degenerative condition. Dr. Coe initially opined that Petitioner's job duties of pushing a cart in general caused the Petitioner's right knee complaints, but Dr. Coe also agreed that her body habitus could have caused the degenerative findings in the right knee. He also agreed that if the history contained in initial medical note from Dr. Soufan on November 12, 2008 was true, given her weight and height, and no traumatic injury, that the condition in the right knee could simply degenerative and not caused by the performance of her job duties.

Separately, Petitioner also failed to prove that the hernia injury was causally related to the trip and fall at home. Petitioner did not seek medical treatment for nearly seven months after the incident. Dr. Koehler opined that the hernia was not caused by the fall. Further, Petitioner's expert Dr. Coe testified that the initial symptoms after the fall at home did not correlate to any abdominal wall injury. Wherefore benefits for the hernia injury are denied.

By:_____
Arbitrator Edward Lee

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cathy Mauerman,

Petitioner,

14IWCC1119

vs.

NO: 13 WC 18337

Family Dollar,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permanent partial disability, notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 30, 3013 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 $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: DEC 22 2014
KWL/vf
O-12/16/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC1119

Case# 13WC018337

MAUERMAN, CATHY
Employee/Petitioner

FAMILY DOLLAR
Employer/Respondent

On 12/30/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2489 LAW OFFICES OF JIM BLACK & ASSOC
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0560 WIEDNER & McAULIFFE LTD
PATRICK J MORRIS
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 19(b)

14IWCC1119

Case # 13 WC 18337

Consolidated cases:

Cathy Mauerman
Employee/Petitioner

v.

Family Dollar
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 **Edward Lee**, Arbitrator of the Commission, in the city of **Rockford, IL**, on **October 15, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other Is Prospective Medical Care, specifically surgery, reasonable, necessary, and causally related to Petitioner's accident?

14IWCC1119

FINDINGS

On the date of accident, **June 27, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship *did* exist between Petitioner and Respondent.

On these dates, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding Petitioner's injury, Petitioner earned **$16,251.56**; the average weekly wage was **$312.53.**

On the date of the June 27, 2011 accident, Petitioner was **41** years of age, **single**, with **0** dependant children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit for any benefits that have been paid by group insurance and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

ORDER

- The Respondent shall authorize the surgical procedure recommended by Dr. Hastings and prospective medical, surgical, and/or hospital care until Petitioner reaches a state of maximum medical improvement.

- The respondent shall pay $ **348.00** for necessary medical services, as provided in Section 8(a) of the Act and consistent with the medical fee schedule. Respondent is entitled to credit for any of the awarded medical expenses that it has previously paid.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Carl Lee
Signature of Arbitrator

12/27/13
Date

ICArbDec19(b)

DEC 30 2013

14IWCC1119

STATEMENT OF FACTS

At trial, the parties stipulated that the Petitioner was an employee of the Respondent on June 27, 2011. The parties stipulated that Petitioner's earnings in the year preceding the injury of June 27, 2011 were $16,251.56 with an average weekly wage of $312.53. The parties stipulated that Petitioner was 41 years of age as of June 27, 2011, single, and with no dependant children.

Petitioner worked for Respondent as an assistant manager at the time of her injury. Her job consisted of stocking, running a cash register, cleaning, facing merchandise, and cycle counting. Petitioner had worked for Respondent for approximately two to three years at the time of her reported injury. Petitioner testified that as an assistant manager, she worked approximately 7 hours per day, 5 days per week. Her hours increased when she became a store manager in October of 2011. While working as an assistant store manager, she would do some administrative work, some cashier work, some supervising, and some stocking of shelves. Petitioner would spend approximately 20-30 minutes a day performing supervisory duties and approximately 30 minutes on administrative duties. She testified that she might spend a couple of hours working a cash register. The rest of her day was spent stocking shelves. Petitioner testified that she would spend approximately 3-4 hours per day, 3-4 days per week performing stocking duties. Petitioner indicated that merchandise would be unloaded from a truck onto a conveyer belt. The merchandise was then moved to a "U-boat," a cart on wheels. Petitioner would occasionally move the merchandise from the conveyer belt to the U-boat. Petitioner would then move items from the U-boat to the shelves. Petitioner testified that the merchandise would be stacked overhead on the "U-boat". She also testified that the shelving was approximately a foot over her head. The heavy items, such as laundry detergent and large soap containers were stacked on the top shelf. Petitioner estimated these items to weigh 25 – 30 pounds. Petitioner noted that some shelving units contained 5-6 shelves, up to four of which are over shoulder height. Petitioner also reported performing cycle counting, which required the use of a scan gun to scan barcodes on the merchandise. Petitioner reported performing much of this work overhead as well.

With Petitioner's work activities, particularly the stocking overhead, she developed pain in her right shoulder. Petitioner is right handed. On March 14, 2011, Petitioner was seen by her primary care physician, Dr. Go-Lim. While there for different medical concerns, Petitioner mentioned that she was experiencing pain in her right shoulder that came and went (Px. 1). An x-ray was performed which was interpreted to be normal (Px. 1). Petitioner testified that she believed the pain to be caused by a pulled muscle which would resolve on its own. Petitioner returned to work, performing her regular job. She experienced an increase in pain with her ongoing work activities and sought treatment with Dr. Go-Lim relative to her right arm pain on June 27, 2011 (Px. 1). At that time, Dr. Go-Lim recommended an MRI, which was performed on July 1, 2011 (Px. 1). The MRI revealed a partial thickness rotator cuff tear and moderate subacromial/subdeltoid bursitis (Px. 1). On July 5, 2011, Dr. Go-Lim referred Petitioner to an orthopedic. Petitioner testified that she had not experienced symptoms to her right shoulder prior to March of 2011. Petitioner testified that she had called the 1-800 number provided by Respondent in which to report any work related injuries. She testified that paperwork was not required, but that the number was for a nurse case manager that would address the injury. Petitioner could not recall the date that she made the phonecall. However, Petitioner filed her initial workers' compensation claim on July 11, 2011, shortly after the MRI revealed the rotator cuff tear (Arb. Ex. 1).

At trial, Respondent submitted a Report of Injury form, dated July 7, 2011. The form indicated that Petitioner experienced pain in her right arm when pulling boxes down from the Uboats and performing heavy overhead lifting.

Petitioner was seen for an independent medical evaluation by Dr. Jeffrey Coe on October 19, 2011 (Px. 3). Dr. Coe took a history from Petitioner that included suffering right shoulder pain as a result of her work activities for Respondent. Petitioner described stocking shelves with merchandise. She reported unloading the U-boats which were piled above shoulder height (Px. 3). She described increased pain from March to June of 2011 with

reaching and lifting. Dr. Coe noted that Petitioner described stocking shelves that were at or above shoulder height (Px. 3). Dr. Coe performed a physical examination and reached a diagnosis of a partial rotator cuff tear and bursitis with impingement pain (Px. 3). Dr. Coe believed that conservative treatment, including steroids and physical therapy would be reasonable, and if unsuccessful, right shoulder surgery would be indicated (Px. 3). It was Dr. Coe's opinion that there was a causative relationship between Petitioner's work activities as a stocker and cashier and the internal derangement in Petitioner's right shoulder (Px. 3). Dr. Coe noted that the activity of pulling, pushing, and lifting at shoulder height and above, can be a factor causing breakdown within the shoulder with rotator cuff tearing and inflammation of the shoulder bursa (Px. 3).

Petitioner was seen by Dr. Lawrence Lieber at Respondent's request on January 24, 2013 (Rx. 5). Dr. Lieber noted Petitioner's history of developing right shoulder pain with repetitive stocking activities for Respondent. Dr. Lieber diagnosed rotator cuff tendinopathy and inflammation of the right shoulder (Rx. 5). He recommended that Petitioner avoid overhead activity and limit use of the right arm. Dr. Lieber noted that his understanding was that Petitioner performed only limited overhead reaching and lifting (Rx. 5). Based on this understanding, he did not feel that Petitioner's work activities contributed to her right shoulder condition. Dr. Lieber did agree that conservative treatment would be reasonable at that time, but that surgery could also "still be in the picture." (Rx. 5).

A repeat MRI was performed on May 14, 2012, evidencing supraspinatus tendinopathy with a small partial thickness tear (Px. 2). Petitioner was seen by Dr. Hastings on June 25, 2012. Petitioner reported pain for approximately a year, attributed to her work activities for Respondent, using a cash register, stocking, and using a scanner above chest height (Px. 2). The record from Dr. Hastings' noted that Petitioner's claim had been denied, preventing her from receiving treatment (Px. 2). Dr. Hastings diagnosed impingement with a contribution from the AC joint. He recommended an injection along with medication and physical therapy (Px. 2). Petitioner underwent the injection and physical therapy with limited improvement. Dr. Hastings also recommended Petitioner avoid overhead activity as much as possible (Px. 2). Petitioner was not able to continue physical therapy due to insurance issues.

On April 5, 2013, Petitioner returned to Dr. Hastings with a denial letter in order to proceed with physical therapy under group insurance (Px. 2). Petitioner underwent an injection and additional physical therapy from April 9, 2013 through May 22, 2013 (Px. 2). On May 17, 2013, Dr. Hastings noted that Petitioner had not improved with the injection and physical therapy. Dr. Hastings noted that Petitioner's options were to live with her current level of discomfort or undergo surgery. Surgery was to include subacromial decompression as well as distal clavicle resection. Petitioner's rotator cuff would also be evaluated for repair (Px. 2). Petitioner testified that she would like to undergo the surgical procedure recommended by Dr. Hastings. Petitioner testified that she continued to experience pain in her shoulder with activity. She used the scan gun in her left hand due to her right shoulder pain. Petitioner was able to continue performing her regular job, but with significant pain as a result.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE DISPUTED ISSUES

C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

The Arbitrator adopts the statement of facts detailed above and finds that an accident occurred that arose out of and in the course of the Petitioner's employment by Respondent on June 27, 2011.

It is clear from the medical records that Petitioner began to experience some pain in her shoulder prior to March 14, 2011. Petitioner discussed her pain with her primary care physician and an x-ray was performed. The x-ray

was noted to be normal and Petitioner returned to work, believing to have suffered a temporary muscle pull. Petitioner continued at her regular job, performing significant overhead stocking work with increasing pain. By June 27, 2011, her pain had become sufficient to seek additional medical treatment. Following the July 1, 2011 MRI, Petitioner became aware that she had suffered a partial rotator cuff tear. The Arbitrator notes that Petitioner described stocking activities with lifting up to 25 pounds for up to 16 hours a week. Much of the work was described as being overhead with heavier items being placed on the top shelves. This constitutes sufficiently forceful overhead activity to cause a partial rotator cuff tear and bursitis. The Arbitrator notes that the Report of Injury form submitted as Respondent's Exhibit 1 also noted Petitioner's right arm pain with her heavy overhead work for Respondent.

Dr. Coe testified to his opinion that Petitioner's work activities were a factor in the development of her right shoulder condition. He explained that the activities of pulling, pushing, and lifting at shoulder height and above, were a factor resulting in the breakdown within the shoulder (Px. 3). Dr. Lieber opined that Petitioner's work activities were not performed at the frequency required to cause the internal derangement in Petitioner's shoulder. The Arbitrator notes that Dr. Lieber did not appear to have an accurate description of Petitioner's work activities noting his understanding that Petitioner performed limited overhead reaching and lifting (Rx. 5). Regardless, the Arbitrator finds Petitioner's testimony and Dr. Coe's opinion to be more convincing. Petitioner testified competently and credibly regarding her work activities and the increasing pain she felt in her right shoulder as a result of those overhead work activities. Petitioner also did not suffer from any prior symptoms or injury to her right shoulder. Further, while Petitioner suffered from some pain as early as March 2011, the records demonstrate that Petitioner's condition was thought to be normal at that time based on the x-rays provided. Petitioner's pain increased through June 27, 2011 and the July 1, 2011 MRI was the first piece of evidence providing Petitioner with an objective diagnosis for her pain.

Therefore, the Arbitrator finds that Petitioner suffered a repetitive trauma injury to her right shoulder that arose out of and in the course of her employment by Respondent on June 27, 2011.

E. ☒ Was timely notice of the accident given to Respondent?

The Arbitrator finds that notice of Petitioner's June 27, 2011 injury was timely provided to Respondent. Petitioner testified that she contacted the 1-800 number that employees were to call when suffering a work related injury. Petitioner testified that she did not recall the specific date that she called the number, but that it was shortly after seeing Dr. Go-Lim. The First Report of Injury form noted that Petitioner had suffered an injury to her right arm as a result of her employment (Rx. 1). That form was dated July 7, 2011. Further, Petitioner's initial Application for Adjustment of Claim, submitted as Arbitrator's Exhibit #2, was filed on July 11, 2011. These forms provide ample evidence that Respondent was notified of Petitioner's injury well within 45 days of June 27, 2011.

As such, timely notice of the June 27, 2011 accident was given to Respondent.

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 is causally related to her work injury of June 27, 2011. The Arbitrator relies upon the opinion of Dr. Jeffrey Coe and the records of the treating physician, Dr. Hastings, which evidence that Petitioner experienced significant right shoulder pain following her injury of June 27, 2011 which has not resolved as of the date of hearing.

The Arbitrator relies upon the well-established rules set forth by the Illinois Supreme Court that "the fact that an employee may have suffered from a preexisting condition will not preclude an award if the condition was

aggravated or accelerated by the employment. The employee need not prove employment was the sole causative factor or even that it was the principal causative factor, but only that it was **a causative factor** in the resulting injury." Williams v. Industrial Com., 85 Ill. 2d 117, 122 (1981). Thus, even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193 (2003).

Petitioner testified regarding her work activities for Respondent, which required significant overhead work. Having found that Petitioner suffered an injury arising out of and in the course of her employment on June 27, 2011, the Arbitrator relies on the opinions of Dr. Coe and the treating records which evidence a causative relationship between her work activities and her current condition of ill-being. Petitioner's accident report and treatment records establish right shoulder pain following her work injury of June 27, 2011. The MRI performed on July 1, 2011 demonstrated a partial rotator cuff tear and bursitis. Following physical therapy and injections, which were not successful in alleviating Petitioner's pain, surgery has been prescribed. The treatment records clearly establish that Petitioner has suffered continued right shoulder pain following her injury in June of 2011.

Petitioner's testimony and her treatment records are consistent with Dr. Coe's opinion that Petitioner's work activities caused the internal derangement in her shoulder. Petitioner experienced no symptoms relative to her right shoulder prior to her work activities for Respondent and her symptoms have not currently resolved. Dr. Lieber agreed that additional treatment relative to the rotator cuff tear and bursitis would be reasonable.

At the time of trial, Petitioner also testified that she continues to experience pain in her right shoulder, increased with activity. She reported being able to continue with her employment, however, she suffers from increased pain with the work. Petitioner noted that she has been forced to use her left hand with increasing frequency due to the difficulty maintaining work with her right arm.

Therefore, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to her injury on June 27, 2011 while working for Respondent.

J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Having determined that Petitioner's June 27, 2011 injury arose out of and in the course of Petitioner's employment, the Arbitrator finds that the Respondent is responsible for the unpaid medical bills submitted as Petitioner's Exhibit 4. At hearing, Respondent agreed that the services provided to Petitioner were reasonable and necessary and objected only to liability.

Petitioner underwent treatment with Dr. Hastings at the Orthopedic and Arthritis Clinic from June 25, 2012 through May 17, 2013 relative to her right shoulder symptoms. As such, the medical bills from the Orthopedic & Arthritis Clinic, totaling $348.00, submitted at Px. 4, are awarded.

L. ☒ What is the nature and extent of the injury?

The Arbitrator adopts the findings of fact and conclusions of law contained above with respect to the issues of accident and casual connection and incorporates them herein by this reference.

As noted below, the Arbitrator finds that Petitioner is entitled to additional treatment as recommended by her treating orthopedist, Dr. Hastings. As such, it is premature to establish nature and extent of Petitioner's June 27, 2011 injury.

O. ☒ Prospective Medical Care?

The Arbitrator adopts the findings of fact and conclusions of law contained above with respect to the issues of accident and causal connection and incorporates them herein by this reference.

Having found that Petitioner's condition of ill being is causally related to her repetitive work activities through June 27, 2011, the Arbitrator finds that Petitioner is in need of prospective medical treatment. Dr. Hastings has noted that Petitioner's options were to live with her current level of discomfort or undergo surgery. Surgery recommended includes subacromial decompression as well as distal clavicle resection. Petitioner's rotator cuff would also be evaluated for repair (Px. 2). Petitioner testified that she would like to undergo the surgical procedure recommended by Dr. Hastings. It was Dr. Coe's opinion, as of October 19, 2011, that conservative treatment, followed by surgical consideration, was reasonable (Px. 3). Dr. Coe recommended steroid injections and physical therapy, followed by consideration for surgery. Dr. Lieber, also agreed that conservative treatment would be reasonable and that surgery would be considered should conservative treatment fail (Rx. 5).

Dr. Hastings' records note that Petitioner underwent the conservative treatment discussed by Dr. Coe and Dr. Lieber. However, the injections and physical therapy, performed through May 22, 2013, were not successful. As such, Dr. Hastings made his recommendation regarding surgery (Px. 2).

Petitioner testified at trial that she continues to experience pain in her right shoulder and that physical therapy was not helpful in alleviating her symptoms. She testified that she would like to have the procedure discussed by Dr. Hastings. As such, Petitioner is in need of prospective medical care. The evidence does not support that Petitioner is at maximum medical improvement. Therefore, the Arbitrator finds that Respondent is responsible for providing prospective medical, surgical, and/or hospital services hereafter incurred, limited to that which is reasonably required to place Petitioner at maximum medical improvement relative to her right shoulder. Specifically, Respondent is responsible for treatment recommended by Dr. Hastings.

Edwd Lee

Arbitrator Lee

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jon Benecke,

Petitioner,

vs.

14IWCC1120

NO: 10 WC 4294

Illinois Department of Employment Security,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) 8(a) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, 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 January 31, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

DATED: DEC 22 2014
KWL/vf
O-12/16/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF 19(b) DECISION OF ARBITRATOR
8(A)

14IWCC1120

BENECKE, JON
Employee/Petitioner

Case# **10WC004294**

IL DEPT OF EMPLOYMENT SECURITY
Employer/Respondent

On 1/31/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2559 BOWMAN & CORDAY LTD
JOHN T BOWMAN
20 N CLARK ST SUITE 500
CHICAGO, IL 60602

0499 DEPT OF CENTRAL MGMT SERVICES
MGR WORKMENS COMP RISK MGMT
801 S SEVENTH ST 6 MAIN
PO BOX 19208
SPRINGFIELD, IL 62794-9208

5031 ASSISTANT ATTORNEY GENERAL
JILL OTTE
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JAN 31 2014

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b) & 8(A)

14IWCC1120

Case # 10 WC 004294

Consolidated cases: _____

Jon Benecke
Employee/Petitioner

v.

Illinois Department of Employment Security
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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Wheaton**, on **December 6, 2013** . After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other (prospective medical care under 8(a).

14IWCC1120

FINDINGS

On the date of accident, **October 13, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current mental condition of ill-being *is not* causally related to the accident.
Petitioner's current lumbar and cervical condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $ **58,656.00**; the average weekly wage was $**1,128.00**.

On the date of accident, Petitioner was **62** years of age, ***single*** with **0** dependent children.

Respondent *has* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of TTD paid October 19, 2009 through April 30, 2012, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Petitioner suffered cervical and lumbar strains as a result of the above injury.

No TTD or medical benefits are awarded after November 9, 2010, the date of MMI by Dr. Zindrick.

No penalties are awarded in this matter.

No prospective medical care is awarded in 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

01-30-14
Date

ICArbDec19(b)

JAN 31 2014

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JON BENECKE,

Petitioner,

v.

ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

14IWCC1120

10 WC 4294
Wheaton

I. Findings of Fact

This action was pursued by the Petitioner under the Workers' Compensation Act seeking relief from his employer the Illinois Department of Employment Security ("IDES"). On December 6, 2013, a 19(b) hearing was held by Arbitrator Kurt Carlson at the Illinois Workers' Compensation Commission in Wheaton, Illinois. Petitioner was represented by counsel. The Illinois Attorney General appeared on behalf of the IDES. After hearing the proofs and reviewing all of the evidence presented, the Arbitrator hereby makes the following findings.

Petitioner began working at IDES in 1999 as an employment service representative doing office work, including answering phones and clerical work. His typical work day was 8:30 a.m. to 5 p.m., unless he worked overtime. Petitioner is 6' 5" and weighs 250. He was 62 years old at the time of the occurrence.

Petitioner had prior military experience with the U.S. Army as a communication specialist (72B) or teletype operator. He volunteered for the U.S. Army during the Vietnam War and spent a year "in country" from October 1968 through October 1969. When Petitioner was on guard duty in Vietnam, he carried a weapon; otherwise, he did not carry a weapon, except to

qualify with it. At times, the base in Vietnam was fired upon from the surrounding mountains by missiles.

While in Vietnam, Petitioner experienced an event where a building or hutch he had previously just exited, was "fragged" (detonation of a fragmentation grenade) by a malcontented American soldier. Petitioner believed that four soldiers were injured in the incident, but did not recall their names and went on with his work day, as he was unhurt.

After being discharged from the army, the Petitioner spent most of his adult life repossessing cars on the south side of Chicago, which he described as dangerous work. He also had a real estate license for thirteen years. Petitioner has been married and divorced twice. The record shows that he is somewhat estranged from his adult daughter and sister who live in the suburbs of Chicago.

Accident

On October 13, 2009, Petitioner was at his desk typing on his computer when the chair he was leaning back on, broke and collapsed. The Petitioner fell back, his legs and feet "shot under the desk," his head hitting the wall on the right side (above his ear), landing on the floor on left side of his head. There was no loss of consciousness. Petitioner's supervisor Maria DiMuzio arrived shortly after the fall. Petitioner recovered and continued to work at his desk until about 7 p.m.

Pre-existing medical treatment

The medical records with Dr. Gerald Lofthouse reveal that Petitioner was first diagnosed with diabetic neuropathy in 2006. Petitioner is a Type II diabetic (RX #2) Further, those records

show that Petitioner had been diagnosed with psychiatric problems in the past including chronic fatigue, depression, family problems and sleep problems, and although those symptoms receded, they were constantly monitored by his family doctors at Bolingbrook Family Medicine. The Petitioner's mother had been diagnosed with schizophrenia. Id. Finally, the family doctor records show that in March 2009, Petitioner was involved in a motor vehicle accident where he injured his neck and back and received two epidural steroid injections. Petitioner testified these injuries resolved themselves prior to his current work injury and the medical records support his statement. Id.

Medical Care after the work accident on October 13, 2009

Petitioner first sought medical attention two days after he fell from the chair at work. He went to his family physicians at Bolingbrook Family Medical where he was diagnosed with a neck and low back strain. He continued to treat with his family doctor for diabetes, as he had done in the past. (RX #2)

Two months later, he was referred to Dr. Zindrick at Hinsdale Orthopeadics where he was diagnosed with cervical and lumbar sprain/strains. Petitioner was prescribed Lyrica along with his other diabetes medication on December 15, 2009. Subsequent MRIs found diffuse mild degeneration and stenosis, but were otherwise unremarkable. (PX #4) Petitioner had two epidural steroid injections ("ESIs") and participated in physical therapy. Id. Id. After an FCE, Dr. Zindrick released Petitioner from his care regarding his neck and back on November 9, 2010. Drs. Zindrick and Kazan agreed that the Petitioner was not a surgical candidate. The Petitioner was referred Petitioner to Dr. Neri (neurologist) for headaches and dizziness.

Petitioner attended a Section 12 examination with Dr. Lim on April 20, 2012, and his

TTD and medical benefits were cut off by Respondent shortly thereafter. However, this report was not put into evidence. It is not part of the record.

Dr. Eugene Neri, diagnosed Petitioner with post-concussion syndrome and post traumatic stress disorder ("PTSD"). However, Dr. Neri's treatment recommendations were rejected by Respondent, so the doctor's treatment was limited to managing the Petitioner's prescription medications, which included Lyrica, Ambien and Lexapro. Nevertheless, he stated that the concussion caused by the fall triggered a pre-existing post-traumatic stress syndrome ("PTSD"). (PX #5)

Dr. Patricia Andrise, a clinical psychologist, (PhD) began treating Petitioner in June 2011, about one and half years after his work incident, and continues to do so weekly. (PX #9) Petitioner paid for her services out-of-pocket. She conducted two separate neuropsychiatric tests which showed mild cognitive deficits. The Petitioner's second exam showed fewer deficits than the first. Despite stating that Petitioner's condition improved, Dr. Andrise stated that Petitioner was unemployable and permanently disabled. She diagnosed traumatic brain injury and adjustment disorder. Her opinion was that the Petitioner's mental condition was triggered not by the accident, but by the way Respondent handled the Petitioner's workers' compensation claim. (PX #9)

Dr. Alexander Obolsky performed a Section 12 examination on behalf of Respondent. He concluded that Petitioner suffers from an anxiety disorder not otherwise specified ("NOS") and a personality disorder NOS with schizotypal, schizoid, and avoidant features and that those conditions were not related to Petitioner's injury on October 13, 2009. Further, Petitioner could return to work. (RX #3)

II. Conclusions of Law

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

The Petitioner established evidence that an accident occurred that arose out of and in the course of Petitioner's employment with IDES.

Immediately prior to his accident, Petitioner was typing on his computer while seated in his chair at his desk. He leaned back in the chair, causing it to "crack" and "shatter" before he fell. Basically, Petitioner fell while leaning back in the chair, which appears reasonable under the circumstances. There was no evidence that Petitioner was attempting to use his chair in manner in which it was not intended. Office workers lean back on chairs. As a result, an accident occurred that arose out of and in the course of Petitioner's employment at IDES.

F. Is Petitioner's current condition of ill-being causally related to the injury?

This Arbitrator finds that Petitioner established that his current condition of ill being of neck and lumbar strains is causally related to his injury. However, Petitioner failed to establish that his current psychological condition is related to the work accident. In City of Springfield, the appellate court noted that "it is universally accepted in this state that mental disability is compensable if it is precipitated by physical contact or injury traceable to a definite time, place and cause." City of Springfield v. IWCC, 291 Ill.App.3d 734, 685 NE2d 12 (4th Dist. 1997)

Petitioner's mental condition is not related to the work accident for the following reasons. First, the Petitioner failed to establish that he suffered a TBI "traumatic brain injury" or even a mild concussion. Immediately after the accident, Petitioner gathered himself and finished his work shift that night. He did not seek immediate medical attention. There was no loss of

consciousness. The next two days, he went to work as usual.

Of vital importance are the Bolingbrook Family Medical records on October 15, 2009, where the Petitioner first sought medical attention. (RX #2) There he was diagnosed with a neck and lumbar strain. His head exam that day was "atraumatic." He had no diaplopia, headache, dysarthia, focal weakness, loss of coordination or vision loss. His hair and scalp were normal. (Id. p.49) Neurologically, the Petitioner was alert and orientated times three. His intellect was grossly normal, his memory was intact. There was no sensory loss or motor weakness. His balance and gait were intact and his deep tendon reflexes were preserved and symmetric. Petitioner exhibited no unusual anxiety or depression (Id.)

Petitioner took a few days off work and then returned to work for another four weeks until November 13, 2009, which was his last day of work for IDES.

As a result of the above, the record does not support a significant head injury as assumed by Drs. Neri and Andrise, who provided causal connection statements in Petitioner's favor. Their opinions were based upon the assumption that Petitioner had injured his head significantly but neither reviewed the records from Bolingbrook Family Medicine, which fail to establish any objective evidence of a head injury. (Neri Dep. p.29) & (Andrise Dep. p.38) The Arbitrator is aware that even minor physical contact or injury may be sufficient to trigger compensability in a mental – physical case. Chicago Park District v. IWCC 263 Ill.App.3d 835 842, 635 N.E.2d 770, 776 (1st Dist. 1994). It is also true that there probably was physical head contact in the fall. However, was not of the character to diagnose a concussion, closed head injury or TBI as assumed by the Petitioner's treating physicians.

Dr. Neri's opinion of causal connection is weakened for additional reasons. Dr. Neri stated that the work accident caused a cerebral concussion which uncovered the Petitioner's

previous PTSD. (Neri Dep. p.41) The cerebral concussion is not an established fact as discussed earlier, therefore it is purely speculative. Further, there is no pre-existing evidence of an "old" diagnosis of PTSD other than the Petitioner's self-report, which he later recanted. If one reads Dr. Neri's report closely, it appears that he never actually made the diagnosis of PTSD on his own, but assumed it to be so based upon the Petitioner's self-reported history of an unknown doctor in the past. Petitioner's family doctor had documented depression and family problems before the work injury. (Id. p.31-32)

Even if one were to believe that Dr. Neri made the diagnosis of PTSD independently, the Petitioner never told Dr. Neri about his experience in Vietnam. (Id. ps.31-32) Petitioner never described the nature and extent of his nightmares. (Id. p.35) When asked if he specialized in PTSD treatment, Dr. Neri replied that he has treated "many, many, fibromyalgia" and "many, many, many, chronic pain" patients and their brain chemical imbalances are similar. (Id. p.36) As a result of the above, Dr. Neri's diagnosis of PTSD was not well grounded.

Onward, Dr. Neri's findings of "decreased memory loss, difficulties with language, cognitive facility, mood disturbance," were not based upon objective examinations. (PX #5) In fact, he admitted that the only way to objectively measure the above is to perform a neuropsychological test. (Neri Dep. p.16) Dr. Neri stated that a proper test was never completed; in fact, the ones finally performed by Dr. Andrise were cursory. (Id. pp.22-23) Moreover, Dr. Neri's treatment records often contain no objective findings and his physician's statements fail to diagnose any psychological condition. (PX #5) Hence, the diagnosis of PTSD was not based on any real objective findings and his foundation for that opinion poorly established. As a result, his opinion is not compelling.

Dr. Neri stated that his causal connection opinion was based the following reasoning.

First, there "there is no other cause that we could come up with." Second, "the findings go right along with the clear history." While this type of reasoning is sufficient for the neck and back strains, it unsatisfactory for the mental claim. Dr. Neri did not know the Petitioner's history and his findings were not objectively measured.

It also bears mentioning that Dr. Neri stated there's been "little improvement" of the Petitioner's condition over the last two years. (Id. p. 27) However, this is clearly contradicted by Dr. Andrise's records, which show great improvement in the Petitioner's mental condition. (PX #7)

Dr. Neri's treatment of Petitioner was limited to prescribing and managing medications. (PX #8 p.23) He increased the Petitioner's dosage of Lyrica to three times a day (for lumbar radiculopathy - January 25, 2010) and added Lexapro and Ambien CR. It should be noted that the most common side effect of Lyrica is balance problems caused by dizziness, (Physicians' Desk Reference - 2014) the very symptom that he agreed to provide medical treatment.

As an aside, the Arbitrator notes that the Petitioner's medications and their (contraindications) include the following: Lyrica (dizziness and depression), Lexapro (depression), Clonozepam (depression and suicide), Zolpidem (decreased memory, hallucinations, confusion and depression), Ambien (memory loss). Of further note, at some point early in 2010, the Petitioner was being prescribed Lyrica by three different providers – Bolingbrook Family Medicine, Dr. Zindrick and Dr. Neri.

Dr. Neri was not cross examined about the medications he prescribed, but was asked if the Petitioner's dizziness could be related to his diabetic neuropathy, a common symptom. He replied that "it wasn't that simple," (Id. p.43) but did not elaborate.

It should also be noted that in looking at Dr. Neri's records as a whole, it is apparent that

he became frustrated with Respondent's rejection of his treatment recommendations, and his communication to them became less than professional. As a result, his opinions appear emotionally charged and biased. (PX #5)

As a result of the above, the Arbitrator does not adopt the opinion of Dr. Neri.

Nevertheless, the Petitioner continues to see Dr. Neri every month. Dr. Neri referred the Petitioner to Dr. Andrise, a psychiatrist (PhD).

Dr. Patricia Andrise

Dr. Patricia Andrise, a clinical psychologist, not a medical doctor, began treating the Petitioner in June of 2011, about one and a half years after his work accident and continues to treat the Petitioner presently. (PX #9) Petitioner pays for her services out-of-pocket. (Id. p.36) Despite this, and knowing that the Petitioner was unemployed, Petitioner was not offered any kind of discount or negotiated rate that would be routinely made with an insurer. (Id.)

At the time of Dr. Adrise's deposition, the Petitioner was "not currently very emotionally distressed." In fact, he had made excellent progress. (Dep. p.26 & 37) Nevertheless, Dr. Andrise opined that he cannot return to work. (Dep. p.28) Part of that reason is because he because he's now on disability. (Id. p.29) Dr. Andrise's expert medical opinion was that his past medical condition, "as best that can be determined" was "not necessarily due to the injury, but how he was treated by the state (of Illinois) in terms of the care of his injuries." (Andrise Dep. p.37-39) The Petitioner had an "emotional reaction to not understanding why he was being treated in the manner that he was treated." (Id. p.38) His current diagnosis is "traumatic brain injury and adjustment disorder. " (Dep. p.30)

The Arbitrator does not find Dr. Andrise's medical opinion to be compelling for the

following reasons. First, it bears repeating that the Arbitrator rejects the assumption that Petitioner suffered a traumatic brain injury as a result of the accident at work. While conceding that it is remotely possible that such an injury occurred, it does not seem likely, given the facts. Second, Dr. Andrise's opinion of causal connection is qualified and does not appear to be within a reasonable degree of medical certainty, as required by the law. Additionally, her causal connection statement is based upon how his claim was being handled, not the injury itself. As a result, it's not a legally viable theory of recovery at the Illinois Workers' Compensation Commission.

There are other concerns about Dr. Andrise's opinion that bear mentioning. First, she refused to forward her treatment records to Respondent despite receiving a valid waiver. She had to be asked three times to respond the subpoena issued by Petitioner's own attorney before complying. As a result, it appears that Respondent had to cancel their IME appointment with Dr. Obolsky, who needed to review the records before examining the Petitioner. These delays were unnecessary. Meanwhile, the Petitioner kept treating with Dr. Andrise and paid retail for the same.

Additionally, Dr. Andrise may not have fully complied with the medical records request. The ones surrendered may not be complete records, as required by law. (PX #7) To wit, the deposition transcript clearly indicates that Dr. Andrise knew the details of the "fragging" incident in Vietnam, (Dep. p.46) but her typed records bear no such details of that event. (Id.) In fact, the word "Vietnam" only appears a handful of times in the entire treatment record. (Id.) Hence, it may be that portions of her treatment records were omitted. As a result of the above, the Arbitrator does not find Dr. Andrise's opinion to be entirely trustworthy for the flowing reasons.

Dr. Andrise stated at her deposition that she had some paperwork regarding the

Petitioner's military and real estate license, but did not have them available for Respondent's counsel to review during the deposition. (Dep. p.44) In regard to the real estate license, she stated that the Petitioner wanted to "re-educate himself a little bit." (Id.) Later, the military papers were sent to Respondent's counsel for review, but not the ones regarding his real estate classes. Please consider this oversight with the following fact. On April 4, 2012, the Petitioner told Dr. Andrise wrote, "Jon is following up on his goals. He sold the condo with good follow thru. We will meet next week." (PX #7) Again, the Arbitrator suspects that portions of the treatment record may have been omitted which would demonstrate that the Petitioner can do more physically and cognitively than was presented to the court. Was he perhaps preparing himself to earn additional money working part-time as a real estate broker, an occupation he done in the past? Again, it appears that Dr. Andrise failed to surrender a full and complete copy of the medical records, possibly limiting Respondent's right to effectively cross examine the Petitioner and Dr. Andrise. Additionally, even if no records were withheld, it seems likely that Petitioner is capable of much more than he led the court to believe. As a result, the Arbitrator does not find Dr. Andrise's records or her opinion to be trustworthy.

Even of one were to believe that the above was innocuous, the record shows that Petitioner has no physical limitations that would prevent him from working at his old job, which is sedentary and involves simply answering the phone and doing clerical work. The Arbitrator notes that the permanent restrictions detailed in the functional capacity exam include limitations to body parts uninjured in the fall (left elbow, shoulders). Further, anyone reviewing the entire record would have to rhetorically ask themselves, "How can Petitioner be completely disabled yet keep track of multiple doctors' appointments, medications, and litigation claims during the course of five years?" It is remarkable to the Arbitrator how few medical appointments the

Petitioner missed or was late in attending. Petitioner never lost any weight. Finally, despite his vertigo, Petitioner never lost his ability to drive a car. Dr. Andrise's statement that the Petitioner's current inability to work was related his "lack of motivation and follow through" is not a strong enough statement to award additional benefits under the Act. (PX #9 pp.51-55)

There is additional evidence in the record of at least seven instances of symptom exaggeration. First, the Petitioner told Dr. Obolsky that after the fall at work, he "messed up his shoulders," (Obolsky p.74) but this is not borne by any treatment record. Second, Petitioner's walking cane is self-prescribed. Third, at his FCE, he complained of several orthopedic conditions that had nothing to do with his workers' compensation claim (elbow and shoulder) and quit doing those exercises because of them. Fourth, The Petitioner stated that he was told his bowel incontinence was due to his back condition, when in fact, he reported it as food poisoning. Fifth, Petitioner testified that his mental condition is "getting worse," but that was directly contradicted by his own treating physician, Dr. Andrise. (PX #7) Sixth, he testified that his 2007 psychological problems were related to Vietnam, but he seemed more troubled by a dispute with his daughter and son in law. Finally, he testified that he is now afraid of sitting in a chair, but this was not documented by any medical health care provider, or observed in court. Taken in its entirety, Petitioner's testimony showed that his memory and recall of past and current events was selective and self-serving. He appears to be able to do much more than he lets on and his limitations are not entirely genuine.

Dr. Alexander Obolsky

Please contrast the opinions of Drs. Neri and Andrise with the deposition transcript and

written report of Dr. Alexander Obolsky, Respondent's Section 12 examiner. (RX #3) Dr. Obolsky's professional qualifications are far and away superior to the Petitioner's treating physicians. (Id.) In contrast, Dr. Andrise is not a medical doctor. Dr. Neri does not specialize in PTSD, and instead seems to specialize in chronic pain and fibromyalgia.

Dr. Oblolsky, in his very thorough report and accompanying deposition transcript, opined that Petitioner suffers from an anxiety disorder not otherwise specified ("NOS") and a personality disorder NOS with schizotypal, schizoid, and avoidant features. (Obolsky Dep. p. 27-28) Dr. Obolsky also considered, after reviewing Dr. Andrise's medical records and psychotherapy notes, that Petitioner "has had a life-long condition of mental ill-being that includes thought and organizational difficulties, as well as emotional difficulties including personality issues, dysthymia, anxiety, and obsessional thinking." (Id. p.43) He further determined that these diagnoses were not related to Petitioner's injury on October 13, 2009. (Id. p.28) Dr. Obolsky did not diagnose Petitioner with PTSD or panic attacks.

In support of his opinion that Petitioner's current mental condition is not causally related to his work incident in October 2009, Dr. Obolsky highlighted that some of the tests Dr. Andrise performed on Petitioner were outdated. (RX #3) Dr. Obolsky used the current testing available to make his diagnoses and opinions. (Id.) Further, Dr. Obolsky determined that there was no evidence the Petitioner developed PTSD in Vietnam or due to his service in Vietnam. (Id.) Further he determined that if Petitioner suffered a traumatic brain injury, it would have been very mild and resolved itself inside of a year. (Id.)

Dr. Obolsky also addressed the fact that there is no evidence the Petitioner developed PTSD in Vietnam or due to his service in Vietnam, other than Petitioner's self-report. (Obolsky Dep. p.35) Dr. Neri and Dr. Andrise's records do not document a description of Petitioner's

symptoms. Id. For example, when Petitioner told them of nightmares, neither doctor asked about the nature and extent of them. Id. For nightmares to qualify as a symptom of PTSD, they have to be distressing to everyday or occupational functioning. (Obolsky Dep. p.36) They also have to be frequent, maybe three to five times a week at least. Id. They may occur several times at night, not only once. Id. They will make a person afraid to go back to sleep. Id. Also, the nightmares will be thematically consistent with the trauma. (Obolsky Dep. p.37) Petitioner was inconsistent with his reporting to Dr. Obolsky when compared to that of what Petitioner told to Dr. Neri and Dr. Andrise. Id. For example, Petitioner denied having symptoms of recurring thoughts about any traumatic events in Vietnam before his work injury, but this is not what he told Dr. Andrise. Id.

Dr. Obolsky also distinguished between nightmares and flashbacks. (Obolsky Dep. p.48) He defined a nightmare as a disturbing dream that happens when a person is asleep. Id. A flashback occurs when a person is awake and he re-experiences the traumatic event as if it is happening right now. Id. Dr. Obolsky opined that Petitioner was unable to distinguish between the two. Id. This was important to Dr. Obolsky because it became apparent that when Petitioner reported to Drs. Neri and Andrise that he had flashbacks, the doctors took him at his word and did not further document what event Petitioner was describing. Id. This is further corroborated by Petitioner's testimony where he misidentifies what he is experiencing as a flashback.

As for whether or not Petitioner suffered a traumatic brain injury, Dr. Obolsky determined that if he had, it would have been exceptionally minor and a "transient event." (Obolsky Dep. ps. 31-32, 41) Petitioner's visit to the doctor two days after the incident was an important factor because if Petitioner had a traumatic brain injury, the symptom onset would have been within hours, if not immediately. (Obolsky Dep. p.33) Further, if Petitioner had any

symptoms related to a mild traumatic brain injury, it would have resolved by the end of the first year. (Obolsky Dep. p.57) Further, Petitioner does not exhibit cognitive deficits related to his October 13, 2009 work event. Id.

Dr. Obolsky also opined within a reasonable degree of medical and psychiatric certainty that Petitioner was not exhibiting or experiencing any condition of mental ill-being that was caused by the work event on October 13, 2009. (Obolsky Dep. p.28)

Dr. Obolsky also opined within a reasonable degree of medical and psychiatric certainty that Petitioner does not experience a condition of mental ill-being that leads to impairment in work functions leading to an inability to work. (Obolsky Dep. p.28)

Dr. Obolsky opined within a reasonable degree of medical and psychiatric certainty that Petitioner does not experience a condition of mental ill-being caused by the work event that resulted in permanent disability. (Obolsky Dep. p.29)

Finally, Dr. Obolsky highlighted that Petitioner is not actually receiving treatment for PTSD from Drs. Neri and Andrise. (Obolsky Dep. p.49) He is not receiving medications that help people with nightmares. Id. Also, Dr. Andrise is not treating Petitioner with specific therapy focused on PTSD. (Id. ps.49 & 55) Rather, she is discussing with Petitioner his interpersonal relationships with his ex-wife, daughter, and son-in-law, as well as his emotional difficulties in order to help him deal with everyday life difficulties and find better coping mechanisms. (Id. ps.49-50) Dr. Andrise is not dealing with Petitioner's fall in 2009 or with events in Vietnam. (Id. Dep. p.55)

Based on all the above, the Arbitrator makes no award in favor of the Petitioner's psychological condition.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds that the medical services provided to Petitioner for his cervical and lumbar sprain/strain were reasonable and necessary. As a result, Respodent must pay any current outstanding medical bills until November 9, 2010, the date Dr. Zindrick stated the Petitioner was at MMI from an orthopedic standpoint.

As the Arbitrator finds that none of the PTSD or mental health issues are related to the work accident, medical treatment after November 9, 2010 is denied. The Arbitrator finds that the medical evidence and the IME Report of Dr. Obolsky indicate that Petitioner's current condition is not PTSD, nor is it causally related to a work-related injury. Therefore, Respondent is not required to pay for these charges.

K. Is Petitioner entitled to any prospective medical care?

The Arbitrator finds that Petitioner's mental condition is not causally related to a work-related injury and, consequently, the Respondent is not responsible for any prospective medical care for that condition. Medical care in this case is terminated when Dr. Zindrick stated that the Petitioner was MMI on November 9, 2010. (PX #4)

L. Is an award of TTD appropriate?

The Arbitrator finds that the Petitioner's current mental condition is not causally related to a work-related injury and, consequently, the Petitioner is not entitled to any additional TTD benefits. Respondent paid TTD until April 30, 2012, which is well beyond the year time frame that Dr. Obolsky indicated a mild traumatic brain injury would have healed and well beyond the

date of MMI by Dr. Zindrick. (PX #4) Respondent is liable for TTD benefits until November 9, 2010 for his cervical and lumbar strains. Petitioner's job description was sedentary and he could have returned to it any time afterwards, but decided not to do so.

M. Should penalties and fees be imposed upon Respondent?

Based on the evidence presented, the Arbitrator finds that penalties and fees against Respondent are not warranted. Respondent's conduct was neither vexatious nor unreasonable. Respondent has a legitimate and reasonable defense in this matter. As supported by Dr. Obolsky's IME, Petitioner does not suffer from PTSD or any other condition related to a work injury. Rather, Petitioner suffers from anxiety disorder NOS and a personality disorder NOS with schizotypal, schizoid, and avoidant features, which are also not related to Petitioner's injury on October 13, 2009. (Obolsky Dep. p.28) Finally, Dr. Obolsky opined that Petitioner is fit to return to work consistent with his education, training, skills and experience. (Id.) Therefore, IDES acted reasonably in denying benefits. It is apparent from the medical records that Petitioner's mental is not causally related to a work-related incident. For these reasons, this Arbitrator does not impose penalties or fees upon Respondent.

III. CONCLUSION

In summary, it is clear from Petitioner's medical records that he suffered from numerous ailments and conditions prior to his work incident and afterwards continued to suffer from these same conditions. Petitioner failed to establish by a preponderance of the evidence that his current condition of ill being is PTSD and that it is causally related to his injury. For these reasons the Arbitrator makes no award in Petitioner's favor.

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ARBITRATOR KURT CARLSON DATE

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARK THOMAS,

Petitioner,

vs. NO: 13 WC 36520

G T & M ENTERPRISES,

14IWCC1121

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, causation, medical expenses, temporary total disability (TTD) and prospective medical, and being advised of the facts and law, reverses the Decision of the Arbitrator with regard to accident, for the reasons stated below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Petitioner testified he worked for Respondent as an over-the-road truck driver. He also testified that he suffers from sleep apnea. Because of this, and because he is required to rest on long trips, he would use a CPAP machine when he would sleep in his semi-truck. Petitioner testified that he installed a permanent power cord, with supervisor Guy Morelis' permission, through the truck floor from the battery below his seat to his CPAP machine in the cab.

Because the truck Petitioner normally used was in the shop on October 12, 2013, he used a different truck for his run from Champaign, Illinois to Palestine, Arkansas. He began the trip around 2 a.m., arrived in Palestine around 10 a.m., started to make his way back and stopped in Charleston, Missouri for his 10 hour break. Because his normal truck was not available, he had

run a power line from the battery below the seat through the driver's side door threshold, and then behind the seat. He estimated that the cab of his truck was approximately four feet above ground level, and there were two step-ups to get to the threshold. He used the CPAP machine when he slept during his break in Charleston.

Petitioner arrived back in Champaign around 3 a.m. on October 13, 2013 and went to the Respondent's lot. He was pulling tandem trailers connected to one another with a dolly. He testified he did not notice ice in the parking lot and the weather was dry. He had not felt any symptoms of lightheadedness, dizziness, balance problems, etc., while he was unhooking the back trailer. After he did, he collected his belongings and pulled around to drop off the second (front) trailer. He testified that he remembers opening the driver's door, and the next thing he remembered was waking up on the ground, flat on his back with his feet pointed towards the truck. He wasn't certain how far he was from the truck, but noted it was still running, the door was ajar and the headlights were on. The front trailer was still connected to the tractor. He was unable to get up, but had his Bluetooth earpiece and was able to call 911 for help.

Two Arrow Ambulance emergency medical technicians were called to the scene. Austin Wingate testified that when they arrived the Petitioner was laying on the ground a couple of feet from his truck door, lying at an angle with his feet closer to the truck. The Petitioner was "altered" and "confused", and wasn't sure what had happened. He remembered driving in from another state and being let into the parking lot gate, but didn't recall anything after that. The truck was still running. He also testified there didn't appear to have been anything in the parking lot that would have caused Petitioner to slip. Joshua Fitzsimmons also testified that Petitioner had a difficult time trying to recall what had happened, and telling them what was wrong with him. He stated: "He didn't really complain of any pain, just noted that he did pass out and had a syncope episode". Mr. Fitzsimmons also testified: "The way he was laying didn't appear that he had slipped because there was nothing around him. It was just a clean parking lot, as I recall." On redirect he indicated that Petitioner actually didn't say he passed out, just that he recalled talking to the gate attendant and nothing after that until he awoke on the ground. The report of Arrow Ambulance from October 13, 2013 states: "The only thing he remembers tonight is picking up a load in Missouri and then talking to the gatehouse guard at the Champaign facility. He does not recall anything after that" (Petitioner's Exhibit 4).

Petitioner's supervisor, Guy Morelis, testified that when he was called about the Petitioner's incident, he initially went to Carle Hospital. When he spoke to the Petitioner, he was "out of it", indicating that all he knew was he was sitting in his truck, opened the door and the next thing he knew he was on the ground. Morelis discussed the situation with Petitioner's wife, Theresa Thomas, at the hospital, noting "we were coming up with scenarios while we were all sitting in the ER while (Petitioner) was laying on the bed", and "it was definitely speculative." He noted that he had given Petitioner permission to wire his CPAP machine to the truck battery. He told Mrs. Thomas that when he returned to the facility and viewed the truck, he noticed the wire was not hardwired in like it had been on Petitioner's usual truck.

Kelly Calhoun, a co-worker of Petitioner, received a call from Morelis on the morning of October 13, 2013 asking if he would disconnect the front trailer from Petitioner's truck. When he got to the truck, he noted that the back trailer and dolly had already been disconnected. When he went to get into the cab to move the truck, he noted a red wire coming out of the truck door to the battery box, with a lot of slack in it. He didn't know if the end of the wire going into the truck was connected to the CPAP machine or not. He didn't have any difficulty getting out of the cab. He didn't notice anything on the ground that he would have considered a hazard.

Petitioner's wife, Theresa Thomas, testified that after the incident she went to the hospital, and Mr. Morelis arrived about 20 minutes later. He drove Mrs. Thomas to the Respondent's facility to pick up Petitioner's personal vehicle. She did not enter the gated area where the semi-truck was parked. When Morelis and Calhoun came out from the gated area, Morelis indicated he thought he had determined how Petitioner had fallen, as when Calhoun was getting out of the truck cab he almost caught his foot on the wire running to the battery.

Petitioner's Exhibit 5 contains the emergency room records of Carle Hospital. The statement of nurse Meeker indicates the Petitioner was getting out of his truck, lost his footing and fell back, waking up on the ground. A separate history note from this E.R. visit indicates the Petitioner fell backwards while getting out of his truck. The notes also indicate Petitioner reported two syncopal episodes while at work that evening. Dr. Welch's report states: "The history is provided by the patient (Patient with HA, driving truck and getting out of truck fell and gets brought in by EMS . . .)." There is a statement in the E.R. report of Dr. Konzelmann indicating, "on further questioning, (Petitioner) states he believes he fell first and then passed out after hitting his head on the ground." A CT scan of the brain indicated no acute abnormalities. The same group of Carle records, all part of Petitioner's Exhibit 5, indicated no evidence of a scalp hematoma.

Petitioner's Exhibit 6 contains documents relating to Petitioner's request to amend Carle Hospital medical records, including changing the language "getting out of truck passed out and fell" to "tripped on cord and fell", as well as to change a syncopal episode to being "knocked out" after a fall.

Dr. Philbert Chen, an occupational medicine physician, testified that the Petitioner provided a history on October 15, 2013 of falling out of his truck. However, he noted Petitioner didn't recall all of the circumstances, and the next thing he remembered after dropping the back trailer and he dolly was being on the ground and dialing 911. (Petitioner's Exhibit 1). His initial report indicated Petitioner "basically blacked out, and fell out of his truck", noting he had some dizziness prior to the event. (Petitioner's Exhibit 7). He did not recall any slipping or tripping events. Petitioner complained of head trauma, dizziness, blurred vision, neck ache, balance problems and pain in the knees, left shoulder and low back. There was no obvious evidence of trauma such as cuts, scrapes, abrasions or a mass or depression in the head. He agreed that had Petitioner fallen from 5 to 8 feet and hit his head, he would expect to have felt a "goose egg" on the head. It was his assessment that the Petitioner had likely blacked out and then fell. He

testified that on November 8, 2013 the Petitioner came in to discuss the content of his medical records, and had "pieced together" the scenario where he had tripped over the CPAP wire, with Dr. P. Chen noting this was the first time he heard anything about tripping over a wire. In a report from neurologist Dr. R. Chen on January 14, 2014, the report states Petitioner "somehow passed out and fell down truck to the ground. He denied any symptoms before the event. In the beginning he was not sure how he fell. Later on found out it was a wire around the truck from his CPAP machine. Likely he tripped over the wire and fell down then passed out. Likely he only passed out for a couple of minutes and there were no signs of seizure". (See Petitioner's Exhibits 1 and 9 to 13).

The Commission finds that, based on the evidence presented, the Petitioner has failed to prove that he sustained an accident arising out of his employment with the Respondent on October 13, 2013.

It is axiomatic that, in order to prove up a compensable workers compensation claim, a Petitioner must show by a preponderance of the evidence that his injuries arose out of and in the course of his employment. *Horath v. Industrial Commission*, 96 Ill.2d 349, 449 N.E.2d 1345 (1983). Here, there is no question that the Petitioner was in the course of his employment, as he was in the process of dropping off his semi trailers when he sustained injury.

With regard to the arising out of element of the claim, the risk to which the claimant was exposed must first be analyzed. The risks to which an employee may be exposed are categorized into three groups: (1) risks distinctly associated with employment; (2) risks personal to the employee, such as idiopathic falls, and (3) neutral risks that have no particular employment or personal characteristics. *Illinois Consolidated Telephone Co. v. Industrial Commission*, 314 Ill. App. 3d 347, 732 N.E.2d 49 (2000).

Based on the Petitioner's testimony that he does not recall what occurred that led him to find himself on the ground beside his truck, the greater weight of the evidence leads to the inference that the Petitioner suffered some sort of syncopal event. As the Petitioner presented no evidence indicating there was a work-related cause for this syncopal event, we must conclude that it was idiopathic and personal to the Petitioner.

If the fall is idiopathic, resultant injuries are not compensable unless the employment significantly contributed to the injury by placing claimant in a position of greater risk of injury from falling. *Stapleton v. Industrial Commission*, 282 Ill. App. 3d 12, 668 N.E.2d 15, 217 Ill. Dec. 830 (1996). Resultant injuries are not compensable without a showing that the employment conditions significantly contributed to the injury by increasing the risk of falling or the effects of the fall. *Id.* The seminal case in this regard is *Rockford Hotel Co. v. Industrial Comm'n*, 300 Ill. 87, 132 N.E. 759 (1921). In that case the claimant was working on a catwalk above a cinder pit when he suffered an epileptic seizure/fit, resulting in a fall from the catwalk into the cinder pit below. While the court found that the seizure/fit was idiopathic and unrelated to the employment, the employment nevertheless put the Petitioner at a greater risk of injury by placing him in a

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dangerous position above the pit when the incident occurred. Based on that, the Court found the Petitioner sustained an accident arising out of the employment.

In order to fulfill his burden of proof, a claimant must show more than just an inability to explain why a fall occurred. "In addition to such inability, a claimant must present evidence supporting a reasonable inference that the fall stemmed from an employment-related risk. After all, the 'arising out of' requirement contemplates 'a causal connection between the accidental injury and some risk incidental to or connected with the activity an employee must do to fulfill [his] duties.' Awarding compensation for a purely unexplained fall would eviscerate this requirement." *Builders Square, Inc. v. Industrial Commission*, 339 Ill. App. 3d 1006, 791 N.E.2d 1308, 274 Ill. Dec. 897 (2003).

In this case, as noted by the Arbitrator, it is arguable that if the claimant fell from his truck at an above-ground height, and because of this height sustained a more serious injury, the case could be found compensable even if the initial cause of the fall was personal to the claimant. In the case at bar, any such determination would be clearly speculative. The only thing Petitioner was able to testify to was that he recalled opening his semi tractor door while he was in the cab, and the next thing he remembered was waking up on the ground. As the Appellate Court noted in *First Cash Financial Services v. Industrial Commission*, 367 Ill. App. 3d 102, 853 N.E.2d 799, 304 Ill. Dec. 722 (2006):

> ". . . circumstantial evidence can only support an inference which is reasonable and probable, not merely possible. *Mann v. Producer's Chemical Co.*, 356 Ill.App.3d 967, 974, 827 N.E.2d 883 (2005); *Stojkovich v. Monadnock Building*, 281 Ill.App.3d 733, 739, 666 N.E.2d 704 (1996). Where the evidence allows for the inference of the nonexistence of a fact to be just as probably as its existence, the conclusion that the fact exists is a matter of speculation, surmise and conjecture, and the inference cannot reasonably be drawn. *Carter v. Azaran*, 332 Ill.App.3d 948, 961, 774 N.E.2d 400 (2002); *Wiegman v. Hitch-Inn Post of Libertyville*, 308 Ill.App.3d 789, 795-96, 721 N.E.2d 614 (1999)."

Ultimately, in this case the Commission is left with several different possible scenarios surrounding how the Petitioner was injured on October 13, 2013. A thorough evaluation of all of the evidence leaves us with the impression that none of these possible scenarios is more likely to have occurred than any other. Under these circumstances, we must conclude that the Petitioner has failed to prove that he sustained a compensable accident.

Again, while it is arguable that there is an inference that Petitioner lost consciousness while still in the truck cab and fell from the cab, there is significant evidence that is not consistent with this scenario. It is clear to the Commission, based on the differing accounts of what happened or what may have speculatively happened, that the Petitioner really does not know what occurred that day. There are histories in evidence indicating that the Petitioner: a) may have suffered syncope while in the truck cab and fell, b) may have been climbing down and passed out and fell, c) may have been climbing down and tripped on a wire and lost

14IWCC1121

consciousness when he landed on the ground, and d) may have been standing next to the cab and suffered a syncopal event. Had the claimant fallen from the cab of his truck or had fallen backwards while getting out of his truck, then hit the ground and sustained a loss of consciousness as a result of the fall, we believe it to be very likely that there would have been some physical evidence of head trauma at the emergency room. Unfortunately, there is no way to know what actually occurred on October 13, 2013, and we find that any inference we may come up with would not be reasonably based on the preponderance of the evidence. Thus, the Petitioner has failed to prove he sustained an accidental injury arising out of his employment with Respondent.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is reversed, for the reasons indicated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 22 2014
TJT: pvc
o 11/3/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Przanowski,

Petitioner,

vs.

NO. 11 WC 35540

City of Des Plaines Department of Public Works, 14IWCC1122

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 permanent partial disability, causal connection and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 8, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court.

14IWCC1122

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

Stephen J. Mathis

DATED: DEC 22 2014
SJM/sj
o-11/13/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PRZANOWSKI, ROBERT
Employee/Petitioner

Case# **11WC035540**

14IWCC1122

CITY OF DES PLAINES DEPT OF PUBLIC WORKS
Employer/Respondent

On 10/8/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2724 LAW OFFICE OF THOMAS J STIBERTH
47 DuPAGE COURT
ELGIN, IL 60120

0863 ANCEL GLINK
BRITT ISALY
140 S DEARBORN ST 6TH FL
CHICAGO, IL 60603

14IWCC1122

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

Robert Przanowski
Employee/Petitioner

v.

City of Des Plaines Department of Public Works
Employer/Respondent

Case # **11** WC **35540**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **May 23, 2013, June 18, 2013, July 26, 2013,** and **August 19, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☒ TPD ☒ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Was there a bona fide job offer?**

FINDINGS

On **July 28, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**62,064.70**; the average weekly wage was $**1,193.55**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **2** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**29,238.03** for TTD, $**7,580.63** for maintenance, and $**10,000.00 advance against permanency, and $8,990.93 in underpayment of maintenance and TTD**, for a total credit of $**55,809.59**.

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 $**795.70**/week for **45 4/7**^{ths} weeks, commencing **July 29, 2011** through **June 12, 2012**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $**795.70**/week for **12** weeks, commencing **June 13, 2012** through **September 4, 2012**, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of $**29,238.03** for TTD, $**7,580.63** for maintenance, and $**10,000.00 advance against permanency, and $8,990.93 in underpayment of maintenance and TTD**, for a total credit of $**55,809.59**.

Respondent shall pay Petitioner permanent partial disability benefits, commencing **October 29, 2012**, of $**448.93**/week for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d) 1 of the Act.

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.

Walter Black

Signature of Arbitrator

October 7, 2013
Date

OCT 8 - 2013

FACTS

Petitioner worked for Respondent in its Department of Public Works as a street maintenance worker. On July 28, 2011, he sustained a right arm work injury when he slipped while attempting to climb the wet steps of a street sweeper. He sought treatment the same day at Alexian Brothers Medical Center Occupational Health Clinic and was referred to Dr. Mark Levin, an orthopedic surgeon at Barrington Orthopedics.

Dr. Levin diagnosed a right shoulder rotator cuff tear. On August 12, 2011, Dr. Levin performed right shoulder arthroscopic surgery consisting of repair of the rotator cuff, labral anterior debridement, and subacromial bursectomy. Petitioner underwent post surgical physical therapy but continued to be symptomatic. Dr. Levin ordered an MRI arthrogram, which revealed a retear mildly retracted. On January 4, 2012, Dr. Levin performed a second arthroscopic procedure on Petitioner's right shoulder consistingof a revision repair of a recurrent rotator cuff tear. Petitioner underwent post-operative physical therapy, work hardening, and a valid functional capacity evaluation.

On June 12, 2012, Dr. Levin released Petitioner with permanent restrictions, as outlined in Petitioner's functional capacity evaluation, of occasional lifting up to 36 pounds, frequent lifting no greater than 18 pounds, and constant lifting no greater than 7 pounds. Petitioner was further limited to no overhead reaching, maximum of 5 pounds lifting at or up to shoulder level, reaching rarely at shoulder level, and no right arm above shoulder level for any work activity. Dr. Levin noted that Petitioner would likely have difficulty driving a large commercial vehicle due to discomfort with twisting at the shoulder.

Petitioner then reported to Respondent and inquired whether Respondent could accommodate Petitioner's permanent restrictions. Respondent advised it could not. Petitioner requested vocational rehabilitation. Respondent did not do so. Petitioner began a self-directed job search within his restrictions and began receiving weekly maintenance benefits commencing June 13, 2012.

Petitioner's claim continued in this manner until Friday, August 31, 2012. On that date, Timothy Ridder, Respondent's assistant director of Public Works and Engineering, contacted Petitioner by telephone and certified mail. Petitioner was ordered to report back to work on September 4, 2012, the Tuesday after Labor Day. Ridder advised that Respondent had determined it could accommodate Petitioner's job restrictions. Ridder followed this conversation with a certified letter to Petitioner the same day. Petitioner was advised that under no circumstances would he be permitted to exceed the permanent restrictions placed upon him by his physician. Petitioner told Ridder that he would need to discuss the matter with his attorney and his physician.

Thereafter, an e-mail exchange occurred between Petitioner's legal representative and Respondent's legal representative further discussing Respondent's offer. In an e-mail dated September 7, 2012, Respondent's legal representative confirmed that the position offered to Petitioner was temporary in nature and would only be available to petitioner for ninety days, with the expectation that Respondent would be in a position within that time frame to offer a permanent position to Petitioner. Respondent's representative stated that Respondent had not yet decided whether it would make the temporary position permanent and that it was, in fact, possible that

Respondent's City Council would need to get involved in order to make this job permanent. Respondent's counsel further advised Petitioner would receive his full wages during this time period.

Petitioner did not return to the position offered by Respondent, and he continued in his job search. Petitioner's representative subsequently responded in an e-mail advising that Petitioner would not abandon his job search efforts for three months to work in a position that was temporary in nature and not expected to last beyond ninety days, as doing so would do little to advance Petitioner in his ultimate pursuit of finding regular and continuous work in a reasonably stable labor market. Petitioner, through his representative, contended that Respondent's attempt to return Petitioner to a temporary job for ninety days did not constitute regular and continuous employment within a reasonably stable, identifiable labor market. Petitioner's counsel indicated that Petitioner would continue to welcome and consider any offer of permanent, regular and continuous employment which existed in a reasonably stable labor market, should Respondent desire to make such an offer.

On September 14, 2012, following a pre-disciplinary hearing, Respondent terminated Petitioner's employment effective September 4, 2012 citing unauthorized absence without leave, refusal to comply with instructions from supervisor, refusal to accept a work assignment, and insubordination. Petitioner's maintenance payments were terminated effective September 4, 2012.

On October 29, 2012, Petitioner found full-time employment as a parts delivery driver for MVP services delivering light parts with the use of his own vehicle. Petitioner's hours gradually decreased to the point that on January 9, 2013, he quit his employment and resumed a self-directed job search.

After beginning employment with MVP Services, Petitioner met with Lisa Helma, a certified vocational rehabilitation counselor with Vocamotive, Inc. on October 31, 2012, for the purpose of a vocational rehabilitation evaluation. Ms. Helma reviewed Petitioner's work history, educational background, medical restrictions, and job search. She also reviewed the position offered by Respondent to Petitioner. Ms. Helma opined that the position Petitioner had located as an auto parts delivery driver for MVP Services was suitable and that the wage he earned from this position, which she calculated to be $14.50 per hour was higher than what she was used to seeing from similar individuals. Ms. Helma opined that based upon his background and physical restrictions Petitioner's current earning capacity would probably be between $9.00 per hour and $11.00 per hour.

With respect to Respondent's August 31, 2012 offer of employment to Petitioner, Ms. Helma opined that the position offered to Petitioner did not exist in a reasonably stable labor market. Ms. Helma opined that the position offered to Petitioner did not directly correlate with any known position in the recognized labor markets. The level of accommodation offered to Petitioner was excessive. If Petitioner were to lose this position, he would not be able to find a similar one in the marketplace.

With respect to the wage which Respondent offered to Petitioner for the position outlined in its August 31, 2012 memorandum, Ms. Helma opined that the amount Respondent agreed to pay Petitioner for this was inflated, as a review of the job duties, all of which involved unskilled labor, typically paid minimum wage to $9.00 per hour.

Ms. Helma opined that based upon Petitioner's present restrictions he could not return to his previous position of employment with Respondent as a street maintenance worker. Ms. Helma opined that Petitioner suffered an impairment of earnings as a result of his work injury, and, although Petitioner was earning $14.50

per hour at the time of her evaluation, it was her understanding Petitioner had lost that job due to the economy and that his most probable wage-earning potential was between $9.00 and $11.00 hourly.

MAINTENANCE

Petitioner declined the temporary 90 day light duty job that was made available to him. Although he did not agree with the tone, manner, or circumstances of being ordered to return to work, he should have done so. By declining a temporary light-duty position, Petitioner conceded to the termination of maintenance.

Therefore, Petitioner is entitled to maintenance through September 4, 2012 and not thereafter.

WAS THERE A *BONA FIDE* JOB OFFER?

Lisa Helma's opinions are persuasive on this issue. Lisa Helma opined that the position offered to Petitioner did not exist in a reasonably stable labor market, that the position offered to Petitioner did not directly correlate with any known position in the recognized labor markets, that the level of accommodation offered to Petitioner was excessive, and that if Petitioner were to lose this position, he would not be able to find a similar one in the marketplace.

The Arbitrator adopts Lisa Helma's opinions.

Furthermore, the temporary 90 day light duty job offer was designed to avoid permanent liability under the Act. It was not offered until the Friday of a Labor Day weekend with an order to report to work for the following Tuesday. The arbitrator is aware that Respondent's witnesses felt that the 90 day job might become permanent. The arbitrator is not persuaded by Respondent's witnesses.

Based upon the foregoing, the Arbitrator finds that there was not a *bona fide* job offer for a permanent position.

NATURE AND EXTENT

The testimonial evidence, the medical evidence, and the vocational evidence demonstrate that Petitioner is incapable of returning to his previous job. Petitioner has chosen the remedy of a wage differential.

If Petitioner not been injured and had been able to continue in his line of employment as a street maintenance operator he would have been earning $65,177.00 annually, or $1,253.40 per week. Petitioner was able to earn $14.50 per hour, or $580.00 per week, as demonstrated by his ability to work as an auto delivery driver for MVP Services, Inc.

Based upon the foregoing, Petitioner is entitled to a wage loss award of $448.93 per week, which is two-thirds the difference between $1,253.40 per week and $580.00 per week, commencing on October 29, 2012 and continuing weekly thereafter at a rate of $448.93 for the duration of his disability.

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

Salvatore Calomino,

Petitioner,

vs.

NO: 04 WC 27815
06 WC 31395
09 WC 09178

United Airlines, Inc.,

14IWCC1123

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 permanent partial disability, causal connection and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that commencing on the Second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 20, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

14IWCC1123

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $56,800.00. 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: DEC 23 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:11/13/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CALOMINO, SALVATORE
Employee/Petitioner

Case# **04WC027815**
06WC031395
09WC009178

UNITED AIRLINES INC
Employer/Respondent

14IWCC1123

On 12/20/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1927 GESSLER HUGHES & SOCOL LTD
MARK WEINER
70 W MADISON ST SUITE 4000
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
MARK MATRANGA
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

14IWCC1123

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

Salvatore Calomino
Employee/Petitioner

v.

United Airlines, Inc.
Employer/Respondent

Case # **04** WC **27815**

Consolidated cases: **06 WC 31395; 09 WC 9178**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Chicago**, on **11/6/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. x Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. x Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. x What temporary benefits are in dispute?
☐ TPD ☐ Maintenance xx 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 **5/16/04, and 5/25/06**, Respondent *was* operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship *did* exist between Petitioner and Respondent.

On these dates, Petitioner *did* sustain an accident that arose out of and in the course of employment. **SEE DECISION**

Timely notice of these accidents *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident of **5/16/04. SEE DECISIONS**

In the year preceding the injury, Petitioner earned **$79,538.94**; the average weekly wage was **$1,529.60**.

On the date of accident, Petitioner was **45** 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 **$454,360.87** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$454,360.87**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,019.73/week for 501-1/7 weeks, commencing 5/17/04 through 11/6/13, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $454,360.87 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner permanent and total disability benefits of **$1,019.73**/week for life, commencing **11/6/13**, as provided in Section 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Carolyn Doherty
Signature of Arbitrator

12/20/13
Date

DEC 20 2013

FINDINGS OF FACT

Petitioner, a 45 year old ramp serviceman, testified that he began working for Respondent in 1987. In May 2004, Petitioner's job title was lead ramp serviceman. His duties included loading and unloading freight bags off planes. Petitioner was required to lift passenger bags, freight, mail sacks and boxes. Petitioner manually lifted over 100 pounds in addition to using a loader for greater weights. Petitioner's highest level of education was one year of high school.

On May 16, 2004, Petitioner was working at the international post office at O'Hare Airport. Petitioner offered to help a co-worker dump a container of mail. Petitioner lifted a 100 pound bag of mail and sustained injury to his right shoulder, cervical area and elbow. The parties stipulated to accident. Petitioner has not returned to work since that day.

Petitioner sought emergency treatment and then began treatment with a chiropractor Dr. Cavazos who gave chiropractic adjustments and conservative therapy.(P ex. 1 and 2) Dr. Cavazos sent Mr. Calomino for an MRI of the right shoulder on May 19, 2004, which showed post traumatic bone bruising of the humeral head and rotator cuff tendinitis and bursitis. Petitioner did not receive relief from the treatment.

On June 30, 2004, Petitioner began treatment with Dr. Montella. Dr. Montella initially diagnosed cervical disc herniation and radiculitis. Petitioner treated conservatively. He underwent an MRI of his cervical area in August 2004 which Dr. Montella read to show cervical disc herniation at C4-5 and C5-6. Dr. Montella administered a right shoulder subacromial steroid injection on 9/21/04 for diagnostic and therapeutic purposes to see if Petitioner would obtain any relief to the overlapping cervical and radiating arm pain. Over the next few months, Dr. Montella also performed cervical injections with only temporary relief.

After the failure of further conservative treatment, Petitioner underwent right shoulder arthroscopic surgery and subacromial decompression on 7/26/05 at Alexian Brothers followed by physical therapy. The post surgical diagnosis was right shoulder impingement syndrome. Petitioner testified that his shoulder improved after the surgery and during physical therapy. Petitioner had an FCE on 4/18/06 and then attended work hardening as prescribed by Dr. Montella.

Petitioner testified that on 5/25/06, while undergoing work hardening, he injured his back. Specifically, Petitioner testified that he had pain in the center of his low back down his right hip and into the groin area while lifting a crate from the ground containing weight of 40 to 50 pounds. Petitioner testified that he continued for a few more weeks in work hardening but "it didn't go well." Petitioner testified that he told the therapists about the back and groin pain and that they tried to treat the pain in those areas with physical therapy. Petitioner went back to Dr. Montella in June 2006 and reported injuring his back at work hardening. Dr. Montella noted that Petitioner was "exerting himself at work conditioning and noticed the onset of back pain that was relatively severe. He was still having difficulties with his neck and shoulder and now a new onset of back pain while at work." PX 10, p. 10. Dr. Montella ordered a lumbar MRI which was performed in August 2006. The MRI was consistent with a lumbar disc herniation at L5-S1 and L4-5. PX 10, p. 11.

In September 2006, Dr. Montella sent Petitioner to a podiatrist for one visit to be fitted for orthotics in order to shield his back from stress. PX 10, p. 12. Dr. Montella testified that Petitioner was not returned

to work at that time due to ongoing neck and radiating shoulder pain, elbow pain and low back pain. PX 10, p. 12. Petitioner continued to treat with Dr. Montella in 2006 for complaints to his right elbow and for continued complaints to his low back. In addition, Petitioner testified that his shoulder pain increased due to overuse.

In January 2007, Dr. Montella continued Petitioner off work and prescribed physical therapy, anti-inflammatory and chiropractic care. PX 10, p. 13. Petitioner had a right elbow MRI on 1/25/07 which indicated an elbow joint effusion and loose body consistent with an intraarticular injury. PX 10, p. 13. In February 2007, Petitioner received a steroid injection to his low back and continued to treat for his low back and hip complaints with Dr. Montella.

In May 2007, Petitioner began treating with Dr. Lopez for his right elbow. Dr. Lopez performed arthroscopic surgery on Petitioner's right elbow July 27, 2007. Petitioner testified that his right elbow pain started with the accident in May 2004 and that it took three years to obtain a right elbow surgery.

Petitioner returned to Dr. Montella on 10/17/07 for complaints to his back, neck and radiating arm pain. Neck, back, shoulder and elbow pain continued at the next visit of 1/9/08 and because the back and hip complaints overlapped, Dr. Montella ordered right hip MRI. Following the MRI, Dr. Montella diagnosed ongoing difficulties with cervical disc herniation, shoulder impingement, elbow instability, lumbar disc herniation and hip chondral injury. Increased activity brought about increased pain. PX 10, p. 15.

Petitioner attended a second FCE on March 4, 2008. Petitioner was not able to complete the FCE due to back and hip pain. As of 9/5/08, Dr. Montella advised Petitioner that he could consider surgery on his back and/or hip. Petitioner continued to treat with Dr. Montella. Petitioner underwent lumbar injections and a right hip MRI on 4/6/09 and lower extremities EMG on 4/7/09. On 6/25/09, Petitioner had another lumbar MRI which showed worsening disc herniation at L5-S1 and the presence of the L4-5 herniation. PX 10, p. 18.

On 7/13/09, Petitioner saw Dr. Lopez for complaints of right hip and groin pain. PX 11, p. 8. Petitioner demonstrated a limp. Dr. Lopez diagnosed right hip osteoarthritis and initiated conservative management of anti inflammatories, physical therapy and home exercises and orthotics. It was his opinion that Petitioner's "right hip problem was caused by and aggravated by the type of work that he did for the airlines" which included loading and unloading luggage. PX 11, p. 11. He specified that the hip injury was due to overuse or aggravation in that there was no specific incident that aggravated the arthritis. He testified that "osteoarthritis can be caused by a traumatic injury or it can have an additive effect from microtrauma and types of things that you are doing." PX 11, p. 14. Dr. Lopez believed Petitioner was working at that time as he had returned Petitioner to work after the elbow treatment in February 2008. PX 11, p. 16.

Dr. Montella continued to treat Petitioner on occasion through 2011 and then a few months before trial. He continued Petitioner on anti-inflammatory medication and well as narcotic pain medication to handle flare ups of pain. In his opinion, Petitioner injured his right shoulder, elbow and neck exerting himself at work and the diagnosis are buttressed by the objective test results and intraoperative findings. With regard to Petitioner's right hip and back injury, Dr. Montella opined that "...I think it was his exertion while attempting to return to work from his work related injuries, I believe, in the form of work

conditioning." PX 10, p. 20. Petitioner had no problems with his back or hip prior to work conditioning. The diagnosis was lumbar disc herniation and hip chondral injury. PX 10, p. 21.

Finally, Dr. Montella opined "I don't think he should work" and continued, "well his orthopedic pathology individually, each individual diagnosis standing alone would be enough to render him disabled because of the increasing pain with any level of increasing exertion, but he has a constellation of orthopedic injuries that conspire to render him permanently, totally disabled. I think it would be safe for him to try to work around the house but I don't think it would be safe for him to participate in any line of work, because even sedentary exertion leads to increasing pain which puts him at risk for increasing dependency on narcotic pain medication, which would ultimately have significant health ramifications." PX 10, p. 22. On cross, Dr. Montella testified that he was not an expert in vocational rehab and did not personally perform any testing to determine Petitioner's physical capabilities.

With regard to his vocational efforts, Petitioner met with Anita Johnson at Corvel. Petitioner worked with Ms. Johnson for two years without success in finding a job. Petitioner was requested to obtain a GED so he underwent tutoring. Petitioner was not successful in obtaining a GED as his test levels were that of 5th to 6th grade.

Petitioner testified that he currently has pain over 85% of his body. Specifically, he has pain in his right hip, back, both shoulders, both knees, and both ankles. Petitioner used a walker at trial. He testified that he also uses a cane prescribed by Dr. Montella. The right shoulder pain increases when Petitioner lifts items or puts pressure on it while using the walker. He has some pain in his right elbow which Dr. Lopez advised would continue due to the arthritis in the right elbow. He takes his pain medication as needed but not every day. His last visit to Dr. Montella was 4 months before trial to obtain prescription medication. His last active treatment with Dr. Montella was in 2011 when he was advised to perform light exercise and stretching.

Petitioner further testified that surgery for his low back and right hip has been mentioned but that the need is not imminent.

Petitioner attended multiple Section 12 exams. On 7/22/04, Petitioner saw Dr. Ira Kornblatt and reported cervical and right shoulder and elbow pain. PX 14, p. 8. He reviewed Petitioner's MRI exams and determined that Petitioner sustained an injury to the right shoulder girdle and right elbow dating back to May 16, 2004. He had findings compatible with rotator cuff tendinitis, low grade lateral epicondylitis of the right elbow and possible cervical radiculopathy . He determined Petitioner could not work his normal job but could work with one arm. PX 14.

After reviewing the cervical MRI from August 2004 showing a cervical disc bulges without significant spinal stenosis or neural foraminal narrowing he determined that the MRI findings did not correlate with Petitioner's complaints. He recommended an EMG to determine nerve root irritation and then referred the parties to his brother Dr. Michael Kornblatt for re evaluation regarding the cervical spine complaints. PX 14, p. 15.

Dr. Ira Kornblatt performed a second Section 12 exam on 6/22/05 and Petitioner complained of ongoing cervical pain, right shoulder and right elbow pain. Dr. Kornblatt's opinion remained unchanged in that he determined Petitioner had significant disability due to right shoulder impingement, lateral epdicondylitis

of the right elbow and degenerative disc disease of the cervical spine. He continued that Petitioner was unlikely to return to his previous job activity. PX 14, p. 19.

Following Petitioner's arthroscopic right shoulder surgery in July 2005, Dr. Ira Kornblatt saw him again for a third exam on 1/11/06. He determined that Petitioner had reached MMI for his right shoulder injury and his right elbow injury based on a "paucity of objective findings to substantiate ongoing subjective complaints" and recommended an FCE. PX 14, p. 23. Following the FCE, Petitioner started his work conditioning and during the work conditioning he developed recurrent right shoulder pain and right elbow pain. PX 14, p. 26. Dr. Kornblatt performed another Section 12 exam in February 2007 and noted these complaints. He reviewed another right elbow MRI and determined that Petitioner had possible loose bodies and a radial collateral ligament tear in the right elbow. PX 14, p. 27. Dr. Kornblatt opined that Petitioner had recovered from the shoulder injury but had right the elbow injury and that it was "impossible" for him to determine whether it was the result of the work injury. PX 14, p. 28. He agreed that right elbow arthroscopy was indicated. Finally, with regard to his work ability, Dr. Kornblatt opined that "he was not capable of returning to his previous job activities" and that he doubted Petitioner would ever be able to do so due to his right shoulder injury. PX 14, p. 29. Dr. Ira Kornblatt did not evaluate Petitioner's low back complaints.

The final Section 12 exam performed by Dr. Ira Kornblatt was on 8/13/08 following Petitioner's right elbow arthroscopy in 2007 and the FCE of March 2008. Dr. Kornblatt determined that Petitioner was at MMI for the right elbow but he was unable to determined Petitioner's work ability with regard to his right elbow only. PX 14, p. 34-39. Dr. Kornblatt determined it was too difficult to separate his elbow injury from all of Petitioner's other injuries to opine on work ability relating to the elbow only. PX 14, p. 39.

Petitioner underwent a Section 12 exam with Dr. Michael Kornblatt on 9/22/04. He reviewed the August 2004 cervical MRI and determined disc bulges at C4-5 and C5-6. He examined Petitioner and found no significant objective abnormal findings and his diagnosis was cervical degenerative disc disease. He felt Petitioner could work with a 20 pound restriction. His next exam was on 5/2/05 at which time Petitioner showed tenderness with palpation of his right lateral epicondyle which Dr. Kornblatt opined was not a finding consistent with the MRI's and NCV studies performed in 2004 nor with Petitioner's history of lifting at work. RX 1, p. 11. In his opinion, Petitioner sustained a cervical strain in the 2004 work accident and was at MMI for the cervical strain as of 5/2/05. He had no opinion on Petitioner's shoulder complaints. He opined that Petitioner could work light sedentary duties with no overhead work and limited lifting ten to fifteen pounds. RX 1, p. 14. He opined that Petitioner did not need further treatment for his neck.

His last exam of Petitioner was on 1/28/08. Dr. Kornblatt reviewed the lumbar MRI from August 2006 revealing left sided disc herniation cussing stenosis at L5-S1 and a bulge at L4-5 without stenosis and arthritis of the spine. RX 1, p. 18. He opined that since there is no documentation of an injury occurring to the lumbar spine he determined that condition to be consistent with two level degenerative disc disease of the lumbar spine. RX 1, p. 19,23. He also testified that in his report he mentioned that Petitioner sustained a lumbar strain while performing work hardening "which is a self-limiting entity" but had reached MMI for the strain as of 1/28/08. An x-ray revealed right hip degenerative arthritis as well. RX 1, p. 22. Conservative treatment was recommended for the hip. Dr. Kornblatt determined that Petitioner should be permanently restricted to light duty work "as a result of his deconditioned state, multiple areas of degenerative arthritis involving his lumbar spine and his right hip." He did not make any

determinations based on the right shoulder as he did not examine the shoulder. Finally, he determined that the right hip was not related to the work incident of 2004. RX 1, p. 27. Dr. Kornblatt opined that Petitioner did not suffer any disability due to the cervical and lumbar strains.

Petitioner was evaluated by Dr. Coe on 5/3/11. PX 12, p. 5. Dr. Coe reviewed Petitioner's medical records as well. Based on his review of the medical records and on his exam of Petitioner, Dr. Coe opined that Petitioner's right shoulder, right elbow and neck conditions were related to his lifting stacks of mail on 5/16/04 at work. PX 12, pp. 42-44. He further opined that Petitioner's back and right hip injuries were the result of the work hardening in May and June 2006 performed as part of his rehab for the neck and right shoulder/arm injury. PX 12, p. 44. He found there to have been a specific injury to Petitioner's low back resulting in a disc herniation and aggravation of his degenerative disc disease and right hip arthritis. PX 12, p. 44. Further he testified that Petitioner's work duties for Respondent caused repetitive type injury to his back and right hip. PX 12, p. 45. As of May 2011, he opined that Petitioner could not work due to the condition of his right hip and lower back and that he needed work restriction due to the conditions of his right shoulder, elbow and neck. PX 12, p. 46.

Anita Johnson testified in her capacity as Petitioner's vocational case manager at Corvel. PX 15, p. 5. She first met with Petitioner in December 2008. Ms. Johnson performed an initial vocational report with a transferrable skills analysis and a labor market survey. Ultimately, she performed job placement services as well. PX 15, p. 11. Ms. Johnson managed Petitioner's case for almost three years. Petitioner had no GED, less than a high school education, and no computer skills. Petitioner's FCE of 3/17/08 placed Petitioner at a sedentary work ability as a result of low back and hip pain. PX 15, p. 14. Ms. Johnson attempted to help Petitioner find sedentary work at an unskilled entry level, minimal computer skills with flexibility in sit/stand/walk tolerances and primarily focused on communication skills. PX 15, p. 15. In addition Petitioner received GED tutoring but Petitioner did not sit for the GED exam. Petitioner was cooperative with the efforts but he did not find a job. PX 15, p. 16. On cross-exam, Ms. Johnson testified that in 2008 the economic climate was stable with a downturn in 2009 through 2011. However, she testified that all of the jobs identified for Petitioner were positions that she believed Petitioner could have worked given his educational level and physical capacities. PX 15, p. 20. She further testified that if Petitioner had continued with her he could have found work once the economy improved. PX 15, 23. She did not recommend that services be terminated.

Tom Grzesik testified in his capacity as a certified rehab counselor who began working with Petitioner in May 2011. He noted the FCE of March 2008 limiting Petitioner to sitting, standing and walking occasionally and alternately and his sedentary work category secondary to his low back and hip issues. PX 13, p. 15-16. He administered standard testing with Petitioner scoring between grade school and high school levels. PX 13, pp. 20-24. Based on these results and following his review of Petitioner's FCE, he determined that Petitioner was not a candidate for participation in a formal academic or vocational training program. PX 13, p. 25. He reviewed the reports from Corvel that determined Petitioner could work within his restrictions as a parking garage attendant, inspector and assembler. He noted that Petitioner did not find a job and that in his opinion Petitioner was not employable based on the opinions of Drs. Montella and Coe, the findings of the FCE, Petitioner's age and his extreme reading, comprehension and math limitations. PX 13, p. 29-30.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

C. Did an accident occur that arose out of an in the course of Petitioner's employment by Respondent? F. Is Petitioner's current condition of ill-being causally related to the injury?

On the issue of accident in all three consolidated matters, the Arbitrator finds that Petitioner sustained accidental injuries to his right shoulder, elbow and cervical area on May 16, 2004 while lifting mail bags. The Arbitrator notes that Respondent stipulated to the accident of 5/16/04. The Arbitrator further finds Petitioner sustained additional accidental injuries to his low back and right hip on May 25, 2006, while in work hardening for the original work related injuries. Specifically, the Arbitrator finds that the low back and right hip symptoms arose and manifested during work hardening activities which aggravated these pre-existing arthritic conditions. The Arbitrator's findings on the issue of accident on May 25, 2006 are buttressed by Petitioner's testimony, the medical records and the opinion of Dr. Montella and Dr. Lopez.

Further, the Arbitrator finds causal connection for Petitioner's right shoulder, cervical, right elbow, low back and right hip conditions. The Arbitrator again notes that the right shoulder, cervical, and right elbow injuries occurred acutely on 5/16/04 and that the low back and right hip conditions arose during subsequent work hardening for the original injuries manifesting on 5/25/06. Consequently, the Arbitrator finds that the injuries occurring during work hardening are casually related to the original accident of 5/16/04. Dr. Montella opined that Petitioner injured his right shoulder, elbow and neck exerting himself at work and the diagnosis are buttressed by the objective test results and intraoperative findings. With regard to Petitioner's right hip and back injury, Dr. Montella opined that "...I think it was his exertion while attempting to return to work from his work related injuries, I believe, in the form of work conditioning." PX 10, p. 20. Petitioner had no problems with his back or hip prior to work conditioning. The diagnosis was lumbar disc herniation and hip chondral injury. PX 10, p. 21.

Dr. Ira Kornblatt agreed that the right shoulder and neck injuries were proximately caused by the May 16, 2004 occurrence. PX 14. Dr. Lopez opined that Petitioner's "right hip problem was caused by and aggravated by the type of work that he did for the airlines" which included loading and unloading luggage. PX 11, p. 11. He specified that the hip injury was due to overuse or aggravation in that there was no specific incident that aggravated the arthritis. He testified that "osteoarthritis can be caused by a traumatic injury or it can have an additive effect from microtrauma and types of things that you are doing." PX 11, p. 14.

Finally, Dr. Coe indicates that the neck, right shoulder and right elbow injuries were proximately caused by the May 16, 2004 work accident. PX 12. He further opined that Petitioner's back and right hip injuries were the result of the work hardening in May and June 2006 performed as part of his rehab for the neck and right shoulder/arm injury. PX 12, p. 44. He found there to have been a specific injury to Petitioner's low back resulting in a disc herniation and aggravation of his degenerative disc disease and right hip arthritis. PX 12, p. 44. The Arbitrator notes again that Petitioner's pre-existing degenerative conditions in his low back and right hip were asymptomatic until the work hardening in May 2006 lending further support to a finding of causal connection. In finding causal connection for all of Petitioner's conditions of ill-being, the Arbitrator assigns greater weight to the opinions of Drs. Montella,

Lopez, Ira Kornblatt and Coe than to the opinion of Dr. Michael Kornblatt who opined that Petitioner sustained a lumbar strain during work hardening.

Lastly, the Arbitrator notes that Petitioner filed a third consolidated claim 09 WC 9178 also with an accident date of 5/25/06. With regard to 09 WC 9178, the Arbitrator refers to the findings above on the accident date of 5/25/06. The Arbitrator makes no separate findings in case 09 WC 9178 as none were requested by Petitioner at trial.

K. What temporary benefits are in dispute? TTD.

Based on the findings on the issues of accident and causal connection, the Arbitrator further finds that Petitioner is entitled to ttd benefits of $561,449.81, representing 501 1/7 weeks from May 17, 2004 through November 6, 2013. Respondent is entitled to a credit of $454,360.87 representing ttd benefits previously paid through November 6, 2011. ARB EX 1.

Petitioner has not worked since the date of the work accident on May 16, 2004. Mr. Calomino has either been restricted to light duty work or off work entirely by his treating physicians. No light duty work was ever provided to Mr. Calomino.

L. What is the nature and extent of the injury?

In order to prove entitlement to permanent total disability benefits for life pursuant to §8(f) of the Act, a claimant must prove such a claim either (a) by a preponderance of the medical evidence, (b) by showing a diligent but unsuccessful job search, or (c) by demonstrating that because of his age, training, education, experience and condition no jobs are available to a person in like circumstances. See *ABB C-E Services v. Industrial Commission*, 250 Ill.Dec. 60, 737 N.E.2d 682, 316 Ill.App. 3d 745 (5th Dist. 2000).

An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of wages to him. *A.M.T.C. of Illinois v. Industrial Commission*, 77 Ill.2d 482, 487 (1979). The employee, however, need not be reduced to total physical incapacity before a permanent total disability award may be granted. *Ceco Corp. v. Industrial Commission*, 95 Ill.2d 278, 286-87 (1983). Rather, the employee must show that he is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *Alano v. Industrial Commission*, 282 Ill.App.3d 531, 534 (1996). If the employee's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, he may qualify for "odd lot" status. *Valley Mould & Iron Co. v. Industrial Commission*, 84 Ill.2d 538,546-47 (1981). An odd-lot employee is one who, though not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market. *Valley Mould*, 84 Ill.2d at 547.

In the present case, based on the record in its entirety, the Arbitrator finds that Petitioner has met his burden to prove his permanent and total disability by a preponderance of the medical evidence as well as under an "odd-lot" theory of permanent total disability. The Arbitrator initially notes that Petitioner credibly testified at trial, as buttressed by his physical appearance, that he has pain in over 85% of his

body. Petitioner appeared at trial using a walker which the Arbitrator observed to be necessary and not simply demonstrative. The Arbitrator further notes that Petitioner worked 17 years in a heavy capacity loading baggage and freight for Respondent prior to his injury in 2004.

On the issue of medical permanent total disability, the Arbitrator notes Dr. Montella's opinion that Petitioner is permanently and totally disabled. Specifically, Dr. Montella testified "I don't think he should work" and continued, "well his orthopedic pathology individually, each individual diagnosis standing alone would be enough to render him disabled because of the increasing pain with any level of increasing exertion, but he has a constellation of orthopedic injuries that conspire to render him permanently, totally disabled. I think it would be safe for him to try to work around the house but I don't think it would be safe for him to participate in any line of work, because even sedentary exertion leads to increasing pain which puts him at risk for increasing dependency on narcotic pain medication, which would ultimately have significant health ramifications." PX 10, p. 22. The Arbitrator agrees that Petitioner's "constellation of orthopedic injuries" provides a sufficient basis for a finding of medical permanent total disability.

The Arbitrator further finds that based on the opinions of Mr. Grzesik, the failed 2 year diligent and focused job search performed with Anita Johnson and on Petitioner's age, education level/disabilities, training and condition, Petitioner has met his burden to prove permanent total disability under an odd-lot theory as well. Mr. Grzesik concluded that Petitioner is not able to find permanent employment. The Arbitrator notes that Mr. Grzesik based his opinion on Dr. Montella's opinions, the restrictions set for in the March 2008 FCE, Petitioner's 9th grade education level, his extreme reading and math limitations, his inability to use any acquired work skill due to physical limitations and his age given his low functional profile. PX 13. He further determined that the foregoing factors deny Petitioner candidacy for participation in a vocational rehab program. PX 13. Again, Petitioner's inability to find suitable employment is further demonstrated by the failed job search performed with the assistance of Anita Johnson for over 2 years. The Arbitrator finds Petitioner has demonstrated that based on his physical impairments, education level and lack of transferable skills, no jobs are available to a person in like circumstances.

Accordingly, the Arbitrator finds that Petitioner is permanently and totally disabled. Respondent shall pay Petitioner permanent and total disability benefits of $1,019.73 per week for life, commencing on the date of the hearing, November 6, 2013, as provided in Section 8(f) of the Act. Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, pay by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with clarification and correction of clerical errors	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Zofia Szotko,

Petitioner,

vs.

NO: 12 WC 15241

14IWCC1124

Hilton/Embassy Suites,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, extent of temporary total disability, nature and extent of permanent disability and medical expenses and being advised of the facts and law, clarifies the Decision of the Arbitrator as stated below and corrects the clerical errors as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission notes that Petitioner testified to a specific incident on September 17, 2011, i.e., that her left foot got stuck in a bed skirt while making a bed and she pulled her left leg to get it out. Petitioner testified that after this incident occurred, she felt pain the same as she would when getting an injection. She continued to work and finished her shift that day. On cross-examination, Petitioner testified that on Monday, September 19, 2011, she informed her manager, Blanca, of what happened. Blanca did not work on September 17, 2011. Petitioner testified, "I showed her how my foot looks like, and she told me to go to the doctor, but she said we are 100 percent busy, and there are no people to work, and maybe it's just twisted foot." However, the Commission notes that Petitioner did not testify as to what she told Blanca about how the incident occurred. No accident report was done at that time. Petitioner did not testify that she told Blanca specifically that she got her left foot caught in a bed skirt and then pulled her leg.

On direct examination, Petitioner testified she continued working for about 3 or 4 weeks and during that time, she was putting a special band aid on her left foot and leg and was using something to put it together. Petitioner testified that she reported the injury on October 17, 2011 and she was sent to Concentra Medical Center.

Petitioner's supervisor Nancy Sanchez testified that on October 17, 2011, Petitioner reported to her that she had hurt her foot and showed her the foot. Ms. Sanchez testified she questioned Petitioner as to why she did not report it and she said she was waiting to see if the pain would go away. Ms. Sanchez then told Petitioner that if she wanted to report it, they could go to security. They did go to security and reported it and made an accident report, Rx3. Ms. Sanchez testified that Petitioner did not tell her that her foot got tangled in a bed skirt inside a room. The only description Petitioner gave Ms. Sanchez was that she was just walking down the hallway on October 1, 2011 and felt pain.

The Team Member Accident Report dated October 17, 2011 and signed by Nancy Sanchez, Rx3, notes a Date of Injury of October 1, 2011. The location of accident is listed as the guest hallway. The description of how the accident occurred is noted as the following: "Was walking down hallway felt a pain on bottom of foot." Rx3 is not signed or dated by Petitioner. Ms. Sanchez testified she wrote what Petitioner told her. Petitioner testified she did not fill out a written accident report because she could not write English and that her supervisor filled out an accident report. Petitioner testified that she did not ever receive a copy of a written accident report that was filled out by her supervisor. Petitioner testified that she told Ms. Sanchez that her injury happened in the room she was cleaning. Ms. Sanchez helped her write the report Rx3. Petitioner did see Rx3 when Ms. Sanchez wrote it, but she was not given a copy of it.

Concentra Medical Center records, Px2, indicate Petitioner was seen on October 17, 2011 by Dr. Bahmanbeigi, who noted she complained of her leg being injured on October 1, 2011. The following Patient Statement was noted: "while working felt pain in my leg not sure what happen." The following history was noted: "Patient states that on 10/01/11 (more than 2 weeks ago) at work she was walking when she felt sharp pain of the left foot. Patient is here due to persisted and worsening pain." The Commission notes that there was no mention of a September 17, 2011 incident in the Concentra Medical Center records. On cross-examination, Petitioner testified she told a female doctor at Concentra that her foot got caught in a bed skirt while working on September 17, 2011. Petitioner testified that the history contained in the Concentra Medical Center records dated October 17, 2011 is not full, but what Concentra documented as what she told them is correct as far as it goes.

Dr. Freedberg's records, Px3, indicate that Petitioner was seen on July 10, 2012 for complaints of left foot pain from a work related injury on September 17, 2011. The following history was noted: "She states she was making the bed, and she thinks her foot got caught in the bed skirt when she stepped back, thinks she may have twisted it. So continued to work, thought it would go away. After she went home, pain increased, and she states it is getting worse every day."

On October 8, 2012, Petitioner saw Dr. Holmes for a §12 evaluation at Respondent's request. In his report, Rx1, Dr. Holmes noted that he had reviewed the medical records of Concentra Medical Center and Dr. Freedberg. Dr. Holmes noted the following: "In terms of her leg work incident and history, the initial report on her presentation in October does not demonstrate that the patient had any specific twisting injury of her foot. The history that was provided to the doctor who was initially taking care of her was that she was simply walking and had noted pain in the back of her heel. This would be consistent with a diagnosis of Achilles tendinopathy of Achilles tendinosis and would not be consistent with an industrial injury per se. It would be almost like saying, I caught a cold at 3:00 at work, and try to attribute that cold to a work injury in that one can catch a cold at any time during the day, and its timing during the day has nothing to do with the work activity. This would be the same issue with this lady in terms of walking and developing the pain. The radiographs and some of her history would suggest that this patient had a long-standing Achilles tendinopathy developing, and it just so happens she was walking at that particular moment that this started or initiated her pain. There is nothing about her job, there is no tripping injury, and there is no medical data that states that simply walking is a known cause of Achilles tendinopathy. The cause of Achilles tendinopathy includes the fact that she is a middle-aged woman, the fact that she has had a hysterectomy and the fact that she is obese. We looked at the factors, such as these factors, in terms of the etiology of Achilles tendinopathy. Again, this is something that develops over a period of decades. Therefore, it is my opinion to a reasonable degree of orthopedic, medical, and surgical certainty that there is no relationship between the alleged incident and he present condition as related to her left foot." The Commission notes that this is the only opinion regarding causation.

Based on the above, the Commission affirms the Arbitrator's finding that Petitioner did not prove by a preponderance of the evidence that her condition of ill-being regarding her left foot arose out of and during the course of her employment with Respondent on September 17, 2011. The Commission finds Petitioner not credible as she did not testify as to what she told Blanca about how the incident occurred and that her version of events is rebutted by Rx3 and the history noted in the Concentra Medical Center records of October 17, 2011. The Commission corrects the clerical error in the Arbitrator's Decision to change Dr. Dennis Noble to Dr. George Holmes. The Commission also corrects the clerical error in Petitioner's age to 61. 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 March 4, 2014 is hereby affirmed and adopted with the above noted clarification and clerical corrections.

14IWCC1124

No bond is due as there is no award 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: DEC 23 2014
MB/maw
o11/06/14
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Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SZOTKO, ZOFIA
Employee/Petitioner

Case# **12WC015241**

14IWCC1124

HILTON/EMBASSY SUITES
Employer/Respondent

On 3/4/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0704 SANDMAN LEVY & PETRICH
WILLIAM H MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

1139 NOBLE & CASSANO
MICHAEL E MAHAY
1979 N MILL ST SUITE 200
NAPERVILLE, IL 60563

14IWCC1124

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

Zofia Szotko
Employee/Petitioner

v.

HILTON/EMBASSY SUITES
Employer/Respondent

Case # **12** WC **15241**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Lynette Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on **10/8/13; 12/2/13 and 1/6/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC1124

FINDINGS

On **September 17, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* not sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to an accident.

In the year preceding the injury, Petitioner earned **$33,879.56**; the average weekly wage was **$651.53**.

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* 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 **$000**.

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

Petitioner has not proven, by a preponderance of the evidence, that an accident arose out of and in the course of her employment with Respondent therefore, no benefits are awarded, pursuant to the Act.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

FINDINGS OF FACT

The disputed issues in this matter are; 1) accident; 2) causal connection; 3) medical bills; 4) temporary total disability; and 5) the nature and extent of Petitioner's injuries. *See,* AX1.

Petitioner testified that she was hired by Respondent in 2001 as a housekeeper to clean rooms, which required lifting, bending, carrying, and walking. Petitioner testified that she was working in a full duty capacity when on September 17, 2011; she caught her left foot in a bed skirt, which pulled her leg. She further testified that the pain felt as though she had been injected with a needle. She finished that day's work and continued to work for the next three (3) to four (4) weeks before she reported the incident to her superiors and was sent to Concentra Medical Center. She testified that she was waiting to see if the pain would stop. They took x-rays and referred Petitioner for therapy for her left foot and leg. She presented to Dr. Howard Freedberg at Suburban Orthopedics and subsequently had surgery on November 30, 2012. He sent her to physical therapy and she was released on February 19, 2013. Petitioner's employment was terminated prior to surgery and she had not received any payments for temporary total disability ("TTD") for this injury.

Upon cross-examination, petitioner testified that her manager, Blanca, was off on September 17, 2011, but that she told her about the accident on the next Monday; and also showed her, her left foot. She further testified that she had no further conversations about her condition with anyone until October 17, 2011. She testified that on that date, she was told to go to Security to report the incident, which is what she did. She did not fill out a report because she cannot read or write in English. She further testified that she told the doctors at Concentra about the incident with the bed skirt and that the medical records from that facility are not correct. She was released by Concentra, to return to work without restrictions in November of 2011. She testified that she was working with pain but the foot was swelling to the point that she had to seek further treatment.

Petitioner did not received any treatment for the leg and foot from November 11, 2011 until July of 2012, when she began to treat with Dr. Freedberg. Currently, she massages and soaks her left foot and ankle and she does not use any device to assist her with walking.

Respondent called Ms. Nancy Sanchez, who testified that she has been employed by the respondent for eight (8) years as a housekeeping supervisor and that she is the petitioner's supervisor. Ms. Sanchez testified that on October 17, 2011, Petitioner reported to her that she and hurt her foot and that she was waiting to see if the pain would subside. Ms. Sanchez further testified that she filled out an incident form from information told to her by the petitioner and that she understood everything Petitioner told her. Lastly, she testified that the petitioner did not tell her that she caught her foot in a bed skirt but that she was walking down the hall when she had pain in her foot.

Petitioner testified that currently, she has pain when she bends over and numbness in her foot. She must sleep on her right side and must now kneel down when lifting. She has pain when she sits a long time in the low back area; and cannot carry things like before the accident, maybe five (5) to seven (7) pounds only.

14IWCC1124

Medical Treatment

The Arbitrator reviewed all medical introduced by the parties. The petitioner was treated by Dr. Khojasteh Bahmanbeigi on October 17, 2011 and by history of her present illness, he states: "that on 10/01/11 (more that 2 weeks ago) at work she was walking when she felt sharp pain of the left foot. Patient is here due to persisted and worsening pain...located on posterior aspect of the left foot and heal". Petitioner's symptoms were moderate, aching, intermittent, sharp stabbing pain in her left foot, made worse with walking. The assessment was bursitis or tendinitis. Petitioner was scheduled for physical therapy three (3) times for one (1) week and advised to return if her symptoms worsened or she developed an infection. Petitioner apparently treated at Concentra until November 3, 2011, with no relief; in fact the therapy worsened her condition. At no time did these records indicate that this was a workers' compensation injury. *See,* PX2.

The petitioner presented to Suburban Orthopaedics, specifically Dr. Howard Freedberg, on or about July 10, 2012. The history of injury stated a date of "September 17, 2011; and a traumatic work [injury] a twisted foot". Petitioner was taken off work and diagnosed with a left foot calcaneal osteophyte; with haglund deformity; and calcific Achilles tendonitis. She had surgery on November 30, 2012 to correct these conditions. *See,* PXs 3-4.

On October 8, 2012, Petitioner was seen by Dr. Dennis Noble, by request of Respondent, for a independent medical examination ("IME"). Dr. Noble also reviewed the petitioner's medical records from Drs. Bahmanbeigi, Westin and Freedberg. Dr. Noble did not find evidence of any specific twisting injury to the left foot and that the initial history of the incident was that she was simply walking and noted a sharp pain in the back of her heel. This would be consistent with her diagnosis of Achilles tendinosis and not related to the type of work injury that Petitioner alleges. *See,* RX1 & 3.

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CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

A decision by the Commission cannot be based upon speculation or conjecture. *Deere and Company v Industrial Commission*, 47 Ill.2d 144, 265 N.E. 2d 129 (1970). A petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d 236, 369 N.E.2d 853 (1977). Where a petitioner fails to prove, by a preponderance of the evidence, that there exists a casual connection between work and the alleged condition of ill-being, compensation is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v Industrial Commission*, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).
The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of her claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs. Industrial Commission*, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).
It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); *see also Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

The Arbitrator finds that the petitioner has not proven, by a preponderance of the evidence, that her condition of ill-being, regarding her left foot, arose out of and during the course of her employment with Respondent therefore, no benefits are awarded, pursuant to the Illinois Workers' Compensation Act. Having found no evidence of an accident, the remaining issues are moot and will not be addressed.

14IWCC1124

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
12WC15241
SIGNATURE PAGE

Signature of Arbitrator

March 3, 2014
Date of Decision

MAR 4 - 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with clarification	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria Gutierrez,

Petitioner,

vs.

NO: 13 WC 10955

14IWCC1125

Universal Laminating, Ltd.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, extent of temporary total disability, medical expenses and prospective medical care and being advised of the facts and law, clarifies 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 (1980).

The Commission notes that Petitioner testified through an interpreter that her job duties on January 2, 2013 were packaging insurance products (Tr 12). The packages came as a hundred or so business cards and the skid started out being a certain height and goes down and down. With the last 2 or 3 lines in the pile, that is when Petitioner had to bend down to be able to reach them and that is when she felt pain (Tr 12). The packages weighed very little individually, but Petitioner was moving a lot of them very fast and at the same time (Tr 12-13). The packages weighed half a pound and she would grab two of them at a time. Petitioner indicated she would bend down and grab two packages at a time. She bent down to the ground and lifted the

packages up to the conveyor belt, which was at the height of the middle of her stomach (Tr 13-14). When she was packaging the insurance stuff and bent over, Petitioner felt pain between her lower back and left hip (Tr 15). The pain started in the left hip and at the waist and started going upwards and down her left leg (Tr 15). She had finished the skid when she felt the pain (Tr 15). She was bending all the way down to the ground and lifting when this pain started (Tr 16). The pain started around 11:00 a.m. or noon (Tr 16). On cross-examination, Petitioner alleged that her accident occurred on January 2, 2013 at approximately 11:00 a.m. or 12:00 p.m. (Tr 30).

The medical records from Edward Hospital Immediate Care, Px2, indicate Petitioner was seen on January 7, 2013 and an interpreter was used. The Immediate Care Orders and Documentation by Dr. Ross that date note the following history: "1/2/13 States felt "a little pain" in lower back. Continued working thinking pain would ease, but instead the lumbar pain worsened for several days until unable to work. States initial injury "while packing on AARP." Repeated bending." In his office notes that date, Dr. Ross noted a date of injury of January 2, 2013 and Petitioner's complaints of low back pain. Dr. Ross noted the following history: "It started about 5 days ago when she was packing boxes for AARP. She is unclear to the exact incident when it happened, but it happened while she was packing heavy boxes. She was doing repeated bending. The pain has gotten worse over the past 5 days. She has been working through it. She has no history of back pain in the past."

New Life Medical Center records, Px3, indicate that on April 23, 2013, Dr. Pandya noted the following history: "Ms. Gutierrez was picking up a package and twisted to her left to place it on a line when she felt sharp low back pain." On May 8, 2013, Dr. Thurston noted Petitioner complained of low back pain, left posterior thigh pain and weakness in the left thigh muscles. Dr. Thurston noted the following history: "A 49-year-old Hispanic female presents complaining of the above listed symptoms she states were caused as a result of a work injury that occurred on 01/02/13. Patient is employed as a general factory laborer by Universal Laminating Company. Patient states that on the date of the injury she was packing boxes of product and was picking up a box and twisted to her left side and felt a "pop" or "crack" in her low back which produced immediate and severe low back pain."

In his October 15, 2013 §12 report, Rx7, Dr. Phillips noted that he had reviewed the records from New Life Medical Center and had used an interpreter during his interview with Petitioner. Dr. Phillips noted the following history: "She was picking up a package and twisted her back. At that time, she developed what she describes as severe low back pain on the left side with left buttock radiation into the posterior thigh. She denies ever having pain radiating beyond the knee."

According to the medical records from Neurological Surgery & Spine Surgery, Px1, Petitioner saw Dr. Salehi on December 19, 2013 and an interpreter was used. Petitioner reported she was injured on January 2, 2013. Dr. Salehi noted the following history: "She states that she was bending down and twisting to lift up boxes to put on the line when she felt pain in the left lower back."

14IWCC1125

Based on the above, the Commission affirms the Arbitrator's finding that Petitioner sustained accidental injuries arising out of and in the course of her employment on January 2, 2013. 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 May 5, 2014 is hereby affirmed and adopted with the above noted clarification.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week for a period of 11-2/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay all reasonable, necessary and related medical expenses under §8(a) of the Act, subject to the Medical Fee Schedule under §8.2 of the Act, through October 15, 2013. Respondent shall have credit of $35,835.67 for medical expenses paid through that date.

IT IS FURTHER ORDERED BY THE COMMISSION that prospective medical care is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. The Commission notes that Respondent paid $2,573.95 in TTD benefits.

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.

14IWCC1125

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 23 2014
MB/maw
o11/06/14
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

GUTIERREZ, MARIA
Employee/Petitioner

Case# **13WC010955**

14IWCC1125

UNIVERSAL LAMINATING LTD
Employer/Respondent

On 5/5/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.45% 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:

2553 LAW OFFICE OF JAMES P McHARGUE
MATTHEW C JONES
123 W MADISON ST SUITE 1000
CHICAGO, IL 60602

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
JENNIFER L JONES
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§(e)18)
☒ None of the above

14IWCC1125

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Maria Gutierrez
Employee/P

Case # 13 WC 10955

v.

Consolidated cases:

Universal Laminating, Ltd.
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 Arbitrator Gerald Granada, Arbitrator of the Commission, in the city of Geneva, on 3/20/14. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of P's employment by Respondent?

D. ☒ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

F. ☒ Is P's current condition of ill-being causally related to the injury?

G. ☐ What were P's earnings?

H. ☐ What was P's age at the time of the accident?

I. ☐ What was P's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to P reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. ☒ Is P 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 14IWCC1125

On the date of alleged accident, 01-02-13, 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 alleged accident was given to Respondent.

Petitioner's current condition of ill-being is not causally related to the accident.

In the year preceding the injury, P earned $17,680.00; the average weekly wage was $340.00.

On the date of accident, Petitioner was 49 years of age, married, with 1 child under 18.

Respondent has paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $2,573.95 for TTD, $0.00 for TPD, $0.00 for maintenance, and $35,835.67 for other benefits (medical expenses paid to date), for a total credit of $38,409.62.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Petitioner failed to meet her burden of proof on this issue of whether her current condition of ill-being is causally connected to her work-related accident from January 2, 2013. Therefore Petitioner's claim for prospective medical care is denied.

Respondent shall pay reasonable, related and necessary medical services through October 15, 2013 subject to the fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Petitioner's request for payment of any medical expenses beyond October 15, 2013 is denied based on the Arbitrator's findings regarding the issue of causation. Respondent shall be given a credit for any medical benefits that have been paid,.

Respondent shall pay Petitioner temporary total disability benefits of $253.00/week for 11-2/7 weeks, commencing 1/18/13-2/4/13, and 5/8/13-7/9/13, as provided in Section 8(b) of the Act. Respondent shall be given a credit in the amount of $2,573.95 for TTD benefits paid.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a *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 of at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4/30/14
Date

MAY 5 - 2014

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FINDINGS OF FACT

On January 2, 2013, Petitioner was working as a hand worker at the Universal Laminating factory site, packaging business cards. Around 11:00 a.m. or 12:00 p.m., she began to feel pain in her left lumbar back, hip, and up and down her left leg. She testified that she reported her accident to Alba Gonzalez on that same date. Ms. Gonzales is not normally Petitioner's supervisor. Maria Ayres is normally Petitioner's supervisor. However, Maria Ayres was absent from work on Wednesday, January 2, 2013 through Friday, January 4, 2013 and Ms. Gonzalez was assigned to cover Ms. Ayres' supervisory duties during that time. Petitioner worked her entire shift on January 2, 2013, and went home at her normal time.

On the morning of January 3, 2013, Ms. Gonzalez again supervised Petitioner, and asked her to complete a task. Petitioner stated she could not complete the task because she had injured her back while working the prior day. Ms. Gonzalez asked the Petitioner why she had not reported her accident the prior day. Petitioner believed she had strained her back and did not find it necessary to report it to a supervisor. Ms. Gonzalez asked Petitioner if she needed to see a doctor. P did not want to see a doctor and wanted to stay where she was. Ms. Gonzalez observed Petitioner performing her duties without difficulty. Petitioner finished her shift and left work at her normal time. Petitioner again worked on January 4, 2013. She worked all day on Friday, January 4, 2013 as well.

On Monday, January 7, 2013, Ms. Ayres returned to work. Ms. Gonzalez notified Ms. Ayres of the Petitioner's complaint made on January 3, 2013. She notified Ms. Ayres that Petitioner did not report any incident on the alleged date of accident, January 2, 2013. Together, they notified Scott Mahalick, the president of the Respondent company. He immediately sent Petitioner to see a doctor at Edward Immediate Care. On that same date, Petitioner saw Dr. Ross at Edward, who ordered work restrictions, medications and therapy. PX 2. Petitioner stated she was "unclear to the exact incident when it happened". She was diagnosed with a lumbar strain after an x-ray demonstrated no acute deformities.

Petitioner began therapy that very same week, which she attended for approximately one month. She worked with light duty restrictions up to January 18, 2013. At the suggestion of Mr. Mahalick and her treating physician, she then went off of work until Monday, February 4, 2013, and was compensated for that time. She testified that as of February 5, 2013, she continued working again with light duty restrictions. On February 11, 2013, she was discharged from care at Edward and referred to an orthopedic surgeon. Petitioner was also discharged from Edward therapy on February 18, 2013, secondary to "no further contact". However, her therapist noted that Petitioner's symptoms had resolved in her last two sessions of therapy.

Petitioner did not receive any medical treatment throughout the remainder of February 2013, and all of March 2013. Respondent accommodated her light duty work restrictions as last ordered by Petitioner's treaters at Edward. Petitioner testified that she felt she "needed" the work restrictions, due to her level of pain. During February, 2013 and March, 2013, she continued to experience symptoms in the low back and left leg. She stated she was not able to lift objects.

Petitioner testified that around the time of her February 11, 2013 discharge from Edward, she spoke to Scott Mahalick, who "could not pay" for her medical bills. Mr. Mahalick later testified that this account was false, and to the contrary, he had encouraged Petitioner to follow the orders of her treaters at Edward, which included seeing an orthopedic surgeon.

In April 2013, P began medical treatment at New Life Medical Center, where she began therapy again. New Life treaters updated her work restrictions, and she continued working light duty. PX 3. Despite Petitioner's need for continued work restrictions, she was observed on several dates performing activities which would suggest that she was capable of greater physical activity than indicated in her restrictions.

On April 15, 2013, video footage of Petitioner was obtained on the company surveillance cameras. RX 9. She is seen running across the shop floor for quite a distance. See RX 9. Mr. Mahalick testified that he certainly did not ask

14IWCC1125

Petitioner to perform that activity, as it is against company rules to run on the shop floor. Mr. Mahalick testified that Petitioner was running from the lunch room to the exit of the shop, as there was a food truck parked outside.

On April 16, 2013, Petitioner is seen lifting what Ms. Ayres identified as a 35 to 40 pound wooden pallet. RX 9. Ms. Ayres appears in the video pointing at Petitioner. She instructs Petitioner to stop lifting the wooden pallet, as it is outside of her work restrictions. Ms. Ayres is then seen directing another male employee to come take the pallet away from Petitioner. According to Ms. Ayres, the activity would have represented a violation of Petitioner's work restriction on that date, and Ms. Ayres did not ask Petitioner to perform that task. Ms. Ayres testified that even if Petitioner had been working normal duties, she would not have been expected to lift the pallet, as that duty is reserved for the men employed on the shop floor.

On May 4, 2013, an MRI was obtained at Archer Open MRI. Tr. 22. On May 8, 2013, Dr. Chunduri, a pain management physician, took Petitioner off of work. Petitioner testified that she remained off of work until July, 2013 at which point she returned and began working again with light duty restrictions ordered by New Life. Petitioner testified that she was compensated TTD benefits for that time which she was off from work. Dr. Chunduri was the only medical doctor that Petitioner saw after her treatment at Edward ended. Petitioner's other treatment providers at New Life are chiropractors.

On October 15, 2013, Petitioner saw Dr. Phillips, an orthopedic surgeon, at the request of the Respondent. See RX 7, 8. Dr. Phillips found that Petitioner had merely suffered a sprain/strain. He reviewed the MRI of May 4, 2013, and found no evidence of any herniated disc. He opined that Petitioner was at MMI and could return to full duty work. No further medical treatment was indicated. The Respondent terminated future medical authorization and TTD benefits. See RX 3. However, Respondent continued to accommodate Petitioner's light duty work restrictions.

On December 19, 2013, Petitioner presented to Dr. Salehi, a neurosurgeon. PX 1. Dr. Salehi diagnosed Petitioner with "lumbosacral spondylosis", recommended an ESI at the L5-S1 level, and ordered work restrictions of no lifting greater than 35 lbs., and no pushing/pulling greater than 50 lbs. PX 1. Petitioner testified that she needs her work restrictions because of her pain.

On March 4, 2014, Petitioner is seen in a video carrying flattened cardboard boxes on her head. RX 9; Mr. Mahalick testified that this activity would have represented a violation of Petitioner's work restrictions. He did not ask Petitioner to engage in that activity, and the boxes weighed approximately 1 to 2 pounds a piece. Petitioner was carrying approximately 10 to 15 flattened boxes on her head. Mr. Mahalick testified that he has asked Petitioner why she violates her work restrictions with such frequency, and that Petitioner responded "I forget" and "It's boring". Petitioner has recently expressed interest in working overtime hours, despite her alleged need for restrictions. Mr. Mahalick also testified that his company has a system in place for job rotation, specifically designed to prevent repetitive-type job injuries. Mr. Mahalick testified that he does not doubt Petitioner's claim that she had an accident and described Petitioner as a good employee.

CONCLUSIONS OF LAW

1. Regarding the issue of accident, the Arbitrator finds that the Petitioner has met her burden of proof in establishing that she sustained a work-related injury to her back on January 2, 2013. Petitioner reported her accident the following day and sought medical treatment on January 7, 2013. Although Petitioner did not report her accident immediately in accordance with the Respondent's policies, notice of the accident was provided within the 45 days allowed pursuant to Section 6(c) of the Act. Although there was evidence presented to confirm that Petitioner reported her accident at a later time, there was no evidence presented to rebut Petitioner's account of her accident.

2. Regarding the issue of causation, the Arbitrator finds that Petitioner's current condition of ill-being is not causally related to the alleged injury of January 2, 2013. The Arbitrator finds persuasive the medical evidence indicating Petitioner sustained a back strain, for which she reached maximum medical improvement. This is further reinforced by the opinions of Dr. Phillips as indicated in his October 15, 2013 report, in which he confirms the Petitioner has reached maximum

14IWCC1125

medical improvement for her back strain injury and needs no further medical treatment. The evidence presented by Respondent at trial shows petitioner lifting crates that weigh in excess of 35lbs and running across the shop floor.

3. Petitioner's request for prospective medical care is denied based on the Arbitrator's findings on the issue of causation. The Arbitrator finds that petitioner has reached maximum medical improvement and has been capable of returning to full duty work. In support of this finding, the Arbitrator relies on the medical evidence as well as the opinions of Dr. Phillips as set forth in his October 15, 2013 report.

4. Petitioner's medical treatment through October 15, 2013 has been reasonable and necessary. As of October, 15, 2013, Dr. Phillips indicated that the Petitioner was at maximum medical improvement and did not need any further medical treatment. As such, the Arbitrator awards the Petitioner all her related medical expenses subject to the fee schedule, through October 15, 2013 as set forth in the various exhibits presented at arbitration. Respondent shall receive a credit for any medical expenses it has already paid.

5. With regard to the issue of TTD, the Arbitrator finds that the Petitioner was temporarily disabled according to her medical evidence from January 18, 2013 through February 4, 2013, and from May 8, 2013 through July 9, 2013. Respondent shall pay any outstanding TTD owed for these periods and shall receive a credit for any TTD it has already paid.

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)
☐ Modify	☐ PTD/Fatal denied
N/A	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Willard Morris,

Petitioner,

14IWCC1126

vs.

NO: 10 WC 06478
(12 IWCC 0989, 12 L 51322)

Ashland Distribution,

Respondent.

DECISION AND ORDER ON REMAND FROM THE CIRCUIT COURT

This matter had previously been heard under §19(b) of the Act, and Petitioner had appealed the Decision of Arbitrator Kane, filed on February 21, 2012, who found that Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent on January 22, 2010; that Petitioner established a causal connection between these accidental work related injuries and his condition of ill-being; that Petitioner was entitled to an award of 18-3/7 weeks of temporary total disability benefits (1/23/10-5/31/10) at a rate of $626.67 per week under §8(b) of the Act ($11,486.63 total TTD); that Petitioner was entitled to an award for reasonable and necessary medical expenses under §8(a) of the Act & Respondent was entitled to a credit of $14,737.57 for medical benefits paid and hold Petitioner harmless; the Arbitrator found Petitioner was entitled to reasonable and necessary medical expenses through June 1, 2010, excluding heart related treatment January 25, 2010 and January 26, 2010. The Arbitrator found that Respondent paid $6,325.00 in group disability benefits. Necessary medical services have been provided by Respondent. The Commission, on Review, affirmed and adopted the decision of the Arbitrator. This matter was further appealed to the Circuit Court, and herein, on remand from Circuit Court, the Circuit Court instructed the Commission to make specific findings of fact and conclusions of law in support of the Commission affirming the Arbitrator's award.

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The Commission again, herein, affirms and adopts the decision of the Arbitrator with the findings noted below. The Commission, further herein, 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).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- No additional exhibits were presented since the initial hearing as this matter is on remand from Circuit Court.

- Petitioner had worked for Respondent for four years as a driver delivering chemicals to customers in drums and in tankers. Petitioner also picked up hazardous waste and occasionally loaded and unloaded his truck. In 2008 Petitioner had been involved in a motor vehicle accident and had suffered left shoulder and neck injuries. Petitioner had undergone left rotator cuff surgery and treatment for a herniated cervical disc and had eventually been released and returned to full duty work. In 2009 Petitioner sustained a work related hernia that required surgery that same year and eventually returned to full duty work on August 24, 2009; from that date to this current incident, Petitioner never took off work due to residual pain.

- As to this incident, Petitioner testified that on January 22, 2010, at the end of his work day (at about 2:30pm) he was called into a meeting in Tony Kuk's office. Present at the meeting were Mr. Kuk (the plant manager), Greg Engleking (the union steward), and Okera Hollis (Bulk dispatcher). Petitioner testified that during the meeting, Mr. Kuk became irate and suspended Petitioner and told Petitioner to get off of Respondent property. Mr. Kuk had apparently become irate when he asked Petitioner about one of the days he worked and Petitioner began going over a log he kept noting every stop he made, how long he was there and if there had been delays during the process. Petitioner testified that as he explained what had occurred on the specific date, Mr. Kuk became irate. Petitioner testified that he then attempted to leave as he had been instructed and as Petitioner opened the door (made of solid oak), Mr. Kuk came at Petitioner from behind and hit Petitioner on his left shoulder which caused Petitioner to hit face first against the door; Petitioner hit the left side of his face and nose against the door and door frame. Petitioner stated he then fell into Mr. Engleking who had been sitting next to the door. Petitioner testified that after the whiplash motion he felt a burning sensation in his nose and face. He sought medical treatment immediately at Ingalls Occupational Health about 40 minutes from Respondent's facility. Petitioner complained of pain in his face and neck, headache, nausea, and dizziness. Petitioner followed up with his family doctor, Dr. Ibrihim on January 25, 2010 and was then admitted to Advocate South Suburban Hospital. The only medication Petitioner was on prior to the accident was for heartburn. Petitioner underwent a CT scan, x-rays and EKG and was referred to Dr. Lofchy, a facial

surgeon, on February 24, 2010. Petitioner was diagnosed with a nasal fracture and septum surgery was recommended.

- Petitioner testified that on March 27, 2010 he was referred to Dr. Carabene, a pain management specialist, for his cervical pain and headaches. Petitioner stated that he had injections on April 6, 2010. Petitioner was not receiving temporary total disability or medical benefits at that time. Petitioner was eventually released at maximum medical improvement (MMI) regarding his nasal fracture and Petitioner testified that he continued treating with Dr. Carabene for pain' undergoing additional injections January 4 and 18, 2011. Petitioner testified that just prior to the §19(b) hearing he underwent a nerve ablation procedure. Petitioner testified at the time of that hearing he had not been released by Dr. Ibrihim or Dr. Carabene and neither had found him at MMI. Petitioner stated that he had further scheduled appointments with both doctors.

- Petitioner testified that from August 24, 2009 through January 21, 2010 he had been guaranteed 40 hours per week, five days per week, per the union collective bargaining agreement, but Petitioner testified that he had averaged 55 hours per week. Petitioner testified Respondent had a system whereas an employee does not go home until their work is done and he noted employees do not pick their own routes. Petitioner testified that if an employee completed their route before the eight hours were up there were more deliveries to be made and the employee must perform those deliveries as refusal could result in termination. Petitioner had been terminated by Respondent March 4, 2010 and had then filed for and been awarded unemployment compensation.

- On cross examination, Petitioner testified that after his motor vehicle accident he had regular medical treatment through December 2008; his neck injury had been herniations C3—7. Petitioner had filed a lawsuit against the other driver and had been deposed in that case August 10, 2010; he did not recall if he indicated he had made a complete recovery. Prior to that accident there had been no recommendation of Petitioner being a candidate for cervical fusion at those levels and it was still not recommended although it had been discussed with Dr. Nockels. Petitioner's therapy after the auto accident ended May 20, 2009 and Petitioner stated that he was still having shoulder and neck pain at that time.

- As to the accident here, Petitioner testified that Mr. Kuk had asked him to leave Respondent's property on that date and also told Petitioner to leave behind Petitioner's daily log binder with Mr. Kuk indicating it was company property. Petitioner stated he had told Mr. Kuk that the binder was obviously personal property, not company property and Mr. Kuk threatened to call the police for taking company property. Petitioner indicated that he had observed Mr. Hollis going towards the phone. The police arrived and a police report was taken.

- Petitioner testified that the Ingalls record was not wholly correct as to the events of the altercation and Petitioner stated that it had been amended. The report noted Petitioner was

punched in the face by his boss who then slammed Petitioner face first into a door; Petitioner indicated that account was written by a doctor but Petitioner's actual statement was on the front of the report. Petitioner subsequently returned to the hospital and informed them of the mistake and the doctor deleted "punched in the face" indicating it a mistake. The chronological order noted at Ingalls Primary Care was also noted incorrect. Petitioner was working as a driver for a different company making $16.50 per hour, 35-40 hours per week but he did not have health insurance through them.

- Mr. Engleking testified that he was the union steward and he noted that the trip reports were usually drafted by the employee. Mr. Engleking stated that the employee keeps a copy and a copy is provided to Respondent. He had been present at the time of the altercation and corroborated the incident. Mr. Engleking testified as Petitioner did regarding the requirement of additional routes unless a driver of lower seniority was present, but otherwise if a driver refused additional work they were subject to discipline or termination. There was nothing in the collective bargaining agreement regarding discipline for refusing overtime, but the procedure was consistent with the testimony and had been like that for 17 years.

- Mr. Japcon testified (for Respondent) that he was a supervisor for Respondent on December 30, 2009 and he made sure all delivery trucks were loaded. He testified he had been passing the lunchroom that day and recognized Petitioner's voice. Mr. Japcon testified that he heard Petitioner state that he had gotten into it with Mark the prior day and he was tired of the BS and he had a right mind to take a fall and claim disability for the next 6 months. Mr. Japcon indicated per policy he had prepared a report of what Petitioner said and gave it to Mr. Kuk and used it against Petitioner in a subsequent grievance filed by Petitioner. He indicated he did the statement on his own and slid it under the door the next day. Mr. Japcon was not aware who all was in the break room when Petitioner made the statement as he was not in the room; it was noted the others present in the room did not substantiate that Petitioner made such a statement, but he would not change his testimony regarding what he supposedly heard.

- Petitioner denied making the alleged statement noted and had not even been aware of any report to that effect. Petitioner testified a few days prior to December 30, 2009 he had called Mark Dewainger to let him know that he was empty at one stop. Petitioner stated that there was a bad storm occurring and Petitioner asked if he still had to make another stop. Petitioner testified that Mr. Dewainger told Petitioner to do what was on the f------ sheets and instructed him not to call again. Petitioner acknowledged that conversation had been the topic of discussion on December 30, 2009 when he was in the break room with the other drivers.

- Various exhibits were presented at the hearing and were considered by the Arbitrator and the Commission on Review.

14IWCC1126

The Commission finds that the Arbitrator found PART OF Petitioner's condition of ill-being to be causally related to the injury. The Arbitrator noted a conflicting series of stories. The Arbitrator found entitlement to temporary total disability (TTD) and medical expenses from January 22, 2010 through June 1, 2010 as causation, was consistent with Petitioner's own testimony under oath (except medical related to unrelated cardiac condition). The Arbitrator found Petitioner's current condition of a fractured septum and cervical injuries requiring injections and nerve ablation were NOT causally related to the injury. The Arbitrator noted that the pictures Petitioner placed into evidence only revealed slight redness on his left cheek bone; there was no evidence of trauma to his nose of any other facial area.

The Commission notes that the Arbitrator's decision very clearly detailed his findings of facts and conclusions of law for each disputed issue. The Commission notes that the Arbitrator addressed the somewhat contradictory stories offered by Petitioner on the date of the accident, but otherwise found Petitioner's testimony credible. Petitioner requested the phrase "punched in the face" be removed from his records (PX 4) so therefore the Arbitrator assumed the remaining portions of that record was true. Another version of the story appeared in RX 2, the deposition transcript from the unrelated case. A fourth version of the story was provided to Dr. Ibrihim on the date of the accident. Petitioner had indicated his boss became unexpectedly physical with him that day and shoved Petitioner and hit him in the arm and hit him with the door and slammed the left side of Petitioner's face. Despite the inconsistencies, the Arbitrator found that the preponderance of the evidence indicated that something had occurred on that date which had caused some level of injury to Petitioner, but that causal connection was limited to the period of January 22, 2010 through June 1, 2010, that being based on Petitioner's own testimony. The Commission again notes that the Arbitrator very clearly explained and detailed his findings.

The Commission further notes that Petitioner argued on Review that medical evidence indicated his current condition of ill-being was causally connected to the accident. After the accident Petitioner was diagnosed with a deviated septum allegedly attributed to the incident in question, and Petitioner had surgery to correct that fracture March 17, 2010. Petitioner further argued that the medical records of Dr. Carobene and Dr. Ibrihim suggested that the accident also aggravated Petitioner's cervical spine and necessitated a resumption of treatment including injections and therapy. Petitioner argued that he complained of head and neck pain and difficulty breathing through his nose following the accident and those complaints continued after June 1, 2010. Accordingly, Petitioner argued that the Arbitrator incorrectly limited causal connection to that date. Conversely, Respondent agreed with the decision of the Arbitrator.

The Commission notes that Petitioner had been deposed regarding an unrelated motor vehicle accident. Petitioner there testified that the door injury he had sustained (January 22, 2010) resulted only in a temporary aggravation of his neck pain and further testified that the neck pain related to the door injury had resolved by June 1, 2010. Petitioner's deposition statement under oath, would seem to totally justify the Arbitrator's termination of causal connection as of that

date. Given Petitioner's argument that it was his cervical injuries and not his nasal fracture which gave rise to a continuation of a causal connection, Petitioner's own contradictory testimony and his failure to claim any existing nasal fracture injury subsequent to June 1, 2010 finds the Arbitrator correctly limited causal connection to June 1, 2010. The Commission therefore finds the decision, of the Arbitrator, as to causal connection, as not contrary to the weight of the evidence, and herein, again, affirms and adopts the decision of the Arbitrator.

The Commission, with the above finding of a causal connection through June 1, 2010, finds the evidence and testimony presented supports that Petitioner proved entitlement to temporary total disability benefits only for the period of time of January 23, 2010 through May 31, 2010. The Commission therefore, herein, finds the decision of the Arbitrator as not contrary to the weight of the evidence, and herein, again, affirms and adopts the Arbitrator's finding as to total temporary disability.

The Commission, with the above finding of a causal connection through June 1, 2010, finds the evidence and testimony presented supports that Petitioner proved entitlement to medical benefits relative to some aggravation of a cervical issue for reasonable and necessary care and medical expenses only through June 1, 2010. The Commission therefore, herein, finds the decision of the Arbitrator as not contrary to the weight of the evidence, and herein, again, affirms and adopts the Arbitrator's findings as to medical expenses.

The Commission finds that there are clearly questions of compensability and causal connection for Respondent to have relied on, given the totality of the evidence and the somewhat conflicting testimony, to show Respondent did not act in an unreasonable or vexatious manner in denying payment of benefits here. Accordingly, Petitioner has failed to meet the burden of proving entitlement to said penalties and attorney fees against Respondent. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and herein, affirms and adopts the Arbitrator's denial of penalties and attorney fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $626.67 per week for a period of 18-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. The Commission finds Respondent paid $6,325.00 in group disability benefits for Respondent is entitled to receive credit.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner for medical expenses under §8(a) of the Act, Petitioner is entitled to reasonable and necessary

medical expenses through June 1, 2010, excluding heart related treatment on January 25, 2010 and January 26, 2010.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 23 2014
d-10/22/14
DLG/jsf
45

David L. Gore

Stephen Mathis

Mario Basurto

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

☐ 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
N/A	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David McKee,

Petitioner,

14IWCC1127

vs.

NO: 07 WC 46035

Freeport Police Department,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition under §19(h) and §8(a), having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection and prospective medical care and being advised of the facts and law, grants Petitioner's motion as stated below.

This matter had previously been heard by Arbitrator Akeman and the decision was filed January 5, 2011. The matter went up on Review and the decision was affirmed and adopted by the Commission in June 2011. No further appeals were taken and the decision became final. That decision found that Petitioner proved he sustained an accident that arose out of and in the course of employment on September 30, 2007 and proved a causal connection to his condition of ill-being. All temporary total disability (TTD) and medical expenses had been paid per stipulation, and Petitioner was awarded permanent partial disability (PPD) of 60% loss of the Petitioner's person as a whole (300 weeks at $599.36) under §8(d)(2) of the Act. This matter came before Commissioner Lamborn for hearing on April 9, 2013 on Petitioner's present §19(h)/8(a) petition.

14IWCC1127

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner was a 39 year old employee of Respondent, who at the prior hearing described his former job as a police officer. On the date of accident, September 30, 2007, Petitioner testified he was in a drive-thru at a McDonald's late. He had placed his order and there was a truck in front of him. Petitioner stated they had been there for a while and he had honked his horn and the driver had leaned back and said F-U. Petitioner stated that he got out of his vehicle, approached the truck and showed his credentials, badge, and identification. Petitioner stated he told the person that he was a police officer and he wanted to get home; he wanted to get his stuff and go home. Petitioner stated the person started talking to him at first and Petitioner stated that he suspected the driver was under the influence of alcohol and advised him that he was being detained. Petitioner stated that he dialed 9-1-1 to get another officer and the next thing Petitioner knew he was waking up in the drive-thru parking lot. Petitioner was consequently crushed between the vehicle and the drive-thru brick wall and he noted there was a video showing Petitioner being crushed between the truck and the wall.

- On April 9, 2014, this matter came before Commission Lamborn for hearing pursuant to Petitioner §19(h)/8(a) petition. On direct examination, Petitioner testified of his previous testimony December 16, 2010 regarding his work accident before the Arbitrator. Petitioner testified that since his prior testimony he had not been involved in any other accident or incidents relative to his back or hip conditions. Petitioner testified that since then he had tried security work but that did not work out as he had the same ongoing pain and things when he was working security for that 6-7 month period. Petitioner testified that due to his pain he quit that job. After the security position, Petitioner testified that he mowed lawns and became a personal assistant (PA) for a handicapped child. Petitioner currently was mowing lawns for the Shirland School, the Shirland United Methodist Church and also for various residents in Shirland. Petitioner had been mowing lawns for about three years and earned about $400.00 per month. Petitioner was currently drawing occupational disability pension benefits. Petitioner stated that his understanding was that he was able to work and earn some income and also draw the disability pension. Petitioner was not currently doing the PA work as he had stopped that in January of 2013; Petitioner stated that he helped a handicapped child but he had to stop because he could not do the lifting; he did the position with his wife and his wife was still performing those duties for the child.

- Petitioner testified that since the prior hearing, back in 2010, he stated he was getting progressively worse and he was taking a lot of medication which were just not working. Petitioner testified as 2011 progressed his back and pelvis were getting worse and he was getting pain down his legs and as a result of that he made an appointment to see Dr. MacKenzie January 4, 2012. Petitioner testified that he reported his symptoms to the doctor and how he was feeling and Dr. MacKenzie thereafter recommended an MRI. Petitioner returned to Dr. MacKenzie after the MRI for a follow up on January 17, 2012. His next appointment with Dr. MacKenzie then was August 21, 2012. Petitioner testified in August 2012 that his back and legs were getting worse and he reported that to the doctor. Petitioner had a follow-up appointment with Dr. MacKenzie on March 27, 2013

and he testified his back and leg condition at that time was definitely worse. He stated at that time it was the pain in his lower back and pelvis and he was getting shooting pain down his legs and sharp shooting pain across his pelvis. At that time, Dr. MacKenzie recommended Petitioner follow up with another doctor, Dr. Dahlberg, the same doctor Petitioner had seen in December 2009. Petitioner saw Dr. Dahlberg in April 2013 and reported his symptoms at that time. Petitioner stated that he wanted to pursue any medical treatment; which was the pain/spinal stimulator. Petitioner testified he tried to get that treatment approved through workers' compensation but it was denied.

- Petitioner testified that Respondent sent him to see Dr. Wehner (for a §12 evaluation-IME) on May 10, 2013. Petitioner stated the appointment with the doctor was 10-15 minutes. Dr. Wehner was the same doctor Respondent had sent Petitioner to twice prior to the previous hearing. Petitioner viewed the letter (PX 3) from Respondent dated June 5, 2013 denying the spinal cord stimulator. Petitioner testified after the Dr. Wehner appointment, he returned for a follow up visit with Dr. MacKenzie on August 26, 2013. Petitioner testified that after that appointment he still wanted the spinal cord stimulator and he had discussed that with the doctor. Petitioner was still taking medications (Lyrica, Aleve, Hydrocodone, and Norco). He also has a prescription for Dilaudid for when he has really bad days. Petitioner testified the dosage now is not what it was in 2010 as now he is on higher doses (especially Lyrica). Petitioner testified that he also takes the medications more than the regularity he was taking it in 2010. He stated now he takes the Lyrica twice per day at a higher dosage. He takes Aleve only once a day but the Norco he takes more like 3-4 times per week. Comparing his condition December 16, 2010 and his current condition, Petitioner testified it is now worse. He testified he has more pain and more shooting pain down his legs and lower back and across his pelvis. Petitioner testified his sleeping pattern is not well and he wakes 2-4 times per night and when he wakes up every morning, it is a chore to get out of bed. Petitioner stated that once he wakes, he has to sit on the edge of the bed and wait for a few seconds for everything to adjust and then he can get up. He stated then he can actually go downstairs and make a cup of coffee and sit and let his back relax until he can get moving. Petitioner testified that he still wanted to pursue the spinal cord stimulator treatment. (Petitioner's exhibits were presented).

- On cross examination, Petitioner testified that he had worked security (security guard) for SPI subsequent to the prior hearing (a friend hired him in 2011). As a security guard Petitioner stated he drove around in a car and checked on other officers; he was brought in as a sergeant so he was administration. Petitioner stated that he used to do errands and run and check if anyone needed to do paperwork; or if they needed something he ran and did it. Petitioner stated they then put him at West Lake, a gated community, to patrol. Petitioner stated that he told them when he tried that, that he was not able to do it; that was when he was having a lot of problems. Petitioner testified that he did drive around then; he has a valid driver's license and he still drives sometimes. He had a Ford F-350 truck. Petitioner agreed he testified that he also mowed yards for a school and church, back in 2011. Petitioner indicated that he has a riding mower and the places he mows are a couple blocks from his home so he does not have to load it into his truck. Petitioner stated that he also has a push mower he sometimes uses. He uses the rider on his own

property also. He usually tries to do the church and school at the same time as they share a yard and that is 1.5-2 acres. He mulches and it just blows to the side. He does about 1-2 residences per week over the last three years besides the church and school. He does not do that in the winter. He sometimes does plow in the winter with an ATV/UTV which is smaller than a car and it has a plow on it; he just does driveways. Over the past winter he mainly did his own and the guy across the street who pays him; sometimes he just does it as a favor.

- Petitioner agreed he saw Dr. Dahlberg one time since 2010 and he saw Dr. MacKenzie 3-5 times. Dr. MacKenzie gives him the prescription for Lyrica and Dr. McFadden gives him the prescription for Norco and Venlafaxine (antidepressant); those are open ended prescriptions. Petitioner had not sustained any injuries working security, mowing or plowing. He was still being paid the award from the County. Petitioner agreed he saw Dr. Wehner for the 3rd time in 2013 and he was aware that Dr. Wehner did not recommend the surgery.

- At the April 4, 2014 hearing Petitioner presented exhibits from Rockford Orthopedic Associates (Dr. Mackenzie)(PX 1), Dr. Thomas Dahlberg, D.O. and Rockford Pain Clinic (PX 2) Cannon Cochran Management (PX 3).

- The records of Rockford Orthopedics Associates (Dr. Mackenzie) noted as follows:

  - 1/4/12-recheck-last seen 8/4/09. Patient noted increased pain lower back, pain and numbness with bilateral hands and feet and increased headaches. Same assessment. Discussed options including nothing, therapy, injections, surgery and further work up. To get new MRI.
  - 1/13/12-noted 2007 injury and severe pain low back and down both legs.
  - 1/13/12-MRI- significant interval reduction in size of left posterolateral L5-S1 disc herniation, a small to moderate size broad based disc protrusion with only slight posterior displacement of descending left S1 nerve root; very small volume central and right posterolateral L4-5 disc protrusion without significant change; right sided iliosacral screw unchanged.1/17/12-MRI results. No change in symptoms from prior. Noted DOI 9/30/07. Noted MRI results as above. Assessment=HNP; radiculopathy. Discussed options as above
  - 1/17/12-MRI results. No change in symptoms from prior. Noted DOI 9/30/07. Noted MRI results as above. Assessment=HNP; radiculopathy. Discussed options as above
  - 8/21/12-low back pain, last visit 1/17/12. Patient reports feeling worse compared to prior visit and exercises not helping. Pain radiates down left leg to foot and bilateral foot and left hand 4th and 5th finger tingling and numbness. Return to refill Lyrica; been out for a few days. BMI 31.77. Noted tender L3-4, good ROM with some pain. Discussed options again.
  - 3/27/13-recheck-back- patient returns and stated his pain and functional levels worse. Last visit 8/21/12. Patient stated lower back pain radiates down posterior legs and now reports shooting pain across pelvis and also radiates posterior legs. Pain 7/10 at rest and 8-9/10 with activity. Discussed options; noted about 5.5

years post injury. Trying to increase medications and recommended return to Dahlberg again to consider SCS trial.

- 8/26/13-chief complaint=low back. Patient returns, last office visit 3/27/13 referred by Dahlberg. Noted he was denied stimulator by WC. Main complaint now is sharp shooting pain down bilateral legs and aching in pelvis. Patient is doing worse since the last visit. Pain level at rest 6/10, depending on activity. Pain is sharp and stabbing. Noted medications; patient activity status=retired. Assessment=radiculopathy. Discussed further options including doing nothing, medications, therapy, injections, surgery and further work up as he has chronic radiculopathy. Meds help a little. Doctor noted he still felt SCS is the way to go, at least a trial is indicated.

- The medical records of Dr. Thomas Dahlberg, D.O. and Rockford Pain Clinic noted as follows:

  - 12/4/09-noted he was in normal state of health until work injury. Assessment-primary axial low back pain most likely on the basis of his pelvic fracture. Does have intermittent bilateral lower extremity neuropathic pain but does not sound radicular so much as he has chronic nerve injury related pain. Noted MRI showed herniations L4-5, L5-S1 but that would certainly not be causing his low back pain and Dr. Sweet does not feel surgery is indicated. PLAN-would like patient to review information on spinal cord stimulator. Doctor felt the SCS offers a fairly good chance of relieving a significant portion of his low back pain and does have the benefit that they are able to trial it before proceeding with any permanent implant. Discussed SCS fully with patient and wife and they understand plan and wish to review it. Patient understands and wishes to proceed with approval of WC carrier.
  - 4/19/13-noted referral from MacKenzie for evaluation and consideration of treatment related to chief complaint of failed back syndrome with low back and bilateral lower extremity neuropathic pain. Initially saw patient in 2009 for similar problems and then had recommended spinal cord stimulator but was never approved by WC. Noted patient was in normal state of health prior to work injury. Noted prior treatment including surgery and extended recovery. Patient now on permanent disability from job but persists in having severe low back pain and lower extremity neuropathic pain. Had been treating exclusively with MacKenzie. Had ESI and facet injections and therapy and multiple medications and despite all the treatments his pain is still intractable on a daily basis. Paid described across low back and down both buttocks and legs to feet. Patient stated it was definitely worse with standing and walking but there to some degree 24 hours per day. Still on permanent disability as a result of his injuries. Assessment=failed back syndrome status post pelvic crush injury. Having severe low back pain and bilateral lower extremity neuropathic pain and failed conservative therapies and intractable pain on a daily basis. Doctor felt the best option for significant improvement is a spinal cord stimulator and recommended insurance carrier that this be approved as he has exhausted all other reasonable options. Patient understands the plan. To bring him back for a psychiatric evaluation and if passes

a dorsal column stimulator trial once they have approval from insurance carrier. Patient wishes to proceed.

- June 5, 2013 letter from Cannon Cochran Management to Petitioner's attorney noted as follows:

    - Letter noted Dr. Wehner, Respondent's examiner of 5/10/13 opined Petitioner functioned fairly well with activities of daily living. He stated no expectation per Dr. Wehner's opinion that a spinal cord stimulator would actually help since there is no specific intra-canal lesion. Present activities of daily living and medication appeared appropriate and stimulator would not expect to improve Petitioner's pain or function and not medically necessary.

- Respondent presented their exhibit of the deposition of Dr. Wehner and accompanying evaluation report. Therein, Dr. Wehner testified of examining Petitioner on multiple occasions (July 30, 2008, February 26, 2010, and May 10, 2013) for Respondent. Dr. Wehner had reviewed various medical records for each evaluation. Dr. Wehner testified of her evaluation and IME report of May 10, 2013, wherein, she opined that Petitioner functioned fairly well with activities of daily living. She stated, in her opinion that there was no expectation that spinal cord stimulator would actually help since there was no specific intra-canal lesion and she noted Petitioner's present activities of daily living and medication appeared appropriate and the spinal cord stimulator would not be expected to improve Petitioner's pain or function and was not medically necessary.

- At this hearing (4/9/14) Petitioner stated that the Commission previously found (affirming the Arbitrator) that Petitioner's back and hip conditions were work related and a spinal cord stimulator to be reasonable and necessary treatment and therefore Respondent should authorize the trial of the spinal cord stimulator along with the psychological evaluation. Petitioner argued that Respondent lost previously with the opinion of Dr. Wehner. Petitioner requested that the Commission award prospective medical care in the form of a trial of the spinal cord stimulator based upon the opinions of Dr. MacKenzie and Dr. Dahlberg consistent with the earlier decision.

- Respondent stated that Petitioner alleges the Commission previously found the hip and back conditions were work related. Respondent argued that while the Commission found the conditions related, there was nothing in the Decision of the Arbitrator or the Commission that stated the spinal cord stimulator was reasonable; what the decision indicated was that the doctor's in 2009 decided not to pursue the stimulator and not that it was reasonable and/or necessary. Respondent argued it is now 4 years later and the question is whether or not the stimulator is reasonable and necessary and would it have been of benefit to Petitioner at this point. As to Respondent's §12 IME, Respondent stated they take the position, using Dr. Wehner for another IME makes sense, as she is familiar with the case and is in a position to determine if in 2013/2014 the spinal cord stimulator is reasonable and necessary. Respondent stated they deposed Dr. Wehner and she testified Petitioner was functioning fairly well albeit he could not return to work as a police officer as prior to the accident and she further testified she did not observe the pain

behavior that would warrant a spinal cord stimulator though Petitioner had subjective complaints of high levels of pain at various different times. Respondent questioned whether or not the spinal cord stimulator is reasonable and necessary and argues that based upon the evidence submitted it is not and consequently, the Commission should deny Petitioner's petition under §8(a).

The Commission considers and notes, as to the prior Review, which was only regarding nature and extent, the following from that prior record; including Petitioner's complaints from that hearing, also as similarly noted in the decision of the Arbitrator:

--Rockford Memorial Hospital records note October 8, 2007-in the discharge summary--closed fracture of right acetabulum, closed fracture of sacrum and coccyx without spinal cord injury, closed fracture of the pubis, closed fracture of lumbar vertebrae without mention of spinal cord injury, open wound to face without complications on forehead, open wound to nose without complication, concussion with no LOC, and open reduction and internal fixation of right sacrum fracture post MVA versus pedestrian-(patient was a pedestrian). History of accident noted-"The patient attempted to talk to driver. The driver intentionally veered his truck into the wall to crush the patient. The patient was pinned against the truck and the wall as the truck slid by him." They noted complaints of very severe hip pain afterwards (L>R). Noted unknown if patient lost consciousness at time of accident; he did suffer several facial lacerations. Patient noted movement increased pain. Noted patient had open reduction internal fixation with placement of screw. Other records noted other problems that arose such as testicular cyst (needing surgery) and gall bladder/liver problem related to trauma (PX 3, PX4). Petitioner further evidenced apparent psychological issues (depression) as a result of chronic pain and other issues of dealing with daily life in his current condition.

--Petitioner testified that currently, he cannot sleep through the night. He is up many times during the night because of the pain and he gets up, out of bed and usually walks downstairs and stays there for about an hour and then he tries to go back to bed; he stated the pain is usually every day. He has the pain in his lower back and kind of in his hip socket areas. He stated once he does get up, he can stand in the shower and tries to for a while to try to loosen up. He stated when he needs to during the day he uses heat pads or ice if it gets real bad. He stated he is on medication which messes him up and makes him horribly drowsy. He stated that he does not sleep throughout the day; he tries to stay awake to try to sleep at night. He testified if he sits down he will nap during the day; he tries to rest his back as much as possible. He stated if he tries to travel anywhere, vehicles, hurt if he goes for an extended period of time; Other than that, he just kind of tinkers around the house. His ability to sit without feeling the need to stand up and stretch varies from day to day. He cannot really sit for real long; he has to

get up and move or stretch his legs out, stand up and bend over/try to bend over, stretching. He testified that he found that lately stretching is getting less and less because the more he stretches, the more it hurts. It was noted that Petitioner has a cane; Petitioner stated that he had pretty much used the cane since he graduated from a wheelchair to the walker to the cane and he left the walker in 2007. Petitioner testified that Dr. MacKenzie told him it was okay to use the cane if it helped, but the doctor told him not to get too dependent on it. Petitioner stated he does not use the cane all of the time, only when he is having some bad days and the prior couple of weeks had been pretty bad. Petitioner testified that he does notice when the weather changes; he stated it hurts more, it throbs. At hearing (December 16, 2010), Petitioner stated it was really throbbing down below and it goes down his legs and in his feet. He notices it more in the cold weather. Petitioner testified that he was still taking Vicodin, he tried not to take it but he does a few times per week; he stated the Vicodin messes him up. Petitioner testified he was taking Hydromorphone, a generic if Dilaudid, a strong pain reliever that he takes 2 pills, three times per day. He was taking Clyobenzaprine a muscle relaxer that he takes three times per day. He also takes Prednisone three times per day and Naproxen three times per day. He takes Ventafaxine when he goes to bed (an antidepressant). Petitioner testified all of the medications are as a result of the September 30, 2007 accident. The last doctor that wrote the prescription for the prescriptions was Dr. McFadden and Petitioner still had future plans to see that doctor for appointments. Petitioner was still considering future medical treatment for his symptoms and conditions as previously testified. Petitioner testified at home going up and down the stairs he currently notices the pain. He stated he could remember when he used to be able to run up and down stairs and not use the rail or anything and now he is like an old person going up and down the stairs using the railing.

--The magnitude of Petitioner's injuries goes beyond the severity of his pelvic fractures and resulting surgery for that. Petitioner suffered a concussion, complications requiring testicular surgery related to trauma, and gall bladder/liver complications, and psychological issues as well. Petitioner further evidenced increased problems with his antalgic gait and further developed herniated disc and annular tears to the point that fusion surgery was recommended and still being considered by Petitioner, as well as, the recommended dorsal column stimulator that Petitioner was still considering. Petitioner was very active and ran up to 10 miles per day and was in good physical shape to be a canine officer and a member of the SWAT team and Petitioner currently has problems with just everyday activities of sleeping, going up and down stairs, and even sitting or standing long and requires him to take medication on a daily basis to tolerate pain levels, which apparently affects his alertness as the medications cause drowsiness. Petitioner is unable to return to his former duties as a police officer.

--The Arbitrator awarded 60% loss of use of a Man as a Whole (MAW). Thereafter, on review, the Commission affirmed the Arbitrator's award of 60% loss of a MAW and no further appeals were taken subsequent to that Review.

The Commission finds that at this most current hearing (April 9, 2014), Petitioner testified of his worsening problems and symptoms and his increased medication doses and frequency. Petitioner's testimony is again supported in the medical records subsequent to the initial hearing record. Petitioner testified that since his prior testimony he had not been involved in any other accident or incidents relative to his back or hip conditions. Petitioner testified that since then he had tried working in security but that did not work out as he had the same thing with a lot of pain. Petitioner stated that he performed security work for about 6-7 months but had to quit that job due to his pain. After the security position, Petitioner testified that he mowed lawns and was also a personal assistant (PA) for a handicapped child. Petitioner currently was mowing lawns for the Shirland School, the Shirland United Methodist Church and also for various residents in Shirland. Petitioner had been mowing lawns for about three years and earned about $400.00 per month. Petitioner was currently drawing occupational disability pension benefits. Petitioner stated that his understanding was that he was able to work and earn some income and also draw the disability pension. Petitioner was not currently doing the PA work as he had stopped that in January of 2013; Petitioner stated that he helped a handicapped child but he had to stop because he could not do the lifting; he did the position with his wife and his wife was still performing those duties for the child.

Further, Petitioner testified that since the prior hearing, back in 2010, he stated he was getting progressively worse and he was taking a lot of medication which were just not working. Petitioner testified as 2011 progressed his back and pelvis were getting worse and he was getting pain down his legs and as a result of that he made an appointment to see Dr. MacKenzie January 4, 2012. Petitioner testified that he reported his symptoms to the doctor and how he was feeling and Dr. MacKenzie thereafter recommended an MRI. Petitioner returned to Dr. MacKenzie after the MRI for a follow up on January 17, 2012. His next appointment with Dr. MacKenzie then was August 21, 2012. Petitioner testified in August 2012 that his back and legs were getting worse and he reported that to the doctor. Petitioner had a follow-up appointment with Dr. MacKenzie on March 27, 2013 and he testified his back and leg condition at that time was definitely worse. He stated at that time it was the pain in his lower back and pelvis and he was getting shooting pain down his legs and sharp shooting pain across his pelvis. At that time, Dr. MacKenzie recommended Petitioner follow up with another doctor, Dr. Dahlberg, the same doctor Petitioner had seen in December 2009. Petitioner saw Dr. Dahlberg in April 2013 and reported his symptoms at that time. Petitioner stated that he wanted to pursue any medical treatment; which was the pain/spinal stimulator. Petitioner testified he tried to get that treatment approved through workers' compensation but it was denied.

The Commission notes that Respondent's most current §12 IME, Dr. Wehner, (as similarly in the prior examinations), opined no further medical care was warranted. As noted in the deposition, Dr. Wehner, after the initial exam, felt Petitioner would have been at maximum medical improvement (MMI) in a year and her 2nd exam showed her estimation and opinion was not on

the mark. Dr. Wehner is neither a pain management doctor nor a specialist in spinal cord stimulators. The Commission finds Dr. Wehner's opinions were not considered persuasive before and are not considered persuasive here either.

The Commission finds that the prior Review demonstrated Petitioner's complaints and symptoms consistent, and fully supported by the treating medical records and causally related to the injury. Likewise here, Petitioner's complaints of worsening symptoms are supported in the records since that initial hearing. The prior records and Petitioner's testimony noted that the stimulator had still been a consideration and at the time of the prior hearing Petitioner still had considered that alternative; albeit, being at MMI at that point with no planned treatment. Since his symptomotology had worsened, the doctors again recommended the psychiatric evaluation and the trial stimulator for determination if a permanent stimulator would be of value to Petitioner. There clearly is evidenced a supported ongoing causal relationship to his worsening condition, and the renewed consideration and recommendation for the evaluation and spinal cord stimulator. The evidence and credible testimony here finds that Petitioner met the burden of proving entitlement to receive the proposed treatment recommended by Dr. MacKenzie and Dr. Dahlberg, again, given that had been a consideration even before the prior hearing and the continued evidenced causal relationship.

The Commission, therefore, awards the recommended psychiatric evaluation and trial spinal cord stimulator, and the implanted stimulator; assuming the trial stimulator demonstrates Petitioner has a reduction in pain levels and an increase in functionality from the trial.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §19(h)/8(a) petition is hereby granted, and herein, orders Respondent to authorize and pay for the proposed, recommended psychiatric evaluation, and trial stimulator, and if that trial stimulator proves successful, for Respondent to authorize and pay for the implanted stimulator as prescribed.

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: DEC 23 2014
o-10/2/14
DLG/jsf
45

David L. Gore

Stephen Mathis

Mario Basurto

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

Jason Pilbean,

Petitioner,

14IWCC1128

vs.

NO: 12 WC 24692

Waste Management,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, medical expenses, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 23, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 24 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 12/18/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PILBEAN, JASON
Employee/Petitioner

Case# **12WC024692**

WASTE MANAGEMENT
Employer/Respondent

14IWCC1128

On 6/23/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

3067 KIRKPARTICK LAW OFFICES
ERIC KIRKPATRICK
3 EXECUTIVE WOODS COURT
BELLEVILLE, IL 62226

1109 GAROFALO SCHREIBER HART ET AL
MATTHEW NOVAK
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

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

14IWCC1128

Case # 12 WC 24692

Consolidated cases: N/A

Jason Pilbean
Employee/Petitioner

v.

Waste Management
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Collinsville**, on **April 21, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 14IWCC1128

On **8/18/2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$49,132.20**; the average weekly wage was **$944.85**.

On the date of accident, Petitioner was **31** 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 **$n/a** for TTD, **$n/a** for TPD, **$n/a** for maintenance, and **$6,337.11** in non-occupational disability benefits for which credit may be allowed under Section 8(j) of the Act, for a total credit of **$6,337.11**.

Respondent is entitled to a credit for any medical bills paid under a group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Petitioner injured his left knee on August 18, 2009; however, Petitioner failed to prove that his current condition of ill-being in his left knee, or the condition of his left knee after September 3, 2009, is causally connected to his accident or that he sustained any permanent partial disability with regard to his August 18, 2009 work accident.

No benefits are awarded.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

June 12, 2014
Date

JUN 23 2014

ARBITRATOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is undisputed that Petitioner sustained an accident on August 18, 2009 that arose out of and in the course of his employment with Respondent. As the evidence will show Petitioner sustained both an ACL injury and a meniscus tear to his left knee; however, Petitioner is only claiming that Respondent should be held liable for the ACL injury.

The Arbitrator finds:

Petitioner has worked for Respondent since 2003 as a heavy equipment operator.

On August 18, 2009 Petitioner was on Respondent's premises when he was startled by a skunk. As he turned to run he experienced an onset of pain in his left knee.

The next day, Petitioner was evaluated by Dr. Dennis Motchan at Concentra Medical Centers. RX 2. Petitioner related the incident of the day before indicating a skunk suddenly appeared, he turned and ran to get away from it, and felt pain in his knee like he had twisted it. Peitioner's past medical history noted that fifteen years earlier he had suffered a similar injury to his left knee. Petitioner recalled there was fluid in the knee at that time, but after some time the fluid disappeared and his knee did not bother him again until this recent incident. He stated that the pain he had now was similar to the pain he had with the prior left knee injury. Physical examination revealed no external sign of trauma, the collateral ligaments were intact, there was moderate joint effusion, there was no locking or pain with full range of motion and the Lachman's and McMurray's tests were both negative. The assessment was left knee strain and effusion of the left knee. Petitioner was recommended to take over the counter anti-inflammatory medications and was provided a knee sleeve. He was advised to continue his regular job and to follow up on August 24, 2009. The notes state Petitioner lived over an hour away from the clinic location, and he wanted to delay his visits as much as possible. He was to return if his symptoms worsened. RX.2.

Petitioner then saw Dr. Nancy Birner on September 3, 2009. PX.1. He gave a history of injuring his left knee while running from a skunk, falling onto his knee, and twisting it. Petitioner reported that he had seen an occupational health doctor who told him he did not think he had damaged any ligaments. Petitioner stated he was doing better, although he had some continued swelling and thought that his knee needed to be drained. He states that he had injured his knee ten to fifteen years earlier and they had to drain the knee, and he did not know if that was what was needed at this time. On physical examination there was positive joint effusion, positive mild quadriceps wasting, a positive Lachman's sign, and a negative McMurray's sign. Dr. Birner offered him an MRI, but did not think the effusion was large enough to drain. Petitioner stated that he wanted to wait since his knee was improving, but if he continued to have problems he would call back for the MRI. Dr. Birner released him to follow up as needed. PX 1.

After the September 3, 2009 visit with Dr. Birner, there is no evidence of further medical treatment for Petitioner's left knee until he returned to see Dr. Birner on June 25, 2012. PX.1. At that visit, Petitioner stated he was playing softball on Saturday and felt his left knee dislocate, relocate and then later on that afternoon/night he dislocated it again. Petitioner complained of increased pain, swelling, and the inability to bear weight. Petitioner stated that this had happened to his knee a few years earlier, but it had improved so he never had the MRI completed. When he re-injured it on Saturday, it had markedly worsened. Physical

examination revealed positive effusion with a large abrasion to the anterior aspect of the left knee. He had hesitancy with trying to manipulate the patella, there was positive joint line tenderness over the medial aspect, and he had a negative anterior and posterior drawer sign. He had positive Lachman's and McMurray's signs. The assessment was left knee pain and concern for a medical meniscal tear. Petitioner was to obtain an MRI to evaluate for internal derangement. PX.1.

Petitioner underwent an MRI on June 26, 2012. PX.5. The radiologist's impression was an anterior cruciate ligament tear and a tear of the body of the posterior horn of the medial meniscus with posterior central displacement of meniscal fragment. There was also a suggestion of a partial tear of the popliteus muscle posterior to the tibia, and contusions involving mainly the lateral tibial plateau and the lateral femoral condyle. There was also a small contusion at the posterior aspect of the medial tibial plateau. PX.5.

Dr. Steven Horner evaluated Petitioner on July 6, 2012. At this visit Petitioner related that he injured his left knee three years earlier at work when he twisted it on some rocks and fell, and "he had a bunch of pain and since then his knee has been unstable and giving way all of the time. More recently he had another episode, in which his knee was all swollen and painful again." Physical examination revealed, among other things, large joint effusion and grossly positive Lachman's test and anterior drawer test. After review of the MRIs, Dr. Horner's diagnosis was ACL unstable left knee with a displaced meniscal tear. He recommended arthroscopic reconstruction of the left anterior cruciate ligament and probable excision of the displaced meniscal fragment. He was expected to be out of work for six to eight weeks and out of sports for six to nine months. PX.2. A handwritten record from the July 6, 2012 visit entitled "Patient Information" states that the onset of his injury was June 23, 2012. Under the section "is this work related" the "no" box was checked. PX.2.

Petitioner signed his Application for Adjustment of Claim on July 12, 2012. (AX 2)

Dr. Horner issued work restrictions to Petitioner, effective July 12, 2012, which included no climbing, no lifting, and no stooping. Petitioner stopped working as of that date. PX 2.

Dr. Horner performed surgery on August 2, 2012 including arthroscopic reconstruction of the left anterior cruciate ligament and partial medial meniscectomy. During the procedure, Dr. Horner noted a displaced bucket-handled tear of the medial meniscus that was un-repairable, and the displaced fragment was removed. Dr. Horner also indicated he removed the remnants of Petitioner's ACL and then reconstructed the ACL with a tendon graft. PX.2.

Petitioner's post-operative recovery was complicated by the development of deep vein thrombosis in his left foot. PX 1, 4. Petitioner obtained medical treatment at Memorial Hospital on August 10, 2012 where he received Coumadin for treatment. PX.4. Dr. Horner's August 31, 2012 evaluation states that Petitioner was undergoing physical therapy following his deep vein thrombosis. He was to continue aggressive physical therapy and remain off of work. PX.2. Dr. Horner then generated a September 21, 2012 work note stating Petitioner could return to work light duty effective September 26, 2012. On September 25, 2012 Dr. Horner stated Petitioner could return to work effective full duty beginning September 26, 2012. PX.2.

On October 12, 2012 Petitioner followed up with Dr. Horner. The note states that Petitioner was doing quite well and he had no complaints. Physical examination showed mild swelling with trace joint effusion of the left knee. He had full extension and normal flexion. Examination showed a negative Lachman's and a negative anterior drawer and Petitioner was walking with a normal gait. Summarily, Petitioner was doing well post left ACL reconstruction. Petitioner was to continue his home exercises. He was noted to he have a gym membership and he was shown exactly what to do. He was counseled against any athletic activities, and he was

to continue strengthening and simply walking for exercise. He was to follow up in four months' time for further consideration of a sports brace. PX.2.

Dr. Horner was deposed on behalf of Petitioner on February 4, 2014. PX.3. Much of Dr. Horner's testimony relates the medical treatment provided to Petitioner, which is summarized in his records. Dr. Horner also testified that Petitioner's MRI showed an absent ACL, a condition which, in his opinion, usually takes time to develop. He stated that ACL fibers would still be present on the MRI with an acute tear. In his opinion, Petitioner's ACL tear did not look acute at the time of surgery. Dr. Horner testified that he believed the ACL tear was related to Petitioner's August 18, 2009 incident. Petitioner had told him that his left knee had been unstable since the work incident, and Dr. Horner thought it was not unusual for people to deal with an absent ACL for periods of time. Dr. Horner thought that the meniscal tear was likely unrelated to Petitioner's August 18, 2009 incident. On cross-examination, Dr. Horner stated that Petitioner's Lachman's sign was grossly (or obviously) positive, which suggested an ACL tear. Dr. Horner agreed that ACL tears cause significant acute pain, joint effusion that can be drained if causing mechanical problems in the knee, and bone bruises. He also noted that the positive Lachman's test and a positive anterior drawer sign were both signs for an ACL tear. Dr. Horner stated that all of these symptoms would be signs of an acute ACL rupture. Dr. Horner further stated that his opinion relating Petitioner's left knee ACL tear to the August 18, 2009 accident was based upon Petitioner's history as described in the July 6, 2012 medical report. Dr. Horner also testified that he had not seen the September 3, 2009 report of Dr. Birner until the day of the deposition, and, in light thereof, stated that Petitioner appeared to have given him an incomplete history. Dr. Horner was unable to tell whether the ACL tear occurred three years ago or ten to fifteen years earlier. He acknowledged that he would not have expected any different surgical findings even if Petitioner had injured his ACL ten to fifteen years before the 2009 accident. Dr. Horner had not seen the medical records of Concentra Medical Center. PX.3.

Dr. Horner also testified that he saw Petitioner one final time on February 8, 2013. PX.3. Petitioner was still doing very well with no complaints, he felt good, had a normal range of motion in the knee, and negative stability on examination. The doctor testified that Petitioner's left knee was "totally solid." PX.3.

Respondent introduced a medical record review report dated December 9, 2013 from Dr. Nikhil Verma, an orthopedic surgeon with Midwest Orthopedics at Rush. RX.1. From Dr. Verma's curriculum vitae, it appears he has significant experience in treating patients for knee injuries. RX.1. Dr. Verma reviewed the medical records of Concentra Urgent Care, Dr. Birner, and Dr. Horner/Belleville Orthopaedic Surgeons. Dr. Verma detailed the examination of Petitioner on August 19, 2009 at Concentra, as well as the examination done by Dr. Birner on September 3, 2009. Dr. Verma also had occasion to review the MRI report of June 26, 2012, which he noted showed the ACL was torn. Dr. Verma also had occasion to review the initial evaluation done by Dr. Horner on July 6, 2012, as well as the operative report on August 2, 2012. Dr. Verma's diagnosis was left knee ACL tear and medical meniscal tear, status post ACL reconstruction complicated by post operative DVT. Dr. Verma did not see a causal connection between Petitioner's left knee condition and his 2009 work injury. He noted that Petitioner had resolution of any left knee symptoms following his 2009 injury with a return to full duty work, and there was not a recommendation for surgery or indication of an ACL deficiency. After the 2009 incident, Petitioner sustained an acute injury while playing softball with MRI evidence of an ACL tear in June of 2012. Upon presentation to Dr. Birner following a June 23, 2012 softball injury, Petitioner reported resolution of his prior knee symptoms after the 2009 event before acutely reinjuring his knee. The MRI scan showed effusion, bone bruising, and an ACL tear, which were all consistent with an acute injury. There was no evidence to suggest that the 2009 injury resulted in an ACL tear, as Petitioner had returned to normal function without a need for surgery after the 2009 incident. RX.2.

Petitioner's case proceeded to arbitration on April 21, 2014. Petitioner testified that he injured his left knee in 1996, for which he underwent an MRI and had the knee drained. Petitioner stated that he attempted to obtain a copy of the MRI but was unable to do so. Petitioner testified after the left knee injury he did not have any further problems, he was able to enroll in the Army and complete boot camp and all the other physical training required. After the August 18, 2009 injury Petitioner testified that his knee would give out two to three times per week, and that, at times, it would lock up or feel like his leg below the knee was not there. Petitioner testified that he participated in coaching sports, particularly baseball, but that he was unable to participate in the physical activities of coaching. Petitioner further testified that he did not seek additional medical treatment between September 3, 2009 and June 25, 2012 because he did not think his knee was that bad and he couldn't afford to be off work. Petitioner testified he wore a brace over his pant leg during this time.

Petitioner testified that he was accompanied by his supervisor to his visit on August 18, 2009. He further testified that he and his supervisor both spoke with the doctor and that his supervisor informed him that, if he obtained an MRI, he and his co-workers would lose their safety bonus.

In regard to the softball incident, Petitioner stated that he played in a coach's softball game for the coaches from the little league in which he participated in. He states that he hit a ball in his first time at bat, and while going to run out of the batter's box his left knee gave out.

The Arbitrator concludes:

Issue F. Is Petitioner's current condition of ill being causally related to the injury?

It is undisputed that Petitioner suffered an accident on August 18, 2009 in which he injured his left knee while attempting to evade or run from a skunk. Petitioner sought medical treatment on August 19, 2009 with Concentra and again on September 3, 2009 with Dr. Birner. The Arbitrator concludes that Petitioner's condition of ill-being to his left knee after September 3, 2009, and any medical treatment or time missed from work or any other benefits pertaining to Petitioner's left knee after September 3, 2009, are unrelated to his August 18, 2009 accident for the reasons outlined below.

When Dr. Motchan evaluated Petitioner at Concentra on August 19, 2009 Petitioner was diagnosed with a left knee sprain. Dr. Motchan noted that Petitioner's collateral ligaments were intact and he had a negative Lachman's sign. Petitioner stated that he suffered a similar injury to the left knee over fifteen years ago (the 1996 injury) in which he had fluid in his knee, and the pain he was having was similar to the pain he had back then. Dr. Motchan instructed Petitioner to follow up on August 24, 2009, and/or if his symptoms worsened. Petitioner did not follow up with Dr. Motchan or at Concentra after his August 19, 2009 visit. Petitioner saw Dr. Birner on September 3, 2009, and related that his knee was doing better. Dr. Birner advised him that he could proceed with an MRI of the left knee, but Petitioner declined as his knee was improving and he wanted to see if it would continue to improve. If his knee continued to have problems, then he would then call for an MRI. He was to follow up as needed. Dr. Birner's notes make no reference to the use of a knee sleeve/brace.

Following Petitioner's September 2009 visit with Dr. Birner, there is no evidence Petitioner obtained medical treatment for nearly three years until he returned to Dr. Birner on June 25, 2012. The reason Petitioner returned to Dr. Birner at that time was due to a re-injury of his left knee while playing softball the previous Saturday. When Petitioner saw Dr. Birner on June 25, 2012 he related an injury a few years prior, presumably the August 18, 2009 incident, but stated his left knee improved so he never had an MRI completed. When he reinjured his knee on the prior Saturday, however, it had markedly worsened. Petitioner made no mention of ongoing complaints in the years between injuries or the need for a knee sleeve/brace.

When Petitioner saw Dr. Horner on July 6, 2012 he told Dr. Horner that he had injured his left knee three years earlier when he "twisted it on some rocks and fell." Petitioner also added that he had been having "a bunch of pain since then" and his knee had been unstable and giving away all the time. Petitioner related a recent episode in which his knee became swollen and painful again. While the history contained in Dr. Horner's July 6, 2012 record is consistent with Petitioner's testimony particularly of his knee giving out two to three times per week and other evidence of instability in the left knee, this history is contradicted by Dr. Birner's June 25, 2012 medical record in which she noted Petitioner's left knee had improved after the August 18, 2009 incident, which is why he never obtained additional medical treatment. Both Dr. Motchan and Dr. Birner instructed Petitioner to follow up for further evaluation if his symptoms worsened or continued, yet he did not do so. The only time Petitioner sought additional medical treatment was after reinjuring his left knee on June 23, 2012. The Arbitrator also notes that Petitioner did not miss any work following his August 18, 2009 incident, but did begin missing work after his June 23, 2012 incident while playing softball.

Dr. Horner testified that he thought Petitioner's ACL tear was related to his August 18, 2009 accident, but it appears Dr. Horner's opinion is based upon inconsistent facts. In particular, Dr. Horner testified that his opinion was based upon Petitioner's history of twisting his knee and falling (PX 3, p. 15) and Petitioner's left knee giving way since the 2009 accident. Dr. Horner's records, however, show a handwritten note that Petitioner's condition started June 23, 2012 and was not related to work. PX.2. Moreover, the history Petitioner gave Dr. Horner is contradicted by both Petitioner's lack of medical treatment from 2009 to 2012, and by the June 25, 2012 record in which he states his left knee had improved after the August 18, 2009 incident. PX.1. It does not appear that Dr. Horner was ever shown Dr. Birner's June 25, 2012 medical record describing the softball incident as well as Petitioner's recovery from the August 18, 2009 incident. The Commission often gives greater weight to statements made to medical personnel close in time to the date of accident when later statements conflict, as it is expected that a person will not falsify statements to a physician from whom he expects and hopes to receive medical aid. E.g., *Vargas v. Millard Maintenance Service Co.*, 03 IIC 0018, citing *Shell Oil Co. v. Industrial Commission*, 2 Ill.2d 590, 119 N.E.2d 224 (Ill.Sup.Ct.1954). In this case, the history Petitioner gave to Dr. Birner on June 25, 2012 that his left knee improved after the August 18, 2009 incident is corroborated by both the medical records from 2009 and the fact that Petitioner did not need medical treatment until the softball incident of June 23, 2012. Petitioner's later history that his left knee was continually painful and giving out two to three times per week is less credible as it conflicts with the history given to Dr. Birner on June 25, 2012. It is also less credible because two doctors advised Petitioner to return for treatment if his symptoms persisted, yet Petitioner failed to do so, likely because his symptoms and the condition of his left knee improved and went away. Of some concern is the additional fact that Petitioner signed his Application for Adjustment of Claim on July 12, 2012, only six days after seeing Dr. Horner and, for the first time, a mention of ongoing instability in the intervening time period was noted.

Petitioner's accident was undisputed; however, the details of the accident are somewhat inconsistent. When seen at Concentra Petitioner stated he turned and felt like he twisted his knee. When seen by Dr. Birner a few weeks later, he reported falling and twisting it. Then when Petitioner presented to Dr. Horner on July 6, 2012 he related twisting his knee on some rocks and falling. These discrepancies in Petitioner's description of the accident undermine his credibility as a good historian. If Petitioner cannot be consistent regarding the details of his work accident can the Arbitrator be certain as to Petitioner's history to Dr. Horner? She also notes that Petitioner failed to say anything to Dr. Horner about his softball incident; rather, he simply referred to "another episode." The Arbitrator is not persuaded that Petitioner actually wore a knee sleeve/brace during his gap in treatment. Petitioner's testimony was not corroborated by any witnesses or the medical records. Petitioner's testimony as to ongoing complaints during the gap was not credible either.

Respondent's expert, Dr. Verma, was able to review all of the medical records from both 2009 as well as the initial treating records from 2012, which form the basis of his conclusion that Petitioner's left knee condition was not causally connected to the August 18, 2009 accident. Dr. Verma noted that the medical records confirm Petitioner recovered from the August 18, 2009 accident and continued to work his full duty job until the June 23, 2012 softball incident. Dr. Verma also confirmed that the MRI study revealed evidence of an acute ACL tear, and that all the evidence pointed to an acute injury occurring on June 23, 2012 while Petitioner was playing softball. Considering Dr. Verma was provided with all of the medical records from 2009 and the contemporaneous medical record of June 25, 2012, and the issues raised with Dr. Horner's testimony as discussed above, the Arbitrator finds Dr. Verman's opinion to be more credible than that of Dr. Horner.

Issue J. Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Based upon her causation determination above, Respondent is not liable for any medical charges or out-of-pocket expenses incurred after September 3, 2009. Also based upon the foregoing, the Arbitrator would find Respondent liable for medical charges for dates of service August 19, 2009 and September 3, 2009, as they relate to the August 18, 2009 incident. However, based upon Petitioner's medical bill itemization (PX.6), it does not appear that any such medical bills were placed into evidence. Therefore, no medical bills are awarded.

Issue K. What temporary benefits are in dispute?

Based upon the foregoing findings of fact and conclusions of law, the Arbitrator concludes that Respondent is not liable for any lost time incurred after September 3, 2009. The Arbitrator notes that there is no claim for lost time benefits between August 18, 2009 and September 3, 2009.

Issue L. What is the nature and extent of the injury?

The Arbitrator adopts all of the previous findings and fact conclusions of law as it pertains to the determination of this issue.

Petitioner had two dates of treatment following his August 18, 2009 work accident. On August 19, 2009 Petitioner was diagnosed as having a knee strain, for which he was given a knee sleeve and recommended to take over the counter pain medications. Dr. Birner did not appear to provide any treatment other than to recommend an MRI, which Petitioner was to obtain if his condition did not improve. Petitioner did not obtain this MRI. The Arbitrator notes Petitioner did not receive any physical therapy, injections, or more aggressive treatment following his August 18, 2009 accident. Petitioner did not miss any time from work following the August 18, 2009 accident, and was capable of performing his full duty job immediately thereafter. Though Petitioner testified to permanent problems with his left knee, those appear attributable to the re-injury of his left knee while playing softball on June 23, 2012 and related treatment.

Based upon the small amount of treatment and the fact that Petitioner lost no time from work, the Arbitrator concludes that Petitioner did not suffer any permanent partial disability resulting from his August 18, 2009 accident.

****

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

Becky J. Hartzell,

Petitioner,

14IWCC1129

vs.

NO: 10 WC 44965

Pekin Prohealth, 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 medical expenses, causal connection, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 10, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

14IWCC1129

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,000.00. 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: DEC 24 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 12/18/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HARTZELL, BECKLY J
Employee/Petitioner

Case# **10WC044965**

PEKIN PROHEALTH INC
Employer/Respondent

14IWCC1129

On 6/10/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2187 HEIPLE LAW OFFICES
JEREMY H HEIPLE
7620 N UNIVERSITY AVE #203
PEORIA, IL 61614

1337 KNELL & KELLY LLC
STEPHEN P KELLY
504 FAYETTE ST
PEORIA, IL 61604

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

14IWCC1129

BECKY J. HARTZELL
Employee/Petitioner

v.

PEKIN PROHEALTH, INC.
Employer/Respondent

Case # 10 WC 44965

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 **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Peoria, Illinois**, on **April 23, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC1129

FINDINGS

On **08/26/09**, 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 as it involves the cervical spine.

In the year preceding the injury, Petitioner earned **$34,074.04**; the average weekly wage was **$655.27**.

On the date of accident, Petitioner was **61** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Petitioner is entitled to temporary total disability benefits of $436.85 per week for twelve weeks, as the Petitioner was unable to work from November 8, 2010 through January 30, 2011.

Respondent shall be given a credit of **$5,433.36** for TTD, **$-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

- **THE PETITIONER SUSTAINED A WORK-RELATED INJURY WHICH AROSE OUT OF THE COURSE OF AND IN THE COURSE OF EMPLOYMENT ON AUGUST 26, 2009.**
- **THE PETITIONER DID GIVE PROPER NOTICE, OF SAID ACCIDENT, TO THE RESPONDENT.**
- **THE PETITIONER'S CONDITION OF ILL-BEING IS RELATED TO THE DESCRIBED WORK ACCIDENT DATED AUGUST 26, 2009 INSOFAR AS HER CERVICAL SPINE INJURIES. HER LUMBAR SPINE INJURIES WHICH REQUIRED SURGERY ARE NOT CAUSALLY RELATED TO HER ACCIDENT.**
- **THE RESPONDENT SHALL PAY THE MEDICAL CHARGES SET FORTH IN THE ATTACHED CONCLUSIONS OF LAW, SUBJECT TO SECTIONS 8 (A) AND 8.2 OF THE ACT.**
- **THE ARBITRATOR FINDS THE PETITIONER IS ENTITLED TO AN AWARD OF 7.5% LOSS OF USE OF PERSON AS A WHOLE WHICH REPRESENTS 37.5 WEEKS X PPD RATE OF $393.16 OR $14743.35.**

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

D. Dylan McCarthy
Signature of Arbitrator

June 2, 2014
Date

JUN 10 2014

BECKY J. HARTZELL V PEKIN PROHEALTH, INC.
CASE NO. 10 WC 44965

FACTS IN CASE

The Petitioner testified she was employed by the Respondent as a triage nurse. In August of 2009 the Petitioner's duties required her to answer phones and greet patients. The Petitioner's job required her to make a determination whether or not a patient should be received in the ER or sent to the doctor. The Petitioner worked directly for Dr. Rhodora LeeHo and Dr. Jeffrey LeeHo.

On August 26, 2009 the Petitioner was working for the Respondent. The Petitioner testified she was entering an elevator at the Respondent's place of business. The elevator did not stop evenly with the ground. The Petitioner's left foot got caught and she fell into the elevator.

The Petitioner testified she immediately noticed pain to her knees. The Petitioner's main concern was to her knees in light of the fact of prior knee replacements.

The Petitioner testified that she did not seek medical treatment initially. The Petitioner further testified she was able to work immediately following the accident.

Petitioner testified that she sought treatment with Dr. LeeHo immediately following the accident. The Petitioner further testified she sought treatment from Dr. Mulvey after the accident. Dr. Mulvey was the specialist who performed the knee replacement of the Petitioner which predated August 26, 2009.

The Petitioner testified on direct examination that she came under the treatment of Dr. Klopfenstein. The Petitioner testified that Dr. Klopfenstein eventually did surgery on her low back on August 29, 2011.

The Petitioner testified, on cross examination, that she did indeed have prior problems with her low back predating August 26, 2009. The Petitioner testified that she did indeed have complaints and treatment to her low back in August of 1998.

Respondent's Exhibit #15 are the records for physical therapy at OSF from August through December of 1998. It is noted in these records that the Petitioner had provided a history of sustaining a work injury when her back hit a side rail of a bed while catching a falling resident. The records of OSF physical therapy in 1998 revealed the Petitioner had pain 10/10. The Petitioner provided a history of having sleep deprivation nightly due to the pain and had right back, buttocks and right leg pain.

The Petitioner testified she went to physical therapy in 1998. The Petitioner testified this included traction. Petitioner further testified that she did provide a true and accurate history to the medical facilities in 1998.

The Petitioner further testified that she received medical treatment to her low back in 1999. This was at Methodist Medical Center. The Petitioner testified that she did indeed have a bone scan, an x-ray and an MRI to her low back predating August 26, 2009.

Petitioner testified, on cross examination, that she had a prior diagnosis to her low back predating the work injury of SI dysfunction, sciatica, and chronic SI pain.

The Petitioner testified on cross examination that on February 21, 2012 she did receive treatment at OSF St. Francis. The Petitioner did indeed sustain an injury when a spine board fell on her low back. This was while she was at the hospital visiting her mother. The Petitioner testified this injury on or about February 21, 2012 did involve her low back and she had increased complaints to her low back at that time.

The Petitioner testified on cross examination that she also received treatment from Dr. Couri. This was the Petitioner's rheumatologist.

The Petitioner testified that in April and June of 2008 the Petitioner did provide a history of having low back pain, chronic. The Petitioner's diagnosis was spondylosis of the lumbar

spine in addition to fibromyalgia. Petitioner testified she was provided medication at that time by Dr. Couri and was on medication for her diagnosis up to August 26, 2009.

The Petitioner testified that when she saw Dr. Mulvey on or about September 9, 2009 she did not have low back pain. A review of Dr. Mulvey's record reveals that Dr. Mulvey did not believe the Petitioner was a surgical candidate for her knees. (Resp. Exh. #1). It is noted in Dr. Mulvey's record of September 9, 2009 the Petitioner provided no low back complaints to that physician.

The Petitioner testified that she did receive treatment by Dr. LeeHo in October of 2009 through March of 2010. A review of those records revealed that the Petitioner did not provide any low back complaints at that time. Petitioner's complaints at that time were only to her neck area. (Pet. Exh. #2).

The Petitioner testified on cross examination she did indeed seek treatment at Midwest Orthopaedic for neck complaints. The Petitioner first saw Dr. Roberts on November 2, 2010. The Petitioner then saw Dr. O'Leary for neck problems on November 3, 2010.

During the Petitioner's testimony on cross examination she admitted her pain drawing to Dr. O'Leary on November 3, 2010 did not include any low back pain. Petitioner testified she was not having any low back pain at that time.

The Petitioner testified that she indeed submit to an independent medical examination on behalf of the Respondent. This was with Dr. Singh on December 2, 2010. (Resp. Exh. #6). Dr. Singh took a history from the Petitioner and performed an examination. (Resp. Exh. #6). Dr. Singh was of the opinion that the Petitioner sustained a soft tissue muscular strain to her cervical and lumbar spine with no aggravation or underlying cervical or lumbar degenerative condition. (Resp. Exh. #6). Dr. Singh was of the opinion that the Petitioner's low back complaints were not related to any work injury. (Resp. Exh. #6). Dr. Singh further noted that the Petitioner was

not forthright regarding her prior complaints. The Petitioner filled out a questionnaire prior to seeing Dr. Singh indicating she had no prior low back pain or treatment predating the work injury. (Resp. Exh. #6). Dr. Singh was of the opinion the Petitioner did not aggravate, accelerate, or exacerbate an underlying degenerative condition of the cervical lumbar spine as a result of the described work injury. (Resp. Exh. #6).

The Petitioner testified she then came under the care of Dr. Klopfenstein. Petitioner testified she underwent surgical intervention with Dr. Klopfenstein. This was performed in August of 2011.

The Petitioner testified that she had a good result from the surgery of Dr. Klopfenstein. Petitioner testified she was in better condition after surgery than post surgery.

The Petitioner testified that since the accident she has voluntarily retired. Petitioner did obtain employment as Bass Pro Shop after release by Dr. Klopfenstein from the surgical procedure.

A review of the medical records of Dr. Klopfenstein reveal that Dr. Klopfenstein is silent as relates to the issue of causation. Dr. Klopfenstein did not provide an opinion as to whether or not the low back condition was related to the work injury.

ARBITRATOR'S FINDINGS

I. Causal Connection

The Petitioner did sustain a work-related injury on August 26, 2009. The Petitioner's complaints were initially focused on her knees and cervical neck.

The Petitioner's low back complaints did not develop, or need medical treatment, until she saw Dr. Ho on December 2, 2010. (PX 2) On that date, her history to the doctor was of right posterior upper leg pain which she'd had for about one week. She then reported, for the first

time, that she'd had the pain on and off since her injury in 2009. She had extensive treatment for other conditions, primarily her cervical spine, from a number of physicians with no reference to the lower back since her accident.

The record, in addition to testimony of the Petitioner, established a pre-existing condition to the Petitioner's low back.

Dr. Klopenstein is silent on the issue of causation between the accident and the Petitioner's low back condition.

Dr. Singh's opinions, which are unrebutted, establish that the Petitioner's lower back condition of ill-being as of December 29, 2010 is not related to the work injury of August 26, 2009. As a basis for his opinion, Dr. Singh points to the fact that the Petitioner did not treat for lower back pain for over a year following her accident. He also questions her credibility in light of her denial of any prior lumbar problems and Dr. Couri's documented finding of lumbar spondylosis in April 2008.

The Arbitrator finds Dr. Singh's opinions persuasive with respect to the lower back.

Thus, the Petitioner has failed to establish that her low back condition was related to the August 26, 2009 work accident.

Petitioner did establish a causal relationship between her accident and her cervical spine injuries. When she saw Dr. Mulvey on September 9, 2009, he wrote that the accident produced a whiplash type aggravation of the Petitioner's neck. (PX 1) On October 9, 2009, Dr. Ho's examination revealed trapezial muscle spasm with occipital neuritis likely from the whiplash. (PX 2) The Petitioner had consistent reported symptoms over the course of the next year as she treated with Dr. Ho. She was taken off work for her cervical problem for twelve weeks beginning on November 8, 2010, and the Respondent agreed as to its liability for TTD benefits. The Petitioner has been diagnosed with cervical arthritis and facet arthrosis per the MRI of October

29, 2010 and fibromyalgia aggravated by the accident per Dr. Ho on February 7, 2011 and Dr. Couri on February 4, 2011.

II. Medical Expenses

The Respondent is not responsible for any medical treatment for treatment of the Petitioner's lumbar spine.

With respect to the Petitioner's cervical injuries, the Petitioner submitted Exhibit 8. While the exhibit is confusing, it appears to the Arbitrator that Dr. Couri's charges for treatment from February 4 through May 5, 2011 has not been paid by the Respondent. As the treatment related to the cervical spine, the respondent is ordered to pay the bill pursuant to the fee schedule. There may be some charges for Dr. Ho's treatment through February 7, 2011, related to the cervical spine which have not been paid by the Respondent. To the extent those charges have not been so paid, the Respondent is ordered to pay them, again subject to the fee schedule.

It appears that the rest of the submitted bills which were not paid by the Respondent relate to the petitioner's lower back.

III. Nature and Extent

The Arbitrator finds that the Petitioner sustained a cervical spine injuries as referenced above, is entitled to an award of 7.5% loss of use of a man as a whole which represents 37.5 weeks times a PPD rate of $393.16 or $14743.50.

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Anna J. Ash,

Petitioner,

vs.

14IWCC1130

NO: 09 WC 51546

Illinois Veterans Home,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, permanent partial disability, the motion to continue/ keep proofs open, Petitioner's Exhibit #14, whether to exclude surveillance on June 10, 2012 at 10:44 a.m., maintenance, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 20, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

14IWCC1130

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 24 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 12/18/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ASH, ANNA J
Employee/Petitioner

Case# **09WC051546**

09WC048650

ILLINOIS VETERANS HOME
Employer/Respondent

14IWCC1130

On 2/20/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

0293 KATZ FRIEDMAN EAGLE ET AL
PHILIP A BARECK
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0499 DEPT OF CENTRAL MGMT SERVICES
MGR WORKMENS COMP RISK MGMT
801 S SEVENTH ST 6 MAIN
PO BOX 19208
SPRINGFIELD, IL 62794-9208

3291 ASSISTANT ATTORNEY GENERAL
DIANA E WISE
201 W POINTE DR SUITE 7
SWANSEA, IL 62222

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

FEB 20 2014

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Adams)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC1130

Anna J. Ash
Employee/Petitioner

v.

Illinois Veterans Home
Employer/Respondent

Case # 09 WC 51546

Consolidated cases: 09 WC 48650

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 **Quincy**, on **December 5, 2013 and in Springfield on December 27, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Evidentiary Issues**

FINDINGS

14IWCC1130

On **November 27, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$24,391.87**; the average weekly wage was **$696.92**.

On the date of accident, Petitioner was **28** 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 **$45,332.66** for TTD, **$0** for TPD, **$11,484.59** for maintenance, and **$0** for other benefits, for a total credit of **$56,817.25**.

Respondent is entitled to a credit of **$N/A** under Section 8(j) of the Act.

ORDER

Medical Benefits

Respondent shall pay reasonable and necessary medical services of $207.86, as provided in Sections 8(a) and 8.2 of the Act for the outstanding bills from Dr. Smith/Hamilton Warsaw Clinic. The parties agree that Respondent shall be given a credit, in part or in full, if Respondent recently made payments pursuant to its group medical carrier pursuant to Section 8(j) of the Act and shall hold Petitioner harmless from any claims for which Respondent is receiving such credit.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $464.61/week for 97-4/7 weeks, commencing 11/27/2009 through 10/11/2011, as provided in Section 8(b) of the Act.

Maintenance Benefits

Respondent shall pay Petitioner maintenance benefits of $464.61/week for 76-1/7 weeks, commencing 1/18/2012 through 7/7/2013, as provided in Section 8(a) of the Act, which excludes the three days in January, 2013 at which time Petitioner worked.

Credits

Respondent shall be given a credit of **$45,332.66** for TTD, **$0** for TPD, and **$11,484.59** for maintenance benefits, for a total credit of **$56,817.25**.

Permanent Partial Disability – Person as a Whole

14IWCC1130

Respondent shall pay Petitioner permanent partial disability benefits of $418.15/week for 150 weeks, because the injuries sustained caused a 30% loss of Petitioner's 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

February 16, 2014
Date

FEB 20 2014

Anna Ash (now Fisher) v Illinois Veteran's Home Quincy, *09WC 51546*

Findings of Fact and Conclusions of Law

Petitioner claims two injuries to her right shoulder while working for Respondent. Claim # 09 WC 48650 originally alleged an accident date of May 15, 2009; however, the date of accident was later amended to May 24, 2009. (AX 3) Petitioner filed a second Application for Adjustment of Claim, 09-WC-51546, alleging an accident date of November 27, 2009. (AX 4) Both cases were consolidated for purposes of trial; however, the parties requested that two decisions issue.

The Arbitrator Finds:

According to medical records, on December 31, 2008 Petitioner went to the office of her primary care physician, Dr. Smith (Hamilton-Warsaw Clinic), reporting that she had hurt her neck at work on December 20, 2008. Petitioner had been on modified lifting restrictions and was reportedly doing better. She denied any numbness, tingling or headaches and reported she had been working with no significant problems and felt ready to return to work on a full duty basis. Petitioner was released to return as needed. (RX 3)

On March 6, 2009, Petitioner returned to see Dr. Smith due to a migraine of several days duration. Petitioner requested an off-work slip, as she had only worked 8 hours of her mandated 16 hour shift. Dr. Smith's office note stated, "Petitioner notes fatigue. States that she has been in the hospital all last week with daughter and also has an infant son at home. The patient's significant other has left her and outside of her family [she] really has no one to lean on to help with her children." (RX 3)

On April 1, 2009 Petitioner reported to Dr. Smith, stating that she had "persistent neck pain, now going on for several months." Dr. Smith set Petitioner up for a cervical MRI which was performed on April 13, 2009 and read as negative for evidence of a herniated disc. (RX 3; PX 2)

On April 17, 2009, Petitioner again saw Dr. Smith for a follow-up regarding her neck pain. Dr. Smith's office note also states, "Patient also complaining of a lot of stress, headaches and anxiety." Petitioner was prescribed Soma and Zoloft and advised to get a physical therapy consultation. (RX 3)

Petitioner testified that on May 24, 2009 she was employed by Respondent as a VNAC (Veterans Nursing Assistant Certified). Petitioner testified she began working for Respondent in November of 2007. Petitioner testified that as a VNAC, her job duties including feeding, dressing and cleaning the residents. Petitioner testified that the residents weighed between 120 and 300 pounds and their ages ranged from the sixties to the nineties. Petitioner is right arm dominant.

Petitioner testified that on May 24, 2009, she was transferring a 200 lb. resident to his bed with the help of a co-worker (Ashley Campbell) at which time the resident's knees buckled and he fell on top of Petitioner landing on her right upper body. Petitioner testified that she felt a pop in her right shoulder. Petitioner testified that she immediately reported the incident to her supervisor and accident reports were completed. (RX 5; PX 8)

Petitioner further testified that prior to this accident, she had no problems with her right shoulder; she acknowledged some treatment for her neck in April of 2009. Petitioner stated that the neck pain was work-related and she underwent an MRI on April 13, 2009 after which cervical physical therapy may have been recommended. Petitioner further testified that her neck problem resolved shortly thereafter. Between April 20, 2009 and May 24, 2009, Petitioner did not have any treatment, restrictions, doctors' appointments or medication for her neck condition. She said it had vastly improved. On cross-examination, Petitioner testified that she did not recall episodes of neck problems before April, 2009 but would not deny that she may have had neck treatment/pain before that time.

Petitioner testified that on May 28, 2009 she went to see Dr. Smith, her family doctor. Dr. Smith's office note records a history of a work injury to Petitioner's right shoulder while assisting with a patient transfer. Petitioner did not complete her entire shift and had been resting her shoulder. On examination Petitioner displayed full range of motion but "exquisite" tenderness in the right trapezial region along with crepitance. Dr. Smith recommended physical therapy. (RX 3; PX 1)

On June 1, 2009 Petitioner completed a Notice of Injury and described the incident involving the transfer of a resident. Petitioner had been seen for medical care but was still working. She identified Ashley Campbell as the co-worker involved in the incident. Ashley Campbell also furnished a statement. According to it, Petitioner and Ms. Campbell were attempting to put the resident to bed at which time his knees buckled and he fell on top of Petitioner. The incident was noted to have occurred on May 24, 2009. An additional report completed by Ms. Campbell noted the same history/accident and indicated that she heard Petitioner's shoulder "pop" when she was underneath him and heard Petitioner say "Ow, my shoulder hurts!". (PX 8, RX 5). A Supervisor's report was completed on the same day which noted that this was a potential workers' compensation injury at which time two VNACs were attempting to transfer the patient when the incident took place. This document was signed by Respondent's Supervisor. (PX 8, RX 5). (RX 5; PX 8)

On June 8, 2009 Petitioner saw Dr. Smith regarding acute low back discomfort. Physical therapy was ordered in light of the heavy lifting associated with her job. (RX 3)

On June 18, 2009, Petitioner saw Dr. Smith complaining of an upper respiratory infection with fatigue. (RX 3) Dr. Smith's office note states: "Patient comes to office today with complaints of sore throat and fatigue for the past two days, has noted a productive cough with gray phlegm. Patient states that she is exhausted, has been mandated to work overtime. Patient states that she leaves home one in the afternoon to drop her kids off at daycare and then picks them up between midnight and 6:30 am depending on mandated hours. Has no other assistance from children's father and her mother and sister live away from the patient. Patient states that she just does not feel well. She did not go in to work this past Sunday because her shoulder was bothering her and has been sick with upper respiratory symptoms and then patient had to leave early from work due to baby's severe constipation which babysitter was not able to handle." (RX 3) Dr. Smith's assessment was: (1) upper respiratory infection and (2) "Fatigue: Discussed possible ways to receive assistance with her children and work. Patient

has put in bids for day shift and hopefully within the next six months will be able to be on day shift which she feels will be better for her and her children as far as time together and rest. In the meantime, patient has tried to take a couple of vacation days, states she has worked at place of employment for two years, but has been denied vacation time due to increase census and limited number of employees." (RX 3)

On June 26, 2009, Petitioner returned to see Dr. Smith regarding her right shoulder and neck pain. Petitioner stated this had been going on for three to four weeks. Dr. Smith's assessment was neck and right shoulder pain: "Will obtain right shoulder films and C-spine films and follow up after results. Off work through next week and return to work on 7/6/2009. Continue Soma, but add Lortab 5/500." (PX 1)

Petitioner underwent x-rays of her cervical spine and shoulder on June 26, 2009 which were read as normal. (PX 2)

On July 21, 2009, Petitioner underwent an MRI of the Right Shoulder. According to the report, there was a tiny amount of joint fluid. Petitioner's acromioclavicular joint appeared normal. There appeared to be a small acromial hook but no evidence of bone bruising or significant degenerative change. No os acromiale was evident. Petitioner's bicep tendon was normal in appearance. The labra were intact. Minimal increased signal was noted in the supraspinatus tendon, suggesting tendinosis. No evidence of a tear was apparent. (RX 2)

Dr. Smith examined Petitioner on July 24, 2009. They reviewed Petitioner's medications and agreed on an orthopedic consultation. (PX 1)

On July 29, 2009, Petitioner saw Dr. Holt at Quincy Medical Group's Orthopedic Department. Petitioner had been referred by Dr. Smith. On the intake form, when asked, "When did the injury or problem occur?," Petitioner wrote: May 28, 2009." (RX 1) Petitioner identified her problems as both her neck and shoulder with pain, numbness, and tingling going all the way down her right arm to her hand which she attributed to a work injury on May 28 or May 24 while helping a heavy patient transfer and, when he began to fall, she took some of the weight on her neck and shoulder. She initially had trapezial tenderness and underwent physical therapy which she believed made things worse. According to the doctor's records, Petitioner had undergone shoulder and c-spine films and MRIs, all of which were read as normal. Dr. Holt stated, "I reviewed the MRI and I think it is basically negative as well, maybe showing just a little tendinitis." (RX 1) Dr. Holt then noted that despite the negative work-up Petitioner continued to complain strongly. On exam, he could not really detect anything wrong with the shoulder itself and commented that Petitioner pointed to the side of her neck and the back of the shoulder in the trapezius area. Dr. Holt did not believe Petitioner really had any pathology in the shoulder itself and he told her he really had nothing to help her. He wrote, "I do not think that the minimal abnormality in the shoulder seen on the MRI requires any treatment or can be logically attributed to her "work injury." I explained that I do not treat neck problems and by her symptoms at least, that is primarily what she seems to have. Maybe some additional physical therapy directed just at the neck itself might help. EMGs could be done to see if there is any actual objective nerve injury. However, I do not feel that there is anything I can do for her at this time." Petitioner was given a note that she should just continue with her current work status. (RX 1)

On August 5, 2009 Petitioner again saw Dr. Smith who noted, "Almost 28 years old, comes in for follow-up right shoulder pain. She did see the orthopedic surgeon who felt apparently that this was coming from her neck. MRI, however, of c-spine was negative. Rt shoulder MRI did show tendonosis. The patient would like another orthopedic surgeon for a second opinion." (RX 3; PX 1)

On August 19, 2009, Petitioner saw Dr. Kirk Green, an orthopedic surgeon. (RX 2) On the Patient Information Sheet when asked, "Is this work related?" Petitioner answered in the affirmative. For the date of injury, Petitioner wrote June 28, 2009. Petitioner described the accident as follows, "...she was hanging onto a gait belt while transferring a patient from chair to bed and he fell on her. She landed on her left shoulder. He impacted her right shoulder. She had immediate pain aggravated by motion...." (RX 2)

Dr. Green's office note indicates Petitioner's pain had persisted despite an excellent course of conservative treatment. She has used low dose NSAIDS, undergone a course of physical therapy, and restricted/protected activity with persistent or even worsening symptoms. Petitioner's symptoms were most notable with activities about shoulder height, although she had pain with any motion of the extremity. Petitioner also reported some occasional paresthesia extending into the dorsum of her hand. Petitioner had undergone a work-up including an MRI of her shoulder and cervical spine, which were relatively benign. Plain x-rays of her shoulder were negative. On examination Dr. Green noted Petitioner's postures were protective of her shoulder. There was some tenderness over the AC joint without instability and over her anterior acromium as well. Sulca sign was listed. Impingement signs were positive. Cuff strength was symmetric. No instability was demonstrable." (RX 2) Dr. Green's impression was: "Apparent impingement syndrome, right shoulder. Maybe a component of AC joint syndrome, right shoulder. I don't appreciate any cervical findings on today's exam." Dr. Green gave Petitioner an injection into her subacromial bursa, recommended a vigorous home exercise program and outlined limited duty work she could perform if available (a 5 lb. lifting restriction and avoidance of pushing, pulling or reaching above shoulder height). (RX 2)

That same day Petitioner also saw Dr. Smith and updated him on her appointment with Dr. Green. (PX 1)

On September 9, 2009, Petitioner again saw Dr. Green, who noted her condition was unchanged after the injection. He also noted that no light duty work had been available for her. On examination, Petitioner displayed full range of motion, with pronounced hesitancy on abduction and flexion about shoulder height. He noted those motions were associated with grimacing. Cuff strength was essentially symmetric, although associated with complaints of pain. On palpation, Petitioner displayed tenderness now localized to the lateral margin of the acromium. All maneuvers recreated that pain. Dr. Green's impression was right shoulder pain, etiology uncertain, with symptoms limited to the margin of the acromium. Dr. Green switched Petitioner to Cataflam and recommended a course of physical therapy rehab, including use of a TENS unit. Petitioner was to follow up in two weeks for a re-check. He noted he had little further to offer to her. (RX 2)

On September 10, 2009 Petitioner underwent an initial evaluation at Advance Physical Therapy and it was decided she should undergo therapy two times per week. (RX 2)

On September 23, 2009, Petitioner returned to Dr. Green. Her condition was reportedly unimproved and still complaining of pain, now more localized over the superior shoulder at her AC joint. On his exam, Dr. Green noted, "She now has tenderness over her lateral acromium, but also her AC joint. Adduction caused pain about her AC joint. Impingement signs appeared negative. Cuff strength was symmetric." Dr. Green's impression was: AC joint symptoms, right. He injected her AC joint and then repeated Petitioner's exam approximately 20 minutes post injection, noting resolution of her complaints. As such, Dr. Green instructed her on continuing her home exercise program, icing, and NSAIDS as needed. Dr. Green also stated, "If work below shoulder height were available, she could return to same, otherwise, she will follow up in 2 weeks for recheck. If doing well at that point, would release her to regular work activities. Her symptoms have been somewhat migratory, but again with response to injection at the AC joint today, that would represent the source of her discomfort." (RX 2)

Petitioner testified that in October of 2009 she moved in with her current husband, Sam Fisher, at 26595 State Highway C, in Ewing, Missouri. Petitioner testified that she met her husband in February of 2009 when she sold a horse to him. Petitioner testified that Sam had ten horses when she moved in with him.[1]

On October 13, 2009, Petitioner again saw Dr. Green. Petitioner was still symptomatic but reported relief for one week after the prior injections. He noted there had been some confusion regarding the TENS unit and Petitioner had never been fitted for it. On examination, Petitioner displayed full range of motion of her shoulder and tenderness over her AC joint, minimally increased with adduction. Dr. Green's impression was: apparent AC joint symptoms, improved, right shoulder. Dr. Green recommended Petitioner continue her home exercise program and take Ibuprofen, as needed. Dr. Green released Petitioner to regular work duties effective October 14, 2009 and indicated Petitioner did not need to be scheduled for routine follow-up. (RX 2)

On October 22, 2009 Petitioner returned to see her family doctor, Dr. Smith, regarding her recurrent right shoulder pain. She reported having performed physical therapy as Dr. Green had requested and that she was relieved to go back to work. Petitioner reported she had been working long shifts and has irritated her right shoulder once again but had been unable to get into the doctor's office the day before. She did try to get in with Dr. Green the day before and had an appointment with him on October 12, 2009. Petitioner reported that, in the past, Dr. Green had discussed the need for surgery if physical therapy didn't provide relief. Petitioner requested a work excuse for the 21st and until her visit with Dr. Green. Dr. Smith's assessment was right shoulder pain for which she was being treated by Dr. Green. She was given an off work slip as requested and told she could continue using Ibuprofen and resting until further advised by Dr. Green. (PX 1)

Petitioner returned to see Dr. Green on October 23rd reporting a recurrence of pain after returning to work. Petitioner localized her pain to the AC joint, noting pain with abduction and forward flexion but no pain with adduction. Petitioner did not demonstrate any shoulder instability. Dr. Green's impression was unchanged but he noted the increase in symptoms. Dr. Green gave Petitioner some samples of Zipsor (25 mg 1 qid) to

[1] Petitioner acknowledged on cross-examination she might be wrong on the number of horses and it might have been 16. In any event she had no horses of her own when she moved in with Mr. Fisher.

replace her current anti-inflammatory. Dr. Green stated, "If it agrees with her, she will contact us and will give her script for same. Went ahead and released her back to work. Really have little further to offer her treatment wise." Petitioner was given a full duty release for October 23rd. (RX 2)

On 11/5/2009, Petitioner's Advance Physical Therapy Discharge Summary noted that therapy was being discontinued because Petitioner was not returning to continue. (RX 2)

Petitioner testified that after being given the full duty release she did, in fact, return to work for Respondent on such a basis.

Petitioner went to Dr. Smith's office on November 16, 2009 regarding an exacerbation at work on November 11, 2009 when a resident pulled and yanked on her shoulder. Petitioner also reported her shoulder had recently been twisted and that after two days of work in a row her shoulder seemed worse and more painful. Petitioner reported she was having trouble sleeping due to shoulder pain and was following up with Dr. Green. Petitioner was taken off work for two days (the 12th and 13th) and referred to Dr. Wheeler for a second opinion. Petitioner was also given Darvocet and work restrictions. (PX 1)

Petitioner phoned Dr. Smith's office on November 23, 2009 stating she was leery to go back to work as she had spoken with someone in the HR office that told her to "watch her P's and Q's" since she was on workers' compensation. The doctor spoke with Petitioner's supervisor who referred her to Human Resources and he was told Petitioner must let her co-workers know what she could and could not do. Petitioner's supervisor assured the doctor Petitioner would be on light duty only. The doctor then re-assured Petitioner. (PX 1)

Petitioner filed her Application for Adjustment of Claim in this case on November 25, 2009.

Petitioner further testified that on November 27, 2009 she was working in the dining room when a resident's alarm went off because he was attempting to stand up unassisted. Petitioner testified that she attempted to safely sit him down but at the same time the resident grabbed her right shoulder in an effort to balance himself and Petitioner felt a worsening of her right shoulder pain. Petitioner notified Respondent. She was sent to the Emergency Room at Blessing Hospital where she gave a history consistent with her testimony. Petitioner was provided a sling and medication. (PX 2, RX 3)

On November 27, 2009, Petitioner filed another Workers' Compensation Report, alleging an injury occurring earlier that same day. Petitioner's hand-written report stated, "I was picking up trays in dining rm. I am the only staff member in the dining rm. Resident set off alarm & family members where helping him stand. I walked over to him to try to talk him into sitting down, he then grabbed my right shoulder to help balance himself and in turn pushing on it. I told resident not to grab my shoulder because it is injured." Another report written by the Petitioner stated, "Resident was standing by his chair, unsteady on his feet. I went over to get him to sit back down and he put his hand on my injured shoulder to steady himself." (RX 6; PX 9) Petitioner testified she was sent to Blessing Hospital. The Supervisor section of the report indicates that this incident was "re-injury to work comp injury" and was signed by Petitioner's supervisor. (RX 6; PX 9)

Petitioner reported to Blessing Urgent Care that same day. According to the records, "Pt at work & resident shoved down on rt shoulder & now pt has pain, pt hx of previous shoulder injury – ice applied." Petitioner was diagnosed with acute right shoulder pain and taken off work until November 28, 2009 at which time she could return to work with restrictions. (PX 2)

On November 30, 2009 Petitioner completed a Notice of Injury regarding an accident on November 27, 2009. Petitioner reported feeling right shoulder pain when a resident grabbed her right shoulder to stabilize himself while in the dining room. Petitioner immediately notified her supervisor who asked if she needed medical treatment and Petitioner was subsequently seen at Blessing Hospital. (RX 6)

On December 7, 2009, Petitioner underwent an MRI of her right shoulder. According to the report, there was no evidence of fracture, bone marrow edema, or dislocation, but mild degenerative changes of the AC joint were apparent. There was also minimal increased abnormal signal within the distal supraspinatus tendon without a tear, most likely representing mild tendinosis. The glenoid labrum was intact. No rotator cuff tear was present. No significant joint fluid was present. (PX 2)

On December 12, 2009 Petitioner was examined by Dr. Crickard at Quincy Medical Group's Orthopedic Department. In the intake form, when asked, "When did the injury or problem occur?" Petitioner wrote: 5/28/2009 and indicated she was lifting a patient at work. Dr. Crickard's office note stated, "The pt is a 28 year old white female with severe right shoulder pain. She has had 2 injuries at work, one in May and one more recent. She has constant pain in the shoulder with any overhead activity. Rest makes it feels better, but any work makes it worse. She has had physical therapy. She has had a cortisone shot by Dr .Green in Keokuk. No other complaints. No neck pain." For his exam, Dr. Crickard noted, "Physical exam showed pain in the impingement zone. No real weakness, however. She has good capillary refill. I did review her new patient form. I also reviewed MRI of the right shoulder, which is essentially normal and I agree with that. We discussed treatment options for rotator cuff impingement. She has no pain over the AC joint. We discussed nonoperative versus operative treatment. At this point, she agreed to proceed with another injection to have me see if I could do any difference. If not, we might proceed with shoulder arthroscopy." (RX 1) Petitioner underwent a right shoulder subacromial injection. She was given restrictions of "No repetitive shoveling, no lifting over 0 lbs, no push or pull over 0 lbs, no reaching above shoulder level. Limited use of Rt shoulder." (RX 1) Petitioner was to return in one month. (RX 1)

Petitioner testified that Respondent was unable to accommodate her restrictions and she continued drawing weekly workers' compensation benefits.

On December 17, 2009 Petitioner's Application for Adjustment of Claim in 09 WC 51546 was filed.

On January 12, 2010 Petitioner returned to see Dr. Crickard, who noted, "The patient returns to clinic today. She continues to have pain in that right shoulder. The shot did not really help. It numbed her pain somewhat, but did not take it away altogether. We discussed possible arthroscopy subacromial decompression

at her last visit and that is what I think she needs. She gets WC through the VA, so we will see what they say." (RX 1)

Dr. Crickard modified Petitioner's restrictions to "No lifting over 5 lbs, no pushing or pulling over 5 lbs, and no reaching above shoulder level." (RX 1)

On February 5, 2010, Petitioner called Dr. Crickard. The note stated, "Anna needs a call back. She never received an order for her surgery." (RX 1)

On February 25, 2010, Dr. Crickard filled out a disability benefits claim sheet for SERS. Under the DX, Dr. Crickard wrote, "pain, shoulder, R shoulder pain since 5/2009; 8/10 scale." Dr. Crickard also wrote, [Petitioner] has not been taken off work, but has been given work restrictions." (RX 1)

On March 2, 2010, Petitioner again saw Dr. Crickard. Petitioner reported ongoing right shoulder pain and they discussed operative and non-operative treatment options along with short and long-term concerns. They also discussed Petitioner's carpal tunnel syndrome of borderline severity. Dr. Crickard noted, "It is not truly workman's comp, as she did not report it, so we probably cannot do it at the same time. We will wait and see what WC says." Dr. Crickard gave Petitioner restrictions of no use of the right arm. (RX 1)

On March 12, 2010, Petitioner underwent right shoulder arthroscopic surgery performed by Dr. Crickard at Blessing Hospital. Dr. Crickard performed a subacromial decompression arthroscopically noting a "large hook was seen on the anterior acromion. The AC joint was stable." (RX 1; RX 3)

On March 15, 2010, Petitioner saw Dr. Crickard for follow-up. Dr. Crickard took Petitioner completely off work on March 15, 2010 and gave her restrictions of no lifting with her right shoulder, no pushing or pulling with her right shoulder, no reaching about shoulder level, and limited use of the right shoulder, effective March 22nd. (RX 1)

On March 25, 2010, Petitioner saw Steven Dement, PA, at Quincy Medical Group. Mr. Dement noted Petitioner was pleasant and accompanied by her family. Petitioner described problems managing her pain and sleeping after surgery on March 12th. She was on Lortab. Petitioner's hydrocodone/APAP 10/325 was renewed and she was instructed to add Aleve 1 tab 3 times/day with food. Additionally, physical therapy was ordered and she was again taken off work completely. On April 8, 2010, Petitioner returned to see Steven Dement, PA. Petitioner was still not sleeping well and waking up a lot with shoulder pain. Gentle compression from her husband helped. Petitioner's pain was being managed moderately well through the rest of the day. She has some eminent swelling, especially after therapy. (RX 1)

Petitioner was described as struggling with pain management, but progressing functionally status post a right shoulder subacromial decompression. Petitioner was taking maximum doses of narcotics and Mr. Dement was willing to keep her off work and in physical therapy. He suggested compression with an ace bandage, especially for sleep. Petitioner was to return in four weeks. (RX 1)

As instructed, Petitioner returned on May 6, 2010 to see Mr. Dement. Petitioner was still experiencing quite a bit of pain up around the superior glenohumeral region with the pain being described as an exaggerated form of stiffness. Petitioner felt she was fine to go back to work with very limited use of her right shoulder. Petitioner was given restrictions of no work until May 10, 2010 and after that restrictions of no lifting with over 15 lbs, no pushing or pulling over 20 lbs., and no use of her right arm except to shuffle papers or minimally steadying a light load held in her left arm. She was also told to continue physical therapy. On examination Petitioner displayed positive impingement and some limitation in strength. (RX 1)

On June 8, 2010, Petitioner saw PA Dement again. Her progress was described as very slow. Petitioner had active range of motion of the right arm to 89 degrees of abduction and 84 degrees of flexion. She had not gotten into any functional strengthening yet. Petitioner reported pain with resisted shoulder flexion and extension with very limited range of motion. Dement noted that when he had her press (as in a bench press against his hands) it caused a little bit of pain as well. There was no tenderness to palpation and skin tones were normal. Again, Petitioner was given restrictions of no lifting with over 15 lbs, no pushing or pulling over 20 lbs, no reaching above shoulder level and no use of the right arm. Physical therapy was increased in frequency. Authorization for her right carpal tunnel release was still pending. (RX 1)

Dr. Crickard examined Petitioner when she returned on July 20, 2010. Petitioner reported less shoulder pain and increased strength and motion. He advised her to continue her therapy and to return in one month at which time he felt he might be able to release her. Petitioner's restrictions remained in effect. (RX 1)

On August 19, 2010, Petitioner again saw Dr. Crickard. Petitioner had not undergone any therapy in the previous month as she wasn't progressing and insurance had refused to pay for any more. Dr. Crickard noted Petitioner was only going to get better if she continued with therapy, noting she had good passive range of motion but pain with active motion. "She needs therapy." Her restrictions remained in effect. (RX 1)

Petitioner returned to see Dr. Smith on September 7, 2010 complaining of persistent shoulder pain. Physical therapy was recommended along with pain management. Petitioner's medications were increased. (PX 1)

On September 21, 2010, Petitioner saw Dr. Crickard for the last time. At that visit Petitioner was describing tremendous shoulder pain and some stiffness. Dr. Crickard recommended Petitioner see Dr. Derhake for a second opinion, as she was not heading in the direction he wished her to be going. Petitioner understood. Her restrictions were continued. On physical examination Petitioner was noted to have significant pain with range of motion and passive flexion and abduction caused significant pain. (RX 1)

On September 22, 2010, Petitioner was examined by Dr. Adam Derhake at Quincy Medical Group (Orthopedics Department). Dr. Derhake noted Petitioner's history of lifting a patient and having her right shoulder jerked. He knew she had undergone surgery and was still experiencing pain and stiffness in her shoulder despite physical therapy. Petitioner was not working secondary to her ongoing symptoms. Based upon his examination Dr. Derhake believed Petitioner had developed some post-operative adhesions which were hindering her ability to fully rehabiliate. He also felt her pain was significantly limiting her. He recommended a

subacromial injection with a corticosteroid today to help limit the pain and possibly help maximize the benefits of therapy. However, he also noted that, ultimately, Petitioner might require a repeat decompression with lysis of adhesions and manipulation under anesthesia. The possibility of repeat surgery on the shoulder was discussed today with the patient. Petitioner underwent the injection and was taken off work entirely as Petitioner advised she could not return to work with her shoulder in its present condition. (RX 1)

Petitioner had another visit with Dr. Smith on September 24, 2010, again reporting ongoing complaints of shoulder pain and requesting a second opinion. (PX 1) Petitioner testified that she was concerned about a second surgery so she contacted Dr. Greatting for a second opinion.

On October 11, 2010, Dr. Crickard completed the physician's portion of Petitioner's Disability Leave application with Central Management Services (pp. 22 and 23 of a 29 page document). Dr. Crickard noted Petitioner's painful range of motion and that shoulder surgery had been recommended. He further noted she had been taken off work since September 22, 2010 and had a "severe limitation" in functional capacity resulting in her being temporarily totally disabled from any occupation at that time. He did not feel she was permanently and totally disabled from employment. (RX 1)

On October 27, 2010, Petitioner again saw Dr. Derhake. Petitioner reported she had been doing her exercises and some gains in range of motion were noted. However, she continued to complain of pain in the shoulder. She stated that she had experienced a couple episodes in therapy where she felt like something had popped in her shoulder and was worried that it may have popped out of place. However, she denied any feelings of complete dislocation or need for relocation. Dr. Derhake's physical exam noted significant tenderness around the subacromial space and acromion along with diminished strength with flexion second to pain. Petitioner had no tenderness to palpation at the AC joint and a negative cross-arm. Instability testing demonstrated simple pain but no significant apprehension. Negative relocation. Petitioner did have a positive load and shift exam which suggested some possible labral pathology. Dr. Derhake's assessment was continued right shoulder pain and stiffness, now with mechanical symptoms and possible labral pathology. Ultimately, he felt she was going to require a repeat operation with lysis of adhesions and manipulation under anesthesia with or without any sort of labral repair. Because her MRI was nearly a year old, he wanted to repeat her MRI as an MR Arthrogram to evaluate for any labral adhesions, as well as small rotator cuff tears. Petitioner was to return after the MRI and was to remain off work. (RX 1)

Petitioner was examined by Dr. Mark Greatting on November 4, 2010. Petitioner gave an accident date of May 21, 2009 and described an incident involving the transfer of a patient. She denied any prior injuries. Petitioner felt her initial surgery had helped but that her shoulder had returned to her pre-surgery state. She denied any neck pain and noted occasional numbness and tingling down her arm to her wrist but not her hand. Petitioner's complaints included shoulder popping, weakness, and painful range of motion. She wanted to see another orthopedic surgeon before undergoing more surgery. On examination Petitioner was tender over the AC joint and anterior to the acromion. Her passive motion was greater than her active motion and Dr. Greatting felt a lot of her limitation was secondary to pain, not stiffness in the joint. They discussed an injection and the doctor's need to review additional notes before making any further recommendations. (PX 5)

Petitioner underwent a right shoulder MRI on November 5, 2010. (RX 1)

On November 10, 2010, Petitioner saw Dr. Derhake regarding her ongoing pain complaints in her shoulder. His review of Petitioner's recent MRI found no evidence of labral pathology and her rotator cuff appeared intact. There was some soft tissue above the rotator cuff tendon and subacromial space, which he felt could represent some adhesion formation. Petitioner displayed pain with extremes of motion and some weakness. Dr. Derhake believed Petitioner had developed some adhesive capsulitis secondary to her post-operative condition that had been refractory to conservative management. He recommended a manipulation under anesthesia with possible lysis of adhesions and subacromial decompression at Petitioner's earliest convenience. In the meantime, and pending workers' compensation approval for surgery, Petitioner was to continue to try to maintain her range of motion to prevent further recurrence of stiffness on that side. Petitioner was again kept off work. (RX 1)

On May 17, 2011, Petitioner underwent a Section 12 Examination with Dr. Nogalski. The examination was done in conjunction with an accident date of November 27, 2009. On the Orthopedic Associates intake form, Petitioner stated, "Chief complaint: constant shoulder pain and decreased movement" and "Date of onset: 4/09." According to the doctor's report, Petitioner injured her right shoulder on November 27, 2009 at which time a resident held onto her shoulder (which already was hurting) and she felt increasing pain in her shoulder. Petitioner also described her May 24, 2009 accident and treatment to date. Dr. Nogalski viewed Petitioner' medical records, conducted a physical exam, and reviewed reports from witnesses, second hand sources and social media regarding fraud and activity levels. After viewing that evidence, Dr. Nogalski stated it was unclear whether Petitioner's current condition was related to either injury. He felt Petitioner had some capsulitis and was probably at a plateau and might need an arthroscopic debridement if a manipulation under anesthesia didn't help. Dr. Nogalski felt Petitioner could return to work with restrictions of no unassisted transfers or supervision of patients. He noted some suggestions of "fraudulent reporting," as well as some suggestion of "fairly significant outside activities undertaken by Petitioner which had not really been reported to any medical providers." Dr. Nogalski continued, "As stated above, I cannot clearly identify that she sustained a "injury" to the shoulder, based on the studies provided as well as the physical findings noted in the initial evaluation. She may have sustained a strain, but certainly has not sustained any specific rotator cuff injury, and it is not clear that she has any rotator cuff "injury" that would precipitate an adhesive capsulitis on a secondary basis nor precipitate an impingement syndrome on a more primary basis as suggested." (RX 9)

Petitioner had an appointment with Dr. Smith on July 11, 2011. He refilled her Lortab and noted diffuse tenderness with palpation and active abduction with resistance. Petitioner had a painful arc at fifty degrees. (PX 1)

Petitioner returned to see Dr. Derhake on August 3, 2011. Dr. Derhake stated, "Patient is a 30 year old female who returns to my office today for follow up evaluation. I have not seen her in close to 9 months, and at last clinic visit she was still having a significant amount of pain and stiffness in her right shoulder after a subacromial decompression in March 2010. I had last seen her in the fall of 2010 at which time we discussed the possibility of an arthroscopic lysis of adhesions and manipulation under anesthesia to regain all of her range of motion. She has been awaiting WC approval, and she did finally get approval to proceed with this procedure

within the last few weeks. She is still having similar complaints of pain in the shoulder. However, she has been able to work out most of the stiffness in her shoulder with her home exercises. No other complaints at this time.

On his physical exam, Dr. Derhake noted, "The right upper extremity demonstrates full passive forward flexion and abduction of the shoulders bilaterally. However, there is a significant amount of tenderness still with extreme range of motion. This is overall significantly improved from her previous exam. She does, however, have focal and severe tenderness to palpation in and about the AC joint on the right shoulder. Negative lift off exam. No significant Popeye deformity. Negative Speed's and yergason's exams. No significant instability." (RX 1) Dr. Derhake believed, overall, that Petitioner's stiffness had improved. However, as her range of motion had improved, her symptoms have not followed suit. Dr. Derhake felt a repeat arthoscopy was reasonable; however, he was more concerned about her AC joint being her source of her residual pain or symptoms. He recommended placing a corticosteroid injection into Petitioner's AC joint today to help us make that decision. Petitioner was advised to call the doctor's office on Monday to report on her response to this injection, and then, if she has significant response with that injection, the doctor might consider a distal clavicle excision at that time of her repeat arthroscopy. (RX 1)

Petitioner testified that she decided to move ahead with the surgery due to her ongoing shoulder complaints. She further explained that she was unable to immediately schedule the surgery because it was not approved by Respondent. Petitioner also testified that she considered having Dr. Nogalski perform her second surgery but ultimately chose Dr. Derhake because he was closer. Petitioner testified that the surgery was eventually authorized by workers' compensation.

On August 9, 2011, Petitioner underwent surgery with Dr. Derhake, who stated, "She was continuing to have pain. This seemed to be localized in the anterior as well as superior aspect of the AC joint and subacromial space. No significant chondromalacial changes of the glenohumeral joint. She did have some mild fraying at the base of the biceps, which was debrided. The subscapularis tendon was probed and found to be within normal limits. The superior and anterior labrums were within normal limits. The axillary pouch was free of any loose bodies. The inferior and posterior labrum were within normal limits. The undersurface of the cuff was inspected and found to be within normal limits. Biceps itself was probed and brought into the joint and found to be free of any significant tearing or synovitis. The patient was found to have some postoperative adhesions and bursitis in the subacromial space. A bur was then inserted into the distal clavicle and AC joint via the anterior portal and an arthroscopic distal clavicle excision was performed." (RX 3; PX 2)

On August 10, 2011, Petitioner again saw Dr. Derhake, who ordered immediate outpatient physical therapy to try and regain all of her range of motion. Dr. Derhake noted that because of her previous problems with stiffness after a previous surgery, it was of the utmost importance that she start physical therapy (PT) immediately. There was a suggestion by her and her husband that they were concerned about WC approval for paying for PT. The doctor warned her that this was a very dangerous time to avoid PT and that she needed to start it immediately to avoid the development of significant postoperative stiffness in that shoulder. (RX 1)

On August 22, 2011, Petitioner again saw Dr. Derhake, who noted, "Overall, the patient has been doing well. She has been participating in outpatient physical therapy with continued gains in her range of motion of

that right shoulder. She has continued to require some pain medication. However, she has run into some effects such as constipation with the medication. Overall, her pain continues to improve, however." A right shoulder x-ray taken that day demonstrated significant increased AC separation and no retained bone." (RX 1) Petitioner was given some Tylenol No. 3 for pain and was told to continue her outpatient PT with an emphasis on terminal range of motion and then transitioning in more strengthening and stabilization exercises." (RX 1)

On September 7, 2011, Petitioner again saw Dr. Derhake. Petitioner was continuing to work with outpatient PT and felt her range of motion had improved. However, she was still experiencing pain and symptoms. Dr. Derhake felt Petitioner looked improved from her previous exam. Despite her continued symptoms, Petitioner felt her shoulder was now feeling better than it had in a long time. Dr. Derhake told her that because she had such longstanding problems with the shoulder it might take a little longer for her to recover from this surgery to where she would feel completely pain free. He released Petitioner to go back to work but with no use of her right arm. Petitioner was to continue with outpatient PT and he prescribed some Voltaren gel that she could rub directly over the AC joint where it hurts in that area. (RX 1)

On October 10, 2011, Petitioner again saw Dr. Derhake. Petitioner was still undergoing PT and noting that she would get to a certain point with her motion and would note difficulty thereafter. Petitioner alaso complained of ongoing pain and discomfort around her shoulder with certain activities and she was unable to get the Voltaren gel secondary to insurance issues. However, she was given some oral Voltaren, which she has not really noted any significant improvement with. Dr. Derhake noted, "Overall, she is doing well. I think some of her continued discomfort is due to the lack of terminal range of motion. Different tabletop and wall stretches were discussed with her today, and I really want to emphasize that terminal range of motion. I encouraged her to continue with stretching of this. She will continue with formal outpatient PT." Petitioner was given restrictions of no lifting, pushing or pulling more than 10 pounds with that right shoulder and no overhead use. (RX 1)

Petitioner testified that she returned to work in a light duty capacity on October 12, 2011 within her restrictions.

Petitioner telephoned Dr. Derhake's office on October 24, 2011 reporting workers' compensation had stopped her formal physical therapy but she was still doing her therapy at home. Petitioner also requested pain medication. (RX 1)

On November 2, 2011, Petitioner again saw Dr. Derhake. Petitioner had been able to return to work with restrictions; however, she was complaining of continued right shoulder pain and symptoms. Dr. Derhake noted Petitioner's therapy had been terminated by workers' compensation. Her examination displayed lack of complete terminal forward flexion and abduction on the right with significant discomfort and tenderness. Otherwise, Petitioner's strength was described as "good." Dr. Derhake felt her progress(in terms of function) was plateauing and for him to think she would continue to progress with oupatient physical therapy or her home exercises, alone, would be unreasonable. He did not believe further surgery would help, however. Accordingly, he recommended Petitioner undergo a functional capacities evaluation (FCE). (RX 2)

On December 1, 2011, Petitioner underwent an FCE. According to the history, Petitioner and a co-worker were involved in an accident at work and her right arm was rotated underneath the resident and petitioner's co-worker had to pull the resident off Petitioner. Petitioner reported the accident, filled out paperwork and was then taken to the emergency room where x-rays were taken and she was given ice packs and a sling. The purpose of the FCE was three-fold: (1) to ascertain Petitioner's physical abilities and limitations; (2) to determine if Petitioner's subjective complaints were reliable; and (3) to determine if Petitioner gave full effort while testing. Petitioner noted her hobbies were gardening and yard work and that she hadn't been able to engage in them as she once had due to pain. Overall test findings, in combination with clinical observations, suggested the presence of near full, though not entirely full, effort on Petitioner's behalf. In describing sub-maximal effort, the evaluator was by no means implying intent. Rather, the evaluator was noting that Petitioner could do more physically at times than was demonstrated during this testing day. It was recommended that any final vocational or rehabilitative decisions for Petitioner should be made with that in mind. Petitioner denied performing any lifting since her surgery and knew she could carry and push up to 5 lbs. She denied performing any pulling but acknowledged she could go upstairs but hadn't tried a ladder nor had she tried crawling. When asked about above shoulder work, Petitioner explained that it was a problem. As an example, she reference putting a shirt on. Reaching forward was, in Petitioner's eyes, dependent upon how far, long, and high she was being asked to reach. Petitioner noted that sometimes her arm would bother her while driving home after work, especially when her shoulder had been bothering her at work. Petitioner expressed the desire to perform her job but didn't feel she could currently do so without severe right shoulder pain.

In the Summary of Findings Petitioner was described as demonstrating a physical demand at the sedentary level, including her lifting ability (floor to knuckle = 15 lbs; knuckle to shoulder = 10 lbs; and shoulder to overhead = 0 lbs). The maximum weight Petitioner lifted was 8 lbs. as she demonstrated the following signs of physical discomfort during the test: Facial grimace and terminated testing after 50 sec due to increased right shoulder, tearfulness. During the 3 minute post test break, Petitioner was observed leaning against the countertop holding her right shoulder. She terminated the cervical lifting test after 42 sec, reporting "It feels like my bicep is ripping apart and being torn out."

Petitioner's carrying demand level was described as light to sedentary (15 lbs. for 30 feet) and her pushing and pulling capacities were in the sedentary category (10 lbs. for 30 feet). During the testing, Petitioner was noted to be holding/massaging her right shoulder and showing facial grimacing and wincing. Testing was terminated due to increased pain signs in the right shoulder. Petitioner participated in lifting, pushing, pulling, and carrying tests with increased amounts of resistance until Petitioner demonstrated increasingly poor body mechanics, facial grimacing, and lack of control. Petitioner reported increased sharp shoulder pain on her anterior humeral head in the bicipital groove area with increased resistance. Petitioner reported bending to the left side her her right shoulder. She reports she felt increased pulling sensation through the right acromian process area. Petitioner could sit for 1 hour and 3 minutes and stand for 1 hour and five minutes. She walked for 41 minutes. She displayed no problems with stair climbing. She declined to participate in ladder climbing due to increased right shoulder strength/stability and increased right shoulder pain. She had no loss of balance and could forward bend to within 4 inches of the floor.

Petitioner reported increased right shoulder pain during repetitive movement screening forward and upward reaching tasks. She exhibited facial wincing during upward reaching. She reported an intensified aching type pain at the anterior tip of her humeral head. She also reported increased right shoulder pain with weight bearing & forward shoulder flexion during crawling. Petitioner demonstrated the following signs of physical discomfort during crawling: facial grimace, pausing/slowing, and tearful. The test was terminated due to increased right shoulder pain. Petitioner had no difficulty with twisting/spinal rotation but had some difficulty with resistance above her shoulder level as she noted increased pain, decreased body mechanics, and increasing loss of control. She had no difficulty with low level work or prolonged neck positioning. She noted increased right shoulder pain with 10 lbs. of impact/jarring resistance. Petitioner's cardiovascular fitness level was in the very heavy category. She demonstrated weak grip strength with firm gripping but none with light gripping. Petitioner demonstrated increasing poor body mechanics with repetitive motion and increased resistance.

Petitioner's subjective complaints of pain were deemed reasonable and reliable, her effort full. Her physical demand level was determined to be sedentary and additional physical therapy was recommended. (RX 4; PX 6)

After the FCE, Petitioner returned to see Dr. Derhake on December 7, 2011, reporting ongoing complaints of pain with no significant interval change in history. Her examination still revealed tenderness and pain at extremes of motion. Petitioner was given restrictions of no lifting, pushing or pulling more than 10 pounds with the right upper extremity and no work above her shoulder level. Dr. Derhake also recommended additional physical therapy aimed at strengthening and stability. Review of the FCE showed appropriate effort with strength. (RX 1)

On December 30, 2011, Petitioner called Dr. Derhake's office asking for a refill on pain medication. Dr. Derhake denied Petitioner's request and advised her to try Tylenol and alternate it with anti-inflammatory. Later that day, Petitioner called Dr. Derhake back and requested a referral to pain management. Petitioner was notified that Dr. Derhake would refer her to pain management. (RX 1)

On January 5, 2012, Petitioner again called Dr. Derhake's office reporting ongoing shoulder pain. Dr. Derhake instructed Petitioner to call her family doctor if she needed assistance before Monday. (RX 1)

On January 9, 2012 Petitioner followed up with Dr. Smith who recommended a pain clinic for her right shoulder symptoms. (PX 1; RX 10)

On January 13, 2012, Petitioner reported to Blessing Emergency Room explaining that she was at work and noticed increased pain. Petitioner was given a prescription for Lortab 7.5/500 and told to continue her work restrictions. (RX 3; PX 2)

On January 18, 2012, Petitioner again saw Dr. Derhake. He noted Petitioner had undergone additional physical therapy but was still experiencing significant pain and symptoms in her shoulder. Dr. Derhake also noted that surgery seemed to have failed to give her any long-term lasting relief and he felt she was at maximum medical improvement and he would not recommend any further surgery. He did feel a referral to a pain

management specialist was appropriate for management of her symptoms and that she should continue her work restrictions per the functional capacity evaluation. Otherwise, she should return as needed. Petitioner was given restrictions of no lifting, pushing or pulling more than 10 pounds with the right upper extremity and no work above her shoulder level. (RX 1)

Petitioner testified that she turned in the permanent restrictions to Respondent and was told the restrictions could not be accommodated. Petitioner was sent home.

In a letter dated January 18, 2012, Respondent's Human Resource Manager noted Petitioner's permanent restrictions and indicated that "[d]ue to the permanent nature of your disability and the inability to perform your job duties, you will be required to resign, retire or seek alternative employment." (PX 14) Petitioner testified that she was not eligible to retire and did not want to resign, so she opted for the alternative employment option offered by the State. Petitioner testified that she filled out the required documentation for the alternative employment list and was placed back on workers' compensation.

Petitioner testified that she began pain management at Blessing Hospital pursuant to the referrals from Drs. Derhake and Smith. (PX 1, 3, RX 1, 10) Petitioner testified that she obtained pain medication from pain management and treated there several times in 2012. (PX 1, RX 3)

On February 21, 2012, Petitioner presented to Dr. Leifheit at Blessing Pain Management. Petitioner's pain levels were described as constant and a "6/10" and "10/10" with activity. Petitioner described anterior and posterior shoulder pain radiating up into her trapezius muscle with her main complaint being the inability to raise her arm above her head. Petitioner was given a TENS unit and started on a trial of Neurontin. (RX 3)

On March 26, 2012, Petitioner returned to see Dr. Leifheit, who noted, "Pain is 8/10 today, at best 6/10, at worst is 10/10. The pain is constant, worse with activity." Petitioner basically denied any improvement in her level of pain. Dr. Leifheit had replaced the Neurontin (she couldn't tolerate it with Mobic) and switched to Nortriptyline. He also noted he might try a muscle relaxant as Petitioner displayed a fair amount of tightness in her right trapezial muscle. (RX 3)

Petitioner testified that on April 5, 2012, she was notified that her application for the alternative employment program had been denied and she had been forced to resign or retire by April 13, 2012 or face a pre-disciplinary meeting. (PX 14) Petitioner testified that she was compelled to resign and began a job search. Petitioner testified that she continued to draw her bi-weekly workers' compensation checks. Petitioner testified that she documented and logged her job search and all of the prospective employers she contacted. Petitioner offered these logs into evidence. (PX 15)

On April 11, 2012, Petitioner again saw Dr. Leifheit, who noted, "Pain and 8/10 today, average and at rest 6-8/10." The Nortriptyline had not been approved and her pain remained unchanged. Dr. Leifheit performed trigger point injections. (PX 2)

On May 24, 2012, Petitioner again saw Dr. Leifheit, who reported Petitioner's pain was a 8/10 today, 7/10 with rest and with activity a 10/10. "She reports she resigned from her job, b/c she was told she would be fired and she didn't want to be fired, so she resigned and now she has lost her health insurance shortly

thereafter." Noting he was running out of options, Dr. Leifheit gave Petitioner Lortab, max 2 per day and Lidoderm ointment. The trial of Nortriptyline had been denied by workers' compensation. (PX 2)

On June 10, 2012, Petitioner was video-taped while on her property and meeting with Kimberly Brown, an investigator hired by Respondent. In response to Petitioner's business webpage, "Fisher Quarter Horses," the investigators contacted Petitioner to view the horse she held out online as for sale. The video is comprised of several days of surveillance, gathered by two cameras: (1) a long range camera and (2) a camera concealed on the investigator, Kimberly Brown. (RX 7) The surveillance video shows Petitioner leading a horse by her right arm (time 21:13), closing a gate with her right arm (21:37), folding up a rope with her right arm (22:00). Later in the video, Petitioner is seen holding the horse's rope with her right arm (45:48). At time 45:57, Petitioner is seen brushing or rubbing the top of the horses head above her shoulder height with her right arm. Again, Petitioner is seen leading the horse away with her right arm (46:10). The video also shows Petitioner walking her dogs with the rope in her right arm and pumping gas, while holding the nozzle in her right arm. (RX 7)

On July 18, 2012, Petitioner returned to see Dr. Leifheit, who noted a 20-30% improvement. Petitioner reported her current pain level: 9; rating at rest: 5; rating with activity: 10. Petitioner reported "constant pain, feels like something is being pushed into the shoulder, also feels like pressure and pulling." Petitioner reported her pain was "aching, sharp, pressure, stabbing, radiating" and "aggravating factors were lifting, pushing, pulling." Dr. Leifhert recommended trying the Nortriptyline once again. In terms of functional abilities, Petitioner noted she occasionally needed assistance with self-care, could perform some family and social activities, could walk long distances and climb over ten steps without difficulty, could occasionally lift over 50 lbs, but was unable to work. Petitioner described her pain as constant as though something was being pushed into a joint. (PX 2)

Petitioner testified that on August 7, 2012, her workers' compensation benefits were terminated. According to the termination letter forwarded by CMS, Petitioner's benefits were terminated based upon the medical records from Dr. Holt (July 29, 2009 entry), Dr. Nogalski's examination and report, and Respondent's information/belief that she was committing fraud in pursuit of a workers' compensation claim and working. (PX 13) Petitioner testified that her last TTD check was paid through August 7, 2012 and that she was never contacted by the Workers' Compensation Fraud Unit nor ever investigated for fraud.

Petitioner testified that she continued her job search and contacted the Department of Missouri Vocational Services for assistance. (PX 11) Petitioner testified that Joanne Moncrief and the State of Missouri Vocational Program assisted her with her employment search and raised schooling options.

On October 3, 2012 Dr. Nogalski issued another report. He did not examine Petitioner in conjunction with this report; rather, he was asked to comment on video surveillance. Based upon the surveillance, Dr. Nogalski didn't think Petitioner needed any arthroscopic surgery, that she was at maximum medical improvement, and that Petitioner didn't need any restrictions. (RX 9)

At the Petitioner's request, Petitioner underwent a Section 12 examination by a non-treating physician, Dr. Timothy Farley, on October 16, 2012. (PX 7)

The deposition of Respondent's examining physician, Dr. Nogalski, was taken on October 29, 2012. Dr. Nogalski is board certified by the American Board of Orthopedic Surgery (RX 8). Dr. Nogalski testified consistent with his earlier written report. Dr. Nogalski testified that Petitioner reported both accidents to him as well as her course of treatment. (RX 8. p. 8, p. 9) Dr. Nogalski acknowledged there was no significant past medical history and testified that she suffered from adhesive capsulitis. (RX 8. p. 10, p. 17)
When asked during his deposition, if Petitioner's injuries, namely falling on the bed with a patient on top of her and having a patient push down on her shoulder while steadying themselves, could cause adhesive capsulitis, Dr. Nogalski opined, "No." (RX 8, P 19)

Dr. Nogalski testified, "The mechanism of injuries, the mechanics of injuries that she describes are fairly weak with respect to any distinct injury, so to speak, especially in the context of reviewing Dr. Crickard's operative report. Adhesive capsulitis is often an idiopathic process, it's something that develops on its own, and unfortunately, is somewhat of an insidious process that can be painful, and fairly intensely painful, especially with sudden movements, and that's often how patients discover it, some sudden activity or event brings that capsulitis to their attention. And the activity she described at work, and the mechanism described as well as Dr. Crickard's direct observations in the records that I have here for review do not at all support that there was a specific injury that would be reasonably related to the claimed injuries, nor is there any specific documentation of injury by Dr. Crickard in his report or reports from an objective level." (RX 8, P 18)

Dr. Noglaski further testified that when he initially saw Petitioner she did not need any further medical care because "[s]he appeared to have fluid motion of the shoulder, did not appear to exhibit any pain behaviors suggesting that she had a shoulder problem. And once again, previous documentation, including Dr. Crickard's operative report report, as well as subsequent objective information from the gadolinium MRI did not suggest that there were clear findings that indicated surgery." (RX 8, P 24) Additionally, Dr. Nogalski testified, "Well, retrospectively given the review of the videotapes and her apparent proficiency in the use of the arm, it would further serve to bolster the opinion that she does not have a significant shoulder issue that requires further treatment." (RX 8, P 25)

Dr. Nogalski also testified regarding his October 3, 2012 review of surveillance video on Petitioner. He felt the video, together with Petitioner's FCE, showed some volitional aspects to her demonstrated abilities and he was unable to identify anything that objectively disqualified Petitioner from her work activities. (RX 8)

On cross-examination, Dr. Nogalski admitted that Petitioner may have sustained a strain from the work injuries, and acknowledged that the accident reports support that Petitioner had shoulder symptomology following the accidents. (RX 3. p. 28, p. 38) Dr. Nogalski admitted that he did not review the operative report from August 9, 2011 or the medical records from Dr. Derhake. (RX 8. p. 41) Dr. Nogalski also admitted that his May 17, 2011 report indicated that Petitioner should consider "an arthroscopic debridement after manipulation" and he also noted in his report that she would need restrictions of no unassisted transfers or supervision of patients. (RX 9. p. 45, p. 50) The doctor testified the second surgery was marginally indicated and Respondent indicated that Dr. Nogalski was willing to perform the second surgery. (RX 8. p. 54, PX 17)

On January 8, 2013 Petitioner interviewed for a job at Lewis County 911. Petitioner testified that she was seeking full-time employment and needed 40 hours a week. Nevertheless, Petitioner testified that she accepted the position and worked there for three days. After the third day, she testified that her and her husband decided the job wasn't appropriate because it paid $9.00 an hour, significantly less than what she was earning for Respondent, and was only part-time work, and therefore not financially viable nor close to her house. Petitioner testified that she called up Lewis County Telephone 911 very upset and notified them that she had to quit the job. Petitioner testified that she continued her job search and continued seeking full-time employment. Petitioner testified that while she would never get a raise at Lewis County 911 there was a possibility of getting on full-time as there were some people working there on a full-time basis.

Dr. Farley's deposition was taken on April 9, 2013. (PX 7) In describing Petitioner's first injury, Dr. Farley described the injury as "On that date, she was assisting in the transfer of a patient from a bed to a chair. The patient was unable to support himself and somewhat crumbled to the ground. At that time, she and the patient ended up stumbling and falling to the ground. She stated she impacted the ground with her neck and right shoulder." (PX 7) In describing the second injury, Dr. Farley stated, "During work related responsibility in the dining room a patient reached up and grabbed her right arm and shoulder. The patient pulled down on it and Ms. Ash-Fisher described increasing pain." (PX 7)

Dr. Farley noted that Petitioner's FCE stated she gave full physical efforts and that her subjective reports were indeed reliable. (PX 7) Dr. Farley noted that he had not viewed the surveillance tape of Petitioner. (PX 7)

Dr. Farley also testified that he believed Petitioner's medical condition was directly related to and caused by her May 24, 2009 and November 27, 2009 injuries. When asked the basis of his opinion, Dr. Farley stated, "It's based on a individual who seemed credible to me, who specifically denied any antecedent discomfort in her shoulder. I was not made aware of any prior medical history or findings that would change that supposition of no prior injury. It's based on an appropriate mechanism of injury. Falling to the ground with the weight of another person's body on top of you, or on top of one's self, is an appropriate mechanism of injury for a shoulder. Having an arm forcibly yanked or distracted is a appropriate mechanism for an injury, especially in the condition where something has not been fully rehabbed from a prior injury." (PX 7) When then asked, "Doctor, if the injuries sustained by her, which would be falling to the ground with a person on top of her and having her arm yanked down, would your opinion change?," Dr. Farley answered, "Yes." When then shown the Petitioner's accident reports after the injuries occurred, which show that Petitioner fell onto a bed and someone placed their hand on her shoulder, but did not yank down on it, and asked, "... But it appears from these witness reports that it's not what occurred on those dates. Would you agree then that the causation opinion was based on an incorrect history?," Dr. Farley stated, "Well, I guess what I would say is, is that if the patient, or Ms. Ash-Fisher in this particular case still had, in an any of the three variations on the theme of the description of what happened to her, the weight of another person falling on her, whether it's a chair of a bed or the ground, I'm not sure my opinion would be any different. It could still be appropriate causation. What I agree to, it seems to be perhaps a little bit different or less clear, yes. I would, I would admit to that. But in any or all of the ways it was read, I still think it could be an appropriate mechanism for an injury." (PX 7) When asked if it was possible that Petitioner did not have a shoulder injury, Dr. Farley stated, "I would say anything is possible. It wouldn't be my opinion, but I would say it's possible, yes."

When asked if it was possible that Petitioner's current condition and the current capsulitis in her shoulder were a result of Dr. Crickard's surgery, rather than any work injuries, Dr. Farley stated, "Any of the traumatic events, whether it's work related or surgically related, could be an instigating factor in adhesive capsulitis." Dr. Farley then agreed that there were several MRIs taken of Petitioner's shoulder and that none of those MRIs showed any objective findings of acute injuries. When next asked if it was possible that Petitioner's shoulder injuries are the result of the natural progression of the degenerative changes in her AC joint, Dr. Farley stated, "Possible, but in my opinion very unlikely."

Dr. Farley refused to give an opinion as to whether Dr. Crickard's March 12, 2010 surgery was reasonable and necessary. Rather, Dr. Farley stated, "Well, that's a loaded question in shoulder surgeries. We don't save lives. It's a, it's a quality-of-life issue. And what's necessary is somewhat based on a lot of different issues. If the patient's perceived quality of life was poor, and that the patient had had an injection with resolution of symptoms for a short period of time, and she did not want to live like she was living, then, yes. I say it would be a necessary sort of thing to do in the treatment of, of the presumed condition." Dr. Farley asked: "Doctor, in light of Dr. Holt's recommendation of no further shoulder treatment, and Dr. Green also releasing Ms. Ash-Fisher from his care, do you believe it was reasonable and necessary for Dr. Crickard to perform the arthroscopic subacromial decompression on 3/12/2010?" Dr. Farley stated, "Again, if the patient continued to have complaints, it would be difficult for me to say it was not reasonable or necessary. This assumes the veracity of the complaints." Dr. Farley was then asked, "So is would be fair to say that you don't have an opinion either way as to whether her 3/12/2010 surgery was reasonable and necessary?" Dr. Farley responded, "My opinion is if the patient had complaints that made her unhappy with her level of function, with her level of comfort, and she had the history as noted in our notes, and that – I'm sorry, I think it would be reasonable to consider the operation." (PX 7)

Dr. Farley testified that Petitioner did not describe her activities outside of work to him, but that adhesive capsulitis is more likely to occur in someone who does repetitive upper extremity activities as opposed to someone who does not. (PX 7)

Petitioner testified that on July 8, 2013 she received full-time employment, 40 hours per week, from BlueCross/BlueShield which was within her restrictions. Petitioner testified that she accepted the position earning $13.05 per hour. Petitioner offered her payroll records into evidence dating back to her date of hire of July 8, 2013. (PX 16) Petitioner testified that the BlueCross/BlueShield position is customer service work. Petitioner testified that her job duties include telephone work and she wears a headset answering questions and concerns from customers. Petitioner testified she continues to work there on a full-time basis[2].

At the arbitration hearing Petitioner testified that she continues to notice pain and achiness in her right shoulder especially with rain and cold weather. Sometimes it hurts if she rolls on it. Petitioner further testified that pain management helped and while she takes hydrocodone per Dr. Smith, she is trying to cut back on it.

On cross-examination Petitioner testified that she was fine before she went to work for Respondent in 2007. Petitioner denied having any issues with work as far as being a single mother and having child care

[2] Petitioner waived a wage differential award under Section 8(d)1 in her proposed decision.

responsibilities; however, she acknowledged having to periodically take time off work to care for her children and being denied excused absences.

Petitioner was also asked on cross-examination about other injuries she had while working for Respondent. She recalled being "smacked" on the side of her head by a lift a few weeks before her May 24th accident but she didn't really think it was an accident. Rather, her neck was stiff but it didn't last very long. While she didn't recall telling Dr. Smith in December of 2008 about neck pain from a work injury on December 20, 2008, she acknowledged it was possible. When asked why she didn't report her continuous neck treatment with Dr. Smith on April 1, 2009 and April 17, 2009, Petitioner denied she was having any "continuous treatment" as she was continuing to work and wasn't too concerned.

Petitioner was also asked on cross-examination about having an MRI due to neck pain and Petitioner did not recall undergoing one. She did recall an MRI of her shoulder and acknowledged she would not dispute Dr. Smith's April 17, 2009 office note referring to a C-spine MRI. When asked if her testimony that she had only a very small injury to her neck and a few days of treatment was incorrect, Petitioner could not recall. When asked if there was some reason she was not able to recall her medical history, Petitioner responded that it was five years earlier and she just couldn't recall.

Petitioner was also asked about the different dates of accident found in some of the medical records. Petitioner testified that she was doing the best she could when giving her histories to the doctors but, all in all, she was pretty sure she injured her shoulder on May 24, 2009 because the resident fell on her and she filled out an accident report. She also testified that with four children and lots of stress "here and there" it is hard to keep the dates of everything straight in her head.

Petitioner testified that she felt the FCE accurately reflected her current abilities. When asked if she is refraining from lifting more than ten pounds, Petitioner testified that she occasionally does as sometimes she absolutely has to. As an example, Petitioner testified that if her child fell down and broke his arm, she would pick him up and not leave him on the ground.

Petitioner acknowledged that on the day of her FCE she did not take her pain medication.

Petitioner testified that she had horses as a child and she rode while growing up. Prior to May 24, 2009 Petitioner owned five horses. They were eventually sold because she couldn't afford their care and she was busy with life. She considered them pets. Petitioner denied being a horse breeder prior to her first accident.

Petitioner denied owning any horses on May 24, 2009 as she believed she had sold her last one to her husband, Sam, as that is how they met. He owned horses and she was trying to sell hers. One day he showed up with his daughter and they bought the horse. Four months later they began dating and they married in 2011. According to Petitioner, she and her husband own ten horses together. They were Sam's technically but she considers them "theirs." They began selling the horses in 2010 because they couldn't' afford the fees, she was not working, and they had four children to take care of. Petitioner denied that Sam breeds or trains horses. Petitioner testified emotionally that they even had to give two horses away because they simply could not afford them. She guessed they had received maybe $7000- $8000 in sales over the previous four years. Petitioner's children ride the horses and share she and Sam's passion for them. They also have six dogs. According to Petitioner, their involvement with the horses has never been to make money. Petitioner estimated they have spent about twenty hours a year buying/selling horses. When the market for horses and hay went down, they began using a website to try and sell the horses.

Petitioner also testified that she was not in the horse breeding or trading business, but had sold several horses over the years. She testified that she has a passion for horses and has loved horses since she was a child. Her grandfather owned several horses and she learned how to ride when she was very young. Petitioner testified she has not ridden a horse since the accidents, but still enjoys watching her children and husband ride. She testified that she has never made a profit owning or selling horses, it was never a business but a hobby, and she treats her horses as pets. She stated that she assists with the caring of her horses but tries not to violate her restrictions. Petitioner looks at her level of activity with the horses as being similar to physical therapy.

Petitioner was asked a lot of detailed questions about her horse activities, both generally and as shown on the video surveillance. Petitioner differentiated between her work and her involvement with the horses. When specifically asked if she violated Dr. Derhake's permanent restrictions of "no work above shoulder level" Petitioner said "no." When asked if brushing horses was above shoulder level, she testified that grooming the horse was not work as she was not being paid to perform it. Petitioner also testified regarding how they fed and cared for the horses in general.

Petitioner was also asked about the website for "Fisher Farms" and her Facebook page. The Facebook page contains information about the Fisher's horse breeding activities including discussion of several horses which needed to be sold and that they were being sold for personal health reasons. Petitioner's Facebook page has a photo of Petitioner holding a large horse's rope with her right arm. She describes herself as the mother of four beautiful kids who are her life. She comments that she has been a stay at home mom for the past year and raises quarter horses as a hobby. Other entries included "Getting ready to ride JD today …need to get some cows," "JD's stall is almost finished thanks to mama and the kids," and "picked up 86 bales of hay and now the boys are stacking them in the barn." (Joint EX 1)

Petitioner acknowledged that her husband rode the horses to keep them conditioned but he didn't train or teach. She also acknowledged that she was offering her horse as a stud for a stud fee and was receiving a boarding fee for housing one horse. Petitioner acknowledged that she was representing to the public that both she and her husband ("we") bred horses but they were his horses and when she used the word "we" it was no different than when she might say she and her daughter ("we") went to dance class.

Petitioner testified that she did not report the sale of her horses on her income taxes nor did she keep any sort of records of the sales. However, she acknowledged that there is a transfer of sale document that goes with the sale of horses and she completed that from time to time.

Petitioner was asked questions about farm land and acknowledged that her husband owns some land but that he doesn't actually farm it.

Petitioner testified that she had a riding mower and mowed the yard on occasion. Regarding the entry indicating that she picked up hay, Petitioner testified that she took a trip with her husband and several friends to pick up the bales of hay and bring them back to their house. She said she was in the truck but did not do any lifting nor physical activities, but took the trip to pick up the hay.

Petitioner was also asked whether she discussed her horse activities with her doctors and she indicated she did, namely with Dr. Smith and Dr. Leifeit. She did not know why there was no mention of it in the doctor's notes indicating that it wasn't up to her what went in the doctor's notes.

Petitioner's husband, Sam Fisher, testified on behalf of Petitioner. Fisher testified that they are not in the horse trading or breeding business. Fisher testified that horses have been their passion and hobby but they both have had full-time jobs. He testified that owning horses is expensive and they lose more money than they make. Fisher testified that he and Petitioner have four children that ride horses, but Petitioner does not ride any longer and has not ridden since her work accidents. He stated that Petitioner's Facebook entry from August 8, 2011 indicating that Petitioner was picking up bales of hay involved him and his friends driving down south to pick up the hay and that Petitioner was in the truck and made the trip to pick up the hay but did not lift or do any physical activities.

Blaine Vaughn testified on behalf of Petitioner. Vaughn testified that he is friends with Fisher and Petitioner. He testified that on August 8, 2011 he assisted in picking up bales of hay and at no time did Petitioner lift or move the hay. Rather, he testified that Petitioner sat in the truck to pick up the hay and when they returned to Petitioner's home she went inside the house to cook lunch for everybody. Vaughn testified that he does not refer to Petitioner's home as Fisher Farm and he has never witnessed Petitioner riding horses since her accidents.

The hearing was then continued until December 27, 2013.

When the hearing resumed on December 27, 2013, the parties amended the Requests for Hearing to acknowledge their agreement that Petitioner was single at the time of the alleged accidents. They also amended Paragraph 7 of both Requests for Hearing to indicate a bill in the amount of $207.86 was in dispute and that a credit under Section 8(j) was agreeable for any bills paid subject to a "hold harmless."

Respondent's attorney then requested that proofs not be closed for two reasons. First, Respondent wished to call Sharon Hendricks as a witness regarding allegations of fraud. Counsel for Respondent argued that a further continuance was necessary in light of recent events – namely, the death of a witness (Christina Hess) who Respondent had recently (approximately Dec. 20, 2013) attempted to subpoena. Counsel represented that Ms. Hess died on/about December 18, 2013. According to Counsel, Ms. Hess had purportedly contacted Ms. Hendricks about alleged fraud and, therefore, Respondent wished to present Ms. Hendricks as a witness. Secondly, Respondent wished to obtain a continuance in light of newly discovered evidence regarding employment by Petitioner during the time she was seeking maintenance. The Arbitrator denied Respondent's request based upon the fact the cases were above the red line, they had been set for hearing in Quincy on December 4, 2013, and then specifically continued to December 5, 2013 to accommodate Respondent. The case was unable to be concluded on December 5, 2013 and Respondent's counsel requested bifurcation to obtain witness Christina Hess. The case was then continued to December 27, 2013 with the understanding proofs would be closed at that time.

Respondent offered the testimony of two private investigators along with surveillance reports and a videotape. (RX 7) Mr. Gregory Kellerman testified that he was provided information from Respondent that suggested Petitioner was a horse breeder/trader and was running a horse business from her home. Mr. Kellerman testified that Respondent asked that he set up a fictitious encounter on her property in an attempt to purchase one of Petitioner's five horses. Kellerman testified that he had reservations about the plan but went along with it. He testified that his associate, Kimberly Brown, contacted Petitioner and claimed to be interested in purchasing one of her horses. Brown also testified for Respondent.

Brown testified that on June 10, 2012 she had a hidden camera/recording device and taped the encounter. Brown admitted that she did not obtain Petitioner's consent to audio record the meeting. On June 10, 2012, Brown testified that she entered Petitioner's property per the scheduled meeting and met with

Petitioner and her husband about purchasing a horse. Brown testified that she saw Petitioner lift her gate and move her right arm around without appearing in distress. Brown admitted that Petitioner never rode a horse, never lifted anything heavy overhead, never placed equipment on the horse nor did anything more physical than brush and pat down the horse. (RX 7)

Ms. Brown also testified that she was an employee of Kellerman Investigations and she participated in surveying Petitioner. Ms. Brown testified that she had an independent recollection of her surveillance with Petitioner, including her conversations with Petitioner. Ms. Brown testified that she was provided with Facebook material showing Petitioner selling horses; as such, she googled "Fisher Farms" and obtained two cell phone numbers to call. Ms. Brown testified that she called Petitioner and Petitioner returned her call that night. Mrs. Brown testified that she asked Petitioner if she had a horse to sell, and Petitioner testified that she did. Mrs. Brown testified she and Petitioner decided to meet on the following Sunday to view the horse for sale.

Ms. Brown testified that when she arrived on Sunday, she met with both Petitioner and her husband. Ms. Brown testified that Petitioner stated to her that she helped care for the horses. Ms. Brown testified that Petitioner stated that her husband worked the night shift, so Petitioner would get up in the mornings and the afternoons and assist with the feedings of the horses. Ms. Brown testified that Petitioner talked about how they were breeding horses and that they had had babies. Ms. Brown testified that Petitioner talked about planting hay, as well. Ms. Brown testified that Petitioner talked about putting equipment on a horse when her daughter rode the horse. Ms. Brown testified that Petitioner talked about being involved with the birthing of horses; Ms. Brown testified that Petitioner talked about a horse having problems and how she had to roll it back and forth, side to side, to get it up, but she could not, so Petitioner had to call her husband for help. Ms. Brown testified that Petitioner agreed that Petitioner was lucky to take care of the horses, not the children.

Ms. Brown testified that Petitioner held the horse's rope with her right arm and the horse jerked its head quite often. Mrs. Brown also testified that Petitioner moved her arm a lot, petting the horse, moving her hands, directing, pointing in directions and speaking with her hands. Ms. Brown testified that there was a heavy metal fence that Petitioner lifted up and opened with her right arm. Ms. Brown testified that Petitioner pushed and pulling the horse and the gate, both of which were over 10 pounds. Ms. Brown testified that Petitioner stated she wanted to show her younger horse at the State Fair.

After viewing the video, Ms. Brown testified that it refreshed her recollection on Petitioner stating that she and her husband had to lock hands to lift a 5 month of horse up into a trailer.

Mr. Kellerman testified that he took long range pictures in the bushes during this June 10, 2012 encounter which Petitioner testified was on her private property. Kellerman admitted that he never checked to determine where Petitioner's lot line was and whether or not he was on her private property. The Arbitrator viewed the surveillance videotape from June 10, 2012, June 30, 2012, July 21, 2012, July 22, 2012, and July 24, 2012. (RX 7)

The Kellerman investigation report indicates that 26.5 hours of surveillance was recorded. During this period of time, Kellerman admitted that Petitioner was not working, was doing daily activities without exceeding her restrictions with her right arm, and at no time did he see any other individuals attempting to purchase horses from Petitioner or her husband. His reports label Petitioner's home as "Fisher Farms," but he

admitted there was no sign labeling her home as Fisher Farms nor did he see any indication on the property that referenced Fisher Farms. Kellerman acknowledged that Illinois has a dual consent requirement called the Illinois Eavesdropping Statute and that both parties in Illinois must consent to an audio recording. He admitted that he never obtained consent for any audio tape communication. Mr. Kellerman also testified that he obtained Facebook postings which discussed Petitioner's horses and her website trying to sell her horses. (RX 7)

Teresa Omachi, Respondent's first attorney of record in this case, also testified on behalf of Respondent and was proffered as a horse expert. Upon voir dire, Ms. Omachi admitted that she has never trained horses, has never trained riders, does not have any special expertise or education regarding horse training/riding, but owns one horse. Ms. Omachi testified that owning a horse requires feeding, brushing, and can be quite physical at times. She admitted that she didn't know Petitioner's involvement with her horses.

RX# 14, 15 and 16 are e-mail exchanges between Teresa Omachi, members of CMS (the Respondent's insurance company), and Sharon Hendricks, an employee at the VA. Teresa Omachi viewed the e-mails and testified that they refreshed her recollection of the case, to wit - there was concern for fraud in 2010 and whether Petitioner should be drawing TTD. She testified that an investigation followed.

Andrew Daggott testified on behalf of Petitioner. Mr. Daggott testified he is friends with Sam Fisher and met Petitioner through him. He testified that he is friendly with Petitioner although he has not seen her in a while. He testified that he assisted with the pick-up of the bales of hay on August 8, 2011. Mr. Daggott testified that Petitioner was in the truck but at no time did she lift anything heavy, nor move any hay, and he recalled that she watched the kids and made lunch that day.

Petitioner acknowledged that she obtained hunting licenses in 2010, 2011, and 2012 and that she went bow hunting a few times in 2012. Petitioner testified that she gets an annual tag to allow her to hunt on "their" property. She also had a fishing license in 2008 but it expired after one year.

Petitioner denied ever giving Ms. Brown permission to videotape on their property and noted that Mr. Kellerman would have walked across their bean field in order to take the long range video. They get $80.00 per acre in cash rent for the land.

The Arbitrator concludes:

1.Issue O: **Other - Evidentiary Issues.**

Respondent objected to the following exhibits offered by Petitioner:

Petitioner's Exhibit #11 – Missouri Office of Adult Learning and Rehabilitative Services – Career Scope and Testing Records. Respondent's objection was based upon hearsay and foundation. Petitioner indicated that these documents were not offered to prove the truth of the matter asserted (the actual results and conclusions from the testing/rehabilitation); rather, they were offered to show Petitioner's general vocational activities after her conditions stabilized. The Arbitrator concludes that these documents are admitted not to prove the truth of the matter asserted but to show Petitioner's general course of activities as part of her job search. Petitioner testified to contacting the Office and obtaining services. These records are admitted to corroborate her testimony and nothing more.

Petitioner's Exhibit #14 – State of Illinois Department of Veterans Affair (Respondent) letters. Respondent objected based on hearsay and foundation. Petitioner testified she received these letters in the mail from Respondent. The Arbitrator finds that these documents qualify under the hearsay exception - Admissions Against Interest and Petitioner laid the proper foundation in the receipt of such documents via mail. Respondent had the ability to bring in the individuals to rebut the validity and content of the documents. The Arbitrator admits Petitioner's Exhibit #14 into evidence. They, too, corroborate Petitioner's testimony. The case was bifurcated and Respondent could have presented rebuttal evidence but did not.

Petitioner's Exhibit #15 – Petitioner's job search logs. Respondent objected based upon hearsay and foundation. The job search logs were in Petitioner's handwriting with corresponding dates as to her job search and prospective employers. Petitioner testified that she completed these logs contemporaneously with her employment search and stated they were accurate recordings. The Arbitrator finds that this is an exception to the hearsay rule as a Past Recorded Recollection and the proper foundation was laid. Respondent had the opportunity to cross-examine Petitioner concerning these job logs. Therefore, the Arbitrator admits Exhibit #15.

Petitioner's Exhibit #17 – Respondent's counsel's (Ms. Omachi's) e-mails concerning surgery. Ms. Omachi testified on behalf of Respondent and could have clarified any of the issues raised in this letter/memorandum. The Arbitrator concludes that this document is admissible regarding the timing and delay of Petitioner's second surgery.

Petitioner objected to the following exhibit offered by Respondent:

Respondent's Exhibit #7 - Portions of the Kellerman Investigations Confidential Report and the audio portion of the surveillance tapes. Petitioner did not object to the surveillance tapes themselves and what was depicted on the film. Petitioner's objection to the audio portion of the surveillance tapes was based on the Illinois Eavesdropping Statute. This statute makes it a felony to audio record all or any part of any conversation unless all parties to the conversation provide consent. 720 Ill Comp. Stat 5/14-2(a)(1). The statute states that any evidence obtained in violation of the statute is not admissible in any civil or administrative proceeding. Id. Petitioner testified that she did not consent to any such recording obtained during the surveillance. Respondent's private investigators admitted that they never obtained consent for such audio taping. However, the audio taping took place in Missouri where Petitioner lived and, according to Kellerman, was permissible under Missouri law. While this is an Illinois proceeding the Arbitrator concludes Missouri law would apply on the issue of consent as Petitioner was a Missouri resident and the surveillance was taking place on Missouri property. Therefore, the Arbitrator overrules Petitioner's objection as to the audio portion of the surveillance tapes. This does not affect the admissibility of the video portion of the recording which was admitted.

Regarding the surveillance reports, the Arbitrator finds that Respondent laid the proper foundation and admits the reports, with the exception of the surveillance obtained on June 10, 2012 from a long range video camera. Petitioner testified that the investigator was on her private property and Kellerman admitted he never checked the property lines, and didn't know whether it was Petitioner's property. The Arbitrator concludes this portion of the report was improperly obtained from Petitioner's property without consent constituting a trespass. The Arbitrator excludes the surveillance report referencing Petitioner on June 10, 2012 beginning at approximately 10:44 a.m. for the duration of that encounter. The Arbitrator will admit the remaining portions of the report(s).

2. **Petitioner's Credibility.**

Petitioner was, overall, a credible witness. Respondent questioned Petitioner's credibility in several ways such as the different dates of accident found in the medical records, her alleged lack of forthrightness with her doctors regarding her level of activity (especially with horses), allegations of fraud, and surveillance allegedly showing an ability to be more active than she let on. While it is true Petitioner's treating records contain several references to different dates of accident, Petitioner's description of how the accident occurred remained consistent and, furthermore, her explanation as to why different dates might have been given was believable – she is a busy mother and had many things on her mind at various times. More importantly, her descriptions of the accident were consistent even if the dates varied. In light of those consistent descriptions, the varied dates are less significant in this instance. Furthermore, Respondent's attack on Petitioner's credibility in light of the different dates found in the records seems disingenuous given the accident was witnessed, reports were promptly filled out and consistent with one another, and the letter from Genex to Dr. Nogalski in which the issues for him to address in his Section 12 examination were laid out essentially glossed over any question about whether an accident occurred. Regarding the other matters, the Arbitrator has given serious consideration to the video surveillance and Petitioner's Facebook pages, as well as the testimony of Ms. Omachi. Nevertheless, this Arbitrator is unable to conclude Petitioner was engaged in fraud or deliberately trying to mislead anyone as to the extent of her injury or her level of activity. As for the Facebook entries and e-mail messages with Ms. Brown, they are an example of how the written word can be interpreted in a variety of ways. To illustrate, there is a reference to Petitioner's husband completing a horse stall "thanks to Anna & the kids." While Respondent may contend that suggests Petitioner was physically helping it can also be interpreted to mean Petitioner and the kids left Mr. Fisher alone to get the work done. Similarly, the reference to "we" in the "bales of hay" does not necessarily mean Petitioner was involved. Petitioner's explanation as to the use of "we" and "theirs" was sincere.

The bottom line is that Petitioner was believable. Throughout the hearing she appeared to be trying to answer Respondent's counsel's questions to the best of her ability. Discrepancies as to the number of horses owned in 2009 or her treatment for a prior neck injury were not significant or damaging to her credibility. She appeared forthright.

As for the surveillance, setting aside the manner in which it was conducted, it does not show Petitioner engaging in activity beyond her restrictions or on a level equal to what she performed at work.. Petitioner credibly testified that she used her right arm and that, occasionally, she might exceed her restrictions. She equated her activity with her horses as similar to physical therapy and home exercises. Petitioner's consistent complaints have been pain and difficulty at or above shoulder height and not general use of her right arm.

Finally, the Arbitrator cannot overlook that (with the possible exception of Dr. Nogalski, Respondent's examining physician) no doctor ever really questioned Petitioner's credibility or the veracity of her complaints. Her FCE was valid and reliable, her effort full. Petitioner was a credible witness.

3. **Issue C: Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?**

Petitioner sustained an accident on November 27, 2009 arising out of and in the course of her employment with Respondent. This conclusion is based upon Petitioner's testimony, the accident reports, and consistent histories found in the medical records. On November 27, 2009, Petitioner testified that a resident attempted to

brace himself in the dining area and grabbed and jerked on her right arm which aggravated her right shoulder pain originally caused by her May 24, 2009 work accident which is the subject matter of Case No. 09 WC 48650. According to the Blessing Hospital emergency room records from November 27, 2009, a resident shoved down on Petitioner's right shoulder which worsened her pain. She was provided a sling and testified that she called Dr. Smith's office. Dr. Smith's records documented the re-injury at work and he referred Petitioner to Dr. Crickard. On December 10, 2009, Dr. Crickard's history noted that she had two injuries at work and suffered from constant pain in her right shoulder.

4. Issue F: Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner's current condition of ill-being in her right shoulder is, in part, causally connected to her November 27, 2009 accident.

According to the Blessing Hospital emergency room records from November 27, 2009, a resident shoved down on Petitioner's right shoulder which worsened her pain. She was provided a sling and testified that she called Dr. Smith's office. Dr. Smith's records documented the re-injury at work and he referred Petitioner to Dr. Crickard. On December 10, 2009, Dr. Crickard's history noted that she had two injuries at work and suffered from constant pain in her right shoulder. Dr. Crickard performed an injection and recommended surgery to her right shoulder. On March 12, 2010, Petitioner underwent right shoulder surgery which involved a subacromial decompression and subacromial impingement. The record reveals that she continued to treat with Dr. Crickard for ongoing right shoulder complaints/problems.

On September 22, 2010, Dr. Crickard referred Petitioner to Dr. Derhake for ongoing treatment. Dr. Derhake's records indicate that her condition was a work-related injury when a patient had jerked on her right shoulder and he recommended a second surgery. Throughout Dr. Derhake's records, he noted that her condition was work/employment related. On August 9, 2011, Dr. Derhake performed the second surgery which included a right shoulder arthroscopy with a distal clavicle excision and subacromial decompression.

Dr. Farley, Petitioner's Section 12 examiner, agreed that the two surgeries and Petitioner's current condition of ill-being was related to the November 27, 2009 accident (as well as the May 24, 2009 accident which is the subject matter of Case No. 09 WC 48650). The only doctor to question causation was Respondent's Section 12 examiner, Dr. Nogalski. Dr. Nogalski testified that he did not believe the work accidents caused or aggravated her right shoulder condition. Dr. Nogalski also testified that he did not believe there was objective evidence that Petitioner needed ongoing right arm restrictions. Yet, Dr. Nogalski acknowledged that the FCE test reported that she gave a full and reliable effort, admitted that Petitioner may have strained he right shoulder from the work injuries and acknowledged that the accident reports support Petitioner had shoulder symptomology following the accidents at work. Furthermore, Dr. Nogalski did not consider the cumulative effects of the two accidents and Petitioner's brief return to work with ongoing symptoms in between the two accidents.

While Dr. Holt did not believe there was any pathology in Petitioner's shoulder, he didn't question the veracity of her complaints – he just felt they might be stemming from her neck and not her shoulder. Petitioner was then seen by Dr. Green shortly thereafter who felt she had impingement syndrome.

Respondent offered the testimony of private investigators Kellerman and Brown as well as Facebook postings and surveillance video. Although the surveillance videotape and private investigators testified that Petitioner was attempting to sell one of her horses, there is nothing in the reports nor videotape that indicates

that Petitioner injured, aggravated or worsened he right shoulder condition away from work. Respondent offered a Facebook posting from August 8, 2011 indicating that Petitioner posted that she was picking up bales of hay, however, Petitioner testified that she was in the truck when her husband and friends did the actual lifting and this was corroborated by her husband, Daggott, and Vaughn. The Arbitrator finds that the testimony of Petitioner, Fisher, Vaughn and Daggott to be credible, believable and consistent.

Petitioner has consistently voiced complaints about activities at or above shoulder level. Nothing on the video shows Petitioner engaged in activities beyond her restrictions or on a repeated/sustained level as she would have at work.

The Arbitrator relies upon a chain of events, the testimony of Petitioner, corroborated by the medical records of Drs. Derhake and Crickard as well as the testimony of Dr. Farley to conclude that Petitioner's right shoulder current condition of ill-being is related to the November 27, 2009 accident (aggravating the prior right shoulder condition which was caused by the May 24, 2009 accident, subject matter of Case No. 09 WC 48650). The Arbitrator places more weight in Dr. Farley's opinion and the records from Drs. Derhake and Crickard than the testimony of Dr. Nogalski. Therefore, the Arbitrator concludes that Petitioner's current condition of ill-being is related to the November 27, 2009 accident.

5. **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?**

Pursuant to the Arbitrator's determinations above, the Arbitrator awards $207.86 in unpaid medical. This bill pertains to Dr. Smith's treatment for Petitioner's right shoulder condition. The parties agreed at arbitration that if Respondent's group medical carrier paid a portion of this bill, Respondent shall be permitted a credit for such payment(s) and will hold Petitioner safe and harmless up to the extent of the credit.

6. **Issue K: What temporary benefits are in dispute? (Maintenance? TTD?)**

Pursuant to the Arbitrator's determination on accident and causation , the Arbitrator concludes that Petitioner was temporarily totally disabled from November 27, 2009 through October 11, 2011, representing 97-4/7 weeks. There is no evidence that Petitioner was working during this period of time and the Arbitrator places more weight on the treating medical records and the opinions of Drs. Crickard, Derhake and Farley than in the testimony of Dr. Nogalski. Therefore, the Arbitrator awards 97-4/7 weeks of TTD benefits. The parties stipulated that Respondent is entitled to a credit for past TTD benefits paid. Based upon Respondent's payment printout, Respondent shall be allowed a credit in the amount of $45,332.66 for past TTD benefits paid.

Maintenance Benefits

On January 18, 2012, Respondent decided to not accommodate Petitioner's permanent restrictions. Petitioner attempted to go through the alternative employment program through the State but was declined. Thereafter she began a job search on her own. Between January 18, 2012, and July 7, 2013, Petitioner sought employment and vocational assistance and did not work during this period except for three days when she worked part-time job at Lewis County 911. Petitioner testified that the job was not full-time employment and paid significantly less than her nursing position for Respondent. Additionally, based upon the distance she had to travel for the position, Petitioner testified that she was financially compelled to quit the job after three days. The Arbitrator finds Petitioner's conduct was reasonable and determines this part-time job was not suitable employment based primarily upon the fact that it was not a full-time position. The Arbitrator awards maintenance benefits during this period of time, excluding three days she worked at Lewis County 911, totaling

76-1/7 weeks of maintenance. According to Respondent's Exhibit #18, Respondent is entitled to a credit in the amount of $11,484.59 in maintenance benefits paid for a total credit of $56,817.25 including the above referenced TTD credit.

7. Issue L: **What is the nature and extent of the injury?**

Petitioner testified in a credible and believable fashion concerning her right shoulder condition and symptomology. Petitioner underwent two shoulder surgeries to her right, dominant arm. Following the second surgery, Petitioner was diagnosed with adhesive capsulitis and was provided permanent restrictions at the sedentary level including restrictions of no lifting, pushing or pulling more than 10 pounds with her right arm and no work above shoulder. These restrictions were based upon an FCE test and her surgeon. Her employer chose to not accommodate her permanent restrictions and Petitioner lost her job with Respondent. Consequently, Petitioner suffered a career/job change and diminished employment options. She ultimately secured a customer service position for BlueCross/BlueShield paying her $13.05 per hour. The parties stipulated that Petitioner's average weekly wage at the time of the accident was $696.92. Clearly, this injury resulted in a substantial wage loss; however, Petitioner did not seek a wage differential pursuant to Section 8(d)1.

Additionally, Dr. Farley found that Petitioner sustained significant deficits in external rotation and abduction and noted that she may need future treatment based upon her level of discomfort and function. Similarly, Drs. Derhake and Smith recommended pain management which Petitioner testified she continues with through Dr. Smith and Blessing Pain Management. Petitioner testified that she suffers with daily shoulder complaints/pain and continues to take the medication, including Hydrocodone, recommended by pain management and Dr. Smith. The Arbitrator also notes Petitioner's young age. Based upon the foregoing and noting Petitioner's injuries partially incapacitate her from pursing her usual and customary line of employment, Petitioner is awarded 30% loss to her person as a whole pursuant to Section 8(d)2 of the Act.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Anna J. Ash,

Petitioner,

vs.

14IWCC1131

NO: 09 WC 48650

Illinois Veterans Home,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, permanent partial disability, the motion to continue/ keep proofs open, Petitioner's Exhibit #14, whether to exclude surveillance on June 10, 2012 at 10:44 a.m., maintenance, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 20, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

14IWCC1131

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 2 4 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 12/18/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ASH, ANNA J
Employee/Petitioner

Case# **09WC048650**
09WC051546

14IWCC1131

ILLINOIS VETERANS HOME
Employer/Respondent

On 2/20/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

0293 KATZ FRIEDMAN EAGLE ET AL
PHILIP A BARECK
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0499 DEPT OF CENTRAL MGMT SERVICES
MGR WORKMENS COMP RISK MGMT
801 S SEVENTH ST 6 MAIN
PO BOX 19208
SPRINGFIELD, IL 62794-9208

3291 ASSISTANT ATTORNEY GENERAL
DIANA E WISE
201 W POINTE DR SUITE 7
SWANSEA, IL 62226

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

FEB 20 2014

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Adams)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC1131

Anna J.Ash
Employee/Petitioner

v.

Illinois Veterans Home
Employer/Respondent

Case # 09 WC 48650

Consolidated cases: 09 WC 51546

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 **Quincy**, on **December 5, 2013 and in Springfield on December 27, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Evidentiary Issues**

14IWCC1131

FINDINGS

On **May 24, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$32,575.19**; the average weekly wage was **$664.80**.

On the date of accident, Petitioner was **27** years of age, *single* with **3** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$N/A** for TTD, **$N/A** for TPD, **$N/A** for maintenance, and **$N/A** for other benefits, for a total credit of **$$0**.

Respondent is entitled to a credit of **$N/A** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that Petitioner sustained an accident on May 24, 2009 arising out of and in the course of her employment and that her current condition of ill-being in her right shoulder is, in part, causally connected to the May 24, 2009 accident. However, the Arbitrator further concludes that Petitioner sustained a second accident on November 27, 2009, which is the subject matter of Case No. 09 WC 51546, which further aggravated her right shoulder. The Arbitrator concludes that the medical services/bills, TTD, maintenance, and permanency issues are best addressed in companion case 09 WC 51546.

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

February 15, 2014
Date

FEB 20 2014

Anna Ash (now Fisher) v Illinois Veteran's Home Quincy, *09WC 48650*

Findings of Fact and Conclusions of Law

Petitioner claims two injuries to her right shoulder while working for Respondent. Claim # 09 WC 48650 originally alleged an accident date of May 15, 2009; however, the date of accident was later amended to May 24, 2009. (AX 3) Petitioner filed a second Application for Adjustment of Claim, 09-WC-51546, alleging an accident date of November 27, 2009. (AX 4) Both cases were consolidated for purposes of trial; however, the parties requested that two decisions issue.

The Arbitrator Finds:

According to medical records, on December 31, 2008 Petitioner went to the office of her primary care physician, Dr. Smith (Hamilton-Warsaw Clinic), reporting that she had hurt her neck at work on December 20, 2008. Petitioner had been on modified lifting restrictions and was reportedly doing better. She denied any numbness, tingling or headaches and reported she had been working with no significant problems and felt ready to return to work on a full duty basis. Petitioner was released to return as needed. (RX 3)

On March 6, 2009, Petitioner returned to see Dr. Smith due to a migraine of several days duration. Petitioner requested an off-work slip, as she had only worked 8 hours of her mandated 16 hour shift. Dr. Smith's office note stated, "Petitioner notes fatigue. States that she has been in the hospital all last week with daughter and also has an infant son at home. The patient's significant other has left her and outside of her family [she] really has no one to lean on to help with her children." (RX 3)

On April 1, 2009 Petitioner reported to Dr. Smith, stating that she had "persistent neck pain, now going on for several months." Dr. Smith set Petitioner up for a cervical MRI which was performed on April 13, 2009 and read as negative for evidence of a herniated disc. (RX 3; PX 2)

On April 17, 2009, Petitioner again saw Dr. Smith for a follow-up regarding her neck pain. Dr. Smith's office note also states, "Patient also complaining of a lot of stress, headaches and anxiety." Petitioner was prescribed Soma and Zoloft and advised to get a physical therapy consultation. (RX 3)

Petitioner testified that on May 24, 2009 she was employed by Respondent as a VNAC (Veterans Nursing Assistant Certified). Petitioner testified she began working for Respondent in November of 2007. Petitioner testified that as a VNAC, her job duties including feeding, dressing and cleaning the residents. Petitioner testified that the residents weighed between 120 and 300 pounds and their ages ranged from the sixties to the nineties. Petitioner is right arm dominant.

Petitioner testified that on May 24, 2009, she was transferring a 200 lb. resident to his bed with the help of a co-worker (Ashley Campbell) at which time the resident's knees buckled and he fell on top of Petitioner landing on her right upper body. Petitioner testified that she felt a pop in her right shoulder. Petitioner testified that she immediately reported the incident to her supervisor and accident reports were completed. (RX 5; PX 8)

Petitioner further testified that prior to this accident, she had no problems with her right shoulder; she acknowledged some treatment for her neck in April of 2009. Petitioner stated that the neck pain was work-related and she underwent an MRI on April 13, 2009 after which cervical physical therapy may have been recommended. Petitioner further testified that her neck problem resolved shortly thereafter. Between April 20, 2009 and May 24, 2009, Petitioner did not have any treatment, restrictions, doctors' appointments or medication for her neck condition. She said it had vastly improved. On cross-examination, Petitioner testified that she did not recall episodes of neck problems before April, 2009 but would not deny that she may have had neck treatment/pain before that time.

Petitioner testified that on May 28, 2009 she went to see Dr. Smith, her family doctor. Dr. Smith's office note records a history of a work injury to Petitioner's right shoulder while assisting with a patient transfer. Petitioner did not complete her entire shift and had been resting her shoulder. On examination Petitioner displayed full range of motion but "exquisite" tenderness in the right trapezial region along with crepitance. Dr. Smith recommended physical therapy. (RX 3; PX 1)

On June 1, 2009 Petitioner completed a Notice of Injury and described the incident involving the transfer of a resident. Petitioner had been seen for medical care but was still working. She identified Ashley Campbell as the co-worker involved in the incident. Ashley Campbell also furnished a statement. According to it, Petitioner and Ms. Campbell were attempting to put the resident to bed at which time his knees buckled and he fell on top of Petitioner. The incident was noted to have occurred on May 24, 2009. An additional report completed by Ms. Campbell noted the same history/accident and indicated that she heard Petitioner's shoulder "pop" when she was underneath him and heard Petitioner say "Ow, my shoulder hurts!". (PX 8, RX 5). A Supervisor's report was completed on the same day which noted that this was a potential workers' compensation injury at which time two VNACs were attempting to transfer the patient when the incident took place. This document was signed by Respondent's Supervisor. (PX 8, RX 5). (RX 5; PX 8)

On June 8, 2009 Petitioner saw Dr. Smith regarding acute low back discomfort. Physical therapy was ordered in light of the heavy lifting associated with her job. (RX 3)

On June 18, 2009, Petitioner saw Dr. Smith complaining of an upper respiratory infection with fatigue. (RX 3) Dr. Smith's office note states: "Patient comes to office today with complaints of sore throat and fatigue for the past two days, has noted a productive cough with gray phlegm. Patient states that she is exhausted, has been mandated to work overtime. Patient states that she leaves home one in the afternoon to drop her kids off at daycare and then picks them up between midnight and 6:30 am depending on mandated hours. Has no other assistance from children's father and her mother and sister live away from the patient. Patient states that she just does not feel well. She did not go in to work this past Sunday because her shoulder was bothering her and has been sick with upper respiratory symptoms and then patient had to leave early from work due to baby's severe constipation which babysitter was not able to handle." (RX 3) Dr. Smith's assessment was: (1) upper respiratory infection and (2) "Fatigue: Discussed possible ways to receive assistance with her children and work. Patient

has put in bids for day shift and hopefully within the next six months will be able to be on day shift which she feels will be better for her and her children as far as time together and rest. In the meantime, patient has tried to take a couple of vacation days, states she has worked at place of employment for two years, but has been denied vacation time due to increase census and limited number of employees." (RX 3)

On June 26, 2009, Petitioner returned to see Dr. Smith regarding her right shoulder and neck pain. Petitioner stated this had been going on for three to four weeks. Dr. Smith's assessment was neck and right shoulder pain: "Will obtain right shoulder films and C-spine films and follow up after results. Off work through next week and return to work on 7/6/2009. Continue Soma, but add Lortab 5/500." (PX 1)

Petitioner underwent x-rays of her cervical spine and shoulder on June 26, 2009 which were read as normal. (PX 2)

On July 21, 2009, Petitioner underwent an MRI of the Right Shoulder. According to the report, there was a tiny amount of joint fluid. Petitioner's acromioclavicular joint appeared normal. There appeared to be a small acromial hook but no evidence of bone bruising or significant degenerative change. No os acromiale was evident. Petitioner's bicep tendon was normal in appearance. The labra were intact. Minimal increased signal was noted in the supraspinatus tendon, suggesting tendinosis. No evidence of a tear was apparent. (RX 2)

Dr. Smith examined Petitioner on July 24, 2009. They reviewed Petitioner's medications and agreed on an orthopedic consultation. (PX 1)

On July 29, 2009, Petitioner saw Dr. Holt at Quincy Medical Group's Orthopedic Department. Petitioner had been referred by Dr. Smith. On the intake form, when asked, "When did the injury or problem occur?," Petitioner wrote: May 28, 2009." (RX 1) Petitioner identified her problems as both her neck and shoulder with pain, numbness, and tingling going all the way down her right arm to her hand which she attributed to a work injury on May 28 or May 24 while helping a heavy patient transfer and, when he began to fall, she took some of the weight on her neck and shoulder. She initially had trapezial tenderness and underwent physical therapy which she believed made things worse. According to the doctor's records, Petitioner had undergone shoulder and c-spine films and MRIs, all of which were read as normal. Dr. Holt stated, "I reviewed the MRI and I think it is basically negative as well, maybe showing just a little tendinitis." (RX 1) Dr. Holt then noted that despite the negative work-up Petitioner continued to complain strongly. On exam, he could not really detect anything wrong with the shoulder itself and commented that Petitioner pointed to the side of her neck and the back of the shoulder in the trapezius area. Dr. Holt did not believe Petitioner really had any pathology in the shoulder itself and he told her he really had nothing to help her. He wrote, "I do not think that the minimal abnormality in the shoulder seen on the MRI requires any treatment or can be logically attributed to her "work injury." I explained that I do not treat neck problems and by her symptoms at least, that is primarily what she seems to have. Maybe some additional physical therapy directed just at the neck itself might help. EMGs could be done to see if there is any actual objective nerve injury. However, I do not feel that there is anything I can do for her at this time." Petitioner was given a note that she should just continue with her current work status. (RX 1)

On August 5, 2009 Petitioner again saw Dr. Smith who noted, "Almost 28 years old, comes in for follow-up right shoulder pain. She did see the orthopedic surgeon who felt apparently that this was coming from her neck. MRI, however, of c-spine was negative. Rt shoulder MRI did show tendonosis. The patient would like another orthopedic surgeon for a second opinion." (RX 3; PX 1)

On August 19, 2009, Petitioner saw Dr. Kirk Green, an orthopedic surgeon. (RX 2) On the Patient Information Sheet when asked, "Is this work related?" Petitioner answered in the affirmative. For the date of injury, Petitioner wrote June 28, 2009. Petitioner described the accident as follows, "...she was hanging onto a gait belt while transferring a patient from chair to bed and he fell on her. She landed on her left shoulder. He impacted her right shoulder. She had immediate pain aggravated by motion...." (RX 2)

Dr. Green's office note indicates Petitioner's pain had persisted despite an excellent course of conservative treatment. She has used low dose NSAIDS, undergone a course of physical therapy, and restricted/protected activity with persistent or even worsening symptoms. Petitioner's symptoms were most notable with activities about shoulder height, although she had pain with any motion of the extremity. Petitioner also reported some occasional paresthesia extending into the dorsum of her hand. Petitioner had undergone a work-up including an MRI of her shoulder and cervical spine, which were relatively benign. Plain x-rays of her shoulder were negative. On examination Dr. Green noted Petitioner's postures were protective of her shoulder. There was some tenderness over the AC joint without instability and over her anterior acromium as well. Sulca sign was listed. Impingement signs were positive. Cuff strength was symmetric. No instability was demonstrable." (RX 2) Dr. Green's impression was: "Apparent impingement syndrome, right shoulder. Maybe a component of AC joint syndrome, right shoulder. I don't appreciate any cervical findings on today's exam." Dr. Green gave Petitioner an injection into her subacromial bursa, recommended a vigorous home exercise program and outlined limited duty work she could perform if available (a 5 lb. lifting restriction and avoidance of pushing, pulling or reaching above shoulder height). (RX 2)

That same day Petitioner also saw Dr. Smith and updated him on her appointment with Dr. Green. (PX 1)

On September 9, 2009, Petitioner again saw Dr. Green, who noted her condition was unchanged after the injection. He also noted that no light duty work had been available for her. On examination, Petitioner displayed full range of motion, with pronounced hesitancy on abduction and flexion about shoulder height. He noted those motions were associated with grimacing. Cuff strength was essentially symmetric, although associated with complaints of pain. On palpation, Petitioner displayed tenderness now localized to the lateral margin of the acromium. All maneuvers recreated that pain. Dr. Green's impression was right shoulder pain, etiology uncertain, with symptoms limited to the margin of the acromium. Dr. Green switched Petitioner to Cataflam and recommended a course of physical therapy rehab, including use of a TENS unit. Petitioner was to follow up in two weeks for a re-check. He noted he had little further to offer to her. (RX 2)

On September 10, 2009 Petitioner underwent an initial evaluation at Advance Physical Therapy and it was decided she should undergo therapy two times per week. (RX 2)

On September 23, 2009, Petitioner returned to Dr. Green. Her condition was reportedly unimproved and still complaining of pain, now more localized over the superior shoulder at her AC joint. On his exam, Dr. Green noted, "She now has tenderness over her lateral acromium, but also her AC joint. Adduction caused pain about her AC joint. Impingement signs appeared negative. Cuff strength was symmetric." Dr. Green's impression was: AC joint symptoms, right. He injected her AC joint and then repeated Petitioner's exam approximately 20 minutes post injection, noting resolution of her complaints. As such, Dr. Green instructed her on continuing her home exercise program, icing, and NSAIDS as needed. Dr. Green also stated, "If work below shoulder height were available, she could return to same, otherwise, she will follow up in 2 weeks for recheck. If doing well at that point, would release her to regular work activities. Her symptoms have been somewhat migratory, but again with response to injection at the AC joint today, that would represent the source of her discomfort." (RX 2)

Petitioner testified that in October of 2009 she moved in with her current husband, Sam Fisher, at 26595 State Highway C, in Ewing, Missouri. Petitioner testified that she met her husband in February of 2009 when she sold a horse to him. Petitioner testified that Sam had ten horses when she moved in with him.[1]

On October 13, 2009, Petitioner again saw Dr. Green. Petitioner was still symptomatic but reported relief for one week after the prior injections. He noted there had been some confusion regarding the TENS unit and Petitioner had never been fitted for it. On examination, Petitioner displayed full range of motion of her shoulder and tenderness over her AC joint, minimally increased with adduction. Dr. Green's impression was: apparent AC joint symptoms, improved, right shoulder. Dr. Green recommended Petitioner continue her home exercise program and take Ibuprofen, as needed. Dr. Green released Petitioner to regular work duties effective October 14, 2009 and indicated Petitioner did not need to be scheduled for routine follow-up. (RX 2)

On October 22, 2009 Petitioner returned to see her family doctor, Dr. Smith, regarding her recurrent right shoulder pain. She reported having performed physical therapy as Dr. Green had requested and that she was relieved to go back to work. Petitioner reported she had been working long shifts and has irritated her right shoulder once again but had been unable to get into the doctor's office the day before. She did try to get in with Dr. Green the day before and had an appointment with him on October 12, 2009. Petitioner reported that, in the past, Dr. Green had discussed the need for surgery if physical therapy didn't provide relief. Petitioner requested a work excuse for the 21st and until her visit with Dr. Green. Dr. Smith's assessment was right shoulder pain for which she was being treated by Dr. Green. She was given an off work slip as requested and told she could continue using Ibuprofen and resting until further advised by Dr. Green. (PX 1)

Petitioner returned to see Dr. Green on October 23rd reporting a recurrence of pain after returning to work. Petitioner localized her pain to the AC joint, noting pain with abduction and forward flexion but no pain with adduction. Petitioner did not demonstrate any shoulder instability. Dr. Green's impression was unchanged but he noted the increase in symptoms. Dr. Green gave Petitioner some samples of Zipsor (25 mg 1 qid) to

[1] Petitioner acknowledged on cross-examination she might be wrong on the number of horses and it might have been 16. In any event she had no horses of her own when she moved in with Mr. Fisher.

replace her current anti-inflammatory. Dr. Green stated, "If it agrees with her, she will contact us and will give her script for same. Went ahead and released her back to work. Really have little further to offer her treatment wise." Petitioner was given a full duty release for October 23rd. (RX 2)

On 11/5/2009, Petitioner's Advance Physical Therapy Discharge Summary noted that therapy was being discontinued because Petitioner was not returning to continue. (RX 2)

Petitioner testified that after being given the full duty release she did, in fact, return to work for Respondent on such a basis.

Petitioner went to Dr. Smith's office on November 16, 2009 regarding an exacerbation at work on November 11, 2009 when a resident pulled and yanked on her shoulder. Petitioner also reported her shoulder had recently been twisted and that after two days of work in a row her shoulder seemed worse and more painful. Petitioner reported she was having trouble sleeping due to shoulder pain and was following up with Dr. Green. Petitioner was taken off work for two days (the 12th and 13th) and referred to Dr. Wheeler for a second opinion. Petitioner was also given Darvocet and work restrictions. (PX 1)

Petitioner phoned Dr. Smith's office on November 23, 2009 stating she was leery to go back to work as she had spoken with someone in the HR office that told her to "watch her P's and Q's" since she was on workers' compensation. The doctor spoke with Petitioner's supervisor who referred her to Human Resources and he was told Petitioner must let her co-workers know what she could and could not do. Petitioner's supervisor assured the doctor Petitioner would be on light duty only. The doctor then re-assured Petitioner. (PX 1)

Petitioner filed her Application for Adjustment of Claim in this case on November 25, 2009.

Petitioner further testified that on November 27, 2009 she was working in the dining room when a resident's alarm went off because he was attempting to stand up unassisted. Petitioner testified that she attempted to safely sit him down but at the same time the resident grabbed her right shoulder in an effort to balance himself and Petitioner felt a worsening of her right shoulder pain. Petitioner notified Respondent. She was sent to the Emergency Room at Blessing Hospital where she gave a history consistent with her testimony. Petitioner was provided a sling and medication. (PX 2, RX 3)

On November 27, 2009, Petitioner filed another Workers' Compensation Report, alleging an injury occurring earlier that same day. Petitioner's hand-written report stated, "I was picking up trays in dining rm. I am the only staff member in the dining rm. Resident set off alarm & family members where helping him stand. I walked over to him to try to talk him into sitting down, he then grabbed my right shoulder to help balance himself and in turn pushing on it. I told resident not to grab my shoulder because it is injured." Another report written by the Petitioner stated, "Resident was standing by his chair, unsteady on his feet. I went over to get him to sit back down and he put his hand on my injured shoulder to steady himself." (RX 6; PX 9) Petitioner testified she was sent to Blessing Hospital. The Supervisor section of the report indicates that this incident was "re-injury to work comp injury" and was signed by Petitioner's supervisor. (RX 6; PX 9)

Petitioner reported to Blessing Urgent Care that same day. According to the records, "Pt at work & resident shoved down on rt shoulder & now pt has pain, pt hx of previous shoulder injury – ice applied." Petitioner was diagnosed with acute right shoulder pain and taken off work until November 28, 2009 at which time she could return to work with restrictions. (PX 2)

On November 30, 2009 Petitioner completed a Notice of Injury regarding an accident on November 27, 2009. Petitioner reported feeling right shoulder pain when a resident grabbed her right shoulder to stabilize himself while in the dining room. Petitioner immediately notified her supervisor who asked if she needed medical treatment and Petitioner was subsequently seen at Blessing Hospital. (RX 6)

On December 7, 2009, Petitioner underwent an MRI of her right shoulder. According to the report, there was no evidence of fracture, bone marrow edema, or dislocation, but mild degenerative changes of the AC joint were apparent. There was also minimal increased abnormal signal within the distal supraspinatus tendon without a tear, most likely representing mild tendinosis. The glenoid labrum was intact. No rotator cuff tear was present. No significant joint fluid was present. (PX 2)

On December 12, 2009 Petitioner was examined by Dr. Crickard at Quincy Medical Group's Orthopedic Department. In the intake form, when asked, "When did the injury or problem occur?" Petitioner wrote: 5/28/2009 and indicated she was lifting a patient at work. Dr. Crickard's office note stated, "The pt is a 28 year old white female with severe right shoulder pain. She has had 2 injuries at work, one in May and one more recent. She has constant pain in the shoulder with any overhead activity. Rest makes it feels better, but any work makes it worse. She has had physical therapy. She has had a cortisone shot by Dr .Green in Keokuk. No other complaints. No neck pain." For his exam, Dr. Crickard noted, "Physical exam showed pain in the impingement zone. No real weakness, however. She has good capillary refill. I did review her new patient form. I also reviewed MRI of the right shoulder, which is essentially normal and I agree with that. We discussed treatment options for rotator cuff impingement. She has no pain over the AC joint. We discussed nonoperative versus operative treatment. At this point, she agreed to proceed with another injection to have me see if I could do any difference. If not, we might proceed with shoulder arthroscopy." (RX 1) Petitioner underwent a right shoulder subacromial injection. She was given restrictions of "No repetitive shoveling, no lifting over 0 lbs, no push or pull over 0 lbs, no reaching above shoulder level. Limited use of Rt shoulder." (RX 1) Petitioner was to return in one month. (RX 1)

Petitioner testified that Respondent was unable to accommodate her restrictions and she continued drawing weekly workers' compensation benefits.

On December 17, 2009 Petitioner's Application for Adjustment of Claim in 09 WC 51546 was filed.

On January 12, 2010 Petitioner returned to see Dr. Crickard, who noted, "The patient returns to clinic today. She continues to have pain in that right shoulder. The shot did not really help. It numbed her pain somewhat, but did not take it away altogether. We discussed possible arthroscopy subacromial decompression

at her last visit and that is what I think she needs. She gets WC through the VA, so we will see what they say." (RX 1)

Dr. Crickard modified Petitioner's restrictions to "No lifting over 5 lbs, no pushing or pulling over 5 lbs, and no reaching above shoulder level." (RX 1)

On February 5, 2010, Petitioner called Dr. Crickard. The note stated, "Anna needs a call back. She never received an order for her surgery." (RX 1)

On February 25, 2010, Dr. Crickard filled out a disability benefits claim sheet for SERS. Under the DX, Dr. Crickard wrote, "pain, shoulder, R shoulder pain since 5/2009; 8/10 scale." Dr. Crickard also wrote, [Petitioner] has not been taken off work, but has been given work restrictions." (RX 1)

On March 2, 2010, Petitioner again saw Dr. Crickard. Petitioner reported ongoing right shoulder pain and they discussed operative and non-operative treatment options along with short and long-term concerns. They also discussed Petitioner's carpal tunnel syndrome of borderline severity. Dr. Crickard noted, "It is not truly workman's comp, as she did not report it, so we probably cannot do it at the same time. We will wait and see what WC says." Dr. Crickard gave Petitioner restrictions of no use of the right arm. (RX 1)

On March 12, 2010, Petitioner underwent right shoulder arthroscopic surgery performed by Dr. Crickard at Blessing Hospital. Dr. Crickard performed a subacromial decompression arthroscopically noting a "large hook was seen on the anterior acromion. The AC joint was stable." (RX 1; RX 3)

On March 15, 2010, Petitioner saw Dr. Crickard for follow-up. Dr. Crickard took Petitioner completely off work on March 15, 2010 and gave her restrictions of no lifting with her right shoulder, no pushing or pulling with her right shoulder, no reaching about shoulder level, and limited use of the right shoulder, effective March 22nd. (RX 1)

On March 25, 2010, Petitioner saw Steven Dement, PA, at Quincy Medical Group. Mr. Dement noted Petitioner was pleasant and accompanied by her family. Petitioner described problems managing her pain and sleeping after surgery on March 12th. She was on Lortab. Petitioner's hydrocodone/APAP 10/325 was renewed and she was instructed to add Aleve 1 tab 3 times/day with food. Additionally, physical therapy was ordered and she was again taken off work completely. On April 8, 2010, Petitioner returned to see Steven Dement, PA. Petitioner was still not sleeping well and waking up a lot with shoulder pain. Gentle compression from her husband helped. Petitioner's pain was being managed moderately well through the rest of the day. She has some eminent swelling, especially after therapy. (RX 1)

Petitioner was described as struggling with pain management, but progressing functionally status post a right shoulder subacromial decompression. Petitioner was taking maximum doses of narcotics and Mr. Dement was willing to keep her off work and in physical therapy. He suggested compression with an ace bandage, especially for sleep. Petitioner was to return in four weeks. (RX 1)

As instructed, Petitioner returned on May 6, 2010 to see Mr. Dement. Petitioner was still experiencing quite a bit of pain up around the superior glenohumeral region with the pain being described as an exaggerated form of stiffness. Petitioner felt she was fine to go back to work with very limited use of her right shoulder. Petitioner was given restrictions of no work until May 10, 2010 and after that restrictions of no lifting with over 15 lbs, no pushing or pulling over 20 lbs., and no use of her right arm except to shuffle papers or minimally steadying a light load held in her left arm. She was also told to continue physical therapy. On examination Petitioner displayed positive impingement and some limitation in strength. (RX 1)

On June 8, 2010, Petitioner saw PA Dement again. Her progress was described as very slow. Petitioner had active range of motion of the right arm to 89 degrees of abduction and 84 degrees of flexion. She had not gotten into any functional strengthening yet. Petitioner reported pain with resisted shoulder flexion and extension with very limited range of motion. Dement noted that when he had her press (as in a bench press against his hands) it caused a little bit of pain as well. There was no tenderness to palpation and skin tones were normal. Again, Petitioner was given restrictions of no lifting with over 15 lbs, no pushing or pulling over 20 lbs, no reaching above shoulder level and no use of the right arm. Physical therapy was increased in frequency. Authorization for her right carpal tunnel release was still pending. (RX 1)

Dr. Crickard examined Petitioner when she returned on July 20, 2010. Petitioner reported less shoulder pain and increased strength and motion. He advised her to continue her therapy and to return in one month at which time he felt he might be able to release her. Petitioner's restrictions remained in effect. (RX 1)

On August 19, 2010, Petitioner again saw Dr. Crickard. Petitioner had not undergone any therapy in the previous month as she wasn't progressing and insurance had refused to pay for any more. Dr. Crickard noted Petitioner was only going to get better if she continued with therapy, noting she had good passive range of motion but pain with active motion. "She needs therapy." Her restrictions remained in effect. (RX 1)

Petitioner returned to see Dr. Smith on September 7, 2010 complaining of persistent shoulder pain. Physical therapy was recommended along with pain management. Petitioner's medications were increased. (PX 1)

On September 21, 2010, Petitioner saw Dr. Crickard for the last time. At that visit Petitioner was describing tremendous shoulder pain and some stiffness. Dr. Crickard recommended Petitioner see Dr. Derhake for a second opinion, as she was not heading in the direction he wished her to be going. Petitioner understood. Her restrictions were continued. On physical examination Petitioner was noted to have significant pain with range of motion and passive flexion and abduction caused significant pain. (RX 1)

On September 22, 2010, Petitioner was examined by Dr. Adam Derhake at Quincy Medical Group (Orthopedics Department). Dr. Derhake noted Petitioner's history of lifting a patient and having her right shoulder jerked. He knew she had undergone surgery and was still experiencing pain and stiffness in her shoulder despite physical therapy. Petitioner was not working secondary to her ongoing symptoms. Based upon his examination Dr. Derhake believed Petitioner had developed some post-operative adhesions which were hindering her ability to fully rehabiliate. He also felt her pain was significantly limiting her. He recommended a

subacromial injection with a corticosteroid today to help limit the pain and possibly help maximize the benefits of therapy. However, he also noted that, ultimately, Petitioner might require a repeat decompression with lysis of adhesions and manipulation under anesthesia. The possibility of repeat surgery on the shoulder was discussed today with the patient. Petitioner underwent the injection and was taken off work entirely as Petitioner advised she could not return to work with her shoulder in its present condition. (RX 1)

Petitioner had another visit with Dr. Smith on September 24, 2010, again reporting ongoing complaints of shoulder pain and requesting a second opinion. (PX 1) Petitioner testified that she was concerned about a second surgery so she contacted Dr. Greatting for a second opinion.

On October 11, 2010, Dr. Crickard completed the physician's portion of Petitioner's Disability Leave application with Central Management Services (pp. 22 and 23 of a 29 page document). Dr. Crickard noted Petitioner's painful range of motion and that shoulder surgery had been recommended. He further noted she had been taken off work since September 22, 2010 and had a "severe limitation" in functional capacity resulting in her being temporarily totally disabled from any occupation at that time. He did not feel she was permanently and totally disabled from employment. (RX 1)

On October 27, 2010, Petitioner again saw Dr. Derhake. Petitioner reported she had been doing her exercises and some gains in range of motion were noted. However, she continued to complain of pain in the shoulder. She stated that she had experienced a couple episodes in therapy where she felt like something had popped in her shoulder and was worried that it may have popped out of place. However, she denied any feelings of complete dislocation or need for relocation. Dr. Derhake's physical exam noted significant tenderness around the subacromial space and acromion along with diminished strength with flexion second to pain. Petitioner had no tenderness to palpation at the AC joint and a negative cross-arm. Instability testing demonstrated simple pain but no significant apprehension. Negative relocation. Petitioner did have a positive load and shift exam which suggested some possible labral pathology. Dr. Derhake's assessment was continued right shoulder pain and stiffness, now with mechanical symptoms and possible labral pathology. Ultimately, he felt she was going to require a repeat operation with lysis of adhesions and manipulation under anesthesia with or without any sort of labral repair. Because her MRI was nearly a year old, he wanted to repeat her MRI as an MR Arthrogram to evaluate for any labral adhesions, as well as small rotator cuff tears. Petitioner was to return after the MRI and was to remain off work. (RX 1)

Petitioner was examined by Dr. Mark Greatting on November 4, 2010. Petitioner gave an accident date of May 21, 2009 and described an incident involving the transfer of a patient. She denied any prior injuries. Petitioner felt her initial surgery had helped but that her shoulder had returned to her pre-surgery state. She denied any neck pain and noted occasional numbness and tingling down her arm to her wrist but not her hand. Petitioner's complaints included shoulder popping, weakness, and painful range of motion. She wanted to see another orthopedic surgeon before undergoing more surgery. On examination Petitioner was tender over the AC joint and anterior to the acromion. Her passive motion was greater than her active motion and Dr. Greatting felt a lot of her limitation was secondary to pain, not stiffness in the joint. They discussed an injection and the doctor's need to review additional notes before making any further recommendations. (PX 5)

Petitioner underwent a right shoulder MRI on November 5, 2010. (RX 1)

On November 10, 2010, Petitioner saw Dr. Derhake regarding her ongoing pain complaints in her shoulder. His review of Petitioner's recent MRI found no evidence of labral pathology and her rotator cuff appeared intact. There was some soft tissue above the rotator cuff tendon and subacromial space, which he felt could represent some adhesion formation. Petitioner displayed pain with extremes of motion and some weakness. Dr. Derhake believed Petitioner had developed some adhesive capsulitis secondary to her post-operative condition that had been refractory to conservative management. He recommended a manipulation under anesthesia with possible lysis of adhesions and subacromial decompression at Petitioner's earliest convenience. In the meantime, and pending workers' compensation approval for surgery, Petitioner was to continue to try to maintain her range of motion to prevent further recurrence of stiffness on that side. Petitioner was again kept off work. (RX 1)

On May 17, 2011, Petitioner underwent a Section 12 Examination with Dr. Nogalski. The examination was done in conjunction with an accident date of November 27, 2009. On the Orthopedic Associates intake form, Petitioner stated, "Chief complaint: constant shoulder pain and decreased movement" and "Date of onset: 4/09." According to the doctor's report, Petitioner injured her right shoulder on November 27, 2009 at which time a resident held onto her shoulder (which already was hurting) and she felt increasing pain in her shoulder. Petitioner also described her May 24, 2009 accident and treatment to date. Dr. Nogalski viewed Petitioner' medical records, conducted a physical exam, and reviewed reports from witnesses, second hand sources and social media regarding fraud and activity levels. After viewing that evidence, Dr. Nogalski stated it was unclear whether Petitioner's current condition was related to either injury. He felt Petitioner had some capsulitis and was probably at a plateau and might need an arthroscopic debridement if a manipulation under anesthesia didn't help. Dr. Nogalski felt Petitioner could return to work with restrictions of no unassisted transfers or supervision of patients. He noted some suggestions of "fraudulent reporting," as well as some suggestion of "fairly significant outside activities undertaken by Petitioner which had not really been reported to any medical providers." Dr. Nogalski continued, "As stated above, I cannot clearly identify that she sustained a "injury" to the shoulder, based on the studies provided as well as the physical findings noted in the initial evaluation. She may have sustained a strain, but certainly has not sustained any specific rotator cuff injury, and it is not clear that she has any rotator cuff "injury" that would precipitate an adhesive capsulitis on a secondary basis nor precipitate an impingement syndrome on a more primary basis as suggested." (RX 9)

Petitioner had an appointment with Dr. Smith on July 11, 2011. He refilled her Lortab and noted diffuse tenderness with palpation and active abduction with resistance. Petitioner had a painful arc at fifty degrees. (PX 1)

Petitioner returned to see Dr. Derhake on August 3, 2011. Dr. Derhake stated, "Patient is a 30 year old female who returns to my office today for follow up evaluation. I have not seen her in close to 9 months, and at last clinic visit she was still having a significant amount of pain and stiffness in her right shoulder after a subacromial decompression in March 2010. I had last seen her in the fall of 2010 at which time we discussed the possibility of an arthroscopic lysis of adhesions and manipulation under anesthesia to regain all of her range of motion. She has been awaiting WC approval, and she did finally get approval to proceed with this procedure

within the last few weeks. She is still having similar complaints of pain in the shoulder. However, she has been able to work out most of the stiffness in her shoulder with her home exercises. No other complaints at this time.

On his physical exam, Dr. Derhake noted, "The right upper extremity demonstrates full passive forward flexion and abduction of the shoulders bilaterally. However, there is a significant amount of tenderness still with extreme range of motion. This is overall significantly improved from her previous exam. She does, however, have focal and severe tenderness to palpation in and about the AC joint on the right shoulder. Negative lift off exam. No significant Popeye deformity. Negative Speed's and yergason's exams. No significant instability." (RX 1) Dr. Derhake believed, overall, that Petitioner's stiffness had improved. However, as her range of motion had improved, her symptoms have not followed suit. Dr. Derhake felt a repeat arthoscopy was reasonable; however, he was more concerned about her AC joint being her source of her residual pain or symptoms. He recommended placing a corticosteroid injection into Petitioner's AC joint today to help us make that decision. Petitioner was advised to call the doctor's office on Monday to report on her response to this injection, and then, if she has significant response with that injection, the doctor might consider a distal clavicle excision at that time of her repeat arthroscopy. (RX 1)

Petitioner testified that she decided to move ahead with the surgery due to her ongoing shoulder complaints. She further explained that she was unable to immediately schedule the surgery because it was not approved by Respondent. Petitioner also testified that she considered having Dr. Nogalski perform her second surgery but ultimately chose Dr. Derhake because he was closer. Petitioner testified that the surgery was eventually authorized by workers' compensation.

On August 9, 2011, Petitioner underwent surgery with Dr. Derhake, who stated, "She was continuing to have pain. This seemed to be localized in the anterior as well as superior aspect of the AC joint and subacromial space. No significant chondromalacial changes of the glenohumeral joint. She did have some mild fraying at the base of the biceps, which was debrided. The subscapularis tendon was probed and found to be within normal limits. The superior and anterior labrums were within normal limits. The axillary pouch was free of any loose bodies. The inferior and posterior labrum were within normal limits. The undersurface of the cuff was inspected and found to be within normal limits. Biceps itself was probed and brought into the joint and found to be free of any significant tearing or synovitis. The patient was found to have some postoperative adhesions and bursitis in the subacromial space. A bur was then inserted into the distal clavicle and AC joint via the anterior portal and an arthroscopic distal clavicle excision was performed." (RX 3; PX 2)

On August 10, 2011, Petitioner again saw Dr. Derhake, who ordered immediate outpatient physical therapy to try and regain all of her range of motion. Dr. Derhake noted that because of her previous problems with stiffness after a previous surgery, it was of the utmost importance that she start physical therapy (PT) immediately. There was a suggestion by her and her husband that they were concerned about WC approval for paying for PT. The doctor warned her that this was a very dangerous time to avoid PT and that she needed to start it immediately to avoid the development of significant postoperative stiffness in that shoulder. (RX 1)

On August 22, 2011, Petitioner again saw Dr. Derhake, who noted, "Overall, the patient has been doing well. She has been participating in outpatient physical therapy with continued gains in her range of motion of

that right shoulder. She has continued to require some pain medication. However, she has run into some effects such as constipation with the medication. Overall, her pain continues to improve, however." A right shoulder x-ray taken that day demonstrated significant increased AC separation and no retained bone." (RX 1) Petitioner was given some Tylenol No. 3 for pain and was told to continue her outpatient PT with an emphasis on terminal range of motion and then transitioning in more strengthening and stabilization exercises." (RX 1)

On September 7, 2011, Petitioner again saw Dr. Derhake. Petitioner was continuing to work with outpatient PT and felt her range of motion had improved. However, she was still experiencing pain and symptoms. Dr. Derhake felt Petitioner looked improved from her previous exam. Despite her continued symptoms, Petitioner felt her shoulder was now feeling better than it had in a long time. Dr. Derhake told her that because she had such longstanding problems with the shoulder it might take a little longer for her to recover from this surgery to where she would feel completely pain free. He released Petitioner to go back to work but with no use of her right arm. Petitioner was to continue with outpatient PT and he prescribed some Voltaren gel that she could rub directly over the AC joint where it hurts in that area. (RX 1)

On October 10, 2011, Petitioner again saw Dr. Derhake. Petitioner was still undergoing PT and noting that she would get to a certain point with her motion and would note difficulty thereafter. Petitioner alaso complained of ongoing pain and discomfort around her shoulder with certain activities and she was unable to get the Voltaren gel secondary to insurance issues. However, she was given some oral Voltaren, which she has not really noted any significant improvement with. Dr. Derhake noted, "Overall, she is doing well. I think some of her continued discomfort is due to the lack of terminal range of motion. Different tabletop and wall stretches were discussed with her today, and I really want to emphasize that terminal range of motion. I encouraged her to continue with stretching of this. She will continue with formal outpatient PT." Petitioner was given restrictions of no lifting, pushing or pulling more than 10 pounds with that right shoulder and no overhead use. (RX 1)

Petitioner testified that she returned to work in a light duty capacity on October 12, 2011 within her restrictions.

Petitioner telephoned Dr. Derhake's office on October 24, 2011 reporting workers' compensation had stopped her formal physical therapy but she was still doing her therapy at home. Petitioner also requested pain medication. (RX 1)

On November 2, 2011, Petitioner again saw Dr. Derhake. Petitioner had been able to return to work with restrictions; however, she was complaining of continued right shoulder pain and symptoms. Dr. Derhake noted Petitioner's therapy had been terminated by workers' compensation. Her examination displayed lack of complete terminal forward flexion and abduction on the right with significant discomfort and tenderness. Otherwise, Petitioner's strength was described as "good." Dr. Derhake felt her progress(in terms of function) was plateauing and for him to think she would continue to progress with oupatient physical therapy or her home exercises, alone, would be unreasonable. He did not believe further surgery would help, however. Accordingly, he recommended Petitioner undergo a functional capacities evaluation (FCE). (RX 2)

On December 1, 2011, Petitioner underwent an FCE. According to the history, Petitioner and a co-worker were involved in an accident at work and her right arm was rotated underneath the resident and petitioner's co-worker had to pull the resident off Petitioner. Petitioner reported the accident, filled out paperwork and was then taken to the emergency room where x-rays were taken and she was given ice packs and a sling. The purpose of the FCE was three-fold: (1) to ascertain Petitioner's physical abilities and limitations; (2) to determine if Petitioner's subjective complaints were reliable; and (3) to determine if Petitioner gave full effort while testing. Petitioner noted her hobbies were gardening and yard work and that she hadn't been able to engage in them as she once had due to pain. Overall test findings, in combination with clinical observations, suggested the presence of near full, though not entirely full, effort on Petitioner's behalf. In describing sub-maximal effort, the evaluator was by no means implying intent. Rather, the evaluator was noting that Petitioner could do more physically at times than was demonstrated during this testing day. It was recommended that any final vocational or rehabilitative decisions for Petitioner should be made with that in mind. Petitioner denied performing any lifting since her surgery and knew she could carry and push up to 5 lbs. She denied performing any pulling but acknowledged she could go upstairs but hadn't tried a ladder nor had she tried crawling. When asked about above shoulder work, Petitioner explained that it was a problem. As an example, she reference putting a shirt on. Reaching forward was, in Petitioner's eyes, dependent upon how far, long, and high she was being asked to reach. Petitioner noted that sometimes her arm would bother her while driving home after work, especially when her shoulder had been bothering her at work. Petitioner expressed the desire to perform her job but didn't feel she could currently do so without severe right shoulder pain.

In the Summary of Findings Petitioner was described as demonstrating a physical demand at the sedentary level, including her lifting ability (floor to knuckle = 15 lbs; knuckle to shoulder = 10 lbs; and shoulder to overhead = 0 lbs). The maximum weight Petitioner lifted was 8 lbs. as she demonstrated the following signs of physical discomfort during the test: Facial grimace and terminated testing after 50 sec due to increased right shoulder, tearfulness. During the 3 minute post test break, Petitioner was observed leaning against the countertop holding her right shoulder. She terminated the cervical lifting test after 42 sec, reporting "It feels like my bicep is ripping apart and being torn out."

Petitioner's carrying demand level was described as light to sedentary (15 lbs. for 30 feet) and her pushing and pulling capacities were in the sedentary category (10 lbs. for 30 feet). During the testing, Petitioner was noted to be holding/massaging her right shoulder and showing facial grimacing and wincing. Testing was terminated due to increased pain signs in the right shoulder. Petitioner participated in lifting, pushing, pulling, and carrying tests with increased amounts of resistance until Petitioner demonstrated increasingly poor body mechanics, facial grimacing, and lack of control. Petitioner reported increased sharp shoulder pain on her anterior humeral head in the bicipital groove area with increased resistance. Petitioner reported bending to the left side her her right shoulder. She reports she felt increased pulling sensation through the right acromian process area. Petitioner could sit for 1 hour and 3 minutes and stand for 1 hour and five minutes. She walked for 41 minutes. She displayed no problems with stair climbing. She declined to participate in ladder climbing due to increased right shoulder strength/stability and increased right shoulder pain. She had no loss of balance and could forward bend to within 4 inches of the floor.

Petitioner reported increased right shoulder pain during repetitive movement screening forward and upward reaching tasks. She exhibited facial wincing during upward reaching. She reported an intensified aching type pain at the anterior tip of her humeral head. She also reported increased right shoulder pain with weight bearing & forward shoulder flexion during crawling. Petitioner demonstrated the following signs of physical discomfort during crawling: facial grimace, pausing/slowing, and tearful. The test was terminated due to increased right shoulder pain. Petitioner had no difficulty with twisting/spinal rotation but had some difficulty with resistance above her shoulder level as she noted increased pain, decreased body mechanics, and increasing loss of control. She had no difficulty with low level work or prolonged neck positioning. She noted increased right shoulder pain with 10 lbs. of impact/jarring resistance. Petitioner's cardiovascular fitness level was in the very heavy category. She demonstrated weak grip strength with firm gripping but none with light gripping. Petitioner demonstrated increasing poor body mechanics with repetitive motion and increased resistance.

Petitioner's subjective complaints of pain were deemed reasonable and reliable, her effort full. Her physical demand level was determined to be sedentary and additional physical therapy was recommended. (RX 4; PX 6)

After the FCE, Petitioner returned to see Dr. Derhake on December 7, 2011, reporting ongoing complaints of pain with no significant interval change in history. Her examination still revealed tenderness and pain at extremes of motion. Petitioner was given restrictions of no lifting, pushing or pulling more than 10 pounds with the right upper extremity and no work above her shoulder level. Dr. Derhake also recommended additional physical therapy aimed at strengthening and stability. Review of the FCE showed appropriate effort with strength. (RX 1)

On December 30, 2011, Petitioner called Dr. Derhake's office asking for a refill on pain medication. Dr. Derhake denied Petitioner's request and advised her to try Tylenol and alternate it with anti-inflammatory. Later that day, Petitioner called Dr. Derhake back and requested a referral to pain management. Petitioner was notified that Dr. Derhake would refer her to pain management. (RX 1)

On January 5, 2012, Petitioner again called Dr. Derhake's office reporting ongoing shoulder pain. Dr. Derhake instructed Petitioner to call her family doctor if she needed assistance before Monday. (RX 1)

On January 9, 2012 Petitioner followed up with Dr. Smith who recommended a pain clinic for her right shoulder symptoms. (PX 1; RX 10)

On January 13, 2012, Petitioner reported to Blessing Emergency Room explaining that she was at work and noticed increased pain. Petitioner was given a prescription for Lortab 7.5/500 and told to continue her work restrictions. (RX 3; PX 2)

On January 18, 2012, Petitioner again saw Dr. Derhake. He noted Petitioner had undergone additional physical therapy but was still experiencing significant pain and symptoms in her shoulder. Dr. Derhake also noted that surgery seemed to have failed to give her any long-term lasting relief and he felt she was at maximum medical improvement and he would not recommend any further surgery. He did feel a referral to a pain

management specialist was appropriate for management of her symptoms and that she should continue her work restrictions per the functional capacity evaluation. Otherwise, she should return as needed. Petitioner was given restrictions of no lifting, pushing or pulling more than 10 pounds with the right upper extremity and no work above her shoulder level. (RX 1)

Petitioner testified that she turned in the permanent restrictions to Respondent and was told the restrictions could not be accommodated. Petitioner was sent home.

In a letter dated January 18, 2012, Respondent's Human Resource Manager noted Petitioner's permanent restrictions and indicated that "[d]ue to the permanent nature of your disability and the inability to perform your job duties, you will be required to resign, retire or seek alternative employment." (PX 14) Petitioner testified that she was not eligible to retire and did not want to resign, so she opted for the alternative employment option offered by the State. Petitioner testified that she filled out the required documentation for the alternative employment list and was placed back on workers' compensation.

Petitioner testified that she began pain management at Blessing Hospital pursuant to the referrals from Drs. Derhake and Smith. (PX 1, 3, RX 1, 10) Petitioner testified that she obtained pain medication from pain management and treated there several times in 2012. (PX 1, RX 3)

On February 21, 2012, Petitioner presented to Dr. Leifheit at Blessing Pain Management. Petitioner's pain levels were described as constant and a "6/10" and "10/10" with activity. Petitioner described anterior and posterior shoulder pain radiating up into her trapezius muscle with her main complaint being the inability to raise her arm above her head. Petitioner was given a TENS unit and started on a trial of Neurontin. (RX 3)

On March 26, 2012, Petitioner returned to see Dr. Leifheit, who noted, "Pain is 8/10 today, at best 6/10, at worst is 10/10. The pain is constant, worse with activity." Petitioner basically denied any improvement in her level of pain. Dr. Leifheit had replaced the Neurontin (she couldn't tolerate it with Mobic) and switched to Nortriptyline. He also noted he might try a muscle relaxant as Petitioner displayed a fair amount of tightness in her right trapezial muscle. (RX 3)

Petitioner testified that on April 5, 2012, she was notified that her application for the alternative employment program had been denied and she had been forced to resign or retire by April 13, 2012 or face a pre-disciplinary meeting. (PX 14) Petitioner testified that she was compelled to resign and began a job search. Petitioner testified that she continued to draw her bi-weekly workers' compensation checks. Petitioner testified that she documented and logged her job search and all of the prospective employers she contacted. Petitioner offered these logs into evidence. (PX 15)

On April 11, 2012, Petitioner again saw Dr. Leifheit, who noted, "Pain and 8/10 today, average and at rest 6-8/10." The Nortriptyline had not been approved and her pain remained unchanged. Dr. Leifheit performed trigger point injections. (PX 2)

On May 24, 2012, Petitioner again saw Dr. Leifheit, who reported Petitioner's pain was a 8/10 today, 7/10 with rest and with activity a 10/10. "She reports she resigned from her job, b/c she was told she would be fired and she didn't want to be fired, so she resigned and now she has lost her health insurance shortly

thereafter." Noting he was running out of options, Dr. Leifheit gave Petitioner Lortab, max 2 per day and Lidoderm ointment. The trial of Nortriptyline had been denied by workers' compensation. (PX 2)

On June 10, 2012, Petitioner was video-taped while on her property and meeting with Kimberly Brown, an investigator hired by Respondent. In response to Petitioner's business webpage, "Fisher Quarter Horses," the investigators contacted Petitioner to view the horse she held out online as for sale. The video is comprised of several days of surveillance, gathered by two cameras: (1) a long range camera and (2) a camera concealed on the investigator, Kimberly Brown. (RX 7) The surveillance video shows Petitioner leading a horse by her right arm (time 21:13), closing a gate with her right arm (21:37), folding up a rope with her right arm (22:00). Later in the video, Petitioner is seen holding the horse's rope with her right arm (45:48). At time 45:57, Petitioner is seen brushing or rubbing the top of the horses head above her shoulder height with her right arm. Again, Petitioner is seen leading the horse away with her right arm (46:10). The video also shows Petitioner walking her dogs with the rope in her right arm and pumping gas, while holding the nozzle in her right arm. (RX 7)

On July 18, 2012, Petitioner returned to see Dr. Leifheit, who noted a 20-30% improvement. Petitioner reported her current pain level: 9; rating at rest: 5; rating with activity: 10. Petitioner reported "constant pain, feels like something is being pushed into the shoulder, also feels like pressure and pulling." Petitioner reported her pain was "aching, sharp, pressure, stabbing, radiating" and "aggravating factors were lifting, pushing, pulling." Dr. Leifhert recommended trying the Nortriptyline once again. In terms of functional abilities, Petitioner noted she occasionally needed assistance with self-care, could perform some family and social activities, could walk long distances and climb over ten steps without difficulty, could occasionally lift over 50 lbs, but was unable to work. Petitioner described her pain as constant as though something was being pushed into a joint. (PX 2)

Petitioner testified that on August 7, 2012, her workers' compensation benefits were terminated. According to the termination letter forwarded by CMS, Petitioner's benefits were terminated based upon the medical records from Dr. Holt (July 29, 2009 entry), Dr. Nogalski's examination and report, and Respondent's information/belief that she was committing fraud in pursuit of a workers' compensation claim and working. (PX 13) Petitioner testified that her last TTD check was paid through August 7, 2012 and that she was never contacted by the Workers' Compensation Fraud Unit nor ever investigated for fraud.

Petitioner testified that she continued her job search and contacted the Department of Missouri Vocational Services for assistance. (PX 11) Petitioner testified that Joanne Moncrief and the State of Missouri Vocational Program assisted her with her employment search and raised schooling options.

On October 3, 2012 Dr. Nogalski issued another report. He did not examine Petitioner in conjunction with this report; rather, he was asked to comment on video surveillance. Based upon the surveillance, Dr. Nogalski didn't think Petitioner needed any arthroscopic surgery, that she was at maximum medical improvement, and that Petitioner didn't need any restrictions. (RX 9)

At the Petitioner's request, Petitioner underwent a Section 12 examination by a non-treating physician, Dr. Timothy Farley, on October 16, 2012. (PX 7)

The deposition of Respondent's examining physician, Dr. Nogalski, was taken on October 29, 2012. Dr. Nogalski is board certified by the American Board of Orthopedic Surgery (RX 8). Dr. Nogalski testified consistent with his earlier written report. Dr. Nogalski testified that Petitioner reported both accidents to him as well as her course of treatment. (RX 8. p. 8, p. 9) Dr. Nogalski acknowledged there was no significant past medical history and testified that she suffered from adhesive capsulitis. (RX 8. p. 10, p. 17)
When asked during his deposition, if Petitioner's injuries, namely falling on the bed with a patient on top of her and having a patient push down on her shoulder while steadying themselves, could cause adhesive capsulitis, Dr. Nogalski opined, "No." (RX 8, P 19)

Dr. Nogalski testified, "The mechanism of injuries, the mechanics of injuries that she describes are fairly weak with respect to any distinct injury, so to speak, especially in the context of reviewing Dr. Crickard's operative report. Adhesive capsulitis is often an idiopathic process, it's something that develops on its own, and unfortunately, is somewhat of an insidious process that can be painful, and fairly intensely painful, especially with sudden movements, and that's often how patients discover it, some sudden activity or event brings that capsulitis to their attention. And the activity she described at work, and the mechanism described as well as Dr. Crickard's direct observations in the records that I have here for review do not at all support that there was a specific injury that would be reasonably related to the claimed injuries, nor is there any specific documentation of injury by Dr. Crickard in his report or reports from an objective level." (RX 8, P 18)

Dr. Noglaski further testified that when he initially saw Petitioner she did not need any further medical care because "[s]he appeared to have fluid motion of the shoulder, did not appear to exhibit any pain behaviors suggesting that she had a shoulder problem. And once again, previous documentation, including Dr. Crickard's operative report report, as well as subsequent objective information from the gadolinium MRI did not suggest that there were clear findings that indicated surgery." (RX 8, P 24) Additionally, Dr. Nogalski testified, "Well, retrospectively given the review of the videotapes and her apparent proficiency in the use of the arm, it would further serve to bolster the opinion that she does not have a significant shoulder issue that requires further treatment." (RX 8, P 25)

Dr. Nogalski also testified regarding his October 3, 2012 review of surveillance video on Petitioner. He felt the video, together with Petitioner's FCE, showed some volitional aspects to her demonstrated abilities and he was unable to identify anything that objectively disqualified Petitioner from her work activities. (RX 8)

On cross-examination, Dr. Nogalski admitted that Petitioner may have sustained a strain from the work injuries, and acknowledged that the accident reports support that Petitioner had shoulder symptomology following the accidents. (RX 3. p. 28, p. 38) Dr. Nogalski admitted that he did not review the operative report from August 9, 2011 or the medical records from Dr. Derhake. (RX 8. p. 41) Dr. Nogalski also admitted that his May 17, 2011 report indicated that Petitioner should consider "an arthroscopic debridement after manipulation" and he also noted in his report that she would need restrictions of no unassisted transfers or supervision of patients. (RX 9. p. 45, p. 50) The doctor testified the second surgery was marginally indicated and Respondent indicated that Dr. Nogalski was willing to perform the second surgery. (RX 8. p. 54, PX 17)

On January 8, 2013 Petitioner interviewed for a job at Lewis County 911. Petitioner testified that she was seeking full-time employment and needed 40 hours a week. Nevertheless, Petitioner testified that she accepted the position and worked there for three days. After the third day, she testified that her and her husband decided the job wasn't appropriate because it paid $9.00 an hour, significantly less than what she was earning for Respondent, and was only part-time work, and therefore not financially viable nor close to her house. Petitioner testified that she called up Lewis County Telephone 911 very upset and notified them that she had to quit the job. Petitioner testified that she continued her job search and continued seeking full-time employment. Petitioner testified that while she would never get a raise at Lewis County 911 there was a possibility of getting on full-time as there were some people working there on a full-time basis.

Dr. Farley's deposition was taken on April 9, 2013. (PX 7) In describing Petitioner's first injury, Dr. Farley described the injury as "On that date, she was assisting in the transfer of a patient from a bed to a chair. The patient was unable to support himself and somewhat crumbled to the ground. At that time, she and the patient ended up stumbling and falling to the ground. She stated she impacted the ground with her neck and right shoulder." (PX 7) In describing the second injury, Dr. Farley stated, "During work related responsibility in the dining room a patient reached up and grabbed her right arm and shoulder. The patient pulled down on it and Ms. Ash-Fisher described increasing pain." (PX 7)

Dr. Farley noted that Petitioner's FCE stated she gave full physical efforts and that her subjective reports were indeed reliable. (PX 7) Dr. Farley noted that he had not viewed the surveillance tape of Petitioner. (PX 7)

Dr. Farley also testified that he believed Petitioner's medical condition was directly related to and caused by her May 24, 2009 and November 27, 2009 injuries. When asked the basis of his opinion, Dr. Farley stated, "It's based on a individual who seemed credible to me, who specifically denied any antecedent discomfort in her shoulder. I was not made aware of any prior medical history or findings that would change that supposition of no prior injury. It's based on an appropriate mechanism of injury. Falling to the ground with the weight of another person's body on top of you, or on top of one's self, is an appropriate mechanism of injury for a shoulder. Having an arm forcibly yanked or distracted is a appropriate mechanism for an injury, especially in the condition where something has not been fully rehabbed from a prior injury." (PX 7) When then asked, "Doctor, if the injuries sustained by her, which would be falling to the ground with a person on top of her and having her arm yanked down, would your opinion change?," Dr. Farley answered, "Yes." When then shown the Petitioner's accident reports after the injuries occurred, which show that Petitioner fell onto a bed and someone placed their hand on her shoulder, but did not yank down on it, and asked, "... But it appears from these witness reports that it's not what occurred on those dates. Would you agree then that the causation opinion was based on an incorrect history?," Dr. Farley stated, "Well, I guess what I would say is, is that if the patient, or Ms. Ash-Fisher in this particular case still had, in an any of the three variations on the theme of the description of what happened to her, the weight of another person falling on her, whether it's a chair of a bed or the ground, I'm not sure my opinion would be any different. It could still be appropriate causation. What I agree to, it seems to be perhaps a little bit different or less clear, yes. I would, I would admit to that. But in any or all of the ways it was read, I still think it could be an appropriate mechanism for an injury." (PX 7) When asked if it was possible that Petitioner did not have a shoulder injury, Dr. Farley stated, "I would say anything is possible. It wouldn't be my opinion, but I would say it's possible, yes."

When asked if it was possible that Petitioner's current condition and the current capsulitis in her shoulder were a result of Dr. Crickard's surgery, rather than any work injuries, Dr. Farley stated, "Any of the traumatic events, whether it's work related or surgically related, could be an instigating factor in adhesive capsulitis." Dr. Farley then agreed that there were several MRIs taken of Petitioner's shoulder and that none of those MRIs showed any objective findings of acute injuries. When next asked if it was possible that Petitioner's shoulder injuries are the result of the natural progression of the degenerative changes in her AC joint, Dr. Farley stated, "Possible, but in my opinion very unlikely."

Dr. Farley refused to give an opinion as to whether Dr. Crickard's March 12, 2010 surgery was reasonable and necessary. Rather, Dr. Farley stated, "Well, that's a loaded question in shoulder surgeries. We don't save lives. It's a, it's a quality-of-life issue. And what's necessary is somewhat based on a lot of different issues. If the patient's perceived quality of life was poor, and that the patient had had an injection with resolution of symptoms for a short period of time, and she did not want to live like she was living, then, yes. I say it would be a necessary sort of thing to do in the treatment of, of the presumed condition." Dr. Farley asked: "Doctor, in light of Dr. Holt's recommendation of no further shoulder treatment, and Dr. Green also releasing Ms. Ash-Fisher from his care, do you believe it was reasonable and necessary for Dr. Crickard to perform the arthroscopic subacromial decompression on 3/12/2010?" Dr. Farley stated, "Again, if the patient continued to have complaints, it would be difficult for me to say it was not reasonable or necessary. This assumes the veracity of the complaints." Dr. Farley was then asked, "So is would be fair to say that you don't have an opinion either way as to whether her 3/12/2010 surgery was reasonable and necessary?" Dr. Farley responded, "My opinion is if the patient had complaints that made her unhappy with her level of function, with her level of comfort, and she had the history as noted in our notes, and that – I'm sorry, I think it would be reasonable to consider the operation." (PX 7)

Dr. Farley testified that Petitioner did not describe her activities outside of work to him, but that adhesive capsulitis is more likely to occur in someone who does repetitive upper extremity activities as opposed to someone who does not. (PX 7)

Petitioner testified that on July 8, 2013 she received full-time employment, 40 hours per week, from BlueCross/BlueShield which was within her restrictions. Petitioner testified that she accepted the position earning $13.05 per hour. Petitioner offered her payroll records into evidence dating back to her date of hire of July 8, 2013. (PX 16) Petitioner testified that the BlueCross/BlueShield position is customer service work. Petitioner testified that her job duties include telephone work and she wears a headset answering questions and concerns from customers. Petitioner testified she continues to work there on a full-time basis[2].

At the arbitration hearing Petitioner testified that she continues to notice pain and achiness in her right shoulder especially with rain and cold weather. Sometimes it hurts if she rolls on it. Petitioner further testified that pain management helped and while she takes hydrocodone per Dr. Smith, she is trying to cut back on it.

On cross-examination Petitioner testified that she was fine before she went to work for Respondent in 2007. Petitioner denied having any issues with work as far as being a single mother and having child care

[2] Petitioner waived a wage differential award under Section 8(d)1 in her proposed decision.

responsibilities; however, she acknowledged having to periodically take time off work to care for her children and being denied excused absences.

Petitioner was also asked on cross-examination about other injuries she had while working for Respondent. She recalled being "smacked" on the side of her head by a lift a few weeks before her May 24th accident but she didn't really think it was an accident. Rather, her neck was stiff but it didn't last very long. While she didn't recall telling Dr. Smith in December of 2008 about neck pain from a work injury on December 20, 2008, she acknowledged it was possible. When asked why she didn't report her continuous neck treatment with Dr. Smith on April 1, 2009 and April 17, 2009, Petitioner denied she was having any "continuous treatment" as she was continuing to work and wasn't too concerned.

Petitioner was also asked on cross-examination about having an MRI due to neck pain and Petitioner did not recall undergoing one. She did recall an MRI of her shoulder and acknowledged she would not dispute Dr. Smith's April 17, 2009 office note referring to a C-spine MRI. When asked if her testimony that she had only a very small injury to her neck and a few days of treatment was incorrect, Petitioner could not recall. When asked if there was some reason she was not able to recall her medical history, Petitioner responded that it was five years earlier and she just couldn't recall.

Petitioner was also asked about the different dates of accident found in some of the medical records. Petitioner testified that she was doing the best she could when giving her histories to the doctors but, all in all, she was pretty sure she injured her shoulder on May 24, 2009 because the resident fell on her and she filled out an accident report. She also testified that with four children and lots of stress "here and there" it is hard to keep the dates of everything straight in her head.

Petitioner testified that she felt the FCE accurately reflected her current abilities. When asked if she is refraining from lifting more than ten pounds, Petitioner testified that she occasionally does as sometimes she absolutely has to. As an example, Petitioner testified that if her child fell down and broke his arm, she would pick him up and not leave him on the ground.

Petitioner acknowledged that on the day of her FCE she did not take her pain medication.

Petitioner testified that she had horses as a child and she rode while growing up. Prior to May 24, 2009 Petitioner owned five horses. They were eventually sold because she couldn't afford their care and she was busy with life. She considered them pets. Petitioner denied being a horse breeder prior to her first accident.

Petitioner denied owning any horses on May 24, 2009 as she believed she had sold her last one to her husband, Sam, as that is how they met. He owned horses and she was trying to sell hers. One day he showed up with his daughter and they bought the horse. Four months later they began dating and they married in 2011. According to Petitioner, she and her husband own ten horses together. They were Sam's technically but she considers them "theirs." They began selling the horses in 2010 because they couldn't' afford the fees, she was not working, and they had four children to take care of. Petitioner denied that Sam breeds or trains horses. Petitioner testified emotionally that they even had to give two horses away because they simply could not afford them. She guessed they had received maybe $7000- $8000 in sales over the previous four years. Petitioner's children ride the horses and share she and Sam's passion for them. They also have six dogs. According to Petitioner, their involvement with the horses has never been to make money. Petitioner estimated they have spent about twenty hours a year buying/selling horses. When the market for horses and hay went down, they began using a website to try and sell the horses.

Petitioner also testified that she was not in the horse breeding or trading business, but had sold several horses over the years. She testified that she has a passion for horses and has loved horses since she was a child. Her grandfather owned several horses and she learned how to ride when she was very young. Petitioner testified she has not ridden a horse since the accidents, but still enjoys watching her children and husband ride. She testified that she has never made a profit owning or selling horses, it was never a business but a hobby, and she treats her horses as pets. She stated that she assists with the caring of her horses but tries not to violate her restrictions. Petitioner looks at her level of activity with the horses as being similar to physical therapy.

Petitioner was asked a lot of detailed questions about her horse activities, both generally and as shown on the video surveillance. Petitioner differentiated between her work and her involvement with the horses. When specifically asked if she violated Dr. Derhake's permanent restrictions of "no work above shoulder level" Petitioner said "no." When asked if brushing horses was above shoulder level, she testified that grooming the horse was not work as she was not being paid to perform it. Petitioner also testified regarding how they fed and cared for the horses in general.

Petitioner was also asked about the website for "Fisher Farms" and her Facebook page. The Facebook page contains information about the Fisher's horse breeding activities including discussion of several horses which needed to be sold and that they were being sold for personal health reasons. Petitioner's Facebook page has a photo of Petitioner holding a large horse's rope with her right arm. She describes herself as the mother of four beautiful kids who are her life. She comments that she has been a stay at home mom for the past year and raises quarter horses as a hobby. Other entries included "Getting ready to ride JD today …need to get some cows," "JD's stall is almost finished thanks to mama and the kids," and "picked up 86 bales of hay and now the boys are stacking them in the barn." (Joint EX 1)

Petitioner acknowledged that her husband rode the horses to keep them conditioned but he didn't train or teach. She also acknowledged that she was offering her horse as a stud for a stud fee and was receiving a boarding fee for housing one horse. Petitioner acknowledged that she was representing to the public that both she and her husband ("we") bred horses but they were his horses and when she used the word "we" it was no different than when she might say she and her daughter ("we") went to dance class.

Petitioner testified that she did not report the sale of her horses on her income taxes nor did she keep any sort of records of the sales. However, she acknowledged that there is a transfer of sale document that goes with the sale of horses and she completed that from time to time.

Petitioner was asked questions about farm land and acknowledged that her husband owns some land but that he doesn't actually farm it.

Petitioner testified that she had a riding mower and mowed the yard on occasion. Regarding the entry indicating that she picked up hay, Petitioner testified that she took a trip with her husband and several friends to pick up the bales of hay and bring them back to their house. She said she was in the truck but did not do any lifting nor physical activities, but took the trip to pick up the hay.

Petitioner was also asked whether she discussed her horse activities with her doctors and she indicated she did, namely with Dr. Smith and Dr. Leifeit. She did not know why there was no mention of it in the doctor's notes indicating that it wasn't up to her what went in the doctor's notes.

Petitioner's husband, Sam Fisher, testified on behalf of Petitioner. Fisher testified that they are not in the horse trading or breeding business. Fisher testified that horses have been their passion and hobby but they both have had full-time jobs. He testified that owning horses is expensive and they lose more money than they make. Fisher testified that he and Petitioner have four children that ride horses, but Petitioner does not ride any longer and has not ridden since her work accidents. He stated that Petitioner's Facebook entry from August 8, 2011 indicating that Petitioner was picking up bales of hay involved him and his friends driving down south to pick up the hay and that Petitioner was in the truck and made the trip to pick up the hay but did not lift or do any physical activities.

Blaine Vaughn testified on behalf of Petitioner. Vaughn testified that he is friends with Fisher and Petitioner. He testified that on August 8, 2011 he assisted in picking up bales of hay and at no time did Petitioner lift or move the hay. Rather, he testified that Petitioner sat in the truck to pick up the hay and when they returned to Petitioner's home she went inside the house to cook lunch for everybody. Vaughn testified that he does not refer to Petitioner's home as Fisher Farm and he has never witnessed Petitioner riding horses since her accidents.

The hearing was then continued until December 27, 2013.

When the hearing resumed on December 27, 2013, the parties amended the Requests for Hearing to acknowledge their agreement that Petitioner was single at the time of the alleged accidents. They also amended Paragraph 7 of both Requests for Hearing to indicate a bill in the amount of $207.86 was in dispute and that a credit under Section 8(j) was agreeable for any bills paid subject to a "hold harmless."

Respondent's attorney then requested that proofs not be closed for two reasons. First, Respondent wished to call Sharon Hendricks as a witness regarding allegations of fraud. Counsel for Respondent argued that a further continuance was necessary in light of recent events – namely, the death of a witness (Christina Hess) who Respondent had recently (approximately Dec. 20, 2013) attempted to subpoena. Counsel represented that Ms. Hess died on/about December 18, 2013. According to Counsel, Ms. Hess had purportedly contacted Ms. Hendricks about alleged fraud and, therefore, Respondent wished to present Ms. Hendricks as a witness. Secondly, Respondent wished to obtain a continuance in light of newly discovered evidence regarding employment by Petitioner during the time she was seeking maintenance. The Arbitrator denied Respondent's request based upon the fact the cases were above the red line, they had been set for hearing in Quincy on December 4, 2013, and then specifically continued to December 5, 2013 to accommodate Respondent. The case was unable to be concluded on December 5, 2013 and Respondent's counsel requested bifurcation to obtain witness Christina Hess. The case was then continued to December 27, 2013 with the understanding proofs would be closed at that time.

Respondent offered the testimony of two private investigators along with surveillance reports and a videotape. (RX 7) Mr. Gregory Kellerman testified that he was provided information from Respondent that suggested Petitioner was a horse breeder/trader and was running a horse business from her home. Mr. Kellerman testified that Respondent asked that he set up a fictitious encounter on her property in an attempt to purchase one of Petitioner's five horses. Kellerman testified that he had reservations about the plan but went along with it. He testified that his associate, Kimberly Brown, contacted Petitioner and claimed to be interested in purchasing one of her horses. Brown also testified for Respondent.

Brown testified that on June 10, 2012 she had a hidden camera/recording device and taped the encounter. Brown admitted that she did not obtain Petitioner's consent to audio record the meeting. On June 10, 2012, Brown testified that she entered Petitioner's property per the scheduled meeting and met with

Petitioner and her husband about purchasing a horse. Brown testified that she saw Petitioner lift her gate and move her right arm around without appearing in distress. Brown admitted that Petitioner never rode a horse, never lifted anything heavy overhead, never placed equipment on the horse nor did anything more physical than brush and pat down the horse. (RX 7)

Ms. Brown also testified that she was an employee of Kellerman Investigations and she participated in surveying Petitioner. Ms. Brown testified that she had an independent recollection of her surveillance with Petitioner, including her conversations with Petitioner. Ms. Brown testified that she was provided with Facebook material showing Petitioner selling horses; as such, she googled "Fisher Farms" and obtained two cell phone numbers to call. Ms. Brown testified that she called Petitioner and Petitioner returned her call that night. Mrs. Brown testified that she asked Petitioner if she had a horse to sell, and Petitioner testified that she did. Mrs. Brown testified she and Petitioner decided to meet on the following Sunday to view the horse for sale.

Ms. Brown testified that when she arrived on Sunday, she met with both Petitioner and her husband. Ms. Brown testified that Petitioner stated to her that she helped care for the horses. Ms. Brown testified that Petitioner stated that her husband worked the night shift, so Petitioner would get up in the mornings and the afternoons and assist with the feedings of the horses. Ms. Brown testified that Petitioner talked about how they were breeding horses and that they had had babies. Ms. Brown testified that Petitioner talked about planting hay, as well. Ms. Brown testified that Petitioner talked about putting equipment on a horse when her daughter rode the horse. Ms. Brown testified that Petitioner talked about being involved with the birthing of horses; Ms. Brown testified that Petitioner talked about a horse having problems and how she had to roll it back and forth, side to side, to get it up, but she could not, so Petitioner had to call her husband for help. Ms. Brown testified that Petitioner agreed that Petitioner was lucky to take care of the horses, not the children.

Ms. Brown testified that Petitioner held the horse's rope with her right arm and the horse jerked its head quite often. Mrs. Brown also testified that Petitioner moved her arm a lot, petting the horse, moving her hands, directing, pointing in directions and speaking with her hands. Ms. Brown testified that there was a heavy metal fence that Petitioner lifted up and opened with her right arm. Ms. Brown testified that Petitioner pushed and pulling the horse and the gate, both of which were over 10 pounds. Ms. Brown testified that Petitioner stated she wanted to show her younger horse at the State Fair.

After viewing the video, Ms. Brown testified that it refreshed her recollection on Petitioner stating that she and her husband had to lock hands to lift a 5 month of horse up into a trailer.

Mr. Kellerman testified that he took long range pictures in the bushes during this June 10, 2012 encounter which Petitioner testified was on her private property. Kellerman admitted that he never checked to determine where Petitioner's lot line was and whether or not he was on her private property. The Arbitrator viewed the surveillance videotape from June 10, 2012, June 30, 2012, July 21, 2012, July 22, 2012, and July 24, 2012. (RX 7)

The Kellerman investigation report indicates that 26.5 hours of surveillance was recorded. During this period of time, Kellerman admitted that Petitioner was not working, was doing daily activities without exceeding her restrictions with her right arm, and at no time did he see any other individuals attempting to purchase horses from Petitioner or her husband. His reports label Petitioner's home as "Fisher Farms," but he

admitted there was no sign labeling her home as Fisher Farms nor did he see any indication on the property that referenced Fisher Farms. Kellerman acknowledged that Illinois has a dual consent requirement called the Illinois Eavesdropping Statute and that both parties in Illinois must consent to an audio recording. He admitted that he never obtained consent for any audio tape communication. Mr. Kellerman also testified that he obtained Facebook postings which discussed Petitioner's horses and her website trying to sell her horses. (RX 7)

Teresa Omachi, Respondent's first attorney of record in this case, also testified on behalf of Respondent and was proffered as a horse expert. Upon voir dire, Ms. Omachi admitted that she has never trained horses, has never trained riders, does not have any special expertise or education regarding horse training/riding, but owns one horse. Ms. Omachi testified that owning a horse requires feeding, brushing, and can be quite physical at times. She admitted that she didn't know Petitioner's involvement with her horses.

RX# 14, 15 and 16 are e-mail exchanges between Teresa Omachi, members of CMS (the Respondent's insurance company), and Sharon Hendricks, an employee at the VA. Teresa Omachi viewed the e-mails and testified that they refreshed her recollection of the case, to wit - there was concern for fraud in 2010 and whether Petitioner should be drawing TTD. She testified that an investigation followed.

Andrew Daggott testified on behalf of Petitioner. Mr. Daggott testified he is friends with Sam Fisher and met Petitioner through him. He testified that he is friendly with Petitioner although he has not seen her in a while. He testified that he assisted with the pick-up of the bales of hay on August 8, 2011. Mr. Daggott testified that Petitioner was in the truck but at no time did she lift anything heavy, nor move any hay, and he recalled that she watched the kids and made lunch that day.

Petitioner acknowledged that she obtained hunting licenses in 2010, 2011, and 2012 and that she went bow hunting a few times in 2012. Petitioner testified that she gets an annual tag to allow her to hunt on "their" property. She also had a fishing license in 2008 but it expired after one year.

Petitioner denied ever giving Ms. Brown permission to videotape on their property and noted that Mr. Kellerman would have walked across their bean field in order to take the long range video. They get $80.00 per acre in cash rent for the land.

The Arbitrator concludes:

1.Issue O: **Other - Evidentiary Issues.**

Respondent objected to the following exhibits offered by Petitioner:

Petitioner's Exhibit #11 – Missouri Office of Adult Learning and Rehabilitative Services – Career Scope and Testing Records. Respondent's objection was based upon hearsay and foundation. Petitioner indicated that these documents were not offered to prove the truth of the matter asserted (the actual results and conclusions from the testing/rehabilitation); rather, they were offered to show Petitioner's general vocational activities after her conditions stabilized. The Arbitrator concludes that these documents are admitted not to prove the truth of the matter asserted but to show Petitioner's general course of activities as part of her job search. Petitioner testified to contacting the Office and obtaining services. These records are admitted to corroborate her testimony and nothing more.

Petitioner's Exhibit #14 – State of Illinois Department of Veterans Affair (Respondent) letters. Respondent objected based on hearsay and foundation. Petitioner testified she received these letters in the mail from Respondent. The Arbitrator finds that these documents qualify under the hearsay exception - Admissions Against Interest and Petitioner laid the proper foundation in the receipt of such documents via mail. Respondent had the ability to bring in the individuals to rebut the validity and content of the documents. The Arbitrator admits Petitioner's Exhibit #14 into evidence. They, too, corroborate Petitioner's testimony. The case was bifurcated and Respondent could have presented rebuttal evidence but did not.

Petitioner's Exhibit #15 – Petitioner's job search logs. Respondent objected based upon hearsay and foundation. The job search logs were in Petitioner's handwriting with corresponding dates as to her job search and prospective employers. Petitioner testified that she completed these logs contemporaneously with her employment search and stated they were accurate recordings. The Arbitrator finds that this is an exception to the hearsay rule as a Past Recorded Recollection and the proper foundation was laid. Respondent had the opportunity to cross-examine Petitioner concerning these job logs. Therefore, the Arbitrator admits Exhibit #15.

Petitioner's Exhibit #17 – Respondent's counsel's (Ms. Omachi's) e-mails concerning surgery. Ms. Omachi testified on behalf of Respondent and could have clarified any of the issues raised in this letter/memorandum. The Arbitrator concludes that this document is admissible regarding the timing and delay of Petitioner's second surgery.

Petitioner objected to the following exhibit offered by Respondent:

Respondent's Exhibit #7 - Portions of the Kellerman Investigations Confidential Report and the audio portion of the surveillance tapes. Petitioner did not object to the surveillance tapes themselves and what was depicted on the film. Petitioner's objection to the audio portion of the surveillance tapes was based on the Illinois Eavesdropping Statute. This statute makes it a felony to audio record all or any part of any conversation unless all parties to the conversation provide consent. 720 Ill Comp. Stat 5/14-2(a)(1). The statute states that any evidence obtained in violation of the statute is not admissible in any civil or administrative proceeding. Id. Petitioner testified that she did not consent to any such recording obtained during the surveillance. Respondent's private investigators admitted that they never obtained consent for such audio taping. However, the audio taping took place in Missouri where Petitioner lived and, according to Kellerman, was permissible under Missouri law. While this is an Illinois proceeding the Arbitrator concludes Missouri law would apply on the issue of consent as Petitioner was a Missouri resident and the surveillance was taking place on Missouri property. Therefore, the Arbitrator overrules Petitioner's objection as to the audio portion of the surveillance tapes. This does not affect the admissibility of the video portion of the recording which was admitted.

Regarding the surveillance reports, the Arbitrator finds that Respondent laid the proper foundation and admits the reports, with the exception of the surveillance obtained on June 10, 2012 from a long range video camera. Petitioner testified that the investigator was on her private property and Kellerman admitted he never checked the property lines, and didn't know whether it was Petitioner's property. The Arbitrator concludes this portion of the report was improperly obtained from Petitioner's property without consent constituting a trespass. The Arbitrator excludes the surveillance report referencing Petitioner on June 10, 2012 beginning at approximately 10:44 a.m. for the duration of that encounter. The Arbitrator will admit the remaining portions of the report(s).

2. **Petitioner's Credibility.**

Petitioner was, overall, a credible witness. Respondent questioned Petitioner's credibility in several ways such as the different dates of accident found in the medical records, her alleged lack of forthrightness with her doctors regarding her level of activity (especially with horses), allegations of fraud, and surveillance allegedly showing an ability to be more active than she let on. While it is true Petitioner's treating records contain several references to different dates of accident, Petitioner's description of how the accident occurred remained consistent and, furthermore, her explanation as to why different dates might have been given was believable – she is a busy mother and had many things on her mind at various times. More importantly, her descriptions of the accident were consistent even if the dates varied. In light of those consistent descriptions, the varied dates are less significant in this instance. Furthermore, Respondent's attack on Petitioner's credibility in light of the different dates found in the records seems disingenuous given the accident was witnessed, reports were promptly filled out and consistent with one another, and the letter from Genex to Dr. Nogalski in which the issues for him to address in his Section 12 examination were laid out essentially glossed over any question about whether an accident occurred. Regarding the other matters, the Arbitrator has given serious consideration to the video surveillance and Petitioner's Facebook pages, as well as the testimony of Ms. Omachi. Nevertheless, this Arbitrator is unable to conclude Petitioner was engaged in fraud or deliberately trying to mislead anyone as to the extent of her injury or her level of activity. As for the Facebook entries and e-mail messages with Ms. Brown, they are an example of how the written word can be interpreted in a variety of ways. To illustrate, there is a reference to Petitioner's husband completing a horse stall "thanks to Anna & the kids." While Respondent may contend that suggests Petitioner was physically helping it can also be interpreted to mean Petitioner and the kids left Mr. Fisher alone to get the work done. Similarly, the reference to "we" in the "bales of hay" does not necessarily mean Petitioner was involved. Petitioner's explanation as to the use of "we" and "theirs" was sincere.

The bottom line is that Petitioner was believable. Throughout the hearing she appeared to be trying to answer Respondent's counsel's questions to the best of her ability. Discrepancies as to the number of horses owned in 2009 or her treatment for a prior neck injury were not significant or damaging to her credibility. She appeared forthright.

As for the surveillance, setting aside the manner in which it was conducted, it does not show Petitioner engaging in activity beyond her restrictions or on a level equal to what she performed at work.. Petitioner credibly testified that she used her right arm and that, occasionally, she might exceed her restrictions. She equated her activity with her horses as similar to physical therapy and home exercises. Petitioner's consistent complaints have been pain and difficulty at or above shoulder height and not general use of her right arm.

Finally, the Arbitrator cannot overlook that (with the possible exception of Dr. Nogalski, Respondent's examining physician) no doctor ever really questioned Petitioner's credibility or the veracity of her complaints. Her FCE was valid and reliable, her effort full. Petitioner was a credible witness.

3. **Issue C: Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?**

Petitioner sustained an accident on May 24, 2009 arising out of and in the course of her employment with Respondent. This conclusion is based upon Petitioner's testimony, the accident reports, the consistent descriptions of the accident as provided to the various doctors and the lack of testimony from any occurrence

witnesses (ex. Ashely Campbell). The Employees Notice of Injury Report signed by Petitioner was offered into evidence and documented Petitioner's description of the accident. (PX 8, RX 5) A report was also completed by Ashley Campbell, Petitioner's co-worker. Petitioner's testimony was unrebutted and she has consistently given accounts of the accident to her medical providers. While the accident date may have varied from time to time, her description of what happened was consistent and her explanation for the various dates, believable. In this instance, the variance in accident dates is not significant.

4. **Issue F: Is Petitioner's current condition of ill-being causally related to the injury?**

The accident reports completed by Petitioner, witness Ashley Campbell, as well as Respondent's Supervisor all corroborate Petitioner's description of the accident. There is no indication that Petitioner had any prior right shoulder problem before the accident and began treatment immediately afterwards. The Arbitrator finds Petitioner's testimony to be credible and believable. The medical records from Drs. Smith, Holt and Green all corroborate and confirm the May 24, 2009 accident. Therefore, the Arbitrator concludes that Petitioner sustained an accident on May 24, 2009 that arose out of and in the course of her employment.

Issue F: Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner's current condition of ill-being in her right shoulder is, in part, causally connected to her May 24, 2009 accident. The Arbitrator relies upon a chain of events, the testimony of Petitioner, corroborated by the medical records of Drs. Derhake and Crickard as well as the testimony of Dr. Farley, to conclude that Petitioner's right shoulder current condition of ill-being is causally related, in part, to the May 24, 2009 accident.

Petitioner had no problems with her right shoulder prior to May 24, 2009. After the May 24, 2009 accident, Petitioner began a course of treatment related to the effects of that accident. Initially, she consistently complained of primarily right trapezial tenderness. While Petitioner was released to full duty prior to the November 27, 2009 accident and she testified that she was involved in a second accident on November 27, 2009 which worsened her right shoulder symptoms/condition, the Arbitrator notes that Petitioner was not symptom free prior to that accident. As the records show, Petitioner's right shoulder was already hurting when she injured it on November 27, 2009. Petitioner's testimony was credible and supported by the medical records from Blessing Hospital, Dr. Smith and Dr. Crickard. The accident of May 24, 2009 has remained a cause of Petitioner's current condition of ill-being in her right shoulder.

Dr. Farley, Petitioner's Section 12 examiner, agreed that the two surgeries and Petitioner's current condition of ill-being were related to the May 24, 2009 accident. The only doctor questioning causation was Dr. Nogalski, Respondent's examining physician. Dr. Nogalski testified that he did not believe the work accidents caused or aggravated Petitioner's right shoulder condition. He also testified that he did not believe there was any objective evidence that Petitioner needed ongoing right arm restrictions. Yet, Dr. Nogalski acknowledged that the FCE test reported she gave a full and reliable effort. He also admitted that Petitioner may have suffered a strain to her right shoulder from the work accidents and acknowledged that the accident reports support Petitioner having shoulder symptomology following the accidents at work. In rendering a causation opinion, Dr. Nogalski never addressed the cumulative effect of the two accidents and Petitioner's brief return to work (with attendant complaints) between the two accidents.

Although the surveillance videotape and private investigators testified that Petitioner was attempting to sell one of her horses, there is nothing in the reports or videotape indicating Petitioner injured, aggravated or worsened her right shoulder condition away from work. Respondent offered a Facebook posting from August 8,

2011 suggesting that Petitioner posted that she was picking up bales of hay; however, Petitioner testified that she was in the truck when her husband and friends did the actual lifting and this was corroborated by her husband, Daggott, and Vaughn. The testimony of Petitioner, Fisher, Vaughn, and Daggott was credible, believable and consistent.

The Arbitrator relies upon a chain of events, the testimony of Petitioner, corroborated by the medical records of Drs. Derhake and Crickard as well as the testimony of Dr. Farley to conclude that Petitioner's right shoulder current condition of ill-being is causally related, in part, to the May 24, 2009 accident.

5. **Issue J: Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?**

The Arbitrator concludes that Petitioner further aggravated her shoulder injury on November 27, 2009 and addresses this issue in the companion decision which is the subject matter of Case No. 09 WC 51546.

6. **Issue K: What temporary benefits are in dispute? (Maintenance? TTD?)**

The Arbitrator concludes that Petitioner further aggravated her shoulder injury on November 27, 2009 and addresses this issue in the companion decision which is the subject matter of Case No. 09 WC 51546.

7. **Issue L: What is the nature and extent of the injury?**

The Arbitrator concludes that Petitioner further aggravated her shoulder injury on November 27, 2009 and addresses this issue in the companion decision which is the subject matter of Case No. 09 WC 51546.

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STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tamara Siller,
Petitioner,

vs. No. 09 WC 019945

Chicago Transit Authority,
Respondent.

14IWCC1132

DECISION AND OPINION ON REVIEW

A Petition for Review having been timely filed by Respondent and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, and the nature and extent of the permanent partial disabilities, and being advised of the facts and law, modifies the award for permanent partial disability and otherwise affirms and adopts Arbitrator Flores' Decision. A copy of the Arbitrator's Decision is attached hereto and made a part hereof.

Petitioner, a 34 year old bus driver for Respondent, alleged that she suffered bilateral carpal tunnel syndrome as a result of her bus driving activities and designated March 26, 2009 as the date her condition manifested. She testified that she worked overtime frequently and used both hands to hold the steering wheel, which moved constantly. Petitioner noted that some buses were more difficult to steer than others, some had padded steering wheels that were easier to grip, and some routes involved more hard turns than others. She also was required to use a knob with her left hand to open the bus door.

Dr. Nagle provided cortisone injections and wrist splints, prescribed vitamin B6, and ordered occupational therapy, but Petitioner's symptoms persisted, and he eventually performed bilateral surgical releases on July 6, 2009 for the dominant right hand and November 9, 2009 for the left hand. Petitioner completed post-operative physical therapy and underwent a functional capacity examination that revealed she was capable of returning to work as a bus driver. Dr. Nagle released Petitioner to return to work full duty as a bus driver on March 22, 2010.

14IWCC1132

Respondent's Section 12 examiner, Dr. Carroll, agreed with Dr. Nagle's diagnosis of carpal tunnel syndrome and treatment, but opined that Petitioner's condition was not causally related to her bus driving activities. Dr. Carroll observed that Petitioner was overweight and had undergone a hysterectomy in 2005, conditions which he believed predisposed her to developing carpal tunnel syndrome.

Petitioner testified that she continues to suffer some carpal tunnel symptoms, such as hand fatigue and night-time paresthesias. She takes over the counter medications to relieve her symptoms, but these drugs cause her to be drowsy. She continues to suffer numbness in both hands. Dr. Nagle opined that Petitioner's bus driving activities aggravate her bilateral hand symptoms.

Arbitrator Flores found Dr. Nagle's causation opinion more persuasive than Dr. Carroll's and concluded that Petitioner had proved that she suffered a repetitive stress injury that was causally related to her bus driving activities. She awarded Petitioner 48-6/7 weeks of temporary total disability and all related medical expenses, as well as permanent partial disability of 17.5% loss of use of the right hand and 15% loss of use of the left hand.

Respondent timely filed a Petition for Review to the Commission, raising issues of accident, causal connection, medical expenses, temporary total disability, and the nature and extent of Petitioner's permanent partial disability.

After reviewing the entire record, the Commission finds that the Arbitrator's award of permanent partial disability was excessive. Based upon Petitioner's current complaints, absence of work restrictions, and prior Commission decisions, there is no basis for awarding Petitioner more permanency for her dominant right hand than for her left hand. Therefore, the Commission modifies the Arbitrator's award from 17.5% loss of use of the right hand to 15% loss of use of the right hand and otherwise adopts and affirms the Arbitrator's Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision, filed on November 8, 2013, is modified with respect to the award for permanent partial disability of the right hand. The Commission reduces the Arbitrator's award of 17.5% loss of use of the right hand to 15%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit under Section 8(j) of the Act; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order. Pursuant to the parties' stipulation in the Request for Hearing (AX1), all medical expenses were paid by Petitioner's group health insurer, for which Respondent is entitled to Section 8(j) credit.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $738.13 per week for a period of 48-6/7 weeks, commencing April 14, 2009 through March 21, 2010, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

14IWCC1132

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $664.32 per week for a period of 30.75 weeks, as provided in Section 8(e)9 of the Act, for the reason that the injuries sustained caused the loss of use of 15% of the right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $664.32 per week for a period of 30.75 weeks, as provided in Section 8(e)9 of the Act, for the reason that the injuries sustained caused the loss of use of 15% of the left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injuries.

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 the Circuit Court.

DATED: DEC 2 6 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-11/12/14
drd/dak
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SILLER, TAMARA
Employee/Petitioner

Case# **09WC019945**

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

14IWCC1132

On 11/8/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% 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:

4015 CHRISTINE F DAVID
222 N LASALLE ST
SUITE 200
CHICAGO, IL 60601

0515 CHICAGO TRANSIT AUTHORITY
ELIZABETH MEYER
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

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

Case # 09 WC 19945

Consolidated cases: N/A

Tamara Siller
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

14IWCC1132

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 **Chicago**, on **September 23 and 25, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC1132

FINDINGS

On **March 26, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment as explained *infra*.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident as explained *infra*.

In the year preceding the injury, Petitioner earned **$57,574.40**; the average weekly wage was **$1,107.20**.

On the date of accident, Petitioner was **34** years of age, ***married*** with **3** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services as explained *infra*.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services as explained *infra*.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$2,360.00** for other benefits (i.e., non-occupational indemnity benefits), for a total credit of **$2,360.00**.

Respondent is entitled to a credit **as agreed by the parties for all bills paid by the group carrier** under Section 8(j) of the Act. *See* AX1.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $738.13/week for 48 & 6/7th weeks, commencing April 14, 2009 through March 21, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from March 26, 2009 through September 25, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Medical Benefits

Respondent shall pay reasonable and necessary medical services for bills submitted into evidence related to Petitioner's bilateral hands, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of $664.32/week for 35.875 weeks, because the injuries sustained caused the Petitioner 17.5% loss of use of the right hand, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $664.32/week for 30.75 weeks, because the injuries sustained caused the Petitioner 15% loss of use of the left hand, as provided in Section 8(e) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

November 8, 2013
Date

NOV -8 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Tamara Siller
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # **09** WC **19945**

Consolidated cases: **N/A**

14IWCC1132

FINDINGS OF FACT

The issues in dispute at this hearing are accident, causal connection, Respondent's liability for certain unpaid medical bills, Petitioner's entitlement to a period of temporary total disability benefits, and the nature and extent of Petitioner's injury. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Petitioner testified that she began working for Respondent in September of 1997 as a part-time bus operator and worked about 25-30 hours per week. Eventually she became full-time bus operator in December of 1999 and continues to work in this capacity. She testified that she worked 40 hours per week and did work some overtime depending on the schedules, which varied. Petitioner also testified that she worked over 40 hours per week in 2005, 2007, and maybe 50-60 hours per week in 2008. She testified that she currently works approximately 10-15 hours of overtime every couple of weeks and that, sometimes, she works overtime six days a week for three months consecutively until the schedule changes. In the latter circumstances, Petitioner testified that she works anywhere from 8-10 hours per day, and actually drive five hours after which she will take a break and then drive the other three hours for a total driving time of approximately seven out of eight hours.

Petitioner testified that from June of 2008 through February of 2009 she drove more than one route because when an operator picks a schedule she picks more than one street and may have more than one route. Primarily, Petitioner testified that she would drive the 55th street bus where there are turns. On this route, Petitioner testified that she would leave the garage and drive down 55th street which is straight until she arrived at the red line [train/bus station] where she would make right and left turns and navigate curves approximately 4-5 times. Petitioner testified that the Ashland street route is a straight route until she reached the north side of the route. She testified that she was operating the Ashland route at one point in time and then picked it again and maybe did that route six months out of the year. She operated the 55th street route for approximately eight months. Petitioner testified that the number of stops that she made in one day depended on whether there was someone that needed to get on or off at a bus stop which could be spaced as closely as every block or two.

Petitioner testified that her duties as a bus operator were to drive using both hands and that she would have to hold the steering wheel. She explained that the bus' tires are located behind her so her steering wheel was constantly moving, unlike in a car. Petitioner also testified that the buses were different; some days she drove a "good" bus and some days she drove a "bad" bus with hard steering. Petitioner explained that busses have different power steering than that in a regular car which requires more work and affected her wrists because she has to grip the steering wheel. Regarding the routes, Petitioner testified that the easier routes were those that

[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.

allowed her to get up and straight routes. Petitioner was also required to use a knob on the left hand side to open the bus door and that she constantly had to flex back and forth to do this.

Petitioner testified that she was never seen by a doctor for any condition in her hands or wrists before she saw Dr. Nagle. She acknowledged that she did have complaints of pain before March 26, 2009, after that her hands would swell up at the end of the day. She testified that she did not know, however, what carpal tunnel was but only knew that her hands were bothering her. She also testified that those symptoms were "on and off" and that they started sometime in 2004 when her hands started falling asleep, but that it was not severe enough for her to go see a doctor.

At one point, Petitioner also testified that the steering wheels on the busses were padded and then they were not, which required her to grip the steering wheel tighter which is when her symptoms really started. Petitioner testified that the absence of the padding affected her because she had to grip the steering wheel tighter and she was getting shooting pains in her right arm and swelling. She also testified that she experienced symptoms after each shift even when the bus steering wheels were padded, but not as bad as when she drove busses without steering wheel padding. She added that she did not wear gloves to drive because it made it slippery to grip the unpadded steering wheel. Petitioner testified that it was the power steering in the bus that made it easy or hard to drive the bus.

Petitioner estimated that she took her breaks after driving 45-90 minutes during the period from June of 2008 through February of 2009. She testified that the difference in her symptoms was that she was experiencing tingling in her wrists and her hands were hurting so that after 90 minutes of driving it was harder to shake off.

Petitioner is right hand dominant and testified that her weight before the accident was consistently around 180-185 pounds.

Medical Treatment

Petitioner testified that her first treatment was at MercyWorks in 2009. The medical records reflect that Petitioner first saw Dr. Nagle on April 14, 2009 at which time Petitioner reported right hand paresthesias and pain since January of 2009 which she attributed to new steering wheels that were narrower on the bus that she drives at work, numbness and tingling that woke her up at night, and recently being given a brace that did not help her. PX1. Petitioner also reported her involvement in a motor vehicle accident after which she did not work for two weeks and during which time she noted an improvement in her symptoms. *Id.* After an examination, Dr. Nagle diagnosed Petitioner "with what appears to be a right carpal tunnel syndrome" and ordered electrodiagnostic studies. *Id.* Dr. Nagle recommended that Petitioner wear a wrist splint and take 150 mg of vitamin B6. *Id.* He also ordered occupational therapy and took Petitioner off of work "given the fact that her work aggravates her symptoms." *Id.*

Petitioner saw Dr. Nagle on April 28, 2009 reporting that "her symptoms have not changed and that she continues to have pain in the volar aspect of her wrist that radiates into her fingers." *Id.* Dr. Nagle noted that Petitioner's nerve studies were negative. *Id.* On examination, Dr. Nagle noted a positive Tinel sign over the right wrist and a positive median nerve compression test. *Id.* He diagnosed Petitioner with mild carpal tunnel syndrome and recommended and administered a steroid injection. *Id.* Dr. Nagle kept Petitioner off work and indicated that if she did not respond to the injection, he would "have to consider another etiology of her symptoms." *Id.*

On June 23, 2009, Petitioner reported to Dr. Nagle that "her symptoms resolved after she underwent a steroid injection[, but that h]er symptoms have gradually recurred unfortunately." *Id.* On examination, Dr. Nagle again noted a positive Tinel's sign and median nerve compression test. *Id.* He noted that "[w]hile the patient has a negative electrodiagnostic study, she has classic findings for a carpal tunnel syndrome and has responded well to a steroid injection. In view of these facts, I believe it is reasonable to move ahead with surgery." *Id.* He kept Petitioner off work. *Id.*

Petitioner underwent the recommended endoscopic carpal tunnel release surgery on the right on July 6, 2009. *Id.* Petitioner continued to follow up with Dr. Nagle post-operatively and attended occupational therapy. *Id.* he restricted Petitioner to left-handed work only effective July 7, 2009. *Id.*

When Petitioner returned to Dr. Nagle on August 18, 2009, he noted that Petitioner's "circulation, sensation and motor function have returned to preoperative levels. … [and that Petitioner] has radial and ulnar pillar pain today. There is no sign of carpal tunnel syndrome and the patient has no carpal tunnel symptoms." *Id.* he prescribed home exercises for the right hand. *Id.* Petitioner also reported, however, "[o]n the left side, the patient states that she has noted nocturnal paresthesias in the medial nerve distribution since she has been using her left hand more that her right." *Id.* On examination, Dr. Nagle noted a positive Tinel's sign and median nerve compression test on the left. *Id.* Dr. Nagle indicated that Petitioner "appears to be developing a carpal tunnel syndrome [on the left] as well possibly related to the fact that she has been uploading her right hand loads into her left hand." *Id.* Dr. Nagle ordered electrodiagnostic studies for the left hand and kept Petitioner restricted to left-handed work only, but noting that she could not drive a bus. *Id.*

On September 17, 2013, Dr. Nagle again noted Petitioner's report of nocturnal paresthesias in the medial nerve distribution since she has been using her left hand more and a positive Tinel's sign and median nerve compression test on the left. *Id.* He noted that Petitioner's nerve study of the left hand was negative for carpal tunnel syndrome, but recommended and administered a steroid injection on the left. *Id.* He restricted Petitioner to limited use of both hands and indicated that she could not drive a bus. *Id.*

On October 20, 2009, Dr. Nagle reported that Petitioner noted relief to her left side for a few weeks and then a gradual recurrence of her symptoms on the left, similar to what had occurred on the right side. *Id.* He recommended a left carpal tunnel release. *Id.* Petitioner underwent the recommended endoscopic carpal tunnel release to her left side on November 9, 2009. *Id.*

Section 12 Examination – Dr. Carroll

Petitioner submitted to an independent medical evaluation with Dr. Carroll at Respondent's request on November 9, 2009. RX1. Dr. Carroll took a history from Petitioner noting that she was "a 35 year old right hand dominant bus driver, who alleges an onset of symptoms on 3/26/09 in each hand." *Id.* Dr. Carroll also reviewed various medical records. *Id.* He also indicated that he "looked at size relative to the change in steering wheels. The diameter and the girth appeared to be the same." *Id.* The Arbitrator notes that it is unclear what Dr. Carroll actually viewed in terms of any bus steering wheels.

Ultimately, Dr. Carroll diagnosed Petitioner with bilateral carpal tunnel syndrome and indicated that her medical treatment to date had been reasonable, but opined that he did "not find that the change in the girth in of itself is a contributing cause to the development of her carpal tunnel syndrome. It does not appear that the gripping as she described can be considered a contributing cause." *Id.* Dr. Carroll also noted that Petitioner's weight may have

been a contributing cause to her carpal tunnel syndrome and "I do not see other factors that could play a There [sic] was a hysterectomy performed in 2005." *Id.*

Continued Medical Treatment

On November 12, 2009, Dr. Nagle noted that Petitioner's "circulation, sensation and motor function have returned to preoperative levels." *Id.* He ordered the "usual postoperative regimen" including range of motion exercises and wound care. *Id.*

On December 10, 2009, Petitioner reported "mild pain in the left hand when performing activities like mopping the floor. She experiences pain in the right hand when the weather changes and with vigorous activity, but overall she is doing well." *Id.* Dr. Nagle recommended a strengthening program with an exit evaluation of Petitioner's ability to perform her duties as a bus driver. *Id.* He kept Petitioner restricted to limited use of both hands and indicated that she could not drive a bus. *Id.*

On February 18, 2010, Petitioner reported intermittent numbness and tingling in the left hand small and ring fingers, which she noticed after sleeping with her left arm hyperflexed, minimal sensitivity and pain to the left palm with activities such as mopping, and significantly improved pain. *Id.* Dr. Nagle noted that Petitioner may have aggravated her left ulnar nerve at home and further noted that "today there is no sign of carpal tunnel syndrome on either the right or left sides." *Id.* In agreement with a physical therapy recommendation, Dr. Nagle ordered physical therapy for two more weeks to the left side to be followed by a functional capacity evaluation. *Id.* In the interim, he kept Petitioner off work. *Id.*

On March 15, 2010, Petitioner underwent a Work Capacity Initial Evaluation at Mercy which found that she was able to perform the tasks required to operate a bus. PX2. The report also noted, however, that Petitioner would benefit from participation in work conditioning to address her issues of fatigue while using a steering wheel. PX2.

On March 16, 2010, Petitioner returned to Dr. Nagle reporting the same intermittent numbness and tingling in the left small and ring fingers that was present on February 18, 2010. *Id.* Petitioner admitted moderate improvement in her symptoms with therapy, but not a complete resolution. *Id.* Petitioner also reported that she "continues to have soreness over the thenar area from gripping activities." *Id.* Dr. Nagle noted no signs of carpal tunnel syndrome on either the right or left side and released Petitioner to full duty work effective March 22, 2010. *Id.*

On November 8, 2010, Petitioner returned to Dr. Nagle one final time. *Id.* She reported that "she began to notice paraesthesias in both of her hands and some discomfort at the volar aspect of both of her wrists at the end of August." *Id.* She further reported nocturnal paresthesias occasionally with paresthesias being felt in all of her fingers, which was alleviated by splinting and aggravated by driving a bus. *Id.* Specifically, Petitioner reported that she "is currently driving two days a week on two very long streets that require no major turning. The other days of the week she is driving on the east-west routs on 55th St and one other east-west street. These routes require more turning." *Id.* After an examination, Dr. Nagle noted that Petitioner may have bilateral thoracic outlet compression combined with possible recurrence of her carpal tunnel syndrome. *Id.* He ordered additional nerve studies and recommended Celebrex, vitamin B6 and that she use her splints at night. *Id.* Petitioner indicated to Dr. Nagle that she would like to continue working as a bus operator. Dr. Nagle had no objection but opined that "her bus driving activities seem to be aggravating her symptoms." *Id.*

Additional Information

Regarding her current condition, Petitioner testified that she no longer has swelling, but that her wrists still bother her and she still gets tired and experiences a sensation at nighttime of tingling/falling asleep in her hands approximately three days per week. She experiences most of her symptoms after her shifts. With her work schedule being long now, Petitioner testified that she does experience tingling/falling asleep sensations and that her symptoms are aggravated depending on the bus that she drives. To relieve her symptoms, Petitioner testified that she takes over-the-counter medications (i.e., Aleve and Advil) which put her to sleep. Petitioner also testified that she still experiences numbness in both hands that starts in her wrists and generates into the fingers, and that one hand is not worse than the other.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (LEXIS 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 (Ill. Sup. Ct. 1989)). A claimant must prove both elements were present (i.e., that an injury arose out of and occurred in the course of her employment) to establish that her injury is compensable. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (1st Dist. 2006). Additionally, it has long been held that an employer takes its employee as it finds her. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204-206 (2003) (*citing Baggett v. Industrial Comm'n*, 201 Ill.2d 187, 199 (2003)).

In repetitive-injury cases, the facts must be closely examined to ensure a fair result for both the faithful employee and the employer. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 71 (Ill. Sup. Ct. 2006). Compensation is allowable where an injury is not sudden, but gradual so long as it is linked to the claimant's work. *Durand*, 224 Ill. 2d at 66. The Court went on to highlight its *Peoria County* decision stating that "[t]o deny an employee benefits for a work-related injury that is not the result of a sudden mishap *** penalizes an employee who faithfully performs job duties despite bodily discomfort and damage." *Durand*, 224 Ill. 2d at 66 (*citing Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 529-30 (Ill. Sup. Ct. 1987)). "Recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." *Sisbro*, 207 Ill. 2d at 204-206; *Caterpillar Tractor Co.*, 92 Ill. 2d at 36-37.

The Arbitrator finds that Petitioner testified credibly at trial. Her testimony is corroborated by the medical records and even the Section 12 report of Dr. Carroll who noted that Petitioner's diagnoses and medical treatment were accurate and appropriate. The parties' dispute stems from Dr. Carroll's opinion that Petitioner's carpal tunnel syndrome could not have developed from an increase in girth in the bus steering wheels as claimed. While Dr. Carroll reasonably notes that there were some possible non-occupational contributing factors to Petitioner's carpal tunnel syndrome, including her weight, "recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." *Sisbro*, 207 Ill. 2d at 204-206. In consideration of all of the medical evidence, the Arbitrator does not find the opinions of Dr. Carroll to be persuasive in this case.

Dr. Nagle's records reflect Petitioner's reported onset of symptomatology related to her work in January of 2009 and her first visit for medical treatment after her symptoms proved to be too much on April 14, 2009. His records corroborate Petitioner's testimony at trial about her symptoms, general medical condition at the time of her treatment, and association of her symptoms, primarily, to the new steering wheels at work. Also, Petitioner

testified at trial about the difficulty in steering buses generally because of the location of the wheels behind the steering wheel (as opposed to a car) requiring her to forcefully hold the wheel with both hands while driving which became more difficult when the steering wheels no longer came with padding. She also testified that the forcefulness with which she gripped the steering wheel depended on whether she was driving a "good" or "bad" bus. Petitioner further testified that she was required to use her left hand to open and close the bus doors as many times as necessary to allow passengers onto her bus, and that the turns that she was required to make while driving any bus depended on her route and the amount of overtime hours that she worked.

Petitioner, who was 34 years old at the time of her alleged accident, plausibly testified about a mechanism of injury to her right hand in which she developed clinically correlated carpal tunnel syndrome as a result of her activities operating a bus for Respondent. Petitioner had been working for Respondent as a bus operator, mostly in a full-time capacity, since 1997 without any need for medical treatment to either hand. The symptoms that Petitioner testified she experienced prior to seeing Dr. Nagle were minimal, did not require any medical treatment or time off work, and Petitioner testified that she did not know what carpal tunnel syndrome was until she saw Dr. Nagle. Petitioner also plausibly testified about, and the medical records reflect plausible reports of, the development of left hand carpal tunnel syndrome while she was off work due to overuse of the left hand, which she testified she used while working to repeatedly open the bus doors for passengers—to compensate for her inability to use her right hand and during physical therapy.

Thus, the Arbitrator finds that Petitioner did sustain an accident that arose out of and in the course of her employment with Respondent as claimed.

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

As explained in the accident analysis above, the Arbitrator finds that Petitioner sustained a compensable repetitive trauma injury to her bilateral hands at work as claimed. No evidence was presented regarding any intervening injury that would break the chain of causal connection through the date that Petitioner was released to full duty work by Dr. Nagle or thereafter. Based on all of the foregoing, the Arbitrator finds that Petitioner has established a causal connection between her claimed current condition of ill being and her accident at work.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

As explained in the accident and causation analyses above, the Arbitrator finds that Petitioner sustained a compensable injury at work and that her bilateral hand condition of ill being is causally related to that accident. Moreover, Respondent's Section 12 examiner, Dr. Carroll, noted that the medical treatment rendered to Petitioner through the date of his examination was reasonable and necessary regardless of causation. Thus, based on the record as a whole, the Arbitrator awards the reasonable and necessary medical bills incurred by Petitioner and submitted into evidence to be paid by Respondent as provided in Sections 8(a) and 8.2 of the Act.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

Based on the facts and conclusions explained in detail above, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the period claimed from April 14, 2009 through March 21, 2010 while she

was placed off work by Dr. Nagle.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

Based on the record as a whole—which reflects that Petitioner developed bilateral carpal tunnel syndrome requiring two carpal tunnel release surgeries followed by physical therapy and a functional capacity evaluation releasing Petitioner back to full duty work but recommending additional occupational therapy to address one of Petitioner's ongoing symptoms in the bilateral hands—the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 17.5% loss of use of the right (dominant) hand pursuant to Section 8(e) and to the extent of 15% loss of use of the left (non-dominant) hand pursuant to Section 8(e).

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Arturo Rodriguez,
Petitioner,

vs. No. 12 WC 13354

Landscapes Concepts Management,
Respondent.

14IWCC1133

DECISION AND OPINION ON REMAND
FROM THE CIRCUIT COURT

This case appears on Remand from the Circuit Court, Nineteenth Judicial Circuit, Lake County, Illinois. The underlying case was tried at a bifurcated Section 19(b) hearing before Arbitrator Erbacci on July 31, 2012 and August 28, 2012. Petitioner alleged that he suffered injuries to his cervical, thoracic and lumbar spine as a result of a slip and fall while shoveling snow for Respondent on February 24, 2012. On October 1, 2012, Arbitrator Erbacci issued his decision denying Petitioner's claim for failure to prove that an accident occurred that arose out of and in the course of Petitioner's employment by Respondent. The Arbitrator also found that Petitioner failed to prove that his current state of ill-being is causally connected to that alleged accident. The Arbitrator explicitly found that Petitioner was not credible and denied all benefits.

Petitioner appealed the Arbitrator's Decision to the Commission, which entered its Decision and Opinion on Review on July 8, 2013. The Commission reversed the Arbitrator's finding that Petitioner had failed to prove a compensable accident occurred on February 24, 2012 and found that Petitioner had given Respondent timely notice. However, the Commission agreed with the Arbitrator's finding that Petitioner had failed to prove that a causal connection existed between Petitioner's current condition of ill-being and his accident, except for his thoracic injury, a compression fracture at T12, which the Commission found causally related. The Commission adopted Dr. Levin's supplemental Section 12 report in which the doctor opined that Petitioner had reached MMI with regard to the T12 fracture by the date of that report, May 22, 2012. The Commission awarded Petitioner medical expenses of $12,387.18 for treatment related to his thoracic condition and denied medical expenses incurred for his cervical and lumbar complaints, as well as all prospective medical treatment. The Commission awarded Petitioner temporary total disability from March 13, 2012 through May 22, 2012 and remanded the matter to the Arbitrator for further proceedings.

14IWCC1133

Petitioner timely appealed the Commission's Decision, denying benefits for his alleged cervical and lumbar injuries, to the Circuit Court of Lake County. The Circuit Court found the Commission's decision finding that Petitioner suffered a thoracic injury as a result of an accident on February 24, 2012 that arose out of and in the course of his employment with Respondent was against the manifest weight of the evidence. The Court instructed the Commission to reverse its decision and reinstate the Arbitrator's denial of all benefits. Pursuant to the instruction of the Circuit Court, the Commission finds that Petitioner failed to prove that he suffered an accident arising out of and in the course of his employment with Respondent on February 24, 2012, and Petitioner failed to prove causal connection. For the foregoing reasons, the Commission denies Petitioner all benefits.

IT IS THEREFORE ORDERED BY THE COMMISSION that, pursuant to instructions from the Circuit Court of Lake County, Petitioner's claim is denied. All other issues are moot.

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 $500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: DEC 2 6 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-10/21/14
drd/dak
68

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify up/down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Richard Ballard,
Petitioner,

vs.

No. 10 WC 12479

State of Illinois, Illinois Dept. of Transportation,
Respondent.

14IWCC1134

DECISION AND OPINION UNDER §19(h) AND §8(a)

Timely Petition for Review under Sections 19(h) and 8(a) of the Act having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of increased permanency and additional medical benefits, and being advised of the facts and law, grants the Petition for additional permanency under Section 19(h) brought by Petitioner on Review for the reasons set forth below.

At hearing before Commissioner Donohoo on June 16, 2014, Petitioner and Respondent stipulated that the Petition under Section 8(a) was dismissed as all related medical bills had been accepted by Respondent. The only issue pending before the Commission at this time is Petitioner's Petition under Section 19(h).

An arbitration hearing was held before Arbitrator Nalefski on July 27, 2010, with award entered on August 16, 2010. The Arbitrator found the following:

- Petitioner sustained an injury to his right knee arising out of and in the course of his employment with Respondent on April 21, 2009. Timely notice of the injury was given to Respondent.

- On April 21, 2009, Petitioner was working as a highway maintainer when he twisted his right knee while squatting and pushing on a stuck dump truck lever. Petitioner testified he felt immediate pain behind his kneecap.

14IWCC1134

- On May 13, 2009, Petitioner underwent an MRI scan of the right knee which was read as showing a meniscal tear in the posterior horn of the medial meniscus, a bony contusion in the superior pole of the patella, and moderate joint effusion and soft tissue contusion with edema anterior to the lower patella and proximal tibia.

- Petitioner underwent an arthroscopic right knee partial medial meniscectomy and patellofemoral chondroplasty with Dr. Milne on August 7, 2009 for a right knee medial meniscus tear and chondral injury lateral patella facet. After a post-operative course of conservative treatment, Petitioner was released to full duty work on November 5, 2009.

- Petitioner testified that his right knee aches at night during sleep and is stiff in the morning when he awakens. He has difficulty walking down stairs and must hold onto railings. He further testified that he has problems getting into his work truck and experiences pain when standing too long and rising from a seated position. He testified sometimes his knee just gives way. Petitioner testified he controls his pain with Tylenol and occasional prescription pain medication.

- The Arbitrator found Petitioner sustained injury to his right knee that caused a 25% loss of the right leg.

No appeal was taken and the Arbitration Decision became the final decision of the Commission.

Petitioner filed a timely Petition for Review under Sections 19(h) and 8(a) of the Act on January 22, 2013. A review hearing was held before Commissioner Donohoo on June 16, 2014 in Collinsville, Illinois. The parties stipulated on the record that all medical bills in issue had been paid or would be paid by Respondent and, therefore, the Section 8(a) Petition was withdrawn.

Petitioner alleged that after the Arbitration hearing, his physical condition deteriorated and he has suffered additional permanent disability related to the April 21, 2009 accident. Section 19(h) authorizes a review of a final award when an employee's disability has recurred, increased, diminished, or ended. It affords an employee an opportunity after a final award to seek additional compensation if his disability has materially increased. The Commission finds the evidence submitted on review supports a finding that Petitioner's condition materially changed and he sustained an additional 10% loss of use of the right leg due to the April 21, 2009 accident. In support of this decision, the Commission finds as follows:

- Petitioner testified that at the time of arbitration he had pain in his right knee that woke him from sleep on occasion, would cause him to have trouble getting in and out of his 3 ton work truck, and affected his ability to walk on uneven ground. He further testified that after arbitration, these complaints progressively worsened and increased from a few times a week to almost daily.

- Petitioner presented to Dr. Brophy, a board certified orthopedic surgeon specializing in sports medicine, on December 19, 2011 due to his increased complaints. Dr. Brophy examined Petitioner, reviewed imaging studies, and took a history of complaints stemming from the April 2009 work accident. The doctor provided treatment in the form of a lubricating injection to the knee for pain complaints primarily in the anterior portion of the knee which Petitioner described as worse with climbing stairs and steps.

- Petitioner presented to Dr. Brophy for follow-up on December 4, 2012 and stated that he did not feel the injection administered in February 2012 was successful in relieving his pain complaints.

- An MR Arthrogram was ordered and revealed a full thickness defect measuring 8 x12 mm on the right patella, consistent with the source of the pain complaints. Surgery was recommended as an option to address the limitations due to pain.

- Dr. Brophy performed a right knee arthroscopic partial medial meniscectomy and chondroplasty of the patella, OATS procedure on January 4, 2013. Petitioner underwent a course of conservative treatment post-surgery and was released to return to his regular duties.

- Dr. Brophy authored an opinion letter dated August 8, 2013. He opined that Petitioner presented in December 2011 with a two year history of right knee pain which he reported began after a work injury in April of 2009. An MR Arthrogram showed focal cartilage defect in the patella and surgery involving OATS procedure was performed. Dr. Brophy noted that the last time he examined Petitioner was on June 25, 2013, and Petitioner stated he was extremely happy with the condition of his knee as he experienced dramatically less discomfort and was able to do more without symptoms. Dr. Brophy opined that the work injury of April 21, 2009 was a causative factor in the need for the medical treatment he provided.

- Dr. Brophy testified by way of deposition on March 25, 2014. He opined, within a reasonable degree of medical certainty, that the April 29, 2009 work injury was a causative factor in producing the chondral defect for which Petitioner underwent additional treatment and ultimately surgery on January 4, 2013. Dr. Brophy testified that the meniscal tear for which he treated Petitioner was also likely to have been caused by the injury which Dr. Milne treated.

- Petitioner testified at review that the treatment with Dr. Brophy was worthwhile as it reduced the frequency of his knee complaints and allowed him to walk better on uneven ground.

- Petitioner testified at review that he still has pain in the right knee with driving long distances and he requires help from co-workers to push up his work truck tailgate and performing work that requires him to go up and down hills, such as clearing brush. Petitioner still has difficulty with traversing steps without his knee locking up.

14IWCC1134

After reviewing all of the evidence and the parties' arguments, the Commission finds that Petitioner has proved that he is entitled to an increase in the permanency award related to his right knee injury under Section 19(h). Arbitrator Nalefski awarded Petitioner 25% of the right leg. The Commission finds that Petitioner has proved he has sustained a material increase in his permanent disability since the time of the Arbitration Decision and is entitled to an increase of 10% of the right leg, from 25% to 35% of the right leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petition brought by Petitioner for increased disability under §19(h) is granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week for a period of 21.5 weeks, as provided in §8(e) of the Act, for the reason that Petitioner sustained a material increase in his permanent disability to the extent 10% of the right leg pursuant to §19(h) of the Act. As a result of the accident of April 21, 2009, Petitioner has now sustained injuries that caused 35% loss of use of the right leg.

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)(1) of the Act, in this case, where the Respondent is the State of Illinois, the decision of the Commission shall not be subject to judicial review.

DATED: DEC 2 6 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-11/05/14
drd/dak
68

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Keith Smith,
Petitioner,

vs. NO. 10 WC 04828

14IWCC1135

Chicago Transit Authority,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, medical expenses and prospective medical expenses and being advised of the facts and law affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on December 20, 2013 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.

14IWCC1135

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 2 6 2014

Daniel R. Donohoo

Ruth W. White

Charles J. DeVriendt

o-12/17/14
drd/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMITH, KEITH
Employee/Petitioner

Case# **10WC004828**

14IWCC1135

CTA
Employer/Respondent

On 12/20/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2902 LAW OFFICES OF PETER G LEKAS
221 N LASALLE ST
SUITE 1700
CHICAGO, IL 60601

0515 CHICAGO TRANSIT AUTHORITY
ANDREW ZASUWA
567 W LAKE ST
CHICAGO, IL 60661

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)

KEITH SMITH
Employee/Petitioner

v.

CTA
Employer/Respondent

Case # 10 WC 04828

Consolidated cases: ___

14IWCC1135

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **6-12-13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **10-13-09**, 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 $**55,889.60**; the average weekly wage was $**1,074.80**.

On the date of accident, Petitioner was **54** years of age, ***single*** with **1** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services. The parties agreed that the issue of past medical bills is deferred to a later hearing.

Respondent shall be given a credit of $**57,091.27** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**57,091.27**.

ORDER

Respondent shall pay petitioner temporary total disability benefits of $**716.53** per week for **116-3/7** weeks, commencing **October 14, 2009** through **October 20, 2009**, **August 2, 2010** through **April 24, 2012** and **December 19, 2012** through **June 12, 2013**, as provided in Section 8(b) of the Act.

Respondent shall pay to petitioner attorneys' fees of $**0.00**, as provided in Section 16 of the act, penalties of $**0.00**, as provided in Section 19(k) of the Act, and penalties of $**0.00**, as provided in Section 19(1) of the Act.

Respondent shall authorize and pay for the necessary surgery that Dr. Silver has recommended for petitioner's left shoulder along with his post-operative recommendations, including use of a home continuous passive motion machine and the ice unit, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

December 19, 2013
Date

DEC 20 2013

Keith Smith	)	
	)	
vs.	)	Case No. 10 WC 04828
	)	
Chicago Transit Authority	)	
	)	

14IWCC1135

FINDINGS OF FACT:

Petitioner is a 59-year-old male who has been employed by the respondent, Chicago Transit Authority ("CTA"), as a full-time Bus Operator for the past 8 or 9 years.

Petitioner testified that on October 13, 2009, he has involved in an accident while at work. While making a turn at a green light, a car struck his bus on the driver's side. He testified that after the collision, he felt pain in his left shoulder and in his back. He waited for police and was taken by ambulance to the emergency room of St. Bernard Hospital. After examining petitioner, the staff advised him to follow up with his primary care physician ("PCP").

Petitioner testified that he presented to Concentra Medical Center on October 14, 2009, where he was examined and given medication. Petitioner testified that x-rays were taken.

Petitioner returned to Concentra Medical Center on October 15, 2009.

Petitioner testified that he saw E. McKinley Fourte', M.D., his PCP, on October 15, 2009. Petitioner testified that he also underwent physical therapy two to three times a week at MercyWorks for a couple months. Petitioner testified that while in physical therapy, he could not reach out and the pain was intense.

Dr. Fourte told petitioner that he needed to see an orthopedic surgeon.

Petitioner testified that he saw J. Michael Morgenstern, M.D. on August 2, 2010, and was given a cortisone shot. Dr. Morgenstern took him off of work. Petitioner testified that Dr. Morgenstern recommended surgery to his left shoulder.

Petitioner testified that he presented to Gregory P. Nicholson, M.D., for a Section 12 examination. Following such examination, the surgery to his left shoulder was approved.

Petitioner testified that he had surgery to his left shoulder on October 12, 2010 at the Peterson Surgical Center. Petitioner continued to see Dr. Morgenstern. Petitioner testified he was given a CPM machine and again underwent physical therapy and a home exercise program. Physical therapy was held at Accelerated Rehab.

Petitioner testified that after his first surgery, he was still experienced left shoulder pain. He underwent work hardening and a Functional Capacity Examination in May of 2011. Petitioner testified that over the course of his treatment, he had six injections into his left shoulder.

Petitioner testified that he underwent a second surgery to his left shoulder on September 20, 2011. He received physical therapy after the surgery and utilized the CPM machine. Petitioner testified he was prescribed a transdermal compound cream. Petitioner testified that while in physical therapy, his left shoulder felt stiff and that it was difficult to perform some activities. He applied an "ice machine" to his shoulder. He testified that he eventually went back to work.

Petitioner testified that he underwent a second Functional Capacity Evaluation and returned to work. He testified that he worked as a bus operator for seven to eight months, from April 2012 to December 2012. Petitioner testified that as he drove, he noticed he was still having pain in his left shoulder "all the way around." He testified that he noticed his shoulder would freeze and he was not able to lift his arm above his shoulder level. He testified that in December of 2012, he called his doctor for an appointment and presented to him on December 19, 2012. Petitioner testified that his doctor took him back off of work on December 19, 2012.

Petitioner testified that he underwent an MRI on January 23, 2013. Dr. Morgenstern recommended physical therapy and an injection. He testified that his doctor recommended that he undergo a third surgery to his left shoulder. He prescribed Mobic and Tramadol. Petitioner testified that Dr. Morgenstern referred him to Ronald L. Silver, M.D.

Petitioner saw Dr. Silver on March 6, 2013. Petitioner testified that Dr. Silver reviewed the MRI from January 23, 2013 and recommended he undergo another surgical procedure.

Petitioner testified that on December 2, 2012 he was at work driving the bus and hit a fire hydrant. He testified that he did not sustain any injuries from this incident and did not treat for it. Petitioner testified that he is ready to have surgery on his left shoulder. He testified that he has problems with dressing, bathing, and picking his grandson up. Petitioner testified that he is right hand dominant.

Petitioner testified that he presented to Dr. Gregory Nicholson for a Section 12 examination on five different occasions throughout his course of treatment.

On cross-examination, petitioner testified that he treated with Dr. Morgenstern on April 20, 2012 and was released to work. He testified that he underwent a Functional Capacity Examination beforehand. Petitioner testified that after being released by Dr. Morgenstern, he worked full duty without restrictions for approximately 7 months and 26 days. Petitioner testified that during the 7 months and 26 days that he was working he did not treat with Dr. Morgenstern until he was taken off of work on December 19, 2012.

Petitioner testified on cross-examination that he presented to Dr. Nicholson on April 18, 2012 and that Dr. Nicholson sent him back to work. He testified that he saw Dr. Nicholson on December 22, 2010, May 11, 2011, August 24, 2011, April 18, 2012, and February 20, 2013. He testified that he was always truthful and accurate in all of his statements to Dr. Nicholson. He testified that Dr. Nicholson believed the two surgeries he had were necessary.

The medical records in evidence show that petitioner initially treated at St. Bernard's Hospital on October 13, 2009. Petitioner was diagnosed with a shoulder strain. (P.X.1)

Petitioner presented at Concentra Medical Center on October 14, 2009 and was diagnosed with a neck sprain. Tenderness of the left shoulder was noted but with no swelling or bruising. There was full active range of motion with pain in all directions. Pain was noted at 6/10. The assessment was cervical strain, left shoulder strain and trapezius/rhomboid strain. Petitioner was placed on modified duty with restrictions on use of the left arm. On October 15, 2009, Petitioner again visited Concentra for a physical therapy evaluation. It was noted that physical therapy would be needed and that the patient demonstrated good prognosis for improvement. (P.X.2)

Petitioner treated conservatively with Dr. Fourte'. He was released to work full duty without restrictions on May 14, 2010. (P.X.3)

An MRI of the left shoulder was performed on June 17, 2010. The radiologist's impression was moderate anterior supraspinatus tendinopathy, multiple tiny interstitial and undersurface tears, evidence of impingement with a 6 mm. subacromial spur and trace subacromial subdeltoid bursitis. (P.X.3)

Petitioner began treating with Dr. Morgenstern on August 2, 2010. Dr. Morgenstern physically examined petitioner and reviewed the MRIs from June 17, 2010. It was noted that petitioner had degenerative disk disease at C2 through C5 and C6 through C7. Dr. Morgenstern diagnosed petitioner with left shoulder impingement syndrome and cervical disk syndrome. A cortisone injection into the left shoulder was administered and the doctor believed that petitioner would be a candidate for arthroscopic surgery if he remained symptomatic. Petitioner was taken off of work. (P.X.5)

Petitioner followed up with Dr. Morgenstern on August 18, 2010. Another cortisone injection into the left shoulder was administered. Dr. Morgenstern opined that petitioner was now a candidate for arthroscopic surgery of the left shoulder. (P.X.5)

Petitioner followed up with Dr. Morgenstern on September 1, 2010 and September 13, 2010. On October 12, 2010, petitioner underwent a diagnostic therapeutic surgical arthroscopy of the left shoulder. The operative procedure indicates that a partial tear of the rotator cuff was identified. The petitioner was prescribed a CPM machine and an ice machine. (P.X.5)

Petitioner saw Dr. Morgenstern for his first post-operative appointment on October 18, 2010. It was noted that the patient would begin use of a CPM machine and begin therapy in a week. (P.X.5) Petitioner saw Dr. Morgenstern again on November 1, 2010 and it was noted that he had not started physical therapy yet. (P.X.5) On November 3, 2010, petitioner presented to Dr. Morgenstern who opined that the left shoulder injury was a direct result of the work-related motor vehicle accident on October 13, 2009. (P.X.5)

On November 18, 2010 and December 10, 2010, petitioner followed up with Dr. Morgenstern who noted petitioner would continue with physical therapy and the use of the CPM machine. (P.X.5)

On December 22, 2010, petitioner saw Dr. Nicholson for a Section 12 examination. Dr. Nicholson noted that petitioner had been operating a CTA bus on October 13, 2009 and was taking a left turn when his bus was struck by a car, which resulted in an injury to his neck and left shoulder. Dr. Nicholson noted that petitioner was taken off of work in January for a short time. Dr. Nicholson noted that two MRIs were done in June of 2010 due to continuing symptomatology –one of the left shoulder and one of the cervical spine. The surgical arthroscopy of the left shoulder was noted. Dr. Nicholson reviewed the operative report from October 18, 2010 and noted that while it mentioned the presence of a partial tear, it did not mention whether it was a full thickness tear, deep partial tear, or the actual size of the tear. (R.X.1)

Dr. Nicholson performed a physical examination of the petitioner on December 22, 2010 and found that he was well healed at his arthroscopic portals. Petitioner was grossly neurologically and vascularly intact. Passive elevation was 90 degrees and passive external rotation was 30 degrees and passive internal rotation was 40 to 45 of the sling. Dr. Nicholson noted that petitioner was "somewhat reticent to move his arm". It was noted that petitioner was not in physical therapy.

Dr. Nicholson reviewed the records of Dr. Morgenstern and other clinic notes. The MRI of the left shoulder from June 17, 2010 was reviewed. Dr. Nicholson reported that the MRI showed a large subacromial spur encroaching upon the rotator cuff tendon. Dr. Nicholson did not see a full thickness rotator cuff tear. He did note there was inflammation of the tendon and a lateral sloping acromion and a large spur. Mild degenerative changes in the AC joint and glenohumeral joint were seen. The muscle bellies of the supraspinatus, infraspinatus and subscapularis were well maintained. (R.X.1)

Dr. Nicholson diagnosed petitioner with left shoulder subacromial impingement syndrome, AC joint painful arthralgia, and partial rotator cuff tear. He believed that petitioner's diagnosis was from a work-related exacerbation of a pre-existing condition and that the arthroscopic surgery on October 18, 2012 was within a reasonable degree of medical and surgical certainty related to the incident. Dr. Nicholson agreed with the course of treatment, and believed that it was imperative that petitioner continue physical therapy. Dr. Nicholson anticipated petitioner would reach maximum medical

improvement ("MMI") within six to eight months of the surgery. He believed the injuries and medical treatment were causally related to the incident on October 13, 2009. He believed petitioner would be capable of working light duty. (R.X.1)

Petitioner saw Dr. Morgenstern on January 14, 2011 and it was noted that petitioner was now in physical therapy. Petitioner rated his pain at 7 out of 10. An injection into the left shoulder was administered and the petitioner was kept off of work. (P.X.5) Petitioner followed up with Dr. Morgenstern on February 2, 2011, March 28, 2011, and April 27, 2011. It was noted that petitioner began a work-conditioning program and underwent a Functional Capacity Evaluation. (P.X.5)

The evaluator found Petitioner's April 26, 2011 Functional Capacity Evaluation results to be valid and reliable secondary to the maximum performance of petitioner. Petitioner demonstrated consistent reliability. A job description of a CTA bus operator was provided and it was found that petitioner met all the physical requirements of the job. (P.X.5)

Petitioner was discharged from Dr. Morgenstern's care on May 9, 2011. It was noted that petitioner would resume his regular work duties as a bus driver.

Petitioner again presented to Dr. Nicholson on May 11, 2011 for a Section 12 examination. A physical examination was performed and it was noted that petitioner had active forward elevation of 140 degrees but he was very careful due to a catch underneath the anterolateral corner of the acromion. Dr. Nicholson found no evidence of limitation to passive or active range of motion. Dr. Nicholson stated that the Functional Capacity Evaluation showed that he could perform his job as a CTA bus driver. It was noted that petitioner was not and had not been using his CPM machine for some time. (R.X.1)

Dr. Nicholson diagnosed petitioner with left residual subacromial impingement syndrome. It was noted that petitioner had been released to full-duty work. A mechanical issue in the subacromial space was noted and the doctor believed that it was common after the type of surgery petitioner had. He believed an injection might be considered in the future. Dr. Nicholson opined that petitioner was at maximum medical improvement and could return to work. (R.X.1)

Petitioner presented to Dr. Morgenstern on June 29, 2011 with complaints of progressive significant symptoms of pain with decreased range of motion in his left shoulder. Petitioner told the doctor that the pain was worse with repetitive motion while driving his bus. A positive impingement sign was noted and a diagnosis of left shoulder impingement syndrome was given. Dr. Morgenstern reviewed an updated MRI that he believed showed downward sloping of the AC joint leading to impingement with multiple small tears and a small undersurface tear of the infraspinatus. Dr. Morgenstern opined that petitioner would be a candidate for a surgical arthroscopy of the left shoulder for impingement syndrome and rotator cuff tear. An injection into the left shoulder was administered and petitioner was taken off of work. (P.X.5)

Petitioner followed up with Dr. Morgenstern on July 18, 2011 and August 8, 2011. (P.X.5)

Petitioner presented to Dr. Gregory Nicholson on August 24, 2011. Petitioner noted increasing pain in his left shoulder. A physical examination was performed and demonstrated a positive impingement sign. Dr. Nicholson reviewed an MRI of the left shoulder that was administered on June 27, 2011. The doctor noted that the MRI demonstrated a type III acromion with a hooked amount of bone at the anterolateral corner of the acromion. The doctor noted the acromioplasty had left behind an encroaching amount of bone that was creating significant subacromial impingement pathology. (R.X.1)

Dr. Nicholson diagnosed petitioner with residual subacromial impingement syndrome due to significant retained bone, AC joint arthralgia and abutment from retained bone, and long head of the biceps tendinitis. He believed that petitioner's condition was work related and that a second left shoulder arthroscopy was necessary. (R.X.1)

Petitioner underwent a second surgical arthroscopy of the left shoulder on September 20, 2011. The operative report notes that there were findings compatible with partial tear of the rotator cuff. (P.X.5)

Petitioner followed up with Dr. Morgenstern on October 5, 2011. He noted that petitioner had increased discomfort in his left shoulder. Petitioner rated his pain at 8 out of 10. The CPM machine, cooling machine, and physical therapy were ordered. (P.X.5) Petitioner followed up with Dr. Morgenstern on October 13, 2011, October 24, 2011, and November 16, 2011. On December 19, 2011, it was noted that petitioner had developed adhesive capsulitis and that he would be a candidate for manipulation of the shoulder under sedation if symptoms continued. (P.X.5)

Petitioner began a work-conditioning program and followed up with Dr. Morgenstern on January 23, 2012, February 6, 2012, February 22, 2012, and April 4, 2012. An updated MRI of the left shoulder was done and was reviewed by Dr. Morgenstern on February 22, 2012. Dr. Morgenstern noted that the MRI was revealed no evidence of a full-thickness tear of the supraspinatus, but did show evidence of subacromial bursal fluid and a down sloping of the acromioclavicular joint leading to impingement. It was noted that petitioner's work conditioning was progressing well. (P.X.5)

Petitioner underwent a Functional Capacity Evaluation on March 22, 2012 that was valid and reliable and found him capable of driving a bus for the CTA. (P.X.5)

Petitioner presented to Dr. Nicholson for a Section 12 examination on April 18, 2012. Upon conducting a physical examination of the petitioner, Dr. Nicholson wrote: "I cannot induce pain today." Dr. Nicholson found that petitioner's Functional Capacity Evaluation was reliable and viable, and matched petitioner's physical abilities to the

demands of his job as a bus driver. Dr. Nicholson believed that petitioner had reached an excellent functional status and could return to work. Dr. Nicholson found petitioner to be at maximum medical improvement with no permanent work restrictions. Dr. Nicholson believed all medical treatment had been necessary and directly related to the injury on October 13, 2009. (R.X.1)

On April 20, 2012, petitioner presented to Dr. Morgenstern. Dr. Morgenstern noted the completion of the Functional Capacity Evaluation and therapy and released petitioner to his regular work duties as a bus driver. Dr. Morgenstern counseled petitioner that he may continue to have intermittent symptoms and that he is to continue with anti-inflammatory medication and application of ice as needed. Petitioner was told to contact the clinic if he had any further questions or concerns. (P.X.5)

Petitioner presented to Dr. Morgenstern on December 19, 2012 at which time he reported increased pain and swelling and restricted motion in his left shoulder. Petitioner told Dr. Morgenstern that he has difficulty and was unable to drive his bus because of these progressive symptoms. He rated his pain as 6-7 out of 10, constant in nature and worse at night. He denied paresthesias and gave no history of direct trauma. Dr. Morgenstern noted swelling of petitioner's left shoulder. He found tenderness to palpation in the anterior lateral aspect of the shoulder with restricted motion. The doctor found after (sic) forward flexion 30 degrees, passive 40 degrees, active abduction 30 degrees, and passive 40 degrees. The doctor also found that petitioner had minimal internal rotation and loss of external rotation. Petitioner exhibited weakness in grip and grasp and overall muscle tone was 4-/5. Dr. Morgenstern diagnosed petitioner with impingement syndrome of the left shoulder and recommended an MRI and physical therapy if his symptoms get progressively worse. Dr. Morgenstern took petitioner off of work. (P.X.5)

An MRI of the left shoulder was administered in January 2013. The radiologist's report was not included in the records admitted into evidence.

Petitioner followed up with Dr. Morgenstern on January 23, 2013. He reported continuing symptoms of left shoulder pain with decreased strength in range of motion particularly when lifting items greater than a few pounds and with activities of daily living including dressing himself. He rated his symptoms at 5 out of 10. Dr. Morgenstern opined: "The patient is continuing with impingement." Dr. Morgenstern reviewed petitioner's MRI and stated that it demonstrated multiple undersurface tears of the supraspinatus with acromial clavicular joint hypertrophy leading to impingement. Dr. Morgenstern noted that petitioner has not received approval for physical therapy and opined that petitioner will continue to be medically impaired and will continue to have decreased strength and range of motion until treatment is approved. Dr. Morgenstern believed petitioner to be a candidate for a subacromial injection to the left shoulder after initiation of physical therapy. (P.X.5)

Petitioner presented to Dr. Morgenstern again on February 6, 2013. Dr. Morgenstern wrote that petitioner continues to have symptoms of left shoulder pain with

decreased strength and range of motion. Petitioner ranked his symptoms at 6 out of 10. Dr. Morgenstern also wrote that petitioner notes increased symptoms when he attempts to lift items with the left upper extremity. Upon examination, the doctor noted tenderness to the anterolateral aspect of the shoulder with active flexion at 50 degrees, abduction at 60 degrees, with passive flexion and abduction in the sitting position at 100 degrees. Strength of the upper extremity was at 3+/5. He believed petitioner was a candidate for diagnostic, therapeutic and surgical arthroscopy for rotator cuff tear. Petitioner received an injection at this appointment and was kept off of work. (P.X.5)

Petitioner presented again to Dr. Nicholson on February 20, 2013 for a Section 12 examination. Dr. Nicholson wrote the following:

> "By history that we have from given (sic) to us with records today it sounds as if he sought treatment with a complaint of left shoulder pain that on 12/02/2012, he was driving a bus making a left turn, he had (sic) a fire hydrant.
>
> When I asked him what happened, he stated a bus hit a bus. I tried to ask him if he hit something or a vehicle hit his bus and he was unclear to (sic) the mechanism of injury."

Dr, Nicholson wrote that he has an event detail form that states petitioner was "attempting to back up on the rear bumper (sic), the bus struck fire hydrant." The doctor noted that this incident occurred on 12/02/2012.

Dr. Nicholson noted that the MRI of January 14, 2013 revealed evidence of a previous surgery, but he did not see evidence of new structural changes. Dr. Nicholson saw no evidence of a full-thickness tear and no evidence of any significant partial undersurface or bursal-sided tears. Dr. Nicholson did note a small amount of bursal signal. (R.X.1)

Dr. Nicholson performed a physical examination of petitioner on February 20, 2013 and noted no atrophy around the shoulder girdle, but exquisite tenderness throughout the shoulder. Dr. Nicholson noted that petitioner attempted to fight him with any type of range of motion, but found that he could actively assist in elevating petitioner to about 90-110 degrees. External rotation to the side was to 45 degrees and internal rotation was to 45 degrees. Dr. Nicholson noted 5/5 rotator cuff strength from external rotation, belly press strength, and supraspinatus abduction strength. Dr. Nicholson noted that, again, he complained of pain throughout the shoulder. The AC joint was non-tender and the long head biceps contour was normal. (R.X.1)

Dr. Nicholson diagnosed petitioner with left shoulder pain of unknown etiology. He felt that petitioner's physical findings and pain behavior were somewhat out of proportion to the mechanism of injury and the MRI findings. Dr. Nicholson, however, did not find petitioner to be at MMI. Dr. Nicholson found it difficult to directly attribute petitioner's significant inhibition and amount of left shoulder pain to the incident in

which the bus was backing up at low speed and struck a fire hydrant. Dr. Nicholson wrote:

> "Clearly he has had left shoulder problems in the past, but had been able to return to full duty work without restriction, have (sic) been working full time for over nine months, and then has had an acute exacerbation of pain due to a not well understood impact or mechanism while backing up a bus."

Dr. Nicholson opined, "At this point, it is unclear to me exactly how his shoulder pain began or why he is having such dramatic pain for such a seemingly minor incident." Dr. Nicholson felt that physical therapy and medication would help petitioner. (R.X.1)

Dr. Ronald Silver wrote a letter to Sedgwick CMS that is dated March 6, 2013. Dr. Silver examined petitioner on that date. He noted that on October 13, 2009, petitioner was driving a CTA bus that was struck at a high rate of speed by a car head on. He noted the history of treatment up until the present date. Dr. Silver felt that the MRI from January 14, 2013 demonstrated multiple partial thickness tears of the rotator cuff with rotator cuff impingement as well as inflammation of the subacromial bursa surrounding the rotator cuff. Dr. Silver performed a physical examination and noted that petitioner's motion was severely limited with 45 degrees forward flexion and lateral abduction both actively and passively with no internal rotation both actively and passively. Dr. Silver found that petitioner had positive impingement, Hawkins and drop arm tests. AP, lateral and outlet views of the shoulder demonstrate subacromial spurring with some degree of hooking of the acromion. Dr. Silver opined that petitioner had severe frozen shoulder-adhesive capsulitis with severe rotator cuff impingement persisting. He believed petitioner would require an arthroscopic subacromial decompression and lysis of adhesions with manipulation under anesthesia with home use of continuous passive motion machine and ice unit immediately post-operatively. Dr. Silver prescribed medication and opined that petitioner is "temporarily disabled pending further surgical treatment, lacking which he will be permanently disabled." Dr. Silver noted that petitioner was a referral from Dr. Morgenstern. (P.X. 6)

On March 7, 2013, Dr. Nicholson completed an addendum to the Section 12 examination of February 20, 2013. Dr. Nicholson stated that petitioner's current left shoulder pain was not related to the work-related injury that occurred on October 13, 2009.

Then, Dr. Nicholson answered the following questions:

> **"Has he current left shoulder pain been directly caused or exacerbated by driving a CTA bus after returning to work in April of 2012?**
>
> He relates that it began by backing up a bus at low speed and impacting something. But in our independent medical examination, initially by history and physical examination and mechanism of injury, we do not

believe his shoulder problem is related to that incident in any way.

On the MRI of 01/13/2013, is he a candidate for surgical arthroscopy for rotator cuff repair?

We state that we had seen that MRI and we do not see any evidence of new structural changes and that there was no evidence of a full-thickness rotator cuff tear. We did not see any evidence of significant partial under-surface tears or bursal sided tears. We did note a small amount of bursal inflammatory signal. We do not feel the MRI specifically indicates a surgical indication." (R.X.1)

ARGUMENT:

Petitioner alleges that he sustained neck and left shoulder injuries, including a rotator cuff tear, as a result of the work-related accident on October 13, 2009. He further claims that as a result of the October 13, 2009 accident, he needed two arthroscopic surgeries to his left shoulder and extensive physical therapy and conservative treatment followed by a release to work full duty on April 24, 2012. Petitioner alleges that his current condition of ill-being as of June 12, 2013 is related to the October 13, 2009 accident that requires a prospective third arthroscopic surgery to his left shoulder, other future medical care and time off work. Accordingly, he contends that he is and has been temporarily totally disabled from December 19, 2012 through June 12, 2013.

Respondent contends that Petitioner's current state of ill-being is not related to the accident on October 13, 2009. Respondent refers to the opinion of Dr. Nicholson, who saw petitioner on five occasions throughout the entire three-year treatment period. Dr. Nicholson agreed that petitioner needed the first two surgeries. However, when he examined petitioner on April 18, 2012, he found him to be at maximum medical improvement and capable of performing the full duties of a commercial bus driver. Dr. Nicholson opined, to a reasonable degree of medical and surgical certainty that petitioner's *current* complaints of left shoulder pain are not causally related to the work-related accident on October 13, 2009, and that petitioner is not a candidate for a third arthroscopic surgery to his left shoulder. (Italics added)

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision with regard to issue (F) "Is petitioner's current condition of ill-being causally related to the injury?," the Arbitrator makes the following findings of fact and conclusions of law:

Petitioner was diagnosed with rotator cuff tears, impingement syndrome and adhesive capsulitis. Despite exhaustive conservative treatment and two surgical procedures, petitioner currently suffers from the same symptoms and ailments. He has discomfort to the left shoulder particularly with abduction above shoulder level and with rotation. He has deficits in strength and range of motion in his left shoulder.

Dr. Morgenstern authored a report on November 3, 2010. Dr. Morgenstern opined that petitioner's left shoulder injury, which entailed a rotator cuff tear with impingement syndrome of the left shoulder, was a direct result of the petitioner's work-related motor vehicle accident on October 13, 2009 when he was driving a CTA bus.

Dr. Morgenstern has diagnosed petitioner with left shoulder impingement syndrome with multiple undersurface rotator cuff tears.

Dr. Silver examined the petitioner on March 6, 2013 and diagnosed severe frozen shoulder – adhesive capsulitis with severe rotator cuff impingement persisting. He further reviewed petitioner's January 14, 2013 MRI and found multiple partial thickness tears of his rotator cuff. Both Dr. Morgenstern and Dr. Silver are currently recommending surgical intervention.

The Arbitrator finds that petitioner's credibility was bolstered by his admission that he did not aggravate his left shoulder condition as a result of the December 2, 2012 fire hydrant incident. The Arbitrator therefore finds that this is evidence that petitioner is not prone to exaggerating the facts or his symptoms, despite Dr. Nicholson's February 20, 2013 opinion that petitioner's pain behavior is somewhat out of proportion.

In his February 20, 2013 report, Dr. Nicholson wrote that in order to get petitioner back to work, he is going to need concerted and organized care, i.e., non-steroidal anti-inflammatory medication and some physical therapy to see if he responds appropriately.

It is true that when Dr. Nicholson examined petitioner on April 18, 2012, he found him to be at MMI. Two days later, Dr. Morgenstern released petitioner to his regular work duties as a bus driver, and indicated that he should follow up p.r.n.

The Arbitrator takes judicial notice that petitioner's job requires him to repetitively turn a large steering wheel while navigating the streets of Chicago.

The Arbitrator finds the opinions of Doctors Morgenstern and Silver to be more credible than those of Dr. Nicholson.

In the absence of any evidence of an accidental injury subsequent to October 13, 2009, that would break the causal chain, the Arbitrator finds that petitioner's current condition of ill-being is causally related to the accident of October 13, 2009.

In support of the Arbitrator's decision with regard to issue (L) "What temporary benefits are in dispute? TTD," the Arbitrator makes the following findings of fact and conclusions of law:

Respondent shall pay petitioner temporary total disability benefits of $716.53 per week for 116-3/7 weeks, commencing October 14, 2009 through October 20, 2009, August 2, 2010 through April 24, 2012 and December 19, 2012 through June 12, 2013, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $57,091.27 for temporary total disability benefits that they have paid.

Petitioner testified that he has been off of work since December 19, 2012. Petitioner's testimony was credible and supported by the medical records and reports of Dr. Morgenstern and Dr. Silver. Dr. Morgenstern examined the petitioner on December 19, 2012 and took him off of work. He further instructed petitioner to remain off of work in subsequent visits on January 23, 2013 and February 6, 2013. Dr. Silver examined the petitioner on March 6, 2013 and recommended surgical intervention. Dr. Silver opined that petitioner was temporarily disabled pending further surgical treatment, lacking which he will be permanently disabled.

In support of the Arbitrator's decision with regard to issue (K) "Is petitioner entitled to any prospective medical care?," the Arbitrator makes the following findings of fact and conclusions of law:

The Arbitrator concludes that petitioner is entitled to further medical treatment based upon the opinions of both Dr. Morgenstern and Dr. Silver. Respondent is ordered to approve and pay for the surgical intervention, as prescribed by Dr. Ronald Silver along with his post-operative recommendations, including use of a home continuous passive motion machine and ice unit, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

In support of the Arbitrator's decision with regard to issue (M) "Should penalties or fees be imposed upon respondent?," the Arbitrator makes the following findings of fact and conclusions of law:

As respondent relied on the opinions of Dr. Nicholson and as there was some evidence to indicate that petitioner may have sustained an intervening accident, the Arbitrator finds that respondent did not act unreasonably or vexatiously in denying benefits. Therefore, the Arbitrator finds that neither penalties nor attorneys' fees are warranted in this case.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Tena,
Petitioner,

vs.

NO. 13 WC 21485

14IWCC1136

Airtite Contractors,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, and prospective medical expenses and being advised of the facts and law affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on December 10, 2013 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.

14IWCC1136

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 $16,800.00. 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: DEC 2 6 2014

Daniel R. Donohoo

Ruth W. White

Charles J. DeVriendt

o-12/17/14
drd/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

TENA, JOSE
Employee/Petitioner

Case# **13WC021485**

AIRTITE CONTRACTORS
Employer/Respondent

14IWCC1136

On 12/10/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% 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:

0222 GOLDBERG WEISMAN & CAIRO LTD
PAUL RODRIGUEZ
ONE E WACKER DR 39TH FL
CHICAGO, IL 60601

0560 WIEDNER & McAULIFFE LTD
BRIAN J KOCH
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

13WC21485

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)

Jose Tena
Employee/Petitioner

v.

Airtite Contractors
Employer/Respondent

Case # 13 WC 21485

14IWCC1136 Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ketki Steffen**, Arbitrator of the Commission, in the city of **Chicago**, on **October 9, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. ☐ What was the date of the accident?

E. ☒ Was timely notice of the accident given to Respondent?

F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?

G. ☐ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. ☐ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

14IWCC1136

FINDINGS

On the date of accident, **June 21, 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 **$77,684.40**; the average weekly wage was **$1,652.86**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **1** 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 $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of $ under Section 8(j) of the Act.
Neither side have submitted AMA guidelines.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $1,101.90/week for 15 & 1/7 weeks, commencing June 25, 2013 through October 9, 2013, as provided in Section 8(b) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

Prospective Medical Treatment
The Respondent shall pay for prospective medical treatment for Petitioner

RULES REGARDING APPEALS UNLESS a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

14IWCC1136

Arb. Ketki Steffen
Signature of Arbitrator

12-9-13
Date

ICArbDec19 (b)

DEC 10 2013

ARBITRATOR'S FINDINGS OF FACT

Procedural Background

This claim was heard on a Sec. 19b request on October 9, 2013 with both parties being represented by their respective counsels. The parties entered into several stipulations in writing and said document is admitted into evidence as Arbitrator's Exhibit 1 ("AX1"). In summary, the issues presented at trial are whether Petitioner was involved in a work related accident, if it was causally connected to employment and if the medical bills are related to such accident.

Factual Summary

Petitioner, Jose Tena ("Petitioner") is a 48 year old male who had worked as a carpenter for the respondent for about a year. Petitioner testified that on the date of the accident, Friday, June 21, 2013, he was working on a project at the Loyola Hospital job site with a subcontractor, Airtight Contractors. He testified that he was working alongside Francisco Vrduco and Rafael Guerrero. Their duties were to load drywall from the 1st floor onto a scissor lift ("lift") and to unload the same on to the second floor. Petitioner stated that when he and Rafael Guerrero were loading the drywall on the lift, they had several pieces (six) of drywall loaded. Mr. Vrduco stood on the second floor to receive the drywall. The seventh sheet of drywall hit the top during loading, dropped and hit his hard hat. This caused him to twist his left shoulder and the drywall hit him on his hard hat, which in turn, hit his teeth. (R. 19) He testified that he had started work around 7 a.m. that morning and that the incident occurred around 9 a.m. He reported the incident to Santino Medina ("Santino") and to Greg Marcus from Power Construction and told them that the drywall had hit his hard hat which hit his teeth and that he had also injured his shoulder (R. 20).

Petitioner further explained during his testimony that he had lied Greg Marcus, the supervisor and told him that he was working with Santino that morning. Petitioner stated that Santino pressured him into the lie because Santino would have gotten into trouble for not working with Petitioner. (R. 21) According to Petitioner, Santino did this because he (Santino) felt that he would get in trouble for letting Petitioner work with an individual who did not speak English well. Petitioner also testified that, prior to the accident; he had worked infrequently with Mr. Guerrero and also with Miguel Perez.

Petitioner testified that after the accident, he sought medical attention around 11:15 a.m. at Peterson Clinic in Chicago. Petitioner's Exhibit 1 (PX1), admitted into evidence documents the medical history and visit with Dr. Jose Castellanos as follows:

Patient works for Power Construction Company. He indicated that he was at a job site. He and another individual were moving drywall. Apparently the drywall slipped out of his hands. The Drywall fell onto his hard hat. As it[fell] forward, he attempted to catch the drywall. There was some sort of shearing or rotational force on his upper left extremity. Additionally, he injured his right wrist and hand. He also had a tooth that became loose at the time that the drywall or hardhat hit his face. See Pet. Ex 1.

Dr. Castellanos diagnosed Petitioner with left shoulder impingement syndrome, a left wrist contusion and a loose tooth, and then returned Petitioner to work with a restriction on climbing and on performing overhead work.

Petitioner testified that he returned to light duty work on June 24, 2013 but was notified by the Respondent that light duty work was no longer available. AX1 documents the stipulation between the parties that Petitioner has been off work since June 25, 2013 to present.

For follow up medical attention, Petitioner sought medical treatment on July 8, 2013 with his Primary Care Physician, Dr. Javara Abelardo, who referred Petitioner to an orthopedic doctor and to a dentist. Petitioner's Exhibit 2 ("PX2") documents these medical records and history. At the initial visit, Dr. Abelardo documents Petitioner's accident as occurring when he was at work

lifting a drywall. Records show, Petitioner stated that the drywall fell in his face hit and knocked his front tooth and that Petitioner was unable to lift his left arm. The notes also indicate that Petitioner reported that the injury occurred at 9 a.m. on June 21, 2013 and that on July 18, 2013, Dr. Abelardo took Petitioner off work until further notice. PX2

Petitioner testified that Dr. Abelardo referred him to Dr. Yanan for dental treatment. Petitioner, however, sought dental treatment with Dr. Frank Munoz who recommended an extraction/bone graft and a subsequent tooth implant procedure. Petitioner's Exhibit 3 ("PX3").

On August 9, 2013, Petitioner also sought treatment with Dr. Guido Marra at Northwestern Hospital. Petitioner's Exhibit 4 (PX4) admitted into evidence documents the following history:

[Petitioner] reports on June 21, 2013 he was lifting a drywall and it fell and hit him on the head and he twisted shoulder. PX4

Dr. Marra diagnosed Petitioner with a wrist sprain and impingement syndrome and recommended a six-week course of physical therapy. Petitioner testified to attending physical therapy in Park Ridge, Illinois and that on a follow up appointment, Dr. Marra, recommended an operative procedure in the left shoulder. (PX4)

On cross examination, Petitioner acknowledged that he had lied to Mr. Marquez about who had been working with him that morning. (R. 35) He also admitted that while he did fill out an accident report (Respondent's Exhibit 1, "RX1") he did not mention his loose tooth but that he told the clinic doctor about the tooth. (R. 36) Petitioner also agreed that RX1 simply indicated that he, Petitioner, was injured in his left shoulder when he was lifting drywall and that he waited till break at 10:30 a.m. to report it. (R. 40) He further agreed that RX1 did not state that the drywall hit his hat. (R. 41)

On redirect exam, Petitioner explained that he had damaged his left shoulder and left canine during this accident. (R. 42-43) He also demonstrated physically that his injured left canine had subsequently fallen out two weeks after the accident. (R. 48). He also explained that although he did not immediately tell his supervisors about the injured tooth, the Peter Clinic Doctor had noticed the injury (cut) to his mouth and noted that his canine had come loose. (R. 48) Petitioner also reiterated that prior to this accident he had no trouble with this left shoulder or tooth. (R. 50).

During Respondent's case in chief, Respondent called two witnesses. Miguel Perez testified to being employed by Respondent as a carpenter. He stated that he had worked with Petitioner on the job site for approximately two to three weeks prior to the accident. He stated that he never heard Petitioner complain about his left shoulder or any drywall hitting him. However, Mr. Perez did not know if he had worked with the Petitioner on the date of accident. On cross-examination, Mr. Perez admitted that he did not recall any details of the incident or if the Petitioner had ever left the job the job site before 3 p.m.

Respondent's second witness, Francisco Vrduco testified that he also worked as a carpenter with the Petitioner and Mr. Guerrero on the job site on the date of accident. He testified that the workday started at 7 a.m. that morning. He stated that Petitioner never lifted sheets of drywall on the date of accident. While he and Mr. Guerrero lifted the drywall, Petitioner would simply just hold the cart and then operate the lift as he and Mr. Guerrero went to the second floor to unload the drywall. On cross-examination, Mr. Vrduco testified to remembering the precise date of accident. He insisted that the on that day, Petitioner worked the entire day till 3:30 p.m. and did not leave the job site early for any reason.

ARBITRATOR'S CREDIBILITY ASSESSMENT AND CONCLUSIONS OF LAW

The evidentiary hearing consisted of testimonial evidence from Petitioner, Respondent's witnesses, Miguel Perez and Francisco Vrduco and documentary evidence in the form of medical records from Peterson Occupation, Dr. Abelardo Jarava, Frank Munoz, DDS from the Northwestern Faculty Foundation. Additionally, Respondent also introduced witness statements from Petitioner, dated 6/21/13; an incident investigation report dated 6/21/13 and a witness statement from Miguel Perez, dated 6/24/13.

In evaluating all the relevant evidence, Petitioner's testimony is most credible and supported by the medical records and documents. Petitioner, in spite of a slight language barrier was clear and credible regarding the date, time and nature of accident. He described how the drywall was being loaded, how and where it fell and the injury to the left shoulder and left canine that it caused him. His testimony is supported by an immediate outcry or report to two supervisors as well as a written report of the incident. Although his incident report, RX1 does not contain details or how the accident happened, it does match up with the date and general facts as he described in court. RX2, the incident investigation report similarly supports the date, time, and location of accident and supports that the Petitioner reported a left shoulder strain.

RX3, the witness statement of Miguel Perez, as well his testimony bear little or no weigh on the case. His testimony in court is that he does not remember if he worked with Petitioner on the day of the accident. His written statement, RX3, prepared three days after incident, by a Jared Rogers, is in English, without any indication that a Spanish interpreter was used. It further clearly states that Miguel Perez only worked with Petitioner up thru 6/12/13 (several days before the incident).

The testimony of Respondent witness, Francisco Vrduco, contradicts the Petitioner's account of the accident in that, Vrduco testified that Petitioner was not injured that day and

worked his full shift till 3:30 p.m. and never complained or left for medical attention. In order to give credit to this account of the event, a fact finder would have to disregard the Respondent's own incident reports prepared on the date and time of the incident as well as the medical documents from the Peterson Clinic which clearly show that Petitioner was seen and treated for precisely the same injuries that he alleges occurred during the course of his employment. Additionally, the explanation of how Petitioner injured his left canine and how Dr. Castellanos discovered and documented this particular injury is also credible. There is no logical explanation of how witness Vrduco could have consistently seen Petitioner during the entire day while Petitioner was being treated by a medical doctor with supporting medical documentation. In comparison, the Petitioner's testimony regarding the work accident is credible and supported by the medical records and documents from his workplace.

Therefore, Arbitrator further finds that the injury and diagnosis of left shoulder impingement syndrome, left wrist contusion and a loose tooth are causally connected to said accident and that the accident arose out of and is related to Petitioner's employment.

Is Petitioner entitled to reasonable and necessary medical benefits?

Having found in Petitioner's favor on the issues of accident, notice and causation, the Arbitrator hereby has deferred ruling on the issue of unpaid medical bills and reasonable and necessary medical care pursuant to agreement and stipulation by both sides. (AX1).

Additionally, the Arbitrator incorporates these findings and rules that Petitioner is entitled to prospective medical care for his shoulder and wrist injuries as well as the recommended dental treatment.

Is Petitioner entitled to temporary total disability benefits?

Having found in Petitioner's favor on the issues of accident and causation, and in reliance on Petitioner's credible testimony and medical treatment notes, the Arbitrator finds that

Petitioner was temporarily totally disabled from for 15 and 1/7th week of lost time covering the period from 6/25/13 to 10/9/19. Petitioner still suffers from these injuries and has been placed on restricted light duty by his doctor. Petitioner has testified that Respondent has not offered him restricted work and Respondent has not refuted this testimony.

Therefore, the Arbitrator finds that Petitioner is entitled to Temporary Total Disability payments.

Ketki Steffen

Signature of Arbitrator

12-9-13

Date

STATE OF ILLINOIS)
)
SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Terry Noonan,
Petitioner,

vs. NO: 08 WC 18511

City of Chicago,
Respondent.

14IWCC1137

DECISION AND OPINION ON REMAND
FROM THE CIRCUIT COURT

This case appears on Remand from the Circuit Court of Cook County, Illinois. The underlying case was tried before Arbitrator O'Malley on January 18, 2012. Petitioner alleged that he suffered injuries to his right wrist on March 31, 2008 as a result from a fall from his office chair while reaching for a pen on the floor. On April 20, 2012, Arbitrator O'Malley issued his decision denying Petitioner's claim for compensation. Arbitrator O'Malley found Petitioner failed to prove he sustained an accident that arose out of his employment with Respondent. The Arbitrator further found that Petitioner failed to prove that his current condition of ill-being, with respect to his right wrist, was causally related to the alleged accident.

Petitioner timely appealed the Arbitrator's Decision to the Commission, which entered its Decision and Opinion on Review on December 26, 2012. The Commission, after review of the record as a whole, considering the issues, and being advised of the facts and law, affirmed and adopted the Decision of the Arbitrator.

Petitioner timely appealed the Commission's Decision to the Circuit Court of Cook County, Illinois. The Honorable Judge Robert Lopez Cepero issued an Order and Opinion on March 14, 2014. Judge Cepero ordered the December 26, 2012 Decision of the Illinois Workers' Compensation Commission reversed and remanded. The Court noted the issue before it was whether the Commission's determination that Plaintiff failed to prove he sustained accidental injuries arising out of his employment on March 31, 2008 was against the manifest weight of the evidence. The Court made the following findings in reaching its Decision:

14IWCC1137

In reaching its conclusion, the Commission stated that Plaintiff "failed to prove that the simple act of sitting in a rolling chair and reaching for a pen exposed him to an increased risk of injury that was beyond what members of the general public are regularly exposed to[sic]." While this is a wonderful recitation of the standard applied to mental-physical injuries, it is inapplicable to the case at bar. See *Baggett v. Indus. Comm'n, 201 Ill. 2d 187 (2002)* (In a mental-physical injury case a claimant need only prove that the usual stress of the workplace was greater than the stress experienced by the general public.).The present matter does not present a mental-physical injury.

The Commission also noted that there was no testimony to the effect that the chair in question was defective, that Plaintiff was somehow in a hurry or under pressure to get a particular project completed, or that the floor or Plaintiff's workspace was somehow contributory to the fall. This is neither a products liability case nor a negligence case. These facts are irrelevant to the question of whether an injury arose out of and in the course of Plaintiff's employment.

For some reason, the Commission found it noteworthy that there was no testimony as to the type of floor that was involved. The Court is unsure how the type of floor affects the outcome of this case. Plaintiff showed that he sustained an injury which arose out of and in the course of his employment with Defendant. Whether this injury occurred on carpeting or on a tile floor is irrelevant to the conclusion that an injury arose out of and in the course of Plaintiff's employment.

For these reasons, the Court reverses the Commission's Decision and remands it for a calculation of the benefits owed to Plaintiff.

This matter, on remand, came before the Commission on December 19, 2014. The facts as contained in the Record are set out below for clarification of the Commission findings and determinations.

1. Petitioner was employed as a clerk for the City of Chicago on March 31, 2008. Petitioner testified his official title was "motor truck driver" but, due to restrictions from a prior workers' compensation claim, he was unable to continue in that position and was assigned a desk clerk job by Respondent. (Tr. 12). Petitioner's duties on March 31, 2008 were clerical in nature and involved filling out truck driver sheets that consisted of truck numbers and information about units. (Tr. 13).

2. On March 31, 2008, Petitioner had been working as a clerk for Respondent for three months. (Tr. 13-14). On that date, Petitioner testified he was filling out a truck sheet and made a mistake. He rose from his chair to get a new form, and, upon sitting back down, knocked a pen to the floor with his elbow. (Tr. 14). Petitioner testified he reached down to pick up the pen and, as he did so, his chair moved out from under him, and he struck his right palm on the floor bracing himself from the fall. (Tr. 14).

3. Petitioner testified that the chair he was sitting in was exactly like the court reporter's chair at hearing, a standard rolling desk chair. (Tr. 14, 39-40). Petitioner confirmed that the chair was on a regular surface and there was no slope or slant to the floor. (Tr. 40). Petitioner confirmed that, in his mind, the fall was "ordinary." (Tr. 40). No further evidence regarding the circumstances of the fall or the office environment is contained in the record.

The Arbitrator found, and the Commission affirmed, that there was no evidence that the chair in question was defective, that Petitioner was somehow in a hurry or under pressure to get a particular project completed, or that the floor or even his work space was somehow contributory to the fall. The Arbitrator noted that, indeed, there was not even any testimony as to the type of floor involved, whether carpeted or not.

The Arbitrator concluded that, "Based on the description [of the accident], and absent any extenuating circumstances, the Petitioner failed to prove that the simple act of sitting in a rolling chair and reaching for a pen exposed him to an increased risk of injury that was beyond what members of the general public are regularly exposed to. Accordingly, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of his employment on March 31, 2008. As a result, Petitioner's claim for compensation is hereby denied." The Commission affirmed the Arbitrator's findings.

The purpose of the Illinois Workers' Compensation Act is to protect an employee from risks and hazards which are peculiar to the nature of the work he is employed to do. *Orsini v. Industrial Comm'n, 117 Ill. 2d 38, 44, 509 N.E. 2d 1005. 109 Ill. Dec. 166 (1987).* Illinois has rejected positional risk. For an injury to be compensable, more is required than the fact of an occurrence at an employee's place of work. *Greater Peoria Mass Transit District v. Industrial Comm'n, 81 Ill. 2d 38, 43, 405 N.E. 2d 796, 39 Ill. Dec. 817 (1980).*

An employee's injury is compensable under the Act only if it meets a two-pronged test: (1) it must occur in the course of employment, and (2) it must arise out of the employment. 820 ILCS 305/1(d) (2011). It is the burden of the employee to establish by a preponderance of the evidence that both elements were present at the time of the accident's occurrence. *Illinois Bell Telephone Co. v. Industrial Comm'n, 131 Ill. 2d 478, 483, 546 N.E. 2d 603, 137 Ill. Dec. 658 (1989); Rodin v. Industrial Comm'n, 316 Ill. App. 3d 1224, 1226, 738 N.E. 2d 955, 250 Ill. Dec. 486 (2000).* Whether an injury arose out of and in the course of one's employment is a factual matter for the Commission to resolve, and its findings in that regard will not be set aside on appeal unless it is against the manifest weight of the evidence. *Knox County YMCA v. Industrial Comm'n, 311 Ill. App. 3d 880, 885, 725 N.E. 2d 759, 244 Ill. Dec. 286 (2000).*

In this case, it is not disputed that the Petitioner's injury was sustained in the course of his employment. He was at his work station during normal work hours at the time of the accident. However, the Commission found Petitioner failed to meet prong two of the test as he failed to prove that his accident arose out of his employment. For an injury to arise out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment. *Illinois Institute of Technology Research Institute v. Industrial Comm'n, 314 Ill. App. 3d 149, 162, 731 N.E. 2d 795, 247 Ill. Dec. 22 (2000)* (quoting *Orsini, 117 Ill. 2d at 45*). 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. *Illinois Institute of Technology Research Institute, 314 Ill. App. 3d at 162.*

Employment risks include the obvious kinds of industrial injuries and are universally compensated. *Illinois Institute of Technology Research Institute, 314 Ill. App. 3d at 162.* Employment risks are special risks or hazards unique to the work or work environment. *Springfield Urban League v. Ill. Workers' Comp. Comm'n, 2013 IL App (4th) 120219WC, ¶31, 990 N.E. 2d 284, 371 Ill. Dec. 384.* Personal risks include nonoccupational diseases, injuries caused by personal infirmities, and injuries caused by personal enemies. *Illinois Institute of Technology Research Institute, 314 Ill. App. 3d at 162-163.* Personal risks are not compensable under the Act. Injuries resulting from neutral risk 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 Comm'n, 407 Ill. App. 3d 1010, 1014, 944 N.E. 2d 800, 348 Ill. Dec. 559 (2011).* Such an increased risk may be either qualitative, such as some aspect of the employment which contributed to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public. *Springfield Urban League, 2013 IL app (4th) 120219WC at ¶27 (quoting Potenzo v. Ill. Workers' Comp. Comm'n, 378 Ill. App. 3d 113, 117, 881 N.E. 2d 523, 317 Ill. Dec. 355 (2007)).* A Petitioner bears the burden of proving by a preponderance of the evidence the elements of his claim. *Baldwin v. Illinois Workers' Compensation Comm'n, 409 Ill. App. 3d 472, 477, 949 N.E. 2d 1151, 351 Ill. Dec. 56 (2011).*

In this case, it is not disputed that the Petitioner's injury was sustained in the course of his employment. The Record establishes that the fall occurred on Respondent's premises during Petitioner's regular work hours. Thus, our analysis turns to whether Petitioner sustained his burden of establishing that his injuries also "arose out of" his employment with Respondent. Petitioner argues that he was in the performance of his duties for the benefit of his employer when he bent to retrieve a pen and fell from his chair, sustaining injury to his right hand. Petitioner asserts that retrieving the pen created a risk directly associated with his employment and, therefore, an employment risk, not a neutral risk for which he must prove he was exposed to a greater degree than the general public.

Petitioner argues that pursuant to *Torbeck v. Industrial Comm'n*, an activity that occurs during the workday is covered if it is required or is conducted for the benefit of the employer. *49 Ill. 2d 515, 516, 276 N.E. 2d 344 (1971).* The issue in *Torbeck* was whether the claimant's injuries, which she suffered when she was hit by a car during her lunch hour, were sustained in the course of her employment.*49 Ill. 2d at 515-516.* Petitioner's reliance on *Torbeck* is misplaced as the issue there was whether an activity that occurred during the workday for the benefit of the employer is sustained "in the course of" employment, not whether such an accident "arose out of" employment.

Petitioner cites three Commission decisions in furtherance of his argument that his injury arose from a risk directly associated with his employment. In the first, *Gossett v. Hoopeston Memorial Hospital, 5 IWCC 257*, the petitioner was a hospital receptionist who was required to get up from her chair regularly to assist patients at the counter. The petitioner attempted to sit back down after assisting a patient when her chair rolled, causing injury. While *Gossett* does

involve an injury involving a rolling chair, it is distinguishable from the case at bar, as the Arbitrator in *Gossett* cited factors that led to the claimant's work activities exposing her to a greater risk of harm than the general public. The chair was on wheels and sat on a tile floor which enhanced her risk of injury, as the chair was much more likely to roll out from under a person on tile flooring. The petitioner was also required to regularly stand up to assist patients. In the case at bar, there is no evidence that Petitioner was on any surface or involved in any activities that enhanced his risk of injury beyond that of a person sitting in an ordinary rolling office chair.

Second, Petitioner cites *Bush v. Charles McDuffee Company, 8 IWCC 6410*, in which the Petitioner sustained a compensable injury after she attempted to sit back down in her chair after reaching for an item in the hutch above her desk. Again, while *Bush* sustained an injury involving a rolling chair, it is distinguishable from the case at bar. In *Bush*, the claimant was working in an office with a concrete floor with a small dip in it. The Arbitrator found that the combination of the wheeled office chair and the concrete floor created an increased risk that the chair would roll when she got up. In the instant case, the chair did not roll from Petitoner as he sat, and there was no evidence of the type of flooring under his chair or any defect in the floor. Petitioner was not exposed to the increased risk of injury faced by the claimant in *Bush*.

The third and final case cited by Petitioner in furtherance of his argument that the injury arose from a risk associated with his employment is *Shearill v. Ill. Vehicle Insurance Agency, 6 IWCC 737*. Petitioner in that case was a cashier required to sit in a tall chair on rollers when she tipped over. The arbitrator found that while the risk of sitting in a chair is shared by all, Petitioner was exposed to a greater risk because the chair was taller, on rollers, and she had to sit in the chair for an extended period of the day. The arbitrator found, and the Commission affirmed, that Petitioner's increased risk in *Shearill* did not arise from the wheeled chair alone, but by the combination of the long hours sitting in the chair coupled with the unique risk presented by the height of the chair.

While Petitioner argues that *Gossett*, *Bush*, and *Shearill* show that retrieving a pen used to fill out forms created a risk directly associated with his employment, each of the cited Commission cases found the Petitioner sustained a compensable injury only after proving that the Petitioner was subject to the risk of injury from a neutral risk to a greater degree than the general public and introduced evidence to support that conclusion. See *First Cash Fin. Servs. v. Industrial Comm'n, 367 Ill. App. 3d 102, 853 N.E. 2d 799, 304 Ill. Dec. 722 (1st Dist. 2006)*(Employment related risks associated with injuries sustained as a consequence of a fall are those to which the general public is not exposed such as the risk of tripping on a defect at the employer's premises). See also *Lanahan v. Alexian Brothers Medical Center, 2006 Ill. Wrk. Comp. LEXIS 297, 6 IWCC 305* (Petitioner's injury sustained when falling from a chair was tied to the condition of the work environment, i.e., the style of the wheeled chair and sloped flooring at the computer station), *Springfield Urban League, 2013 IL App (4th) 120219WC* (claimant established sufficient proof of a special risk or hazard through testimony describing the kinked condition of the mat she tripped over to prove her injury arose out of her employment).

In this case, Petitioner fell and sustained injury when the chair he was sitting in moved out from under him while he was retrieving a pen on the floor. There is no evidence that the risk of this type of injury is distinctly associated with Petitioner's employment with Respondent. Petitioner presented no evidence that his work environment or job duties somehow increased the risk that he would fall from his ordinary office chair and sustain injury to any greater degree than that to which other people are exposed to the same hazard. See *Deem v. State of Illinois, Illinois State Police, 2005 Ill. Wrk. Comp. LEXIS 1010, 5 IWCC 985* (Petitioner sustained an injury directly related to Petitioner's employment when she rose to retrieve a pen from under her desk as the work station setup created a unique hazard, as the space was confined and the desk had been improperly assembled, causing the keyboard tray to be higher than normal). As such, we are not presented with a risk directly associated with Petitioner's employment. Likewise, this case does not involve a personal risk as there is no evidence that Petitioner's fall was the result of any personal defect or weakness. Having eliminated the first two types of risks, we find that the fall may be properly categorized as resulting from a neutral risk. Resolution of this appeal therefore centers upon whether Petitioner presented evidence that he was exposed to a risk of injury to a greater degree than that of the general public.

Petitioner does not present any evidence that he was exposed to a greater risk of falling and sustaining injury than the general public. He does not present any evidence that the chair or work area was defective or hazardous in any way. See *Dorothy Bailey v. Cook County Department of Corrections, 2012 Ill. Wrk. Comp. LEXIS 394, 12 IWCC 399* (Petitioner failed to provide any evidence that the desk she was reaching across was defective or exceptionally large or that Respondent required the items she was reaching for when she fell from her chair be placed at a distance or height that reaching for them became hazardous. Petitioner also failed to provide any evidence that there was a defect in the chair or the floor upon which she sat.). In addition, Petitioner presented no evidence regarding the frequency to which he had to retrieve items from the floor while seated in his office chair. By itself, the act of sitting in a wheeled office chair and bending over does not establish a risk greater than that faced by the general public. See *First Cash Fin. Servs., 367 Ill. App. 3d at 105* (holding that walking across a floor at the employer's place of business does not establish a risk greater than that faced by the general public).

In the Illinois Supreme Court case *Brady v. Louis Ruffalo & Sons Construction Co., 143 Ill. 2d 542, 578 N.E. 2d 921, 161 Ill. Dec. 275 (1991),* the petitioner was working at a designated location within respondent's building when a third-party driver struck the building with a vehicle and injured Petitioner. In *Brady*, the Court found there was no evidence to demonstrate the employment environment exposed the employee to an increased risk beyond that to which the general public is subjected. *143 Ill. 2d at 550-551.* Likewise, in this case, the Arbitrator and Commission agreed with Respondent that the risk at issue in this case is neutral in nature, and Petitioner failed to establish that he was subject to the risk of injury from a neutral risk to a greater degree than the general public. Petitioner was sitting in an ordinary office rolling chair on a flat surface when he fell while reaching for a pen on the ground. The Petitioner in this case did not present any evidence that his employment environment exposed him to an increased risk of injury under the circumstances presented. For instance, the Petitioner did not produce any evidence or testimony that there was a defect in the flooring or chair or that the chair or workstation was unique in any manner and contributed to his injury.

In the Illinois Supreme Court case, *The Board of Trustees of the University of Illinois v. Industrial Comm'n, 44 Ill. 2d 207, 254 N.E. 2d 522 (1969),* the Court upheld the trial court's reversal of a Commission decision awarding benefits to a teacher's assistant who injured his back while turning in his chair. The Court found that there was no suggestion that the chair was defective or unusual in any way, and his injury occurred as he simply turned in his chair. *Board of Trustees of the University of Illinois, 44 Ill. 2d at 214-215.* See also *Hopkins v. Industrial Comm'n, 196 Ill. App. 3d 347, 351, 553 N.E. 2d 732, 143 Ill. Dec. 25 (1990)* (the court found there was no suggestion that the chair was defective or unusual in any way or that the deputy's holster got caught in the chair as he turned causing injury to his back).

In *Caterpillar Tractor v. Industrial Comm'n, 129 Ill. 2d 52, 58, 541 N.E. 2d 665, 667, 133 Ill. Dec. 454 (1989),* the Illinois Supreme Court found that there was no hazard or defect in the premises to cause injury and, further, traversing curbs was the same risk as that of the general public and therefore the claimant's fall did not arise out of his employment. The Court distinguished *Caterpillar* in *Nascote Industries v. Industrial Comm'n, 353 Ill. App. 3d 1056, 820 N.E. 2d 531, 289 Ill. Dec. 755 (2004).* In *Nascote,* the court found that Petitioner sustained injury when she stepped out of a rack of trimmed bumpers as part of her job duties on a route prescribed by her job and onto the floor and that the injury occurred as the result of her attempting to hurry and keep pace with the production line. The court in *Nascote* distinguished *Caterpillar* as the employee in Caterpillar was not required, as part of his job duties, to continuously traverse the curb. *Nascote, 353 Ill. App. 3d at 1061.*

The Circuit Court recited facts of the case on page one of its March 14, 2014 Order and Opinion. The Court noted that Petitioner testified that on March 31, 2008, he was sitting down in his chair filling out truck work sheets when the pen he was using rolled off his desk and, as he leaned over to retrieve it, his wheeled chair slid out from underneath him, forcing him to brace his fall and causing injury to his right hand. The Circuit Court noted that the Petitioner testified that the chair he was sitting in had wheels. No further facts regarding the work environment or the circumstances of the injury were mentioned in the Circuit Court opinion. The Circuit Court went on to find in its Discussion that the requirement that Petitioner be exposed to an increased risk of injury beyond what members of the general public are exposed to was inapplicable to the case at bar as the standard only applies to mental-physical injuries. The Court further found that questions regarding defects in the chair or floor, any stress Petitioner was under, the condition of Petitioner's workspace, or the type of flooring on which the chair was situated were irrelevant to the issue of whether an injury arose out of Petitioner's employment, as this was not a products liability or negligence case. Without further comment or reasoning, the Circuit Court found that the Commission's decision was against the manifest weight of the evidence, and that Petitioner proved that he sustained an injury which arose out of and in the course of employment with Respondent. For these reasons, the Court reversed the Commission's decision.

The Commission concludes the Circuit Court did not make any findings based on the correct legal standard in determining the Commission's decision finding Petitioner failed to prove he sustained an injury arising out of his employment was against the manifest weight of the evidence. As the Circuit Court mistakenly applied erroneous legal standards in contradiction of the Act and well established case law in determining that the Commission's December 26, 2012 Decision was against the manifest weight of the evidence, the Commission is foreclosed

14IWCC1137

from applying the Order of the Circuit Court here, as doing so would require us to depart from well established existing authority.

The Commission finds, based on the evidence contained in the record, that Petitioner failed to prove he sustained an accident that arose out of his employment with Respondent on March 31, 2008. Petitioner provided no evidence the risk of injury in the manner suffered was directly associated with or peculiar to his employment. There was no evidence presented that the setup of his workstation created a unique hazard or the job duties themselves contributed to the injury. Further, there is no evidence that Petitioner was exposed to the risk of injury to a greater degree than the general public by reason of his employment. There is no evidence that a quantitative risk existed from the time he spent bending in an office chair or that a qualitative risk existed due to defective or unusual flooring, chair, workspace set-up, or some other special risk or hazard unique to his work environment.

For the reasons set forth above, the Commission affirms and adopts the Decision of the Arbitrator denying Petitioner benefits under the Act, with additional reasoning as provided herein.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed April 20, 2012, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent shall pay to Petitioner interest under Section 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injuries.

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: DEC 2 6 2014

Daniel R. Donohoo

o-12/17/14
drd/adc
68

Charles J. DeVriendt

Ruth W. White

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bryan Grant,
Petitioner,

vs. No: 09 WC 15481

City of Peoria,
Respondent.

14IWCC1138

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and nature and extent of the permanent disability, and being advised of the facts and law, reverses the December 23, 2013 Decision of the Arbitrator, which is attached hereto and made a part hereof.

Arbitrator Stephen Mathis found that Petitioner failed to prove that he sustained an accident that arose out of and in the course of employment on August 19, 2008 and also failed to prove that his current condition of ill-being is causally related to that accident. The Arbitrator denied all benefits.

After considering the entire record, and for the reasons set forth below, the Commission reverses the December 23, 2013 decision of the Arbitrator.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner filed an Application for Adjustment of Claim under the Occupational Disease Act on April 8, 2009, claiming injury on August 19, 2008 to his body as a whole when he was exposed to carcinogins that caused his renal cancer while fighting fires within the scope and course of his employment for Respondent. AX2.

2. Petitioner testified that he had worked for Respondent since April 1990 in the roles of firefighter, engineer and fire captain.

3. On August 18, 2008, Petitioner's primary care doctor suspected he had appendicitis and ordered a CT scan of Petitioner's abdomen. The scan revealed that Petitioner was suffering from renal cancer.

4. Dr. Kelly Bewsey of Affiliated Urology Specialists removed Petitioner's right kidney on September 10, 2008. Petitioner missed 6-5/7 weeks of work following surgery and returned to work full duty.

5. Petitioner testified that he did not discuss the cause of his cancer with Dr. Bewsy.

6. Petitioner explained that Respondent provided self-contained breathing apparatuses ("SCBAs") for firefighters' protection. The firefighters wore the SCBAs when fighting structural fires, but not when fighting dumpster or car fires. Petitioner testified that the firefighters were instructed to use the SCBAs during "overhauls," when they went back over the area where the fire had been extinguished to check for hotspots, smoldering, or smoke. However, both Petitioner and the Fire Chief, Kent Tomlin, admitted that SCBAs were heavy and unwieldy and that firefighters frequently chose not to wear them during overhauls, because they were hot and tired and didn't want to carry the extra 60 pounds of equipment.

7. Petitioner offered the causation opinions of Dr. Peter Orris of Occupational Health Services Institute at the University of Illinois Medical Center. Dr. Orris not only practiced medicine, but also taught medical students at several universities and had served as the Regional Medical Officer for NIOSH. Dr. Orris testified by deposition that it was likely that Petitioner's exposure to carcinogens while working for Respondent from 1990 to 2008, when he was diagnosed with renal cancer, contributed to and was a cause of his renal cell cancer. Dr. Orris based his opinion upon Petitioner's history of exposure, the chemicals to which firefighters are exposed, the latency period of more than 20 years, epidemiological literature with respect to firefighters and kidney cancer, and his own clinical judgment and knowledge. He concluded that Petitioner is at increased risk for developing renal cancer again. PX1, pp. 23, 27.

8. Respondent countered with the causation opinions of Dr. Scott Eggener, a urologic oncologist who specialized in the care of patients with cancers of the genitals and urinary tracts. Dr. Eggener testified that renal cancer constitutes only 2% of all cancers, and 95% of renal cancer is idiopathic. He opined that there was no causal connection between Petitioner's work as a firefighter and his development of kidney cancer. Dr. Eggener testified in his deposition that the most common factors for developing kidney cancer are smoking, obesity and hypertension. Petitioner didn't smoke, but he was overweight and battled hypertension. Dr. Eggener rejected Dr. Orris's reliance on epidemiological studies linking firefighters' exposure to the development of renal cancer and opined that the studies lacked good exposure assessment. RX2, p. 33.

9. Petitioner relied in part upon the presumption found in Section 1(d) of the Occupational Disease Act.

> 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, . . . and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment.

820 ILCS 310/1(d). An identical provision appears in Section 6(f) of the Workers' Compensation Act. 820 ILCS 305/6(f). Petitioner filed his Application for Adjustment of Claim under the Occupational Diseases Act, as he alleged his cancer was caused or aggravated by the gradual insidious process of exposure to carcinogenous chemicals during his firefighting activities.

10. Arbitrator Mathis found that, despite the presumption of Section 1(d) of the Occupational Disease Act or Section 6(f) of the Workers' Compensation Act, Petitioner failed to prove that he suffered an accident that arose out of and in the course of his employment as firefighter. The Arbitrator further found that Petitioner failed to prove that his current condition of ill-being is causally related to his alleged work accident. The Arbitrator based his decision upon the expert witnesses' testimony and the articles from medical literature presented in support thereof.

Petitioner timely appealed the Arbitrator's denial of benefits to the Commission. After considering the entire record, the Commission reverses the Arbitrator's findings with respect to accident and causal connection.

Accident/Causal Connection

The Occupational Disease Act provides in Section 1(d) a rebuttable presumption that any condition, specifically including cancer, resulting in any disability to the employee, specifically including firefighters, shall be rebuttably presumed to arise out of and in the course of the employment. An identical presumption is established in Section 6(f) of the Workers' Compensation Act. Therefore, a statutory presumption arises in this case that Petitioner's condition arose out of and in the course of his firefighting activities. Section 1(d) further provides a rebuttable presumption that the cancer is causally connected to the exposures that occurred during Petitioner's firefighting activities. The Commission finds that, pursuant to Section 1(d) of the Occupational Disease Act, Petitioner presented a prima facie case for both accident and causal connection. The issue becomes then whether Respondent succeeded in rebutting the statutory presumption.

Both parties offered extremely persuasive expert testimony. Petitioner's expert, Dr. Orris opined that even though Petitioner's obesity and hypertension probably contributed to cause his renal cancer, his exposure to "bad air" in the performance of his duties as firefighter also contributed to his condition. Respondent's expert, Dr. Eggener, testified that Petitioner's cancer was caused by his obesity and hypertension, not by exposure to carcinogens during the performance of his firefighting duties. Both experts offered numerous medical studies in support

of their causation opinions. Dr. Orris noted that all of the studies were necessarily suspect because of the pool of participants was small, due to the relative rarity of renal cancer. However, there is substantial support in the medical literature provided for opposing causation opinions.

Respondent also argued that Petitioner's own conduct contributed to or exacerbated his exposure. Petitioner admitted that he elected at times not to use available SCBAs, even when he knew the air was "bad," such as during overhauls. Tr. 16, 39-40. Fire chief Kent Tomlin agreed that it's common for firefighters not to wear SCBAs at dumpster or car fires and during overhauls, because the firefighters are hot and sweaty and don't want to wear the extra 60 pounds. Tr. 58.

Arbitrator Mathis noted that Respondent had provided a specially fitted SCBA for Petitioner to protect him from possible carcinogens to which he might be exposed during his firefighting activities. The Arbitrator found that Petitioner had been instructed to use the SCBA in structural fires and was subject to discipline if he did not properly utilize the protective device. Since the SCBA was available and would have protected Petitioner from exposure to any carcinogens, but Petitioner elected not to use the device except during suppression of structural fires, the Arbitrator found that no accident had occurred and that there was no causal connection between Petitioner's job duties as firefighter and his renal cancer.

The Commission views the evidence differently. Although the SCBA was available to Petitioner and provided protection against the "bad air" that Petitioner alleges caused or contributed to his development of cancer, both Petitioner and the fire chief acknowledged that firefighters frequently do not use the SCBAs. In overhauls and during the suppression of dumpster and vehicle fires, both witnesses testified that firefighters frequently eschew the use of the heavy and awkward SCBA. The Commission finds that Petitioner may have been exposed to "bad air" during the occasions he did not use the SCBA and that, pursuant to the presumption contained in Section 6(f) of the Workers' Compensation Act, Section 1(d) of the Occupational Diseases Act, and the medical causation opinions presented by Dr. Orris and medical literature, Petitioner has proved both accident and causal connection by a preponderance of the evidence. Petitioner's conduct in choosing not to wear the SCBA at all times does not defeat his right to benefits under either the Occupational Diseases Act or the Workers' Compensation Act. Contributory negligence, if any, is not a defense in either, and Petitioner's conduct was not so egregious as to remove him from the course and scope of his employment, so as to defeat his claim. Therefore, the Commission reverses the Decision of the Arbitrator, and finds Petitioner proved he sustained a compensable accident under the Act and that the accident was a cause of his condition of ill-being.

Medical Expenses. As the Commission has concluded that Petitioner suffered an accident that arose out of and in the course of his employment as firefighter, engineer, and fire captain, it awards Petitioner all reasonable medical expenses related to his renal cancer diagnosis and treatment, as listed in Petitioner's Exhibit 9. Petitioner alleges in his Statement of Exceptions that most of the medical bills were paid by either Humana or Cigna group health insurance, but that $618.00 remains outstanding, and Petitioner paid $312.12 out of pocket toward his medical expenses. Petitioner's Brief, p. 18. Respondent is ordered to pay the outstanding amount of medical expenses in Petitioner's Exhibit 9 and to reimburse Petitioner for his out of pocket

14IWCC1138

expenses. Pursuant to Section 8(j), Respondent is entitled to credit for any payments made by its group health insurer, but must hold Petitioner harmless from any claims by that insurer for payments made toward his medical bills.

Temporary Total Disability. The parties stipulated that Petitioner's average weekly wage was $1,366.53 at the time of accident. Petitioner alleges that he is entitled to 6-5/7 weeks of temporary total disability. Following his kidney surgery on September 10, 2008, Dr. Bewsy took him off work until October 27, 2008, when Petitioner returned to work full duty. The Commission finds that Petitioner is entitled to temporary total disability benefits of $911.02 for the period of 6-5/7 weeks.

Nature and Extent. Petitioner underwent surgery to remove his right kidney and continues to see Dr. Bewsy annually. Dr. Orris testified at deposition that Petitioner is at an increased risk of damage to his renal function if he suffers trauma to his remaining kidney. If Petitioner's remaining kidney must be removed, he will have to undergo dialysis for the remainder of his life. Petitioner urges the Commission to award 20% loss of use of the person as a whole. The Commission agrees that Petitioner suffered a loss of 20% of the person as a whole and orders Respondent to pay $664.72 per week for 100 weeks, pursuant to Section 8(d)(2) of the Workers' Compensation Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the December 23, 2013 Decision of the Arbitrator is reversed. The Commission finds Petitioner sustained an accident on August 19, 2008 that arose out of and in the course of his employment, and Petitioner proved by a preponderance of the evidence that his current condition of ill-being is causally related to the accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $911.02 per week for a period of 6-5/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical expenses contained in Petitioner's Exhibit 9 pursuant to §8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week for a period of 100 weeks, as provided in Section 8(b)(2) of the Act, for the reason that the injuries sustained cause the loss of use of 20% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injuries.

14IWCC1138

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: DEC 2 6 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-11/05/14
drd/dak
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GRANT, BRYAN
Employee/Petitioner

Case# **09WC015481**

CITY OF PEORIA
Employer/Respondent

14IWCC1138

On 12/23/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2427 KANOSKI BRESNEY
THOMAS R EWICK
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

0980 HASSELBERG GREBE SNODGRASS
KENNETH M SNODGRASS
124 S W ADAMS ST SUITE 360
PEORIA, IL 61602-2321

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

BRYAN GRANT
Employee/Petitioner

v.

CITY OF PEORIA
Employer/Respondent

Case # **09 WC 15481**

14IWCC1138

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 **Stephen Mathis**, Arbitrator of the Commission, in the city of **Peoria**, on **September 24, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC1138

FINDINGS

On ***August 19, 2008***, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* 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 $71,059.62; the average weekly wage was $1,366.53.

On the date of accident, Petitioner was **51** 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 and Respondent is not liable for said services based on the Arbitrator's decision..

ORDER

The Petitioner has failed to prove by a preponderance of the credible evidence that he sustained accidental injuries arising out of and the course of his employment by Respondent on August 19, 2008. In addition, the Petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being is causally related his claimed injury date. Based on the findings of no accident and causal connection, the Petitioner is not entitled to TTD, medical benefits or an award of permanency.

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

12-13-13
Date

DEC 23 2013

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? (F) Is Petitioner's current condition of ill-being causally related to the injury?, (J) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?, (K) What temporary benefits are in dispute?, and (L) What is the nature and extent of the injury?,*** *the Arbitrator finds as follows:*

(C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

Petitioner has been employed as a City of Peoria firefighter since April of 1990. He was promoted to the position of an engineer in August of 1999 and was further promoted to Fire Captain in October of 2012. The Petitioner has alleged no specific event at work but rather claims his kidney cancer as a result of his occupational exposure as a firefighter. On August 19, 2008, a CT scan found a mass on the right kidney. (PX2). Dr. Busey removed the right kidney on September 10, 2008 at St. Francis Hospital. The Petitioner testified that the removal of his kidney does not affect his ability to perform his current job as a captain on the fire department. The Petitioner has been diagnosed as being obese with hypertension. Petitioner testified that on average he responds to six structural fires per year, six dumpster fires per year and anywhere from eight to twelve car fires per year. Petitioner testified that when fighting fires, he would use a self-contained breathing apparatus in order to provide fresh air and prevent him from breathing contaminants at the fire. He noted that during the overhaul process at a fire scene, he would take off the self-contained breathing apparatus. He indicated at that time the smoke and the heat was pretty much dissipated and everything seemed clear. Petitioner testified he was exposed to diesel exhaust due to the fire trucks operating on diesel. The Petitioner testified that he had previously worked as a pipe fitter for approximately five years. He acknowledged that he would have been exposed to asbestos in that job while working around insulators. The Petitioner testified he currently understands that you can wear the self-contained breathing apparatus while doing the overhaul work. He understands the reason is because there may be potential smoke or other matters in the air. By wearing the self-contained breathing apparatus, it avoids inhaling smoke or any of the particles in the air.

Chief Kent Tomlin testified on behalf of the Respondent. Self-contained breathing apparatuses have been available since 1990, the year the Petitioner began his employment as a firefighter with the City of Peoria. Chief Tomlin testified that the firefighters are to wear their self-contained breathing apparatus while fighting a fire. Chief Tomlin indicated that self-contained breathing apparatus is to be worn during overhauls at fire scenes. A firefighter is subject to discipline if he is not wearing a self-contained breathing apparatus at a structural fire. Chief Tomlin testified that an engineer typically is away from the structure fire and manning the truck. Chief Tomlin further testified that OSHA requires a fit testing of the mask for firefighters which is represented by Respondent's Ex. 10. Chief Tomlin described the self-contained breathing apparatus and how it is to be worn at the scene.

Based on the testimony submitted, the Arbitrator finds that an accident did not occur which arose out of and in the course of employment and further would rely and adopt its findings as it pertains to (F) as to whether Petitioner's current condition of ill-being is causally related to the injury as additional support for the finding of no accident.

(F) Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator notes that the only Illinois Workers' Compensation Act provides for a statutory presumption as to firefighters and paramedics. The statutory presumption is set forth in 820 ILCS 305/6(f) and states as follows:

(f) Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), or paramedic 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, EMT, or paramedic 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, EMT, or paramedic. However, this presumption shall not apply to any employee who has been employed as a firefighter, EMT, or paramedic 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. The Finding and Decision of the Illinois Workers' Compensation Commission under only the rebuttable presumption provision of this subsection shall not be admissible or be deemed res judicata in any disability claim under the Illinois Pension Code arising out of the same medical condition; however, this sentence makes no change to the law set forth in Krohe v. City of Bloomington, 204 Ill.2d 392.
(Source: P.A. 93-721, eff. 1-1-05; P.A. 95-316, eff. 1-1-08.)

After reviewing the expert witnesses' testimony and the articles presented in support of said testimony, the Arbitrator finds that the Petitioner's diagnosis and treatment of kidney cancer has not been causally connected to his employment as a firefighter.

(J) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Based upon the Arbitrator's findings and rulings as to (C) and (F) of this decision, the Respondent is not responsible for the medical services under work comp that were provided to the Petitioner in treating his condition of kidney cancer.

(K) What temporary benefits are in dispute?

Based upon the Arbitrator's findings and rulings as to (C) and (F) of this decision, the Arbitrator finds that the Petitioner is not entitled to temporary total disability benefits for his time off from work.

(L) What is the nature and extent of the injury?

Based upon the Arbitrator's findings and rulings as to (C) and (F) of this decision, the Arbitrator finds that the Petitioner is not entitled to an award of permanency benefits as a result of his condition.

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

Kordula M. Kastl,
Petitioner,

vs. NO: 11WC 30645

United Airlines, Inc.,
Respondent,

14IWCC1139

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, 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 31, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

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: DEC 2 6 2014
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CJD/jrc
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Daniel R. Donohoo

Ruth W. White

14IWCC1139

DISSENT

I must respectfully dissent and would award permanent partial disability in this case. I find Petitioner's testimony credible that, after her accident on May 5, 2011, her shoulder pain was different and more of a sharp pain. Although she was eventually released to return to work full duty as a flight attendant, Petitioner testified that it is not exactly the same "position." She used to frequently work in the galley and enjoyed that job but she now tries to avoid that position because she has difficulty pulling the overhead bin.

Petitioner also testified that since her work accident, her habits and lifestyle has changed. She cannot blow dry her hair using her right arm nor can she carry her purse or groceries on the right side. She cannot do overhead stretches or sleep on her right side because it wakes her up at night, which was not the case prior to her work accident. Petitioner also testified that she used to be very active with sports including tennis, badminton, and speedminton but she can no longer participate in those activities.

Petitioner testified that she feels constant pain but she is postponing surgery because she is concerned that it could disqualify her from being a flight attendant if there are complications and because she has nobody to help her while she is recovering.

Based on the above, I would award 2.53% loss of use of the person as a whole for her right shoulder condition.

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KASTL, KORDULA M
Employee/Petitioner

Case# **11WC030645**

UNITED AIRLINES INC
Employer/Respondent

14IWCC1139

On 7/31/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0391 THE HEALY LAW FIRM
MATTHEW M GANNON
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

0560 WIEDNER & MCAULIFFE LTD
ASALYA I AKHMEROVA
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
X ☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kordula M. Kastl
Employee/Petitioner

v.

United Airlines, Inc.
Employer/Respondent

Case # **11 WC 30645**

Consolidated cases:

14IWCC1139

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 Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **June 26, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ 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 **5/11/11**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

For the reasons set forth in the attached conclusions of law, the Arbitrator finds that the accident of May 11, 2011 resulted in a right shoulder strain. The Arbitrator further finds that Petitioner failed to establish causation as to any claimed permanency or need for right shoulder surgery. Dr. White released Petitioner from care on April 19, 2012, at which time he noted no abnormalities on right shoulder examination and described the strain as "resolved." PX 2 at 8.

In the year preceding the injury, Petitioner earned **$35,899.24**; the average weekly wage was **$690.37**.

On the date of accident, Petitioner was 47 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 **$4,143.42** for TTD, **$N/A** for TPD, **$N/A** for maintenance, and **$N/A** for other benefits, for a total credit of **$4,143.42**.

Respondent is entitled to a credit of **$N/A** under Section 8(j) of the Act.

ORDER

FOR THE REASONS SET FORTH IN THE ATTACHED CONCLUSIONS OF LAW, THE ARBITRATOR FINDS THAT THE ACCIDENT OF MAY 11, 2011 RESULTED IN A RIGHT SHOULDER STRAIN. THE ARBITRATOR FURTHER FINDS THAT PETITIONER FAILED TO ESTABLISH CAUSATION AS TO ANY CLAIMED PERMANENCY OR NEED FOR RIGHT SHOULDER SURGERY. DR. WHITE RELEASED PETITIONER FROM CARE ON APRIL 19, 2012, AT WHICH TIME HE NOTED NO ABNORMALITIES ON RIGHT SHOULDER EXAMINATION AND DESCRIBED THE STRAIN AS "RESOLVED."

THE ARBITRATOR FINDS THAT PETITIONER WAS TEMPORARILY TOTALLY DISABLED FROM MAY 16, 2011 THROUGH JUNE 23, 2011, A PERIOD OF 5 4/7 WEEKS. BASED ON THE STIPULATED AVERAGE WEEKLY WAGE OF $690.37, THE ARBITRATOR AWARDS TEMPORARY TOTAL DISABILITY BENEFITS AT THE RATE OF $460.24 PER WEEK. RESPONDENT IS ENTITLED TO CREDIT FOR THE $4,143.42 IN BENEFITS IT PAID PRIOR TO HEARING. RESPONDENT WAIVED ANY CLAIM TO OVERPAYMENT AT THE HEARING. ARB EXH 1. T. 5.

THE ARBITRATOR AWARDS NO PERMANENT PARTIAL DISABILITY BENEFITS IN THIS CASE.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

14IWCC1139

Molly C Mason
Signature of Arbitrator

Date 7/31/13

JUL 31 2013

Kordula Kastl vs. United Airlines
11 WC 30645

14IWCC1139

Arbitrator's Findings of Fact

Petitioner testified she has worked as a flight attendant for Respondent since September of 1991. T. 11. Her job consists of collecting boarding passes, organizing the galley, stowing bags, closing bins and serving food and beverages. She is required to lift up to 55 pounds above shoulder level. T. 13.

Petitioner acknowledged having some right shoulder discomfort prior to her claimed accident of May 11, 2011. In 1996, she sustained a work-related right shoulder strain while closing an overhead bin. She did not file a claim in connection with this strain because the injury occurred just prior to a scheduled four-week vacation. She felt she could tough it out. T. 16.

Petitioner testified that, during the days before May 11, 2011, she was experiencing "here-and-there discomfort" in her right shoulder. Her shoulder did not feel right but she attributed the discomfort to the aging process. T. 16.

Petitioner testified that, on May 11, 2011, she was organizing a plane galley. The plane's purser, Linda Hinchey, was also in the galley. T. 14. Petitioner testified she was injured while attempting to free an overhead bin that was "stuck" on its runners. The bin was full of ice. It was when she pulled the bin a third time that she felt a sharp, knife-like pain in her right shoulder and collarbone area. T. 17-18. Immediately after the plane landed, Petitioner went to an office and reported the injury to Kim Swierzinski, a supervisor. Swierzinski completed an accident report (T. 20) asked Petitioner if she needed to see a doctor. Petitioner told Swierzinski she had been seeing a physician for her shoulder for a while and wanted to go to that physician since he was already familiar with her. T. 19. According to Petitioner, Swierzinski gave the go-ahead for her to see this physician, Dr. White of the Dreyer Medical Clinic. Upon arriving home, Petitioner called Dr. White's office. The office was closed. Petitioner called again the next day, at which point the doctor was in surgery. Petitioner secured the "first available appointment" on Monday, May 16th. During the interval before this appointment, Petitioner applied ice to her shoulder and took anti-inflammatories. T. 21-22.

On May 12, 2011, Lisa Soto, a "medical only" representative of Gallagher Bassett, wrote to Dr. White authorizing one visit, for purposes of evaluation and X-rays, "regarding the workers' compensation claim that occurred on 5/11/11." Soto informed the doctor that no care beyond this visit would be authorized until she had received and reviewed a treatment plan. In closing, she wrote: "thank you for seeing this employee on my behalf." PX 1. Soto wrote to Petitioner the same day, acknowledging receipt of Petitioner's claim and clarifying that the claim had not yet been accepted. PX 1. Petitioner testified that, from the outset, she was under the impression Gallagher Bassett recognized her May 11, 2011 injury as work-related. T. 31.

Dr. White's note of May 16, 2011 sets forth the following history:

> "Patient in again about her right shoulder. Up until last Wednesday she states she was doing fine and then she was at work trying to pull something out of an overhead bin, she felt a sharp pain in the top of her right shoulder around the AC joint. She reported the injury to her employer and asked to see me. She says she is having pain again in the top of the shoulder, not quite as bad as it was before but definitely worse since the injection last done in March."

PX 2, p. 28. On right shoulder examination, Dr. White noted some erythema and tenderness around the acromioclavicular joint, some pain with crossed-arm testing, an intact range of motion and a negative impingement sign. He diagnosed a right shoulder "AC strain." He recommended observation and limited overhead use of the arm, commenting that "it is probably not a good idea to inject a recent injury." He advised Petitioner to return to him in one month. PX 2, p. 28.

Petitioner returned to Dr. White on June 23, 2011 and again complained of right shoulder pain. She requested a Voltaren refill and inquired about an injection. On examination, the doctor again noted some tenderness over the acromioclavicular joint and pain with cross-armed testing. He diagnosed "chronic AC pain right shoulder." He injected Marcaine and Depo-Medrol into Petitioner's right acromioclavicular joint, noting that Petitioner "might want to consider distal clavicle excision if she is going to keep having problems with this." At Petitioner's request, he released Petitioner to work as of the following day. PX 2, p. 27.

A document in PX 2 reflects that Petitioner called the doctor's office on June 23, 2011, presumably after being seen, and inquired as to whether physical therapy was an option, with the doctor responding, via his nurse, as follows: "PT probably won't help til after surgery." PX 2, p. 24.

Petitioner next saw Dr. White on July 25, 2011. She reported that the injection provided only about a week of relief before the "pain came back." The doctor's examination findings were unchanged. He again diagnosed "chronic AC pain right shoulder." Based on Petitioner's limited response to the injection, he recommended a right shoulder arthroscopy with distal clavicle excision. He noted that Petitioner requested time to consider this recommendation since she was back at work and thus far able to tolerate her symptoms. PX 2, p. 22.

On August 11, 2011, Petitioner filed an Application for Adjustment of Claim alleging a right shoulder injury of May 11, 2011. PX 1.

Petitioner returned to Dr. White on August 29, 2011. Petitioner described her right shoulder as feeling "pretty good," indicating she had just returned from vacation. On examination, the doctor noted normal motion and "no tenderness over AC joint." He indicated that Petitioner was working "as tolerated" and wanted to "put off any surgery until next year." He instructed Petitioner to return to him in six months. He indicated he could repeat the AC joint injection "at any time." PX 2, p. 20.

Petitioner went back to Dr. White on October 20, 2011, with the doctor administering another injection that day. The doctor noted that Petitioner was "planning on surgery next spring" and might need one more injection to get her through to April of 2012. PX 2, p. 19.

At the next visit, on March 22, 2012, Petitioner informed Dr. White she had decided to further defer surgery because her father was sick. The doctor noted that Petitioner "has not had too much pain lately because she has not been lifting as much at work." He noted no abnormalities on examination and thus decided not to administer another injection. He recommended "observation for now" and instructed Petitioner to return to him in one month. PX 2, p. 18.

Petitioner returned to Dr. White on April 19, 2012. The doctor noted that Petitioner reported "occasional twinges but nothing that she thinks she would need to operate on [sic]." He again noted no abnormalities on examination. He diagnosed a "resolved" right shoulder strain and discharged Petitioner from care, indicating Petitioner could return to him as needed. PX 2, p. 8. T. 30. On a separate "treatment order," he indicated he did not anticipate any further treatment. PX 2, p. 12.

Petitioner testified she has not returned to Dr. White since April 19, 2012. T. 30. Gallagher Bassett paid for the care she underwent with Dr. White after May 11, 2011. Gallagher Bassett also paid her temporary total disability benefits during the month or so she lost from work after May 11, 2011. T. 31.

Petitioner testified she constantly experiences pain in her right shoulder. This pain increases with work activities. She applies ice to her shoulder to alleviate her discomfort. She lives with the pain because surgery is not currently an option for her. She is single and has no relatives in the United States who could care for her and drive her to therapy following a surgery. She is also concerned that her ability to work could be affected if the surgery did not go well. T. 33. She avoids sleeping on her right side and uses her left arm when carrying groceries or performing above shoulder activities such as drying her hair. She used to engage in tennis and badminton but now avoids these sports. T. 32.

Under cross-examination, Petitioner testified that Dr. White did not order X-rays or an MRI on May 16, 2011. T. 35. On that date, the doctor told her to rest and avoid lifting anything above shoulder level. T. 35-36. Before May 16, 2011, she had undergone care for right shoulder discomfort at the Dreyer Clinic over a 2 ½ year period. T. 36. She originally saw Dr. Dreyer in December of 2009. At that time, she told Dr. Dreyer she had been experiencing right

shoulder pain for about eight months. T. 37. It was after the May 11, 2011 incident, however, that her shoulder "went bad." T. 38. As of May 11, 2011, she went to the gym five days a week. Her regular gym routine involves thirty minutes of cardiovascular exercise followed by exercises using free weights such as bicep curls and shoulder shrugs. T. 38-39. After looking at Dr. Dreyer's note of December 17, 2009, Petitioner admitted that the doctor told her to avoid working out with her right shoulder and avoid certain activities such as an "overhead press." T. 41. Petitioner also admitted that, at that visit, Dr. Dreyer recommended an orthopedic consultation. She denied, however, that Dr. Dreyer ordered a right shoulder MRI. T. 41. She also denied undergoing a right shoulder MRI on January 28, 2010. T. 42. After looking at a right shoulder MRI report dated January 28, 2010, Petitioner again denied undergoing an MRI on that date. T. 44. She testified it was after the work incident of May 11, 2011 that Dr. White ordered the MRI. T. 44. She denied that Dr. White discussed the possibility of performing a right shoulder arthroscopy on February 17, 2010. T. 46. The following exchange occurred:

> "Q: Prior to May 11, 2011, did Dr. White recommend right shoulder arthroscopic surgery to you?
>
> A: No, he did not recommend it.
>
> Q: Did he mention it to you?
>
> A: He mentioned that, that as part of – yes, that is part of it it's all wrong . . . . how do you . . . sorry. He mentioned – I believe that's the fix after a certain--
>
> Q: So he mentioned it as an option, correct?
>
> A: He mentioned as an option but not to me. For me, it was a general that is the next step, not that you have to."

T. 50. Petitioner did not recall whether Dr. White discussed a cortisone injection with her in February of 2010. T. 51. Petitioner acknowledged undergoing cortisone injections with Dr. White prior to May 11, 2011 but she could not recall exactly when he administered those injections. If the doctor's records show that she underwent two such injections prior to May 11, 2011, the records are "probably" correct. T. 52. Petitioner's counsel stipulated that Dr. White administered the second of these injections on March 3, 2011. T. 54. RX 1. Petitioner testified Dr. White told her she could undergo two cortisone injections per year. T. 55. Dr. White administered two more injections in June and October of 2011. T. 56-57. Petitioner denied telling Dr. White on March 22, 2012 that she was no longer experiencing right shoulder pain. She told the doctor her shoulder was "not as painful" and she did not want to undergo surgery at that point. T. 57-58. When the doctor released her from care on April 19, 2012, he did not relay a diagnosis of "resolved right shoulder strain." T. 58. He told her to return to him as needed. T. 59. After the May 11, 2011 accident, she resumed working in June of 2011, after

telling Dr. White she wanted to return to work. T. 61. She did not return to exactly the same position she had held before May 11, 2011, however. She can no longer work that position. T. 61. Dr. White did not impose any restrictions when he released her to return to work. She has not undergone any right shoulder care since she last saw Dr. White in April of 2012. T. 62. She is an international flight attendant. T. 62-63.

On redirect, Petitioner testified that, on April 19, 2012, Dr. White told her to continue self-treating with ice and over-the-counter medication. He also told her he knew she would be coming back in order to schedule the surgery she needs. T. 64. Before May 11, 2011, no doctor recommended she undergo right shoulder surgery. T. 64. It was only after May 11, 2011 that any doctor told her surgery should heal her pain. T. 64-65. Before the accident of May 11, 2011, she had right shoulder discomfort that she was able to live with. After the accident, the discomfort escalated to "sharp pain" that affected her daily habits and ability to sleep. T. 65-66. The pain she experienced as a result of the accident was bad enough to make her feel nauseated. T. 66, 69. As far as she can recall, she was not experiencing right shoulder pain on the morning of May 11, 2011, before the accident. T. 68.

Under re-cross, Petitioner testified it was after the May 11, 2011 accident that Dr. White first told her she needed surgery. T. 71. He did not, however, tell her she needed to undergo surgery "now." T. 71. The discomfort and pain she has experienced over time was always in the same area, i.e., the top of her right shoulder, near the collarbone. T. 73. Dr. White told her she has arthritis in the shoulder. T. 73. She is aware of Respondent's requirements concerning the reporting of work accidents. Those requirements have changed over time. She did not report her 1996 work injury to anyone at Respondent. T. 73-74.

Respondent did not call any witnesses. Respondent offered into evidence extensive records from Dreyer Medical Clinic. RX 1. Some of those records pre-date the claimed May 11, 2011 work accident. On December 17, 2009, Petitioner complained of right shoulder pain of eight months' duration to Dr. Dreyer. The doctor indicated that Petitioner did not attribute this pain to any trauma or injury. He noted that Petitioner's job involves moving luggage and that Petitioner reported working out with weights on a regular basis. On right shoulder examination, he noted positive Hawkins, "empty can" and cross-arm testing. He obtained right shoulder X-rays. He found Petitioner's examination "consistent with supraspinatus injury, could be sprain or tear." He indicated Petitioner should give consideration to an MRI and an orthopedic consultation. He recommended that Petitioner "avoid working out with the right shoulder." RX 1, p. 124. Petitioner underwent a right shoulder MRI on January 28, 2010. The report lists Dr. Dreyer as the ordering physician. The interpreting radiologist noted mild to moderate tendinosis, no evidence of a tear, moderate osteoarthritis, a Type II acromion and mild bursitis. RX 1, pp. 130-131. On February 17, 2010, Petitioner saw Dr. White at Dr. Dreyer's referral, with the doctor recording the following history:

> "This is a 46-year-old right-handed patient who comes in with nontraumatic right shoulder pain off and on for about a year, getting worse. Notices pain with

> certain motions, particularly abduction, reaching over her head. She works as a flight attendant and has a lot of trouble putting luggage into the overhead compartment. She has had an X-ray and MRI scan and is sent by Dr. Dreyer for orthopaedic opinion. She is scheduled to have foot surgery by Dr. Taha in a couple weeks and after that plans to go to Europe for 3 months for recovery."

Dr. White recommended a three-week course of anti-inflammatories but noted Petitioner could not begin taking this medication until after her foot surgery. He indicated Petitioner would need an injection if the anti-inflammatories did not help, with the "next step" being a shoulder arthroscopy for discal clavicle excision, debridement and/or repair of rotator cuff. He went on to state: "we did not really discuss surgery very much because she is just at the start of treatment." The doctor indicated Petitioner could begin the anti-inflammatories and possibly the injection while in Europe. He advised Petitioner to check back with him once she returned to the United States. RX 1, p. 157.

On March 4, 2010, Petitioner underwent a bunionectomy, performed by Dr. Taha. On March 12, 2010, Dr. Taha recommended that Petitioner see Dr. White in follow-up for her right shoulder. He indicated Petitioner could start taking non-steroidal anti-inflammatories, as previously recommended by Dr. White, in one week. RX 1, p. 170. On May 26, 2010, Petitioner returned to Dr. White and reported that she took the anti-inflammatories as directed but that her right shoulder pain returned about a week after she discontinued the medication. The doctor noted "she is wanting to do something other than surgery until she can get back to work following her bunion surgery." On right shoulder examination, Dr. White noted a negative impingement sign and painful cross-arm testing. He recommended an injection and more medication in the event the injection did not help. He indicated that, if neither of these measures helped, the "next option is operative intervention for shoulder arthroscopy and probable distal clavicle excision." He went on to note that Petitioner "is not interested in surgery at this time" due to being off work for her foot operation. He then administered the injection, prescribed Diclofenac and instructed Petitioner to return to him as needed. RX 1, pp. 186-188. On October 11, 2010, Petitioner called Dr. White's office and obtained a refill of Diclofenac. On March 3, 2011, a little more than two months before her claimed work accident, Petitioner returned to Dr. White, with the doctor noting the following interval history:

> "Patient back with recurrence of right shoulder pain. The injection she got last spring she said helped for about 4 months and she had been waiting for it to really bother her before coming in again. The pain seems to be more in the top of the shoulder. She says she can use the arm."

On examination, Dr. White noted tenderness over the AC joint, a non-painful range of motion and negative impingement testing. He addressed diagnosis and treatment recommendations as follows:

> "It appears that the problem is still just the AC joint and not in the rotator cuff and subacromial space. She is asking for another injection and that will be provided. Advised that the shots can be done every 3 months. Advised if the shots cease to be effective, then the next step would be shoulder arthroscopy for distal clavicle excision."

The doctor injected the AC joint with Depo-Medrol and Marcaine. He indicated Petitioner should "re-check when the shoulder hurts again." RX 1, pp. 217-219.

Arbitrator's Credibility Assessment

The Arbitrator found Petitioner's accident-related testimony to be detailed and believable. The Arbitrator did not otherwise find Petitioner to be a credible witness. Petitioner acknowledged undergoing a right shoulder MRI but denied that this MRI was performed on January 28, 2010. Petitioner persisted in this denial even after Respondent's counsel handed her a copy of the MRI report bearing that date. T. 44. On redirect, Petitioner insisted the MRI took place after the May 2011 accident. This is not the case. Petitioner also denied that Dr. White described her right shoulder strain as "resolved" on April 19, 2012 (T. 58), even though the doctor's note of that date says exactly that. Petitioner's testimony that the accident caused her shoulder symptoms to escalate from bearable discomfort to sharp, nauseating pain is at odds with her medical records. Petitioner's testimony that no doctor recommended right shoulder surgery to her prior to May 11, 2011 is also at odds with her records. Surgery is mentioned in every one of Dr. White's pre-accident records. While those records do not reflect that Dr. White recommended surgery on an emergent basis, they do reflect that the doctor contemplated operating and that it was Petitioner who wanted to defer surgical intervention due to economic considerations. On May 26, 2010, Dr. White described Petitioner as "wanting to do something other than surgery until she can get back to work following her bunion surgery." He administered an injection. On March 3, 2011, approximately two months before the accident, the doctor administered another injection at Petitioner's request, noting that surgery would be the "next step" if the injections ceased to be effective.

Did Petitioner sustain an accident on May 11, 2011 arising out of and in the course of her employment? Did Petitioner establish a causal connection between her claimed accident of May 11, 2011 and her current right shoulder condition of ill-being?

The Arbitrator finds that Petitioner met her burden of proof on the issue of accident. Petitioner described the accident in a detailed and convincing manner. Petitioner identified a purser who was in her vicinity when the accident occurred. Petitioner testified she reported

the accident to a supervisor immediately upon landing. According to Petitioner, the supervisor completed an accident report.

Based on the records from Dreyer Medical Clinic, the Arbitrator finds that the accident of May 11, 2011 resulted in a right shoulder strain which Dr. White described as having "resolved" on April 19, 2012. PX 2, p. 8.

The Arbitrator finds that Petitioner failed to establish a causal connection between the May 11, 2011 accident and any claimed permanency or need for right shoulder surgery. If in fact there was a discrepancy between Dr. White's written notes and oral statements, as Petitioner would have the Arbitrator believe, the doctor needed to explain that via a deposition or report.

Is Petitioner entitled to temporary total disability benefits?

Petitioner claims temporary total disability benefits from May 16, 2011 through June 23, 2011. Respondent disputes that claim and claims credit for the $4,143.42 in benefits it paid. Respondent waived any claim for credit arising from a potential overpayment.

The Arbitrator has found that Petitioner sustained a work accident on May 11, 2011 and that this accident resulted in a right shoulder strain. Based on these findings, along with Dr. White's records, which reflect that the doctor imposed restrictions on May 16, 2011 and released Petitioner to full duty as of June 23, 2011, the Arbitrator finds that Petitioner was temporarily totally disabled from May 16, 2011 through June 23, 2011, a period of 5 4/7 weeks. The Arbitrator finds the temporary total disability rate to be $460.24 per week, based on the stipulated average weekly wage of $690.37.

Is Petitioner entitled to permanent partial disability benefits?

The Arbitrator has found that the accident of May 11, 2011 resulted in a right shoulder strain. Dr. White noted no abnormalities when he examined Petitioner's right shoulder on April 19, 2012. He discharged Petitioner from care on that date and described the strain as having "resolved." He indicated Petitioner could return to him as needed. Petitioner acknowledged she has not been back to Dr. White since April 19, 2012. She also acknowledged she continues to work as a flight attendant.

The Arbitrator awards no permanency in this case.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☒ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mike Reid,
Petitioner,

vs.

NO: 01WC 56076

14IWCC1140

Temperature Equipment Corp.,
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 causation, medical, prospective medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 19, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Respondent shall pay the petitioner the sum of **$483.46**/week for life, commencing May 24, 2013, as provided in Section 8(f) of the Act, because the injury caused the permanent and total disability of the petitioner. Commencing on the second July 15th after the entry of this award, the petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

14IWCC1140

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: DEC 2 6 2014
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CJD/jrc
049

Daniel R. Donohoo

Ruth W. White

DISSENT

I must respectfully dissent and would find that Petitioner's left shoulder condition is causally related to his work-related low back injury. Petitioner credibly testified that although he had previously injured his left shoulder in 1997 and had an MRI, he treated conservatively for that and he had not had any left shoulder symptoms for many years prior to the August 2009 incident. There are no medical records to indicate that Petitioner had any left shoulder complaints since 1997.

Petitioner also credibly testified that, in August 2009, he attempted to get on his lawn tractor when his right leg gave out and he fell over to the far side of the tractor. Petitioner testified that he his left shoulder struck the concrete floor and he noticed immediate pain and had difficulty raising his arm. This history is supported by the September 4, 2009 record of Dr. Nahra who noted "recent fall at home from right leg giving out, landing this time on left shoulder with severe left shoulder pain. No past left shoulder symptoms." Dr. Nahra prescribed a left shoulder MRI and physical therapy.

Despite multiple recommendations for a new MRI, this was not approved by the insurance company. It was eventually performed on February 18, 2011; almost a year and a half after his injury. The MRI report indicated a complete tear of the supraspinatus tendon with 1.5cm of tendon retraction and associated muscular atrophy, severe degenerative changes of the AC joint, small joint effusion, and tendinopathy of the intraarticular portion of the biceps tendon.

On March 4, 2011, Dr. Nahra recommended a left shoulder rotator cuff repair. Dr. Nahra testified that the MRI findings and his physical examination were definitely consistent with the mechanism of injury of Petitioner's fall. Dr. Nahra testified that he also treated Petitioner for his left shoulder problem in the late 1990s. He compared the two MRIs and explained that, although the 1997 MRI report indicates a "complete" tear, it really was a focal tear that was only .8cm in length, which was able to be treated conservatively. In contrast, he testified that the 2011 MRI showed a complete tear with retraction of the tendon. Dr. Nahra opined that Petitioner's fall onto his left upper extremity caused the rotator cuff tear that was shown on the MRI because the tendon is retracted, the muscle is becoming atrophic, and he has persistent symptomatology.

Even Respondent's Section 12 examiner, Dr. Lieber, admitted that the mechanism of injury of falling on the floor did cause an isolated left shoulder injury but his opinion was that it did not cause any significant further deterioration of the left shoulder because the MRI in 2011 did not show any evidence of acute abnormality. Dr. Lieber testified that he compared the 2011 MRI films with the 1997 MRI report (not films) and, although there was now a retraction of the

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supraspinatus muscle, it was his opinion that this was a normal progression of a chronic rotator cuff tear.

I would find the opinion of Dr. Nahra more persuasive than that of Dr. Lieber. Specifically, I note that the MRI was not performed until a year and a half after his left shoulder injury so there is no way to know if there was any "acute" injury at the time that he fell. If it had been approved by the insurance company more promptly, the MRI most likely would have shown an acute injury and Dr. Lieber's opinion might be different. To find that Petitioner's left shoulder condition is completely degenerative based on Dr. Lieber's interpretation of this MRI seems to reward the insurance company for its failure to timely approve reasonable and necessary treatment.

Dr. Nahra testified that he had treated Petitioner for his work-related low back and right leg radiculopathy conditions and that Petitioner's right leg would give out on him occasionally and this is what brought about the left shoulder injury. Dr. Lieber testified that he wasn't asked to opine about whether Petitioner had back problems and whether his knee was giving out.

Based on the above, I would find that Petitioner sustained an injury to his left shoulder in the August 2009 incident when his right leg gave out and he fell while attempting to get on his tractor. This was the sequelae of his original low back work injury and I would award the left shoulder surgery recommended by Dr. Nahra.

Regarding Petitioner's low back treatment, I would award the February 18, 2011 lumbar MRI as well as the prospective aquatic therapy and medications as prescribed by Dr. Nahra. Respondent argued that the previous Section 19(b) decision, issued on June 12, 2009 and modified by the Commission on March 31, 2010, only awarded prospective treatment as recommended by Dr. Ghanayem, which included an MRI and standing long cassette films. However, that decision also awarded all of the medical bills related to the spine that had been incurred up to the date of hearing. I do not interpret that decision as being intended to limit Petitioner's prospective treatment to what Dr. Ghanayem was recommending at that time to the exclusion of any prospective treatment that may be required. Just because pool therapy wasn't recommended previously does not mean that it is not reasonable and necessary now. In the previous decision, Petitioner was found to not be at maximum medical improvement (MMI) because Dr. Ghanayem was recommending a fusion. The fact that Petitioner is now at MMI based on his desire to not have the surgery does not mean that he is not entitled to palliative care to help reduce his low back symptoms.

Surprisingly, the Arbitrator refused to award the February 18, 2011 lumbar MRI because the insurance claim form indicates that the service was "not related to employment." However, it seems more likely than not that it indicates that because there was a problem getting the MRI approved. It is the Commission's jurisdiction to determine what is or isn't related to employment and it is not bound by what a claim form says. And, I do not accept Respondent's argument that it isn't responsible for an MRI that was specifically ordered in the previous 19(b) decision just because the insurance form says that it isn't work-related.

Therefore, I would award that lumbar MRI because it had previously been ordered by the Commission. I would also award continued palliative treatment in the form of aquatic exercises and medication as recommended by Dr. Nahra since this is reasonable and necessary to relieve him of the effects of his work-related injury.

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

REID, MIKE
Employee/Petitioner

Case# **01WC056076**

14IWCC1140

TEMPERATURE EQUIPMENT CORP
Employer/Respondent

On 6/19/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0230 FITZ & TALLON LLC
PATRICK A TALLON
5338 MAIN ST
DOWNERS GROVE, IL 60517

2461 NYHAN BAMBRICK KINZIE & LOWRY
ROBERT HARRINGTON JR
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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

MIKE REID,
Employee/Petitioner

Case # 01 WC 56076

v.

Consolidated cases:

TEMPERATURE EQUIPMENT CORP,
Employer/Respondent

14IWCC1140

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS J. HOLLAND**, Arbitrator of the Commission, in the city of **WAUKEGAN**, on May 24, 2013 . After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other Prospective medical treatment to the left shoulder.

FINDINGS

On **11/3/2000**, 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 as it relates to his lower back ***is*** causally related to the accident.

Petitioner's current condition of ill-being as it relates to his left shoulder ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $37,709.88; the average weekly wage was $ 725.19.

On the date of accident, Petitioner was 50 years of age, ***married*** with 0 dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

ORDER

- **The Petitioner failed to establish that his alleged current condition of ill-being as it relates to his left shoulder is causally related to the November 3, 2000 back injury.**
- **The Petitioner failed to establish that Respondent is liable for any medical bills submitted at trial.**
- **The Petitioner failed to establish that Respondent is liable for any prospective medical treatment to his left shoulder.**
- **The Petitioner is permanently and totally disabled as a result of his November 3, 2000 back injury. Respondent is liable for permanent total disability benefits in the amount of $483.46 per week.**

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.

Douglas J Holland

Signature of Arbitrator

6-15-13
Date

JUN 19 2013

14IWCC1140

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CASE NUMBER 01 WC 56076

MIKE REED VS. TEMPERATURE EQUIPMENT CORP.

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

This matter proceeded to trial on May 24, 2013. At the onset of the hearing the parties stipulated that the Arbitrator could make a finding on the issue of permanency in the event that he found that Petitioner did not establish a causal relationship between his alleged left shoulder injury from a fall at home and his underlying November 3, 2000 back injury.

The then 50-year-old right-handed Petitioner injured his lower back in the course of his employment on November 3, 2000. This matter proceeded to previous 19(b)/ 8(a) hearings on May 20, 2004, December 17, 2004 (Pet. Ex. 5), February 25, 2009, and March 25, 2009 (Pet. Ex. 6). Petitioner testified that since the last hearing date he has continued to receive TTD benefits.

The Petitioner testified that his right leg gave out in August of 2009 when he tried to climb onto a lawn tractor at his home. He testified that he is in the habit of mowing his lawn. He testified that he landed **on his left shoulder** on a concrete floor and noticed pain in his left shoulder. He testified that he did not go to an emergency room after his alleged August of 2009 fall at home.

On September 4, 2009, Petitioner saw Dr. Nahra. At that time he gave the doctor a history of a recent fall at home from his right leg giving out, landing this time **on his left shoulder** with severe left shoulder pain. The Petitioner told Dr. Nahra at that time

that he had, "no past left shoulder symptoms." (Pet. Ex. 2). The Arbitrator notes that this was not an accurate history. Petitioner admitted on cross-examination that he, in fact, treated with Dr. Nahra for a left shoulder injury in 1997. He testified that Dr. Nahra, in fact, ordered a left shoulder MRI in 1997. At the September 4, 2009 visit Dr. Nahra diagnosed left shoulder rotator cuff strain and recommended an MRI of the left shoulder with physical therapy. The Petitioner continued to treat conservatively with Dr. Nahra for his back and for his bilateral shoulders.

On February 21, 2011, Petitioner was examined by Dr. Lawrence Lieber at Respondent's request. Dr. Lieber testified at his evidence deposition that he is a board certified orthopedic surgeon. His practice includes treatment to the shoulders and he performs surgery to the shoulders. (Res. Ex. 1). At the time of Dr. Lieber's February 21, 2011 examination, the Petitioner gave the doctor a history of falling on his left shoulder at his home in July of 2010. The Petitioner further gave Dr. Lieber a history that he had, "No prior history of any left shoulder problems." (Res. Ex. 1; dep. ex. 2 p.1). The Arbitrator notes that aside from providing the doctor with the wrong year, the Petitioner again gave an inaccurate history of no prior left shoulder problems. Dr. Lieber's IME included a review of medical records which did confirm, "an abnormality within the left shoulder with treatment in 1997." Dr. Lieber reviewed the November of 1997 MRI of the left shoulder and found that, "it indicated a complete tear of the supraspinatus or the rotator cuff along with tendonopathy of the infraspinatus and degenerative changes of the AC joint." (Res. Ex. 1; dep. ex. 2 p. 3).

As part of his independent medical examination, Dr. Lieber conducted a physical examination of Petitioner's left shoulder and diagnosed chronic left shoulder rotator

cuff tear. He found that Petitioner showed significant preexisting rotator cuff pathology within the shoulder from a report of an MRI from 1997. The doctor found, "There is no evidence of any acute abnormality within the left shoulder area that can even be related or caused by the 2010 event." (Res. Ex. 1 p. 39) He found Petitioner reached maximum medical improvement in association with the left shoulder area and required no further treatment at that time or in the future. He found "the left shoulder MRI report of November 5, 1997 confirms a significant rotator cuff tear that was present prior to the recent fall. Upon review of the history, it appears that there is no direct relationship to the fall and that of the preexisting low back complaints of 2000." He concluded, "There is no direct relationship to the lower back injury and subsequent surgical intervention related to the November 3, 2000 event and that of the recent left shoulder problems." (Res. Ex. 1; dep. ex. 2 p. 4).

Following a February 22, 2011 IME, Dr. Lieber reviewed a February 18, 2011 MRI report and MRI films of the left shoulder. The doctor authorized an April 26, 2011 addendum report. At that time he concluded there was no evidence of any acute abnormality within the left shoulder area that could be related to the July, 2010 event. The doctor compared the two MRIs and found, "the only real changes noticed were that of the retraction of the supraspinatus muscles, which in my opinion is the normal progression of a chronic rotator cuff tear." After comparing the two MRIs and reviewing the records of Dr. Nahra, Dr. Lieber indicated that his opinion as to MMI relative to the left shoulder did not change. (Res. Ex. 1; dep. ex. 3).

Dr. Lieber testified at his evidence deposition that his opinion as to lack of causation had nothing to do with whether or not the Petitioner's leg allegedly gave out.

He testified that he concentrated on the Petitioner's history of mechanism of injury - alleged act of falling and landing **on the left shoulder.** (Res. Ex. 1 p. 39). No medical records documented any history of landing on an outstretched arm.

Petitioner testified in December of 2012 that he climbed onto a chair to swat a spider on the ceiling in his home. He testified that his right leg gave out at that time and that he fell on his left shoulder. Petitioner testified on cross-examination that he did not seek immediate medical attention and did not go to an emergency room following that alleged December of 2012 fall at home.

Petitioner testified that since the last 8(a)/19(b) hearing on March 25, 2009, he has continued to treat with Dr. Nahra for his low back injury. Dr. Nahra's medical records indicate that he continued to provide treatment for Petitioner's chronic lower back pain. At his evidence deposition, Dr. Nahra testified that relative to Petitioner's back condition, he was not provided a history of any new back injury since March 25, 2009 (the date of the last 19(b)/8(a) hearing) (Pet. Ex. 2, p. 10). The doctor testified that since March 25, 2009, he has conducted straight leg raising tests at most visits. (Pet. Ex. 2, p. 104). On March 12, 2009, the straight leg raising test was positive at 75 degrees bilaterally. At his evidence deposition, Dr. Nahra reviewed the Petitioner's straight leg raising tests in his chart going all the way back to 1996 (before the November 3, 2000 accident) and testified, "I don't see a normal straight leg raising reported."

Dr. Nahra testified that the February 18, 2011 MRI of the lumbar spine revealed no significant changes from the previous MRI. (Pet. Ex. 2, p. 111-112). He testified that if the Petitioner refuses back surgery, he will be at MMI relative to the back. (Pet. Ex. 2, p. 112). He testified that in the two and a half years since the last date of trial he has

treated the patient's back conservatively and has not prescribed back surgery. (Pet. Ex. 2, p. 113). He testified he has not referred Petitioner to Dr. An for back surgery since the last hearing in 2009. The Arbitrator notes that no medical records from Dr. An were offered at trial.

Dr. Nahra testified that he was never made aware that the Arbitrator in the March 25, 2009 hearing awarded prospective medical treatment specifically limited to an MRI scan as well as a standing long cassette film to assess his overall alignment. (Pet. Ex. 2, p. 121). The doctor testified that if he had been made aware of that, he probably would not have prescribed a repeat MRI earlier than the February 18, 2011 MRI.

The Petitioner offered into evidence a copy of the March 1, 2005 Decision of Arbitrator Erbacci relative to the May 20, 2004 and December 17, 2004 19(b)/8(a) trial (Pet. Ex. 5); a copy of the Decision of Arbitrator Andros relative to the February 25, 2009 19(b)/8(a) hearing (Pet. Ex.6); and a copy of the March 31, 2010 Decision and Opinion on Review relative to the same hearing (Pet. Ex.7). The Arbitrator notes that the prospective medical award from the February 25, 2009 hearing was specifically limited to "repeat MRI scan as well as standing long cassette films to assess his overall alignment." (Pet. Ex. 6, p. 3). The Arbitrator further notes that pool therapy, ultrasound, and therapeutic exercises were not awarded.

At the present trial, Petitioner offered medical bills into evidence. (Petitioner's Group Exhibit 1). Respondent objected to any and all medical bills relating to treatment to either of the Petitioner's shoulders on the basis of causation and all treatment to the lower back that was not authorized at the last 8(a) hearing by Arbitrator Andros.

(Alejandro Irizarry v. The Industrial Commission; 337 Ill. App. 598; 786 NE 2d 218; 271 Ill. Dec. 960.) The Arbitrator notes that Dr. Nahra's bills that were offered into evidence include treatment to both Petitioner's left shoulder and his back. The Arbitrator further notes that Dr. Nahra's bills indicate that the **"patient's condition is not related to his employment. "** (Pet. Group Ex. 1).

The Arbitrator further notes that medical bills submitted by Petitioner from Ortho Therapy pertain to pool therapy which is not awarded as prospective medical treatment at the last 19(b)/8(a) hearing (Pet. Group Ex. 1 and Pet. Ex. 6) .

The Arbitrator further notes that the medical bills submitted by the Petitioner from Northern Illinois Medical Center pertain to diagnostic studies for Petitioner's left shoulder and also included aquatic therapy (Pet. Group Ex. 1).

Finally, the Arbitrator notes that the medical bills for McHenry Radiologists do contain one bill for an MRI to lumbar spine on February 18, 2011 but that the corresponding claim form indicates that **"patient's condition is not related to employment."**

The Petitioner offered no other medical bills and testified that he is presently receiving Social Security Disability.

CONCLUSIONS OF LAW

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (F) "IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING AS IT RELATES TO HIS LEFT SHOULDER CAUSALLY RELATED TO THE INJURY?" THE ARBITRATOR FINDS AS FOLLOWS:

The Petitioner failed to establish that his current condition of ill-being as it relates to the left shoulder is causally related to the November 3, 2000 back injury. In support of this finding, the Arbitrator relies upon the medical opinion of Dr. Lieber, which he finds to be most credible and reliable. Dr. Lieber reviewed medical records, compared MRIs of the left shoulder, conducted a physical examination and found that there was no evidence of any acute abnormality within the left shoulder area that can even be related or caused by the 2010 event.

IN SUPPORT OF THE ARBITRATOR'S FINDINGS ON THE ISSUE OF (J) MEDICAL, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator adopts the findings in the preceding section of causal connection and finds that Petitioner failed to establish the Respondent is liable for any medical bills concerning treatment to the left shoulder.

The Arbitrator further finds relative to treatment to Petitioner's low back that Petitioner failed to establish that Respondent is liable for any treatment to the back other than that which was prospectively awarded at the prior 8(a) hearing. In support of this, the Arbitrator relies upon Petitioner's Exhibits 6 and 7. The medical bills from McHenry Radiologists for February 18, 2011 MRI of lumbar spine shows a charge of $522.00 and a balance of $0.00. The Arbitrator notes that the attached claim form for said bill states that the "**patient's condition is not related to employment.**" There are

no other bills for lumbar MRI. For these reasons the Arbitrator finds that the Petitioner failed to establish that Respondent is liable for payment of any medical bills contained in Petitioner's Group Exhibit 1 that pertain to treatment to the back.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING (O) PROSPECTIVE MEDICAL TREATMENT TO THE LEFT SHOULDER, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the foregoing section on causation, the Arbitrator finds that the Petitioner failed to establish by a preponderance of credible evidence that Respondent is liable for any prospective medical care to the Petitioner's left shoulder. The Arbitrator further relies upon Dr. Lieber's opinion which he finds to be most credible and reliable "that Petitioner reached maximum medical improvement in association with the left shoulder area and requires no further treatment at this time or in the future ". (Res. Ex. 1; dep. ex. 2 p. 3)

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING (L), WHAT IS THE NATURE AND EXTENT OF INJURY? THE ARBITRATOR FINDS AS FOLLOWS:

Having found that Petitioner failed to establish a causal relationship between the November 3, 2000 accident and his alleged current condition of ill-being as it relates to his left shoulder, the Arbitrator finds that Petitioner is permanently totally disabled from returning to gainful employment as a result of his back injury. In support of this finding the Arbitrator notes that the Petitioner's back condition has stabilized and that permanent restrictions remain in place. The Arbitrator further relies upon Dr. Nahra's

testimony that Petitioner has "chronic back pain; I don't think he can do any physical work" (Pet. Ex. 2 p. 71). Dr. Nahra concluded that if the patient refuses back surgery, he would have reached MMI (Pet. Ex. 2 p. 94). Dr. Nahra testified that in the two and a half years since the last date of trial he treated the Petitioner's back conservatively (Pet. Ex. 2 p. 113). During that time he did not prescribe back surgery and did not refer him to Dr. An for surgical consultation (Pet. Ex. 2 p. 113, 114). The Arbitrator notes the Petitioner offered no medical records from Dr. An at this hearing. Petitioner further did not testify to any medical treatment from Dr. An at this hearing. As such, the Arbitrator finds Petitioner is permanently totally disabled from returning to gainful employment as a result of his chronic back pain and restrictions. Respondent is liable to Petitioner for permanent total disability benefits in the amount of $483.46 per week from May 24, 2013. The Arbitrator further finds that Respondent is entitled to a credit for TTD payments made to Petitioner after that date.

All other issues are moot.

Dated: 6-15-13

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KIMBERLY E. BENTON,

Petitioner,

14IWCC1141

vs.

NO: 11 WC 38315

OLIN CORPORATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, notice, temporary total disability, permanent partial disability, penalties and fees, and "violation of Sec. 7090.10 of Admin. Code and Supreme Court Rule 137," 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 awarded Petitioner a permanent partial disability award of 58.45 weeks representing loss of 10% of use of the right hand and 15% loss of the use of the right arm. The 15% loss of the right arm was based on an injury to Petitioner's shoulder. In *Will County v. Illinois Workers' Compensation Commission*, 970 N.E.2d 16 (3rd Dist. WC Div. 2012), the Illinois Appellate Court held that an injury to a shoulder results in disability to the person-as-a-whole, and not to an arm. The Commission notes that 15% loss of an arm translates into an award of 37.95 weeks of permanent partial disability benefits and 7.5% loss of the person-as-a-whole results in an award of 37.5 weeks of permanent partial disability benefits. The Commission does not consider this minimal reduction of the shoulder portion of Petitioner's award to be inappropriate. Petitioner had mild shoulder impingement without a rotator cuff tear. From all accounts she had excellent results from the shoulder surgery and actually told her surgeon, Dr. Rogalsky, that she had no shoulder pain at all.

In addition, Petitioner requests the imposition of penalties and fees based on her allegation that Respondent failed initially to provide complete medical records pursuant to subpoena and that an entry in those records was altered. Respondent responds that it tried to comply with the subpoena but the records were of a separate entity. It also denies that Petitioner proved that there was any alteration of the records and alternatively if there was an alteration it was based on the assertion that the particular entry was not actually a medical record. The Commission recognizes Petitioner's concerns, and has given them due consideration. However, based upon the evidence before us, we do not find sufficient justification for the imposition of penalties and attorney fees.

Also in response to Petitioner's Petition for Penalties and Fees, Respondent seeks sanctions against Petitioner's lawyer based on its allegation that the Petition for Penalties and Fees is frivolous and in bad faith. It seeks such sanctions under Supreme Court Rule 137 and Commission Rule 7090.10. First, Supreme Court Rule 137 allows a "court" to impose sanctions against attorneys who file bad faith pleadings. The Commission is an administrative agency and not a court. Therefore, the Commission finds that the Commission does not have authority to impose sanctions pursuant to Supreme Court Rule 137.

Second, Commission rule 7090.10(a) provides: "where a verified, written allegation of improper, unethical or contemptuous conduct is made against an attorney, relating to practice before the Commission, by a party to pending litigation or any officer of the Commission, the Commission may hold a hearing to determine the truth or falsity of the allegations." The Commission notes that there is not any verified allegation filed before the Commission. Therefore, the Commission declines to hold a hearing, as specified under Rule 7090.10, or otherwise to make any findings regarding these allegations.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $611.29 per week for a period of 13&1/7 weeks, that being the period of temporary total disability for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $550.16 per week for a period of 58 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the permanent loss of the use of the right hand and the permanent loss of 7.5% of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $220.00 for medical expenses under §8(a) of the Act, pursuant to the applicable medical fee schedule under §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

14IWCC1141

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition for Penalties and Fees is denied.

II IS FURTHER ORDERED BY THE COMMISSION that Respondent's request for sanctions pursuant to §7090.10 of Administrative Code and Supreme Court Rule 137 is denied.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $40,000.00. 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: DEC 2 6 2014

Ruth W. White

Charles J. DeVriendt

Michael J. Brennan

RWW/dw
O-12/2/14
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BENTON, KIMBERLY E
Employee/Petitioner

Case# **11WC038315**

OLIN CORPORATION
Employer/Respondent

14IWCC1141

On 5/16/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% 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:

JOSEPH E HOEFERT
1600 WASHINGTON AVE
ALTON, IL 62002

0299 KEEFE & DEPAULI PC
JAMES K KEEFE SR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

141WCC1141
IWCC1141

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KIMBERLY E. BENTON
Employee/Petitioner

v.

OLIN CORPORATION
Employer/Respondent

Case # 11 WC 38315

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 **Collinsville**, on **3/22/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Violation of Section 7090.10 of the Rules Governing the IWCC**

FINDINGS 14IWCC1141

On **6/15/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**47,679.84**; the average weekly wage was $**916.93**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $**3,659.75** for other benefits, for a total credit of $**3,659.75**.

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 $611.29 per week for a period of thirteen and one-sevenths (13 1/7) weeks, commencing November 22, 2011 through February 21, 2012, as provided in Section 8(b) of the Act. Respondent shall receive a credit for any TTD already paid.

Respondent shall pay Petitioner permanent partial disability benefits of $550.16 per week for 58.45 weeks because the injury sustained caused the ten percent (10%) loss of use of the right hand; and fifteen percent (15%) loss of use of the right arm, as provided in Section 8(e) of the Act.

Respondent shall pay reasonable and necessary medical services of $220.00 to Petitioner, as provided in Section 8(a) of the Act. Respondent shall pay any outstanding, reasonable and necessary medical services, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for any medical expenses paid through group insurance and shall hold the Petitioner harmless for the same.

Petition for Penalties and Attorney Fees is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

5/9/13
Date

MAY 16 2013

Findings of Fact

Petitioner, right hand dominant, has worked for Respondent for 19 years. For the first 18 years of Petitioner's employment she worked as a Loader/Packer in T500. Since March, 2012, Petitioner has worked as a B Operator. Prior to June, 2011, Petitioner had never incurred any injuries or received medical treatment to her right upper extremity. Since working for Respondent, Petitioner did not have any outside activities or hobbies requiring the repetitive use of her right upper extremity.

Petitioner first reported to Olin's medical department on June 15, 2011, complaining of shoulder and bilateral hand pain. On that date, Petitioner stated to Olin medical that when she opens the machine it hurts her right shoulder. She testified that she was referring to the Thiele #26 machine. Petitioner further told Olin medical at that time that her hands are numb, that she drops objects and that the pain was from flipping shells on her machine. (Arbitrator Ex. 3, p. 20).

Petitioner returned to Olin medical on June 22, 2011, complaining of bilateral wrist and right shoulder pain of approximately 6 months duration. Petitioner informed Olin medical at that time that her symptoms were caused by "day by day work". Petitioner told Olin medical at that time that she felt her job was repetitious and that she did a lot of pulling at the machine door (Thiele Machine #26). On June 28, 2011, there is a notation from Olin Safety Department indicating that Petitioner's right shoulder would be accepted under workers' compensation for conservative treatment and her wrists were accepted under workers' compensation for any treatment needed. (Arbitrator Ex. 3, p. 21).

Respondent referred Petitioner to Dr. David Peeples on July 11, 2011, for a nerve conduction study. At that time Petitioner gave a history to Dr. Peeples of being a Packer/Operator and for the past year she had had bilateral hand pain, numbness and paresthesias, the right hand more severe than the left. At that time it was noted that Petitioner's pain and numbness at times extended to the elbows and the right shoulder. Dr. Peeples read that nerve conduction study as being negative. (RX. 3, Depo. Ex. 4).

Petitioner treated with her primary care physician, Dr. Kevin Boyd, on July 15, 2011, for a consultation regarding her hands. Petitioner testified that the reason she saw Dr. Boyd on July 15, 2011 was because the recent negative nerve studies did not explain her ongoing pain and paresthesias into her hands. Dr. Boyd stated on July 15, 2011, that the physical exam and the history were very consistent for carpal tunnel syndrome. (PX. 2, p. 2). Dr. Boyd referred Petitioner to Dr. Rai of St. Anthony's Health Center who performed another nerve conduction study upon Petitioner on August 17, 2011, which was read as evidencing right carpal tunnel syndrome. (PX. 1, Depo. Ex. 2, p. 19). Dr. Rai administered a right carpal tunnel injection which Petitioner testified gave her no relief. Petitioner further testified that she also wore a right wrist splint which did not benefit her.

Petitioner returned to see Dr. Boyd on September 30, 2011, complaining of chronic right shoulder pain which seemed to be a little bit worsening recently. (PX. 2, p. 3). Dr. Boyd ordered x-rays and an MRI of Petitioner's right shoulder. The MRI of Petitioner's right shoulder dated October 7, 2011, was read as showing supra and infra spinatus tendinosis without a full thickness rotator cuff tear along with AC hypertrophy and mild decreased subacromial space which the radiologist stated maybe related to clinical symptoms of subacromial impingement. (PX. 2, p. 6).

Dr. Boyd referred Petitioner to Dr. Randall Rogalsky on October 17, 2011. Petitioner testified that by then she had significant pain in her right shoulder, was barely able to lift her right arm above her shoulder level and that

her symptoms were the worst while performing her job duties. On October 17, 2011, Dr. Rogalsky reviewed the MRI of Petitioner's right shoulder and found there to be swelling and increased water content and edema on both sides of the AC joint. On that date, Dr. Rogalsky found Petitioner to have positive findings being a painful arc and loss of glenohumeral rhythm at 70 degrees, normal being 90 degrees. Dr. Rogalsky's diagnosis on that date was post traumatic subacromial impingement based upon Petitioner's history, the MRI scan results and the doctor's physical exam. (PX. 1, pp. 6-7). It is noted that the history Petitioner gave Dr. Rogalsky on October 17, 2011 is that she was working as a Packer when a door stuck and she wrenched the shoulder attempting to open it (Thiele Machine #26); (PX. 1, Depo. Ex. 2, p. 1).

Petitioner was seen by Dr. Michael Beatty, a hand specialist, on October 20, 2011, for her continued hand difficulties. On that date, Petitioner filled out for Dr. Beatty a job description setting forth her job duties as a Loader/Packer. Dr. Beatty also had a familiarity with the job duties of a Loader/Packer at Olin. Dr. Beatty diagnosed Petitioner with bilateral carpal tunnel syndrome further stating that he believed that her condition was work related. (PX. 3, p. 2). Petitioner testified that when she saw Dr. Beatty on October 20, 2011, she was experiencing severe numbness and tingling in her hands and her symptoms were most notable while at work and while sleeping at night.

Petitioner ultimately underwent a right shoulder subacromial decompression on November 22, 2011, at the hands of Dr. Rogalsky. Dr. Rogalsky testified that the intraoperative findings confirmed his preoperative diagnosis of traumatic subacromial impingement. Dr. Rogalsky testified that the reason he performed the right shoulder surgery upon Petitioner was because she had been having trouble with the shoulder for some time, had positive findings for impingement and if the spurs were causing the impingement and they are not removed she would go on to suffer a complete full thickness rotator cuff tear the recovery of which would take 4 to 6 months as opposed to 4 to 6 weeks when he got the spurs out earlier. (PX. 1, pp. 8-9). Dr. Rogalsky took Petitioner off of work effective November 22, 2011. (PX. 1, p. 9).

When Petitioner returned to see Dr. Rogalsky on December 23, 2011, she had complaints of right carpal tunnel syndrome. Dr. Rogalsky noted that the earlier EMG performed by Dr. Rai confirmed right carpal tunnel syndrome. On December 23, 2011, Dr. Rogalsky found a positive Tinel of the right wrist, a positive provocative pressure test and the strength in her thenar muscular group at the base of her thumb was 4+/5, all being consistent with right carpal tunnel. (PX. 1, pp. 9-11). Dr. Rogalsky performed a right carpal tunnel release on Petitioner on January 12, 2012, because of Petitioner's long standing symptoms of numbness and tingling and her muscles were starting to get weak. Dr. Rogalsky explained that when the muscles of the right hand begin to get weak, if you don't release the carpal tunnel it is very difficult to rehab thereafter. Dr. Rogalsky testified that his intraoperative findings confirmed his preoperative right carpal tunnel diagnosis. (PX. 1, p. 12).

Petitioner followed up with Dr. Rogalsky on January 12, 2012, and Petitioner continued to complain of some continued numbness in the hand. At the last office visit with Dr. Rogalsky on February 10, 2012, Petitioner complained of occasional numbness of the right hand, similar to what she had experienced prior to surgery. On February 10, 2012, Dr. Rogalsky returned Petitioner to work effective February 22, 2012. (PX. 1, pp. 13-14).

Regarding Petitioner's job duties as a Loader/Packer, Petitioner prepared a self job description marked Dr. Rogalsky Ex. 3, which she testified accurately reflects her Loader/Packer job duties at Olin. Petitioner testified that as a Loader/Packer, she worked on 4 different machines, namely, the Hixson, the Offline, the Parker Loader and the Thiele. Petitioner testified that when she first complained of her right shoulder and wrist complaints to

Olin in June, 2011, she was working a great deal of overtime, typically 12 hours per day and 6 to 7 days per week. Petitioner testified that working on these machines required her to repetitively hand stamp cartons and cases with her right hand over 1,000 times per shift. Petitioner testified that her job required her to pick out bad shells with her right hand which were coming by on a fast moving conveyor belt. Petitioner testified that she was required to pack the ammunition into cases and then into cartons folding each end. Petitioner testified that she would then push the carton and cases through a tape machine. Over an 8 hour shift Petitioner was required to pack between 100 and 120 cases per shift or 1,000 cartons or 60,000 rounds. Petitioner testified that she would handle all 60,000 rounds per 8 hour shift. Petitioner testified that if she worked a 12 hour shift those numbers would be times 1.5. Working the Parker Loader, Petitioner was also required to scoop bullets weighing approximately 20 pounds and manually dumping them overhead into a container approximately 20 times per shift.

Regarding the Thiele machine, this was the machine that Petitioner was working at when she first reported her right upper extremity injuries to Respondent. Petitioner testified that when running the Thiele, she is required to forcefully use a poker with her right arm to poke stuck shells in an overhead fashion. Petitioner testified that she performs this activity approximately 100 to 200 times per shift. Petitioner testified that in the first half of 2011, the #26 Thiele machine is the machine that she worked on. Petitioner testified that for the first 6 months of 2011 the Thiele machine #26 had a malfunctioning door which made it extremely difficult for her to open and close. Petitioner would use her right hand and shoulder at approximately chest level to forcefully open and close the #26 Thiele machine door approximately 30 to 40 times per shift. Petitioner testified that the opening and closing of the #26 Thiele machine malfunctioning door caused her great pain in her right shoulder. Petitioner testified that she had complained to her supervisor, Randy Sutton, approximately 20 times about the malfunctioning Thiele door. Petitioner testified that despite Randy Sutton telling her that the door would be fixed, it never was fixed the first 6 months of 2011. Lastly, Petitioner testified that after she reported her right shoulder and hand complaints to Olin medical on June 15, 2011, Olin finally repaired the Thiele door but it began malfunctioning very soon thereafter. Petitioner testified that she believes the opening and closing of the malfunctioning Thiele #26 door was the source of her shoulder complaints because this maneuver caused her great pain day in and day out.

Petitioner Ex. 4 is a copy of a Physical Demands Analysis from Respondent depicting the job duties of a Loader/Packer in T500. This job description indicates that firm grasping, simple grasping and fine manipulation are essential elements to the job. (PX. 4, p. 4). Petitioner agreed with that aspect of the Physical Demands Analysis further stating that her job requires her to constantly handle objects.

Dr. Rogalsky testified via evidence depostion that he has a general familiarity with the job requirements of a Loader/Packer at Olin from treating prior patients. He reviewed Petitioner's self prepared job description twice before his deposition. He testified that with reference to the carpal tunnel, Petitioner's work activities were definitely an aggravating factor in the development of her right carpal tunnel syndrome in that she is required to do repetitive activities with her upper extremities. (PX. 1, pp. 14-16) Regarding Petitioner's right shoulder, Dr. Rogalsky testified that the forcible wrenching of the handle to open and close the malfunctioning #26 Thiele machine door seemed to aggravate Petitioner's right shoulder condition over time. Dr. Rogalsky testified that he also believes Petitioner's over the head activities were causative to her right shoulder condition and surgery. Dr. Rogalsky testified that the repetitive activities required of Petitioner in the work place are "logically connected" to the development of the problem. (PX. 1, p. 17).

Petitioner was twice seen by Dr. Mitchell Rotman for Section 12 exams at the request of Respondent. Dr.

Rotman examined Petitioner on November 7, 2011, and April 2, 2012. Subsequently, Dr. Rotman opined that Petitioner did not suffer from right carpal tunnel syndrome or from right subacromial impingement and that if she did suffer from these conditions, they were not work related. In opining that Petitioner did not suffer from right carpal tunnel at the time of Dr. Rotman's initial exam, he cites the normal nerve studies from Dr. Peeples conducted on July 8, 2011. Dr. Rotman does acknowledge that the nerve conduction study performed by Dr. Rai on August 17, 2011 was positive for right carpal tunnel. (RX. 3, pp. 7 & 24). In addition, when Dr. Rotman examined Petitioner on November 7, 2011, he found there to be a negative Tinel and no findings for carpal tunnel. (RX. 3, p. 10). Regarding the Petitioner's impingement condition, Dr. Rotman testified that the opening and closing of malfunctioning Thiele #26 machine doors would not cause her right shoulder condition. Dr. Rotman acknowledges that he does not know what position Petitioner's arms were located in when she lifted or closed these doors and he acknowledges that this activity was not seen on the DVD. (RX. 3, p. 29). Dr. Rotman acknowledges that he would have preferred to have seen this particular activity on the DVD in addressing medical causation herein. (RX. 3, p. 30).

Petitioner testified that currently, she has constant numbness in the base of her right thumb similar to what she experienced prior to surgery. Petitioner testified that she has a loss of strength in her right hand which she notices with certain work duties. Petitioner testified that currently she has daily pain in the right shoulder typically brought on at work coupled with a loss of strength of the right shoulder compared to the left. Petitioner testified that she has a loss of motion of her right shoulder in that she is not able to reach as high with her right arm behind her back as compared to her left arm. Petitioner currently takes 3 Advil a day due to her right hand and shoulder symptoms.

Petitioner testified that she made a copayment to Dr. Rogalsky in the amount of $55.00, two $55.00 copayments to Dr. Rai, and one $55.00 copayment to Dr. Beatty. (PX. 1, Depo. Ex. 2, p. 22; PX. 5; PX. 3, p. 8).

Conclusions of Law

1. Petitioner has met her burden of proof regarding the issue of whether she sustained an accident arising out of and in the course of her employment with the Respondent. Her testimony regarding her job duties, her onset of symptoms and her complaints was both credible and corroborated by the medical evidence. The Arbitrator notes that the Petitioner provided credible evidence regarding the physical job requirements involving repetitive and forceful use of her hands throughout the work day. Additionally, her testimony regarding her complaints of pain to her right shoulder from the difficulty she experienced in opening the Thiele #26 machine was not rebutted.

2. Petitioner met her burden of proving that she provided notice to the Respondent. The medical evidence shows that the Petitioner went to the on-site medical clinic on the date of accident. These records document the Petitioner's complaints of shoulder and hand pain, and her belief that they relate to her employment activities.

3. Petitioner has met her burden of proof regarding the issue of causation. Specifically, the Arbitrator finds that Petitioner sustained a repetitive trauma injury to her right upper extremity causally related to her work activities while employed by the Respondent. The Arbitrator relies on the opinions of Dr. Rogalsky regarding this issue and finds that the supporting medical evidence from the Petitioner's various medical providers make Dr. Rogalsky's opinions more persuasive than the opinions set forth by Respondent's IME, Dr. Rotman.

4. Based on the Arbitrator's findings regarding accident and causation, the medical treatment provided to Petitioner was reasonable and necessary, in particular, the carpal tunnel and subacromial decompression

surgical procedures performed by Dr. Rogalsky. Further, Petitioner paid out of pocket medical expenditures in the amount of $220.00 for necessary medical treatment. Accordingly, Respondent shall pay all outstanding, related medical expenses, subject to the fee schedule pursuant to Section 8(a) and 8.1 of the Act. Respondent shall reimburse Petitioner for the $220.00 paid out of pocket for her related medical treatment and shall receive any credit for any medical expenses it has paid to date. Respondent shall hold the Petitioner harmless for any medical expenses paid through group insurance.

5. Petitioner is entitled to temporary total disability benefits for thirteen and one sevenths (13 1/7) weeks, commencing November 23, 2011 through February 21, 2012. Respondent is entitled to a credit of $3,659.75. In support of this conclusion the Arbitrator notes that Dr. Rogalsky authorized Petitioner to be off work for the aforementioned period of time and there is no evidence to the contrary.

6. As a result of her injuries,, the Petitioner has proven that she has sustained 10% loss of use of the right hand and 15% of the right arm under Section 8(e) of the Act. Accordingly, the Respondent shall pay to Petitioner the sum of $550.16 per week for 58.45 weeks because the injury sustained caused the ten percent (10%) loss of use of the right hand, and fifteen percent (15%) loss of use of the right arm, as provided in Section 8(e) of the Act.

7. Regarding the issue of penalties, attorneys fees and Section 7090.10 of the Rules Governing Practice before the Illinois Workers Compensation Commission pertaining to the discipline of attorneys; the Arbitrator denies penalties, attorney fees and defers to the Commission regarding any allegations under Section 7090.10 of the Rules. In this case, Petitioner's attorney alleges that Respondent's attorney failed to provide Petitioner with a copy of all medical records in their possession in response to a subpoena, and that such conduct is a violation of Section 16 of the Act. The records show that the Respondent ultimately did tender the Petitioner's records despite the various communications between the representatives. Furthermore, the Respondent did present a viable defense of this claim as evidenced by the opinions of its expert, Dr. Rotman. For these reasons, the request for penalties and attorneys fees is denied. As for the claim regarding a violation of Section 7090.10 pertaining to the discipline of attorneys, the Rules indicate that the Commission may hold a hearing to address such matters. Accordingly, the Arbitrator defers to the Commission to decide that issue.

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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steven M. Dubbs,

Petitioner,

14IWCC1142

vs.

NO: 07 WC 52972

Monterey Coal Company,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of occupational disease, average weekly wage rate, permanent partial disability, and evidentiary error and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner was a 52 year old employee (currently 59) of Respondent, who described his job as a coal miner. Petitioner had graduated from Gillespie High School and then went for two years to Lewis and Clark Community College in Alton, Illinois; he did not get his degree. In Petitioner's coal mining career all 32 years had been spent underground, all for Monterey Coal at Mine #1 in Carlinville. Petitioner testified in the course of his coal mining career he was exposed to plain coal dust and regularly exposed to and breathed in silica dust, roof bolting glue fumes and diesel fumes; all of the outside equipment was diesel. The actual equipment at the face (there they cut the coal and grind and blow it off with various pieces of equipment) and stuff was all electrical equipment; there were no diesel equipment used at the face. Later, Petitioner worked as a supply man and often he

had to remove broken tubes of roof bolting glue. When he came to the top with the glue in his vehicle he had to load it onto trams and then hoist it to the surface and they would send it back down and they would tell them to go bury it somewhere because it was too expensive to dispose of since it was considered a toxic waste. Petitioner testified that he was not happy doing that because for days after they did that he would be working down in that area and they could smell that stuff to where there was almost to the guard as the stuff was pretty pungent. On the date of accident (last exposure), November 1, 2006, Petitioner testified that was the last shift he worked as a coal mine employee. Petitioner was then 52. His classification at that time was supply man and that day he was exposed to and did breathe coal dust. He believed that position was a level 3 per the Bituminous wage agreement (PX 9). The agreement would have covered through 2014 if he was still working there. He believed per that paperwork his pay rate would have been $27.643/hour (with Petitioner being refreshed seeing the exhibit). Petitioner testified November 1, 2006 was his last day working at the coal mine because under the new contract they came up with a 30 and out clause so that if you had 30 years in the coal mine you could retire as if you had worked there until you could reach retirement age and you would get all of your benefits. At that time, Petitioner testified that Respondent did not tell him that Respondent was being sold so he was not aware of that. Petitioner testified that anytime they were going to give that kind of agreement he was ready to retire.

- After leaving the mine, Petitioner testified that he had been able to look for work and find jobs. Petitioner had worked through a series of jobs from the time he left the mine up until a few months prior to the hearing. The first job Petitioner had after the mine was with Olin Corporation in Alton, Illinois; there he made plastic shotgun shells (Winchester Western) for about $15.00 per hour. Petitioner stated that he had worked there for about three months. As soon as that job ended, Petitioner looked for and found another job which was at Litchfield Filter in Litchfield, Illinois where he earned $13.00 per hour drafting programs, drawing up filters on a computer with the dimensions and stuff and assisting the engineers. Petitioner stated that part of his job entailed him listening to the ideas that the engineer came up with and say whether or not he could actually make what the engineer envisioned as a lot of times the engineers did not realize that just because you wanted to make something out of glass as thin as a sheet of paper, did not mean it could be done as envisioned. After that job ran out, Petitioner worked for Madison Communications in Stauton and basically worked as a go-fer or fill in doing whatever came up including pick up and delivering bank deposits and doing research on equipment they were going to buy. Petitioner stated that when he worked there he made $15.50 per hour. Petitioner testified that he had been terminated from that job earlier this year because of his diagnosis of and treatment for brain cancer. Petitioner stated that he had been diagnosed in October and has been through a lot of treatment with radiation and chemo and has not been able to work. Petitioner testified that his current income, as he had not been able to work, was only about $400.00 per month, his retirement pension from the mine job. He indicated that does not adequately fulfill his monthly financial obligations. Petitioner had applied for Social Security Disability but has not yet started receiving that.

- Petitioner testified that prior to starting his mining career and after he left Lewis and Clark Community College he worked for Echlin Manufacturing in Litchfield as a precision inspector. Petitioner stated that he was there less than a year. When he left there he started in the mine where he worked for 32 years. While Petitioner worked for Respondent he worked as a scoop tractor operator (at the face), a buggy runner, a ventilation man, and a miner operator (13 years). The scoop tractor operator goes in and cleans up after they cut the coal and you move it over to the next entry when they move back; like raking leaves and putting it in a place to be picked up and disposed of. There he also had to dust the face with rock dust to keep it from being combustible per federal guidelines; you are always running rock dust through a blower or by hand and you are always breathing it back in. It is like silica dust from crushed rock. Petitioner testified that as a ventilation man he put up curtains or concrete block walls in areas to direct the flow of air over the roof bolters which create a lot of dust, drilling through rock, that gets blown down to the next place where you may be working. As a scoop tractor operator Petitioner stated that he had to do that every day with the rock dusting; generally during the lunch break.

- Petitioner testified that he first noticed he was having breathing problems around the mid 80's. Petitioner stated that he was experiencing shortness of breath and a cough with phlegm. At that time he was running a miner and had to move the cable as the miner worked across the face. The cable has to be moved so it does not get run over; it is like an extension cord for an appliance. If the cable gets smashed or cut they had to cut out the bad section and splice it. He had to lift and move the cable by hand; a section weighed about 75 pounds and he had to do that 10-12 times per day in a dusty environment. He first noticed the breathing problems with the exertion in the dust. He stated he noticed he had breathing problems when he was just mining because you would cough up and spit out black phlegm and stuff. The rock dust bags weigh 50-60 pounds and he had to move 14-15 of those every day, then dump it into a hopper to rock dust during the lunch break period.

- Petitioner is presently in a wheelchair constantly. Prior to his diagnosis of brain cancer Petitioner maybe could walk the length of a football field or like 2-3 flights of stairs at a regular pace before he got short of breath. Petitioner stated that from the time he first noticed it in the mine until he had finally left the mine it got worse. During his mining career he did bid on different job classifications to try to get in a less dusty area. He had bid for supply man for that reason but he ended up having to take supplies into areas that were extremely dusty and it really did not help. Petitioner had a letter from the Mine Safety Health Administration finding he had pneumoconiosis so he had first choice on his bid.

- Petitioner's family doctor is Dr. Epplin in Litchfield. Petitioner stated that when he was working as a coal miner he had spoken to the doctor about his breathing problems because he was getting a lot of sinus infections and the doctor thought that it might be related to all the diesel fumes he breathed as sometimes the air was so thick with it you could see it. Petitioner indicated that the doctor told him that he needed to see if he could get out of that. Petitioner stated that he tried to wear the best respirator they had for mist

and fumes, but diesel is a hard thing to take out of the air. Petitioner testified that he had never smoked cigarettes. Petitioner had no problems with his heart or hypertension or diabetes. Petitioner stated that his breathing problems do affect his daily activities now and makes it more difficult for him to use the wheelchair and get in and out.

- On cross examination, Petitioner testified that he would agree if Respondent's records showed he started working at Respondent on March 3, 1975. He agreed the last day he worked there was November 1, 2006. Right after he left the mine he called a company and went for an interview and was hired. His jobs after working the mine had been full time. Petitioner was aware the mine closed about a year after he had retired; he stated if he had known that he would have waited that year when they sold and started laying off people. Petitioner agreed the last 8 years working at the mine he was a supply man. Petitioner agreed he had been making wine for 8-9 years as he helped a friend open a winery; he would go and help there and then started making his own.

- Dr. Paul (for Petitioner) testified that in his practice he had occasion to examine Petitioner on February 28, 2008 at request of Petitioner's law firm. He obtained a history did a physical exam, pulmonary function test and read x-rays. He believed he had a B-reading available along with his chest x-ray; he also did blood work. He prepared a report of his exam with his findings and supporting data; he identified his report. Dr. Paul testified that in order to have pneumoconiosis you must have coal mine dust deposited in your lungs; the lungs have a reaction to it and the reaction is scarring or fibrosis. He testified the scarring from the disease does not allow the lungs to function as normal healthy lung tissue. He indicated they can have focal emphysema disease. He testified that with pneumoconiosis there is necessarily some impairment in function of the lung at the site of the scarring whether it can be measured with spirometry or not. Spirometry measures global impairment of the lung so it is possible to have the disease and still have normal pulmonary function testing. He indicated a person having shortness of breath can have pulmonary function testing within normal range. A person with a lobe of lung surgically removed can still test within normal range (bell curve). The bell curve covers 95% of the population similar to a minor in terms of age, height, sex, race. He indicated 2.5% of the population would be lower than normal and 2.5% above. There is a specific predicted normal value for each person tested. It is possible for a patient to be well below predicted normal but still be within normal range. The range of normal does not tell what the prior position of a specific miner was. He indicated you would need serial function tests to see if a specific exposure caused the impairment. If one patient had serial tests and FEV fell 82% in 5 years he would be concerned about that person's lung disease. The function test can tell whether the abnormality is obstructive or restrictive and how severe, but it does not tell the etiology. Emphysema is obstructive. Scarring of pneumoconiosis can be either obstructive or restrictive. He indicated a patient can have coal workers' pneumoconiosis (CWP) that is radiographically significant and not have shortness of breath; they can also have normal pulmonary function test and normal blood tests and normal physical chest exams. Dr. Paul indicated CWP is considered a progressive disease and with further exposure it can progress to massive fibrosis or complicated CWP which can be life threatening. Further exposure can progress and involve the heart to have cor pulmonale which is life threatening. There is no cure for CWP. Dr. Paul testified if a coal

miner has CWP and stops the exposure to coal mine dust it can still progress and there is no way to stop the progression. If a miner has CWP they cannot have further exposure without endangering the health as it may progress progression of the disease. Dr. Paul testified that usually CWP is gradual progression so it may come on slow and they have it for some time before you recognize it (as with other diseases). Dr. Paul testified there are exposures in a coal mine besides the dust that can further injure the lungs; like silica, diesel fumes, petroleum products fumes, glue fumes, welding fumes, high-sulfur coal fires, and smoke and fumes from electrical cable fires. Dr. Paul testified that chronic obstructive pulmonary disease (COPD) as a term is an umbrella term of obstructive lung disease and those include emphysema, chronic bronchitis and asthma. He indicated CWP could result in a COPD like condition. He indicated a restrictive disease might decrease the ability of the lungs to expand. In an obstructive lung disease, the elasticity is gone and some small airways are destroyed like with smoking induced emphysema. It may cause holes in the lungs and progress to bolus emphysema with larger holes. Obstructive lung disease can be multifactorial in origin. Dr. Paul testified inhalation of coal dust can result in shortness of breath, chronic cough, emphysema, and chronic bronchitis. He testified there are exposures in the coal mine than can result in occupational asthma and the exposures can aggravate diseases like emphysema, chronic bronchitis and asthma. With seeing treating records of a miner, he indicated you cannot change what you see on the x-ray. No matter what was in the treating records that would not change the pulmonary function testing results or what he found on examining a patient's chest and physical exam. Dr. Paul testified if a person does have COPD the best medical practice would be to avoid further exposure that can cause or aggravate it. Dr. Paul testified the development of CWP varies with individuals; some it takes 40 years and others in 2 years. NIOSH has protocols for x-rays but not CT scans. Dr. Paul testified that he is not a B-reader but he is familiar with the NIOSH system and standards. Dr. Paul stated that he had probably been doing examinations for black lung for 30 years. He indicated the CT scan has about 100 times more radiation exposure that regular analog x-rays of the chest. Dr. Paul indicated one advantage of the CT is that it can be programmed for some diseases to emphasize what you are looking for. Dr. Paul noted chronic bronchitis is one of the chronic obstructive pulmonary diseases in which you can have a normal pulmonary function test, normal blood gases and normal physical exam. He testified if you have that and are further exposed to coal dust it can make the condition worse. Asthma can be made severe and prolonged. Asthma is a reactive airway disease characterized by asthma attacks, responses to certain triggers, you get the bronchospasm. That can be aggravated by the environment with the dust, smoke and fumes of a coal mine. He indicated with repeated bronchospasm, asthma attacks can become a fixed obstruction. Dr. Paul indicated based on his diagnosis Petitioner could not have further exposure in the mine without endangering his health. He indicated if the spasm becomes severe it can become serious enough to be fatal. Dr. Paul had noted records he reviewed in his report. He noted Petitioner had pneumoconiosis with nodules, and fibrosis. Dr. Paul indicated that is important because that finding noted on x-ray can progress to end stage pulmonary fibrosis, massive pulmonary fibrosis associated with CWP. He indicated the pulmonary function test showed Petitioner had a mild to moderate amount of obstruction of air flow. His lung capacity was 79% of predicted; it demonstrated he has a mild obstructive lung disease. He indicated it did not indicate emphysema but Petitioner had asthma. Dr. Paul

testified the totality of the findings indicated Petitioner does have CWP and it was caused by exposure to coal mine dust. He does also have asthma and that could be aggravated by coal mine dust exposure. Dr. Paul testified Petitioner has clinically significant pulmonary impairment with the shortness of breath, wheezing, etc, related to the CWP and asthma diagnosis. Dr. Paul indicated radiographically it was consistent with CWP abnormalities. Dr. Paul testified Petitioner does have physiologically impaired pulmonary function which could be from both the CWP and the asthma. He testified with the CWP he could not be further exposed to coal mine dust without endangering his health and potentially aggravating the asthma. Dr. Paul testified that based on the results, Petitioner was disabled from coal mine work permanently due to both diagnoses. He testified Petitioner is capable of working outside the coal mine. There is no cure for CWP and it can progress even removed from the coal mine environment.

- Dr. Tutor (for Respondent) testified that he is a physician in internal medicine and pulmonary diseases. He teaches, treats patients, reviews chest x-rays daily and reviews pulmonary function testing results. He routinely examines patients. Dr. Tutor examined Petitioner November 25, 2009 at Respondent's request. Prior to seeing Petitioner he had an x-ray done of Petitioner's chest and had the films available to review when he saw Petitioner. He agreed Petitioner had pulmonary function testing done on the day before he saw Petitioner and those results were available. He had obtained a history from Petitioner in addition to doing the exam. He prepared a report of his exam and review of the data. Petitioner had subsequent cardiac testing (essentially normal) done and he had prepared a supplemental report after he reviewed those results. He indicated those cardiac reports did not affect anything in his initial report. Dr. Tutor testified that per history, when he saw Petitioner, Petitioner was not on any medications for any pulmonary respiratory problems at the time of the exam. Dr. Tutor testified that Petitioner's physical exam was normal and there was an absence of late inspiratory crackles. He had reviewed the x-rays and stated they were negative and there was no interstitial pulmonary process and no evidence of CWP. He indicated the pulmonary function test was within normal limits and revealed no pulmonary abnormalities. There was exercise intolerance on the study by Petitioner; he indicated no identified pulmonary cause. He testified he could tell if pulmonary function test findings were valid and he stated the spirometry was grossly invalid; by definition of the findings as assessment of maximum function. He indicated the baselines reported by Dr. Paul were speculative and cannot be based on the baseline date. He indicated Petitioner has allergic rhinitis and there would not be any connection between that and any occupational lung disease. Dr. Tutor testified that in his opinion there was insufficient evidence to indicate the presence of CWP of significant severity and profusion to cause clinical symptoms, physical examination abnormalities, impairment of pulmonary function, or radiographic change. Dr. Tutor testified he found no evidence of any coal mine dust related lung disease. He stated clearly Petitioner does not have COPD phenotype and that clinical manifestation of COPD and airflow obstruction was not present and therefore Petitioner does not have 'so-called' legal coal workers' pneumoconiosis with the utmost of reasonable medical certainty. He indicated that he did not find any evidence of chronic bronchitis or emphysema which are included under COPD. Dr. Tutor testified he found no evidence of reactive airway problems or asthma in Petitioner. Dr. Tutor stated this was evaluated objectively in several ways; one

of which was a bronchodilator and another was Petitioner's response to exercise. Dr. Tutor stated both were negative.

The Commission finds that Petitioner testified that he was a 52 year old employee (currently 59) of Respondent, who described his job as a coal miner. Petitioner had graduated from Gillespie High School and then went for two years to Lewis and Clark Community College in Alton, Illinois; he did not get his degree. In Petitioner's coal mining career all 32 years had been spent underground, all for Monterey Coal at Mine #1 in Carlinville. Petitioner testified in the course of his coal mining career he was exposed to plain coal dust and regularly exposed to and breathed in silica dust, roof bolting glue fumes and diesel fumes; all of the outside equipment was diesel. The actual equipment at the face (there they cut the coal and grind and blow it off with various pieces of equipment) and stuff was all electrical equipment; there were no diesel equipment used at the face. Later, Petitioner worked as a supply man and often he had to remove broken tubes of roof bolting glue. When he came to the top with the glue in his vehicle he had to load it onto trams and then hoist it to the surface and they would send it back down and they would tell them to go bury it somewhere because it was too expensive to dispose of since it was considered a toxic waste. Petitioner testified that he was not happy doing that because for days after they did that he would be working down in that area and they could smell that stuff to where there was almost to the guard as the stuff was pretty pungent. On the date of accident (last exposure), November 1, 2006, Petitioner testified that was the last shift he worked as a coal mine employee. Petitioner was then 52. His classification at that time was supply man and that day he was exposed to and did breathe coal dust. He believed that position was a level 3 per the Bituminous wage agreement (PX 9). The agreement would have covered through 2014 if he was still working there. He believed per that paperwork his pay rate would have been $27.643/hour (with Petitioner being refreshed seeing the exhibit). Petitioner testified November 1, 2006 was his last day working at the coal mine because under the new contract they came up with a 30 and out clause so that if you had 30 years in the coal mine you could retire as if you had worked there until you could reach retirement age and you would get all of your benefits. At that time, Petitioner testified that Respondent did not tell him that Respondent was being sold so he was not aware of that. Petitioner testified that anytime they were going to give that kind of agreement he was ready to retire. After leaving the mine, Petitioner testified that he had been able to look for work and find jobs. Petitioner had worked through a series of jobs from the time he left the mine up until a few months prior to the hearing. The first job Petitioner had after the mine was with Olin Corporation in Alton, Illinois; there he made plastic shotgun shells (Winchester Western) for about $15.00 per hour. Petitioner stated that he had worked there for about three months. As soon as that job ended, Petitioner looked for and found another job which was at Litchfield Filter in Litchfield, Illinois where he earned $13.00 per hour drafting programs, drawing up filters on a computer with the dimensions and stuff and assisting the engineers. Petitioner stated that part of his job entailed him listening to the ideas that the engineer came up with and say whether or not he could actually make what the engineer envisioned as a lot of times the engineers did not realize that just because you wanted to make something out of glass as thin as a sheet of paper, did not mean it could be done as envisioned. After that job ran out, Petitioner worked for Madison Communications in Stauton and basically worked as a go-fer or fill in doing whatever came up including pick up and delivering bank deposits and doing research on equipment they were going to buy. Petitioner stated that when he worked there he made $15.50 per hour. Petitioner testified that he had been terminated from that job earlier this

14IWCC1142

year because of his diagnosis of and treatment for brain cancer. Petitioner stated that he had been diagnosed in October and has been through a lot of treatment with radiation and chemo and has not been able to work. Petitioner testified that his current income, as he had not been able to work, was only about $400.00 per month, his retirement pension from the mine job. He indicated that does not adequately fulfill his monthly financial obligations. Petitioner had applied for Social Security Disability but has not yet started receiving that.

The Commission notes that Petitioner's testimony is unrebutted. Petitioner was exposed to the breathing hazards of mining over many years. The evidence in this record finds a chest x-ray from May 2002 indicating category 1 CWP and he was then advised to minimize his exposure. Petitioner bid on the supply job but he was still thereafter significantly exposed to significant amount of coal dust until his retirement in November 2006, taking an early retirement option not for health related issues. Petitioner noted his breathing difficulties. Petitioner had obtained various jobs from the time of his retirement until his brain cancer diagnosis. Petitioner had been seeing his primary doctor since the early 1980's for various reasons. In 2008 Petitioner was examined by Dr. Paul for Petitioner's counsel. In Dr. Paul's report and testimony he opined Petitioner has CWP and some impairment related to Petitioner's long coal mining history. Petitioner had been seen by Dr. Tutor in 2009 and contrary to the 2002 x-ray report indicating CWP, Dr. Tutor opined Petitioner did not have CWP or any obstructive or restrictive problem. Dr. Wiot, a B-reader, reviewed a grade 2 film (overexposed), of Petitioner in February 2010 and he opined no CWP. The Commission finds with the evidence and testimony that Petitioner had been having intermittent problems throughout his mining career and after. Petitioner had treated for asthma which became periodically aggravated through his career. The pulmonary function test done with Dr. Paul's exam indicated significant impairment while Dr. Tutor's exam indicated no impairment. CWP as noted by the doctors is a progressive disease and has no known cure and further exposure can cause further progression; it can also progress in some cases despite no further exposure. Dr. Paul's opinion is supported by a grade 1 film and the prior Federal screening finding of CWP. Furthermore, Dr. Paul's opinion seems much more credible than the Dr. Wiot's grade 2, overexposed film and the opinions of Dr. Tutor. Petitioner was clearly exposed to coal mine dust and various fumes and chemicals for 32 years. There is clear evidence of a CWP diagnosis, as well as impairment. The evidence and credible testimony finds that Petitioner met the burden of proving an occupational disease that arose out of and in the course of his employment with Respondent, and further proved impairment and a causal relationship to his current condition of ill-being (CWP with impairment). The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding of accident/Occupational exposure/disease, and further affirms and adopts the Arbitrator's finding as to causal connection.

The Commission finds The Arbitrator found an average weekly wage (AWW) of $895.43 with a corresponding permanent partial disability (PPD) rate of $596.95. The Commission finds that 60% of $895.43 equals **$537.26** so the Arbitrator's figure for PPD was clearly in error. The Commission finds the decision of the Arbitrator as contrary to the weight of the evidence, as a simple error, and, herein, modifies the PPD rate to $537.26, based on the AWW of $895.43.

The Commission notes that Petitioner argued that the Arbitrator erred by refusing to grant a wage differential award. Petitioner argued that the refusal to award a wage differential is contrary to the Act and the case law interpreting it. Petitioner argued the plain language interpretation of §8(d) has been interpreted as barring the Commission from awarding a percentage person as a whole award where the claimant has shown a loss of earning capacity. Petitioner argued that the Arbitrator's rationale in observing that the Petitioner 'left his mining job voluntarily' is premised on legal error and must be reversed. Petitioner argued there is nothing in the Act that bears on wage differential. Petitioner argued that he proved that suffered from a work related pulmonary disease causing impairment in lung function and medically precluding him from further work as a coal miner and thus proved entitlement to a wage differential award. Petitioner argued that his AWW was $895.43 and that he made $15.50 per hour (AWW of $620.00) at Madison Communications after leaving the mine with no proof of a better job, resulting in a difference in wage of $275.43. Petitioner requests a wage differential award under §8(d)(1) of $183.61 (2/3 of the wage difference of $275.43). The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence nor contrary to the Act or rules of evidence applicable here, and herein, affirms and adopts the Arbitrator's findings as to evidentiary rulings/findings, as the Commission finds no legal or evidentiary error.

The Commission, with the above finding for Petitioner as to occupational disease and causal connection, finds that Petitioner met the burden of proving entitlement to a PPD award. The evidence and credible testimony supports a finding of an award, under the facts and circumstances in evidence here, of 12.5% loss of Petitioner's person as a whole, as more consistent with prior Commission decisions of similar nature. The Commission finds the decision of the Arbitrator as not totally contrary to the weight of the evidence, but finds the higher award more appropriate and fully supported in the evidence and herein, modifies, the PPD rate to **$537.26** per week, and further modifies the Decision to find Petitioner suffered a loss of **12.5%** loss of his person as a whole (**62.5 weeks**).

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $537.26 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 Petitioner's person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

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Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $33,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 2 9 2014
o-10/23/14
DLG/jsf
45

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DUBBS, STEVEN M
Employee/Petitioner

Case# **07WC052972**

14IWCC1142

MONTEREY COAL COMPANY
Employer/Respondent

On 5/6/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.45% 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:

0755 CULLEY & WISSORE
BRUCE WISSORE
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

0332 LIVINGSTONE MUELLER ET AL
L ROBERT MUELLER
P O BOX 335
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC1142

STEVEN M. DUBBS,
Employee/Petitioner

v.

MONTEREY COAL COMPANY,
Employer/Respondent

Case # 07 WC 52972

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **4/17/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS 14IWCC1142

On **11/1/06**, 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 **$46,562.49**; the average weekly wage was **$895.43**.

On the date of accident, Petitioner was **52** 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 **$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 permanent partial disability benefits of $596.95/week for 37.5 weeks, because the injuries sustained caused 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

5/5/14
Date

ICArbDec p. 2

MAY - 6 2014

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 52 year old coal miner, alleges he sustained an accidental injury that arose out of and in the course of his employment by respondent on 11/1/06. Petitioner is claiming an Occupational Disease. Petitioner is a High School graduate, and had 2 years of general study in college. Petitioner voluntarily retired from respondent on 11/1/06. He worked full duty until he was diagnosed with brain cancer in October of 2013. Petitioner has been treating for this condition since then.

Petitioner was employed by respondent in the coal mines for 32 years. Petitioner testified that during this period he worked underground in the mine in Carlinville. Petitioner testified that during these 32 years he was exposed to silica, roof bolting glue, coal dust and diesel fumes. During his tenure with respondent petitioner worked as a scoop tractor operator, buggy runner, ventilation man, miner operator and supply man. As a scoop tractor operator petitioner would go in and clean up the coal after the coal was cut. Petitioner would run the rock dust through a blower or by hand, and breath in silica dust. Petitioner did this every day during the lunch period while a scoop tractor operator.

Petitioner first noticed breathing problems in the 1980's, when he experienced shortness of breath, and coughing with phlegm. During this time petitioner would have to move the miner cable so that it did not get run over and stop working. Petitioner would lift and move the cable by hand at least 10-12 times a day. Petitioner performed this task in a dusty environment. Petitioner also experienced breathing problems while moving 14-15 bags of rock dust weighing 50-60 pounds each every day. Petitioner testified that after he was diagnosed with pneumoconiosis he finally bid into the supply man job to get away from the dust, but actually had to bring parts into area of the mine that were very dusty and he continued to breath in the dust. Petitioner worked as a supply man for 8 years before he retired. Petitioner had a lot of sinus infections while working in the mine. He testified that had a lot of exposure to diesel fumes. Petitioner wore the best ventilation masks there were while working in the mine.

Petitioner retired from the mine on 11/1/06. He stated that at that time there was a new contract with a "30 and out clause" that allowed petitioner to retire since he had worked more than 30 years and get benefits. Petitioner retired as soon as he could because he felt it was a good deal. What petitioner did not know was that the mine would close the next year. In hindsight, he stated that had he known the mine would close the next year he would not have retired.

After petitioner retired from mining on 11/1/06 he stated that he could walk at a regular pace up 2-3 flights of stairs and the length of a football field before experiencing any shortness of breath. Petitioner testified that his breathing problems worsened after he left the mine. Petitioner never smoked. Petitioner denied any other

problems while in the mine other than breathing problems. He stated that these problems now affect his activities of daily living.

After retiring from the mine in 2006 petitioner continued to work full time doing other work. Petitioner helped his buddy open a winery and then made wine for 8-9 years. He also worked for International Filter Manufacturing Corporation in 2007 and 2008, and worked for Schwartz Ventures in 2008-2013. Petitioner was terminated due to his brain cancer. If petitioner was still working in the mine for respondent the prevailing wage would be $27.643 an hour.

On 8/29/07 petitioner underwent PA and lateral chest x-rays, that revealed pneumoconiosis with interstitial fibrosis p/p, all zones involved, profusion 1/1. The x-ray was read by Dr. Henry Smith who is a certified B-Reader.

Petitioner offered into evidence the medical records of Dr. Epplin, his primary care physician from 1980 to present. In 1980 it was noted that petitioner had a history of asthma back to at least 1965. He was worked up and it was determined that he had marked reactivity to house dust, grass, ragweed and molds. He was assessed with allergic rhinitis, seasonal; allergic conjunctivitis, seasonal; and asthma by history. He was given an inhaler shoulder he have a bout of shortness of breath, chest tightness or wheezing. On 6/17/80 Dr. Epplin noted that petitioner's asthma was probably aggravated by his working in a shaft coal mine.

On 2/20/86, 1/8/93, 3/17/04, 1/31/11, and 12/7/12 petitioner was diagnosed with a sinus infection and/or sinusitis. On 6/18/03 petitioner's lung sounds were clear to auscultation, and he had even respiration. On 10/28/05 his breath sounds were normal. On 2/1/06, 1/21/08, 7/2/09, 3/14/11, 4/23/12, and 7/16/12 petitioner had no cough or difficulty breathing, and his breath sounds were normal. Petitioner was congested on 1/31/11 and 3/14/11. On 12/7/12 petitioner had a cough, was congested, but had regular auscultation.

On 5/7/02 petitioner had a chest x-ray under a program authorized by the Federal Mine Safety and Health Act of 1977 and administered by NIOSH. NIOSH determined that his x-ray showed definite evidence of Category 1 pneumoconiosis. Petitioner was instructed to minimize his exposure to dust at work to prevent the worsening of his pneumoconiosis.

On 2/28/08 petitioner was examined by Dr. Gennon Paul, a respiratory specialist, at the request of petitioner's lawyers. Dr. Paul took a history, performed a physical examination, performed pulmonary function studies, CBC, and read a chest x-ray and B-reading. Petitioner gave a history of asthma and occasional wheezing and coughing. He also reported shortness of breath on walking about 1 mile and going up 1-2 flights of stairs. Dr. Paul noted that the chest x-ray showed multiple small nodules with some fibrosis throughout both

lung fields. The pulmonary function test showed that petitioner had a mild to moderate amount of obstruction of the air flow, and reversible obstructive airway disease (asthma). No emphysema was suggested. Dr. Paul diagnosed petitioner with coal worker's pneumoconiosis complicated by asthma.

On 12/1/08 the evidence deposition of Dr. Glennon Paul was taken on behalf of the petitioner. Dr. Paul is the Medical Director of St. John's respiratory therapy, and Clinical Assistant Professor of Medicine at SIU Medical School. Dr. Paul is the senior physician at the Central Illinois Allergy and Respiratory Clinic. Dr. Paul treated coal miners in the 1970's. At that time he examined coal miners for black lung claims.

Dr. Paul stated that in order to have pneumoconiosis you must have a tissue reaction (scarring or fibrosis) to the coal mine dust deposited in the lungs. He was of the opinion that the scarring of coal workers' pneumoconiosis cannot perform the function of a normal healthy lung tissue. He was further of the opinion that if one has coal workers' pneumoconiosis they have some impairment in the function of the lung at the site of the scarring whether it can be measured by spirometry or not. Dr. Paul was of the opinion that it is possible to have an injury or disease in the lung, shortness of breath, and a lobe of a lung surgically removed, despite having normal pulmonary function test results. Dr. Paul stated that pulmonary function testing can tell you the type of abnormality, but not the etiology. He stated that scarring from pneumoconiosis can be either obstructive or restrictive. He was also of the opinion that a person can have coal miner's pneumoconiosis that is radiographically significant but not have shortness of breath. They can also have normal pulmonary testing, normal blood bases, and a normal physical examination of the chest. Dr. Paul opined that pneumoconiosis is a progressive disease, despite the fact that the person may have no further exposure. He further opined that a person cannot have further exposure to coal mine dust without endangering their health. He was of the opinion that since the progression is slow someone may have coal workers' pneumoconiosis for some time before you recognize it.

Dr. Paul testified that in addition to coal dust, diesel fumes, fumes from other petroleum products, smoke and fumes from electrical cable fires, fumes from glues used in the roof bolting process, and welding fumes can injure the lungs. Dr. Paul was of the opinion that scarring of the lungs with pneumoconiosis might decrease the ability of the lungs to expand. He was further of the opinion that there are exposures in the coal mine that can aggravate asthma.

Dr. Paul opined that petitioner has coal worker's pneumoconiosis caused by exposure to coal mine dust. He further opined that petitioner has asthma that could or might have been aggravated by his coal mine exposure. Dr. Paul opined that petitioner has clinically significant pulmonary impairment in terms of symptoms of shortness of breath and wheezing, related to his coal workers' pneumoconiosis and asthma. He further opined

that petitioner could not have any further exposure to coal mine dust without endangering his health as it relates to his asthma and coal worker's pneumoconiosis. Dr. Paul was of the opinion that petitioner was capable of work outside the coal mine.

On cross-examination Dr. Paul noted that petitioner was 79% of predicted on the total lung capacity reading, and 80% would be the low of the normal range. He assessed the 79% as a mild restriction. Dr. Paul noted that petitioner told him he had occasional coughing and wheezing, but had not had any treatment at all for these conditions. Dr. Paul opined that the progression of coal workers' pneumoconiosis is considerably less likely with a cessation of the exposure as opposed to somebody still being exposed.

On 11/25/09 petitioner underwent a Section 12 examination performed by Dr. Peter Tuteur, at the Washington University School of Medicine, Lung Center, at the request of the respondent. Petitioner gave a history of 32 years of work in the coal mines, working exclusively underground for 13 1/2 years operating a continuous miner, and the last part of his career as a supply man. As a supply man petitioner sanded tracks. He stated that he was not exposed to mine fires, but was regularly exposed to diesel exhaust. Dr. Tuteur was of the opinion that clearly petitioner was exposed to sufficient amounts of coal mine dust to produce coal workers' pneumoconiosis in a susceptible host. Petitioner reported that since leaving the coal mine he has worked as an inspector in quality control and currently works for Madison Communication doing building maintenance and other assorted jobs, which he likes very much. Petitioner stated that he spends a substantial amount of time making wine. Petitioner stated that he experienced exercise associated breathlessness for the past 5 years. He stated that he has to stop walking after 200 feet of flat ground and can climb just a bit more than 1 flight of stairs before he has to stop. Petitioner reported no cough, expectorate, wheeze or chest pain.

Following a physical examination and review of laboratory data that included a chest x-ray, pulmonary function studies, and outside records, Dr. Tuteur opined that petitioner did not have a primary pulmonary process, and no evidence to support the presence of either an obstructive or restrictive abnormality. He was of the opinion that petitioner does not have any radiographic evidence of coal workers' pneumoconiosis. Dr. Tuteur was of the opinion that there was some quantitative discrepancy in exercise limitation and may possibly have mitrol valve prolapse.

On 2/23/10 Dr. Wiot, Professor of Radiology, B-Reader reviewed a PA and lateral chest x-ray of petitioner dated 11/25/09. He noted that the films were overexposed, but of acceptable quality. Dr. Wiot was of the opinion that there was no evidence of coal worker's pneumoconiosis, but there was dextroscoliosis of the upper thoracic spine.

On 1/19/12 the evidence deposition of Dr. Tuteur was taken on behalf of the respondent. Dr. Tuteur is board certified in internal medicine and pulmonary diseases. Dr. Tuteur teaches and sees patients at Washington University. Dr. Tuteur stated that petitioner was not on medications for any pulmonary respiratory problems when he saw him. He further noted that when he reviewed the chest x-ray it was totally negative except for some evidence of old healed infectious granulomatous disease. He stated that he saw no interstitial pulmonary process or evidence of coal workers' pneumonconiosis. Dr. Tuteur was of the opinion that petitioner's pulmonary function test revealed no abnormalities.

Dr. Tuteur opined that there was insufficient evidence to indicate the presence of coal workers' pneumoconiosis of significant profusion and severity to cause clinical symptoms, physical examination abnormalities, impairment of pulmonary function, or radiographic change. He further opined that he found no evidence of coal mine dust-related lung disease.

On cross-examination Dr. Tuteur agreed that the environment of a coal mine under certain circumstances can aggravate a runny nose. He also agreed that a person with asthma can have abnormal pulmonary function testing sometimes, and normal sometimes. Dr. Tuteur stated that if a person has asthma and they are exposed to diesel fumes, roof bolting glues, plant glues and other adhesives in the mine, that can aggravate possible asthma. He also stated that inhalation of coal mine dust can result in shortness of breath and a cough. Dr. Tuteur opined that the scarring of coal workers' pneumoconiosis is permanent, and a scarred lung can perform normally. He further opined that if there is enough scarring that can result in measurable pulmonary impairment, coal workers' pneumoconiosis can progress to progressive massive fibrosis, which can be life threatening.

Dr. Tuteur was of the opinion that if a person is diagnosed with radiographically significant coal workers' pneumoconiosis, they should have no further exposure to the coal mine dust. He was of the opinion that 50% of coal workers' with coal workers' pneumoconiosis will progress after they leave the coal mine. Dr. Tuteur agreed that it is possible for a person with radiographically coal miner's pneumoconiosis to have a normal pulmonary function test, physical examination of the chest, and no symptoms or complaints.

C. DID PETITIONER SUSTAIN 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 DISEASE?

The term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public. A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon

consideration of all circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after it's contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence.

An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists. No compensation shall be payable for or on account of any occupational disease unless disablement occurs within two years after the last day of the last exposure to the hazards of the disease, except in cases of occupational diseases caused by berrylliosis, or by the inhalation of silica dust or asbestos dust and, in such cases, within three years after the last day of the last exposure to the hazards of such disease.

In the case at bar petitioner is alleging he sustained an occupational disease to his lungs and/or heart that arose out of and in the course of his employment on 11/1/06. Petitioner alleges his occupational disease is due to the inhalation of coal mine dust including, but not limited to, coal dust, rock dust, fumes and vapors for a period in excess of 32 years. Petitioner is alleging shortness of breath and exercise intolerance.

Petitioner's mining career consisted of approximately 32 years of mining, all of which were underground, and all of which were for respondent. During this period petitioner worked as a scoop tractor operator, buggy runner, ventilation man, miner operator and supply man. During this period petitioner was regularly exposed to rock and silica dust, the fumes from roof bolting glue, diesel fumes, and coal dust.

Petitioner first noticed breathing problems in the 1980's, when he experienced shortness of breath, and coughing with phlegm. During this time petitioner would have to move the miner cable so that it did not get run over and stop working. Petitioner would lift and move the cable by hand at least 10-12 times a day. Petitioner performed this task in a dusty environment. Petitioner also experienced breathing problems while moving 14-15 bags of rock dust weighing 50-60 pounds each every day.

On 5/7/02, while working for respondent, petitioner had a chest x-ray under a program authorized by the Federal Mine Safety and Health Act of 1977 and administered by NIOSH. NIOSH determined that his x-ray showed definite evidence of Category 1 pneumoconiosis. Petitioner was instructed to minimize his exposure to dust at work to prevent the worsening of his pneumoconiosis. After receiving these results petitioner bid into the supply man job to get away from the dust, but actually had to bring parts into area of the mine that were very dusty and he continued to breath in the dust. Petitioner worked as a supply man until he retired in 2006.

Petitioner had sinus infections while working in the mine. He testified that he had a lot of exposure to diesel fumes. Petitioner wore the best ventilation masks there were while working in the mine.

After petitioner retired from mining on 11/1/06 he stated that he could walk at a regular pace up 2-3 flights of stairs and the length of a football field before experiencing any shortness of breath. Petitioner testified that his breathing problems worsened after he left the mine. Petitioner never smoked. Petitioner denied any other problems while in the mine other than breathing problems. He stated that these problems now affect his activities of daily living.

Petitioner underwent another PA and lateral chest x-rays that were read by B-Reader Dr. Smith. Dr. Smith's impression was pneumoconiosis with interstitial p/p, all zones involved, profusion 1/1.

Petitioner began treating with Dr. Epplin, his primary care physician in 1980. He reported asthma dating back to at least 1965. In 1980 Dr. Epplin gave him an inhaler should he have a bout of shortness of breath, chest tightness and wheezing. On 6/17/80 Dr. Epplin was of the opinion that petitioner's asthma was probably aggravated by his working in a shaft coal mine.

Based on Dr. Epplin's records, from 1980 to 2012 petitioner was diagnosed with at least 5 sinus infections and/or sinusitis. During this period petitioner's lung sounds were clear to ausculation, his breathing sounds were normal, he had no cough and had no difficulty breathing when he presented to Dr. Epplin, except on 1/31/11 and 3/14/11 when he was congested, and on 12/7/12 when he had a cough, was congested, but had regular ausculation.

On 2/28/08 Dr. Paul, a respirator specialist, examined petitioner, read the chest x-ray and performed a pulmonary function test. The pulmonary function test showed that petitioner had mild to moderate amount of obstruction of the air flow, and reversible obstructive airway disease (asthma). He diagnosed coal workers' pneumoconiosis complicated by asthma. At that time petitioner reported occasional wheezing and coughing which was consistent with Dr. Epplin's records, and shortness of breath on walking about 1 mile and going up 1-2 flights of stairs.

Dr. Paul opined that the scarring of coal workers' pneumoconiosis cannot perform the function of a normal healthy lung tissue. He was further of the opinion that if one has coal workers' pneumoconiosis they have some impairment in the function of the lung at the site of the scarring whether it can be measured by spirometry or not. Dr. Paul was of the opinion that it is possible to have an injury or disease in the lung, shortness of breath, and a lobe of a lung surgically removed, despite having normal pulmonary function test results. Dr. Paul stated that scarring from pneumoconiosis can be either obstructive or restrictive. He was also of the opinion that a

person can have coal miner's pneumoconiosis that is radiographically significant but not have shortness of breath. They can also have normal pulmonary testing, normal blood bases, and a normal physical examination of the chest. Dr. Paul opined that pneumoconiosis is a progressive disease, despite the fact that the person may have no further exposure. He further opined that a person cannot have further exposure to coal mine dust without endangering their health. He was of the opinion that since the progression is slow someone may have coal workers' pneumoconiosis for some time before you recognize it.

Dr. Paul opined that petitioner has coal worker's pneumoconiosis caused by exposure to coal mine dust. He further opined that petitioner has asthma that could or might have been aggravated by his coal mine exposure. Dr. Paul opined that petitioner has clinically significant pulmonary impairment in terms of symptoms of shortness of breath and wheezing, related to his coal workers' pneumoconiosis and asthma. He further opined that petitioner could not have any further exposure to coal mine dust without endangering his health as it relates to his asthma and coal worker's pneumoconiosis.

On cross-examination Dr. Paul noted that petitioner was 79% of predicted on the total lung capacity reading, which was a mild restriction. Dr. Paul noted that petitioner told him he had occasional coughing and wheezing, but had not had any treatment at all for these conditions.

Respondent had Dr. Tuteur examine petitioner. Dr. Tuteur was of the opinion that clearly petitioner was exposed to sufficient amounts of coal mine dust to produce coal workers' pneumoconiosis in a susceptible host. Following a physical examination and review of laboratory data that included a chest x-ray dated 11/25/09, pulmonary function studies, and outside records, Dr. Tuteur opined that petitioner did not have a primary pulmonary process, but no evidence to support the presence of either an obstructive or restrictive abnormality. He was of the opinion that petitioner does not have any radiographic evidence of coal workers' pneumoconiosis. Dr. Tuteur was of the opinion that there was some quantitative discrepancy in exercise limitation and petitioner may possibly have mitrol valve prolapse.

Dr. Tuteur stated that petitioner was not on medications for any pulmonary respiratory problems when he saw him. He further noted that when he reviewed the chest x-ray it was totally negative except for some evidence of old healed infectious granulomatous disease. He stated that he saw no interstitial pulmonary process or evidence of coal workers' pneumonconiosis. Dr. Tuteur was of the opinion that petitioner's pulmonary function test revealed no abnormalities.

Dr. Tuteur opined that there was insufficient evidence to indicate the presence of coal workers' pneumoconiosis of significant profusion and severity to cause clinical symptoms, physical examination

abnormalities, impairment of pulmonary function, or radiographic change. He further opined that he found no evidence of coal mine dust-related lung disease.

Dr. Tuteur agreed that it is possible for a person with radiographically coal miner's pneumoconiosis to have a normal pulmonary function test, physical examination of the chest, and no symptoms or complaints. Dr. Paul opined that

On 2/23/10 Dr. Wiot, Professor of Radiology, B-Reader reviewed a PA and lateral chest x-ray of petitioner dated 11/25/09. He noted that the films were overexposed, but of acceptable quality.

Based on the above, it is unrebutted that petitioner worked in the coal mines for 32 years and was exposed to sufficient amounts of coal mine dust to produce coal workers' pneumoconiosis in a susceptible host. Given the fact that the chest x-ray performed 11/25/09 and reviewed by Dr. Wiot and Dr. Tutuer, was overexposed, the arbitrator finds the chest x-ray that was authorized by the Federal Mine Safety and Health Act of 1977 and administered by NIOSH that showed definite evidence of Category 1 pneumoconiosis, and the chest x-ray performed 8/29/07 that was reviewed by Dr. Smith and Dr. Paul and found to reveal pneumoconiosis with interstitial p/p, all zones involved, profusion 1/1, more credible than the one overexposed chest x-ray performed 11/25/09 and relied on by Dr. Wiot and Dr. Tuteur.

In addition to the radiographic findings of pneumoconiosis the arbitrator finds that on 2/28/08 petitioner's pulmonary function test revealed a mild to moderate amount of obstruction of the air flow, and reversible obstructive airway disease. Based on these findings Dr. Paul diagnosed coal workers' pneumoconiosis complicated by asthma. Although Dr. Tuteur opined that petitioner did not have any radiographic evidence of coal workers' pneumoconiosis or any impairment of pulmonary function, he admitted that person's with radiographical coal miner's pneumoconiosis can have a normal pulmonary function test, physical examination of the chest and no symptoms or complaints. He also agreed that persons with asthma can sometimes have abnormal pulmonary function testing, and sometimes normal. Dr. Tuteur opined that the elements petitioner was exposed to in the mine (diesel, coal dust, roof bolting glue, etc) can aggravate asthma.

Based on petitioner's examinations by Dr. Paul and Dr. Tuteur, as well as his examinations by Dr. Epplin, petitioner's sinus problems, coughing, difficulty breathing and congestion were intermittent. Petitioner did not present with these symptoms every time he was examined. As such, although the arbitrator finds the petitioner did prove by a preponderance of the credible evidence that he has radiographical coal workers' pneumoconiosis, she finds that his pulmonary function tests ranged between mildly abnormal to normal after he retired from

respondent. The arbitrator further finds, based on the opinions of Dr. Paul and Dr. Tuteur that that although petitioner had preexisting asthma it could have been aggravated by his work in the coal mines.

Based on the above as well as the credible evidence, the Arbitrator finds that the petitioner sustained an occupational disease that arose out of and in the course of his employment by respondent on 11/1/06. The arbitrator bases this finding on the fact that petitioner worked in the coal mines for 32 years; that during this dust; that petitioner's treating records from 1980-2012 when petitioner worked in the coal mine included intermittent reports of sinusitis, congestion, cough, and shortness of breath, slightly abnormal pulmonary function tests; and that chest x-rays performed on 5/7/02 and 8/29/07 showed radiographic evidence of coal miner's pneumoconiosis11/25/09. The arbitrator finds these chest x-ray readings more credible than those of Dr. Tuteur, who reviewed a chest x-ray that was overexposed. Although Dr. Wiot, who is also a certified B-reader interpreted a chest x-ray performed 11/25/09, and found no evidence of coal worker's pneumoconiosis, he did not interpret the other chest x-rays dated 5/7/02 and 8/29/07, and was of the opinion that the chest x-ray dated 11/25/09 he read was overexposed.

The arbitrator further finds that petitioner's current condition of ill-being as it relates to his asthma became aggravated and disabling as a result of his occupational exposures to coal dust, silica, rock dust, diesel fumes, and roof bolting glue. The arbitrator finds, based on the credible evidence, that these exposures can be harmful to a person's pulmonary health. Even Dr. Tuteur admitted that petitioner was exposed to sufficient amounts of coal mine dust to produce coal worker's pneumoconiosis in a susceptible host; that the inhalation of silica dust as a component of coal mine dust can cause obstructive ventilatory defect, and can aggravate a defect that was caused by asthma; that exposure to glues in the roof bolting process can cause reactive airway disease; and that diesel fumes can cause chemically induced bronchial reactivity.

L. WHAT IS THE NATURE AND EXTENT OF THE DISABLEMENT?

Petitioner claims he is entitled to a wage differential pursuant to Section 8(d)(1) of the Act. Petitioner claims that he is partially incapacitated and that prevents him from pursuing his usual and customary line of employment. Although it is true that any further exposure to coal mine dust could endanger his health as it related to his asthma and coal workers' pneumoconiosis, the arbitrator notes that petitioner voluntarily retired from respondent on 11/1/06 when he was given a "30 and out" offer that allowed petitioner to retire since he had worked more than 30 years and get benefits. Petitioner was not restricted from working in the coal mines by any doctor at the time he retired. In fact, he stated that had he known that the mine was going to close the next year he would have continued working in the coal mine for respondent until it closed.

Once petitioner retired he testified that he continued working full duty in different jobs until he was terminated in October of 2013 due to unrelated brain cancer. Petitioner is currently treating for this condition. Although Dr. Paul and Dr. Tuteur opined that petitioner can no longer safely work in the coal mine, the arbitrator notes that petitioner had retired, of his own free will, on 11/1/06, and not as the result of any work restrictions imposed on him. Additionally, there is no credible evidence to support of finding that petitioner was, at any time before he retired, unable to perform his usual and customary job. Therefore, the arbitrator finds the petitioner voluntarily left his employment with respondent so that he could receive his retirement benefits, and no doctor had restricted him from working as a coal miner at that time.

Petitioner has had intermittent breathing problems since the mid-1980's. He testified that his breathing problems have gradually worsened and interfere with his everyday activities. Petitioner breathing tests have ranged from normal to mild obstruction. After voluntarily leaving the mine in 2006 petitioner worked full time in various jobs until he was diagnosed with an unrelated illness that has caused him to stop working.

Based on the above, as well as the credible evidence the arbitrator finds the petitioner sustained a 7.5% loss of use of his person as a whole pursuant to Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Causal connection	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Niestrom,
Petitioner,

vs. No: 09 WC 47049

14IWCC1143

Kane Is Able, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, and temporary disability and being advised of the facts and law, affirms in part and reverses in part the November 4, 2013 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).

After hearing on October 8, 2013, Arbitrator Falcioni found that Petitioner did sustain an accident that arose out of and the course of employment on September 16, 2009 when Petitioner sustained a lifting injury to his back. The Arbitrator found that Petitioner did provide timely notice of the accident to Respondent and his current condition of ill-being was causally related to the accident. The Arbitrator ordered Respondent to pay Petitioner temporary total disability benefits of $961.54 per week for 206 6/7 weeks for the period October 16, 2009 through October 8, 2013. Petitioner's undisputed average weekly wage was $1,442.31. Petitioner was also awarded medical expenses contained in Petitioner's Exhibit 1 and prospective medical treatment.

After considering the entire record, including surveillance footage of Petitioner, and for the reasons set forth below, the Commission affirms the findings of accident and notice and reverses the remainder of the November 4, 2013 decision of the Arbitrator.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. On September 16, 2009, Petitioner was employed as an Operations Manager for Respondent and his duties included running the warehouse, preparing reports, and supervising the facility which employed 300 people. (Tr. 10-11). Petitioner began working for Respondent in March of 2009. (Tr. 11).

2. Prior to being hired by Respondent, Petitioner underwent a physical examination and acknowledged that he had a permanent 20 pound lifting restriction due to a previous work related motor vehicle accident in 1998 with injury to his back and neck. (Tr. 11-12, 14). Petitioner testified that he had undergone several surgeries to his spine; the most recent in September 2004. (Tr. 15).

3. Petitioner testified that the 1998 motor vehicle accident led to an arbitration hearing in September 2008, and ultimately a lump sum settlement in September 2009 that compensated him for 80% loss of use of the person as a whole under Section 8(d)2 of the Act. The contract kept open Petitioner's medical benefits as part of the settlement for the 1998 spinal injury. (RX1, RX2).

4. Petitioner testified that he was prescribed Methadone and was actively treating for his back complaints prior to his employment with Respondent through the date of accident. (Tr. 15-16). Prior to the accident date, Petitioner was treating with Dr. Lubenow for chronic lumbar radiculopathy with left leg pain. (PX6). As recently as July 17, 2009, Petitioner received steroid injections for his radicular pain. (PX6).

5. Petitioner testified that the night manager stopped working for Respondent in June 2009 and Petitioner had to take over the night manager duties in addition to his regular work. From June 2009 though the accident date, Petitioner would work from 7:00 am to 4:00 am the next morning, six days a week. (Tr. 31-32,44).

6. Petitioner testified that on September 16, 2009, he was at work when a mechanic informed him that one of the machines needed a part. (Tr. 20-21). Petitioner was leaving the property to obtain the part when he was stopped by the Respondent's General Manager who was preparing the propane grill for a company bar-b-que. (Tr. 22-23). The General Manager asked Petitioner to get the propane tanks for the grill filled while he was out obtaining the machine part. (Tr. 22-23).

7. Petitioner testified that an empty tank weighed 20 pounds and a full tank weighed 40 pounds. (Tr. 23-25). Petitioner testified that after the tanks were filled, he grabbed them without thinking about the weight. (Tr. 24-25). Petitioner reported he experienced an immediate pop in his back and pain in both legs after lifting the full 40 pound tank. (Tr. 24). An employee of the hardware store put the tanks in his car and an employee of Respondent removed them when Petitioner returned to work (Tr. 26). Petitioner gave notice of the accident to Respondent the same day and presented to Premier Occupational Health for treatment. (Tr. 27).

8. Petitioner received conservative treatment at Premier Occupational Health on September 16, 2009 and complained of sharp pain in his back and down the left leg into the toes. Petitioner was diagnosed with a lumbar strain and radiculitis and returned to work. He returned to Premier Occupational Health for follow up on September 18, 2009 with continued and constant sharp and throbbing back pain at level 8/10 radiating down the lower left leg. Petitioner was advised to continue muscle relaxers and his regular duty desk job. (PX2).

9. Petitioner presented to Dr. Lubenow on September 25, 2009 for follow up of his long standing chronic back pain. Dr. Lubenow advised Petitioner to continue taking his previously prescribed methadone. (PX6).

10. Petitioner underwent a lumbar MRI on September 25, 2009 which showed congenital spinal stenosis, possible small left lateral disc herniation at L2-3, and postsurgical changes. He continued follow up care at Premier Occupational Health through October 16, 2009 and was given work restrictions of no lifting, bending, or twisting, limit work to eight hours a day, and standing limited to 10 minutes an hour. Petitioner was able to continue working his regular duty for Respondent under these restrictions. (PX2).

11. Petitioner continued to work for approximately one month for Respondent until he was terminated for poor performance on October 16, 2009 (Tr. 37-38).

12. After his termination from Respondent, Petitioner presented to Dr. Ross, a neurosurgeon, on October 23, 2009. Dr. Ross diagnosed a lumbosacral strain and recommended additional physical therapy. Dr. Ross reviewed the September 25, 2009 MRI and noted that there was no evidence of significant disc herniation or nerve impingement. Dr. Ross opined Petitioner was able to continue working his full duty managerial position. (PX3).

13. Rather than return for treatment with Dr. Ross, Petitioner resumed treatment on December 3, 2009 with Dr. Geisler, with whom he had previously treated for the 1998 back injury, including a 2004 fusion surgery. (PX4). Prior to the 2009 work accident, Petitioner had last seen Dr. Geisler for low back and left leg pain on October 30, 2008. At that time Dr. Geisler noted that Petitioner's pain complaints were 8/10, he had undergone physical therapy and spinal injections, and was currently taking methadone for his symptoms. Dr. Giesler recommended a CT scan at that visit. (PX4).

14. Petitioner confirmed that after the September 16, 2009 work accident, he continued to take the same dosage and number of methadone pills as prior to the accident. (Tr. 52). He testified at trial that he regularly treats with Dr. Lubenow at the Rush Pain Clinic every two months, a similar frequency as he presented before the September 2009 work injury. (Tr. 61).

15. Petitioner testified at hearing on October 8, 2013 that he currently has pain down both legs in addition to the low back, he must use two canes for balance, and he is unable to perform much housework. (Tr. 43-44).

16. Respondent entered into evidence surveillance footage of the Petitioner on two dates in October, 2012 which depict Petitioner ambulating without the use of a cane and show him bending at the waist, operating his vehicle and shopping for groceries. (RX11).

17. Also entered into evidence was the transcript at arbitration on September 2, 2008 relating to the 1998 accident. Petitioner testified that he treated with Dr. Lubenow monthly for medication refills and quarterly for steroid injections (RX2, P.34). Petitioner further testified at that time that he experienced pain in his neck, back and legs as well as numbness that was sharp without relief. His pain complaints had changed his life in that he was not able to do anything but go to work and come home and his doctors had advised he would be like this for the rest of his life. (RX2, P.9, 30, 36, 38).

18. At the request of Respondent and pursuant to Section 12, Petitioner was examined by Dr. Andreshak, a board certified orthopedic spine surgeon. Following Dr. Andreshak's record review and examination of Petitioner on July 19, 2010, the doctor opined that the brief lifting episode involving the propane tank on September 16, 2009, "likely strained the already injured muscles that had been operated through multiple times, possibly towards some scar tissue that causes pain." (RX3, P. 17). Dr. Andreshak noted that Petitioner was not asymptomatic prior to the September 16, 2009 work injury and had continuing symptoms for many years prior to the work accident that appeared not to improve despite numerous operations. (RX3, P.23).

19. Dr. Andreshak testified that he reviewed two distinct myelograms that had been performed, one on September 16, 2005, before the work accident, and one on December 30, 2009, after the accident. Dr. Andreshak testified that the CT myelograms were identical with no significant change except bone graft remodeling over the intervening four years. (RX3, P.28).

20. Dr. Andreshak opined Petitioner sustained a lumbar strain on September 16, 2009 and anticipated that Petitioner's alleged work injury would resolve within three months of the alleged accident date. In other words, Petitioner would have reached maximum medical improvement by December 16, 2009. (RX3, P. 18).

21. Dr. Andreshak further opined that Petitioner did not require any further medical treatment after December 16, 2009 for the September 16, 2009 strain injury, but he should continue with his normal medical management for his preexisting back problems. Dr. Andreshak testified that Petitioner could work in his prior occupation as a manager, which was relatively sedentary in nature. (RX3, 21).

The Commission affirms and adopts the Arbitrator's findings that on the date of accident, September 16, 2009, Respondent was operating under and subject to the provisions of the Act and an employer-employee relationship did exist between Petitioner and Respondent. The Commission finds the Petitioner's average weekly wage in the year preceding the injury was $1,442.31 and on the date of accident, Petitioner was 49 years of age, married with one dependent child. The Commission further affirms and adopts the Arbitrator's finding that on September 16, 2009, Petitioner did sustain an accident that arose out of and in the course of employment and timely notice of the accident was given to Respondent.

The Commission finds the Petitioner's current condition of ill-being is not causally related to the September 16, 2009 work injury and therefore, reverses the Arbitrator's finding regarding causation. The Commission finds the opinions of Dr. Andreshak regarding the causal connection between Petitioner's complaints and the work injury credible and more persuasive then those of Dr. Laich when viewed with the record as a whole, including the medical evidence both before and after the accident, testimony, and video surveillance. The preponderance of the credible evidence supports a finding that Petitioner sustained a temporary aggravation of his preexisting condition which returned to baseline on or about December 16, 2009. Petitioner has failed to prove that his current condition with regard to his back is related to the September 16, 2009 accident.

Based on the Commission's finding regarding causation, the Commission reverses the Arbitrator's findings of medical expenses, prospective medical treatment, and temporary disability benefits.

The Petitioner claims unpaid medical bills totaling $1,743.74 as contained in Petitioner's Exhibit 1 and prospective medical expenses as prescribed by Dr. Laich. The preponderance of the evidence, including the credible medical opinion of Dr. Andreshak, the medical records in evidence documenting Petitioner's symptoms and treatment regimens both before and after the September 16, 2009 accident, and the testimony of Petitioner regarding his complaints at the time of a September 2008 arbitration hearing as well as the present claim, supports the Commission's finding that Respondent has paid for all reasonable and necessary medical treatment and that any treatment rendered beyond December 16, 2009 is not related to the alleged work injury.

With regard to temporary total disability benefits, the Commission finds the Arbitrator's award of benefits from October 16, 2009 through October 8, 2013 is contrary to the preponderance of the evidence. Based on its findings regarding causation, the Commission finds Petitioner is entitled to temporary total disability benefits from October 16, 2009 through December 16, 2009, a period of 8 6/7 weeks. Dr. Andreshak opined that Petitioner reached maximum medical improvement as of December 16, 2009 and that he was capable of returning to work in his prior position as a manger by that time.

After considering the record as a whole, and for the foregoing reasons, the Commission finds that on the date of accident, September 16, 2009, Respondent was operating under and subject to the provisions of the Act and an employee-employer relationship did exist between Petitioner and Respondent. Petitioner did sustain an accident on that date that arose out of and in the course of employment and timely notice of the accident was given to Respondent. In the year preceding the injury, Petitioner earned an average weekly wage was $1,442.31 and on the date of accident, Petitioner was 49 years of age, married with one dependent child. The Commission further finds Petitioner's current condition of ill-being is not causally related to the accident and Respondent has paid all reasonable and necessary charges for all reasonable and necessary medical services. Respondent shall pay Petitioner temporary total disability benefits of $961.54 per week for 8 6/7 weeks for the period October 16, 2009 through December 16, 2009.

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Consistent with these findings, the Commission affirms the Arbitrator's finding of accident and notice but reverses the remainder of the Arbitrator's findings including causation, medical expenses and temporary disability.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the November 4, 2013 Decision of the Arbitrator is affirmed in part and reversed in part.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $961.54 per week for a period of 8 6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injuries.

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 $7,800.00. 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: DEC 30 2014

Daniel R. Donohoo

Ruth W. White

o-10/21/14
drd/adc
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DISSENT

I must respectfully dissent from the majority's finding that Petitioner failed to prove that his current condition of ill-being was causally connected to the accident on September 16, 2009. Instead the Arbitrator's decision should be affirmed and adopted.

The Arbitrator found that Petitioner's testimony at trial was very credible. Petitioner did admit that prior to the accident he had undergone four back surgeries, the last being on April 2, 2004. He also admitted that he was receiving treatment to his lower back the summer of 2009 by way of injection at the Rush Pain Clinic. (Transcript Pgs. 12-14)

Petitioner had been working for the Respondent since June of 2009 as a night manager. Prior to September 16, 2009, the day manger quit and Petitioner was required to work six days a week, working twice the number of hours. (Transcript Pg.32) (Transcript Pg. 44)

Respondent was advised prior to June of 2009 that Petitioner was under a 20 pound weight lifting restriction and was taking methadone for his pain. Respondent provided Petitioner a job within those restrictions. (Transcript Pgs. 12-14)

On September 16, 2009, Respondent asked the Petitioner to take the empty propane tanks, which weighed 20 pounds, and replace them with filled tanks which weighed 40 pounds. Once the tanks were filled, Petitioner lifted up the full tank and felt a pop in his back. He felt excruciating pain in his back and pain down his right leg. Petitioner testified he had never had pain like that before. (Transcript Pgs. 23-25)

Petitioner received conservative care and was terminated by the Respondent because he was told he was unable to perform the duties of his job. (Transcript Pg. 32) Because he was in extreme pain Petitioner went back to see Dr. Geisler who performed his last surgery in 2004. Petitioner mentioned the September 16, 2010 injury to Geisler. (Transcript Pg. 36)

Petitioner eventually came under the care of Dr. Laich. Laich noted the lumbar pain that Petitioner was now having occurred when he was lifting the tanks at work. He opined that Petitioner needed a lateral fusion at L2-L3 and L3-L4. He also noted that the SI joint may have to be addressed surgically. Per Dr. Laich, prior to September 16, 2009 Petitioner was functioning and back to his desired life. The fact that he was able to function in an acceptable pattern was a clear indicator that he had reached medical maximum improvement from his prior lower back injuries. He further opined that the cause of Petitioner's having to be seen repeatedly and needs the surgery recommended by him on July 20, 2011, was the injury on September 16, 2009. (Petitioner Exhibit 5 Pgs.21-25)

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The Arbitrator found that Dr. Laich's opinions as to causal connection were more persuasive. Taking that into account, as well as the Petitioner's very credible testimony, the Arbitrator's decision should clearly be affirmed and adopted.

I respectfully dissent.

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR
AND 8(a)

NIESTROM, DAVID A
Employee/Petitioner

Case# **09WC047049**

KANE IS ABLE INC
Employer/Respondent

14IWCC1143

On 11/4/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% 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:

0146 CRONIN PETERS & COOK
JOHN J CRONIN
221 N LASALLE ST SUITE 1454
CHICAGO, IL 60601

1120 BRADY CONNOLLY & MASUDA PC
NICOLE RUSSO WEISBRODT
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

14IWCC1143

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) AND 8(a)

DAVID A. NIESTROM
Employee/Petitioner

v.

KANE IS ABLE, INC.
Employer/Respondent

Case # 09 WC 47049

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 FALCIONI**, Arbitrator of the Commission, in the city of **GENEVA**, on **OCTOBER 8, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Is Respondent liable for the medical bills?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **9/16/09**, 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 **$75,000.00**; the average weekly wage was **$1,442.31**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **1** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Medical bills set forth under Petitioner's Exhibit Number. Respondent is to pay these bills pursuant to the medical fee schedule. Respondent is also responsible for the outstanding bills of $1,743.00. Since there is no 8j credit, Respondent is responsible to reimburse the insurance carriers.

Respondent shall pay Petitioner TTD benefits of $961.54 per week for 206-6/7 weeks from October 16, 2009 through October 8, 2013 the date of hearing.

Pursuant to Section 8(a) Respondent is responsible for the surgery and any follow up medical care as prescribed by Dr. Daniel Laich as set forth herein.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

October 29, 2013
Date

ICArbDec19(b)

NOV - 4 2013

STATEMENT OF FACTS

Petitioner was hired by Respondent in February 2009 and commenced working March 16, 2009.

Petitioner was hired as an Operations Manager. Petitioner was in charge of all the operations at Kane is Able's.

Anything that took place at the plant was Petitioner's responsibility. Petitioner managed the facility and was responsible for over 300 employees.

Prior to being hired Petitioner underwent a medical exam. Petitioner informed the doctor and various other people at Kane is Able, Inc. that he had a prior back injury in 1998, when he was struck by a car. He also informed Respondent that he was under a 20 lb. lifting restriction and was taking methadone for his pain. This was also told to his supervisor Justin Bell Smith.

As a result of his prior injury, Petitioner underwent four surgeries. The last two were fusions.

The last surgery was performed by Dr. Fred Geisler in April 2, 2004.

The last time Petitioner was examined by Dr. Geisler was October 30, 2008. (Pet. Ex. No. 4A and 4B)

Petitioner continued to work during the prior surgeries. He would take off a month or two to recover from the surgeries and then return to work.

While working for Respondent, Petitioner was being treated by Dr. Timothy Lubenow, at the Rush Pain Clinic and did receive injections during the summer of 2009.

Petitioner also testified that in June 2009 the night manager stopped working for Respondent.

At that time, Petitioner had to take over the duties of the night manager and also work his regular hours. He would now work from 7:00 a.m. to 4:00 a.m. the next morning.

Prior to September 16, 2009, Petitioner was working six days a week and working twice the hours.

On September 16, 2009, Petitioner arrived for work and was informed by Pat Miller, a mechanic, that they need a part for one of the machines. Petitioner was leaving the plant to get the part when he was stopped by the General Manager Justin Bell Smith. Petitioner was informed by Mr. Smith that the Respondent was giving all the employees a Barbeque to celebrate the successful month that had just completed. The propane tanks for the grill were empty and need to be replaced. Petitioner was told to get the propane tanks filled. Petitioner testified that an empty tank weighed 20 lbs and full tank weighs 40 lbs. Petitioner also testified that anything that goes on at the plant is his responsibility. This included any function that takes place at the facility.This was also confirmed by Respondent's witness the HR Manager , Melissa Vagnarelli. She also confirmed that a night manager's hours are from 7:00 p.m. to 4:00 a.m.

Petitioner testified that he left and obtained the part. He then went to Ace Hardware and filled the tanks. Once the tanks were filled, Petitioner went to pick up a tank, and without thinking, he lifted the full tank and felt a pop in his back. He felt

excruciating pain in his back. He also felt pains down his right leg. Petitioner testified that he had never felt pain like this before.

Petitioner went back to work informed one of the owners, Hillary Kane, of what had occurred. Ms. Kane instructed Petitioner to go to Premier Occupational Health.

Pat Miller testified that at that time he observed, Petitioner in extreme pain. Mr. Miller testified that Petitioner was in so much pain that he could barely breathe. Mr. Miller was a coworker of Petitioner.

Petitioner received conservative treatment at Premier Occupational Health.

He was then terminated on October 15, 2009. Petitioner never returned to work for Respondent. Petitioner was never paid any benefits. Petitioner was never offered any work.

Premier Occupational Health referred Petitioner to Dr. Matthew Ross on October 23, 2009. Dr. Ross diagnosed a back sprain. (Pet. Ex. No. 3)

On December 3, 2009, Petitioner returned to his surgeon, Dr. Fred Geisler because he was still in extreme pain. (Pet. Ex. No. 4 and Pet. Ex. No. 5) Dr. Geisler was informed of the injury that took place on September 16, 2009.

Petitioner then came under the care of Dr. Daniel Laich, a partner of Dr. Geisler, who did a diagnostic work up. Dr. Laich reviewed all the MRI's and CT Scans. Dr. Laich was familiar with Petitioner's prior medical care. (Pet. Ex. No. 4A and 4B) Dr. Laich noted the lumbar pain onset was while lifting a tank at work. This history continued to be noted throughout Dr. Laich's records. (Pet. Ex. No. 4B)

Following his diagnostic work up, Dr. Laich has prescribed for Petitioner a lateral fusion at L2-L3 and L3-L4. He also stated that the SI joint may have to be addressed surgically after the first surgery.. (Pet. Ex. No. 5 p. 21)Additionally, Dr. Laich was of the opinion that a spinal cord stimulator might also have to be implaced but that he would have to first correct the structural problem via the aforementioned surgeries. (Pet. Ex. No. 5, p. 22). Dr. Laich testified that Petitioner's lumbar problems were a result of his injury at work on September 16, 2009. He stated that he based his opinion on the fact that although Petitioner was still recieiving treatment for his low back prior to September 16, 2009 Petitioner was functioning and was back to his desired life. The fact that he was able to function in an acceptable pattern was a clear indicator that he had reached maximum medical improvement for his prior surgeries. (Pet. Ex. No. 5 p. 22) Dr. Lacih felt that the injury of September 16, 2009 is the cause of why Petitioner is being seen repeatedly and is the reason for the surgical recommendation he made on July 20, 2011. (Pet. Ex. No. 5 p. 22)

Petitioner testified that prior to the injury he was working and functioning and that now his work life has changed and that he is unable to work due to the pain caused by the accident alleged herein. This was confirmed by Dr. Laich. (Pet. Ex. No. 5 p. 46) On cross-examination, the petitioner acknowledged that subsequent to the alleged September 16, 2009, date of accident, he continued taking the same Methadone prescription that he was on pre-alleged date of injury. Petitioner confirmed that he was taking the same dosage and the same number of pills both before and after the September 16, 2009, date of accident. Petitioner acknowledged that on October

23, 2010, he was involved in another car accident, but claims that his injuries only affected the right shoulder and right side of his neck. Petitioner denied that the rear-end collision aggravated his back at all. Petitioner testified that he now uses two canes frequently for balance, that he has problems at home, that he is unable to do any yard work, and that he is in constant extreme pain. Dr. Laich noted that Petitioner used the canes on and off. Respondent entered into evidence surveillance footage of the petitioner taken on October 18, 2012, and October 19, 2012, which depict the petitioner ambulating without use of a cane on both dates, and also identify him bending at the waist, operating his vehicle, and shopping for groceries. The video reflects approximately thirteen minutes of the sixteen hours of surveillance that was performed.

Petitioner testified that he is on Social Security Disability Benefits, and that he has been unable to find a job. He testified that he has looked for work since his employment with the respondent, but has been unable to find employment.

At the request of respondent, the petitioner was examined by Dr. John Andreshak, a board certified orthopedic surgeon. (Rx. 3, p. 6). Dr. Andreshak specializes in treating 100% spine surgery patients. (Rx. 3, p. 6). Dr. Andreshak first examined the petition on July 19, 2010. (Rx. 3, p. 8). With regard to Dr. Andreshak's examination findings, he testified that "the only unusual findings where that he had all these exhibits of pain behaviors, so he had a lot of non-anatomic findings on his examination to try and accentuate or show me how much pain he was having, and it was always in a

distracted manner, such that it was not there when not being directly examined, but as soon as we would directly examine some body part of his back, he would exhibit all of these pain behaviors. (Rx. 3, p. 16-17). Following his examination and records review, Dr. Andreshak felt that the brief lifting episode involving the propane tank "likely strained the already injured muscles that had been operated through multiple times, possibly towards some scar tissue that causes pain." (Rx. 3, p. 17). Dr. Andreshak felt that a lumbar strain was related to the alleged September 16, 2009, date of accident. (Rx. 3, p. 18). He anticipated that the petitioner's alleged work injury would resolve within 3 months of the alleged date of accident. (Rx. 3, p. 18). Dr. Andreshak further testified that he felt it unusual that Dr. Geisler was recommending facet injections, because the purpose of those was to treat inflammation in an arthritic joint that is moving, but the petitioner had already undergone multiple surgeries to fuse his back. (Rx. 3, p. 20). Dr. Andreshak did not think that petitioner would require any further treatment regarding the lumbar strain of September 16, 2009. (Rx. 3, p. 21). Dr. Andreshak felt the petitioner should continue with his normal medical management which included his medication use, but that this was all related to his prior back problems, and not the alleged September 16, 2009, injury. (Rx. 3, p. 21). Dr. Andreshak testified that the petitioner should be able to return to his prior occupation, which appeared to be relatively sedentary in nature and did not require lifting greater than 10 pounds. (Rx. 3, p. 21). Dr. Andreshak did not feel that petitioner's symptoms were asymptomatic prior to the alleged September 16, 2009, date of accident, and noted that petitioner had "continuing symptoms for many, many years that appeared to

not improve despite numerous operations." (Rx. 3, p. 23). Dr. Andreshak also noted that despite the fact that petitioner described numbness as a new complaint following the September 16, 2009, alleged date of injury, that there was prior complaints of numbness and multiple records over the course of petitioner's years of treatment. (Rx. 3, p. 23). Dr. Andreshak further testified that it would be expected for patients with a multilevel fusion to have pain at adjacent levels and advanced degeneration, just based on the normal aging process. (Rx. 3, p. 26-27).

WHETHER AN ACCIDENT OCCURRED WHICH AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT

The Arbitrator had the opportunity to observe the Petitioner testify. The Arbitrator concludes that Petitioner is a very credible witness.

The Petitioner's testimony stands unrebutted.

Petitioner testified that he was the operations manager for the Respondent's facility. Petitioner was responsible for everything that happened with this facility. He was also responsible for all three hundred plus employees. In fact the Human Resources Manager, who was called by Respondent, testified that Petitioner as the Operations Manager was responsible for everything that happened at that plant.

Petitioner testified that on the day he was injured he was asked by Pat Miller, one of his mechanics, to pick up a part for one of the machines that had broken down.

Petitioner was also stopped that morning by the General Manager, Justin Bell Smith. Mr. Smith was Petitioner's immediate supervisor. When Petitioner saw Mr. Smith, Smith was pulling a gas grill. Mr. Smith told Petitioner that Respondent was having barbeque for the employees in the plant because of the successful month they had. He directed Petitioner to pick up and fill a propane tank for use with the grill for the picnic.

As directed by his supervisor, Petitioner went to refill the propane gas tank. There was no question that when he went to pick up full propane tank Petitioner felt a pop in his low back and the immediate onset of intense pain. Based on this unrebutted testimony and the record as a whole, the Arbitrator finds that the facts presented reveal that the task that Petitioner was performing was definitely incidental to his employment and that the accident as alleged herein arose out of and in the course of his employment with Respondent.

CAUSAL CONNECTION

The medical records and Petitioner's testimony reveal that Petitioner had a long and extensive history of low back problems dating back to 1998 when he was involved in a motor vehicle accident. As a result thereof, Petitioner had four surgeries to his low back. The last surgery was performed by Dr. Fred Geisler on April 15, 2004. (Pet. Ex. No. 4A and Pet. Ex. No. 5) Prior to the accident herein, Petitioner was last seen on October 30, 2008 by Dr. Geisler. At the time, he was working as a regional manager. (Pet. Ex. No. 4A and Pet. Ex. No. 5) Petitioner however continued to treat with a pain

specialist, Dr. Lubenow through the date of accident. The treatment consisted of follow up visits with Dr. Lubenow and prescribed medications including methadone for pain on a regular basis and injections as late as June and July of 2009. In spite of this, Petitioner continued working full time.

Petitioner testified that following the accident herein, he returned to Dr. Geisler, who referred him to his partner, Dr. Laich. He then had follow up treatments with Dr. Daniel Laich.

Petitioner also testified in the summer of 2009 that the night manager left the Respondent and Petitioner had to take over the duties of the night manager.

Prior to his injury of September 16, 2009, Petitioner was working for from 7:00 a.m. to 4:00 a.m. the following day. The Petitioner was working these hours five to six days a week. Petitioner had been working full time for Respondent since March 2009. Petitioner testified that he had not missed any days of work since he commenced working for Respondent on March 6, 2009

Petitioner testified that it was only after his injury of September 16, 2009 that his pain became so intense that it limited his work and resulted in his termination on October 15, 2009.

The medical records reveal a clear history of medical treatment from the date of his injury until his last visit with Dr. Laich (REF) who prescribed surgery to relieve Petitioner's condition. (Pet. Ex. No. 5) No further surgery had been recommended for Petitioner since his last surgery on April 15, 2004.

Petitioner further testified that he never felt pain like he experienced after lifting the propane tank on September 16, 2009 and now felt pain down his right leg. Pat Miller testified that when he saw Petitioner shortly after the accident, Petitioner was in so much pain that he was having difficulty breathing.

Dr. Laich testified that prior to September 16, 2009 injury, Petitioner's complaints had resolved, that is Petitioner was working and able to function in an acceptable pattern. He was working regular hours. (Pet. Ex. No. 5, p. 22) Dr. Laich further found that prior to the September 16, 2009 injury, Petitioner had reach maximum medical improvement from his prior surgeries, that being the decompression rearthodesis from L3 to the sacrum that Dr. Geisler had performed in April 2004. Only after September 2009 was there a recommendation for a new surgery. (Id. p. 22)Further, Dr. Laich testified that Petitioner had new symptoms that were not previously present. Petitioner now had right lower extremity and mid back pain had progressed and was now more superior. (Id. p. 23)

Dr. Laich testified that he was familiar with the pain treatment at Rush Medical Center.

The only conclusion that can be drawn from the facts presented here that is that the injury sustained on September 16, 2009 was an intervening injury breaking the causal connection from the prior injury.

Here Petitioner was at maximum medical improvement from the prior surgery and was receiving what appeared to be maintenance treatment from Dr. Lubenow. No surgery of any kind was prescribed or in the offing. Following the accident herein,

Petitioner manifested new symptoms and at the very least a new prescription for treatment, that is the surgery prescribed by Dr. Laich. The Arbitrator finds that Dr. Laich's opinions on cajusal connection are more persuasive than those of Dr. Andreshak. Dr. Andreshak saw Petitioner one time, and could not testify that he had complete medical records to review when he formulated his opinion.

To find Dr. Andreshak's opinion credible, the Arbitrator would have to disregard Petitioner's unrebutted testimony as to his ongoing symptoms and ignore Petitioner's history of having worked more than full time/full duty for over five years prior to the date of injury herein despite being in enough pain to require methadone treatment on an ongoing basis to do so. This the Arbitrator declines to do, and based on the record as a whole, finds that Petitioner's current condition of ill being is causally related to the accident as alleged herein.

TEMPORARY TOTAL DISABILITY BENEFITS

While under active medical care, Petitioner was terminated from his employment on October 16, 2009.

The Petitioner continues to remain under the medical care of Dr. Daniel Laich.

Dr. Laich has prescribed medical treatment as a result of Petitioner's work related injury on September 16, 2009 and kept Petitioner off work since that date.

Respondent has refused to authorize said surgery. The evidence is clear that Petitioner is in need of further medical treatment as prescribed by Dr. Laich.

Dr. Laich testified that Petitioner is unable to work and Petitioner testified several times that Dr. Laich has not released him to work. (Pet. Ex. No. 5, p. 46)

Therefore, based on the record as a whole, the Arbitrator finds that Petitioner is entitle to be paid temporary total disability benefits from October 16, 2009, the date of termination, up to and through October 8, 2013, the date of hearing or 206 6/7 weeks of benefits.

MEDICAL BILLS

Arbitrator finds that the medical bills as presented in Petitioner's Exhibit Number one are causally connected to the accident alleged herein, and reasonable and necessary to cure or relieve Petitioner's current condition of ill being. Respondent is responsible for these bills pursuant to the fee schedule.

PROSPECTIVE MEDICAL

Based on the record as a whole, the Arbitrator finds that the facts support the medical necessity of proceeding with medical treatment under Section 8(a) of the worker's compensation act as proscribed by Dr. Laich including follow up care and rehabilitation and so orders same.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Aaron Clark,
Petitioner,

vs.

No. 10 WC 30376

14IWCC1144

Ford Motor Co.,
Respondent.

DECISION AND OPINION ON REVIEW

A Petition for Review having been timely filed by Respondent and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, and permanent partial disabilities and being advised of the facts and law, modifies the Decision of the Arbitrator and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission reduces the permanent disability award to 15% loss of use of the person as a whole.

Petitioner saw Dr. Silver for the last time on November 2, 2011. Petitioner had almost a full range of motion and his strength had improved. Petitioner was placed on permanent restrictions due to his shoulder replacement and advised to avoid heavy lifting in regard to that shoulder. He was returned to his old job in which he had a ten pound weight lifting restriction from a prior injury to his shoulder. Prior to the accident Petitioner was asymptomatic and was able to work full time with a ten pound restriction without a need for medication. (Petitioner Exhibit Pgs. 27-31)

The Commission therefore finds that Petitioner is entitled to a 15% person as a whole award.

14IWCC1144

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $949.79 per week for a period of 22 weeks, 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 the sum of $669.64 per week for a period of 75 weeks, as provided in Section 8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use to the person as a whole to the extent of 15%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses under §8(a) of the Act and 8-2 as laid out by the Arbitration Decision with the Respondent given an §8(j) credit of $51,795.28

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injuries.

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 $56,700.00. 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: DEC 30 2014

Charles J. DeVriendt

o-10/22/14
hsf/cjd
49

Daniel R. Donohoo

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CLARK, AARON
Employee/Petitioner

Case# **10WC030376**

FORD MOTOR CO
Employer/Respondent

14IWCC1144

On 7/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0293 KATZ FRIEDMAN EAGLE ET AL
JASON CARROLL
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0560 WIEDNER & MCAULIFFE LTD
RANDALL SLADEK
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

14IWCC1144

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

Aaron Clark
Employee/Petitioner

v.

Ford Motor Co.
Employer/Respondent

Case # **10** WC **30376**

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 **Chicago**, on **May 17, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **July 29, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment as explained *infra*.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident as explained *infra*.

In the year preceding the injury, Petitioner earned **$74,083.36**; the average weekly wage was **$1,424.68**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **1** dependent child.

Petitioner ***has*** received all reasonable and necessary medical services as explained *infra*.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services as explained *infra*.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$14,580.00** for other benefits (i.e., nonoccupational indemnity disability benefits), for a total credit of **$14,580.00**. *See* AX1.

Respondent is entitled to a credit of **$51,795.28** under Section 8(j) of the Act. *See* AX1.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $949.79/week for 22 weeks, commencing April 13, 2011 through September 12, 2011, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from July 29, 2010 through May 17, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Medical Benefits

Respondent shall pay reasonable and necessary medical bills incurred by Petitioner and submitted as exhibits into evidence as provided in Sections 8(a) and 8.2 of the Act with the exception of any medical record copying fees charged.

Respondent shall be given a credit of $51,795.28 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner permanent partial disability benefits of $669.64/week for 112.5 weeks, because the injuries sustained caused the 22.5% 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

July 26, 2013
Date

JUL 29 2013

14IWCC1144

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Aaron Clark
Employee/Petitioner

v.

Ford Motor Co.
Employer/Respondent

Case # **10** WC **30376**

Consolidated cases: **N/A**

FINDINGS OF FACT

Petitioner testified that he was employed by Respondent in July of 2010 at its assembly plant in south Chicago and had been employed by Respondent since May of 1995. As of July of 2010, Petitioner testified that he worked as a rear bumper installer and used a hoist to perform these duties. Petitioner had been so employed from November of 2008 through July of 2010.

Petitioner described his duties to include operating a hoist with two hand grips and turning 180 degrees from a basket full of bumpers to a car coming down the assembly line and back again. Petitioner testified that the hoist would grab metal bumpers from a basket using claws. Petitioner would then press a button and turn around to secure the bumper to the car using a gun tool.

Prior Medical History

Petitioner testified that he was in a car accident in 1995 and injured his left shoulder. The medical records confirm that this accident occurred on October 27, 1995. PX9 at 22; PX8 at 26. Petitioner was reaching with his left arm into the back seat to protect a child and noted shoulder pain and stiffness later. *Id.*

Petitioner sought treatment at Trimboli Chiropractic and with his primary care physician, Dr. Sardesai, during the same general time period that he treated with Joseph Hecht, M.D. ("Dr. Hecht") at Orthopaedic Specialists of Northwest Indiana. PX1; PX8; PX9. The medical records reflect that Petitioner worked through February 16, 1996 when he saw Dr. Hecht. *Id.* Dr. Hecht noted that Petitioner's duties were mainly below waist level at the time, but that he was certainly unable to perform above-shoulder level work. *Id.* Petitioner had several follow up visits with Dr. Hecht who eventually diagnosed Petitioner with adhesive capsulitis and osteoarthritis, after an arthrogram that revealed no rotator cuff tear, and he underwent injections and physical therapy. PX1; PX9 at 18-22. He returned to Dr. Hecht again on December 5, 1997 with continued symptomatology. *Id.* The medical records reflect that Petitioner was also involved in a car accident in 1997. PX8. In any event, Dr. Hecht recommended surgery and Petitioner underwent a manipulation of his left shoulder under anesthesia on April 8, 1998. PX9 at 16, 18.

At a June 24, 1998 follow up visit, Dr. Hecht advised Petitioner to have a second opinion regarding his shoulder with Dr. Gluek. PX9 at 12. Petitioner treated with Dr. Gluek on July 7, 1998. PX9 at 10-11. Dr. Gluek advised Petitioner that he could either return to work as he was and learn to live with his left shoulder condition or undergo a shoulder arthroplasty. *Id.* Dr. Gluek also noted that if Petitioner underwent this surgery, he could certainly no longer work for Respondent. *Id.* Petitioner testified that he did not want to undergo this surgery and he returned to work.

Petitioner's last visit with Dr. Hecht was on November 5, 1998. PX9 at 4. Dr. Hecht indicated that although they discussed the possibility of surgery, he was "clearly not wanting to go in that direction." *Id.* Petitioner had one final visit with Dr. Hecht on January 13, 2000 for the purpose of obtaining an impairment rating. PX9 at 3. Dr. Hecht noted that Petitioner had returned to work with restrictions and that Respondent was honoring those nicely for him. *Id.*

Petitioner also filed a workers' compensation claim (No. 98 WC 24665) for a left shoulder injury on January 6, 1998 and ultimately settled it with Respondent for 40% loss of use of the left arm. RX1.

Petitioner testified that he had no medical treatment for the left shoulder after his last visit at Trimboli in 2001 until after his July 29, 2010 injury at work. The medical records reflect that Petitioner did not receive any treatment for any complaints related to his left shoulder between April 27, 2001 and July 29, 2010. Petitioner did follow up at Respondent's medical department on several occasions in relation to his left shoulder to confirm and extend his work restrictions. PX7. Following his final restriction extension on January 5, 2004, Petitioner did not return to Respondent's medical department due to his left shoulder for any reason until July 29, 2010, the date of his accident. PX7 at 163-169. Petitioner testified that he had worked without restrictions after 2004/2005.

Petitioner also testified that he did not take any pain medications for left shoulder pain, or for any reason other than taking aspirin for his heart, before July of 2010. He explained that his left shoulder was normal before his claimed date of accident and that he could use his left arm without any problem. Petitioner testified that he had plenty of strength in the left arm/shoulder before July 29, 2010.

July 29, 2010

On July 29, 2010, Petitioner testified that he was operating the hoist and was turned around to get a bumper from a full basket. He testified that he raised the hoist and grabbed a bumper that got stuck in a full basket. He testified that he struggled to get the bumper out of the basket and that it took some work to dislodge it. Petitioner testified that he injured his left arm in this process resulting in pain and a complete lack of strength in his left arm.

The parties stipulated that Petitioner provided notice of this accident to Respondent. AX1. Nonetheless, Petitioner testified that he rushed to the supervisor's office to get a medical pass to go to the medical department and gave notice of the incident to Lou Towslin ("Mr. Towslin"). Petitioner received treatment that day at Respondent's medical department and testified that he was sent to Ingalls hospital with transportation provided by Respondent.

Emergency Medical Treatment

At Respondent's medical department, Petitioner was treated for his injury by Winston Khin, M.D. ("Dr. Khin"). PX7 at 169-171. Petitioner reported that he was injured while using a rear-bumper install hoist to secure a bumper when it got stuck in a basket and, when he tried to free it, the hoist shot up and jerked his left shoulder causing instant pain. *Id.* Petitioner reported pain and restricted movement in the left shoulder. *Id.* Dr. Khin provided Petitioner with a cold compress, 800 mg of Ibuprofen, and referred him to Ingalls for x-rays. *Id.*

Petitioner[1] then went to Ingalls hospital in Calumet City, Illinois for evaluation of a left arm injury and underwent the recommended left shoulder x-ray which was negative for fracture or dislocation, but showed moderate left glenohumeral joint space narrowing with associated subchondral sclerosis and osteophyte formation. PX5 at 12. The interpreting radiologist noted that the x-ray showed moderate left glenohumeral degenerative joint disease. *Id.* Petitioner testified that he eventually returned to Respondent's facility and informed Mr. Towslin that he was back, but he did not work further that day.

Trimboli Chiropractic & Dr. Silver

Petitioner went to Trimboli Chiropractic on July 30, 2010 and through August 2, 2010. PX1 at 12-23. Petitioner treated with Bonni K. Ahlf, D.C. ("Dr. Ahlf") and reported being at work the previous day and working on a hoist when it pulled his left arm. PX1 at 19-21. On examination, Petitioner had decreased range of motion in the left shoulder. *Id.* Petitioner followed up on July 31, 2010 and August 2, 2010. PX1 at 16-18. Petitioner testified that he then sought treatment with Dr. Silver.

The medical records reflect that Petitioner first saw Ronald Silver, M.D. ("Dr. Silver") on September 29, 2010 reporting that he wrenched his shoulder using a hoist at work on July 29, 2010. PX2 at 9-10, 31. Petitioner also reported severe shoulder pain, limited range of motion, and difficulty with activities of daily living as well as working full time without restrictions, treatment or symptomatology in the left shoulder prior to this injury. *Id.* On examination, Dr. Silver noted very limited motion with 70° of forward flexion and lateral at adduction with internal rotation to the back pocket, positive impingement and Hawkins tests, and an equivocal drop arm test. *Id.* Petitioner's x-ray showed complete loss of joint space in the glenohumeral joint. *Id.* He diagnosed Petitioner with "…pre-existing asymptomatic degenerative changes of his left shoulder that have been severely exacerbated and accelerated by the aforementioned work injury." *Id.* He further noted the previous frozen shoulder issues in 1998 in which he underwent a manipulation under anesthesia. *Id.* Dr. Silver administered a cortisone injection into Petitioner's left shoulder, ordered physical therapy, and restricted him to right-hand work only. *Id.*

On November 5, 2010, Dr. Silver noted that the injection provided only mild short term relief and that his severe pain returned. PX2 at 11. Dr. Silver ordered continued prescription medications including Vicodin for pain, Mobic for inflammation, and Omeprazole for gastrointestinal protection. *Id.* He also ordered continued physical therapy and maintained Petitioner's work restrictions. *Id.*

Petitioner began physical therapy at Accelerated Rehabilitation Centers in Munster, Indiana on November 9, 2010. PX2 at 50; PX3. At his next follow up visit on December 10, 2010, Dr. Silver indicated that conservative care including anti-inflammatory medications, steroid injections, and physical therapy had failed. PX2 at 12. On examination, he noted that Petitioner had limited forward flexion to 60° and to 40° on lateral abduction. *Id.* Dr. Silver refilled Petitioner's prescriptions, maintained his work restrictions, and recommended shoulder replacement surgery because conservative care had not ameliorated his severe symptoms. *Id.*

[1] The Arbitrator notes that Petitioner's Exhibit 5 also includes records for treatment of a left shoulder condition dated July 24, 2010, however, these notes indicate a patient that was 32 years-old, African American and born on March 12, 1978 who worked for the railroad. PX5 at 6-11. Based on this information, which conflicts with other record evidence regarding Petitioner, the Arbitrator infers that the July 24, 2010 notes do not relate to Petitioner, but rather to a different individual named Aaron Clark.

Section 12 Examination & Testimony of Dr. Marra

Petitioner underwent a Section 12 examination with Guido Marra, M.D. ("Dr. Marra") at Respondent's request on February 24, 2011. RX2 (Dep. Ex. 2). After obtaining a history from Petitioner, performing a physical examination and reviewing various treating medical records, Dr. Marra diagnosed Petitioner with glenohumeral osteoarthritis and opined that his condition preexisted the injury on July 29, 2010. *Id.* Dr. Marra further opined that Petitioner's condition was a result of the degenerative process and that, while a total shoulder arthroplasty was reasonable, it was not related to his injury at work. *Id.*

Dr. Marra drafted an addendum report dated June 22, 2011 after reviewing additional medical records including Petitioner's April 13, 2011 operative report. RX2 (Dep. Ex. 3). Dr. Marra maintained his original opinions. *Id.*

Dr. Marra submitted to a deposition on October 19, 2012. RX2. He is a board-certified orthopedic surgeon and performs shoulder and elbow surgeries. RX2 at 4-6; RX2 (Dep. Ex. 1). Dr. Marra maintained his diagnosis that Petitioner had degenerative osteoarthritis in the shoulder, which took years to develop, as well as his opinions that Petitioner's shoulder condition pre-dated his injury at work and that Petitioner's injury at work did not cause his need for the recommended shoulder surgery. RX2 at 13-16, 25-26.

Dr. Marra testified that Petitioner sustained a "hyper-elevation injury" to his left shoulder while using a hoist to move bumpers, which he explained to mean that Petitioner's arm was forcibly brought in an upward position. RX1 at 7, 18-19. On cross examination, Dr. Marra conceded that while Petitioner would have required total shoulder arthroplasty given his pre-existing condition, a major indication for the need for such a surgery is pain complaints, which Petitioner did not have for years prior to his injury at work. RX2 at 26-28. Dr. Marra also conceded that the accident as described to him by the Petitioner could have been an accelerating component, but he maintained that Petitioner had a long history of pre-existing left shoulder problems and medical treatment such that he did not believe that Petitioner's injury at work was a materially contributing factor. RX2 at 28-29.

Continued Medical Treatment & Dr. Silver Testimony

Dr. Silver reviewed Dr. Marra's report and drafted a letter to the workers' compensation representative for Respondent dated March 30, 2011. PX2 at 13. He disagreed with Dr. Marra and opined that Petitioner's July 29, 2010 accident exacerbated and accelerated Petitioner's pre-existing, but asymptomatic, degenerative condition causing him to become severely symptomatic with regard to the left shoulder. *Id.* Dr. Silver concluded that Petitioner's need for a shoulder replacement was, therefore, causally connected to the injury at work. *Id.*

Petitioner testified that he underwent the surgery and continued to work in a light duty capacity until his surgery. Dr. Silver performed the left shoulder replacement surgery on April 13, 2011. PX2 at 27-28; PX4. Pre- and postoperatively, he diagnosed Petitioner with end-stage articular cartilage fragmentation, left shoulder. *Id.*

Following surgery, Petitioner followed up with Dr. Silver on April 20, 2011. PX2 at 14. Dr. Silver advised the Petitioner to begin using a home continuous passive motion machine and to return to see him in three weeks. *Id.* Petitioner testified he was able to obtain that machine and used it as described by Dr. Silver.

On May 18, 2011, Dr. Silver ordered physical therapy, which Petitioner began at Accelerated Rehabilitation the following day. PX2 at 14; PX3 at 22. Petitioner underwent physical therapy through September 2, 2011 and

continued to follow up with Dr. Silver. PX2 at 14-15, 50-69; PX3. Petitioner testified that he was kept off work from the date of his surgery through September 12, 2011, and the medical records reflect that Dr. Silver kept Petitioner off work during follow up treatment during this period of time. *Id*; *see also* PX10 at 25-26. Petitioner also testified that, during physical therapy, he noticed that it took about three months to regain any strength in the left shoulder.

On September 7, 2011, Dr. Silver released Petitioner to light duty right-handed work only effective September 13, 2011. PX2 at 16. Petitioner testified that he returned to work for Respondent on that date working light duty.

Petitioner had another follow up visit with Dr. Silver on October 5, 2011 before he was ultimately released at maximum medical improvement on November 2, 2011. PX2 at 16-17. Dr. Silver noted that Petitioner would have permanent difficulty in heavy lifting, over-the-shoulder, and repetitive left shoulder activities. *Id.* Petitioner testified that this was his last treatment with Dr. Silver and that he continued to work for Respondent.

Dr. Silver submitted to a deposition on July 16, 2012. PX10. He is a board-certified orthopedic surgeon specializing in shoulder and knee surgeries. PX10 at 5-7; PX10 (Dep. Ex. 1). Dr. Silver testified about his treatment of Petitioner and the initial September 29, 2010 x-rays which revealed a complete loss of the joint space in the shoulder joint. PX10 at 9. He testified that, normally, there is a cushion between the ball and socket of the joint (i.e., cartilage), but that Petitioner's "cartilage had fragmented to the point of being bone on bone." *Id.* Dr. Silver maintained his diagnosis that Petitioner had pre-existing, but asymptomatic, degenerative changes in the shoulder that were exacerbated and accelerated by his July 29, 2010 injury at work. PX10 at 10-11. He testified that, as in Petitioner's case, it was not unusual for an arthritic joint to be asymptomatic for decades or more until there is trauma at which point the degenerated cartilage is further fragmented resulting in "severe inflammation that just will not go away. Now it becomes bone on bone." PX10 at 11-12.

At his deposition, Dr. Silver agreed with Respondent's Section 12 examiner, Dr. Marra, that Petitioner had pre-existing arthritis in his shoulder, but disagreed with his opinion on causal connection or the related need for total shoulder replacement because Dr. Marra failed to note that Petitioner was asymptomatic and working full time [for years] before his injury at work. PX10 at 19-22.

On cross examination, Dr. Silver conceded that at Petitioner's initial visit with him he had not reviewed any of Petitioner's prior treating medical records, but he testified that he utilized the history provided by Petitioner to determine that Petitioner was severely limited in his range of motion on September 29, 2010. PX10 at 31-33. Dr. Silver also acknowledged that the findings by Dr. Hecht in January of 2000 regarding Petitioner's range of motion (i.e., abduction at 60 degrees and forward flexion at 75 degrees) were very similar to his own range of motion findings in September of 2010. PX10 at 33-35. However, he qualified his response and testified that Petitioner's left shoulder condition had improved over those 10 years given the history provided by Petitioner that he worked full duty without restrictions. *Id.*

In a lengthy and somewhat obfuscatory response, Dr. Silver further testified that lay people misunderstand arthritis and that it is not a continuous, progressive disease; rather, he explained that while such progressive arthritis does occur in some people, there are many people with arthritis who do not know that they have it and in whom it may never become symptomatic. PX10 at 38-40. On re-direct examination, Dr. Silver clarified that he did not only recommend surgery to address Petitioner's range of motion, but rather, and more importantly, to address Petitioner's pain complaints. PX10 at 43-44.

Additional Information

Petitioner testified that he is currently in a control point job working as an inspector requiring him to inspect cars. Petitioner does not use his arms at all in this position and he testified that he works 10 hours per day.

Regarding his current left shoulder condition, Petitioner testified that he finds that his left shoulder is "gripped," like a charley horse, and that he has to exercise and loosen it. He experiences tightness since his operation that he cannot escape, continued weakness, and a pulling sensation when he bends over. Petitioner also testified that he has to prop up on right arm to get up off the ground while performing mechanical work, which is a passion of his. He further testified that he cannot ride a bike anymore because of "wiggling" when he used to ride it 6-7 miles to work in 2006. Petitioner testified that he has not re-injured his left shoulder.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

The Arbitrator finds that Petitioner did sustain an accident that arose out of and in the course of his employment with Respondent on July 29, 2010 and that this accident aggravated or accelerated his left shoulder condition.

It has long been held that "a preexisting condition does not prevent recovery under the Act if the condition was aggravated or accelerated by the claimant's employment." *Caterpillar Tractor Co. v. Industrial Comm.*, 92 Ill. 2d 30, 36, 440 N.E.2d 861 (Ill. Sup. Ct., 1982). This general rule is limited in circumstances where the claimant's health was so deteriorated that any normal daily activity is an overexertion or where the activity engaged in presented no greater risks than those to which the general public is exposed. *Caterpillar Tractor Co.*, 92 Ill. 2d at 36. Thus, "causal connection between the claimed injury and an accident may be established by a chain of events showing that prior to the accident the employee was fully capable of performing manual job tasks and that immediately after the accident such ability was diminished." *Goldblatt Bros., Inc. v. Industrial Comm.*, 85 Ill. 2d 172, 177, 421 N.E.2d 909 (Ill. Sup. Ct., 1981).

The Arbitrator finds the Petitioner is credible and notes the consistency of his testimony at trial with other record evidence. Petitioner testified that he was injured at work while operating a hoist that got stuck pulling out a car bumper and that, in that process, it jerked his left arm resulting in immediate pain and loss of strength. Petitioner sought immediate medical treatment at Respondent's medical department where he reported the same mechanism of injury. Respondent's medical department physician, Dr. Khin, noted physical examination findings that were consistent with Petitioner's reported symptomatology in the left shoulder. Petitioner provided the same mechanism of injury and symptomatology reports to emergency room doctors, his chiropractor, Dr. Silver, and Respondent's Section 12 examiner, Dr. Marra, who found clinically correlating physical examination findings.

Moreover, the evidence that Petitioner was at work and performing work functions at the time that he was injured is uncontroverted. While Dr. Marra disputes causation noting Petitioner's underlying left shoulder condition, the evidence establishes that Petitioner had no left shoulder treatment or symptoms that prevented him from working his full duty position or that limited his activities of daily living for almost a decade before sustaining the traumatic pulling injury in question on July 29, 2010 after which he could no longer perform his duties at work and that spurred his need for medical treatment and the ensuing total shoulder replacement. Thus, while the Arbitrator acknowledges that Petitioner's left shoulder condition was severely degenerated before his injury at work and its "bone-on-bone" status at the time of the injury is undisputed between Dr. Silver and Dr. Marra, there is no evidence that Petitioner was symptomatic in the left shoulder for almost a decade before a sustaining his injury at work.

Based on all of the foregoing, Arbitrator finds that Petitioner did sustain an accident that arose out of and in the course of his employment with Respondent on July 29, 2010 as claimed.

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

As explained above, the Arbitrator finds credible evidence that Petitioner sustained a compensable accident involving his left shoulder at work on July 29, 2010. The record is devoid of evidence breaking the chain of causation after Petitioner's July 29, 2010 injury at work. The record is similarly devoid of evidence diminishing the credibility of Petitioner's testimony about his claimed current condition of ill being. The first time in over nine years that Petitioner was unable to perform his full duty job or that he needed any medical treatment for any left shoulder symptoms occurred only after the car bumper incident described on the date of accident. Dr. Silver causally related Petitioner's left shoulder condition with the injury at work focusing on Petitioner's lack of symptoms for years beforehand, which is consistent with the evidence presented at trial. Thus, the Arbitrator finds that Petitioner's claimed current condition of ill-being in the left shoulder is related to the injury sustained at work on July 29, 2010.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

As the issues of accident and causal connection have been resolved in Petitioner's favor as explained in detail above, the Arbitrator awards the reasonable and necessary medical bills incurred by Petitioner and submitted as exhibits into evidence to be paid by Respondent as provided in Section 8(a) and pursuant to Section 8.2 of the Act with the exception of any medical record copying fees charged.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

Respondent's defense to Petitioner's claim of entitlement to temporary total disability benefits is premised upon liability claiming that no compensable accident occurred and disputing causal connection, which have been resolved in Petitioner's favor. Moreover, Petitioner credibly testified, and the record reflects, that Petitioner was kept off work by Dr. Silver from the date of his surgery on April 13, 2011 through September 12, 2011. Based on all of the foregoing, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the period beginning on April 13, 2011 through September 12, 2011.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

Based on the record as a whole, and as explained in detail above, the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 22.5% loss of use of the person as a whole pursuant to Section 8(d)(2)[2] for his left shoulder injury.

[2] The Arbitrator awards permanent partial disability benefits pursuant to Section 8(d)(2) of the Act in this case, which involves an injury to Petitioner's shoulder, in light of the Appellate Court's holding in *Will County Forest Preserve District v. Illinois Workers' Compensation Commission*, 2012 Ill.App. LEXIS 109 (February 17, 2012).

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Frances Montero,
Petitioner,

vs.

NO: 05 WC 45489
06 WC 17114
07 WC 05982
07 WC 05983

SBC and AT & T,
Respondent.

14IWCC1145

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 Petitioner's issues of temporary total disability, permanent partial disability, medical expenses and penalties and attorneys' fees and Respondent's issues of accident, permanent partial disability and medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof..

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 11, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $24,000.00. 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: DEC 30 2014

Daniel R. Donohoo

Ruth W. White

Charles J. DeVriendt

o-12/17/14
drd/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

MONTERO, FRANCES
Employee/Petitioner

Case# **05WC045489**
06WC017114
07WC005982
07WC005983

SBC AND AT&T
Employer/Respondent

14IWCC1145

On 9/11/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.03% 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:

0393 THOMAS R LICHTEN LTD
53 W JACKSON BLVD
SUITE 1634
CHICAGO, IL 60604

0766 HENNESSY & ROACH PC
NATALIE ROMO
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

14IWCC1145

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

CORRECTED

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Frances Montero
Employee/Petitioner

v.

SBC and A T & T
Employer/Respondent

Case # 05 WC 45489

Consolidated cases: 06 WC 17114
07 WC 5982-3

Applications for Adjustment of Claim were filed in these consolidated matters, and a *Notice of Hearing* was mailed to each party. The matters were heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **05/22/2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On 9/30/04 **(as amended)**, 3/30/06, 12/7/06, and 1/11/07, 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 repetitive trauma injuries that arose out of and in the course of employment.

Timely notice of said injuries *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to these repetitive trauma injuries.

In the year preceding September 30, 2004, Petitioner earned **$39,390.00**; the average weekly wage was **$757.50**. Arb Exh 1. In the year preceding March 30, 2006, Petitioner earned $40,378.10; the average weekly wage was $776.50. Arb Exh 3. In the years preceding December 7, 2006 and January 11, 2007, Petitioner earned $41,392.00; the average weekly wage was $796.00. Arb Exh 5, 7.

On the alleged manifestation dates, Petitioner was **53, 54 and 55** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

In accordance with the parties' stipulations, Respondent is entitled to a credit of $30,673.04 under Section 8(j) of the Act for medical expenses paid through its group plan. Respondent is also entitled to a credit of ~~$3,532.40~~ $2,366.49 (T. 7) under Section 8(j) of the Act for non-occupational indemnity disability benefits it paid from April 7, 2006 through May 8, 2006. Arb Exh 1, 3, 5, 7.

ORDERS

THE ARBITRATOR ELECTS TO ADDRESS ALL FOUR CONSOLIDATED CLAIMS IN ONE DECISION.

IN 06 WC 17114, THE ARBITRATOR AWARDS TEMPORARY TOTAL DISABILITY BENEFITS IN THE AMOUNT OF $517.67 PER WEEK FROM MARCH 31, 2006 THROUGH MAY 9, 2006 AND FROM OCTOBER 10, 2006 THROUGH DECEMBER 4, 2006, A TOTAL OF 13 5/7 WEEKS. IN 07 WC 5982, THE ARBITRATOR AWARDS TEMPORARY TOTAL DISABILITY BENEFITS IN THE AMOUNT OF $530.67 PER WEEK FROM DECEMBER 8, 2006 THROUGH JANUARY 4, 2007 AND FROM JANUARY 12, 2007 THROUGH JULY 23, 2007, A TOTAL OF 31 4/7 WEEKS.

FOR THE REASONS SET FORTH IN THE ATTACHED CONCLUSIONS OF LAW, THE ARBITRATOR DECLINES TO AWARD MAINTENANCE BENEFITS, AS REQUESTED BY PETITIONER.

IN 06 WC 17114, THE ARBITRATOR AWARDS THE FOLLOWING MEDICAL EXPENSES, SUBJECT TO THE FEE SCHEDULE: 1)SOUTHLAND BONE & JOINT (DR. LABANA), $847.40 (PX 9); AND 2) DR. PANIO, $75.00.

IN 07 WC 5983, AND SUBJECT TO THE STIPULATED AWW OF $796.00 AND THE MAXIMUM SET FORTH IN 8(B), THE ARBITRATOR AWARDS THE FOLLOWING WAGE DIFFERENTIAL BENEFITS UNDER SECTION 8(D-1) OF THE ACT: 12/1/08 THROUGH 4/5/09, $221.67/WEEK; 4/6/09 – 6/8/09, $247.33/WEEK; 6/9/09 – 9/1/09, $530.67/WEEK; 9/2/09 – 3/17/10, $247.33/WEEK; 6/15/10 – 1/1/11, $530.67/WEEK; 1/2/11 – 4/4/11, $264.67/WEEK; 4/5/11 – 4/15/11, $281.00/WEEK; 4/16/11 – 1/1/12, $530.67/WEEK; 1/2/12 – 4/12/13, $281.00/WEEK; AND 4/18/13 – 5/22/13, $530.67/WEEK. FROM 5/23/13 FORWARD AND FOR THE DURATION OF HER DISABILITY, THE ARBITRATOR AWARDS PETITIONER WAGE DIFFERENTIAL BENEFITS IN THE AMOUNT OF $281.00 PER WEEK.

FOR THE REASONS SET FORTH IN THE ATTACHED CONCLUSIONS OF LAW, THE ARBITRATOR DECLINES TO AWARD PENALTIES AND FEES, AS REQUESTED BY PETITIONER.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Molly C Mason
Signature of Arbitrator

~~7/15/13~~
Date
corrected issued
9/11/13

SEP 11 2013

Frances Montero v. SBC
05 WC 45489, 06 WC 17114
Frances Montero v. A T & T
07 WC 5982-3
(consolidated)

Arbitrator's Findings of Fact Relative to All Cases

Petitioner was born on June 1, 1951. She testified she is right-handed. At some point after graduating from Bloom High School, she took month-long courses in Excel and Microsoft. She has no other formal training or education. She is able to speak both English and Spanish. T. 23-24.

Petitioner testified she began working for Illinois Bell on October 6, 1986. Prior to that, she worked as a mailroom clerk at a bank from 1977 through 1979 and as a sales clerk at Sears for about three months. T. 25-26.

Petitioner testified she initially worked as a customer clerk at Illinois Bell. At first, her job consisted solely of telemarketing. Over time, she progressed to handling inbound and outbound calls. She began learning how to use a computer and conduct sales. T. 27-28.

In approximately 1993 or 1994, the customer clerk position "closed" and Petitioner began performing a customer service representative job at Illinois Bell's Bridgeview office. Petitioner testified this job involved making collection-related calls to customers. The Bridgeview office closed in 1994 or 1995, at which point Petitioner was "downgraded" to a lower-paying directory assistance job. T. 29-30. Petitioner testified this job was a union position. Petitioner remained in the union throughout the rest of her tenure for Illinois Bell, which later became SBC and then A T & T. T. 31.

Petitioner testified she worked 37 ½ hours per week as a directory assistance operator, per the collective bargaining agreement. Initially, she performed this job at an office in Chicago Heights. Her work station was equipped with monitors and a keyboard. T. 31-32.

Petitioner testified that, when she first began working as a directory assistance operator, she handled an average of 1200 calls per day. Her supervisors monitored her to ensure she met this quota. T. 32. Her attendance was "perfect." She missed work only for "something excusable" such as an illness supported by a doctor's note. T. 32.

Petitioner testified that, over the next few years, she continued performing the same job but at different locations. After a year or two in Chicago Heights, she was relocated to Lansing. After a couple of years, she was relocated to Harvey. About a year later, she was relocated to her "final" location on Canal Street in downtown Chicago. T. 33-34.

Petitioner testified she used a headset (T. 39) and worked at similarly configured work stations over the years. At the Canal Street location, however, the majority of the work stations were "broken" in the sense that the tables holding the monitor and keyboard could not be adjusted, height-wise. Petitioner testified this was a problem for her, since she is only five feet tall. T. 35. She could no longer type with her hands at about chest level. Instead, her hands were at about shoulder level, with her forearms at a 30- to 45-degree angle. The chairs were adjustable but this did not help. As Petitioner put it, "the chairs were okay but I'm just too short." T. 37.

Petitioner testified her workload changed over time. While the previous quota of 1200 calls per day decreased, the keyboarding time did not, because customers calling directory assistance were now being allowed to request two numbers rather than just one. T. 37-39.

Petitioner testified that each customer who called directory assistance and reached her initially heard a pre-recorded message saying, "thank you for calling, this is Frances, how can I help you?" The customer would then identify the business or person he was trying to reach. Petitioner would then quickly type as few letters as necessary in order to determine the correct number of that business or person. Once she found the number, she would "hurry up" and "release" that customer so as to be able to take the next call. T. 40. The customer would receive the number via computer. T. 41.

Petitioner testified she was allowed to take two ten-minute breaks, a lunch break and "timed" bathroom breaks during each 7 ½-hour workday. If a light was on in the office, it meant that another worker was using the bathroom and "you had to hold it until the light turned off," at which point you could "hurry up and go to the bathroom" and get back to your desk. T. 42.

Petitioner testified she first noticed hand symptoms when she was working in the Lansing office. Her hands were "burning real bad." Petitioner testified she informed her manager, Maurice Owens, of this: "I told my manager I have to go home. I can't stand my hands, they're burning so bad." T. 43. On September 30, 2004, Petitioner sought treatment of these symptoms from her family physician, Dr. Joshi of Well Group Health Partners. Petitioner had previously seen Dr. Joshi for other medical problems. T. 44.

Dr. Joshi's note of September 30, 2004 reflects that Petitioner complained of numbness and tingling in both hands "for the past few days." Dr. Joshi also noted that Petitioner complained of a "lot of burning," itching in her palms and difficulty making a fist. He noted that Petitioner "does do a lot of typing." On examination, he noted no obvious Tinel's sign. He gave Petitioner bilateral wrist splints and prescribed Bextra and Vitamin B6. PX 5.

Petitioner returned to Dr. Joshi on October 30, 2004 and complained of numbness in her arms, neck pain and pain and inflammation in her hands when not wearing the splints. Petitioner indicated she felt "okay" if she wore the splints while typing. The doctor prescribed Mobic. He instructed Petitioner to continue wearing the splints and taking Vitamin B6. PX 5.

On January 31, 2005, Petitioner underwent EMG/NCV testing at Dr. Joshi's recommendation. The testing was negative. PX 5. T. 45.

Petitioner returned to Dr. Joshi on February 5, 2005 and complained of numbness and pain in her hands "which is now extending to her legs." Petitioner indicated her symptoms would improve with splint usage but would return when she removed the splints. Petitioner also indicated she had derived some benefit from Mobic but no longer had any of this medication. On examination, Dr. Joshi noted "tenderness over [the] wrist area." He expressed doubt as to whether Petitioner was suffering from "classic tendonitis." He ordered blood work, prescribed Voltaren and Vitamin B6 and indicated he planned to have Petitioner see Dr. Coats if she remained symptomatic. PX 5.

Petitioner testified she continued performing her normal work duties during this time period. Her symptoms progressed in the sense that the burning sensation in her hands was "now going up to" her forearms and elbows. T. 45-46.

Petitioner saw Dr. Coats, an orthopedic surgeon at Well Group, on February 25, 2005. T. 46. The doctor's handwritten note of that date is somewhat difficult to read. It appears to reflect that Petitioner began experiencing burning, tingling and numbness in her hands in "Oct '04" and continued working at A T & T. The doctor noted the negative EMG results.

The doctor's typed note of February 25, 2005 reflects that Petitioner has "been working for 18 years as a telephone operator so she does quite a bit of typing." The note also reflects that Petitioner began experiencing burning in both hands in October of 2004, with that sensation progressing to "pain as well as numbness and tingling throughout the bilateral upper extremities."

On examination, Dr. Coats noted that Petitioner was wearing bilateral wrist splints. He indicated he was able to see "some fullness in the distal forearm over the extensor retinaculum bilaterally." Palpation of this region caused some tenderness "but not exactly the pain" that Petitioner described earlier. Tinel's and flexion-compression testing was negative. Finkelstein testing was also negative bilaterally. The doctor noted "tenderness to palpation proximally in the forearm over the common extensor tendon origin" that worsened with resisted wrist extension.

Dr. Coats obtained multiple X-rays of both wrists. He saw no radiographic evidence of fractures, dislocations or radiocarpal arthritis.

The typed note of February 25, 2005 is incomplete. Based on subsequent notes, it appears that Dr. Coats injected Petitioner's elbows, gave Petitioner a tennis elbow strap and prescribed occupational therapy.

Petitioner testified she underwent therapy at Athletico from March 7, 2005 through April 1, 2005. T. 47. The therapist who conducted the initial evaluation on March 7, 2005 noted that Petitioner "has been a telephone operator for many years" and began experiencing wrist and elbow symptoms on October 1, 2004. The therapist also indicated that Petitioner had experienced some relief of her elbow symptoms since undergoing injections by Dr. Coats on February 25, 2005. The therapist noted that the doctor had dispensed bilateral wrist and tennis elbow splints. PX 10.

On March 21, 2005, Petitioner returned to Dr. Coats and reported that the injections helped for about two weeks and that she was still experiencing pain "off and on." The doctor's handwritten note reflects that Petitioner described her symptoms as "worse with work."

Dr. Coats' typed note of March 21, 2005 sets forth the following interval history:

> "Ms. Montero is a 53-year-old woman who I am treating for a bilateral epicondylitis. About six weeks ago, I gave her injections into the lateral epicondyle, both elbows, [and provided] a tennis elbow strap. She appears to have been using wrist splints to help with some of her pain, especially while she works. She is a telephone operator, working with directory assistance, and has to use a computer to look up people's requests. After her injections, she had two weeks of good relief but has since gradually had return of her symptoms."

Dr. Coats noted he had talked with Petitioner's occupational therapist. On visual examination, he again noted some fullness in the extensor compartment, with accompanying mild tenderness to palpation. He also noted tenderness over the common and extensor origins on both sides.

Dr. Coats diagnosed bilateral lateral epicondylitis and bilateral extensor tendonitis. He prescribed Celebrex, continued therapy and custom wrist splints to wear "while typing and working." He addressed work capacity as follows:

> "Due to the fact that Ms. Montero states that her symptoms are much worse after work and [her] occupational therapist has confirmed the post-work edema that she has witnessed, I am recommending that she continue to work with the splints in place but she needs to have ten-minute breaks every hour in order to break up the amount of time she spends typing."

He indicated he might need to take Petitioner off work if her symptoms did not improve. PX 5.

Petitioner testified she submitted Dr. Coats' work restrictions (PX 6) to her supervisor. Petitioner also testified that Respondent eventually approved the restrictions. Petitioner indicated she had to go through "SMART," a "different department" of Respondent, in order to obtain this approval. T. 49. She received a letter dated April 22, 2005 from Kandria Daniels, a "job accommodations specialist" for Respondent SBC. This letter (PX 6) reflects that, based on Petitioner's request for accommodation and information submitted by Dr. Coats, Respondent SBC had provided the following "temporary accommodation" to Petitioner's supervisor: "wearing splints, no typing greater than an hour without a 15-minute break." This accommodation is followed by the date "May 6, 2005." The letter also reflects that "the decision whether or not this accommodation is reasonable and can be made rests with your management team" and that any request for extension of the accommodation beyond the indicated date, i.e., May 6, 2005 had to be accompanied by additional medical information. PX 6.

On April 1, 2005, Petitioner's occupational therapist noted that Petitioner reported her pain and symptoms would increase "after long days of work." PX 10.

Petitioner testified she stopped seeing Dr. Coats. At a friend's referral, she started seeing Dr. Labana instead. T. 50.

Dr. Labana's initial note of April 5, 2005 reflects that Petitioner "works for SBC as a telephone operator" and that he was seeing her for "another opinion" due to complaints of bilateral elbow and forearm pain. Dr. Labana also noted: "The patient states that her symptoms began back in October and she feels that it is due to the repetitive nature of her work." He indicated Petitioner derived only transient relief from the injections Dr. Coats administered.

On cervical spine examination, Dr. Labana noted no tenderness and negative Spurling's testing. On bilateral shoulder examination, he noted a good range of motion and negative impingement testing. On bilateral elbow examination, he noted tenderness over both of the lateral epicondyles and pain on resistant extension of both wrists, worse on the right. He also noted "some tenderness more distally in the area of the radial nerve or the forearm extensors." He further noted a minimal long finger raise test and a "very minimal carpal tunnel Tinel's on the right." He prescribed continued therapy and anti-inflammatories. He instructed Petitioner to return to him in two weeks. PX 5.

Petitioner testified she underwent additional therapy at a facility in Dr. Labana's building after April 5, 2005. This therapy provided no relief. T. 51.

Petitioner returned to Dr. Joshi on May 16, 2005, with the doctor noting a history of "chronic severe [elbow] pain for the last few months." The doctor indicated Petitioner underwent "cortisone injections times two" and went off work but experienced a recurrence of pain when she went back to work. Petitioner indicated she "developed depression from all this pain." The doctor provided Petitioner with samples of Ultracet. PX 5.

Petitioner testified she last saw Dr. Labana on June 23, 2005. T. 51-52. The doctor's note of that date indicates that Petitioner described her symptoms as "essentially resolved." On examination, the doctor noted an excellent range of elbow motion, no tenderness and full strength on resisted extension of the fingers and wrists. He found Petitioner to be at maximum medical improvement. He instructed Petitioner to return to him on an "as needed" basis. He sent copies of this note to "work comp" and Dr. Joshi. PX 5.

Petitioner testified she did not believe she was still working pursuant to Dr. Coats' restrictions when she last saw Dr. Labana. T. 52. To her recollection, Respondent SBC was overstaffed at that point and was "allowing a lot of excused time" without pay. Petitioner testified she availed herself of the opportunity to take excused time because working "five days in a row was too hard for [her] arms." She would leave work in tears. She hardly ever made it to the end of her shift. She would type an hour and then leave, saying "I can't do this anymore." If Respondent SBC scheduled her to work on a Wednesday, she would try to take an excused absence on Wednesday so as to avoid working more than two days in a row. T. 53.

On September 16, 2005, Petitioner returned to Dr. Joshi and complained of continued elbow pain "going up and down her arms." Petitioner indicated she had seen Drs. Coats and Labana, who provided injections that helped only temporarily. Dr. Joshi described Petitioner was "unhappy with the outcome." He noted that Petitioner expressed a desire to see Dr. Panio. He referred Petitioner to this doctor and gave Petitioner Celebrex. PX 5.

Petitioner first saw Dr. Panio on October 5, 2005. T. 54. The doctor described Petitioner as having been "sent in by her primary care physician for work-related trauma to both upper extremities." He indicated he told Petitioner he was seeing her "for an independent evaluation only since she has been under the care of two other hand specialists." He noted the negative EMG/NCV testing. He also noted that Petitioner "does a great deal of typing" while working in telephone operations and "because of this noted pain in both forearms associated with sensory changes in both hands." He indicated Petitioner complained of pain in the lateral aspect of both elbows, radiating down both forearms.

On examination, Dr. Panio noted a full range of motion in both elbows in flexion and extension, no pain with forced dorsiflexion of the wrist and digits against resistance on either side, symmetrical wrist range of motion and grip strength, negative Tinel's over the ulnar and median nerves bilaterally, positive wrist compression testing bilaterally, no evidence of tenosynovitis and negative Finkelstein and grind testing.

Dr. Panio assessed Petitioner as having "resolving bilateral lateral epicondylitis" and "resolving bilateral carpal tunnel." He recommended that Petitioner follow up with either Dr. Coats or Dr. Labana. He indicated that, if Petitioner remained symptomatic, she might want to consider undergoing elbow MRIs "to determine if there is any tear or inflammatory process to the common extensor tendons over the lateral epicondylar region." He also indicated Petitioner probably would benefit from repeat EMG/NCV testing.

Dr. Panio sent a copy of his report to Tomika Elligan at Respondent SBC. PX 11.

On October 13, 2005, Petitioner filed an Application for Adjustment of Claim against SBC alleging bilateral upper extremity injuries of October 1, 2004. Arb Exh 2.

On February 9, 2006, Petitioner underwent repeat EMG/NCV testing. T. 55. This testing was negative. PX 5.

On March 31, 2006, Petitioner returned to Dr. Joshi and complained of persistent left elbow pain. Petitioner also reported that SBC told her to "speed up her typing" but she was unable to comply because she was unable to use her left hand and was thus typing one-handed. The doctor instructed Petitioner to refrain from working until her upcoming appointment with Dr. "Pinot," apparently referring to Dr. Panio. He also provided Petitioner with samples of Celebrex. PX 5.

On April 5, 2006, Petitioner returned to Dr. Panio, with the doctor noting the negative repeat EMG/NCV testing. The doctor indicated Petitioner was "still having myofascial pain going up both arms." He recommended Petitioner see a physiatrist, Dr. DeRubertis. PX 11.

Petitioner first saw Dr. DeRubertis on April 6, 2006. The doctor noted that Petitioner complained of bilateral elbow pain, left "much worse" than right. He also noted that Petitioner was "quite insistent" about attributing her problems to "increased activities at work, primarily typing, and the pressures of maintaining the speed in phone call volume." He indicated Petitioner had derived little relief from injections, therapy, splints, medication and home exercises.

Dr. DeRubertis described Petitioner as 5 feet tall and weighing 224 pounds. He noted that Petitioner had brought wrist splints and tennis elbow straps to the examination.

On examination, Dr. DeRubertis noted "severe tenderness and extreme sensitivity even to light touch over the lateral epicondylar areas, left greater than right, but it is bilateral." He also noted no obvious elbow joint effusion, a good range of elbow joint motion and good pronation and supination through the forearm. He was unable to appreciate any sensory or motor deficits. He noted "significant tightness throughout the muscle areas and bogginess and irregularity to the muscles." He found this suggestive of acute inflammation and possible chronic irritation or possibly attributable to the injections.

Dr. DeRubertis diagnosed "chronic lateral epicondylitis of the elbows bilaterally, left greater than right." He prescribed Diclofenac, a non-steroidal medication, as well as ice, massage, occupational therapy and continued splint usage. Because Petitioner was correlating her symptoms with work, he took Petitioner off work for four weeks. He instructed Petitioner to return to him in a month. PX 5. He issued a note stating: "I believe this condition is a work-related repetitive use injury – recurrence." PX 7.

Petitioner next saw Dr. DeRubertis on May 4, 2006, at which time she reported only slight improvement on the right side and no change on the left. Petitioner also reported attending therapy, doing home exercises and using the splints and straps. She indicated she had not been back to work. The doctor noted that Petitioner "is again reinforcing the fact that this was a work-related aggravation of symptoms that she has had from the past."

On re-examination, Dr. DeRubertis noted "significant tenderness over the lateral epicondylar region of both elbows," with the left "seeming worse," and "significant muscle swelling and deformity within the extensor group of muscles of the left forearm." He recommended that Petitioner continue her various therapies and see an orthopedic surgeon for a surgical consultation. He instructed Petitioner to return to him in a month. PX 5.

Petitioner testified she resumed working on May 10, 2006 after Dr. DeRubertis gave her the go-ahead. T. 59. After she resumed working, she continued experiencing the same problems. She also continued leaving work early and trying to avoid working more than two days in a row. T. 59.

Petitioner testified that, in January of 2006, she spoke with her longtime manager, Maurice Owens, about the fact that the work stations were broken and could not be adjusted, height-wise. She spoke with Mr. Owens in Respondent's offices on South Canal in Chicago. No one else was present. Initially, Petitioner testified she discussed this with Mr. Owens many times. T. 61. Later, Petitioner testified she discussed this with Mr. Owens "only once." T. 68-69.

Petitioner testified that, per union policy, there were "no assigned seats." When you walked in, you took whatever work station was available. If only broken work stations were available, "you were stuck with a broken one." At one point, Petitioner told Mr. Owens she had found a work station that was "perfect" for her, height-wise. She asked to be allowed to use this work station on a regular basis. Her request was denied.

At Respondent's request, Petitioner saw Dr. Fernandez for a Section 12 examination on July 6, 2006. T. 124. Dr. Fernandez is a board certified orthopedic and hand surgeon associated with Midwest Orthopedics. RX 1. In his report of July 6, 2006, he noted the following history:

> "Ms. Montero states that she began to notice symptoms of pain and discomfort in the arms and specifically the elbows bilaterally on or about October 1, 2004. She denies any specifically single event or trauma that led to her symptoms and attributed her symptoms to her work activities as she reports that she was engaged in 'constant repetitive typing all day long.'"

Dr. Fernandez noted that Petitioner described working at a station with an adjustable chair. He indicated Petitioner demonstrated the position her hands and arms would be in while keyboarding. He described this position as "relatively physiologic without any significant ergonomic variances." He indicated he reviewed a written job description.

On examination, Dr. Fernandez noted subjective tenderness to direct palpation at the lateral epicondyles centered at the epicondyle "consistent with the diagnosis of lateral epicondylitis." He obtained multiple elbow X-rays. He interpreted the films as showing no evidence of fracture, dislocation or degenerative process.

Dr. Fernandez did not view Petitioner's lateral epicondylitis as work-related. He indicated that lateral epicondylitis is "most commonly idiopathic in nature" and that it occurs most commonly in Petitioner's age group. He stated the condition is "attributable to degeneration of the collagen fibers within the tendon at the insertion at the elbow." He indicated that, while the condition can be work-related, "keyboarding is not one of the recognized risk factors." He conceded that significant activities involving the use of the hands, such as typing and writing, "may increase the underlying symptoms of the condition" but that this would "not mean that there is an underlying aggravation effect or causal relationship." He found Petitioner to be at maximum medical improvement unless she elected to undergo further treatment such as repeat injections or surgery. He characterized the treatment to date as reasonable and necessary. He disagreed with Dr. DeRubertis's opinion as to Petitioner's inability to work. He found Petitioner capable of full duty. RX 1.

Petitioner testified she saw Dr. Mass on October 10, 2006, at Dr. Joshi's referral. T. 69. By this time, she was regularly attaching ice packs to her elbows, using covers that were equipped with Velcro. She would work as long as she could while wearing the wrist splints, the elbow straps and the ice packs. T. 70-71.

Dr. Mass's initial note of October 10, 2006 reflects a history of bilateral elbow pain dating back to 2004. The doctor indicated this pain "began atraumatically as a burning-type of pain on the dorsal aspect of the extensor portion [of the] elbow that was made worse with typing and activities at work." The doctor also indicated that did not initially experience numbness or tingling and continued working, while seeking care with Dr. Coats and "Dr. Obana." He noted that Petitioner experienced a period of relief after undergoing elbow injections but had a "return of similar pain," along with paresthesias into the wrist and thumbs, in March 2006. He noted the negative EMG/NCV results. He indicated that Petitioner continued trying to work but was unable to stay all day most days "because of significant pain."

On examination, Dr. Mass noted tenderness bilaterally overlying the lateral epicondyles as well as some tenderness anteriorly in the area of the radial tunnel. He also noted full flexion and extension of the elbows in both pronation and supination, 4/5 muscle strength with wrist extension and flexion, pain with long finger extension testing, no neurological abnormalities and negative Tinel's signs at the wrists and elbows.

Dr. Mass diagnosed "what appears to be bilateral lateral epicondylitis in the presence of concomitant radial tunnel syndrome." He recommended that Petitioner undergo bilateral epicondyle and radial tunnel releases. He suggested that the first surgery involve both elbows and the more symptomatic left radial tunnel.

Dr. Mass addressed causation as follows: "It does appear that this is continuing to be exacerbated by her typing type activities at work." He took Petitioner off work pending surgery. He instructed Petitioner to continue using her braces in the interim. PX 14.

Drs. Villa and Mass examined Petitioner on October 26, 2006, in anticipation of surgery. Dr. Mass described his examination findings as unchanged.

On October 30, 2006, Dr. Mass performed a left lateral epicondylar release, extensor lengthening and radial tunnel release. At the first post-operative visit, on November 13, 2006, the doctor noted that Petitioner reported only a little discomfort. He instructed Petitioner to start physical therapy in two weeks.

Petitioner testified she resumed working on December 5, 2006, after receiving a call from Respondent indicating she had to return to work as her "time was up." Petitioner testified Dr. Mass released her to work at her request. T. 76-77. After reporting to work on December 5, 2006, she met with Mr. Owens, who issued a "verbal warning" because her "time off was unapproved." T. 77-78. Petitioner testified she performed her regular duties on December 5 and 6 and half a day on December 7. While working, she experienced severe pain in both arms. She testified she returned to Dr. Mass, who took her off work again as of December 8, 2006. T. 79.

Dr. Mass's records show that Petitioner returned to him on December 21, 2006, and reported doing well until she attempted to return to her job, which she described as "mainly typing." On examination, Dr. Mass noted that "the typing caused [Petitioner's] arm to swell up and strain." He indicated that the type of surgery Petitioner underwent typically requires a three- to four-month period of recovery. He commented that "when you are typing, you hold your wrist back in these muscles that are being stressed." He administered an injection and instructed Petitioner to resume therapy and return to him in four weeks. He indicated that, at that point, he would know whether he could get Petitioner back to some form of modified duty. PX 14.

A "patient message sheet" in Dr. Mass's chart reflects that Petitioner called the doctor's office on January 2 and 3, 2007, and indicated Tan Payton of Respondent needed more information from the doctor, in terms of objective findings and functional limitations, to support Petitioner being off work. Petitioner indicated her "disability is being denied as of December 8th and she is not getting paid." The doctor's nurse, M. Koval, R.N., noted that she returned Petitioner's calls on January 3, 2007, told Petitioner she thought the doctor's December 21, 2006 note had been faxed to Respondent and indicated the "note could not be altered." Petitioner reiterated that she needed something more from the doctor to support her

being off work. A subsequent note authored by Nurse Koval indicates that Dr. Mass said there was nothing more he could do. RX 11b.

On January 4, 2007, Dr. Mass issued a note releasing Petitioner to work as of the following day, subject to the following restrictions: "1) 5 minute break every 30 minutes; 2) no lifting over 5 pounds; 3) ergonomically correct work station; 4) may need to ice elbow intermittently throughout the day; 5) must attend physical therapy; 6) wear wrist splint." The doctor indicated these restrictions were to stay in place until Petitioner's next visit on January 18, 2007. Handwriting on this document reflects that Nurse Koval faxed the note to Tan Payton at Respondent's disability center the same day, January 4, 2007. RX 11b.

Petitioner testified she continued applying ice to her elbows at work after January 5, 2007, per Dr. Mass's recommendations. Petitioner further testified that Mr. Owens saw her applying this ice. T. 80. On January 5, 2007, Mr. Owens gave her a written warning entitled "pre-suspension attendance letter." T. 83. This warning states, in relevant part, that Petitioner had been told on December 5, 2006 that her attendance "had reached the unsatisfactory level and that immediate improvement was needed to avoid further disciplinary action." The warning also states that "disciplinary action, up to and including dismissal, may occur" if Petitioner failed to maintain perfect attendance, without any "chargeable" absences, during the next twelve months. PX 13. Petitioner testified that Mr. Owens told her the "next step," discipline-wise, would be a "five-day suspension with possible termination." T. 86. Petitioner testified she worked on January 5, a Friday, took a personal day on January 8, worked all day on January 9 and 10 and worked only one hour on January 11. Petitioner testified she left work on January 11 after working only an hour due to pain in both arms from the elbows down. She told the supervisor on duty she was leaving. T. 83. She has not worked for Respondent since January 11, 2007. T. 83.

A "patient message sheet" in Dr. Mass's chart reflects that Petitioner spoke with the doctor's nurse, M. Koval, R.N., on January 11, 2007 and reported having left work the preceding Thursday, after only one hour, "because she was in so much pain." RX 11b.

On January 18, 2007, Dr. Mass signed a form releasing Petitioner to work as of January 22, 2007. The same day, Dr. Mass sent a lengthy letter via facsimile to Tan Payton, a disability specialist affiliated with Respondent. He indicated he "tried to get [Petitioner] back to work early," i.e., in December, at Payton's request. He also indicated this was "actually a month earlier than [he] would have normally allowed [Petitioner] to return to work." He went on to state:

> "At work, she has had a flare of her right elbow, which has gotten worse though her left elbow pain continues to decrease and at her left wrist. She seems to have developed an extensor tendinitis at the left wrist. I have injected that today with significant relief of her pain. I am hoping that this in itself with some time off

work will allow this to resolve without needing surgery so that we can schedule her for her right lateral epicondylar release and radial tunnel release. She also has some pain at the distal radius on the right.

I hope you will take this into consideration and allow her to be on continued disability until she can fully rehabilitate. I am hoping her left arm will be better within the next couple of weeks and then we can schedule the right arm surgery."

PX 14.

Petitioner testified she took early retirement from Respondent in February of 2007 to avoid being terminated. At that point, she had "just completed" twenty years of service. She felt she had "no choice" but to retire because, had she been terminated, she would have lost her benefits, including the group coverage she needed in order to undergo the pending right-surgery. T. 87-88.

A "patient message sheet" in Dr. Mass's chart reflects that Petitioner called the doctor's office on February 2, 2007 and complained of left arm pain. The sheet also reflects that Petitioner reported she was no longer working, having been "forced to take early retirement." RX 11b.

Another "patient message sheet" in Dr. Mass's chart reflects that Petitioner called the doctor's office on February 28, 2007 and asked nurse Koval whether she was supposed to be in therapy. The nurse noted that Petitioner had not undergone any therapy since December 2006 and had not inquired about therapy during two previous telephone conversations. She recommended that Petitioner discuss this issue with Dr. Mass.

On March 29, 2007, Petitioner returned to Dr. Mass and reported being able to use her left arm without any real problems. Petitioner also reported that her right elbow was continuing to bother her and that she was unable to work and "no longer at her old job." On right elbow examination, Dr. Mass noted exquisite tenderness to palpation over the lateral epicondyle and none overlying the radial tunnel. He recommended that Petitioner undergo only a lateral epicondylar release "and VY lengthening" since the radial tunnel was no longer bothering her. He instructed Petitioner to stay off work "until her right side has fully recuperated." A "cc" notation at the bottom of the page reflects that Dr. Mass provided Tan Payton with a copy of his note via facsimile. PX 14. RX 11b.

Dr. Mass performed a right epicondylar release on April 17, 2007. PX 14. Following this surgery, Petitioner underwent additional therapy and continued seeing Dr. Mass until July 23, 2007. Dr. Mass released Petitioner to work with use of an ergonomically designed keyboard on that date. PX 14. Petitioner testified that it was after Dr. Mass released her that she took one-

month computer courses at Prairie State College. She also contacted the Illinois Department of Employment Security and obtained assistance in creating a resume. She began applying for customer service and clerical jobs. Eventually, on November 28, 2008, she began performing a minimum wage sales position at Bed Bath & Beyond in Matteson. T. 95. She was scheduled to work six or nine hours per week. She worked in this position for "maybe four or five days at the most," at which point she quit to start a seasonal job as a bilingual intake worker for CEDA [Community Economic Development Association]. This job involved helping low-income families obtain assistance with energy bills. Petitioner testified the job involved working 40 hours per week at a rate of $10.00 per hour. T. 98. She interviewed individuals, entered information in a computer and completed applications. T. 98-99. She testified the job involved "some" typing. T. 99. She testified the job ended in March or May of 2009 and started up again in September of 2009. [Petitioner's testimony as to the end date of the first interval of employment is inconsistent with the documentary evidence, i.e., a paycheck dated June 12, 2009 covering the period June 1, 2009 through June 7, 2009, PX 2]. Petitioner testified that, after September 2009, she continued working for CEDA until March or April of 2010. At that point, she "let go of that job" because the work was tapering off and she needed to be ready to assist her husband, who was going to undergo knee replacement surgery. T. 101. After her husband recovered from this surgery, she began looking for work again. T. 101.

The Arbitrator notes that Petitioner did not offer any job search records into evidence even though she made reference to, and appeared to possess, such records at the hearing. T. 122.

On August 21, 2009, Dr. Fernandez gave a deposition on behalf of Respondent. RX 3. Dr. Fernandez is a fellowship-trained, board certified orthopedic surgeon who holds a certificate of added qualification in hand surgery and microsurgery. RX 3 at 4-5. He is an assistant professor at Rush University. He is affiliated with several hospitals, including Rush University Medical Center. RX 3 at 5.

Dr. Fernandez testified he has treated patients with lateral epicondylitis. This disorder is commonly known as "tennis elbow." It is a "degenerative condition of what [is referred to] as the common extensor origin, which is basically the tendon attached to the outside part of the elbow." RX 3 at 6. The tendon is composed of "small collagen fibers," which start to break apart as part of the aging process. Lateral epicondylitis tends to be self-limiting but it can be chronic. Sometimes the condition can go on for several years. RX 3 at 7-8. Eventually, it goes away, regardless of treatment. RX 3 at 8. The condition causes pain, which can be aggravated by lifting. RX 3 at 8.

Dr. Fernandez testified that the "primary cause of lateral epicondylitis is idiopathic, meaning that most of the individuals who come in the office for treatment have no known cause." Even though the condition is referred to as "tennis elbow," most of the individuals who develop the condition have never played tennis. RX 3 at 9. However, "there are certain activities that can aggravate" the condition. These activities usually involve gripping or grasping

or "highly repetitive activities associated with tools." Using your hands to grip and then rotate a tool can cause or aggravate the condition. RX 3 at 9-10.

Dr. Fernandez testified he examined Petitioner on July 6, 2006. Petitioner told him she "constantly types" while working as a directory assistance operator for Respondent. Petitioner demonstrated the hand positioning she uses at work. That positioning was physiologic. RX 3 at 11. Petitioner typed onto a screen that displayed a form with "fill-in blanks." RX 3 at 11.

Dr. Fernandez testified he did not receive a formal description of Petitioner's job. RX 3 at 11.

Dr. Fernandez testified he noted only one abnormality on examination, i.e., pain on resisted wrist extension. This is a typical finding for lateral epicondylitis. RX 3 at 15. He diagnosed bilateral lateral epicondylitis based on Petitioner's history, his examination and his review of the treatment records. RX 3 at 16. He recommended conservative care consisting of splinting, counter-force straps, a stretching program and a series of injections. RX 3 at 16. He also noted that Petitioner might eventually be a surgical candidate. RX 3 at 16. He found Petitioner capable of continuing full duty. RX 3 at 16.

Dr. Fernandez opined that Petitioner's history of working 19 years at A T & T "was not a contributory factor in the causation of her bilateral lateral epicondylitis." RX 3 at 17. Keyboarding and data entry have not been shown to cause or contribute to this condition. RX 3 at 17. Age can be a factor in developing the condition, as can lack of physical fitness. RX 3 at 18. Keyboarding could cause aggravated symptoms, much the same way that aerobic activity could cause aggravated symptoms in a person suffering from lung cancer. RX 3 at 19.

Dr. Fernandez described Petitioner as "very honest." He indicated he believed her "completely" and found her symptoms to be "forthright." RX 3 at 20. There is no doubt her symptoms increase with arm usage but that does not mean there is causation. RX 3 at 20.

Under cross-examination, Dr. Fernandez testified he sees about 5,000 patients per year and performs 800 to 1,000 surgeries per year. RX 3 at 23-24. He performs about 5 to 10 independent medical examinations per week, about 75% of which are for respondents. RX 3 at 24. He charges about $1,000 per examination. RX 3 at 24. In the instant case, he received a cover letter from attorney Natalie Romo. He may have relied on some of the information set forth in that letter. RX 3 at 27. He has not seen Petitioner since July 6, 2006 and does not know what Petitioner's current condition is. RX 3 at 30.

Dr. Fernandez testified he is familiar with Dr. Mass. Dr. Mass has a good reputation as a hand surgeon. RX 3 at 32. Dr. Labana also has a good reputation as a hand surgeon. RX 3 at 33. Dr. Fernandez testified he is not familiar with Dr. DeRubertis. If this doctor opined that Petitioner's lateral epicondylitis was work-related, he would disagree with that opinion. RX 3 at 34.

Dr. Fernandez testified that the hand positioning Petitioner demonstrated during the examination was "physiologic," meaning that her wrists were neither hyper-flexed nor hyper-extended. RX 3 at 36. He asks every examinee to demonstrate the position his or her arms are while typing at work. RX 3 at 37-38. He did not visit Petitioner's workplace. He does not recall Petitioner telling him that some work stations were broken and non-adjustable. RX 3 at 38. Petitioner told him she is 5 feet, 6 inches tall. He did not measure Petitioner's height. RX 3 at 38. If Petitioner applied ice to her arms, that would have been appropriate, although no one knows why icing helps people with lateral epicondylitis. RX 3 at 42. Some of his patients type all day long at work. Some of these patients suffer from lateral epicondylitis. He might tell patients to "work within [their] limitations" but he does not specifically restrict patients from typing. RX 3 at 43. Taking a 5- or 10-minute break each hour would reduce symptoms. RX 3 at 44.

Dr. Fernandez testified he does not necessarily subscribe to the term "cumulative trauma disorder." He does, however, believe that ergonomics can help people feel better while working. RX 3 at 45. Nevertheless, there is no evidence that ergonomics prevent the type of disorders that are typically labeled "cumulative trauma." RX 3 at 45. Most work-related lateral epicondylitis stems from acute trauma, such as an avulsive type of injury. In those cases where the disorder develops gradually, a "moderate, forceful job" is usually involved, with that job requiring gripping and grasping of a tool and with the person rotating his or her hand. RX 3 at 46-47. Research is being done to determine whether some cases of lateral epicondylitis stem from repetitive trauma. RX 3 at 47.

Dr. Fernandez was unable to identify any specific publication that states lateral epicondylitis is most commonly idiopathic. RX 3 at 48.

Dr. Fernandez testified that "every case of epicondylitis is different" and that recovery times differ. RX 3 at 51.

Dr. Fernandez testified that the causation opinions he has rendered in Petitioner's case are not based on the assumption that Petitioner worked in a physiologic position. Rather, his opinions are based on the fact that "data entry, even at the extreme level [Petitioner] is self-describing, has not been shown [to be] and mechanically is not a causative factor in lateral epicondylitis." RX 3 at 53. It is not unusual, however, for the symptoms of epicondylitis to worsen at work. RX 3 at 53. Doctors usually recommend splinting for lateral epicondylitis, even though they do not know whether this really helps the "repair process." Splints are prescribed for comfort. Some physicians recommend increased activity but he does not necessarily agree with that. RX 3 at 55. Doctors also administer cortisone injections for lateral epicondylitis although, again, they do not know why such injections tend to help, at least temporarily. RX 3 at 60-61. He tells his patients that about two-thirds of them will improve after surgery. One third will not improve but will feel no worse. Of the two-thirds who improve, about one-third will experience complete resolution of their symptoms within a short period of time. RX 3 at 62. In all cases, regardless of whether surgery is undertaken, the condition will resolve on its own. RX 3 at 62. Recurrence of lateral epicondylitis is "relatively unusual." RX 3 at 63, 65. The

rate of recurrence is very, very low, even in people who resume their prior activity level. RX 3 at 65. He noted no objective abnormalities when he examined Petitioner. RX 3 at 71.

On February 25, 2010, Petitioner saw Dr. Robertson for an examination at her attorney's request. Dr. Robertson is associated with Occupational Medicine Associates of Chicago. He obtained board certification in orthopedic surgery in 1976. PX 15 at 5. He has had occasion to treat patients with lateral epicondylitis. He has performed the same surgeries that Petitioner underwent. PX 15 at 13. He retired in 2002. PX 15 at 16-17. He now performs independent medical examinations. Initially, he performed those examinations mainly for claimants. In the last two years, however, "it's basically been for the respondent." PX 15 at 17.

At his May 17, 2012, deposition, Dr. Robertson testified he did not independently recall Petitioner and thus needed to rely on his report. PX 15 at 7. Petitioner told him she worked as a directory assistance operator for twenty years, initially for SBC and later for SBC's successor, A T & T. PX 15 at 9-10. Petitioner also told him she attempted to return to work in February of 2007, about four months after Dr. Mass performed a left lateral epicondylar release and radial nerve decompression, but lasted only two days, at which point her pain returned. Petitioner told him she was "forced to retire" at this point and subsequently underwent right-sided surgery. PX 15 at 9.

Dr. Robertson testified he reviewed EMG reports, records from various treating physicians and Dr. Mass's operative reports in connection with his examination. PX 15 at 8-9.

Dr. Robertson testified that Petitioner complained to him of occasional pain over the lateral epicondyle of both elbows with strenuous activity as well as intermittent paresthesia of both hands in the thenar area. Petitioner indicated she had difficulty lifting a gallon of milk. PX 15 at 10. On examination, Dr. Robertson noted bilateral healed surgical scars over the lateral epicondyles, pain on palpation over both lateral epicondyles, no increased pain with resisted extension of the wrists and inconclusive Jamar testing secondary to pain. PX 15 at 11.

Dr. Robertson diagnosed bilateral epicondylitis. He testified that epicondylitis consists of "microscopic tears in the origin of the extensor muscles at the level of the elbow." PX 15 at 12. The surgeries Dr. Mass performed released the tendons so they could heal but "if you put the weak tendon back to doing the same thing [i.e., typing] the pathology is going to recur." PX 15 at 14-15. When you type, you periodically flex and extend your wrists. Every time you extend your wrists, you're contracting the extension muscles at the elbow and putting tension on the tendons. PX 15 at 15-16.

Dr. Robertson testified "it's a well known fact that using a keyboard can produce epicondylitis and carpal tunnel syndrome." He opined that Petitioner's "long hours of typing were the cause of her pain." PX 15 at 12. He characterized Petitioner's treatment as reasonable and necessary. PX 15 at 12. He opined that Petitioner should avoid typing for long periods and lifting, pushing or pulling over 25 pounds. PX 15 at 13. Petitioner could perform a job that involved intermittent typing and occasional lifting under 25 pounds. PX 15 at 14. He

did not foresee any possibility of Petitioner returning to work as a directory assistance operator. PX 15 at 14. If Petitioner resumed rapid typing for long periods she would develop lateral epicondylitis all over again. PX 15 at 14.

Dr. Robertson testified he disagrees with Dr. Fernandez's causation opinion. He has not seen any literature indicating epicondylitis is genetic. The epicondylitis he has seen has been "mechanical from repetitive work or trauma." PX 15 at 16.

Under cross-examination, Dr. Robertson acknowledged receiving a letter dated February 24, 2010 from Petitioner's counsel. In this letter (Resp Dep Exh 1), Petitioner's counsel outlined Petitioner's job duties and complaints. PX 15 at 18. Petitioner's counsel sent him records from Dr. Joshi, Dr. Coats, Dr. Labana, Dr. DeRubertis and Dr. Panio, along with Dr. Fernandez's report and physical therapy notes. PX 15 at 20. Dr. Robertson did not recall the dates of treatment reflected in these records. PX 15 at 20. Petitioner told him she answered calls and typed information into a computer over an eight-hour day with "maybe a couple of half-hour breaks." PX 15 at 21. Petitioner did not tell him how many calls she answered per shift or how fast she typed. PX 15 at 22. Petitioner did not indicate whether she had to type only a couple of words per call or complete sentences. PX 15 at 22. He did not know over what 20-year period Petitioner performed this work. PX 15 at 23-24. Dr. Robertson testified that age does "not necessarily" play a role in the development of epicondylitis. Tissue deteriorates as a person ages but that deterioration does not necessarily mean the person is going to develop painful epicondylitis. PX 15 at 24. He did not find Petitioner's weight (240 pounds at a height of 5 feet) to be relevant since Petitioner was not weight bearing on her arms. PX 15 at 25. He views Petitioner as "slightly obese." PX 15 at 25. He could not identify any of the medical literature stating that repetitive work causes certain illnesses such as epicondylitis. PX 15 at 25-26. He did not review any of this literature before or after examining Petitioner. PX 15 at 26. He is not a partner of Occupational Medicine Associates. He receives a stipend from Dr. Coe, one of the partners, each time he performs an independent medical examination or gives a deposition. PX 15 at 26-28. He performs about 80 to 90 independent medical examinations per year. PX 15 at 28. About 90% of these are for respondents. PX 15 at 29.

Under re-cross, Dr. Robertson testified he "knows" that Petitioner was "forced to retire" due to pain because Petitioner told him this. PX 15 at 30-31.

On April 19, 2010, Petitioner met with Susan Entenberg of Rehabilitation Services Associates. Entenberg issued a report on May 3, 2010, following this meeting. She opined that Petitioner was not capable of resuming her former occupation, based on Dr. Robertson's restrictions. She noted that Petitioner had most recently worked as a bilingual intake worker for CEDA, earning $10.00 per hour. She further noted that Petitioner left this job on March 17, 2010, "for personal reasons." She opined that the bilingual intake worker job was appropriate, restriction-wise, and within a realistic earning capacity range. PX 1.

At Respondent's request, Petitioner saw Dr. Fernandez for a second Section 12 examination on September 2, 2010. In his report of the same date, the doctor noted "there

were no new records to review" since the first examination. Petitioner described her two surgeries to the doctor. Petitioner indicated she worked part-time as an intake worker from September of 2009 through March of 2010 and then took time off because her foot was casted and she needed to help her husband, who had undergone knee replacement surgery.

Dr. Fernandez noted that Petitioner denied any residual elbow symptoms but complained of occasional burning in both palms.

Dr. Fernandez noted a weight gain of 30 pounds. He described Petitioner as 5 feet tall and weighing 240 pounds. He noted large incisions at the lateral elbows along both forearms as well as an incisional scar along the anterior radial proximal forearm consistent with a radial tunnel release. He otherwise noted no abnormalities on examination of both elbows and wrists. He obtained bilateral elbow X-rays, which showed "changes to the bone along the lateral epicondyle along the lateral aspect." He described these changes as "consistent with either post-surgical changes or local heterotropic bone formation from the epicondylitis process."

Dr. Fernandez described his causation opinions as unchanged, noting there was "no new information to support any change in those opinions." He found Petitioner to be at maximum medical improvement from her surgeries. He found Petitioner capable of unrestricted duty with respect to her elbows. He characterized the treatment to date as reasonable and necessary. RX 2.

At Respondent's request, Petitioner met with Pamela Nelligan of MedVoc Rehabilitation on December 4, 2010. Nelligan issued a report on January 10, 2011. In this report, Nelligan noted that Petitioner left the CEDA job in March 2010 because her husband was scheduled to undergo knee replacement surgery the following month and because she disagreed with some of CEDA's procedures. Nelligan also noted that Petitioner was continuing to look for work and was primarily targeting clerical jobs. Nelligan indicated she performed a labor market survey, contacting twenty-six prospective employers, in December of 2010. The average wage offered by these employers was $13.78 per hour. Nelligan stated that fifteen of the employers she contacted expressed willingness to accommodate the restrictions imposed by Dr. Robertson. Of these fifteen, only eight were currently hiring.

Based on Petitioner's education and work history, as well as the restrictions recommended by Dr. Robertson, Nelligan opined that Petitioner was capable of working as a customer service representative, collections clerk, call center representative, office assistant, switchboard operator or receptionist. RX 4.

Petitioner testified she received Nelligan's report from her attorney in January of 2011. She contacted some of the prospective employers that Nelligan identified. She only contacted the employers whose businesses she could get to on public transportation. T. 102-103. None of the employers she contacted responded to her or offered her an interview. T. 103. While she was contacting these employers, she continued looking for work on her own. T. 103-104.

She applied to various staffing agencies, schools and businesses. Eventually, she found a seasonal job with H & R Block. She underwent training for this job in December of 2011 and worked thereafter until April 17, 2012. She again performed this job between December of 2012 and April 15, 2013. While undergoing training, she earned $8.25 hour. While working, she earned $9.00 per hour. T. 110. In 2013, she averaged about 30 hours per week. She offered copies of her H & R Block paychecks into evidence as PX 3. The copies relating to the 2011-2012 tax season reflect the following gross earnings: $99.00 (12/30/11), $29.04 (1/13/12), $213.00 (1/27/12), $427.59 (2/10/12), $383.58 (2/24/12), $408.87 (3/9/12), $233.28 (3/23/12), $81.99 (4/6/12) $186.12 (4/18/12) and $133.11 (5/4/12). The copies relating to the 2012-2013 tax season reflect the following gross earnings: $103.87 (1/11/13), $88.20 (1/25/13), $618.71 (2/8/13), $642.69 (2/22/13), $599.48 (3/8/13) and $366.50 (3/22/13). PX 3.

Petitioner testified that the H & R Block job went well, for the most part. On one occasion, however, her manager asked her to call about 200 customers to thank them for coming in. By the thirtieth call, she had to stop due to arm pain. Her manager did not have a headset. T. 111-112.

Petitioner testified she began looking for work again after the H & R Block job ended on April 15, 2013. Since then, she has sent her resume out and looked for work online. She has not seen any openings for jobs she is qualified to perform. One job required proficiency in Excel, Word and Access. She does not have this proficiency. T. 113.

Petitioner testified that her earnings as a directory assistance operator were governed by collective bargaining agreements. Based on her seniority and "zone," she earned $757.50 per week as of April 4, 2004, $776.50 per week as of April 3, 2005 and $796.00 per week as of April 2, 2006. Had she still been working for Respondent as of April 1, 2007, her weekly pay would have been $814.00. As of April 6, 2008, her weekly pay would have been $832.50. As of April 5, 2009, her weekly pay would have been $871.00. As of April 4, 2010, her weekly pay would have been $897.00. As of April 3, 2011, her weekly pay would have been $921.50. T. 114-119. The agreements defined the "work week" as consisting of 37 ½ hours. T. 117. PX 16.

Petitioner testified that her arms are weaker than they used to be. She cannot lift heavy items and has some trouble lifting a gallon of milk. She avoids repetitive activities involving her arms. She tried painting a wall but her arms began hurting. Her pain generally begins in her left arm. T. 121. In general, however, she feels Dr. Mass "did a splendid job." T. 120.

Petitioner testified that Respondent provided no vocational assistance to her other than the meeting with Nelligan. Nelligan identified no prospective jobs for her other than those listed in the report.

Under cross-examination, Petitioner testified she stopped driving in 1986, when she started an evening job with Respondent. She is a "very nervous person when it comes to driving" and had never driven in the dark. T. 124-125. She retired in part because she had reached her 20-year point. T. 125. As a retiree with twenty years of employment, she is

entitled to medical, dental and vision benefits. Her husband is entitled to medical and dental. T. 126. She retired on February 3, 2007 after Mr. Owens conducted an "exit interview." She could not recall whether the exit interview took place on January 26, 2007, the day she signed various retirement-related documents. T. 133-134. RX 6.

Petitioner testified that Mr. Owens discussed a "gain" issue with her on March 30, 2006. She is unsure what "gain" means but, essentially, Mr. Owens told her she was not meeting her "target" of 19.4, meaning she was not averaging 19.4 seconds per call. She was "running" 19.8 seconds per call at that point. T. 128. She had met her target the previous month. The target changes depending on call volume. T. 129. Respondent did not permanently assign her to the work station she liked but did provide her with a foot rest in August of 2006. T. 130. A "man that A T & T had" recommended this foot rest along with a sponge wrist pad after evaluating her. T. 131.

Petitioner testified that Suzanne Kolomis handled disability and attendance issues for Respondent. Kolomis would "call [her] to come back to work when [her] disability was up." On January 3, 2007, she called Kolomis and provided her with an account of her attendance. Kolomis told her that her job would be in jeopardy if she could not get Dr. Mass to "support [her] absence" from work. T. 140. Petitioner told Kolomis she wanted to call off sick until her next scheduled appointment with Dr. Mass on January 19th. Kolomis told her she could not do that because "she doesn't know what code to use" to document Petitioner's absence. Kolomis was looking for a disability slip, which Petitioner did not have. T. 141. Petitioner testified she called Kolomis the following day, January 4, 2007, and said she would have to go to work the next day as Dr. Mass was not able to help. After other calls, including one to Dr. Mass's nurse, Dr. Mass released Petitioner to work but with splint usage. T. 142. On January 18, 2007, Petitioner called Kolomis and indicated she would "return" to work on Monday, the 22nd. In fact, Petitioner did not have to actually work that week because the week of the 22nd was her "WP week," meaning a week of paid personal days. Petitioner did not want to lose this week because she knew she was going to retire. T. 144. As of January 29th, Petitioner would be suspended for five days and then retire. T. 144.

Petitioner testified she was unsure whether Respondent viewed workers' compensation differently from disability. Respondent initially approved her for "workers' comp" and then asked her to complete disability paperwork. She found this confusing. T. 136.

Petitioner testified that, although she was a union member, she only got a union representative involved in her situation on one date, March 30, 2006. She got the representative involved because she knew she could not meet the "CST" because she was typing with one hand. T. 137. She chose not to grieve the December verbal warning. T. 137.

On redirect, Petitioner testified Dr. Mass gave her a note on December 21, 2006 stating she would have to be off work for four weeks. T. 145-146. Petitioner testified she gave this note to Respondent. T. 146. Despite the note, Respondent "gave [her] a hard time" in early January 2007, saying she had no authorization to be off work, because her FMLA time had

expired. T. 147. The man who recommended the gel pad did not give her the pad. She bought the pad on her own. T. 147. The man did give her a foot rest but she had to carry this around and reposition it because her work station changed daily. T. 148. The foot rest did not alleviate her hand and arm symptoms. She could only use the foot rest if she was able to sit at a desk that was at the right height. She could not use the foot rest when she stood at work. She had to work standing up at times when she was assigned to a position that was too high and that was "stuck" in that position. T. 148-149. Sometimes she elected to work while standing up. T. 149. The man who recommended the foot rest and gel pad evaluated her "very briefly." He was "just there to see if [she] was sitting correctly in the position." T. 150. During her exit interview, Mr. Owens completed a check list and she completed a form entitled "resigning/retiring employee's statement." T. 151. On this form, Petitioner wrote that Respondent did not allow her sufficient time to heal after her left-sided surgery, that she got warnings on December 5, 2006 and January 5, 2007, that she had used up all of her FMLA time and that she was taking retirement because she had no other choice. She wrote: "this is my only choice to avoid getting fired." T. 152-153.

Under re-cross, Petitioner testified she gave Dr. Mass's "off work" slip of December 21, 2006 to Mr. Owens or another supervisor. She could not recall exactly who she gave it to. T. 154. She turned in the slip on December 22, 2006, assuming that day was a workday. T. 154.

On further redirect, Petitioner testified that, assuming December 21, 2006 was a Thursday, she turned in the doctor's slip the following day. Alternatively, she might have faxed or E-mailed the slip to Respondent. T. 155-156. She always turned in her doctors' notes. T. 156.

Under additional re-cross, Petitioner reiterated she submitted the slip. She acknowledged she did not know whether the slip was received. T. 156.

Two witnesses testified on behalf of Respondent. Ural Maurice Owens testified he has worked for Respondent and its predecessors for twenty-two years. Since May of 2011, he has worked as a "U-verse attendance manager." T. 160. Between approximately 2004 and 2007, he was the "front line manager" at Respondent's facility at 10 South Canal. Prior to that, he worked as an attendance manager for operator services for three or four years. T. 161-162.

Owens testified that Petitioner was "on [his] team" at Respondent's Lansing office and at the Canal Street facility. T. 163. He acknowledged that the Canal Street facility offered work stations to directory assistance operators on a "first come, first served" basis. T. 163. If an operator had a favorite work station, and that station was occupied by someone else, the operator would have to "go to another position." T. 164. Owens also acknowledged that some of the work stations at the Canal Street location were "broken." In some instances, the monitor could not be raised or lowered. In other instances, the keyboard did not work or the computer did not function. T. 164.

Owens testified that a "gain" discussion is a process whereby an operator's call patterns would be observed to determine whether the operator was "oversearching" or "overkeying." The goal of the discussion was to make the operator more productive and proficient. T. 165. Owens testified he had a "gain" discussion with Petitioner on March 30, 2006. He identified RX 7 as a note he entered in Respondent's computer system following this discussion. T. 167. The note accurately represents the exchange he had with Petitioner. T. 167.

Owens testified that, on July 18, 2006, Scott Lansky performed an ergonomic study of Petitioner at his request. T. 168, 172. He requested this study based on a request for an accommodation he received from Petitioner's medical provider via "IDSC," Respondent's "Integrated Disability Service Center." T. 170-171. Lansky recommended accommodations, including a foot rest. Owens testified he provided a foot rest to Petitioner. T. 172. RX 8. Owens further testified that, based on Lansky's recommendations, he set up a work station that was exclusively for Petitioner's use. T. 176. Petitioner worked at this station thereafter. The union representative, Debbie Greenly, knew of this and said it was "perfectly fine." T. 177.

Owens testified he conducted an exit interview with Petitioner on January 26, 2007. A week before this interview, Petitioner called him and said she wanted to take vacation time she had acquired as of January 1st and then retire. T. 173-174. Petitioner also said she felt Respondent was forcing her to retire. Owens testified that, to his knowledge, Respondent did not force Petitioner to retire. T. 174.

Owens acknowledged Petitioner worked with ice packs attached to her arms at the Canal Street location. T. 175.

Under cross-examination, Owens testified that, during the "gain" discussion, he warned Petitioner that disciplinary action, up to and including dismissal, could be taken against her if she failed to consistently improve month by month. T. 178-179. Automatic recordings are made of each operator so as to determine the amount of time an operator spends on each call. T. 179. Not all operators have the same "target" in terms of average time spent per call. The "internal target" for all operators was 17.1. He did not set this target. Corporate set it. T. 187. He did, however, set Petitioner's targets. T. 180-181. He set a lower target each month to ensure improvement. T. 182. The goal was to have each operator get as close as possible to the "internal target" of 17.1. T. 184. An operator's target could never be raised because that would not reflect improvement. T. 184. During this time frame, Owens supervised about 12 to 14 operators. Some of these operators averaged less than 17.1 seconds per call and some were slower. Several operators on his team were not meeting the 17.1 internal target. Petitioner was one of these operators. He could not remember whether Petitioner was the slowest member of his time. T. 185. He told Petitioner she had to improve even though Petitioner had informed him she could only use one hand to type. T. 187-188.

Owens acknowledged seeing Petitioner leave work early in tears because of the pain she was experiencing. T. 189.

Owens did not recall exactly when he assigned a specific work station to Petitioner. He knew, however, that he made this assignment after the ergonomic evaluation of July 18, 2006. T. 189-190. Lansky, who conducted the evaluation, was an employee of Respondent. T. 191. Owens denied telling Petitioner she could not have her own work station due to union regulations. T. 195. Owens did not recall what Petitioner's performance was like after she got her own work station. T. 195.

Owens testified that he checked with Petitioner on an hourly basis after giving her the foot rest, with Petitioner reporting she was having no pain and "everything was okay." T. 192. RX 6. Petitioner continued using the ice packs and splints after getting the foot rest. T. 193-194. Petitioner wore the splints "the majority of the time." T. 194.

Owens testified Petitioner completed a form during the exit interview. On this form, Petitioner indicated she needed more time to recover from surgery and felt she was being forced to retire. Petitioner told him she felt she would be fired if she did not retire. T. 196. He told her "we're not forcing you to retire." T. 196. On January 5, 2007, he handed Petitioner PX 13, a written warning concerning Petitioner's attendance. T. 197. The warning stated that Petitioner would be subject to disciplinary action, up to and including dismissal, if she failed to maintain perfect attendance during the ensuing twelve months. T. 198. It was Petitioner's responsibility to provide Respondent with documentation from a healthcare provider substantiating lost time. T. 199. As of January 5, 2007, Petitioner lacked sufficient "worked hours" to qualify for FMLA time. T. 199-200. If an absence was due to "workers' comp," it would not be "chargeable" but Respondent did not consider Petitioner's absence to be "workers' comp." Thus, Petitioner lacked both "workers' comp" protection and FMLA protection. T. 201.

On redirect, Owens testified that "sickness disability" exists as a benefit but only when an employee has FMLA time available, which Petitioner did not have. T. 202. Respondent was not on the brink of terminating Petitioner when the exit interview took place. T. 202. Petitioner was not even subject to a verbal warning as to her job performance at that point. The "gain discussion" was as far as discipline had gone, performance-wise. T. 203. Attendance and job performance are viewed separately. Petitioner was at the "written warning" level, attendance-wise, as of January 5, 2007. T. 204-205.

Under re-cross, Owens testified he could not recall whether a one-day or a three-day suspension would be the "next step" after a written warning. The step after suspension is termination. T. 207-208.

Suzanne Kolomis also testified on behalf of Respondent. She testified she retired from A T & T in 2010. Prior to retiring, she worked for A T & T and its predecessors for 37 years. T. 201. For eight years prior to her retirement, she worked as an attendance analyst. T. 210. She talked with Petitioner over the telephone but never met Petitioner, to her recollection. T. 211.

Kolomis identified RX 9 as a group of notes she made concerning her conversations with Petitioner. Kolomis did not independently recall these conversations. Her notes reflect that Petitioner called on January 2, 2007 to discuss the documentation she needed to support her time off. The paperwork Petitioner had submitted was a duplicate of paperwork Petitioner had previously submitted. Kolomis clarified she does not handle this paperwork. Instead, it is submitted to Sedwick or SMAART. T. 214. Petitioner called her again on January 4, 2007 and related she had reached a nurse but was unsure whether she was going to be resuming full or restricted duty. Kolomis testified she told Petitioner she needed to clarify this. T. 216. On January 11, 2007, Petitioner "went out on a relapse disability again" because she felt was in too much pain to work. Kolomis testified she explained to Petitioner that she was not eligible for FMLA, since she did not have enough work hours in. She instructed Petitioner to "get medical in" to support being back out on disability. Kolomis testified she later learned Petitioner planned to return to work on January 22, 2007. T. 217-218.

Under cross-examination, Kolomis clarified that Sedgwick handles workers' compensation for Respondent and that Sedgwick used to be known as "SMAART." Kolomis testified she is not the individual who decided whether a worker was entitled to disability. Nor was the individual who determined whether medical documentation was sufficient to support the payment of disability benefits. T. 222. She never saw Dr. Mass's note of December 21, 2006. That note would not have come her way. T. 223.

In addition to the exhibits previously discussed, Petitioner offered into evidence an undated report authored by Dr. Labana. Based on the notations at the top of this report, it appears Dr. Labana sent this report to Petitioner's counsel on December 30, 2009, via facsimile. In the report, Dr. Labana indicated that Petitioner complained of elbow and forearm pain at her initial visit on April 5, 2005 and attributed this pain to the "repetitive typing" she performed as an SBC telephone operator. He noted he did not have an exact job description. He further indicated he diagnosed Petitioner with bilateral lateral epicondylitis "as well as some likely radial nerve compression," treated Petitioner conservatively with splints and therapy and discharged her from care on June 23, 2005, at which time she had "essentially resolved symptoms."

Dr. Labana addressed causation as follows:

> "I do feel that the repetitive nature of [Petitioner's] work at least contributed to her symptoms and, therefore, as per the Illinois Workers' Compensation Act, was a factor In causing her symptoms. [T]herefore, I do believe her treatment rendered and medical conditions at that time were work-related and therefore should have been covered under workers' compensation."

PX 8.

Petitioner also offered into evidence a Petition for Penalties and Attorneys' Fees filed on March 29, 2013. PX 4.

In addition to the exhibits previously discussed, Respondent offered into evidence a collection of motions it filed in these cases, seeking hearings, along with multiple "Form 41" continuance requests made by Petitioner's counsel. RX 10. Respondent's requests for hearing date back to early 2007. The Arbitrator admitted RX 10 into evidence over Petitioner's relevancy objection. T. 258-259. The Arbitrator views the documents in RX 10 as tangentially relevant to Petitioner's claim for penalties and fees.

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Arbitrator's Credibility Assessment

Petitioner came across as a hard-working, "salt of the earth" type of individual. The Arbitrator found her very credible, as did Respondent's examiner, Dr. Fernandez. RX 3 at 20. Ural Owens, who testified on behalf of Respondent, confirmed much of what Petitioner had to say about the poor condition of some of Respondent's work stations. He also confirmed that Petitioner wore braces and ice packs while working and often left work in tears. Owens disagreed with one aspect of Petitioner's testimony, however. He claimed that Respondent assigned a work station to Petitioner for her exclusive use at some point after Lansky's ergonomic evaluation. Petitioner denied this. On this point, the Arbitrator finds Petitioner more credible than Owens.

The Arbitrator finds credible Petitioner's testimony that she felt forced to resign. This testimony is supported by notations in Dr. Mass's chart (RX 11b) and the statement Petitioner wrote at the time of the exit interview. It is also supported by the timeline. In his office note of December 21, 2006, Dr. Mass indicated he would only later be able to determine whether Petitioner would be able to resume some kind of restricted duty. He signed a slip the same day indicating Petitioner would not be able to return to work for four weeks. PX 12. Respondent's suggestion that it never received Dr. Mass's December 21, 2006 notes is not well-supported. Instead, it appears that Tan Payton received the notes but wanted more, in the way of objective findings, to support the doctor's decision to keep Petitioner off work. [See the patient message sheets of January 2 and 3, 2007 in RX 11b and PX 14.] Respondent declined to issue disability benefits until these findings were produced. Petitioner, understandably, had some difficulty grasping the nuances of this situation based on her discussions with Kolomis, given Kolomis's limited role as a go-between who had no access to the actual records being transmitted. Petitioner could only go back to Dr. Mass, with the doctor's nurse responding, not unexpectedly, by simply re-faxing the December 21, 2006 notes to Sedgwick/SMAART. [See the first note in RX 9]. Petitioner continued to make attempts to clarify the situation, with the doctor's nurse subsequently faxing a list of specific work restrictions to Tan Payton at Respondent's disability center on January 4, 2007. [The fact that Dr. Mass issued restrictions on January 4, 2007 prompts the Arbitrator to question the veracity of Kolomis's January 4, 2007 note. This note, one of four in RX 9, reflects that Petitioner told Kolomis Dr. Mass indicated she did <u>not</u> need restrictions.] The very next day, January 5, 2007, Owens gave Petitioner a written warning indicating she could be terminated if she accrued additional chargeable absence before successfully completing twelve months of perfect attendance. PX 13. At that point, Petitioner was facing a second surgery, which would require time off that Respondent would view as "chargeable," per Owens. T. 200-201.

In the Arbitrator's view, Petitioner did everything possible to try to determine what Respondent required in order for her to substantiate her claimed disability and resultant absences. Once Petitioner finally obtained some clarification, i.e., work restrictions, Respondent threatened discipline, up to and including suspension, and imposed a requirement of perfect attendance that Petitioner knew she could not meet.

This imperfect storm of circumstances prompts the Arbitrator to find that Petitioner's retirement was not voluntary.

Did Petitioner establish injuries secondary to repetitive trauma? Did Petitioner establish causal connection as to her current claimed bilateral upper extremity condition of ill-being?

The Arbitrator finds that Petitioner established repetitive trauma injuries to both upper extremities manifesting themselves on September 30, 2004 (as amended at the hearing), March 30, 2006, December 7, 2006 and January 11, 2007. The Arbitrator finds it appropriate for Petitioner to have alleged several manifestation dates given that her symptoms tended to wax and wane.

There is no real dispute in this case as to the nature of Petitioner's duties. Petitioner was required to perform the same task over and over again, i.e., accept a call from a person seeking a telephone number, key in sufficient information to obtain the number and "release" the call to the computer. Nor is there any dispute that Petitioner was subject to strict time constraints while handling calls. Respondent's witness, Ural Owens, acknowledged that Petitioner and the other operators in his "team" were subject to a corporate-devised "target" number in terms of seconds spent on each call. Owens also acknowledged that Respondent cut no slack, target-wise, even when active symptoms called for leniency. Nor is there a dispute as to the problems with some of Respondent's work stations. Owens conceded that some of these stations were "broken" and thus non-adjustable. He did not dispute Petitioner's testimony that she sometimes had to stand while working in order to be able to keyboard with her hands at a reasonable level.

While expert testimony is needed to establish causation in most repetitive trauma claims (Nunn v. Industrial Commission, 157 Ill.App.3d 470, 506-7 (4th Dist. 1987)), the instant case is one in which such testimony is the proverbial "icing on the cake." The causation opinions rendered by Drs. Labana and Dr. Mass, along with Dr. Robertson's testimony, are almost superfluous, given the duration of Petitioner's employment, the repetitive nature of Petitioner's work and the extent to which Owens bolstered Petitioner's testimony.

Is Petitioner entitled to temporary total disability benefits?

At the hearing, Petitioner indicated she is claiming four intervals of temporary total disability: March 31, 2006 through May 9, 2006 (40 days, or 5 5/7 weeks), October 10, 2006 through December 4, 2006 (56 days, or 8 weeks), December 8, 2006 through January 4, 2007 (28 days, or 4 weeks) and January 12, 2007 through July 23, 2007 (193 days or 27 4/7 weeks).

Having found that Petitioner established repetitive trauma and causal connection, and in reliance on the records of Drs. Joshi, Panio, DeRubertis and Mass, the Arbitrator awards temporary total disability benefits during the four intervals claimed by Petitioner. The Arbitrator awards the first two intervals, which total 13 5/7 weeks, in 06 WC 17114. The

Arbitrator awards the second two intervals, which total 31 4/7 weeks, in 07 WC 5982.

Is Petitioner entitled to maintenance?

Petitioner claims maintenance from July 24, 2007 (the day after Dr. Mass released her to restricted duty) through November 27, 2008, the day before she began working at Bed, Bath and Beyond.

The Arbitrator declines to award maintenance in this case. Petitioner testified she attended computer-related courses for one month after Dr. Mass released her. Petitioner also testified she looked for work on her own thereafter. At one point in the hearing, Petitioner obtained a folder from her purse. The folder purported to contain lists of many, although not all, of the job contacts Petitioner made. T. 104-108. Petitioner appeared to rely on these lists in identifying the businesses she contacted. As to the dates of those contacts, however, she was vague at best. She linked only two contacts (Davis Staffing and the Department of Motor Vehicles) to specific periods, i.e., February and March of 2008. She later indicated that the lists reflected contacts made in 2012 and 2013. T. 107-108.

While the Arbitrator finds Petitioner credible, Petitioner did not offer any job search documents into evidence, even though she apparently had such documents available at the hearing. On this record, with Petitioner identifying only two contacts made during the relevant period, the Arbitrator denies Petitioner's claim for maintenance.

Is Petitioner entitled to medical expenses?

Having found that Petitioner established repetitive trauma and causal connection, and noting that Respondent's examiner, Dr. Fernandez, characterized Petitioner's treatment as reasonable and necessary, the Arbitrator awards the following medical expenses, subject to the fee schedule, in 06 WC 17114: 1) Southland Bone & Joint (Dr. Labana), $847.40 (PX 9); and 2) Dr. Panio, $75.00.

Is Petitioner entitled to wage differential benefits?

To qualify for a Section 8(d-1) wage differential award, a claimant must establish 1) partial incapacity that prevents him from pursuing his usual and customary line of employment and 2) impairment of earnings. Gallianetti v. Industrial Commission, 315 Ill.App.3d 721, 730 (3rd Dist. 2000).

The Arbitrator finds that Petitioner established partial incapacity, by virtue of Dr. Mass's restrictions, and impairment of earnings, by virtue of her job search, the wage schedules in evidence and the opinions rendered by Entenberg and Nelligan.

Petitioner seeks wage differential benefits in varying amounts from December 1, 2008

forward. December 1, 2008 is the approximate date on which Petitioner began her bilingual intake worker job at CEDA. Having considered Dr. Robertson's opinions concerning appropriate restrictions, as well as the opinions of both parties' vocational consultants, Entenberg and Nelligan, the Arbitrator finds the type of job that Petitioner performed for CEDA, i.e., a service position that required little keyboarding, as "suitable employment." The Arbitrator finds Nelligan somewhat more persuasive than Entenberg as to what hourly wage is realistic for Petitioner. At the hearing, Petitioner came across as a person who would deal well with the public. She had good communication skills. She is also bilingual. The Arbitrator finds $12.50 per hour to be a realistic hourly wage for Petitioner, given her "people" and language skills. The Arbitrator recognizes that Petitioner did not earn $12.50 per hour in the seasonal CEDA and H & R Block jobs she performed after leaving Respondent. The Arbitrator notes, however, that Petitioner opted not to offer any job search records into evidence, even though she appeared to possess such records at the hearing. Although it is arguable that Petitioner could have secured year-round rather than seasonal jobs, the Arbitrator gives Petitioner the benefit of the doubt on this point with respect to the periods predating the hearing, noting that Nelligan identified only a few employers who were actually hiring and that Petitioner received no formal job search assistance from Respondent.

Having found $12.50 per hour, or $500.00 per week, to be a realistic wage for Petitioner, and based on the union wage scale records and paychecks in evidence, the Arbitrator finds that Petitioner has wage losses as follows:

12/1/08 – 4/5/09:	$832.50 - $500.00 = $332.50
4/6/09 – 6/8/09:	$871.00 - $500.00 = $371.00
6/9/09 – 9/1/09:	$871.00 - $0 = $871.00
9/2/09 - 3/17/10:	$871.00 - $500.00 = $371.00
6/15/10 – 1/1/11:	$897.00 - $0 = $897.00
1/1/11 – 4/4/11	$897.00 - $500.00 =$397.00
4/4/11 – 4/15/11	$921.50 - $500.00 = $421.50
4/16/11- 1/1/12	$921.50 - $0 = $921.50
1/1/12 – 4/17/13	$921.50 - $500.00 = $421.50
4/18/13 – hearing of 5/22/13	$921.50 - $0 = $921.50

Based on the foregoing, and subject to the stipulated average weekly wage of $796.00 and the applicable maximum, the Arbitrator awards Petitioner the following weekly wage differential benefits under Section 8(d-1) in 07 WC 5983:

12/1/08 – 4/5/09	$221.67
4/6/09 – 6/8/09	$247.33
6/9/09 – 9/1/09	$530.67
9/2/09 – 3/17/10	$247.33
6/15/10 – 1/1/11	$530.67
1/2/11 – 4/4/11	$264.67

4/5/11 – 4/15/11	$281.00
4/16/11 – 1/1/12	$530.67
1/2/12 – 4/17/13	$281.00
4/18/13 – 5/22/13	$530.67

The Arbitrator declines to award benefits from March 18, 2010 through June 14, 2010 because the evidence reflects Petitioner voluntarily left the CEDA job early on March 17, 2010 when she could have worked another three months.

From May 23, 2013 forward, and for the duration of her disability, the Arbitrator awards Petitioner wage differential benefits in the amount of $281.00 per week. $281.00 represents two-thirds of the difference between $921.50 and $500.00, or two-thirds of $421.50.

Is Respondent liable for penalties and fees?

The Arbitrator declines to award penalties and fees in this case. While the Arbitrator does not find Dr. Fernandez persuasive, the Arbitrator cannot conclude that Respondent acted in an objectively unreasonable and vexatious manner in relying on the doctor in denying benefits. Dr. Fernandez is a highly qualified hand surgeon who first addressed causation in July of 2006, more than six years before Petitioner formally placed penalties and fees at issue.

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

Brent Hanley,

Petitioner,

vs.

NO: 12 WC 31417

14IWCC1146

Williams Brothers Construction,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical both prospective and incurred and temporary total disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission modifies the order of the Arbitrator ordering the Respondent to pay all prospective treatment recommended by Dr. Snyder, Dr. Lin and Dr. Tracy including, but not limited to, the trial spine stimulator and if necessary, the permanent spinal stimulator and associated follow up care for the stimulator. The Commission is taking out the phrase "but not limited to." The Commission finds the Respondent is liable for all costs Dr. Snyder, Dr. Lin and Dr. Tracy undertaken in putting in the temporary spinal stimulator and if necessary the permanent spinal stimulator, and the reasonable and necessary treatment that follows the placement of those stimulators.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $667.92 per week for a period of 32 1/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner for all costs Dr. Snyder, Dr. Lin and Dr. Tracy undertake in putting in the temporary spinal stimulator and if necessary the permanent spinal stimulator, and the reasonable and necessary treatment that follows the placement of those stimulators.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $9,600.00. 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: DEC 30 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

HANLEY, BRENT
Employee/Petitioner

Case# **12WC031417**

WILLIAMS BROS CONSTRUCTION INC
Employer/Respondent

14IWCC1146

On 12/23/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4476 KELLY LAW FIRM
JAMES M KELLY
4801 N PROSPECT RD
PEORIA HEIGHTS, IL 61616

1337 KNELL & KELLY LLC
CHARLES D KNELL
504 FAYETTE ST
PEORIA, IL 61603

14IWCC1146

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

BRENT HANLEY
Employee/Petitioner

v.

WILLIAMS BROS. CONSTRUCTION, INC.
Employer/Respondent

Case # 12 WC 31417

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 **Stephen Mathis**, Arbitrator of the Commission, in the city of **Peoria, Illinois**, on **9/26/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **10/19/11**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$20,351.96**; the average weekly wage was **$1,001.94**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **2** dependent children.

Respondent shall be given a credit of **$14,523.32** for TTD.

ORDER

Petitioner's injuries are causally related to his work accident.

Respondent shall pay Petitioner temporary total disability benefits of $21,470.14 for 32 1/7ths weeks commencing on 2/13/13 through 9/26/13 as provided in Section 8(a) of the Act. Respondent shall be given a credit for $14, 523.38 in TTD.

Respondent shall pay for all prospective medical treatment recommended by Dr. Snyder, Dr. Lin and Dr. Tracy, including, but not limited, to the trial spine stimulator and, if necessary, the permanent spinal stimulator and associated follow up care for the stimulator.

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.

S J Mathis
Signature of Arbitrator

12-13-13
Date

ICArbDec19(b)

DEC 23 2013

STATE OF ILLINOIS)
) ss.
COUNTY OF PEORIA)

14IWCC1146

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATOR'S DECISION

BRENT HANLEY,
Employee-Petitioner,

vs. Case No.: 12 WC 31417

WILLIAMS BROS. CONSTRUCTION, INC.,
Employer-Respondent. Peoria, IL

STATEMENT OF FACTS

A previous 19b hearing was held on February 13, 2013. On May 3, 2013, the Arbitrator issued a decision awarding TTD benefits through the date of the February 13, 2013 hearing. The Arbitrator denied additional TTD until Petitioner underwent work hardening. The Arbitrator denied prospective medical care. The parties stipulated that the September 26, 2013 19(b) hearing would pertain to benefits from February 13, 2013 until the September 26, 2013 hearing date.

Since the last hearing Petitioner participated in work hardening. Petitioner testified that during the work hardening his symptoms got progressively worse. Petitioner talked to Dr. Snyder who prescribed medicine for pain relief. Dr. Snyder stopped his work hardening. Petitioner testified that the work hardening therapist concurred with stopping work hardening. Petitioner testified that he continues to receive treatment with Dr. Snyder, Dr. Tracy and Dr. Lin. Petitioner testified subsequent to work hardening Petitioner went back to Dr. Tracy. Dr. Tracy again recommended a spinal stimulator. Petitioner also discussed the stimulator issue with Dr. Snyder. Dr. Snyder is also recommending the stimulator. Petitioner testified that Dr. Lin continues to recommend the stimulator. Petitioner testified that he wants to try the stimulator.

Petitioner testified that currently his symptoms are "pretty miserable." Petitioner had to stop three times while driving from Macomb to the hearing in Peoria. Petitioner indicated he cannot sit or stand very long. Petitioner testified that some days his activity level is better than others, "but none are good." Petitioner testified that there are some days that he cannot tie his shoes. Petitioner has not been able to sleep in a bed for approximately a year and a half. Petitioner testified he has tried medications, an electrode system and water and heat to try to obtain relief. Petitioner testified that none of them usually provide him relief.

Petitioner testified that prior to performing work hardening, Dr. Snyder recommend he undergo a functional capacity evaluation. Petitioner participated in the FCE. The FCE placed Petitioner on a light restriction. Petitioner testified he also has been placed on a 25 pound no lifting/pushing/pulling restriction by all of his treating physicians.

Petitioner testified that prior to his injury he was a full duty construction laborer. Petitioner worked out of the Union Hall and could not work with any type of restriction.

Subsequent to the last hearing, Petitioner was seen by Dr. Mirkin for a follow up Section 12 exam at Respondent's request. Petitioner testified that Respondent offered him a position for employment within Dr. Mirkin's restriction of 70 pounds. Petitioner testified he did not believe he could perform within the 70 pound lifting restriction. Petitioner testified that the jack hammer he operated at Williams Bros. was 90 pounds plus the hose. Petitioner testified his typical duties at Williams Bros. involved running a 90 pound jack hammer, lifting heavy concrete forms, hauling debris in wheelbarrows, swinging a sledge hammer, and knocking down walls.

Petitioner testified that he was assigned a rehabilitation nurse to assist with the coordination of his treatment and return to work activities. Kim Entwistle was the rehab nurse assigned to his case. She attended every one of Petitioner's doctor's appointments. She also discussed return to work issues and follow up treatment with Petitioner, his doctors and Respondent. Petitioner testified he fully complied with Kim Entwistle.

Petitioner testified that he would return to work within his restrictions of a 25 pound weight restriction or the FCE work restrictions if it was offered to him. Petitioner testified he has not been offered any work within those restrictions by Respondent. Petitioner also indicated that he has looked daily for a job within his restriction. Petitioner testified he looks in the daily newspaper and Internet. Petitioner provided Respondent's counsel at arbitration his records outlining the daily list of jobs that Petitioner researched looking for employment within his 25 pound weight restriction. Petitioner testified he has had no interviews nor has he sent out any resumes. Petitioner indicated he has called the Union Hall and also talked to friends to try to locate a job. Petitioner indicated he told the Union Hall he has a 25 pound weight restriction and they indicated they would not send him out to a job with a restriction.

Petitioner testified that prior to the last hearing, he would not go through work hardening. Petitioner indicated after he received the Arbitrator's decision he complied with participating in work hardening. Petitioner underwent an FCE on June 4, 2013 and then started work hardening on June 10, 2013. Petitioner underwent the FCE and work hardening at Advance Rehab in Macomb. Petitioner participated in 8 visits from June 10, 2013 to June 18, 2013. Petitioner agreed that he was discharged from work hardening based on a report from Advance Rehab on July 9, 2013. Petitioner indicated he had seen Dr. Snyder on July 2, 2013. Petitioner also saw Dr. Tracy in August of 2013. Petitioner has not returned to Dr. Lin but Dr. Lin's recommendation remains the same for a stimulator. Petitioner testified that he was aware of the job offer made by Williams Bros. Construction that was set to begin on September 3, 2013 within Dr. Mirkin's restrictions. Petitioner indicated that he would be willing to return to work with Williams Bros. within his treating doctors' restrictions. Petitioner indicated he did not go back to the job offered within Dr. Mirkin's restrictions. Petitioner indicated he was being paid TTD but his benefits were terminated on September 2, 2013 after he did not report to Williams Bros. to work within a 70 pound restriction outlined by Dr. Mirkin.

Petitioner testified he saw Dr. Snyder on July 30, 2013 and again in September to continue to fill his prescriptions. Dr. Snyder continues to recommend the stimulator. Petitioner testified he is supposed to schedule an appointment with Dr. Tracy if his stimulator gets approved. Petitioner's follow up appointment with Dr. Snyder is on October 15, 2013.

Petitioner testified he has not done any work for anyone since February 13, 2013. Petitioner testified he drives, does home exercises, simple stretches and walking. Petitioner indicated after he drove from Macomb to his son's baseball game in Peoria he had to stop along the way and walk around. Petitioner indicated that some days at home he is able to lift things within the 25 pound weight restriction, other days he cannot lift anything

and he has to sit around. Petitioner indicated that he originally did not want to do the work hardening because he knew the more activity that he did the more it would hurt. Petitioner indicated when he got the Arbitrator's Order he complied with the order for work hardening and gave maximum effort. Petitioner testified that he originally did not want the stimulator because he is young and he wanted to try to go back to work. Petitioner eventually changed his mind about the stimulator because of his chronic pain. Petitioner testified the stimulator is his last option. Petitioner indicated he has tried everything else. Petitioner testified that he does not have any income coming in now that his TTD has been terminated. Petitioner testified that he continues to look daily for jobs including contacting friends. Petitioner indicated he contacted Joe Fisher, an iron worker, and Gary McIntyre, to see if they were aware of anyone hiring.

Kim Entwistle testified that she is the rehab nurse hired by Respondent. She is a nurse case manager for Coventry Health Care. Entwistle has been practicing nursing for 18 years. She is a registered nurse with a bachelor's degree in nursing from Bradley University. She has been a field nurse and has worked with injured workers and facilitate medical and return to work issues for the past 10 years for Coventry and 2 years previously as telephonic nurse. Entwistle indicated that she worked directly with Petitioner to facilitate his care and return to work. She attended all of Petitioner's doctors' appointments. Entwistle has been working with Petitioner from shortly after his original injury in October 2011 until she was taken off the case after Dr. Mirkin's report releasing Petitioner at MMI. Entwistle testified the entire time she worked with Petitioner he "absolutely" gave his full cooperation. She indicated he gave full effort with regard to any therapy being recommended. Entwistle testified she is familiar with Petitioner's treating physicians, Dr. Lin, Dr. Tracy and Dr. Snyder. She is familiar with their ability to treat patients in the Peoria area. She did not have any problems with any of the treatment options being rendered to Petitioner. She was aware that all of the physicians were recommending a spinal stimulator. Entwistle knew Petitioner was placed on a 25 pound weight restriction by his treating physicians. She passed on his 25 pound restriction to Respondent. She also indicated that during the entire time she worked with Petitioner she saw no evidence of symptom magnification or malingering.

Allen Durr is the safety coordinator for Williams Bros. Construction. He has been employed with Williams Bros. for approximately 13 years. His job involves doing safety audits and handling workers' compensation along with general liability and auto. Mr. Durr does on-site OSHA compliance and deals with all types of safety and training. Allen Durr works with employees on restrictions to help facilitate their return to work. Allen Durr testified he contacts job superintendents to see if they can comply with the injured worker's restrictions. Mr. Durr was aware that Petitioner had a 25 pound weight restriction. Mr. Durr indicated that he has not discussed with the superintendents whether they could accommodate Petitioner's 25 pound weight restriction. Mr. Durr testified he was asked by their attorney whether there was employment within Dr. Mirkin's 70 pound restriction. Mr. Durr indicated he called one of their jobs at the Pekin Waste Water Department and discussed it with superintendent Dean Schneider. They agreed they could accommodate a 70 pound weight restriction. Petitioner's job would have been as a laborer doing cleanup work. Mr. Durr agreed that if Petitioner was coming out the Union Hall it would be very hard for them to comply with the 70 pound weight restriction outlined by Dr. Mirkin. Mr. Durr indicated the job would run until 2015. Mr. Durr indicated it would have been at regular union wages with benefits. Mr. Durr agreed it would be prudent to look at the treating physicians' restrictions to weigh whether to bring Petitioner back to work. Mr. Durr knew that the treating doctors disagreed with Dr. Mirkin's restriction. Mr. Durr indicated that Petitioner's job did not exist prior to September 2, 2013. After they got the IME report, they were able to offer the job because of the higher weight restriction. Mr. Durr indicated that he knew Dr. Mirkin placed Petitioner at MMI. He indicated he would monitor the safety of an employee that had a treating doctor's restriction that is less than the IME doctor's restriction. Mr. Durr testified that laborers hired out of the Union Hall do not have any restrictions.

Dean Schneider testified he was the field superintendent for Williams Bros. Construction. Mr. Schneider was working at the Pekin Waste Water Treatment Plant where Petitioner was offered the light duty job. Mr. Schneider indicated that Allen Durr contacted him about a job offer for Petitioner. Mr. Schneider testified he was aware that Petitioner had a 70 pound weight restriction. Mr. Schneider indicated Petitioner would be cleaning of equipment, sweeping floors and moving miscellaneous materials such as debris. The debris would weigh less than 5 pounds. Petitioner was going to be paid at union scale with benefits. Mr. Schneider indicated the job at Pekin would not have lasted until 2015. Mr. Schneider indicated there would have been several places he could have kept him working for a substantial amount of time.

Mr. Schneider was not aware that Petitioner's treating doctor placed a 25 pound weight restriction. Mr. Schneider could accommodate a 25 pound weight restriction and he could not give a reason why a 25 pound weight restriction job was not offered to Petitioner. Mr. Schneider stated generally "as a rule of thumb" they want laborers without restrictions. He indicated for the cleanup job it would not matter whether Petitioner was full duty. Mr. Schneider testified that nobody was performing the job that Petitioner rejected as of the time of arbitration. Mr. Schneider indicated that the work that Petitioner would be performing would be done by regular laborers on rainy days rather than sending them home.

Petitioner entered into evidence his treatment records since the prior 19b hearing. Dr. Lisa Snyder at IPMR continued to treat Petitioner for chronic pain for his low back and left lower extremity. Dr. Snyder's March 26, 2013 history indicates that Petitioner is hoping that he can get approved for a spinal cord stimulator to help with the radiating pain in his left lower extremity. Petitioner was more uncomfortable than usual. Petitioner had a positive straight leg raising test and reflexes absent in his knees and left ankle. Dr. Snyder made the following recommendation: "I think a spinal cord stimulator is the best option for Mr. Hanley's left lower extremity pain management."

On May 21, 2013, Dr. Snyder saw Petitioner again for his chronic back and left lower extremity pain. Dr. Snyder noted that increasing activities at home exacerbates his pain. She advised Petitioner would call when his prescriptions needed to be renewed. She kept Petitioner on 25 pound lifting, pushing, pulling restriction which she deemed permanent.

On May 28, 2013, Dr. Snyder noted that the Arbitrator recommended a work hardening program. Dr. Snyder prescribed a functional capacity evaluation prior to starting work hardening. Dr. Snyder anticipated that a functional deficiency would be noted during the exam. She recommended making treatment options after the functional capacity examination.

On July 2, 2013, Petitioner had been in work hardening for two weeks but it caused a marked exacerbation of Petitioner's pain. Petitioner had increased low back pain with radicular pain in the lower extremity down to the left buttock and posterior thigh to the calf. Petitioner had stopped the work hardening program a little over a week ago and his pain was starting to return back to baseline level after increasing during the work hardening. Dr. Snyder increased Petitioner's medication. Dr. Snyder "strongly recommended" that Petitioner be a candidate for a trial spinal cord stimulator for his persistent left lower extremity pain. Dr. Snyder noted that she discussed her recommendations with case management nurse, Kim Entwistle, from Coventry.

On July 30, 2013, Dr. Snyder saw Petitioner for a re-check. In the interim, Petitioner had seen Dr. Mirkin for an IME on July 22, 2013.

Dr. Snyder reviewed the lumbar MRI from November 19, 2012 performed at OSF St. Francis Medical Center. The findings were suggestive of clumping of the nerve roots in the mid L3 vertebral body through the lower L4 endplate region. Petitioner had been referred to Dr. Lin, his neurosurgeon, because of this condition. Dr. Lin asked Dr. Tracy to evaluate Petitioner for a spinal cord stimulator. Dr. Snyder noted that it was Dr. Tracy's opinion that Petitioner would be a candidate for a trial of a spinal cord stimulator. Dr. Snyder outlined that work comp had denied the trial stimulator based on Dr. Mirkin's report. Dr. Snyder stated that Dr. Tracy and Dr. Lin were both neurosurgeons that believed Petitioner was an appropriate candidate for a spinal cord stimulator. Dr. Snyder pointed out that Dr. Mirkin fails to mention Dr. Tracy's or Dr. Lin's opinions. Dr. Snyder respectfully disagreed with Dr. Mirkin's opinion regarding Petitioner's condition. She had never found Petitioner to be untruthful or false in his presentation. Dr. Snyder indicated she has treated patients with chronic pain for over 20 years and believes that Petitioner is reliable. Dr. Snyder noted that Petitioner's examination had been consistent but he was now demonstrating weakness which had not been appreciated previously. She stated that Petitioner has never demonstrated any evidence of malingering and Waddell signs have never been positive. Dr. Snyder outlined that two respected neurosurgeons locally felt that Petitioner was a candidate for a spinal cord stimulator and she concurred with that opinion. She pointed out that Dr. Mirkin's July 22, 2013 note did not address the possibility of arachnoiditis noted on the MRI done in November 2012. Dr. Snyder continued Petitioner on pain medications and his restriction of 25 pound lifting, pushing, pulling permanent work restrictions.

Petitioner was seen by neurosurgeon, Dr. Patrick Tracy, on August 24, 2013. Dr. Tracy's note indicates he had been seeing Petitioner for about a year for chronic left sciatica and indicated Petitioner would be a good candidate for a dorsal column stimulator. Petitioner has pain in the S1 distribution down the back of his leg with some pain predominant in the hip, posterior thigh and calf which is consistent with being "stung by bees." Dr. Tracy noted that there had not been approval by workers' compensation for the spinal stimulator which may be due in fact that he had an "independent" medical examination by Dr. Peter Mirkin. Dr. Tracy disagreed with Dr. Mirkin's statement that he "saw no indication for a dorsal column stimulator." Dr. Tracy felt that Petitioner would be a good candidate for a trial of a dorsal column stimulator and disagreed with Dr. Mirkin's impressions. Dr. Tracy advised Petitioner to call once his arbitration matter had proceeded.

Dr. Tracy authored a letter to Dr. Lisa Snyder on August 22, 2013 indicating that Petitioner would be a good candidate for dorsal column stimulator for his chronic left sciatica. Dr. Tracy noted it was currently being arbitrated with workers' compensation and he would wait to hear back regarding how the issue was resolved once Mr. Hanley was ready to proceed.

The Functional Capacity Evaluation report from June 4, 2013 was admitted into evidence. The report indicates that Petitioner gave a maximal effort on all tests. Petitioner demonstrated cooperative behavior and was willing to work to maximum ability in all test items. According to the FCE, Petitioner was only able to work at a light activity level. Petitioner would need to have positional breaks after approximately 10 minutes of walking or standing, and approximately 25 minutes of sitting. Crouching and sustained forward bending activities should be avoided and kneeling is significantly limited. Petitioner's activity levels would be recommended for not just any job-related activities but also for his regular daily activities.

Petitioner's work hardening notes from Advanced Rehab and Sports Medicine were also entered into evidence. Petitioner's physical therapy notes indicate that he had greater pain with each therapy session. Petitioner was unable to sleep and was getting increasing pain down his left leg. On July 9, 2013, Petitioner was discharged from therapy because of significant pain with limited functional ability. Dr. Snyder gave written instructions for the patient to be off of work condition/work hardening. Petitioner was discharged from physical therapy on the 8th visit.

Dr. Mirkin's July 22, 2013 follow up IME report was entered into evidence by Respondent. Dr. Mirkin opined that Petitioner could "work easily with a 70 pound restriction." Dr. Mirkin recommended that Petitioner not have a spinal cord stimulator as "I have never seen one work in someone his age with primarily subjective symptoms." Dr. Mirkin believed that Petitioner was at MMI. Dr. Mirkin also disagreed with the FCE as he believed all stopping points were based on subjective symptomology. Dr. Mirkin's pain drawing prepared by Petitioner was attached to Dr. Mirkin's report showed symptoms in the low back and down the left leg/calf and heel.

CONCLUSIONS OF LAW

The Arbitrator adopts the above findings of material facts in support of the following conclusions of law:

In support of the Arbitrator's Decision relating to F: "Is Petitioner's current condition of ill-being causally related to the injury?" the Arbitrator reaches the following legal conclusions:

Dr. Tracy and Dr. Lin are board certified neurosurgeons that opined Petitioner needs a spinal stimulator. Dr. Snyder, a board certified rehabilitation and pain medicine, concurs that Petitioner needs a spinal stimulator. All three physicians have found no evidence of symptom magnification or malingering. Work hardening had to be stopped because of increasing pain in Petitioner's low back and left lower extremity. The work hardening physician did not question the symptomology or Petitioner's effort. An FCE was performed prior to work hardening that indicated that Petitioner could only do very light duties with stringent additional restrictions. The FCE examiner indicated that Petitioner gave maximum effort and was fully cooperative. The Respondent's nurse case manager testified that Petitioner was fully cooperative and gave maximal effort in his treatment. She testified she has been working with him since shortly after his accident and saw no evidence of symptom magnification or malingering. Petitioner testified at arbitration and was a credible witness. . He testified to difficulty driving and with activities of daily living. The FCE examiner noted that he should not only have restrictions with work activities but also with activities of daily living that included breaks to stand, sit and limited stooping and bending. Dr. Mirkin, Respondent's Section 12 examiner, is alone in his opinion that Petitioner only has subjective complaints. All of the physicians found objective findings on exam including positive straight leg test, loss of reflexes and evidence of radiculopathy. Dr. Mirkin disagreed with the three treating physicians, FCE examiner and work hardening outcome.

Based on all of the credible medical evidence, Petitioner's credible testimony and the testimony of the nurse case manager, Petitioner's current symptoms and need for treatment are causally related to the work accident.

In support of the Arbitrator's Decision relating to K: "Is Petitioner entitled to any prospective medical care?" the Arbitrator reaches the following legal conclusion:

Dr. Lin, Dr. Tracy and Dr. Snyder recommend a trial spinal stimulator. Petitioner has been trying home exercises and medications without relief. Petitioner was not able to complete work hardening because of his symptoms. Dr. Mirkin believes Petitioner is at MMI. Based on the credible medical evidence of the three treating physicians, Petitioner's prospective medical care as recommended by Dr. Tracy, Dr. Lin and Dr. Snyder should be provided by Respondent.

Therefore, Petitioner's request for prospective medical treatment is granted.

In support of the Arbitrator's Decision relating to L: "<u>What temporary benefits are in dispute?</u>" the Arbitrator reaches the following legal conclusions:

Since February 13, 2013 Dr. Lin, Dr. Tracy and Dr. Snyder have all had Petitioner on a 25 pound weight restriction. Respondent's witnesses testified they did not have work available within that restriction. Petitioner underwent an FCE that placed him at light duty. The Respondent did not have work available within that restriction. Petitioner was denied ongoing TTD at the last hearing because he did not undergo work hardening. Petitioner attempted work hardening as recommended by the prior arbitration ruling. Petitioner testified he was not able to complete work hardening due to the increase in symptoms and the work hardening was stopped by his therapist and his treating doctor. Petitioner testified he looks daily for work within his 25 pound weight restriction from multiple sources. Respondent's attorney cross-examined Petitioner regarding his job search documents. Respondent's nurse hired to facilitate Petitioner's return to work indicated that Petitioner gave a maximum effort during his treatment and showed no signs of malingering. Dr. Mirkin believed that Petitioner could work at 70 pounds and was at maximum medical improvement. Dr. Mirkin is standing alone in his opinions and they are not supported by the evidence. Petitioner was a credible witness and his testimony was supported by the treating doctors, FCE examiner and the rehabilitation nurse.

Accordingly, Petitioner is entitled to TTD from February 13, 2013 through September 26, 2013 representing 32 1/7ths weeks. Respondent is entitled to a credit for TTD paid since February 13, 2013 to the September 26, 2013 arbitration date.

In support of the Arbitrator's Decision relating to M: "<u>Should penalties or fees be imposed upon Respondent?</u>" the Arbitrator reaches the following legal conclusions:

Penalties are not awarded.