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

Craig Eldridge,

Petitioner,

vs.

NO: 14WC 02899

16IWCC0081

KEHE Distributors LLC Traverlers Property Casualty Company Of 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 medical, temporary total disability, causal connection, fees and penalties and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 file April 13, 2015, is hereby affirmed and adopted.

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

16IWCC0081

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 $39,000,00. 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: FEB 1 - 2016
o012116
DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

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

ELDRIDGE, CRAIGN
Employee/Petitioner

Case# **14WC002899**

16IWCC0081

KEHE DISTRIBUTORS LLC TRAVLERS PROPERTY CASUALTY COMPANY OF AMERICA
Employer/Respondent

On 4/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1876 PAUL W GRAUER & ASSOC
EDWARD ADAM CZAPLA
1300 E WOODFIELD RD SUITE 205
SCHAUMBURG, IL 60173

1139 NOBLE & ASSOCIATES PC
DENNIS NOBLE
387 SHUMAN BLVD SUITE 210-E
NAPERVILLE, IL 60563

16IWCC0081

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)

CRAIG ELDRIDGE
Employee/Petitioner

v.

KEHE DISTRIBUTORS, LLC; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA
Employer/Respondent

Case # **14** WC **02899**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica HEGARTY**, Arbitrator of the Commission, in the city of **Chicago**, on **December 4, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **11/18/2013**, Respondents ***were*** operating under and subject to the provisions of the Act.

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

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 Respondents.

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

In the year preceding the injury, Petitioner earned $ **89,460.38**; the average weekly wage was $**1,720.39**.

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

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$1,146.93** /week for a period of **26-4/7** weeks commencing **May 2, 2014** through **October 12, 214 and October 14, 2014 through November 4, 2014,** as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner the reasonable and necessary medical expenses admitted into evidence (Px. 5 – Px. 9), pursuant to the Medical Fee Schedule, as provided in Sections 8 and 8.2 of the Act.

Respondent shall pay to Petitioner penalties of **$2,449.32** as provided in Section 19(k) of the Act; and **$5,550** as provided in Section 19(l) of the Act; and attorneys fees of **$489.86**, as provided in Section 16 of the Act. Furthermore, see the Arbitrator's decision for the additional 19(k), 19(l) penalties and Section 16 attorney's fees 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

4/8/15
Date

APR 1 3 2015

IN THE WORKERS' COMPENSATION COMMISSION OF THE STATE OF ILLINOIS

CRAIG ELDRIDGE, Petitioner,	)	
	)	Case No: 14 WC 02899
KEHE DISTRIBUTORS, Respondent.	)	

ADDENDUM TO THE DECISION OF ARBITRATOR

Background

This matter originally proceeded to hearing pursuant to §19(b) and §8(a) of the Workers' Compensation Act (the "Act") on May 1, 2014. The Arbitrator found Petitioner's current condition of ill-being with respect to his right knee causally related to the November 18, 2013, injury at work and awarded Petitioner the reasonable and necessary post-operative care and treatment for his right knee injury recommended by Dr. Raab. (6/2/14 Arbitrator Decision p.3-4). The Arbitrator awarded Petitioner medical expenses (Px.6 – Px.11) and temporary total disability benefits from November 19, 2013, through January 21, 2014 and January 23, 2014 through May 1, 2014. (6/2/14 Arbitrator Decision p.4). Petitioner's claim for penalties and attorneys fees was denied.

On December 4, 2014, this matter proceeded to a second arbitration hearing pursuant to §19(b) of the Act in the City of Chicago, County of Cook.

The issues in dispute included alleged maintenance owed to the Petitioner and medical bills that were previously awarded but not paid per the fee schedule. The Petitioner filed a penalties petition.

The Arbitrator adopts and incorporates the prior decision filed with the Commission on June 2, 2014.

FINDINGS OF FACT

Petitioner twisted his right knee at work on November 18, 2013, retrieving work papers in the parking lot of a grocery store customer. (6/2/14 Arbitration Decision p.3). Diagnostic studies revealed a torn medial and lateral meniscus for which Petitioner underwent arthroscopic surgery. (6/2/14 Arbitration Decision p.3).

On March 25, 2014, Dr. Raab performed a right knee arthroscopy with partial medial and lateral meniscectomy and chondroplasty of medial femoral condyle and patellofemoral joint. (6/2/14 Arbitration Decision p.2 and Px. 3). Operative findings noted "fraying of the posterior horn of the medial meniscus" and a "complex tear of the

posterior and middle third of the lateral meniscus". (6/2/14 Arbitration Decision p.2 and Px.3).

Despite prophylactic medications including Warfarin, Lovenox, and Coumadin a postoperative hemarthrosis developed in Petitioner's right knee. (Px. 3). He was scoped by Dr. Breslow for debridement of a hematoma (on April 2, 2014)." (Px. 3).

Thereafter, Petitioner treated with Dr. Angel Guzman, a hematologist, at Lutheran General Hospital for his DVT prophylaxis. (Px. 3). Petitioner has a history of DVTs and PEs. (Px. 3).

Petitioner returned to Dr. Raab on July 14, 2014, complaining of ongoing soreness, swelling and pain in the right knee. Examination revealed positive patellofemoral crepitus and patellofemoral grind. (Px. 3). Petitioner received a double cortisone injection with 2ml of Celestone and a combination of Marcaine and Lidocaine. Continued physical therapy was ordered and Petitioner remained restricted to a seated job. (Px. 3).

On August 11, 2014, Petitioner reported no significant improvement and was given a prescription for Jobst compression stockings. (Px. 3). Examination continued to reveal positive patellofemoral crepitus and patellofemoral grind. Petitioner was issued restricted duty, alternating sitting and standing, and was released to drive. (Px. 3).

On August 21, 2014, Petitioner completed a 4 month course of physical therapy at Illinois Bone and Joint. (Px. 3).

On September 15, 2014, Petitioner returned to see Dr. Raab who noted positive patellofemoral crepitus and mildly positive patellofemoral grind on exam. (Px. 3). Dr. Raab released Petitioner to return to work full duty without restrictions and was advised to return in 1 month.

On October 17, 2014, Petitioner advised Dr. Raab that he returned back to work for 1 day and was told by his supervisor "that he is unable to perform his job and not to come back until he can perform full duty". (Px. 3). Examination of the right knee revealed some equivocal joint line tenderness, patellofemoral crepitus and equivocal patellofemoral grind. Dr. Raab ordered a functional capacity evaluation ("FCE") which Petitioner completed on November 7, 2014.

On November 5, 2014, The therapist conducting the FCE noted Petitioner performed at a "Medium to Heavy" physical demand level in this evaluation, which does meet the requirements of his pre-injury profession as Sales for Kehe Distributors. The therapist further noted:

> *[H]owever, due to poor body mechanics with lifting from floor to knuckle level, inability to safely kneel bilaterally, and limited activity tolerance with standing and walking there is noted concern with Mr. Eldridge's ability to safely complete his job.* (Px. 4).

The therapist:

> *[R]ecommends that Mr. Eldridge is not able to safely perform his pre-injury job due to his objective and subjective data collected in this functional capacity evaluation. Mr. Eldridge is not limited with strength components of FCE, however is limited with mobility and both static and dynamic standing. Evaluator can conclude that due to Mr. Eldridge's knee ROM flexion deficits, lack of walking and standing endurance/tolerance, there is noted concern with Mr. Eldridge working his pre-injury job.* (Px. 4).

On November 24, 2014, Dr. Raab released Petitioner to full duty work with no restrictions. (Px. 3).

CONCLUSION OF LAW

The Arbitrator adopts the above Findings of Fact along with the prior Findings of Fact from the May 1, 2014 hearing in support of the following conclusions of law.

Causal Connection

The Arbitrator notes no evidence contained in the record that Petitioner sustained no subsequent trauma or injury to his right knee following the initial 19(b) hearing. Therefore, based on the medical evidence presented at trial along with Petitioner's unrebutted testimony the Arbitrator finds that Petitioner's current condition of ill-being in the right knee is causally related to the November 18, 2013 injury at work.

Medical Expenses

Based on the Arbitrator's findings of a causal connection between the November 18, 2013, injury at work and Petitioner's current condition of ill-being in the right knee, the Arbitrator finds that Respondent shall pay Petitioner the reasonable and necessary medical expenses (Px. 5 – Px. 9) incurred in the care and treatment of Petitioner's right knee pursuant to the Medical Fee Schedule and Sections 8 and 8.2 of the Act. Respondent shall receive a credit for amounts paid by Petitioner's group insurance.

Temporary Benefits

The parties stipulated that Petitioner is entitled to temporary total disability benefits from May 2, 2014 through September 14, 2014. (Arbitrator Ex. 1, p.2).

Throughout May and June 2014 Petitioner was restricted to a seated job only which Respondent didn't accommodate. (Tr. 13). In July 2014, Petitioner was issued seated work only restrictions which Respondent did not accommodate. (Tr. 16). In August 2014, Petitioner's work restrictions were modified to alternate sitting and standing. (Tr. 17). Respondent did not accommodate Petitioner's work restrictions. (Tr. 17-18).

Consequently, on September 15, 2014, Dr. Raab released Petitioner to return back to work full duty so that respondent would take him back. (Px. 3 and Tr. 36). Petitioner was not discharged from treatment. Petitioner contacted Jenny Singleton, Respondent's

HR Representative, at that time regarding his return to work. (Tr. 18-20). Petitioner continued to phone and email Jenny Singleton regarding his return to work throughout September and October 2014. (Tr. 20-21).

Petitioner was ultimately offered a $35,000 a year sales representative position to return to work for Respondent on October 13, 2014. (Px. 20 and Tr. 22). Petitioner returned to work for Respondent on October 13, 2014. (Tr. 23). At the end of his first day back to work Petitioner's supervisor, Roy Bailey, told Petitioner not to return to work the next day. (Tr. 24). Although Petitioner has problems limping, squatting, and kneeling he told Roy Bailey he could do the job and pleaded with Roy Bailey to allow him to return to work since Petitioner had not received any disability benefits since September 14, 2014. (Tr. 25-26). Petitioner received temporary total disability benefits of $253 per week from September 15, 2014 until his return to work on October 13, 2014. (Tr. 30-31).

Petitioner continued to contact Jenny Singleton regarding his return to work after talking with Roy Bailey. (Tr. 31-32). Jenny Singleton advised Petitioner to follow-up with Dr. Raab. (Tr. 32). On October 17, 2014, Dr. Raab ordered a functional capacity evaluation and issued Petitioner full-duty work restrictions. (Tr. 32). Respondent failed to respond to Petitioner's repeated requests to return to work.

However, on November 4, 2014 Respondent offered Petitioner a job assisting salesman. (Tr. 42-43). Petitioner was offered a position on the merchandising crew stocking deliveries. (Tr. 43). Petitioner returned to work for Respondent the next day November 5, 2014. (Tr. 42).

The evidence presented at trial is sufficient to support a finding that, at the time of the September 15, 2014, release to return to full duty work, Petitioner's condition had not stabilized, he was still receiving medical treatment, and he had not reached maximum medical improvement. Therefore, based upon the Arbitrator's finding of causal connection between the November 18, 2013 injury at work and Petitioner's right knee injury the Arbitrator further finds that Respondent shall pay Petitioner $1,146.93 per week for temporary total disability benefits for the periods May 2, 2014 through October 12, 2014 and October 14, 2014 through November 4, 2014. Respondent shall receive a credit for the net long term disability benefits and temporary total disability benefits issued to Petitioner.

Penalties/Fees

On June 1, 2014, the Arbitrator awarded Petitioner the following medical expenses:

Px. 6 Illinois Bone and Joint Institute
Px. 7 Advocate Lutheran General Hospital
Px. 8 Park Ridge Anesthesiology
Px. 9 Jewel Osco - $373.89
Px. 10 Jewel Osco - $44.56
Px. 11 Illinois Bone & Joint Institute, LLC
DME Services - $51 (6/2/14 Arbitration Decision p.4)

Petitioner testified that Respondent failed to pay the benefits awarded following the May 1, 2014 hearing. (Tr. 9-11). Respondent failed to pay the medical expenses awarded despite repeated request for payment. (Px. 11, 16, 17). Consequently, on October 10, 2014 Petitioner filed a third petition for penalties and attorneys fees for Respondent's failure to pay Petitioner the medical expenses awarded. (Px. 24). Respondent offered no proof of payment of the medical expenses awarded. Moreover, Respondent offered no good cause argument for their failure to pay Petitioner the medical expenses awarded pursuant to the medical fee schedule. Respondent's failure to pay the medical expenses awarded is not supported by any medical opinion.

Section 19(l) of the Act provides in part:

> "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 more shall create a rebuttable presumption of unreasonable delay." 820 ILCS 305/19(l).

The Arbitrator finds that Respondent failed to meet their burden of showing that it had a reasonable belief in denying payment of the medical expenses awarded Petitioner. *Lester v. Industrial Commission*, 256 Ill.App.3d 520, 524, 628 N.E.2d 191 (1933). Respondent did not review the Arbitrator's award of medical expenses. Therefore, the Arbitrator awards Petitioner 19(l) penalties of $30 per day from the date of the award to present in the amount of $5,550 (185 days x $30/day = $5,550).

Petitioner also seeks 19(k) penalties for Respondent's failure to pay Petitioner the medical expenses awarded. Imposition of 19(k) penalties is discretionary. *McMahan v. Industrial Commission*, 183 Ill.2d at 515 (1998). They are assessed when a benefit payment delay is deliberate or results from bad faith or "improper purpose". *McMahan* at 515.

Section 19(k) provides:

> "In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act, shall be considered unreasonable delay." 820 ILCS 305/19(k).

Over **185** days have passed since the 19(b) arbitration decision was entered which Respondent failed to pay in full.

No good cause has been given by Respondent why the Arbitration award has not yet been paid. Consequently, the Arbitrator finds Respondent's failure to timely pay the Arbitration award unreasonable and vexatious. 820 ILCS 305/19(k).

The Section 8.2 Medical Fee Schedule prepared by Petitioner reflects the following outstanding account balances from the medical expenses awarded Petitioner:

Px. 6 Illinois Bone and Joint Institute - **$4,094.78**;
Px. 7 Advocate Lutheran General Hospital - **$334.40** (Px. 25)

Furthermore, Petitioner was awarded the following medical expenses:

Px. 9	Jewel Osco	**$373.89**
Px. 10	Jewel Osco	**44.56**
Px. 11	Illinois Bone & Joint Institute, LLC DME Services	**51.00**
	Total	**$4,898.63**

Therefore, the Arbitrator awards Petitioner Section 19(k) penalties of **$2,449.32** representing 50% of the outstanding medical expenses along with Section 16 attorney's fees of **$489.86** representing 20% of the 19(k) penalties.

Finally, Petitioner seeks penalties and attorneys fees for Respondent's underpayment of benefits subsequent to the May 1, 2014, 19(b) hearing. Despite repeated requests for payment of his medical expenses Respondent continued to have the bills paid pursuant to Petitioner's group health insurance carrier (Blue Cross Blue Shield) and failed to pay the outstanding account balances (Px.5 – Px.6) pursuant to the Medical Fee Schedule. (Px. 13 and Px. 16).

Furthermore, although Petitioner was awarded TTD benefits Respondent failed to timely and adequately issue Petitioner's TTD benefits despite repeated requests. (Px. 10, 11, 15, 16, 17, 19 and Tr. 28-29). Instead, Petitioner was issued long term disability benefits that he received monthly from May 16 through September 2014 along with TTD benefits of $253/week. (Tr. 29-30).

Therefore, the Arbitrator finds that Petitioner is entitled to 19(l) penalties of **$5,550** for Respondent's delay in payment of Petitioners medical expenses and TTD benefits. (6/3/14 – 12/4/14 = 185/days x $30/day = $5,550). Furthermore, the Arbitrator finds Respondent's continued denial and delay in payment of Petitioner's medical expenses and TTD benefits unreasonable and vexatious. *McMahan v. Industrial Commission*, 183 Ill.2d 499, 515 (1998). Consequently, the Arbitrator awards Petitioner 19(k) penalties of 50% of the unpaid medical expenses pursuant to the Medical Fee Schedule and Sections 8 and 8.2 of the Act along with 19(k) penalties of 50% of the underpaid TTD benefits.

Finally, the Arbitrator awards Petitioner Section 16 attorneys fees of 20% of the 19(k) penalties for the medical expenses and TTD benefits.

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

Brandon Ridgeway,
Petitioner,

vs.

NO: 14WC 25215

DuQuoin Impact Incarceration Program,
Respondent,

16IWCC0082

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 July 2, 2015, is hereby affirmed and adopted.

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

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

DATED: FEB 1 - 2016
o012116
DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RIDGEWAY, BRANDON
Employee/Petitioner

Case# 14WC025215

16IWCC0082

DuQUOIN IMPACT INCARCERATION PROGRAM
Employer/Respondent

On 7/2/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

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

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

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

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

JUL 2 - 2015

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

16IWCC0082

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Brandon Ridgeway
Employee/Petitioner

v.

DuQuoin Impact Incarceration Program
Employer/Respondent

Case # **14** WC **25215**

Consolidated cases: **N/A**

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **May 13, 2015**. By stipulation, the parties agree:

On the date of accident, **June 23, 2014**, Respondent was operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**66,711.91**, and the average weekly wage was $**1,282.93**.

At the time of injury, Petitioner was **35** years of age, ***married*** with **2** dependent children.

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

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

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of $**721.66**/week for a further period of **20** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **4% loss of the body as a whole.**

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

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

Signature of Arbitrator

6/22/15
Date

Brandon Ridgeway v. DuQuoin Impact Incarceration Program
IWCC No. 14-WC-25215

Petitioner is a 35-year-old correctional officer at DuQuoin Impact Incarceration Program. Petitioner alleged a date of accident of June 23, 2014, for injuries he sustained to his back after slipping and falling on water. This case proceeded to a full hearing before Arbitrator Edward Lee at the Herrin docket on May 13, 2015. The issues at trial included causal connection as to nature and extent, medical bills, and nature and extent.

On June 24, 2014, Petitioner presented to Dr. Jodi Fox-Altug at SIMCA. He reported that he was running the shower line at work on a wet floor on 6/23/14 when he slipped and fell flat on the floor. Petitioner reported a sharp pain and numb sensation in the left gluteal area. He reported he was very stiff. Petitioner reported pain in the lumbar spine radiating to the left lower extremity. Petitioner reported that the pain was interfering with his sleep and work. Physical examination revealed tenderness of the spinous process at L3 and the transverse process on the right at L3. Soft tissue palpation on the left produced tenderness of the paraspinal region at L3. Petitioner exhibited pain with both active and passive ranges of motion. Petitioner was assessed with low back pain. X-rays were recommended. Petitioner was started on a Medrol taper. Ice was recommended. Petitioner was to stay off work for one week. Petitioner was to return for reevaluation.

On June 24, 2014, Petitioner underwent x-rays of the lumbosacral spine at Union County Hospital. The findings revealed slight narrowing of the L5-S1 disc space. There was no fracture. There was minor spondylosis. There was slightly asymmetric SI joint sclerosis. The radiologist's impression was: "[m]inor disc space narrowing with minimal arthritis."

On July 1, 2014, Petitioner returned to Dr. Jodi Fox-Altug for a follow-up on back pain with some improvement. Petitioner reported he was experiencing tightness across the lumbar area. Petitioner noticed some burning in the right hip when prolonged sitting. Petitioner had not lifted or worked out all week. He still felt tight. Physical examination revealed tenderness of the spinous process at L4 and the transverse process on the right at L4. Petitioner exhibited tenderness of the paraspinal region at L4. Petitioner reported pain with both active and passive ranges of motion. Dr. Fox-Altug reviewed the x-rays of the lumbar spine which revealed minimal disc height change at L5. Petitioner reported some burning in the right hip. Dr. Fox-Altug recommended that Petitioner continue NSAID and was referred to physical therapy. Dr. Fox-Altug recommended an MRI of the lumbosacral spine. Petitioner was to remain off work and was scheduled for a follow-up in two weeks.

On August 4, 2014, Petitioner presented to Dr. David Raskas with a chief complaint of some tightness in his back and occasional numbness in his left glut. Petitioner reported a consistent history of the accident on June 23, 2014, and his subsequent medical treatment. Petitioner reported that he had not returned to work since the accident. Petitioner's pain score was a 3-4/10. Petitioner reported exercising 4 times a week as tolerated. His hobbies included weight training, bike riding and golf. After a physical examination, Dr. Raskas' impression was Petitioner suffered from a lumbar strain/low back strain. Dr. Raskas recommended work conditioning for two weeks. At that point, Petitioner could return to work regular duty.

On August 18, 2014, Petitioner returned to Dr. Raskas after completing physical therapy. Petitioner's pain score was a 1. He reported that it got a little bit flared up on Friday. His left lower back area, but it just went away. Petitioner thought he was recovering well from his lumbar strain. Physical examination revealed full range of motion. Petitioner had normal strength and normal gait. He moved around the room easily. He went from sitting to standing and standing to walking without any dyskinetic motion of difficulty. Petitioner was returned to work without restrictions. He was to return in six to eight weeks. If everything was okay, he would be released from care at that point.

On October 7, 2014, Petitioner returned to Dr. Raskas. He returned to work full duty after the last appointment and was back to weight lifting. Petitioner had minimal back discomfort. His back pain seemed to be triggered with running. Petitioner reported that he works at a boot camp and runs several miles per week. Petitioner reported that his symptoms improve after taking an anti-inflammatory medicine. Petitioner had been taking Meloxicam but no longer had a prescription for this. Petitioner had done well recovering from his low back strain. He was back to work full duty and regular activities of daily living at home. Physical exam revealed full range of motion. Petitioner exhibited normal strength and gait. He moved around the room easily. He was given a prescription for Meloxicam. Petitioner was placed at maximum medical improvement. If he needed additional refills on Meloxican, he was instructed to contact his primary care physician.

Petitioner testified that he experiences tightness in his back with mowing grass, weed eating, shoveling. He testified that he can't run over a mile anymore. Petitioner testified that if he overdoes it, he sometimes experiences a sharpness down his left butt cheek. Petitioner testified that he takes Aleve. Petitioner testified that while he runs with the inmates, this is not a requirement of his job and that it is voluntary.

Therefore, the Arbitrator concludes the following:

1. In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a) [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). The Arbitrator finds no percentage of impairment pursuant to the AMA in the record. Petitioner was thirty years old on the date of accident. As a result of the alleged accident, Petitioner sustained injuries to his low back. There was no evidence that Petitioner sustained any impairment in his future earning capacity. The testimony of Petitioner with regard to continuing complaints was corroborated by the medical records. Given Petitioner's medical treatment and complaints, he is entitled to 4% loss of use of the man as a whole.

2. Respondent shall pay for reasonable and necessary medical bills as outlined in Petitioner's Exhibit #1, pursuant to the Illinois Medical Fee Schedule. Respondent shall receive a credit for all medical bills previously paid, including any bills paid by group health. 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.

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

Scott Lynn,

Petitioner,

vs.

NO: 13 WC 18385
(consolidated with 13 WC 02690 & 13 WC 18386)

Hinckley Springs,

16IWCC0083

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 that arose out of and in the course of employment, causal connection, temporary total disability-(causal connection only), medical expenses/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. 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, herein, specifically notes that this matter was consolidated with 13 WC 02690 and 13 WC 18386 which, however, were not tried together with this matter, and were, therefore, never subject to Review herein.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 11, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Review reflected regarding 13 WC 02690 and 13 WC 18386 is hereby dismissed and the matters remanded for hearing to the Arbitrator, as those matters were not even addressed at hearing and were never subject to Review with this present case.

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: FEB 1 - 2016
o-1/21/16
DLG/jsf

David L. Gore

Stephen Mathis

Mario Basurto

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

LYNN, SCOTT
Employee/Petitioner

Case# **13WC018385**

13WC002690
13WC018386

HINCKLEY SPRINGS
Employer/Respondent

16IWCC0083

On 6/11/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0598 LUSAK & COBB
RONALD W COBB
221 N LASALLE ST SUITE 1700
CHICAGO, IL 60601

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

16IWCC0083

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)

Scott Lynn Case # 13 WC 18385

Employee/Petitioner

v. Consolidated cases: 13WC2690 & 13WC18386

Hinckley Springs

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 Ketki Steffen, Arbitrator of the Commission, in the city of **Chicago**, on **4/1/15.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. [ ] Was there an employee-employer relationship?

C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. [ ] What was the date of the accident?

E. [ ] Was timely notice of the accident given to Respondent?

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

G. [ ] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

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

J. ☐ Were the 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, **3/18/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**63,624.08**; the average weekly wage was $**1,223.54**.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $ **4,679.12** for other benefits, for a total credit of $**4,679.12**.

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

ORDER

CREDITS

Respondent shall be given a credit of $4,679.12 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.

Prospective Medical

Respondent shall pay reasonable and necessary medical services relative to the prospective Spinal Fusion recommended by Dr. Vivek Mohan, including all recommended pre and post-operative treatment and care as required and as provided in Section 8(a) of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary partial disability benefits of $815.70/week for 26 weeks, commencing October 2, 2014 through April 1, 2015 and ongoing, 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.

Kethi Steffen 6/9/15

Signature of Arbitrator Date

ICArbDec19(b)

JUN 11 2015

PROCEDUAL HISTORY

This case was tried pursuant to Sections 8(a) and 19(b) on April 1, 2015 before Arbitrator Ketki Steffen. The arbitrator notes that the case has been consolidated with 2 other applications, 13 WC 2690 and 13 WC 18386. The Petitioner elected to proceed to hearing on case number 13 WC 18385 only. The other two matters remain pending before Arbitrator Steffen.

FACTUAL HISTORY

The Petitioner, Scott Lynn, was 55 years of age on the date of the occurrence of 3/18/13. He had been employed by the respondent for 31 years as a route salesman. The duties of a route salesman include delivering water to customers. The water is contained and transported in plastic 5 gallon bottles that weigh 43 pounds. A photograph of the bottle was introduced into evidence and a sample of the empty bottle was brought to court for demonstrative purposes. (PX1) Petitioner testified that he also delivers packaged water cases in which the water is contained in 1 liter bottles. On a typical day, he would deliver approximately 150 to 170 five gallon bottles of water to customers. The method of delivery involved driving the truck to the customer location and withdrawing the bottles from racks on the truck. The racks ranged from above shoulder level to waist level. He would carry the bottles up to two at a time to the drop off zone at the customer's location. When carrying two bottles, the Petitioner would carry one bottle on his shoulder and the other in the opposite hand. Petitioner would regularly perform his delivery duties in all seasons and all types of weather. Petitioner's testimony regarding his work duties was corroborated by Respondent witness, Tom McNamara, who held the position of Branch Manager. The Branch Manager further

testified that the Petitioner was a good and diligent worker.

On March 18, 2013, the Petitioner was making a residential delivery carrying a five gallon bottle of water. The Petitioner testified he was in the process of delivering water to a customer's home when he noticed pain in his lumbar spine. He was carrying a 5 gallon container of water on his left shoulder and a case of liter bottles of water in his right hand down the customer's driveway. When he reached the customer's porch he put the case of liter bottles down and then removed the 5 gallon bottle of water from his shoulder and placed it onto the customer's porch. The Petitioner stated that after he placed the 5 gallon bottle of water on the porch he noticed pain in his low back region. He stated that he felt a sharp pain in his lower back and pain radiating into his left leg. He testified that he did not slip and that the bottle did not slip. He simply placed the 5 gallon bottle of water onto the customer's porch, as he had done thousands of times before in his 31 years with the respondent, when he noticed pain in his lumbar spine region.

Petitioner was cross examined and acknowledged that over the course of his years with the respondent, the petitioner had given notice of having noticed pain in his back on several prior occasions: 6/19/87, 10/27/87, 7/28/88, 2/8/91, 3/1/02, 2/18/08, 2/2/10, 10/29/12, and 1/4/13. Petitioner explained that the pain he experienced in his back and leg was a new pain greater and more intense than from any prior incident.

After the incident, Petitioner contacted his office by the company radio to report the injury, but decided to finish the remainder of the day. Upon his return to the office, he reported the injury to Tom McNamara, who filled out an accident report. This testimony was corroborated by Mr. McNamara.

Following his work incident, Petitioner was treated by his Dr. Michael Hall, his primary care physician at Winchester Medical Group, S.C. in Libertyville, Illinois. (PX 3). Throughout 2011 and into 2012 the petitioner returned to his primary care physician, Dr. Michael Hall, for treatment for his lumbar spine. Dr. Hall's diagnoses during that period were "back pain with radicular pain into the left leg" and "sciatica".

After the initial incident, alleged accident of 10/29/12, Dr. Hall took a history of, "Patient was setting a product (five gallon water bottle) down at work on 03/18/13 and reinjured his back. He notified his supervisor." (PX 3). Dr. Hall ordered an MRI of the lumbar spine and authorized the Petitioner as off work until further notice. (PX 3). The interpreting radiologist stated the following findings from that MRI:

- Asymmetric disk bulge to the left resulting in mild to moderate left foraminal stenosis at L5-S1;
- Asymmetric disc bulge to the right resulting in mild foraminal stenosis, greater on the right at L1-S2;
- Tiny left paramedian disc protrusion indenting the interior fecal sac at L4-5 without significant stenosis;
- Mild degenerative changes throughout the remainder of the lumbar spine.

Following this 2/2/10 episode of back pain, the Petitioner also underwent 2 epidural steroid injections and returned to his full duty employment with the Respondent.

Petitioner was also referred to see Dr. Vivek Mohan at Complete Orthopedic Care on April 13, 2013. Dr. Mohan took a history and described the incident with the water bottle on March 18, 2013 as causing back pain and radiating pain into Petitioner's left foot. The exam noted Petitioner had positive straight leg raising on the left side. Dr.

Mohan placed Petitioner on light duty (PX 4) and (PX 7, Deposition of Mohan, p. 8-10).

Petitioner returned to Dr. Mohan on May 20, 2013 where he had positive straight leg raising and pain and tingling down his left leg even after completing his physical therapy. The records indicate on that day the doctor's plan noted that his current episode was brought on by his work injury that the Petitioner had to consider epidural injections versus surgical decompression and the ultimate plan was to move to decompression surgery as epidural steroid injections would only provide temporary relief. The Petitioner was returned to full duty as tolerated while awaiting surgical approval. (PX 7, Deposition of Mohan, pp. 2 and 3). Petitioner attempted to perform his full job duties but returned on June 20, 2013 to Winchester Medical Group complaining that, "He continues to have back pain and discomfort that is exacerbated by bending and stooping and lifting heavy weights. He has been working but the pain continues to worsen his lower back." and Dr. Hall gave a new restriction of no lifting greater than 10 pounds, no excessive bending, stooping pending surgical intervention. (PX 3, Dr. Michael Hall). The Respondent accommodated the light duty until an independent medical exam dated August 30, 2013 with Dr. Steven E. Mather, M.D. Dr. Mather diagnosed degenerative disc disease with an overlay of a lumbar strain and returned the Petitioner to full duty (RX 1, Dr. Mather Deposition, p. 13) and Dr. Mather returned Lynn to full duty as a route salesman. (RX 1, Dr. Mather Deposition, p. 15). Based on the opinion of Dr. Mather, Petitioner testified that he returned to full duty and made his best effort. Petitioner worked until October 23, 2013 when he returned to Winchester Medical Group wherein he gave a history that he had increased pain in his lower lumbar region and was returned to work with a new lifting restriction of 20 pounds with no

excessive lifting, stooping or bending until evaluated by Dr. Mohan. (PX 2, Dr. Hall). On October 31, 2013 the Petitioner followed up with Dr. Mohan whose history stated "56 year-old M with over five months CO of back and left leg pain that is aggravated by standing and walking. He has done physical therapy without pain relief. He has tried to go back full duty after an IME cleared him and stated that it was a lumbar strain. However, the pain returned soon after again and he is back on light duty. Pain worsens with any lifting or prolonged walking and bending." (PX 4) Dr. Mohan's exam found positive straight leg raising on the left with increased sensation in the left L5 dermatome. Dr. Mohan's plan was to proceed with surgery with light duty continuing until such surgery was approved. The Respondent accommodated Petitioner's light duty with office work and he was paid full salary during this time. Subsequent to this treating Dr. Mohan changed practices to the Spine Center of DuPage Medical Group. (PX 6). Dr. Mohan opined that the work related lifting incident of March 18, 2013 permanently aggravated Petitioner's back to the extent that the extent of his pain has become chronic and that the injury aggravated his back to the point where he now needs surgery. (PX 7, pp. 32-35). Dr. Mohan further testified that, "To a certain degree of medical certainty that this has not gotten better over a year and a half, 18 months or so, and he needs some surgical intervention. This is now chronic pain. This is no longer temporary . . . But once the pain becomes chronic there are other syndromes associated with pain. It is not ideal to allow somebody to be in this much pain a chronic amount of time. He does need some treatment at this point to alleviate him of this pain. To my experience and knowledge, I believe this patient needs the surgery to help him with his pain." (PX 7, pp. 33 and 34). Dr. Mohan further testified that an L5-S1

laminectomy and inter-body fusion was recommended and was related to cure the effects of the injury of March 18, 2013. (PX 7, Deposition of Mohan, pp. 32 and 33).

The respondent retained Dr. Stephen Mather as its Section 12 examining physician. The films of the MRIs that were performed on 2/22/10 and 4/10/13 were tendered to Dr. Mather for his review and analysis. Dr. Mather testified that the films from the 2 MRIs were identical. Dr. Mather testified that the 2 sets of films showed degenerative changes at L5-S1 and degenerative foraminal stenosis at L5-S1 without any nerve root compression. Dr. Mather testified that when he compared the 2 sets of films he noted that there was no structural injury to the petitioner's spine, that the condition was purely degenerative.

Dr. Mather examined the petitioner on 8/30/13. Petitioner reported that his back pain started around February of 2010, that he underwent 2 epidural steroid injections, but still had complaints of left leg and back pain which became worse after 10/29/12. The petitioner told Dr. Mather he had a recurrence of back pain symptoms after putting the 5 gallon water container down on 3/19/13. Dr. Mather performed a physical examination of petitioner. The petitioner complained of pain in the low back region that radiated down his left leg. The motor examination was normal. The petitioner's reflexes were normal, 2+ bilaterally, and asymmetric. There was no atrophy. The straight leg raising tests were negative. Dr. Mather noted that in the seated position the petitioner had a reproduction of back and leg pain, which he could not explain. This, he explained, was a non-organic finding meaning that the maneuver performed should not have caused nerve root compression.

Dr. Mather stated a diagnosis of degenerative disc disease at L5-S1. As to the event of 3/8/13, Dr. Mather testified that the petitioner sustained a lumbar strain.

Dr. Mather testified that the petitioner did not require surgery, especially the procedure that was recommended by the petitioner's treating orthopedic surgeon, Dr. Mohan, in August of 2013. Dr. Mohan was recommending a decompression hemilaminectomy and a foraminotomy. Dr. Mather explained that the petitioner had degenerative disc disease as the source of his pain and that a destabilizing foraminotomy would only make it worse. Dr. Mather explained that the foraminotomy is only indicated in patients with significant facet hypertrophy, which the petitioner did not have. Dr. Mather testified that the proper surgical procedure for a patient with degenerative disc disease is a fusion, but that it would not be good for this petitioner because he had degeneration at several levels. Dr. Mather opined that the petitioner was capable of returning to his job as a route salesman.

Dr. Vivek Mohan testified via deposition. He testified that first saw the petitioner on 4/19/13 he did not believe the petitioner needed surgery. Dr. Mohan testified that the epidural steroid injections worked in the past and he tried to persuade the petitioner to undergo another course of epidural steroid injections at that time. However, the petitioner did not want a temporary solution. Dr. Mohan testified that the degeneration of the petitioner's spine was not caused by his work but that the work accident of March 18, 2013 caused a permanent aggravation to his back, caused his pain to become chronic to the point where he needs surgery. Dr. Mather acknowledged that the petitioner initially did not want surgery and that he preferred to be on light duty. Dr. Mohan initially recommended a decompression and foraminotomy; however, he later

recommended a fusion based on the chronic nature of Petitioner's complains and symptomology.

The Respondent offered the petitioner a job as a sales representative at Costco stores. The petitioner would be selling DS Waters of America, Inc. products at the Costco store. This job would require the petitioner to stand for a prolonged period of time. Ms. Meg Karolczak, the human resources manager for the respondent, testified that she reviewed all of the petitioner's medical data in September of 2014 and found that neither of the petitioner's physicians stated a "standing" restriction. Ms. Karolczak offered the Costco job to the petitioner on 9/22/14 and he accepted it on 9/26/14. The petitioner worked the job for 2 days and then contacted Ms. Karolczak on 10/2/14 and told her he could not physically handle the job duties. On 10/3/14 the Petitioner obtained a note from Dr. Michael Hall stating that he could not stand for more than 2 hours per day.

FINDINGS/ANALYSIS

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? and K: Is Petitioner entitled to any prospective medical care? And L: What temporary benefits are in dispute?:

A claimant must prove by the preponderance of credible evidence that an injury arose out of and was in the course of employment in order to receive compensation under the Act. See, e.g. Orsini v. Industrial Commission, 117 Ill.2d 38, 44-45 (1987), Parro v. Industrial Commission, 260 Ill.App.3d 551 (1st Dist. 1993). "In the course of" refers to the time, place and circumstance under which the accident occurred, while

"arising out of" refers to the origin or cause of the accident that gave rise to the injury. Illinois Bell Telephone Co. v. Industrial Commission, 131 Ill.2d 478, 483 (1989). It should be noted that the commission need not award compensation even if the claimant's version of relevant events is undisputed. Smith v. Industrial Commission, 98 Ill.3d 20 (1983).

In the case at bar, the Petitioner testified that the pain started while delivering and a 5 gallon bottle of water that weighs about 43 lbs. Although a claimant's burden of proof requires more than describing an onset of symptoms during employment, Petitioner's testimony that he was delivering the water to a customer when he felt back pain is persuasive and sufficient to meet the burden in this case. Undoubtedly, Petitioner had documented back issues but he was able to work full duty, without restrictions for 31 years. The nature of his job duties requires regular heavy lifting, bending and carrying. His testimony was credible and supported by the medical testimony and opinion of Dr. Mohan. It is sufficient to show that Petitioner suffered a work accident that permanently aggravated his back. The proof and medical testimony makes this conclusion reasonable and probable, not merely possible.

Some of the factors that the Arbitrator finds relevant in reaching this conclusion is that the Petitioner is a long time (31 years) employee that has worked diligently and faithfully for the respondent for many years. The accident that resulted in the aggravation of the back problems is caused by the lifting of heavy bottles and not some smaller, light weight object. The Petitioner's history that he has prior back issues is always supplemented by his return to work duties within a very short time. This shows that the Petitioner is a diligent employee and not a malingerer. Most importantly it is

conceivable and reasonable that a 55 year old male with preexisting back issues could have seriously injured his back while lifting and delivering a heavy object. In summary, the nature, mode and description of accident is not in conflict with the mechanism of the injury.

As to causation and prospective medical care in the nature of fusion surgery, the Arbitrator finds that the Petitioner's current condition is causally related to his work accident and that he is entitled to the requested fusion procedure and the appropriate and recommended pre and post care following the surgery. The Arbitrator is persuaded by the following facts and arguments:

Petitioner suffered a back injury and immediately reports it to his employer and is treated for the same. An MRI shows a degenerative condition and even the IME, Dr. Mather acknowledges that Petitioner has a degenerative back with a sprain overlay from the work incident. Dr. Vivek Mohan, an orthopedic surgeon, treats Petitioner and causally relates his condition to the work accident. He documents the accident history and described the incident with the water bottle on March 18, 2013 as causing back pain and radiating pain into Petitioner's left foot. His exam confirmed that Petitioner had a positive straight leg raising on the left side. (PX 7) Deposition of Mohan, p. 8-10). The May 20, 2013 again had positive straight leg raising and pain and tingling down his left leg even after completing his physical therapy. Dr. Mohan opined that Petitioner's current condition was brought on by his work injury.

The IME, Dr. Mather has opined that Petitioner suffered a lumbar strain but that a fusion is not a good option for the Petitioner as he has degeneration as several levels. Dr. Mather further opined that Petitioner was capable of returning to his job as a route

salesman. The Arbitrator finds the opinion of Dr. Mohan to be more persuasive on the issue of causation and prospective medical care in the nature of fusion surgery. The straight leg test supports Dr. Mohan's opinion as the positive results of the test corroborate and support Petitioner's subjective complaints. Petitioner had prior back issues but the work accident made them chronic and permanent. Petitioner's efforts and attempt to unsuccessfully return back to his job support Dr. Mohan's opinion that the accident was the straw that broke the camel's back. The Arbitrator also finds Dr. Mohan's opinion to be persuasive because it is followed by attempts at conservative care and treatment and where return to work duty further aggravated Petitioner's condition. Lastly Dr. Mather's opinion is weak as he concludes that the degeneration is serve and multi-level but that the Petitioner should not have surgery. He offers no viable options but releases Petitioner to full time work in spite of these findings. The Arbitrator finds his opinion of severe degeneration and full duty release to be inconsistent. The Arbitrator finds causation and awards prospective medical care per the opinion and directive of Dr. Mohan.

In further support of her findings, the Arbitrator notes that Dr. Mohan opined that the work related lifting incident of March 18, 2013 permanently aggravated Petitioner's back to the extent that his pain has become chronic and that he now needs surgery. (PX 7, pp. 32-35) Dr. Mohan further testified that, "To a certain degree of medical certainty that this has not gotten better over a year and a half, 18 months or so, and he needs some surgical intervention. This is now chronic pain. This is no longer temporary . . . But once the pain becomes chronic there are other syndromes associated with pain. It is not ideal to allow somebody to be in this much pain a chronic

amount of time. He does need some treatment at this point to alleviate him of this pain. To my experience and knowledge, I believe this patient needs the surgery to help him with his pain." (PX 7, pp. 33 and 34) Dr. Mohan further testified that an L5-S1 laminectomy and inter-body fusion was recommended and was related to cure the effects of the injury of March 18, 2013. (PX 7, Deposition of Mohan, pp. 32 and 33) His explanation and diagnosis are persuasive and in line that the work accident need not be the primary cause of Petitioner's condition.

It is axiomatic that employers take their employees as they find them. *Sisbro, Inc.*, 207 Ill.2d at 205; citing *Baggett v. Indus. Comm'n*, 201 Ill. 2d187, 199, 266 Ill. Dec. 836, 775 N E.2d 908 (2002). "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." *General Electric Co. v. Indus. Comm'n*, 89 Ill. 2d 432, 434, 60 Ill. Dec. 629, 433 N.E.2d 671 (1982). Thus, even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co. v. Indus. Comm'n*, 92 Ill. 2d at 36; *Williams v. Indus. Comm'n*, 85 Ill. 2d 117, 122, 51 Ill. Dec. 685, 421 N.E.2d 193 (1981).Accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Rock Road Construction Co. v. Indus. Comm'n*, 37 Ill. 2d 123, 127, 227 N.E.2d 65 (1967).

In conclusion, after taking into account the preceding evidence and medical opinions, the Arbitrator finds that the Petitioner suffered an accident which arose out of

and in the course of Petitioner's employment by Respondent on March 18, 2013. The Petitioner is entitled to temporary total disability from October 2, 2014 to the present and ongoing. By competent testimony of his treating physician, Dr. Mohan, Petitioner requires an L-5/S-1 Spinal Fusion to cure the effects of his injury of March 18, 2013. The Arbitrator awards the TTD and prospective medical.

Ketki Shroff Steffen 6/9/15

Signature of Arbitrator Ketki Shroff Steffen Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Phyllis Lightfoot

Petitioner,

vs. NO. 10WC031484

Pace,

16IWCC0084

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 27, 2015 is hereby affirmed and adopted.

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

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

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

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

DATED: FEB 1 - 2016
SJM/sj
o-12/17/2015
44

Stephen J. Mathis

David L. Gore

Mario Basurto

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

LIGHTFOOT, PHYLLIS
Employee/Petitioner

Case# **10WC031484**

16IWCC0084

PACE
Employer/Respondent

On 4/27/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0062 TEPLITZ & BELL
JOEL M BELL
221 N LASALLE ST SUITE 1900
CHICAGO, IL 60601

1505 SLAVIN & SLAVIN LLC
DAVID VanOVERLOOP
20 S CLARK ST SUITE 510
CHICAGO, IL 60603

16IWCC0084

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)

Phyllis Lightfoot
Employee/Petitioner

v.

Pace
Employer/Respondent

Case # **10** WC **31484**

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 **Maria S. Bocanegra**, Arbitrator of the Commission, in the city of **Chicago**, on **2/24/2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

Phyllis Lightfoot v. Pace
10 WC 31484

16IWCC0084

FINDINGS

On the date of accident, **1/25/10**, 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 $**39,806.00**; the average weekly wage was $**765.50**.

On the date of accident, Petitioner was **58** 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 $**122,229.72** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**122,229.72**.

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

ORDER

Respondent shall pay Petitioner temporary partial disability (TTD) benefits of $510.33/week for 247 1/7 weeks, commencing 1/28/10 through 4/22/10, 7/29/10 through 10/05/11, and 11/01/11 through 2/24/15 as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $122,229.72 for TTD paid.

Respondent shall authorize and pay for the lumbar re-exploration and instrumented stabilization of the petitioner's lumbar spine as recommended by Dr. Martin Luken.

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

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

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

Signature of Arbitrator

4/27/15
Date

ICArbDec19(b)

APR 27 2015

FINDINGS OF FACT

Phyllis Lightfoot ("Petitioner") testified she was a 58 year old bus driver who injured herself on 1/25/10 when she attempted to manually lift up a wheelchair lift on her bus. She felt "charley horse" in her entire body. It is undisputed that Petitioner provided notice to Respondent. She was taken to Ingalls Occupational Health.

On 1/28/10, Petitioner presented to Ingalls Occupational Health where it was documented Petitioner suffered a low back injury after lifting a lift at work. Medicine and restricted duty was prescribed. On 2/1/10, Petitioner followed up with Ingalls, noting ineffective pain medication, radiating pain down the right leg posteriorly down the foot and numbness. Pain was rated 10 out of 10. Neurologically, left knee reflex was 2+ at L2-4, left ankle reflex (S1) was 2+, right knee reflex (L2-4) was 2+ and right ankle reflex was 2+. Ingalls diagnosed right sided sciatica and stated that the cause of Petitioner's problem was related to work activities. Light duty was continued. On 2/2/10, Petitioner underwent initial evaluation with Accelerated Rehabilitation. Assessment was symptoms consistent with back strain. Therapies continued 2/4, 2/5, 2/9, 2/11 and 2/12.

On 2/8/10, Ingalls noted Petitioner's ongoing complaints of lower back pain. She described the pain as intermittent, made worse by sitting, improved with lying down, accompanied with numbness down the right leg to the foot when sitting. Diagnosis was unchanged and light duty was continued. On 2/15/10, Petitioner's exam showed ability to heel-toe, pain with extension and lateral movement, pain at end-flexion and positive straight leg raise on the right. Ingalls continued light duty, held any further PT and ordered an MRI of the lumbar spine. On 2/24/20, MRI showed degenerative disc disease at L5-S1, with diffuse posterior disc bulge and a superimposed broad-based left-sided disc herniation with slight inferior extrusion with significant bilateral neural foraminal narrowing along with mild posterior disc bulge at L4-L5 with moderate to severe central stenosis."

On 3/1/10, Ingalls referred Petitioner to Dr. Zaki Anwar, a pain specialist for an injection. Petitioner complained of constant low back pain and into the hips and buttocks. On 3/8/10, Ingalls continued light duty as Petitioner awaited for injection approval. Medrol dosepak was prescribed. It was noted Petitioner had developed bilateral hip pain with mild antalgic gait. On 3/10/10, Petitioner saw Dr. Anwar who noted significant pain o flexion of the lumbar spine with radiation of pain to the right side, positive straight leg raise, and quadriceps weakness on the right. Dr. Anwar read the MRI as showing at L5-S1 modic type II changes, left sided herniation with slight extrusion and bilateral neuroforaminal narrowing. He opined she suffered from lumbar radiculitis. He recommended transforaminal epidural injection (TESI) at L4-5 and L5-S1 along with holding therapy to avoid exacerbation.

On 3/15/10, Petitioner followed up with Ingalls who noted ongoing back pain with radiation to the right leg but that Petitioner was more concerned now with her constant buttock pain. On 3/18/10, Dr. Anwar performed and Petitioner underwent bilateral L4-5 and L5-S1 TESI at Flossmoor Pain Institute. On 3/25/10, Ingalls noted improvement in back pain and leg numbness having returned only the day before. Light duty was continued.

On 4/7/10, Petitioner complained of left lower back pain and nearly 70-80% relief following the first TESI. Dr. Anwar recommended repeat TESI. On 4/21/10, Dr. Anwar performed and Petitioner underwent bilateral L4-5 and L5-S1 TESI at Flossmoor Pain Institute. On 4/22/10, Ingalls noted Petitioner reported feeling much better, that her gait was normal and that Dr. Anwar had released her to full duty. On 5/5/10, Dr. Anwar noted 50% improvement following the latest injection. Petitioner reported slight irritating pain with activity. By 5/18/10, Petitioner reported to Ingalls low back pain with radiation to the bilateral buttock, pain with bending and steady gait. Regular duty was continued.

On 6/2/10, Dr. Anwar noted Petitioner reported almost 60-70% improvement with the first 2 injections that she continued to work full duty albeit with discomfort. He recommended a third injection. Full duty work was continued. On 6/23/10, Dr. Anwar performed and Petitioner underwent bilateral L4-5 and L5-S1 TESI at Flossmoor Pain Institute. On 6/30/10, Ingalls noted Petitioner presented with slightly guarded gait, pain in the low back area radiating to both hips, 8 out of 10 pain and that she reported improvement but without resolution. On 7/28/10, Petitioner followed up with Dr. Anwar. He noted that after she returned to work as a bus driver she began having severe pain and problems with sitting on her back, along with weakness and numbness in the region of the right thigh. The doctor believed Petitioner was suffering from symptomatic discogenic pain and recommended a provocative lumbar discography with discogram. On that same day, she reported 10 out 10 daily pains to Ingalls.

On 9/8/10, CCMSI drafted a letter to Dr. John Andershak regarding a scheduled Section 12 exam for Petitioner asking the doctor to answer interrogatories of findings, diagnosis, recommendations, future medical treatment, causation and work capabilities. On 9/13/10, Dr. Anwar continued his recommendation for discography. On 9/27/10, Petitioner underwent a Section 12 examination with Dr. Andershak of OAD Orthopedics. History of present illness was positive for weakness in the back, calf and thigh and positive for numbness in the calf and thigh. The doctor diagnosed back pain and spinal stenosis. He noted objective findings of minor mechanical low back pain and disagreed with discogram and CT scan. He recommended standing x-rays to rule out spondylolisthesis which would explain some of her mechanical low back pain. The doctor stated that given her positive response to the injections, she was a candidate for L4-5 laminectomy with bilateral foraminotomies at L4-S1 to "open up the stenosis." He stated discogram is indicated only in cases of mechanical low back pain as her stenosis was indicative of radicular and sciatic pain. He found causal relation, noting that Petitioner likely had pre-existing degenerative disease and stenosis likely aggravated by the injury. The doctor did not have an opportunity to visualize the MRI images and instead relied on the report alone.

On 10/18/10, Dr. Anwar continued to recommend lumbar discogram and CT scan to rule out the need for invasive surgery and to explore further options. On 12/15/10, Dr. Anwar saw Petitioner and recommendations were unchanged. On 12/29/10, Petitioner underwent bilateral L4-5 and L5-S1 TESI with Dr. Anwar. On 1/12/11, Dr. Anwar continued to note Petitioner's sciatic and mechanical low back pain. He continued to recommend injections and discography.

On 1/28/11, Petitioner began treating with Dr. Martin Luken at the referral of her primary care doctor. He noted Petitioner's work accident, protracted conservative care and Dr. Andershak's opinions. Review of the MRI showed degenerative changes of the L4-5 and L5-S1 spinal motion segments and that at both interspaces disk space narrowing with bony parenchymal reactive changes above and below the disk and spinal stenosis. The doctor concluded there was "no practical doubt that Ms. Lightfoot's relentless and incapacitating symptoms are the result of her demonstrated spinal degenerative disease, many of the changes of which are undoubtedly chronic," and that the condition was "aggravated by the injury," so as to "precipitate the symptomatic course and necessitate the numerous treatment efforts." The doctor opined that Petitioner had exhausted comprehensive conservative treatment and was a surgical candidate. Specifically, the doctor stated that, "given the prominence of the mechanical back pain in the account of her symptoms Ms. Lightfoot gave to me today, in my view prudence would dictate proceeding with instrumented stabilization of her lower lumbar segments in addition to decompression of her spinal stenosis and resection of her L5-S1 disk herniation; on this point, I respectfully disagree with Dr. Andershak, who specifically alludes elsewhere in his report to 'her mechanical-type pain,' but apparently discounts its significance."

On 2/23/11, Respondent issued a letter to Dr. Andershak asking for an addendum opinion and enclosing the medical opinions of Dr. Luken. On 3/10/11, Dr. Andershak issued his response, stating that he could neither agree nor disagree with Dr. Luken as he still did not have any MRI films to review. He noted that mechanical low back pain is always worse with sitting and not standing. Further, he stated that fusions are sometimes necessary where there is extensive bony resection in the foramen and the almost complete facetectomy often needed. He surmised that if Dr. Luken were correct and if there was extensive facetectomy then a posterior spinal fusion would be indicated based on the resultant instability. On 4/14/11, Dr. Anwar saw Petitioner and continued to note radiation of pain into the leg with significant mechanical low back pain with flexion. He recommended another TESI for pain and a diagnostic discography. Medications were continued. On 4/20/11, Petitioner underwent a 5th TESI at L4-5 and L5-S1. On 4/28/11, Petitioner followed up with Dr. Anwar and reported relief.

On 5/13/11, Dr. Andershak did in fact review the MRI films, findings that it showed multilevel degenerative disc disease at L4-5 and L5-S1, bilateral foraminal stenosis at L4-5 and L5-S1 secondary to facet arthroplasty and disc collapse and some reactive end plate changes at L5-S1 consistent with modic type II changes. He concluded that the foramen appeared to be able to be decompressed without the need for stabilization and therefore without fusion surgery. On 6/23/11, Dr. Anwar recommended outpatient lumbar microdiscectomy to resolve discogenic pain. He did not think Petitioner was not a fusion candidate given her short stature and the fact that that she weighed 240 pounds. In the interim, he recommended another TESI. On 6/29/11, Petitioner underwent a 6th TESI at L4-5 and L5-S1. On 7/13/11, Dr. Anwar continued to recommend surgery and TESI in the interim. On 8/10/11, Petitioner underwent an outpatient lumbar microdiscectomy/percutaneaus lumbar discectomy at L5-S1, discography and discogram interpretation. The doctor noted that surgery was indicated based on Petitioner's "clinical history of intractable axial low back and left leg pain."

On 8/18/11 and 9/28/11, Petitioner followed up with Dr. Anwar, who noted Petitioner's continued intense low back pain and he recommended decompression and fusion surgery. On 11/1/11 and 11/14/11, Dr. Anwar recommended "comprehensive pain control and then consider spinal cord stimulator implant as well as lumbar laminectomy and decompressive laminectomy." He referred Petitioner to Dr. Luken and for a psychiatric evaluation for the recommended spinal cord stimulator. On 11/2/11, Petitioner was cleared by Dr. Kahn for trial spinal cord stimulator placement.

On 12/14/11, counsel for Respondent issued a letter to Dr. Andershak asking him to re-evaluate Petitioner in light of recent medical treatment and Dr. Anwar's recommendations. On 12/15/11, Dr. Anwar now recommended consideration of laminectomy and spinal stimulator. On 12/16/11, Dr. Luken saw Petitioner and recommended decompression and fusion. He deferred endorsing a spinal cord stimulator pending outcome of her recommended surgery. On 12/28/11, Dr. Andershak re-evaluated Petitioner and found the examination and symptoms consistent with his prior opinions and maintained his previous recommendation that Petitioner required a laminectomy at L4-5 with bilateral foraminotomies. On 1/19/12, Dr. Anwar continued to opine his agreement with Dr. Luken's recommendation of comprehensive pain control, spinal cord stimulator, decompressive lumbar laminectomy and fusion surgery at L4-5 and L5-S1 in the future.

On 2/8/12, Dr. Anwar performs implantation of trial dorsal column stimulator targeted at the L2-2 epidural space. On 2/10/12, Dr. Andershak noted that Petitioner presented for follow up of spinal cord stimulator. Petitioner reported ineffective relief following spinal cord implantation and scheduled removal and clearance for back surgery. On 2/13/12, Dr. Anwar indicated that Petitioner reported more than 60% relief following cord implantation. Petitioner was directed to follow up with Dr. Luken. On 2/29/12, Dr. Andershak confirmed on new MRI Petitioner's spinal stenosis at L4-5 and L5-S1 showing central and foraminal stenosis with subarticular recess stenosis. The doctor recommended laminectomy at L4-5 with bilateral foraminotomies that he believed would resolve her pain, which he opined was stenotic in nature.

On 3/29/12, Dr. Andershak performed and Petitioner underwent L4-5 laminectomy and bilateral L4-5 and L5-S1 foraminotomies at Central DuPage Hospital. On 4/11/12, Petitioner reported to Dr. Andershak better back pain, absence of leg pain and some leg numbness on the right. Follow up and physical therapy was ordered. On 4/26/12, Dr. Anwar wrote that Petitioner was reported "extreme excruciating pain and is having issues of acute pain around the scar tissue as well as continues to complain of right sided leg pain which is a new onset pain." He recommended physical therapy and another implantation of spinal cord stimulator.

On 5/9/12, Dr. Andershak noted that Petitioner still had some back pain, right leg with some numbness. Medications, light duty and physical therapy were ordered. In an undated FCE with PTSIR, who noted that Petitioner failed 7 of 15 performance criteria, less than full participation, over-guarding and that though Petitioner may possess true dysfunction, that data may not represent true status. Musculosketal results showed difficulty assuming a functional squatting position, use of a cane for ambulation and poor body mechanics with material handling. Petitioner reported pain the lower back described as stabbing, burning, throbbing

sensations along with radicular pain in the left lower extremity. For the occasional lifting and carrying testing portion, therapists noted Petitioner complained of pain in the left hip and left lower extremity and noted poor mechanics. Frequent lifting test showing reported pain greater than 6 out of 10 in the low back and left hip. Functional activity circuit showed perceived exertion of 11-12 out of 20, reported low back pain 10 out of 10 after 3:55 minutes of activity.

On 7/6/12, Dr. Andershak noted some ongoing back pain with right sided leg numbness. Petitioner had not yet been walking as previously recommended. The doctor noted inconsistencies in an FCE. The doctor recommended work conditioning, increasing walking distances, review of a job description and that Petitioner avoid lifting and bus driving. On 8/21/12, Underwriters Safety & Claims, Inc. faxed a copy of Petitioner's job description for bus operator. On 8/31/12, Dr. Andershak recommended that Petitioner discontinue physical therapies as it was not progressing her overall condition. He opined that her permanent restrictions were ability to drive buses with no lifting over 15 pounds, no standing greater than 30 minutes. He recommended follow up with her medical doctor for flare ups of pain or inflammation. Petitioner was placed at maximum medical improvement and released. Petitioner testified that work never took her back after the release and vocational rehabilitation was begun but terminated after a few meetings with the counselor.

The next record appears on 2/6/13, wherein Underwriters denied further medical treatment. On 2/20/13, Dr. Luken documented denial of approval by workers compensation for treatment. On 12/25/13, Petitioner presented to Ingalls Memorial Hospital for evaluation of pain to the right lower back. The pain was documented as chronic, radiation to the right buttock, sciatica on the right for greater than 6 months. Petitioner reported pain exacerbated by movement and relieved by being still. Petitioner was given morphine and was directed to follow up with Dr. Luken. CT scan of the lumbar spine showed moderate to severe left lateral recess stenosis and bilateral neural foraminal stenosis at L5-S1 and moderate to severe bilateral neural foraminal stenosis at L4-5.

On 1/24/14, Dr. Luken saw Petitioner and noted that following surgery, Petitioner did not have any notable relief of her symptoms and that he was not surprised given that her primary preoperative symptom was mechanical back pain. Exam showed antalgic gait and positive bilateral straight leg raise. He recommended an MRI of the lumbar spine and dynamic lumbar radiographs. On 3/7/14, MRI of the lumbar spine showed herniation versus granulation at L5-S1 with underlying bulge narrowing the foramina, diffuse bulge at L3-4 and L4-5 narrowing the foramina and mild-moderate spinal stenosis, partly congenital.

On 5/2/14, Dr. Luken "explained to Ms. Lightfoot that in my view the only surgical intervention which appears to me to have a reasonable likelihood of relieving her would involve lumbar re-exploration and instrumented fusion of her mid-and lower lumbar segments." On 8/8, 9/5 and 10/3/14, Petitioner followed up with Dr. Luken who noted he continued to recommended re-exploration and fusion surgery and continued to await approval.

On 10/29/14, Dr. David Spencer conducted a Section 12 exam of Petitioner at the request of Respondent. He concluded Petitioner did not have symptomatic spinal stenosis and that she

did not need the L4-L5 laminectomy and that ongoing complaints of pain in her back and legs to any degree, is more probably than not related to the unnecessary interventional treatment that she has had rather than any original injury and that further surgery is not necessary. Dr. Spencer further opined that Petitioner was capable of returning to full-duty work as a bus driver.

Petitioner testified that she presently takes Hydrocodone four times a day and Valium twice a week. She still has pain in her tailbone, both hips down to her right big toe, numbness in her legs and that she is willing to undergo the fusion recommended by Dr. Luken. Petitioner also testified that her temporary total disability benefits terminated on 11/4/14. At hearing Petitioner testified that the epidural steroid injections administered by Dr. Anwar only lasted an hour if even that long, and that she has been and continues to be in constant pain. Furthermore, Petitioner testified that she has not worked since the day of the accident. Petitioner testified that the pain increases when she sits or lies down for too long causing her to shake. Petitioner testified to one such incident where she had to sit for four hours waiting for a doctor's appointment and the next morning was taken by ambulance to a hospital because her whole right side "was in a charley horse." Petitioner did not introduce any records of this incident into evidence.

CONCLUSIONS OF LAW

ISSUE (F) Is Petitioner's Current Condition Of Ill-Being Causally Related To The Injury?

Here, there is no doubt the parties agree that Petitioner's condition as it existed on 8/31/12, was causally related to her original work injury, which is not in dispute. The current dispute arises over whether Petitioner's current condition is causally related given her MMI release date and given what appears to be a "gap" in treatment following this MMI release date. For the reasons that follow, the Arbitrator concludes that Petitioner's current condition of ill-being is causally related to her work injury.

The Arbitrator adopts the recommendations and opinions of Dr. Luken. In doing so, the Arbitrator notes that Dr. Luken has continuously and consistently recommended Petitioner for a fusion surgery given the location of her condition on MRI and her continued mechanical low back complaints. When Dr. Andershak concluded Petitioner was not a fusion candidate, he initially did so without imaging studies. Subsequently, the doctor reviewed those imaging studies and stated that the foramen appeared to be able to be decompressed without the need for stabilization. During surgery, however, Dr. Andershak noted significant facet arthropathy and nerve roots severely narrowed under the articular facets. In the Arbitrator's view, the doctor's reading of the imaging studies was equivocal when compared to Dr. Luken's firm opinion from the outset that Petitioner needed a fusion and decompression. Dr. Andershak also conceded that if an extensive facetectomy was performed than a fusion may be indicated based on the resultant instability.

Following surgery, while medical records certainly document some improvement in symptoms and pain following surgery, Dr. Andershak's records also document Petitioner's ongoing complaints of pain in the low back and right sided leg numbness. Physical therapy records leading up to her MMI date show Petitioner unable to complete certain tasks due to reported increased low back pain. Those therapies were discontinued by Dr. Andershak and considered ineffective by the doctor as not helping Petitioner improve. In reviewing Petitioner's FCE, it is noted that although she appeared to not give full effort, therapists explained that this did not necessarily dismiss the likelihood of impairment only the extent to which Petitioner perceived pain and disability. Further, therapists during the FCE noted Petitioner reporting low back pain as "stabbing, burning, throbbing sensation along with radicular symptoms in left lower extremity." The fact that Dr. Andershak released Petitioner with permanent restrictions consistent with the findings of the FCE belies any contention that the results were invalid. If the results were invalid, it would stand to reason that Dr. Andershak would have released Petitioner otherwise.

Further, Dr. Andershak disclosed and explained to Petitioner right before her lumbar surgery that inherent risks of surgery included failure to achieve desired result and otherwise failure to obtain relief. Petitioner's documented complaints following surgery and following her MMI date, along with her testimony, support Dr. Luken's current opinion that Petitioner's surgery was not successful in addressing her complaints. In addition, at the time of her MMI release date, Dr. Andershak suggested that Petitioner should seek to re-enter treatment if she experienced flare-ups and pain, which his precisely what the record shows Petitioner attempted to do. In rejecting the opinion of Dr. Spencer, who ultimately concludes that Petitioner did not even need an L4-5 laminectomy, the Arbitrator notes that Dr. Spencer's opinion that no surgical intervention was needed at all in the first place is at odds with the medical opinions of Drs. Andershak, Luken and Anwar, even if those opinions differed on the nature and type of surgery to be performed. Further, Dr. Spencer's conclusion that any current symptoms or conditions would be related to the surgery and not the injury misses the well established rule that any complications flowing from the work related surgery would be ultimately related to the injury in question as a sequela or consequence of that injury.

In addressing Respondent's contention that Petitioner's condition of ill-being is unrelated to her original work injury due in part to the large "gap" in treatment following her MMI release date, the Arbitrator notes that Petitioner's credible testimony was that she never obtained optimal relief following surgery. Those statements are corroborated in the treatment records leading up to her MMI release date and treatment records following the MMI release date. In fact, doctors had differed from the outset whether Petitioner should undergo a fusion surgery or a simple laminectomy. In addition, imaging studies post release date show Petitioner's condition had in fact not yet stabilized and that there was evidence of ongoing stenosis along with other issues. Following Petitioner's release on 8/31/12, the next record appears on 2/9/13 denying authorizing for continued medical treatment. In the Arbitrator's view, this does not suggest a willful gap in treatment but supports Petitioner's contention that she had been experiencing ongoing back pain and leg pain that she attempted to re-enter some type of treatment which was ultimately denied. For whatever reason, the medical note potentially referenced in the 2/9/13 denial letter does not

appear in the record. However, the Arbitrator need not review it in order to find Petitioner's complaints consistent and persuasive during this time.

Given that Petitioner had both low back, mechanical-type in nature along with radicular/stenotic pain that was treated with conservative treatment and surgical intervention, which has ultimately proven unsuccessful based on ongoing documented complaints, the Arbitrator concludes that Petitioner's current condition of ill-being is causally related to her work injury.

ISSUE (K), (O) Is Petitioner Entitled To Any Prospective Medical Care?

Having found in favor of Petitioner on the issue of causal connection, the Arbitrator finds Petitioner is entitled to prospective care. When seen by Dr. Luken on May 14, 2013 he opined " that in my view the only surgical intervention which appears to me to have a reasonable likelihood of relieving her would involve lumbar re-exploration and instrumented fusion of her mid-and lower lumbar segments." which was the same opinion he had in January 2011. The Arbitrator finds Dr. Luken to be credible and his recommendation for a spinal fusion to be reasonable and necessary to relieve the petitioner's pain. The Arbitrator finds Dr. Spencer to less persuasive in his opinion that the Petitioner does not need further surgery. The Arbitrator concludes and orders that Respondent shall authorize and pay for the lumbar re-exploration and instrumented stabilization of the Petitioner's lumbar as recommended by Dr. Luken including any pre and post operative care.

ISSUE (L), (O) What Temporary Benefits Are In Dispute?

Having found in favor of Petitioner on the issues of causal connection and prospective medical care, the Arbitrator finds that Petitioner was released to return to her job as a bus driver by Dr. Andershak but was not taken back within her restrictions by Respondent. Further, the Arbitrator finds that Petitioner's condition of ill-being has not yet stabilized and therefore Petitioner, being unable to work and Respondent otherwise unable to accommodate, is entitled to temporary total disability benefits. The Arbitrator declines to adopt the medical opinion of Dr. Spencer that Petitioner is able to return to work full time without restriction as this not only runs counter to the evidence showing her condition is not yet stabilized but also runs contrary to Dr. Andershak's recommendations, which had initially placed Petitioner with permanent work restrictions.

The Arbitrator concludes that Petitioner is entitled to TTD and Respondent shall pay Petitioner TTD benefits of $510.33/week for 247 1/7 weeks, commencing 1/28/10 through 4/22/10, 7/29/10 through 10/05/11, and 11/01/11 through 2/24/15. Respondent is entitled to a credit of $122,229.72 for TTD paid.

ARBITRATOR SIGNATURE

4/27/15
DATE

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

Frank Klein,

Petitioner,

vs. NO. 10WC044620

All Chicagoland Moving and Storage,

16IWCC0085

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, 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 July 2, 2015 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.

16IWCC0085

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:
SJM/sj FEB 1 - 2016
o-1/21/2016
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KLEIN, FRANK
Employee/Petitioner

Case# 10WC044620

16IWCC0085

ALL CHICAGOLAND MOVING & STORAGE
Employer/Respondent

On 7/2/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% 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:

4262 ROMANEK & ROMANEK
DARON ROMANEK
ONE N LASALLE ST SUITE 425
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
JASON D KOLECKE
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

16IWCC0085

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Frank Klein,
Employee/Petitioner

v.

All Chicagoland Moving & Storage,
Employer/Respondent

Case # **10** WC **44620**

Consolidated cases: **none**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **New Lenox**, on **5/7/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **8/16/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**52,000.00**; the average weekly wage was $**1,000.00**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **no** dependent children.

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

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

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

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

ORDER

The Arbitrator finds that Petitioner failed to prove by a preponderance of the credible evidence that he sustained accidental injuries arising out of and in the course of his employment on August 16, 2010, and as a result likewise failed to prove that his current condition of ill-being is causally related to said alleged accident. Accordingly, Petitioner's claim for compensation is hereby denied.

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

6/16/15
Date

JUL 2 - 2015

STATEMENT OF FACTS:

Petitioner, a 50 year old packer, testified that he had worked for Respondent for about 13 years and had worked as a mover for the past 30 years. He noted that as a "packer" for Respondent he did both commercial and residential moving, and sometimes used a small truck to move items. Petitioner testified that on August 16, 2010 he was assigned to work a residential job in Lemont, Illinois. Petitioner was working with two other employees on that day, Mike Gotfried and Mike Stiltner. Petitioner testified upon his arrival he unloaded the boxes and reams of paper that would be needed to pack the household items. He indicated that he started the day packing items in the kitchen. These items consisted of dishes, pots, pans and wall hangings.

Petitioner testified that he loaded two boxes that morning weighing 40 to 50 pounds each. He noted that while in the process of lifting the second box he experienced extreme pain up and down his back and neck. He indicated that the pain also brought on headaches and numbness in his right arm. Petitioner testified that he was unable to work the rest of the day and actually ended up lying in the truck while his co-workers finished the job. He testified that he informed the dispatcher, Sandy Koslowski, of the accident that day. Petitioner testified that he did not seek any medical attention on the date of the alleged work accident.

On cross examination, Petitioner also claimed that he spoke to Joe Illingworth, Respondent's operations manager, on the date of the alleged accident. Mr. Illingworth testified that he spoke to Petitioner every day, to go over paperwork and send him out on jobs. However, Mr. Illingworth noted that Petitioner did not mention any accident at work until the day he was let go on September 10, 2010. More to the point, Mr. Illingworth indicated that Petitioner had about 10 to 12 jobs after the alleged accident and never reported any neck injury, and that the crew that worked with Petitioner never mentioned it either. In addition, Mr. Illingworth noted that during the period following the alleged accident he did not notice Petitioner having a problem holding his head up or otherwise having problems with his neck. Mr. Illingworth testified that if Petitioner had told him about an accident before he was let go he would have instructed him to go to Concentra for treatment. Mr. Illingworth noted that Petitioner had previously reported injuries to his hand and back and had received treatment at Concentra for same in the past before returning to work.

Petitioner testified that on August 17, 2010, or the day following the alleged accident, he worked on another job but was unable to lift anything. He noted that on that date he drove and was the "boss", and that Respondent provided him a helper, Lenny Baron, to assist him. Mr. Illingworth testified that Mr. Baron worked in the office as a dispatcher. He noted that Mr. Baron had hurt his back a long time ago and had not done any packing or moving since. Mr. Illingworth was also not aware of any jobs after the alleged date of accident where Petitioner was supplied with an extra helper.

Petitioner testified that he continued to work his regular duties for Respondent through September 10, 2010. Petitioner noted that on that date he went in to get his check and was informed by Mr. Illingworth that they had to let him go and that he was fired. Petitioner testified that he was not given a reason. Mr. Illingworth testified that he informed Petitioner on that date that things were getting slow on account of the economy and that they had decided to keep the other packing crew. Mr. Illingworth testified that Petitioner then informed him that he would sue him for his back, and drove off.

Petitioner testified that after his termination of employment he did not work any of other moving jobs or seek alternative employment. He noted that the pain in his neck continued and that he subsequently sought treatment with Dr. George Nahra on September 28, 2010. At that time Petitioner completed a history intake form. (RX3). This form indicates that Petitioner listed his complaint as "back pain, with a date of on set on

August 16, 2010." The form further documented Petitioner previously undergoing a low back discectomy and fusion surgeries in 1992 and 1995. (RX3).

The medical records from the date of Petitioner's first treatment with Dr. Nahra, September 28, 2010, reflect a history of low back pain after a lifting injury on August 16, 2010. A physical exam taken on that date documents low back pain with restricted bending and a positive straight leg test at 75 degrees. The record also indicates that Petitioner's neck was examined and his cervical range of motion was normal. Dr. Nahra provided a diagnosis on that date of "exacerbation of chronic low back pain." The record makes no reference to any neck or cervical pain. Petitioner was also provided an off work note on that date with the diagnosis indicating low back pain. (PX1).

On October 12, 2010, Petitioner returned to see Dr. Nahra at which time it was noted that Petitioner complained of "significant low back pain with radicular symptoms and neck pain/stiffness." Physical therapy was prescribed and Petitioner was restricted from work with a diagnosis of low back pain. (PX1).

Based on Dr. Nahra's prescription for physical therapy, Petitioner began treating at Orthogo on October 13, 2010. (PX3). At the time of Petitioner's first visit, the therapist completed a Lumbar Spine Assessment form. On the form Petitioner indicated that his present symptoms included "neck pain, low back pain, with stiffness." Petitioner indicated the symptoms were present for the last 4-5 years. Petitioner also indicated that the pain commenced as a result of lifting heavy boxes weighing over 100 pounds. Petitioner was examined on that day and the report details that all treatment was focused on the lumbar spine. The physical therapy treatment goals were tailored to Petitioner's lumbar spine. There was no mention of treatment goals for Petitioner's cervical spine. (PX3).

Petitioner's next physical therapy visit was on October 18, 2010. On that date Petitioner completed a cervical spine assessment form. The symptoms included posterior cervical spine right greater than left with symptoms to the elbow. The form indicates that these symptoms had been present since July of 2007. These symptoms commenced as a result of "moving furniture, twisted neck and force of movement." There is no mention of an August 16, 2010 work accident. The form also has a section labeled "accidents" and wherein Petitioner indicated "no." (PX3).

On November 2, 2010, Petitioner returned to Dr. Nahra with improvement but continued complaints of right radicular symptoms. Petitioner continued to treat sporadically with Dr. Nahra for his neck symptoms through April 6, 2012. (PX1). These records do not provide a history of cervical spine injury on August 16, 2010.

On December 14, 2010, Petitioner underwent a CT myelogram of his cervical spine. This exam revealed severe spinal stenosis at C5-6 based on a large posterior endplate osteophytes and associate disc bulge with uncovertebral spurring causing moderate stenosis. (PX5).

On February 4, 2011, Petitioner was examined by Dr. Edward Goldberg at the request of Respondent pursuant to §12 of the Act. At that time Petitioner provided a history of sustaining a neck injury on August 16, 2010 while lifting. Petitioner also acknowledged prior neck pain for four years with episodes of parasthesias in the right arm and weakness that caused him to drop things. Dr. Goldberg's diagnosis was spinal stenosis at C5-6 and C6-67 causing neck and right radicular arm pain. Dr. Goldberg opined that based on Petitioner's self-reported history of four years of intermittent neck pain and radicular symptoms prior to the August 16, 2010 accident, as well as no mention of cervical pain in the records until two months after the accident took place, that his cervical condition was not caused or aggravated by the work accident. (RX2).

Petitioner eventually came under care of Dr. Alexander Ghanayem. He began treating with Dr. Ghanayem on May 11, 2011. At that time Petitioner provided a history of being a mover and having neck pain that developed four years prior, which was intermittent in nature. Petitioner indicated his condition worsened in August 2010 with moving activities. Dr. Ghanayem diagnosed Petitioner with cervical spondylosis, which was aggravated through his work activities in August 2010. Dr. Ghanayem recommended that Petitioner undergo a cervical diskectomy and fusion at C5-6 and C6-7. (PX7).

On January 30, 2012, Dr. Ghanayem performed surgery consisting of an anterior cervical discectomy and decompression at C5-6 and C6-7 with an interbody fusion at the same levels. (PX6). Following surgery, Petitioner continued to follow up with Dr. Ghanayem and participated in physical therapy. On June 4, 2012, Dr. Ghanayem indicated that Petitioner's neck felt good, the arm pain was essentially gone, his strength was good and there were no focal deficits. A functional capacity evaluation was prescribed. (PX7).

Petitioner eventually underwent an FCE on September 18, 2013 at which time he was found capable of working in the medium physical demand level with the ability to lift up to 57 pounds. (PX8). Thereafter, Dr. Ghanayem found that Petitioner had reached maximum medical improvement and released him from care on September 30, 2013 per the FCE restrictions. (PX7).

At the time of trial Petitioner testified that he was not taking any medication but had daily pain in his neck. Petitioner noted that he had limited motion in his neck and some difficulty with driving. He also stated that he experienced frequent headaches that were not present prior to the accident. Petitioner indicated that he had looked for work driving bread routes, but had not obtained any stable employment.

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that on August 16, 2010 he loaded two boxes weighing 40 to 50 pounds each when he experienced extreme pain up and down his back and neck. He indicated that the pain also brought on headaches and numbness in his right arm. Petitioner testified that he was unable to hold his head up and that he ended up lying in the truck while his co-workers finished the job. These co-workers were not called to testify. Furthermore, Petitioner testified that he informed the dispatcher, Sandy Koslowski, of the accident that day. Once again, Ms. Koslowski was not called to testify. Petitioner did not seek any medical attention on the date of the alleged work accident. In fact, the record shows that Petitioner continued to work and did not seek medical attention until September 28, 2010, or roughly two (2) weeks after he was laid off and more than six (6) weeks after the alleged date of accident.

Petitioner testified that he also spoke to Joe Illingworth, Respondent's operations manager, on the date of the alleged accident. Mr. Illingworth testified that he spoke to Petitioner every day, to go over paperwork and send him out on jobs. However, Mr. Illingworth noted that Petitioner did not mention any accident at work until the day he was let go on September 10, 2010. More to the point, Mr. Illingworth indicated that Petitioner had about 10 to 12 jobs after the alleged accident and never reported any neck injury, and that the crew that worked with Petitioner never mentioned it either. In addition, Mr. Illingworth noted that during the period following the alleged accident he did not notice Petitioner having a problem holding his head up or otherwise having problems with his neck. Mr. Illingworth testified that if Petitioner had told him about an accident before he was let go he would have instructed him to go to Concentra for treatment. Mr. Illingworth noted that Petitioner had previously reported injuries to his hand and back and had received treatment at Concentra for same in the past before returning to work.

Petitioner testified that on August 17, 2010, or the day following the alleged accident, he worked on another job but was unable to lift anything. He noted that on that date he drove and was the "boss", and that Respondent provided him a helper, Lenny Baron, to assist him. Mr. Illingworth testified that Mr. Baron worked in the office as a dispatcher. He noted that Mr. Baron had hurt his back a long time ago and had not done any packing or moving since. Mr. Illingworth was also not aware of any jobs after the alleged date of accident where Petitioner was supplied with an extra helper.

Petitioner testified that he continued to work his regular duties for Respondent through September 10, 2010. Petitioner noted that on that date he went in to get his check and was informed by Mr. Illingworth that they had to let him go and that he was fired. Petitioner testified that he was not given a reason. Mr. Illingworth testified that he informed Petitioner on that date that things were getting slow on account of the economy and that they had decided to keep the other packing crew. Mr. Illingworth testified that Petitioner then informed him that he would sue him for his back, and drove off.

Petitioner testified that after his termination he subsequently sought treatment with Dr. Nahra on September 28, 2010. A physical exam taken on that date reflects low back pain with restricted bending and a positive straight leg test at 75 degrees. The record also indicates that Petitioner's neck was examined and his cervical range of motion was normal. Dr. Nahra provided a diagnosis on that date of "exacerbation of chronic low back pain." The record makes no reference to any neck or cervical pain. Instead, the history intake form completed on that date shows a complaint of "back pain, with a date of on set on August 16, 2010." The form also noted that Petitioner had previously undergone a low back discectomy and fusion surgeries in 1992 and 1995. (RX3).

The record further shows that Petitioner had experienced symptoms of neck pain and radiating right arm pain prior to the alleged accident on August 16, 2010. Petitioner testified that these symptoms included dropping things and pain so bad at times that his co-workers would do his work so he could rest. The cervical CT myelogram Petitioner underwent on December 14, 2010 revealed severe spinal stenosis caused by a large posterior endplate osteophytes and associated disc bulge with uncovertebral spurring causing moderate stenosis. Dr. Goldberg noted that the CT myelogram provided no evidence of an acute condition and "disc osteophyte complexes" develop over time as a disc wears out. (RX1, p.10). Petitioner's treating surgeon, Dr. Ghanayem, confirmed this fact, noting that this is "...not an acute condition." (PX11, p.47).

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the credible evidence that he sustained accidental injuries arising out of and in the course of his employment on August 16, 2010. The Arbitrator finds Petitioner's claim that he injured his back and/or neck on the date in question to be unsubstantiated by the histories and witness testimony. Furthermore, it would appear that Petitioner had cervical complaints prior to the date of the alleged accident, and that subsequent radiographic evidence failed to support his claim that he suffered an acute injury to his cervical spine on August 16, 2010. Accordingly, Petitioner's claim for compensation is hereby denied.

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

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to accident (issue "C", supra), the Arbitrator finds that Petitioner failed to prove that his current condition of ill-being is causally related to said alleged accident. Along these lines, the Arbitrator finds the opinions of Dr. Goldberg to be more persuasive than those offered by Dr. Ghanayem on the question of causation. Accordingly, Petitioner's claim for compensation is hereby denied.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the above, and in light of the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner failed to prove his entitlement to medical expenses pursuant to §8(a) of the Act. Accordingly, Petitioner's claim for same is hereby denied.

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

Based on the above, and in light of the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner failed to prove his entitlement to temporary total disability benefits pursuant to §8(b) of the Act. Accordingly, Petitioner's claim for same is hereby denied.

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

Based on the above, and in light of the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner failed to prove his entitlement to an award for permanent partial disability. Accordingly, Petitioner's claim for same is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Larry Torres,

Petitioner,

vs. NO. 12WC038387

University of Chicago,

16IWCC0086

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, prospective medical care, causal connection, 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 12, 2015 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court is hereby fixed at $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: FEB 1 - 2016
SJM/sj
o-1/21/2016
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TORRES, LARRY
Employee/Petitioner

Case# **12WC038387**

UNIVERSITY OF CHICAGO
Employer/Respondent

16IWCC0086

On 5/12/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1702 GRAZIAN & VOLPE PC
VOLPE, RICHARD S
5722 W 63RD ST
CHICAGO, IL 60638

2461 NYHAN BAMBRICK KINZIE & LOWRY
DEIDRE A CHRISTENSON
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

16IWCC0086

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

LARRY J. TORRES,
Employee/Petitioner

Case # **12 WC 38387**

v.

UNIVERSITY OF CHICAGO,
Employer/Respondent

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

DISPUTED ISSUES

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

FINDINGS

On **10/16/2012**, 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 $ **76,616.28**; the average weekly wage was $ **1,473.39**.

On the date of accident, Petitioner was **43** 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 $ **79,843.70** for TTD, $ **N/A** for TPD, $ **N/A** for maintenance, and $ **N/A** for other benefits, for a total credit of $ **79,843.70**.

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $**712.55** /week for **160** weeks, for injuries sustained causing **32** % loss of a person as a whole, as provided in § 8(d)2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**712.55**/week for **6.325** weeks, for injuries sustained causing **2.5** % loss of the right arm, as provided in § 8(e) of the Act.

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

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

Signature of Arbitrator

MAY 8, 2015
Date

MAY 12 2015

Larry Torres v. University of Chicago Police Department

12 WC 38387

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven J. Fruth on February 24, 2015. The disputed issues were: ***F.*** Is Petitioner's current condition of ill-being causally related to the injury?; ***L.*** What is the nature and extent of Petitioner's injury?

Petitioner testified at hearing. Petitioner offered documents in evidence including records from University of Chicago Medical Center, Orland Park Orthopedics, Hinsdale Orthopedics, Midwest Orthopedics at Rush, and Loyola University Medical Center. Respondent offered in evidence documents including Transaction Table, Dr. Wellington Hus IME reports, Dr. Theodore Fisher AMA Impairment Rating report, and Dr. Alexander Ghanayem return to work note. All exhibits which were offered were admitted in evidence.

FINDINGS OF FACT

Petitioner, age 43, is a sworn police officer for Respondent. Petitioner testified that he was engaged in his regular duties as a patrol officer on October 16, 2012 when he received a "shots fired" call. He responded to a call for assistance from another officer and engaged in a foot pursuit of the suspect. Petitioner testified that during the foot pursuit he stepped in a hole and fell. He suffered immediate back pain with numbness in in his les and right arm numbness and tingling. He testified that prior to the date of accident he had not had any complaints to his low back or legs. He notified his supervisor and drove himself to the emergency room.

At the University of Chicago Medical Center ER (PX 1) Petitioner reported that he had slipped and fallen during a chase. He fell onto a concrete step. He reported back pain and numbness in both legs. He also complained of right elbow pain. X-rays of the right elbow and lumbar spine were taken. A CT scan and MRI were also taken of the lumbar spine. The x-rays were unremarkable. The CT and MRI showed degenerative changes at L4-5 with an annular disruption and central disc protrusion. No acute fractures were noted in any of the imaging. Petitioner was discharged with instruction to follow up with Dr. Patrick Gabikian at University of Chicago.

Petitioner followed up with orthopedic surgeon Dr. Blair Rhode on October 19, 2012 (PX 2). Dr. Rhode noted Petitioner's complaints of bilateral leg numbness and numbness in the right ring and little fingers. Dr. Rhode diagnosed lumbar pain with radiculopathy and elbow pain with ulnar nerve mononeuritis. Dr. Rhode performed transforaminal epidural steroid injections (ESIs) at L4-5 on November 6, 2012, December 4, 2012, and December 29, 2012. Petitioner had minimal relief from the injection. Dr. Rhode referred Petitioner to Dr. Mark Lorenz for evaluation.

Although Petitioner followed up with Dr. Lorenz he continued with Dr. Rhode through April 12, 2013 for the elbow. Dr. Rhode injected Petitioner's right medial

epicondyle on February 4, 2013. Dr. Rhode added a diagnosis of medial epicondylitis. He kept Petitioner off work through the last visit on April 12, 2013.

Dr. Mark Lorenz first examined Petitioner on January 24, 2013 with a history of slipping and falling at work. (PX 3) Petitioner had developed back pain which radiated into his left leg and also numbness and tingling along the right ulnar nerve distribution. 3 ESIs over the prior five months failed to alleviate the symptoms. Dr. Lorenz interpreted Pettioner's MRI as showing a disc herniation at L4-5. He noted the radiologist's impression that the herniation was traumatic. Dr. Lorenz ordered physical therapy Pettioner's disc herniation with segmental instability at L4-5. He also took Petitioner off work. Petitioner received his therapy at ATI through February 22, 2013.

On March 6, 2013 Dr. Lorenz referred Petitioner for a discogram. Dr. Steven Bradfield performed the discogram on March 12, 2013. The discogram generated concordant pain at L4-5. By March 25, 2013 Dr. Lorenz felt a fusion at L4-5 was the option he endorsed.

Petitioner underwent a § 12 examination by orthopedic surgeon Dr. Wellington Hsu of Northwestern University School of Medicine on April 16, 2013.(RX 2) Petitioner reported the facts of his work-related injury and medical care up to that point. He reported the ESIs administered by Dr. Rhode provided only temporary relief. On exam Dr. Hsu noted negative Waddell signs. He diagnosed an L4-5 disc herniation and lumbar spondylosis. Dr. Hsu concluded that Petitioner "...sustained a work related injury on October 16, 2012 that likely caused a lumbar disc herniation on the left a L4-5..." He further opined that Petitioner's subjective complaints correlated with the objective findings. Dr. Hsu also concluded that based upon Petitioner's failed conservative treatment surgery a left sided L4-5 microdiscectomy was appropriate.

Dr. Hsu prepared an addendum to his original report on July 3, 2013. Dr. Hsu had by then reviewed Dr. Ghanayem's surgical evaluation. Based on review of Dr. Ghanayem's evaluation Dr. Hsu changed his opinion and opined that Petitioner was a candidate for either an L4-5 microdiscectomy or an anterior interbody fusion at L4-5.

Petitioner testified that his workers' compensation case manager referred him to Dr. John Fernandez at Midwest Orthopedics at Rush (Midwest) for his continuing problems with is right arm. Petitioner first saw Dr. Fernandez on July 22, 2013. He reported that he had only temporary relief from Dr. Rhode's injection. Dr. Fernandez diagnosed right elbow epicondylitis and possible cubital tunnel syndrome. He recommended a long-arm splint, an EMG, and an MRI.

On follow-up on August 24, 2013 Dr. Fernandez noted the MRI finding of moderate tendinosis of the common flexor tendon consistent with medial epicondylitis. The EMG was positive for cubital tunnel syndrome. Dr. Fernandez recommended platelet-rich plasma (PRP) injections. Dr. Jeffrey Mjaanes performed the PRP injection into Petitioner's right elbow on September 15, 2013. Petitioner had a good response to the injection and was referred for physical therapy for his arm. By December 5, 2013

Dr. Mjaanes believed Petitioner's epicondylitis was resolved and determined he was MMI and able to return to full duty work in terms of the elbow only.

Petitioner came under the care of Dr. Alexander Ghanayem at Loyola University Medical Center (Loyola) for evaluation for surgery. Petitioner was admitted to Loyola by Dr. Ghanayem on September 24, 2013. Dr. Ghanayem and Dr. John Santaniello collaborated in performing an L4-5 anterior fusion and posterior decompression L4 -5 laminotomy on September 24. Petitioner was discharged September 27, 2013 with directions to follow up with Dr. Ghanayem in the orthopedic clinic. Petitioner described the post-operative pain he felt from the surgical wounds both on his stomach and his back. Petitioner testified that by about one month after surgery the shooting pain down his legs were gone but that he continued to have back and hip pain.

Petitioner followed up with Dr. Ghanayem on October 21, 2013. He reported that the shooting pain into his legs was gone but that he still and back and hip pain. He was using a cane to get in and out of chairs. Petitioner was still taking Norco and muscle relaxants. On November 25, 2013 Petitioner reported that he was taking Norco and relaxants occasionally. The numbness and tingling in his legs was gone but his hip pain persisted when sitting a long time or when getting in and out of a chair. Dr. Ghanayem ordered physical therapy to concentrate on core lumbar strengthening, trunk stabilization, and postural strengthening.

By December 30, 2013 Petitioner had completed a month of physical therapy at ATI. He reported that his leg numbness was gone and no longer complained of hip pin. He was released to return to light duty work. Petitioner was to follow up after another course of physical therapy. Petitioner returned to the orthopedic clinic on February 3, 2014. He complained of some back pain when getting up from a seated position. He also complained of some numbness in his feet. Dr. Ghanayem thought he had typical post-fusion symptoms. He recommended another month of physical therapy.

On follow-up with Dr. Ghanayem March 3, 2014 Petitioner was feeling worse with regard to his back pain and numbness in his left foot. The examination revealed decreased sensation in both feet, the doctor ordered an MRI. Physical therapy was put on hold and Petitioner placed off work as well. The March 17, 2014 lumbar MRI showed that an annular fissure remained along with neural foraminal narrowing at L4-5. On examination that day Dr. Ghanayem noted good range of motion and 5/5 strength. Dr. Ghanayem restarted physical therapy and adjusted medication with a recommendation to wean off Norco. He continued to keep Petitioner off work.

On return April 28 Petitioner was noted as doing well with therapy. He had no complaints of numbness. The exam did not reveal deficits in sensation. Petitioner was to begin work conditioning 3 days a week. Use of a leg holster for Petitioner's sidearm was discussed. Petitioner remained off work. Work conditioning at ATI continued through May 30, 2014, at which time Petitioner had progressed to medium to heavy physical demand level.

On June 2, 2014 Dr. Ghanayem released Petitioner with no restrictions and returned him to full duty work.

Petitioner was examined by orthopedic surgeon Dr. Theodore Fisher at request of Respondent on February 18, 2015 for purposes of an impairment rating. (RX 3) During that exam Mr. Torres complained of back pain of 7/10. His pain can be as bad as 9 and as good as 4. Petitioner stated when he sits or walks for long periods he develops left leg radicular symptoms with pain in left buttock. Aggravating factors include wearing a belt. He had maximum tenderness over left PSIS. Petitioner reported burning pain when he wears his duty belt. He reported he exercises with the exercises he learned in physical therapy three times a week.

Dr. Fisher examined Petitioner and reviewed medical records including MRI and CT scan reports, the records of emergency care at University of Chicago Medical Center, Hinsdale Orthopedics, Petitioner's discogram report, the operative report from Petitioner's surgery September 24, 2013, and Dr. Ghanayem's follow-up notes. Dr. Fisher concluded that, pursuant to AMA guidelines, Petitioner suffered whole person impairment percentage of 10%. Dr. Fisher further opined that Petitioner had achieved MMI. He did not address Petitioner's right elbow injury.

Petitioner testified that he returned to his regular job in June of 2014. He testified that Dr. Ghanayem released him to work without restrictions. Petitioner testified that he is capable of doing his normal job duties. He testified that a leg holster was not allowed by his employer. He still has pain and pressure in his low back and left side when he wears his duty belt. A duty belt holds handcuffs, a weapon, ammunition magazines, a heavy flashlight, and a Mace dispenser. Petitioner has transferred most of these items, excepting his weapon, to a vest to relieve the pressure on his back.

Petitioner testified that he takes Motrin and that he uses hot and cold packs for his continuing back pain. On cross-examination, Petitioner testified that he is not on any prescription medications for pain. He has not seen Dr. Ghanayem or a physician for his low back since June 2, 2014. Petitioner testified that he continues to work his regular job as a police officer. His job can involve long periods of sitting in his patrol car interspersed with sudden vigorous activity. When sitting for a long time in his patrol car Petitioner adjusts his posture to relieve back pressure. This causes pressure and stiffness on his right elbow.

F. Is Petitioner's current condition of Ill being casually related to the injury?

The Arbitrator finds that Petitioner's conditions of ill-being with his low back and right elbow were causally related to his accident arising out of and in the course of his employment with Respondent.

Petitioner, a sworn police officer, was engaged in a foot chase when he fell on concrete steps on October 16, 2012. Petitioner sought immediate care in the emergency

department of University of Chicago Medical Center for complaints about his back and elbow. He followed up with extensive medical care from board certified physicians: Drs. Rhode, Lorenz, and Ghanayem. Petitioner was diagnosed with a herniated disc at L4-5 as well as right epicondylitis and cubital tunnel syndrome. Petitioner has proved by a preponderance of the direct and circumstantial evidence, including the temporal relation to the onset of complaints, that the injuries to his low back and right elbow were caused by the work-related accident on October 16, 2012. The records of Petitioner's treating physicians and Pettioner's credible testimony and trial proved that Petitioner's ongoing complaints were caused by the accident on October 16, 2012. The Arbitrator relies upon the direct and circumstantial evidence from the records of Petitioner's treating physicians, Drs. Rhode, Lorenz, and Ghanayem, that the fall during a chase of a criminal suspect as part of his job as a police officer caused Petitioner to suffer a herniated disc at L4-5. Drs. Hsu and Fisher, Respondent's retained examining physicians, supported the opinions of Pettioner's treating physicians. In fact, Dr. Fisher found that Petitioner was permanently impaired to a 10% extent.

Drs. Rhode and Fernandez diagnosed and treated Petitioner's right elbow injury. They found that the work-related accident on October 16, 2012 caused epicondylitis and cubital tunnel syndrome. Respondent offered no opinion in rebuttal of these findings.

The Arbitrator finds the opinions of all of the above physicians persuasive and reliable in finding that Pettioner's current conditions of ill-being are causally related to the accident on October 16, 2012.

L. **What is the nature and extent of Petitioner's injury?**

The Arbitrator finds that Petitioner proved by a preponderance of the evidence that he sustained permanent partial disabilities as a result of his work related injuries caused by the accident on October 16, 2012.

It is undisputed that Petitioner sustained a herniation of the L4-5 disc as a result of the accident. It is also undisputed that Petitioner sustained injuries to his right elbow, including epicondylitis and cubital tunnel syndrome. Petitioner's low back injury required extensive medical intervention, including physical therapy, ESIs and ultimately fusion and microdiscectomy. Petitioner's back surgery was unusually involved in that it required an anterior approach through the abdominal wall and then in the same session a posterior approach for the discectomy. The Arbitrator takes note that recovery from abdominal surgery tends to be more prolonged than recovery from a microdiscectomy only. Petitioner still has back pain, which he testified to in a credible manner. His radicular symptoms have resolved. He treats his continuing back pain with over-the-counter medication and from time to time has to take off work due to his pain. Even so Petitioner works full duty without restrictions.

Petitioner's right elbow injury involved conservative care also. Petitioner was placed in a long-arm splint and had a PRP injection which achieved generally good

results. He does have occasional complaints with his right elbow when he accommodates his back pain by shifting his posture.

§ 8.1b of the Act requires the Arbitrator to consider 5 factors to determine the extent of permanent partial disability: (i) the reported level of impairment pursuant to AMA "Guides to the Evaluation of Permanent Impairment; (ii) the occupation of the injured employee, (ii) 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.

As to Petitioner's back injury the Arbitrator notes Dr. Fisher AMA rating of 10% impairment. The Arbitrator considers Dr. Fisher's opinion in light of his examination of Petitioner and his review of Pettioner's medical records. It is unclear from Dr. Fisher's report whether he viewed original MRI images taken October 16, 2012. It is unclear whether he reviewed a CT scan done that same day. What is clear is that Dr. Fisher did not review the entire body of Petitioner's medical records which were admitted in evidence at arbitration hearing. It is also clear that Dr. Fisher did not review a description of Petitioner's job duties and requirements. Dr. Fisher did not discuss or comment on the nature of a recovery for an anterior lumbar fusion. Therefore, the Arbitrator does not give significant weight to Dr. Fisher's impairment rating.

Petitioner is a sworn police officer. His occupation often involves sedentary and mundane activities subject to interruption with emergent levels of extreme physical activity, activity that involves great stress and physical risk and even can be life threatening. The nature of Petitioner's occupation frequently involves activities which led to his original injury. These work conditions are noted to cause of exacerbation of Petitioner's daily symptoms. The Arbitrator considers this as a major factor of disability.

Petitioner was 43 years old at the time of the injury. Statistically, Petitioner has a life expectancy of approximately 38 years and a worklife expectancy of approximately 19 years. It is reasonably foreseeable that he will continue to suffer from the continuing back pain that he complains of now. The Arbitrator considers this to be a moderate factor of disability.

Petitioner's future earning capacity may be affected in the future. Despite his return to full duty work he may lose additional time from work. due to occasional aggravations of his back injury. The fusion surgery has resulted in permanent alteration of the structure of his lumbar spine. This permanent condition may make Petitioner more susceptible to future injury and therefore may result in future lost time from work or even early retirement. The Arbitrator places greater weight on this factor.

The Arbitrator also places great weight on Pettioner's medical records. Petitioner sustained a herniated L4-5 disc that failed resolution under conservative care. That conservative care included the 3 invasive ESIs performed by Dr. Rhode. Having failed conservative care Petitioner underwent fusion of L4-5 through an abdominal approach

along with a posterior microdiscectomy at the same time. Pettioner's condition effectively kept him off work, except for a short effort to return to work, from October 2012 to June 2014. The fusion of 2 vertebra by definition resulted in loss of motion in Petitioner's lumbar spine. His pain and limitations were well documented in his medical records. His credible testimony at hearing corroborated the opinions set forth in those records. Therefore the Arbitrator places great weight on the records of Petitioner's treating physicians.

In consideration of all 5 factors the Arbitrator, noting both the objective medical findings in evidence along with Petitioner's subjective complaints, finds that Petitioner suffered disability to the Person as a Whole to the extent of 32%, as provided in § 8(d)2 of the Act.

As to Petitioner's right elbow injury the Arbitrator notes that no report of impairment in accord with AMA guidelines was submitted. Therefore the Arbitrator cannot consider that factor

Petitioner is a sworn police officer. His occupation often involves sedentary and mundane activities subject to interruption with emergent levels of extreme physical activity, activity that involves great stress and physical risk and even can be life threatening. Petitioner testified that his elbow bothers him when he adjusts his posture to alleviate back pain. He offered no testimony that his right elbow affects his service as a police officer. The Arbitrator considers this as a lesser factor of disability.

As stated above Petitioner was 43 years old at the time of the injury. Statistically, Petitioner has a life expectancy of approximately 38 years and a worklife expectancy of approximately 19 years. Based on the generally good resolution of Petitioner's right elbow complaints is reasonably foreseeable that he will not continue to suffer from the continuing back pain that he complains of now. The Arbitrator considers this to be a lesser factor of disability.

Petitioner's future earning capacity may not be affected by his elbow injury in the future. Petitioner was able to return to full duty work as a sworn police officer without restriction. Petitioner offered no testimony that he continuing complaints that impaired his functioning as a police officer. The Arbitrator places lesser weight on this factor.

Petitioner's medical records clearly demonstrate that he sustained an epicondylitis and cubital tunnel syndrome to his right elbow. He received conservative care, including splinting. However, he also had an invasive PRP injection. While conservative, Pettioner's care for his elbow problem was aggressive. The Arbitrator places greater weight on this factor of disability.

Accordingly, in consideration of all 5 factors the Arbitrator finds that Petitioner suffered 2.5% loss of use of the right arm as provided in§ 8(e) of the Act.

Respectfully submitted,

Steven J. Fruth, Arbitrator

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bonnie Stahl,

Petitioner,

vs. NO. 13WC017996
13WC017997

Coil Craft Inc.,

Respondent.

16IWCC0087

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 disability, permanent 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 23, 2015 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.

16IWCC0087

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: FEB 1 - 2016
SJM/sj
o-1/21/2016
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

STAHL, BONNIE
Employee/Petitioner

Case# **13WC017996**

13WC017997

16IWCC0087

COIL CRAFT INC
Employer/Respondent

On 3/23/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2489 LAW OFFICE OF JIM BLACK
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

3227 HOLECEK & ASSOCIATES
JAMES M EBERLIN
215 SHUMAN BLVD SUITE 206
NAPERVILLE, IL 60563

16IWCC0087

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

BONNIE STAHL
Employee/Petitioner

v.

COIL CRAFT, INC.
Employer/Respondent

Case # **13 WC 17996**

Consolidated cases: **13 WC 17997**

An *Application for Adjustment 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 **Rockford**, on **February 24, 2015** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **7-12-12 and 11-15-12**, 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 not*** sustain an accident that arose out of and in the course of employment.

In the year preceding the injury, Petitioner earned $**31,460**; the average weekly wage was $**605**.

On the date of accident, Petitioner was **58** 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**.

ORDER

AS SET FORTH MORE FULLY HEREIN, THE ARBITRATOR FINDS THAT PETITIONER DID NOT SUSTAIN AN ACCIDENT ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT WITH RESPONDENT. ALL OTHER ISSUES ARE MOOT.

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

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

Signature of Arbitrator

March 16, 2015
Date

MAR 23 2015

Bonnie Stahl vs. Coil Craft, Inc.
Court No: 13 WC 17996 and 13 WC 17997

16IWCC0087

STATEMENT OF FACTS

Petitioner testified she worked for Respondent at their Oregon, Illinois location, in their shipping and receiving department. She alleged that in 2012, as she also told Dr. Coe in a Petitioner's Section 12 exam, that she was stacking 100-300 boxes onto pallets regularly, and that these weighed up to 50 lbs. She claimed that part of her job involved quality control, and she had to handle the boxes, opening some, to make sure the right parts were contained in them.

She also testified that her job included lifting boxes, weighing10-50 lbs., up onto racks that extended up over six feet tall, so that she had to climb up a ladder to stack them up and then periodically retrieve them from the top of the racks.

She testified that she at most, had 1 person to help her with these and other duties. Shipments would also come in and go out during the day, and she would have to load and unload the delivery trucks. Boxes weighed up to 50 lbs. On cross-examination, she did admit only one hour of her work day involved lifting items. The other 7 hours were doing computer work.

Sometime in July 2012, she began noticing pain in both arms, from heavy lifting. She testified that she complained of the arm pain to her supervisor, Mr. Scribner, due to her heavy lifting, but she claims he told her to "do her job, and that is part of it." Petitioner described her pain as shooting pain from forearm up to the shoulders, and that they would go numb if she would lay her forearms on the table.

She claimed when she stacked boxes on pallets that she would stack them up to five feet in the air. She claims she reported this bilateral arm pain to her supervisor, and also the HR representative, Pat Seloover, in July 2012. Her first office visit with her first treator, Dr. Gabriel, was on July 12, 2012, and she stated that she had told her employer about her injury before seeing him.

Dr.Gabriel's SOAP notes do show an office visit of July 12, 2012, but they do NOT show evidence of an accident happening at work. (Pet. Ex. 1) She continued to treat with him and also Dr. Gunderson.

Petitioner underwent right and left rotator cuff repair, and a right side revision, in 2013. She was released from care in late 2013.

Petitioner left the employ of the Respondent in December 2012, and was given a severance package. She met with Ms. Seloover at the time the agreement was signed, but did not mention her shoulders were injured at work. She testified on cross examination that she knew she was giving up her right to bring an action against her company as part of the severance payment.

Petitioner was examined by Dr. Jeffrey Coe on February 5, 2014 at her request. She told Dr. Coe that her job involved repeatedly stacking 100-300 boxes, weighing up to 15 lbs. on skids, and mostly without any help. Dr. Coe lists her two injury dates as October 1, 2010 and October 1, 2012, both of which are inconsistent with the dates on Petitioner's Applications for Adjustment of Claim.

Ms. Pat Seloover testified for Respondent, as the HR Manager for Coil Craft, Inc. She was familiar with the Petitioner's past health history. She testified the Petitioner started working at the Oregon location in 2002, working in shipping and receiving. In the Fall of 2009, the Petitioner had been off on FMLA leave for a heart condition but returned with restrictions of no lifting over 10 lbs., which restriction continued until Petitioner left in 2012. Petitioner in 2009 was doing mainly SEDENTARY work, and two other people in Shipping and Receiving did the lifting.

In July 2010, the major shipping duties were moved from the Oregon location where Petitioner worked, to their Princeton plant. At that time, Petitioner was still on light duty restrictions, according to Ms. Seloover. On September 8, 2010, Petitioner brought in a note from her doctor, and in October 2010, Petitioner went out on FMLA again for her knees. She was off for almost a year, returning in September 2011, after having both knees replaced. Petitioner testified these injuries were NOT work related.

Ms. Seloover testified that Petitioner continued to work light duty, which consisted of some light lifting, but the majority of her time was spent at a table, doing work on the computer. That continued from 2009 until July and August of 2012. Ms. Seloover spoke with Petitioner in July or August 2012, who indicated her doctor told her she could not work because of her shoulders. Petitioner indicated to Ms. Seloover that she hurt her shoulders, "from using crutches hauling herself around her house after her knee surgeries," or words to that effect. Ms. Seloover denied that Petitioner told her the bilateral rotator cuff tears were work related during that meeting. She also denied that Petitioner EVER reported her shoulder pain as caused by her work, and she saw her almost daily when doing HR work at the Oregon location.

She also remembered Petitioner coming into the Oregon plant and executing her severance agreement in December 2012, and Petitioner at that last meeting did NOT indicate her shoulder injuries were work related. She testified the Petitioner's last day of work at the Oregon plant was August 9, 2012. The severance agreement was negotiated in the interim period. At no time did the Petitioner ever ask to fill out a written report of injury to her shoulders. Ms.. Seloover testified the first notice of a work injury, was when she received the Applications for Adjustment of Claim from the Law Office of Jim Black, in mid-2013, long after Petitioner had left the company. She also testified that as part of the Petitioner's severance agreement, the company paid her health insurance and disability insurance premiums for six months after December 2012.

Plant manager, Mr. Helfrick, testified for Respondent, and stated the Petitioner never reported a work injury involving her shoulders to him, nor did she submit notice of an accident in writing, using company forms. He corroborated Ms. Seloover, and also testified that the bulk of the heavy s hipping was moved to the Princeton plant in July of 2010.

Shipping and Receiving supervisor, Mr. Scribner, testified for the Respondent. He denied that the Petitioner reported a work injury to him or Ms. Seloover in July 2012, or that he "ordered her back to work," when Petitioner alleges she reported pain in her shoulders. Mr. Scribner also testified that after 2010 the shipping and receiving department at the Oregon plant, was not heavy lifting any more. He also testified that the heavy lifting part had been shifted to the Princeton plant in 2010, and that 90% of the Petitioner's tasks from 2010 till she left in 2012 was desk work on the computer. He stated that Petitioner was provided assistance when packages were delivered and that the delivery schedule was very light at the plant from 2008 to 2012, when she left. (Resp. Ex. 1.) Most days the average delivery to the plant was 1-5 boxes, not

exactly a busy department. The shipments going out largely mirrored the incoming deliveries, according to Mr. Scribner. He also stated that the Petitioner had TWO people to help her in the department. He had daily contact with her, and she never reported arm or shoulder pain to him as a result of lifting or other tasks she performed for her company. She also never submitted written notice of any injury either. The Respondent was accommodating Petitioner, as they had been since 1-31-12, as indicated by Dr. Gabriel in his 1-31-12 SOAP note. (Pet. Ex. 1)

Petitioner had amended her two Applications for Adjustment of Claim prior to this hearing, changing the alleged accident dates to July 12, 2012 and November 15, 2012.

ISSUES AND ARGUMENT RE: 13 WC 17996

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

Respondent does not dispute that the Petitioner was a full time employee in the shipping and receiving department of Coil Craft, Inc., at its Oregon, Illinois location from 2009 through 2012, when Petitioner alleges two accident dates. Respondent also does not dispute that Petitioner had three shoulder surgeries in 2012-2013. What it does dispute is that any accidents occurred in 2012 that caused injury to both shoulders.

On the contrary, Respondent argues that the Petitioner's job duties from 2009 through 2012 were extremely sedentary, and could not have injured her. Petitioner herself admitted that she worked an 8 hour shift, and 7 of those hours were spent doing sedentary desk work. All three of the Respondents' witnesses testified that the repetitive heavy lifting part of the department had been moved to their Princeton plant in 2010, and Mr. Scribner produced a document and testimony that the average number of boxes entering and leaving the department from 2008 to 2012 was 5-10 on average each day, and some days it was 3.

Petitioner told her examining doctor, Dr. Coe, that part of her duties was stacking 100-300 boxes on pallets, yet the Respondents' witnesses stated that task had also been moved to Princeton in 2010, two years prior to the 2012 alleged injury dates, so she could not have still been doing that type of work in 2012. This testimony was corroborated by Petitioner.

All of the Respondents' witnesses contradicted Petitioners claim of a strenuous busy job in the shipping and receiving department, and that it was understaffed. All three agreed that she was doing largely sedentary work since 2009, with a 10 lb. lifting restriction, since returning from a heart condition in 2009. 90% of her day was spent doing computer work, and Mr. Scribner said she had 2 people to help with lifting. Even her treating doctor makes note of the Respondent honoring her restrictions. Dr. Gabriel, during an office visit of 1-31-12, notes that petitioner has knee pain which resolves itself by her sitting down during her shift. " they do allow her to do this at work so that has been helpful." (Pet. Ex. 1, p. 35)

Petitioner stated that she told Mr. Scribner, her direct supervisor and Ms. Seloover, the HR rep for Respondent in July2012 that she hurt both shoulders at work, and that she had shooting pain from forearm to shoulders. She also testified that Mr. Scribner was less than sympathetic, and

even ordered her to get back to work. She testified she told them both before she saw her doctor about her accident and painful shoulders. It is assumed she was speaking to the July 2012 accident date.

All three of Respondents' witnesses testified that Petitioner never reported orally or in writing to them that she hurt her shoulders working for Coil Craft, as she claims. Even her treating doctor, during a visit immediately after she claims to have told Mr. Scribner and Ms. Seloover of her injuries, on July 12, 2012, does not corroborate the Petitioner's version. To the contrary, Dr. Gilbert notes: "this is a workers comp related visit—no" Under trauma or injury: "does not recall specific injury." (Pet. Ex. 1, pg. 20) This is the very first visit concerning shoulder injury, and the first visit to the doctor and her doctor did not note a work related injury.

Given the facts of this case, and the fact that Petitioner is claiming a repetitive trauma injury, the Arbitrator finds it difficult to come to the conclusion that the job duties that Petitioner performed were repetitive enough to have caused her injuries as alleged herein.

Wherefore, based on the record as a whole, the Arbitrator finds that Petitioner did not sustain her burden of proving that she sustained an accidental injury arising out of and in the course of her employment with Respondent on either of the dates alleged herein. All other issues are moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Howard Williams,

Petitioner,

vs. NO. 14WC017812

Servisair,

16IWCC0088

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, causal connection, medical expenses, prospective medical, 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 May 26, 2015 is hereby affirmed and adopted.

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

16IWCC0088

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: FEB 1 - 2016
SJM/sj
o-12/17/2015
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

WILLIAMS, HAROLD
Employee/Petitioner

Case# **14WC017812**

16IWCC0088

SERVISAIR
Employer/Respondent

On 5/26/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
162 W GRAND AVE
CHICAGO, IL 60654

4866 KNELL O'CONNOR & DANIELWICZ
JOE NEEDHAM
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60667

16IWCC0088

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
19(B) ARBITRATION DECISION

Howard Williams
Employee/Petitioner

v.

Servisair
Employer/Respondent

Case # 14 WC 17812

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 **April 15, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of **March 5, 2014**,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 not*** sustain accidental injuries that arose out of and in the course of employment.

Timely notice of the accidents ***was*** given to Respondent.

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

In the year preceding the injuries, Petitioner earned $**1,009.35**; the average weekly wage was $**252.35**.

On the dates of accident, Petitioner was **57** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

Petitioner has failed to prove, by a preponderance of the evidence that an accident occurred, which arose out of and in the course of his employment by Respondent therefore, no benefits are awarded, pursuant to the Act.

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

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

16IWCC0088

FINDINGS OF FACT

The disputed issues in this matter are: 1) accident; 2) causal connection; 3) medical bills; 4) temporary total disability; 5) attorney's fees; 6) penalties; 7) and whether the petitioner is entitled to prospective medical treatment. *See*, AX1.

Petitioner's testimony

Mr. Howard Williams ("Petitioner") testified that his employment with Servisair ("Respondent") beginning approximately one month before the March 5, 2014 alleged date of injury. He was in good health on March 5, 2014 and was being trained to fuel commercial jetliners for United and Continental Airlines, on behalf of Respondent. Mr. James Washington, the person training him, was present in court and identified for the record. Tr. pp. 12-13.

Petitioner started training to fuel planes on March 4, 2014. He described the task and testified that on March 5, 2014, he slipped on an oily substance and fell to the ground onto both knees. He had difficulty getting up because of the oily surface, and claimed to have spent one to two minutes on the ground before he was able to regain his balance and stand. He did not call out for help, because "there was no one else out there" to assist him. The day was extremely cold and wet and upon rising, he felt pain in his knee. As he continued to work his regular shift, he walked stairs without stated difficulty but felt pain in the right knee on the trip home. He completed his shift the following day, March 6, 2014. He made no claim of a twisting component to his March 5, 2014 injury. Tr. pp.14-22.

Petitioner testified he informed Mr. Washington on March 5, 2014, that he "slipped and fell in front of the aircraft" when he returned to the fuel truck, but did not report it as a work injury because he thought it was a relatively minor accident, without injury. After completing work March 6, 2014, Petitioner called off March 7, 2014; and was not scheduled to work until March 11, 2014.

On March 11, 2014, Petitioner "called in" to inform that he would not be at work, due to right knee pain following a fall in front of a plane. He sought no treatment until April 3, 2014. On April 3, 2014, he sought treatment at the University of Chicago Hospital emergency department, with pain and swelling in the right knee. Thereafter, he had difficulty securing an appointment with Cook County Hospital and treated with Dr. Ronald Silver, who would provide him treatment without insurance, providing right knee therapy and an MRI. Following the MRI, Dr. Silver recommended right knee surgery, but would not perform it without insurance authorization.

Therapy brought about some improvement but according to the records, the right knee was not at full strength and pain medications do not alleviate the pain. The petitioner was to remain off work awaiting treatment and recovery. Petitioner testified to training logs identifying by flight number, denoting the planes fueled on March 4, 2014, and a similar record of May 5, 2015, missing the flight numbers. Tr. pp. 23-31, 33-59.

Testimony of Respondent's witness

Mr. James Washington testified that he has worked for Respondent for seven (7) years and was its lead fueler. He testified to training Petitioner on fueling duties March 4 & 5, 2014, which allowed Petitioner to be out of his sight, at times. He identified Petitioner's Exhibits 5 and 6 as the March 4 & 5, 2014 training logs, and testified that he did not know why the logs were not complete however, if March 5, 2014 was a day of high precipitation, the flight numbers would not be transcribed onto the logs, until Petitioner could do so at a dry location. Tr. pp. 60-65.

Mr. Washington stated that if Petitioner had reported an injury to him on March 5, 2014, he would have taken Petitioner to his supervisor, and the supervisor, not Mr. Washington, would have completed an injury report and taken Petitioner for medical treatment and drug screening. Mr. Washington stated it was not until the following Tuesday that he learned of Petitioner's alleged injury, and initially thought he was being informed that the petitioner injured himself at home because Petitioner did not seek medical attention for a work injury. Tr. p. 76.

Petitioner's medical records show that initial treatment began on April 3, 2014, at the University of Chicago Hospital emergency department. His initial diagnosis was knee pain, with a history of a blunt trauma to the right knee at work, two weeks prior, when he sustained a mechanical fall onto his knees. X-rays were performed and read to reveal moderate swelling and mild to moderate osteoarthritis but no acute injury; and the diagnostic impression was mild osteoarthritis, without acute fracture or misalignment. Petitioner was discharged with a knee immobilizer and crutches. PX2.

On May 21, 2014, Dr. Silver wrote a letter to Respondent's adjuster advising that he was treating Petitioner for a work injury sustained on March 4 or 5, 2014, when he fell on an oily surface. Dr. Silver described a twisting event not described in Petitioner's ER records and not alleged by Petitioner at trial. He recommended therapy and restricted Petitioner from all work. Petitioner started therapy May 23, 2014, and attended twenty-six (26) sessions prescribed by Dr. Silver between May 23, 2014 and July 22, 2014. PX3& 4.

A May 27, 2014 MRI of the right knee revealed impressions of joint effusion, a subtle tear of the posterior horn of the medial meniscus without tear of the lateral meniscus or collateral and cruciate ligaments, and a loose body in the suprapatellar bursa. The knee joint exhibited normal alignment without fracture, dislocation or bone marrow signal disruption. PX2.

Dr. Silver wrote treatment letters to Respondent's insurance company on eight separate occasions between May 30, 2014 and December 17, 2014, each time outlining his treatment plan, restricting Petitioner from working and requesting authorization to provide treatment. Petitioner's July 22, 2014 therapy record reports Petitioner "made significant progress since onset of PT" and recommended an additional 4-6 weeks of therapy. A July 30, 2014 therapy prescription from Elmwood Park Same Day Surgery Center, requested an additional five (5) weeks of therapy, with three (3) sessions per week.

That same day Dr. Silver's letter to Respondent's insurance company again sought surgical authorization, noting Petitioner would be left with permanent disability without it.

On November 24, 2014, Dr. John Cherf performed a Section 12 examination on Petitioner's right knee, and authored a written report. He took a detailed history of Petitioner's alleged accident on March 5, 2014 with Petitioner stating that his right foot slipped outward and his left foot slipped forward; he teetered for a moment and fell forward on both hands and knees. Petitioner informed Dr. Cherf the injury was witnessed by an unknown individual and reported to his trainer Mr. Washington. Dr. Cherf possessed a statement of Mr. Washington stating he was unaware of any injury sustained by Petitioner, and Petitioner stated Mr. Washington was lying because he had not complete an injury report. Petitioner informed Dr. Cherf he worked the remainder of the day and the next, but was then bedridden for a month. He secured an attorney who referred him to Dr. Silver for treatment. RX1.

Dr. Cherf reviewed Petitioner's MRI films and the report, and where the MRI report described a loose body in the suprapatellar bursa, Dr. Cherf believed the image showed a soft tissue lesion because it differed in density than bone or articular cartilage. Its location, at the anterior capsule just posterior to the fat pad, is not a bursal area and appeared attached, not loose; and there was no apparent location from which the loose body could have come. Petitioner complained of pain in the right knee, radiating into his thigh for the prior month. Examination revealed no soft tissue swelling or bruising. Squatting was limited but Petitioner did not exhibited muscle atrophy and had a full range of motion of the knee. Dr. Cherf reviewed right knee x-rays showing moderate to advanced osteoarthritis in the medial compartment, consistent with idiopathic osteoarthritis.

Upon response to specific questions, Dr. Cherf diagnosed Petitioner as having right knee idiopathic osteoarthritis, degenerative medial meniscus tear and soft tissue lesion, without traumatic loose body. According to Petitioner's treating doctor, the petitioner appeared to suffer a work-related right knee contusion with a sprain/strain, while a MRI showed no evidence of traumatic injury. Dr. Cherf opined that while it was possible that Petitioner had a temporary exacerbation of the underlying osteoarthritis without permanent aggravation, a work injury could not be attributed to causing Petitioner's osteoarthritis symptoms.

On December 17, 2014, Dr. Silver again wrote for surgical authorization, noting Petitioner's positive McMurray's test, tenderness and crepitation with swelling. PX3.

Dr. Cherf issued an addendum report dated December 18, 2014, in response to additional questions, explaining that if Petitioner's injury had traumatically induced or aggravated Petitioner's osteoarthritis, the MRI would show some evidence of bone edema or soft tissue edema or large effusion. However, these conditions were not evident, nor were there loose bodies, as explained previously. It was his opinion that Petitioner should not require restrictions relative to the alleged

work injury, and there was no basis to increase Petitioner's permanent partial impairment rating pursuant to the additional four factors enumerated under Section 8.1b.

In a separate report issued December 29, 2014, Dr. Cherf outlined the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition and its permanent partial impairment protocol, outlining the basis for Petitioner's PPI rating. Rx3.

Petitioner's medical exhibits state outstanding charges from AthletiCo Physical Therapy for $65,419.00, Elmwood Park Same Day Surgery totaling $1,138.61, Infinite Strategic Solutions billed at $1,469.46, Orthopedic Specialists of North Shore billed in the amount of $1,785.00, RX Development in the amount of $26,283.49 and University of Chicago Hospital billed in the amount of $2,158.00. They total $98,253.56, with an outstanding balance of $66,170.46, prior to Section 8.1 Fee Schedule reduction. Petitioner presented no evidence in support of the reasonableness of these bills or the necessity of the treatment provided. PX1.

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).

It is the burden of every Petitioner before the Worker's Compensation Commission to establish, with evidence, every disputed issue litigated at trial, including the issues establishing Respondent's liability for benefits. *Board of Trustees of the University of Illinois v. Industrial Commission* (1969), 44 Ill.2d 207 at 214, 254 N.E.2d 522, *Edward Don v Industrial Commission* (2003) 344 Ill.App.3d 643, 801 N.E.2d 18. For treatment of an employee's workplace injury to be compensable under workers compensation laws, Petitioner must establish the condition is caused by the work injury and not some other cause or condition. *Hansel & Gretel Day Care Center v Industrial Commission*, (1991) 215 Ill.App.3d 284, 574 N.E.2d 1244. The Commission is not required to accept the opinion of a treating physician over that of an examining physician, and may give greater weight to an IME physician where the facts warrant. *Prairie Farms Dairy v. Industrial Commission*, 279 Ill.App. 3d 546, 664 N.E.2d 1150 (1996).

Petitioner testified to a slip and fall work injury wherein he landed on both hands and knees, against pavement. It took his one to two minutes to regain his footing due to the slippery surface and he had right knee pain immediately following the event. Petitioner then testifies that he informed James Washington that he was late getting back to the fuel truck because he had fallen. By Petitioner's own testimony he did not report being injured at work, did not report pain in his knee following the fall to the ground, and did not believe he had sustained a meaningful injury. Petitioner did not allege or describe a twisting event at trial and his mechanism of injury, as recorded in the University of Chicago Hospital emergency treatment records, states that he suffered a blunt trauma not a twisting event. When examined by Petitioner's Section 12 expert, Dr. John Cherf, the mechanism of injury was recorded in detail, i.e., Petitioner's right foot slipped outward (to the right) and his left foot slipped forward; he teetered for a moment and fell forward on both hands and knees, affecting his knees bilaterally.

In relating Petitioner's knee pain and need for treatment, Dr. Silver described the injury as a twisting episode resulting in meniscal tear and loose body of the knee. Dr. Silver found the totality of Petitioner's symptoms related to that twisting episode and did not relate Petitioner's mechanism of injury as an impact or blunt trauma to the knees bilaterally, as recorded in the emergency treatment and therapy records.

Dr. Cherf reviewed Petitioner's MRI films and the report, and advised that the MRI did not reveal a loose body in the suprapatellar bursa, as posited by Dr. Silver as evidence of trauma and the basis for surgery. Dr. Cherf advised that the MRI showed a soft tissue lesion and not a loose body in the suprapatellar bursa. He knew this because the object differed in density from a bone or articular cartilage loose body, was not loose but was attached; and because its location at the anterior capsule

just posterior to the fat pad, is not a bursal area and therefore there was no location from which the loose body could have derived. Dr. Cherf further explained had an injury traumatically induced or traumatically aggravated Petitioner's osteoarthritis, the MRI would have shown bone edema, soft tissue edema or large effusion; and that the MRI showed none of these conditions but did reveal a soft-tissue lesion, establishing that the knee condition was not traumatically induced.

Dr. Cherf's clinical examination also revealed no evidence of knee trauma. He documented the absence of soft tissue swelling, bruising, or muscle atrophy, and that Petitioner exhibited full range of motion of the right knee. Dr. Cherf reviewed x-rays of April 3, 2014, which showed moderate to advanced osteoarthritis in the medial compartment, consistent with idiopathic osteoarthritis. He opined that Petitioner's symptoms and need for treatment stemmed from the advanced state of his idiopathic osteoarthritis, which was neither traumatically induced nor aggravated by a fall. Despite possessing Dr. Cherf's report, Dr. Silver did not address these details, which patently contradicted his claim of a traumatically induced right knee condition.

While Dr. Silver repeatedly recorded Petitioner's treatment appointments in letters to Respondent's agents, he provided little detail of his examination and findings customarily contained in treatment records. Dr. Silver did not document the condition of the knee on visual inspection. His records did not address either the presence or absence of soft tissue swelling, bruising, muscle atrophy or any reduction in strength or tested range of motion of the right knee. Conversely, Dr. Cherf documented the absence of evidence of right knee trauma, including the absence of soft tissue swelling, bruising, muscle atrophy, weakness or restricted range of motion, noting full range of motion in Petitioner's right knee.

Dr. Silver has opined that Petitioner's right knee condition is a meniscal tear with a loose body at the suprapatellar bursa, but issued his diagnosis and causation opinion without elaboration or support, simply stating the right knee twisting event caused Petitioner's conditions. He does not delineate between new and pre-existing knee pathology or whether his interpretations of Petitioner MRI and x-ray results are based on visualizing the actual images or simply the diagnostic report; and he does not document visual evidence of traumatic injury such as bruising, contusion, abrasion or any evidence of trauma to the knee. In addition, Petitioner's records of initial treatment at University of Chicago reveal no evidence of trauma, both on visual inspection and x-ray imaging. While Dr. Silver performed his own x-rays, he appears not to have taken into account, Petitioner's April 3, 2014 right knee x-rays, which specifically ruled out signs of acute injury, while showing only swelling related to osteoarthritis.

Consistent with the University of Chicago ER records, Dr. Cherf's reports document the absence of trauma on visual inspection and with diagnostic testing. He confirmed the absence of muscle atrophy not addressed by Dr. Silver, the absence of visual evidence of trauma also not addressed by Dr. Silver, and outlined in detail the true nature of the MRI findings and the mechanism of injury as described by Petitioner. Dr. Silver appears to have accepted and parroted Petitioner's history that he had a fall at

work, causing his symptoms and conditions, without questioning the true nature of the aggravation or performing a critique of the MRI findings, as he interpreted them. Conversely, Dr. Cherf detailed his physical examination findings, the basis for his interpretation of the MRI; and the impossibility of a loose body in the suprapatellar bursa, both on its location and appearance. With Dr. Cherf performing greater investigation into the nature and cause of Petitioner's right knee condition and the mechanism of injury alleged to have occurred March 5, 2014; and providing greater detail on the nature of his diagnosis and the objective diagnostic support for his determinations, Dr. Cherf's opinions appear both better explained and well founded.

The Arbitrator is entitled to give greater weight to Respondent's Section 12 physician where the facts warrant; and in this case, Dr. Cherf's delineated opinions are more reliable than Dr. Silver's unsupported conclusions. The Arbitrator finds Dr. Cherf's opinions and conclusions more persuasive than those of Dr. Silver, based on the quality of the opinions and support provided by Dr. Cherf.

Petitioner has failed to prove, by and preponderance of the evidence that an accident occurred, which arose out of and in the course of his employment by Respondent. In that the petitioner has failed to prove an accident, the remaining disputed issues are moot and will not be addressed.

16IWCC0088

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
14WC17812
SIGNATURE PAGE

Signature of Arbitrator

May 22, 2015
Date of Decision

MAY 26 2015

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

Donna Niven,

Petitioner,

vs. NO. 12WC023221

16IWCC0089

American Liberty School Bus,

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 disability, causal connection, medical expenses, permanent disability, reimbursement to husband's group insurance for bilateral knee replacements, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 18, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that 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.

16IWCC0089

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: FEB 1 - 2016
SJM/sj
o-12/17/2015
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NIVEN, DONNA
Employee/Petitioner

Case# **12WC023221**

AMERICAN LIBERTY SCHOOL BUS
Employer/Respondent

16IWCC0089

On 5/18/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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CHICAGO, IL 60602

16IWCC0089

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

Donna Niven
Employee/Petitioner

v.

American Liberty School Bus
Employer/Respondent

Case # **12** WC **23221**

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 **New Lenox**, on **March 6, 2015**. After reviewing all of the evidence presented, the undersigned Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 5, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is, in part,*** causally related to the accident as explained *infra.*

In the year preceding the injury, Petitioner earned $**15,521.48**; the average weekly wage was $**298.49**.

On the date of accident, Petitioner was **63** years of age, ***married*** 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 $**691.43** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**691.43**.

Respondent is entitled to a credit of $0 under Section 8(j) of the Act. *See* AX1.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner sustained a right hip contusion and strain and that she failed to establish a causal connection between her bilateral knee condition and accident at work.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $253.00/week for 2 & 6/7th weeks, commencing May 4, 2012 through May 23, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from April 5, 2012 through March 6, 2015, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $691.43 for temporary total disability benefits that have been paid.

Medical Benefits

Respondent shall pay the reasonable and necessary medical services of MedWorks totaling $1,168.90 that remain unpaid pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for amounts paid toward this bill, 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.

As explained in the Arbitration Decision Addendum, Petitioner's claim for payment of bills for medical treatment related to the bilateral knees or for reimbursement of $96.232.79 paid by her husband's group insurance carrier (Blue Cross/Blue Shield) is denied.

Permanent Partial Disability: Schedule Injury

Respondent shall pay Petitioner permanent partial disability benefits of $253.00/week for 10.75 weeks, because the injuries sustained caused the 5% loss of the right leg, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

May 5, 2015
Date

MAY 18 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Donna Niven
Employee/Petitioner

v.

American Liberty School Bus
Employer/Respondent

Case # **12** WC **23221**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute at this hearing include causal connection, Respondent's liability for certain medical bills that were paid by Petitioner's husband's group insurance plan, Petitioner's entitlement to a period[1] of temporary total disability benefits commencing July 26, 2012 through March 21, 2013, and the nature and extent of Petitioner's injury. Arbitrator's Exhibit[2] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Petitioner testified that she was hired by Respondent as a bus aide in 2007. She took a pre-employment physical, which she passed. Petitioner described her job duties to be those of a bus monitor, which included taking care of wheelchairs, putting children in car seats, and escorting small children up and down stairs.

Petitioner testified that she previously worked for Laidlaw Bus Company as a bus monitor for about 11-12 years before she worked for Respondent. She explained that she performed the same job duties for this company and Respondent. Petitioner described these duties to include walking the aisle of the bus, ambulating up and down bus stairs, securing wheelchairs to the bus, and monitoring up to 16 children.

Petitioner also testified that on November 26, 2008, she was injured. She explained that she was talking to one of the drivers in the bus and she tripped over the cross bar falling on both hands and knees. Petitioner testified that she saw Dr. Niemeyer and was placed off work approximately one month. She testified that she had no other medical care.

The medical records reflect Petitioner's report on November 26, 2008 at MedWorks that she tripped and fell down injuring her right knee. RX3. Petitioner's right knee x-rays showed severe degenerative changes and a large knee effusion. *Id.* Dr. Arain of MedWorks diagnosed Petitioner with a right knee contusion and restricted her to no walking over 10 minutes per hour. *Id.* Petitioner returned to MedWorks on December 29, 2008 at which time she reported some persistent pain in the outer aspect of the right knee which she attributed to her arthritis. *Id.* She was diagnosed with a right knee contusion with underlying arthritis and released to full duty work. *Id.*

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[1] The parties stipulated to Petitioner's entitlement to temporary total disability benefits from May 4, 2012 through May 23, 2012. AX1.

[2] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party. Exhibits attached to depositions will be further denominated with "(Dep. Exh. _)."

Petitioner testified that she returned to work January 1, 2009 to her job as a bus aide. She worked six hours per day five days per week. Petitioner testified that she continued to work for Respondent through April 4, 2012 and was not under any medical care for her left leg or knee.

April 5, 2012

On April 5, 2012, Petitioner testified that she was at the end of the driveway made of pavement and gravel. She was standing by a mailbox where drivers put their trip sheets waiting for her driver to pick her up when another bus came by and stopped. Petitioner reached in and grabbed the trip sheet from that driver, but the bus was still rolling and she shouted that to the driver. Petitioner testified that she somehow ended up on the floor.

Petitioner testified that she does not know if she hit her left knee, but she landed on her right knee and hip. Other than this injury at work, Petitioner testified that she has had no other injuries to either leg or knee.

Medical Treatment

Petitioner testified that she was sent to see Dr. Niemeyer at MedWorks on the same day. She testified that she told them how she was hurt. Petitioner testified that she was given pain pills and sent home. She was also placed on light duty.

The medical records reflect Petitioner's report "that earlier this morning, while in the parking lot at the bus company, she fell and landed on the right hip. She now complains of right hip pain. She points to the greater trochanter." RX1. Dr. Niemeyer noted the following on physical examination: "She gets up out of her chair without apprehension or sign of discomfort. She has full range of motion in the lumbosacral spine. She states that she has bad knees and cannot perform a quick test. In the seated position, usual neurovascular fully intact with negative straight leg raising. Supine examination fails to reveal tenderness in the groin. Passive internal and external rotation. Hip unremarkable and nonprovocative. The range of motion is full. She is diffusely tender over the right hip greater trochanter. There is bone point tenderness." *Id.* Petitioner was diagnosed with a right hip greater trochanter contusion and released to sedentary work. *Id.*

Petitioner testified that she went back the following day for x-rays of both her right knee and right hip. However, the medical records of April 6, 2012 reflect Petitioner's report of soreness in the right hip. RX1. Petitioner's x-rays of the right hip showed no fracture, dislocation or substantive arthrosis. *Id.* Pelvic x-rays showed no acute fracture and partially visualized generative changes in the spine. *Id.* On physical examination, Dr. Niemeyer noted some bruising in the lateral thigh and tenderness over the greater trochanter. *Id.* He noted that Petitioner's x-rays of the pelvis and hip were unremarkable and there was no arthritis. *Id.* Dr. Niemeyer maintained his diagnosis of a right hip contusion. *Id.*

On cross examination, Petitioner testified that she told the doctor on both April 5, 2012 and April 6, 2012 that she fell on her right and left knees at the time of the accident. She explained that there were indents on both knees from the little gravel stones. Petitioner testified that she showed the swelling in her knees to Dr. Niemeyer.

Petitioner returned to MedWorks Occupational Health on April 11, 2012. RX1. Dr. Niemeyer noted that Petitioner "now complains of a lateral right knee pain that radiates down the lateral aspect of the leg. To the best of my memory, she did not tell me about that the first time I saw her." *Id.* On physical examination, he noted tenderness over the greater trochanter and "diffuse discomfort over the lateral aspect of the knee, nothing

specific." *Id.* Dr. Niemeyer diagnosed Petitioner with a right hip contusion and right knee contusion. *Id.* He kept Petitioner restricted to sedentary level work. *Id.*

Petitioner returned on April 18, 2012. RX1. She reported that the discomfort over the greater trochanter was no longer present. *Id.* "Now she is describing deep buttock discomfort and actually points towards her right ischial tuberosity. She is miserable if she is riding a bus because of that discomfort over the right ischial tuberosity. She also complaints of right knee discomfort worse than previous. When she was seen originally in the emergency room, they only x-rayed her hip." *Id.*

Dr. Niemeyer noted lateral joint line tenderness, tenderness over the lateral tibial plateau, and discomfort that radiates down the lateral aspect of the tibia. *Id.* He also reviewed Petitioner's knee x-rays which showed quite advanced osteoarthritic changes with marked osteophytosis and no acute fractures or healing injuries. *Id.* Dr. Niemeyer placed Petitioner off work and ordered physical therapy. *Id.*

Petitioner testified on cross examination that if Dr. Niemeyer's records do not contain her complaints about her left knee, those records are incorrect. Petitioner was off work from May 4, 2012 through May 23, 2012 and she received temporary total disability benefits.

Section 12 Examination – Dr. Wardell

On May 16, 2012, Petitioner submitted to a medical evaluation with Dr. Steven Wardell at Respondent's request. RX4 (Dep. Exh. 2). Petitioner testified that she reported a bilateral knee injury to Dr. Wardell.

Dr. Wardell's report reflects Petitioner's reported history of injury to the lateral aspect of the right hip and right knee while getting a trip sheet from a bus driver and being pushed forward onto the ground by the bus' folding door. *Id.* Petitioner reported right buttock discomfort and right lateral hip discomfort that shot down her leg at the time of her evaluation. *Id.*

Dr. Wardell noted a marked deformity of the right knee, angular malalignment, a mild effusion with minimal swelling about the knee and crepitation upon range of motion in both knees. *Id.* On examination of the right hip, Dr. Wardell noted painless range of motion in the groin, mild pain within the right buttock, significant extra soft tissue in the right buttock and hip area, and no evidence of ecchymosis. *Id.*

Dr. Wardell reviewed bilateral knee x-rays which he noted showed severe end stage chronic osteoarthritis to the bilateral knees with marked valgus alignment, marked osteophyte formation with marked valgus and evidence of loose bodies within the posterior compartments of the right knee that may be a chronic bone spur, and a very large bone spur osteophyte emanating off the superior patella that appeared chronic with valgus alignment left worse than right. *Id.*

After reviewing records from MedWorks and physical therapy notes from Accelerated Rehab Center, Dr. Wardell diagnosed Petitioner with a right knee strain, a right hip muscle strain, obesity, and chronic, severe osteoarthritis to the bilateral knees with marked valgus alignment. *Id.* He also opined that, given Petitioner's mechanism of injury, Petitioner had very severe chronic osteoarthritis of the bilateral knees that was causing significant valgus deformitites to both knees predisposing her to falls and instability. *Id.* Dr. Wardell also opined that Petitioner's mechanism of injury caused minimal injury and her symptoms appeared to be primarily related to a sprain/strain. *Id.* He recommended one more week of physical therapy followed by a home exercise program and return to full duty work. *Id.*

Dr. Wardell noted no need for surgery to the right knee or hip as a result of her injury at work. *Id.* He further noted that given the chronicity of Petitioner's bilateral knee condition, she would likely require a total knee replacement, which he opined was completely unrelated to her fall at work. *Id.*

Continued Medical Treatment

Petitioner testified that she returned to work for Respondent after May 23, 2012 through the end of the school year for two hours per day on June 1, 2012. On May 25, 2012, Petitioner testified that she was released by MedWorks.

On July 5, 2012, Petitioner saw her primary care physician, Dr. Dinesh Jain. PX2. She reported bilateral knee pain and bilateral shoulder pain. *Id.* After an examination, he diagnosed her with degenerative joint disease in the knees and referred her to Dr. Nikkel. *Id.* On cross examination, Petitioner testified that she told Dr. Jain that she injured her knee.

On July 26, 2012, Petitioner saw Dr. Mark Nikkel at Bone and Joint Physicians. PX3 (P's Dep. Exh. 3). She reported bilateral shoulder and bilateral knee pain that was equal on both sides. *Id.* She reported trouble walking, sitting and standing with pain a little worse on the right. *Id.* Petitioner also reported "an injury in April when she was waiting for the bus. She was about to get on the bus and the bus, for whatever reason, started rolling forward resulting in her falling over injuring both knees and shoulders. She denies any other complaints." *Id.* Dr. Nikkel reviewed Petitioner's July 5, 2012 x-rays which showed "severe tricompartmental DJD." *Id.* He diagnosed Petitioner with severe degenerative joint disease in the bilateral knees and recommended a total knee replacement on the right. *Id.* Petitioner testified that it was only after her injury at work that any doctor recommended knee replacement surgery.

Petitioner underwent a total right knee replacement surgery on September 24, 2012. PX3 (P's Dep. Exh. 3 & 4). She then underwent post-operative physical therapy[3]. *Id.* On October 10, 2012, Dr. Nikkel recommended the same surgery on the left knee. *Id.* Petitioner underwent a total left knee replacement surgery on December 10, 2012 followed by post-operative physical therapy. *Id.*

Petitioner continued to follow up with Dr. Nikkel on and off through July 9, 2013. *Id.* At a visit on March 22, 2013, Dr. Nikkel indicated that Petitioner could return to work. Petitioner testified that she did not return to work, however. She applied for social security and Medicare benefits, which she receives. Petitioner is also claiming temporary total disability benefits during period of time she saw Dr. Nikkel from July 26, 2012 through March 21, 2013. Petitioner testified that she continues to see Dr. Nikkel on a yearly basis.

In a narrative letter dated February 19, 2014, Dr. Nikkel indicated that Petitioner's fall at work in April of 2012 aggravated her pre-existing arthritic condition in the bilateral knees causing the need for total knee replacements. PX3 (P's Dep. Exh. 2). At his deposition, Dr. Nikkel testified that he provided this letter in response to Petitioner's handwritten note requesting "a causal connection letter that my work injury of April 5th, 2012 might or could be related to this work injury and that my surgery was necessary, that the injury of April 5th,

[3] Petitioner had an initial physical therapy evaluation for her bilateral shoulder condition on October 15, 2012 as reflected in Dr. Nikkel's medical records. PX3 (P's Dep. Exh. 3). At that time, Petitioner reported in pertinent part: "H/O RECENT BIL SHLD DISLOCATIONS W/ONSET SOMETIME DURING SUMMER 2012 BUT UNKNOWN ORIGIN OF DISLOCATIONS. H/O P.T., FOR BIL SHLDS UNTIL KNEE SURGERY 9-24-12 (RIGHT TKA)." *Id.*

2012, aggravated by pre-existing conditions on both knees and shoulders and that is why I had surgery to both left and right knee, Donna Niven, please send to law office." PX3 at 30-31.

Deposition Testimony – Dr. Nikkel

Petitioner called Dr. Nikkel as a witness and he gave testimony at an evidence deposition on July 29, 2014. PX3. Dr. Nikkel is a board-certified orthopedic surgeon specializing in knee and shoulder surgery. PX3 at 4-5; PX3 (P's Dep. Exh. 1). Dr. Nikkel testified about Petitioner's bilateral knee condition and medical treatment, and he rendered various opinions consistent with his February 19, 2014 narrative report. *See generally* PX3.

Dr. Nikkel testified that Petitioner did not report any significant problems with her knees prior to seeing him. PX3 at 9. He maintained that Petitioner's accident at work accelerated her need for the bilateral total knee replacement surgeries. PX3 at 12. Dr. Nikkel also reviewed the reports generated by Dr. Wardell and disagreed with his conclusions. PX3 at 14.

On cross examination, Dr. Nikkel acknowledged that Petitioner did not provide any historical information to him about a pre-existing condition [in the knees] prior to her accident at work on April 5, 2012. PX3 at 18-19. He also acknowledged that he did not receive or review any medical records with regard to her pre-existing condition. PX3 at 19, 29. Dr. Nikkel testified that Petitioner did not provide him with information that she received medical treatment after her injury at work for her knees. PX3 at 20-21. He also acknowledged that he did not review any records related to Petitioner's knee injury in 2008 or her x-rays from 2008. PX3 at 34.

However, after reviewing the MedWorks April 5, 2012 note Dr. Nikkel testified that the contents did not change his opinion. PX3 at 23-24; PX3 (R's Dep. Exh. 1). After some discussion, Dr. Nikkel maintained that his training as an orthopedic specialist placed him at an advantage over a primary care doctor without such specialized training and he noted that the MedWorks record did not show an entire bone and joint exam. PX3 at 24-26; PX3 (R's Dep. Exh. 1). He reviewed the MedWorks notes from April 6, 2012 and April 11, 2012. PX3 at 26-27; PX3 (R's Dep. Exh. 2 & 3). He maintained his causal connection opinion, but acknowledged that Petitioner did not report any knee pain until she reported right knee pain on April 11, 2012. *Id.*

After further discussion, Dr. Nikkel testified that he knew Petitioner had a pre-existing condition because he could read her x-rays and it was obvious that she had a pre-existing condition, which he maintained was exacerbated by her fall. PX3 at 31. When asked what showed that Petitioner's pre-existing condition had been aggravated, Petitioner testified that he based his opinion on "[t]he fact that she came to me as a physician. People don't come to the doctor just because they're not having problems. She came to me because she was having pain. And so, I addressed her pain. You asked my opinion. The pain was exacerbated by a fall." PX3 at 31-32. When asked what findings he made on physical examination or intraoperatively to support his opinion, Dr. Nikkel testified that he based it "on the patient's subjective history." PX3 at 32.

On cross examination, Dr. Nikkel also testified that Petitioner's x-rays showed very significant osteophytes that take many years to form. PX3 at 33. He testified that he was not surprised if Petitioner had complained of severe knee pain in 2004 or even 10 years before her accident at work. PX3 at 33-34. Dr. Nikkel also testified that Petitioner was overweight and that obesity alone could aggravate a pre-existing osteoarthritis condition in the knees in the absence of trauma such that a total knee replacement would be necessary. PX3 at 34-35. Dr. Nikkel also testified that Petitioner submitted an intake form in which she noted that her condition was not work-related. PX3 at 20; PX3 (R's Dep. Exh. 5).

Section 12 Examination Addendum Report – Dr. Wardell

On April 30, 2014, Dr. Wardell issued an addendum report noting the additional information that he reviewed. RX4 (Dep. Exh. 3). Petitioner met with Dr. Wardell to review her knee x-rays from November of 2008. *Id.* He interpreted those x-rays to show osteoarthritis of the right knee with severe bone on bone changes within the lateral compartment with associated valgus alignment, multiple loose bodies in the intercondylar notch and posterior compartments with large hypertrophic osteophytes emanating off the superior patellar posterior femur and lateral femur, large draping osteophytes off the femoral trochlea and patella with joint space narrowing, and bone on bone changes within the lateral compartment. *Id.*

Dr. Wardell opined that "[u]pon review of the radiographs stated above from November 2008, it is very apparent that [Petitioner] has had pre-existing, severe osteoarthritis within her right knee that in 2008 radiographically [sic]. She was noted to valgus alignment with complete bone on bone changes within the lateral compartment with multiple loose bodies and large osteophytes. I strongly feel that her reported work related injury on 4/5/12 did not accelerate or aggravate her need for a total knee replacement, which was readily evident prior to her reported injury, based on these radiographs...." *Id.* Dr. Wardell maintained his other opinions as indicated in his original report. *Id.*

Deposition Testimony – Dr. Wardell

Respondent called Dr. Wardell as a witness and he gave testimony at an evidence deposition on September 8, 2014. RX4. Dr. Wardell is a board-certified orthopedic surgeon specializing in adult joint reconstruction of the hip and knee. RX4 at 4-5; RX4 (Dep. Exh. 1). He testified consistent with his reports about Petitioner's physical condition and medical treatment, as well as the various opinions he rendered in his reports. *See generally* RX4.

Dr. Wardell described Petitioner's severe valgus deformity to be that her knees touched and it was difficult for Petitioner to put her heels together. RX4 at 14. He testified that obesity can accelerate the progression of osteoarthritis in the knees because of increased weightbearing load in the joints such that it can aggravate the knee condition to the point that the patient could need a total knee replacement. RX4 at 14-15. He noted that at the time of his evaluation, Petitioner had mild effusion and mild swelling in both knees. RX4 at 18.

Dr. Wardell opined that Petitioner's right hip strain was causally related to her accident at work. RX4 at 20-21. He noted that she did not report any knee pain until about a week after the accident. *Id.* Dr. Wardell maintained his opinion that Petitioner's severe end stage osteoarthritis was not caused by her accident and her need for total knee replacement surgery was unrelated to the accident. RX4 at 21-22. He explained that Petitioner's need for this surgery was not accelerated, aggravated, or hastened by her accident at work because she had well documented severe osteoarthritis in both knees with no acute injury or comment by the initial medical examiners as to any right knee complaint. *Id.* Dr. Wardell also testified that the x-rays that he later reviewed from 2008 reinforced his previous opinion that Petitioner had a longstanding severe osteoarthritis condition that essentially was unchanged in four years and was at the end stage. RX4 at 24-25.

On cross examination, Dr. Wardell acknowledged that he did not know whether Petitioner worked full duty after her injury in 2008 or that she was injured either at home or at work between that time and her injury on April 5, 2012. RX4 at 28-29. When asked whether Petitioner's injury on April 5, 2012 could have "broken the camel's back," Dr. Wardell replied that "[t]here was no indication for almost six days that she had any type of injury." RX4 at 30. He added that there was quite a delay in symptoms for six days. RX4 at 30-31.

With regard to questions regarding the possibility that a patient could hurt one part of the body and not realize the injury to another part until several days later, Dr. Wardell testified that "[g]enerally, if there was an acute injury on that day to the that portion of your body, there generally would have been a complaint verbalized or have been obvious on physical exam that that area was injured, especially since the same extremity was examined." RX4 at 32. Dr. Wardell also testified that severe osteoarthritis may or may not require a total knee replacement surgery with or without trauma. RX4 at 32-33.

Additional Information

Regarding her current condition, Petitioner testified that she has pain in both knees. She also has difficulty balancing, stiffness in the morning in the bottom parts of her legs, and she uses a walker to keep her balance. Petitioner testified that she did not use a walker before her injury at work or have any of these complaints before her accident other than pain in her knees. On cross examination, Petitioner testified that she had bad knees for a long time before her accident at work stemming back to 2004.

The medical bills paid by Petitioner's husband's insurance company, Blue Cross/Blue Shield, were submitted into evidence. Petitioner testified that she seeks reimbursement of this amount to repay Blue Cross/Blue Shield.

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 hearing as follows:

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:

After a careful review of the record as a whole, the Arbitrator finds that Petitioner did sustain a right hip contusion and strain as a result of her undisputed accident on April 5, 2012 and addresses the extent of that injury below. The Arbitrator further finds that Petitioner's bilateral knee condition of ill-being is not causally related to her accident at work on April 5, 2012. In so concluding, the Arbitrator notes significant inconsistencies between Petitioner's testimony and her reports as reflected in other record evidence, and relies on the opinion of Respondent's Section 12 examiner, Dr. Wardell, which is persuasive given the facts of this case.

To recover in a preexisting condition case, a claimant need only establish a causal connection between her work-related injury and claimed current condition of ill-being by showing that her injury aggravated or accelerated the preexisting disease. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 204-206, (2003). As in this case, even where an employee has a pre-existing condition that renders her more vulnerable to an injury, the claimant's employment need not be the sole or even the primary cause of the condition of ill-being; it need only be a causative factor. *Sisbro*, 207 Ill. 2d at 205; *Tower Automotive v. Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 434 (1st Dist. 2011).

The medical records reflect that Petitioner first reported symptoms in her right knee six days after her accident when she complained of lateral pain to Dr. Niemeyer at MedWorks on April 11, 2012. According to the note, Petitioner did not report any injury to the left knee and Dr. Niemeyer noted that the right knee complaint was new. When Petitioner presented to Dr. Wardell six weeks after her accident at Respondent's request, she only reported right hip pain and right knee pain. Dr. Wardell does not note any report of left knee pain or injury.

The medical records first reflect a complaint of left knee symptoms three months after her accident, on July 5, 2012, when Petitioner saw her primary care physician, Dr. Jain. He diagnosed her with degenerative joint disease in the knees and referred her to Dr. Nikkel. Dr. Nikkel's initial evaluation note reflects a different account of the accident entirely. Dr. Nikkel noted on July 26, 2012 that Petitioner reported "an injury in April when she was waiting for the bus. She was about to get on the bus and the bus, for whatever reason, started rolling forward resulting in her falling over *injuring both knees and shoulders*. She denies any other complaints." PX3 (P's Dep. Exh. 3) (*emphasis* added).

By contrast, Petitioner testified at trial that she reported falling on both knees at the time of her accident and she disputed the accuracy of Dr. Niemeyer's records from MedWorks in the absence of such notations. On cross examination, however, Petitioner admitted that she did not know if she hit her left knee when she fell, but she did land on her right knee and hip. Petitioner also disputed the accuracy of her history as noted in Dr. Wardell's Section 12 report, and testified that she reported bilateral knee pain to him at the time of her examination on May 16, 2012.

Petitioner's testimony at trial that she fell on both knees at the time of her accident appears to be consistent with

Dr. Nikkel's initial evaluation note, regardless of the lack of such notations by Dr. Niemeyer, Dr. Jain, or Dr. Wardell. However, Petitioner also reported to a physical therapist on October 15, 2012 that she did not know how she dislocated her shoulders and she believed that it occurred sometime in the summer of 2012. She presented to Dr. Nikkel to address bilateral knee and bilateral shoulder pain. Thus, to Dr. Nikkel, Petitioner reported an injury to both knees and both shoulders at the time of her accident at work, which is contrary to her testimony at trial as well as prior treating medical records, but she also tells gives a different history to a physical therapist stating that she does even not know how she injured her shoulders and her belief that her bilateral shoulder symptom onset was not in April or the spring of 2012, but during the summer of 2012.

While Petitioner does not claim compensation for any bilateral shoulder injury, the inconsistencies regarding her shoulder pain onset and the mechanism of that injury—whether at work or not—raise further concern about the reliability of her testimony as a whole and whether she injured her knees when she fell at work as she now claims. With regard to her fall at work, the notations by Dr. Niemeyer at MedWorks are much more contemporaneous with the accident than is the history she gave to Dr. Nikkel or her testimony at trial. Petitioner's inconsistent and contradictory reports as noted by various medical providers—which even varied at trial between direct and cross examination—are simply too many and too varied to ignore as *de minimus* given the advanced state of bone-on-bone degeneration in both knees at issue here. Thus, the Arbitrator finds that Petitioner's testimony is unreliable and turns to the medical opinions offered by Petitioner's treating physician and Respondent's Section 12 examiner.

Dr. Nikkel and Dr. Wardell opined on causal connection based on the medical records and x-rays available to them and Petitioner's history as reported to each. Dr. Nikkel understood a different mechanism of injury reported by Petitioner than that reported to Dr. Niemeyer at MedWorks, Dr. Jain, or Dr. Wardell. Indeed, none of the latter physicians noted any report by Petitioner of an injury to the left knee or bilateral knees on April 5, 2012. Additionally, Dr. Nikkel admitted that he did not have any of Petitioner's medical records pre-dating her April 5, 2012 accident or even Petitioner's medical records from after her accident. He based his diagnoses, treatment recommendations, and causal connection opinions on the information he obtained and the history given to him by Petitioner.

Both doctors agree that Petitioner had severe, pre-existing degenerative joint disease in both knees. But Dr. Nikkel's causal connection opinion was offered without the benefit of significantly more information than was available to Dr. Wardell. Dr. Nikkel did not have Petitioner's 2008 x-rays, knowledge of her bilateral knee injury or condition in 2008, or the inconsistencies notable in the reported mechanism of injury given to Dr. Niemeyer or Dr. Jain after her accident and before seeing him for the first time. Given that Petitioner's bilateral knee x-rays taken four years before her accident show the same type of bone-on-bone changes and severe osteoarthritis noted in Petitioner's 2012 x-rays, and Petitioner's varying reports to all of the examining doctors, the Arbitrator finds the opinions of Dr. Wardell to be persuasive. Specifically, the Arbitrator finds Dr. Wardell's opinion that Petitioner's accident did not cause, aggravate, or accelerate her bilateral knee condition to be persuasive. Dr. Wardell simply had a more comprehensive understanding of Petitioner's pre-existing condition and post-accident medical care than did Dr. Nikkel.

Thus, in light of the record as a whole, the Arbitrator finds that Petitioner sustained a right hip strain as a result of the undisputed accident at work on April 5, 2012 and further finds that her bilateral knee condition is not causally related to the accident. By extension, all other issues related to the bilateral knees are rendered moot and all requested compensation and benefits related to the bilateral knees are denied.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

"Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (4th Dist. 2011) (*citing University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1st Dist. 1992)). Whether a medical expense is either reasonable or necessary is a question of fact to be resolved by the Commission, and its determination will not be overturned on review unless it is against the manifest weight of the evidence. *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 534 (1st Dist. 2001).

At trial, the parties stipulated that the bill from MedWorks for $1,168.90, if it remained unpaid, should be paid by Respondent pursuant to Sections 8(a) and 8.2 of the Act. This bill is for medical treatment after Petitioner's accident at work. Thus, the Arbitrator awards payment of this bill.

The remaining bills submitted into evidence relate to medical treatment for Petitioner's bilateral knee condition. Petitioner testified her husband's group insurance paid (BlueCross/BlueShield) paid medical bills on her behalf and Petitioner's Exhibit 1 reflects payment in the amount of $96.232.79. Petitioner requests payment by Respondent directly to her for that sum of money so that she could reimburse Blue Cross/Blue Shield. As explained in the causal connection analysis above, the Arbitrator finds that Petitioner's bilateral knee condition is not causally related to her accident at work and, by extension, the Arbitrator finds no evidence that the medical treatment for the bilateral knee condition was reasonable or necessary to alleviate Petitioner from the effects of her accident at work resulting in a right hip strain. Thus, Petitioner's claim for reimbursement or payment of these bills is denied.

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

Petitioner claims that she is entitled to temporary total disability benefits for the disputed period beginning July 26, 2012 through March 21, 2013. As explained above, the Arbitrator finds that Petitioner's bilateral knee condition is not causally related to her accident at work. The period of disputed temporary total disability benefits beginning on July 26, 2012 was for time off work during medical treatment for the bilateral knees. Petitioner's medical treatment for the right hip ended before this date.

Based on the foregoing, Petitioner's claim for temporary total disability benefits beginning July 26, 2012 through March 21, 2013 is denied. As stipulated by the parties, Petitioner is entitled to temporary total disability benefits from May 4, 2012 through May 23, 2012 and Respondent shall received a credit for $691.43 for temporary total disability benefits paid to Petitioner.

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

Based on the record as a whole, which reflects that Petitioner sustained a right hip contusion and strain as explained in detail above, the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 5% loss of use of the right leg pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronele DeGroot,

Petitioner,

vs. NO: 13 WC 16104

O'Reilly Auto Parts,

16IWCC0090

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, notice, medical expenses, both incurred and prospective, temporary total disability and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

Petitioner sustained a compensable injury to her right leg on December 12, 2012. That injury is being litigated in case number 13 WC 16105. Petitioner alleges that on March 29, 2013, while getting physical therapy on that right knee, she noticed significant immediate pain in her left knee while performing a stool exercise. (Transcript Pgs. 37-40)

The records of Kewanee Physical Therapy do not mention any left knee pain at the March 29, 2013 visit. There is no mention as to the type of exercises performed on that date. John Debord, the certified athletic trainer of Kewanee therapy, prepared a letter on August 22, 2013. He prepared this letter because he was asked to clarify what happened to Petitioner's left knee. He admitted that Petitioner was not in his constant vision during her visits and that Mr. Boss was the individual who directly worked with Petitioner. (Petitioner Exhibit 11 Pgs. 13-16) He testified that he "remembers" speaking with Petitioner on March 29, 2013 after he was informed of the Petitioner complaining of pain in her left knee. He spoke with her, felt that her complaints were a non-finding, and did not merit anything further.

He claimed that was why nothing was mentioned in that day's record. He further admitted that when he prepared the letter for his deposition, all he had was the Kewanee Physical Therapy notes.

The Commission finds the testimony of John Debord not credible or persuasive. The Petitioner mentioned nothing about significant immediate left knee pain on March 29, 2013. However, on April 1, 2013, Kewanee Physical Therapy note indicates Petitioner gave a history that she had really been sore over the weekend but mostly in her non-surgical knee. She stated that she did a lot of stair climbing on Saturday that may have aggravated it. Most importantly, there does not appear to be any history given of the exercises performed on Friday as being the cause of her left knee pain. It also does not appear that any treatment was provided for the left knee. (Petitioner Exhibit 8)

Dr. Stewart offered testimony of a causal connection between the Petitioner's stool exercise and the left knee pain, which began on March 29, 2013. However, Dr. Thomas assumed that the history presented to him was truthful and correct. (Petitioner Exhibit 10 Pg.5) Although he was aware that Petitioner made no complaints of left knee pain on March 29, 2013, he was not aware of the history given Kewanee Therapy on April 1, 2013. The only record he had following the March 29, 2013 date is the records from April 9, 2013. The Doctor admitted that it might or could change his opinion regarding causation if Petitioner made no mention of injuring her left knee on March 29, 2013 during the April 1, 2013 visit. (Petitioner Exhibit 10 Pgs. 20-22)

The Commission finds the Petitioner's and Mr. Debord's testimony lacking in credibility. The Commission finds the Kewanee Physical Therapy records to be credible and therefore reverses the Arbitrator's decision and finds that the Petitioner failed to prove that she sustained accidental injuries on March 29, 2013.

All other issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision finding that the Petitioner sustained accidental injuries arising out of and in the course of her employment on March 29, 2013 is reversed.

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.

16IWCC0090

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

DATED: FEB 1 - 2016

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

HSF
O: 12/2/15
049

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

DeGROOT, RONELE
Employee/Petitioner

Case# **13WC016104**
13WC016105

O'REILLY AUTO PARTS
Employer/Respondent

16IWCC0090

On 4/20/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0080 WINNE LAW OFFICE LLC
JOSEPH E WINNE
416 MAIN ST SUITE 300
PEORIA, IL 61602

2542 BRYCE DOWNEY & LENKOV LLC
EDWARD JORDAN
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

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
19(b)

Ronele DeGroot
Employee/Petitioner

v.

O'Reilly Auto Parts
Employer/Respondent

Case # **13** WC **16104**

Consolidated cases: **13 WC 16105**

16IWCC0090

An *Application for Adjustment 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 27, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident 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

16IWCC0090

FINDINGS

On the date of accident, **March 29, 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 $**17,561.96**; the average weekly wage was $**337.73**.

On the date of accident, Petitioner was **56** 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 $**4,056.66** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**4,056.66**.

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 $**253.00**/week for **80 2/7** weeks, commencing **July 15, 2013** through **January 27, 2015** as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $**4,056.66** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, as provided in Sections 8(a) and 8.2 of the Act and Respondent shall be given a credit for medical benefits that have been paid.

Respondent shall authorize and pay reasonable and necessary medical expenses associated with the left knee arthroscopic surgery prescribed for the Petitioner by Dr. Stewart, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Arbitrator Anthony C. Erbacci

April 10, 2015
Date

13 WC 16104
ICArbDec19(b)

APR 20 2015

FACTS:

The Petitioner filed two Applications for Adjustment of Claim and the matters were consolidated for hearing. Claim number 13 WC 16105 alleges an injury to the Petitioner's left ankle and right knee on December 12, 2012. Claim number 13 WC 16104 alleges an injury to the Petitioner's left knee on March 29, 2013. The matters are addressed by separate Arbitration Decisions.

On December 12, 2012 the Petitioner sustained undisputed accidental injuries arising out of and in the course of her employment with the Respondent. The Petitioner testified that she had delivered some parts to a customer and was exiting the customers building when she tripped on the threshold of the exit door and fell forward twisting her left ankle and striking her right shin and knee on the ground. The Petitioner reported her injury to the Respondent and sought medical treatment that same day at Kewanee Hospital.

The records of Kewanee Hospital demonstrate that the Petitioner was seen there on December 12, 2012. A history of the Petitioner's fall is noted as well as complaints regarding her left ankle, and her right shin and knee. X-rays of the Petitioner's left ankle and right knee were performed and were reported to reveal no acute fractures or dislocations, soft tissue swelling, and osteoarthritic changes. The Petitioner was diagnosed with a left ankle sprain and was prescribed an air cast and pain medication. The Petitioner was directed to follow up with her personal physician.

The Petitioner then sought treatment from Dr. Timothy Pratt on December 17, 2012. The Petitioner reported a history of her injury on December 12, 2012 and complained of continuing left ankle pain as well as pain, swelling, and bruising on her right leg from the knee downward to the middle of the lower leg. Dr. Pratt prescribed the Petitioner off work for the rest of the week. The Petitioner followed up with Dr. Pratt on January 11, 2013 and Dr. Pratt noted that the Petitioner's right knee continued to have some swelling, bruising, and soreness. Dr. Pratt returned the Petitioner to light duty work and prescribed an MRI of the Petitioner's right knee.

An MRI of the Petitioner's right knee was performed on January 17, 2013 and was reported to demonstrate diffuse tricompartmental chondromalacia with moderate to severe involvement of the patella and mild involvement of medial and lateral compartments, horizontal tear and mild lateral extrusion of the body of the lateral meniscus, and radial oblique tear of the posterior horn of the lateral meniscus near the meniscal root.

The Petitioner next presented to Dr. Mark Stewart on referral from Dr. Pratt. The Petitioner saw Dr. Pratt on February 12, 2013 and she reported a history of right knee pain since December 12, 2012 when she sprained her left ankle and fell on the right leg. Dr. Stewart's physical examination noted tenderness along the medial joint line of the right knee and a positive McMurray's test. Dr. Stewart indicated that the Petitioner's MRI was consistent with a medial meniscal tear of the right knee and he recommended that the Petitioner undergo an arthroscopy of the right knee.

The Petitioner testified that she returned to work with the Respondent on a light-duty basis beginning January 11, 2013 and that she continued to work in a light-duty capacity until undergoing right arthroscopic surgery with Dr. Stewart on March 14, 2013.

On March 14, 2013, Dr. Stewart performed a right knee arthroscopy with lateral meniscal tear debridement at Hammond-Henry Hospital. Dr. Stewart's postoperative diagnosis was lateral meniscal tear of the right knee. Post surgically, Dr. Stewart prescribed physical therapy 2-3 times a week for 4-6 weeks and on March 18, 2013 the Petitioner began a course of physical therapy at Kewanee Physical Therapy & Rehab Specialists. The Petitioner's physical therapy was performed by physical therapist Jon DeBord and student physical therapist, Miranda Boss.

The Petitioner testified that on March 29, 2013, she was at Kewanee Hospital Physical Therapy performing an exercise that required her to sit on a stool with four wheels and casters and use her heels and feet to slide her chair and body down and back across a room. The Petitioner testified that while she was performing that exercise, she felt pain in her left knee like she had never had before. She testified that she told the physical therapist about her pain and that the exercise was then stopped.

The Petitioner testified that the physical therapy incident occurred on a Friday, and she returned to therapy on a Monday. Petitioner testified that during the week-end following the physical therapy incident, her left knee felt unusual and she had trouble going up and down the stairs of her home. The Petitioner testified that both of her knees hurt, but her left knee was really bothering her. The Kewanee Hospital Physical Therapy records from March 29, 2013 note that the Petitioner reported that her knee was a little sore after last visit from the new exercises, but that she iced it a lot and it was feeling better.

The Petitioner testified that she informed her supervisor, Dave Allensworth, that she hurt her left knee in physical therapy. The Petitioner testified she may have also informed Jen Peed, the assistant Manager for Respondent, that she had hurt her left knee in physical therapy. The Petitioner testified that she continued with physical therapy with therapy concentrating on the left knee after March 29, 2013.

The April 10, 2014 deposition testimony of Jon DeBord was admitted into the record as Petitioner's Exhibit 11. Mr. DeBord testified that on March 29, 2013, the Petitioner was performing a stool walking exercise and reported pain in the posterior aspect of her left knee. Mr. DeBord testified that after the Petitioner complained of pain in the left knee, the exercise was stopped. Mr. DeBord testified that when the Petitioner presented for therapy again on April 1, 2013, she complained of soreness in her non-surgical left knee and reported that she had done more stair climbing over the weekend which she felt may have aggravated it as well. On April 5, 2013, the Petitioner followed up in physical therapy and reported an increase in soreness in her left knee that had been painful and sore since the prior Friday, March 29, 2013. Mr. DeBord testified that the Petitioner indicated to him that she felt that the stool walking performed on the 29th of March had cause the discomfort.

Mr. DeBord testified that it was his opinion that the mechanics of the Petitioner's December 12, 2012 injury were consistent with the findings that he saw in her right leg. Mr.

DeBord further opined that there was a direct relationship between the Petitioner's accident of December 12, 2012 and the right knee condition for which he treated the Petitioner. Mr. DeBord also opined that the mechanics of the Petitioner's March 29, 2013 injury in physical therapy were consistent with her left knee complaints. Mr. DeBord opined that the Petitioner's left knee condition was aggravated by the exercises of March 29, 2013.

On April 22, 2013 the Petitioner returned to Dr. Stewart and reported complaints of left knee pain since March 29, 2013. Dr. Stewart noted that the Petitioner reported that she was pulling herself on a stool across a carpet in physical therapy at Kewanee Hospital when she started developing left knee pain and that the pain was getting worse. The Petitioner was noted to have complaints of constant pain, swelling, weakness, and stiffness. Dr. Stewart's diagnosis was left knee pain and he recommended that the Petitioner remain off work. On May 8, 2013 Dr. Stewart noted tenderness along the medial joint of the Petitioner's left knee and a positive McMurray's test on the left side. Dr. Stewart recommended the Petitioner undergo an MRI of the left knee which was performed on June 25, 2013 and was reported to demonstrate a small partial radial tear of the posterior horn of the medial meniscus, moderate sized irregular radial tear in the anterior junction of the medial meniscus, full-thickness cartilage loss across the medial mid weight-bearing surface tibial plateau and femoral condyle, and moderate subjacent bone stress edema in the medial tibial plateau subjacent to the meniscus tear. The MRI was also noted to demonstrate moderate patellofemoral osteoarthritis.

The Petitioner followed up with Dr. Stewart on July 15, 2013 and reported continued complaints of pain in the left knee as well as some right knee pain in the frontal aspect. Dr. Stewart indicated that the Petitioner's left knee condition was consistent with a medial meniscal tear of the left knee and he recommended the Petitioner undergo a left knee arthroscopy. Dr. Stewart continued the Petitioner off work and the Petitioner testified that Dr. Stewart has not released her to return to work since that time.

The April 10, 2014 deposition testimony of Dr. Stewart was admitted into the record as Petitioner's Exhibit 10. Dr. Stewart opined that the Petitioner's December 12, 2012 accident caused the condition of ill-being in the Petitioner's right knee and the need for the surgery he performed on that knee. Dr. Stewart further opined that the Petitioner's physical therapy activities on March 29, 2013 caused the onset of the Petitioner's left knee condition and the need for the surgery he has prescribed for the Petitioner's left knee. Dr. Stewart testified that when he last saw the Petitioner on July 15, 2013 her right knee had healed but she was still in need of the left knee arthroscopy that he had prescribed for her.

At the request of the Respondent, the Petitioner was examined by Dr. Lawrence Lieber on July 22, 2013. Dr. Lieber authored a report summarizing his examination and findings relating to the Petitioner's December 12, 2012 and March 29, 2013 injuries and, after being provided with additional medical records, he authored an addendum report providing additional opinions relating to the causal relationship between Petitioner's bilateral knee conditions.

The August 21, 2014 deposition testimony of Dr. Lieber was admitted into the record as

Respondent's Exhibit 1. Dr. Lieber testified that the Petitioner's right knee complaints on July 22, 2013 included pain with ambulation and weakness, and she reported that she received no relief from the surgical intervention. Dr. Lieber testified that the Petitioner's right knee had tenderness about the medial and lateral joint line, a positive McMurray and Steinman test, and tenderness about the patellofemoral joint. Dr. Lieber testified that the Petitioner reported that her left knee bothered her with ambulation, stairs, and bending and that she had problems with her left knee giving way and being painful at night. Dr. Lieber noted decreased range of motion due to pain, tenderness to palpation over the medial and lateral joint line, a positive McMurray and Steinman test, and tenderness about the patellofemoral joint. Dr. Lieber indicated that the MRI of the Petitioner's left knee demonstrated evidence of a possible small partial radial tear in the posterior horn of the peripheral aspect of the medial meniscus with some patellofemoral degenerative change.

Dr. Lieber's assessment was status post arthroscopy, partial lateral meniscectomy, of the right knee and internal derangement of the left knee. Dr. Lieber opined that there was no causal relationship between the Petitioner's present complaints and the December 12, 2012 work injury, that the Petitioner had no evidence of any disability or functional impairment, and that the Petitioner was at maximum medical improvement in association with the December 12, 2012 injury and required no further treatment. Dr. Lieber opined that the need for the arthroscopic surgery that Dr. Stewart performed on the Petitioner's right knee, and the appropriate treatment afterward, up to July 22, 2013 was caused by the December 12, 2012 accident but that the Petitioner's present right knee complaints are related to pre-existing abnormalities that were neither caused, aggravated, nor related to the December 12, 2012 event and subsequent treatment.

Dr. Lieber testified that with regard to the Petitioner's left knee condition, he did not believe that the March 2013 therapy event placed significant force across the knee that would cause any symptomatic complaints or any pathology within the knee to warrant the symptoms and any further treatment. Dr. Lieber opined that under no circumstances could the mechanics of the Petitioner pulling herself across the carpet with her heels have caused the condition in her left knee that was diagnosed by Dr. Stewart and for which he recommended surgery.

On cross-examination, the Petitioner acknowledged that she did have pain in her right knee in October of 2010 while she was bowling. On October 6, 2010, the Petitioner was evaluated at Sheffield Family Medical Center where she was diagnosed with right popliteal pain, swelling, and a baker's cyst. Medical records from Perry Memorial Hospital demonstrate that the Petitioner underwent x-rays of her right knee on October 15, 2010 which were reported to demonstrate moderate osteoarthritis with narrowing of the patellofemoral joint. The Petitioner followed up with Sheffield Family Medical Center for her right knee pain on November 3, 2010. At that time, it was noted that the Petitioner might need an MRI if she did not get better and the Petitioner was prescribed a medrol dose pack. On December 9, 2010 the Petitioner followed up with Dr. Pratt of the Sheffield Medical Center complaining of left axillary/chest wall pain for the last 2 days with a history of hypertension and some diffuse arthralgias. There is no mention of right knee complaints in Dr. Pratt's December 9, 2010 record.

The Petitioner testified that she did not recall having had left knee problems prior to March 29, 2013. Medical records from Perry Memorial Hospital, however, indicate that on November 17, 2003, x-rays were obtained of the Petitioner's left knee and were reported to demonstrate moderate joint effusion, moderate degenerative changes, and no acute osseous abnormalities. An MRI of the Petitioner's left knee was also performed on November 17, 2003 and was reported to demonstrate evidence of moderate joint effusion, evidence of narrowing of both joint compartments, and no evidence of meniscal tear. The Petitioner testified that she was never placed on any restrictions after her left knee evaluation in November of 2003 and that she was never placed on any type of restrictions after her right knee evaluation in October of 2010. The Petitioner testified on cross-examination that she did not have left knee pain after her initial fall on December 12, 2012.

The Petitioner testified that currently she continues to have pain in both of her knees, as well as her hips and her back, and that she has difficulty walking on uneven ground. The Petitioner testified that she would like to avail herself of the left knee surgery prescribed for her by Dr. Stewart.

CONCLUSIONS:

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

The Petitioner sustained an undisputed right knee injury which arose out of and in the course of her employment with the Respondent on December 12, 2012. That injury is the subject of the Arbitrator's Decision issued in case number 13 WC 16105. The Petitioner treated initially for that injury with Dr. Pratt who ordered an MRI and referred the Petitioner to Dr. Stewart. Dr. Stewart diagnosed the Petitioner as having a meniscal tear and he performed a right knee arthroscopy on March 14, 2013. Dr. Stewart's postoperative diagnosis was lateral meniscal tear of the right knee. Post surgically, the Petitioner underwent a course of physical therapy at Kewanee Physical Therapy & Rehab Specialists.

The Petitioner testified that on March 29, 2013, while she was undergoing post-surgical physical therapy for her right knee, she was performing an exercise that required her to pull herself across a carpeted floor while she was seated on a wheeled stool. The Petitioner testified that while she was performing that stool walking exercise she experienced an onset of pain in her left knee. The Petitioner testified that she advised the physical therapist and the exercise was stopped. The Petitioner also testified that she told her boss, Dave Allensworth, of the physical therapy incident. The Petitioner testified that she did not recall exactly when she notified Dave Allensworth of the incident but she thought it was sometime in the week following the incident.

The Petitioner returned to physical therapy on April 1, 2013 and it was noted that the Petitioner reported that she was sore in her "nonsurgical" knee. The April 5, 2013 record from Kewanee Physical Therapy indicates that the Petitioner reported that her knee had been extremely sore and painful since last Friday and that Petitioner recalled having discomfort with the stool walking exercise. The Petitioner underwent a Functional Progress Examination on April 9, 2013 which reported that she was able to return to work in light or medium duty.

The Petitioner saw Dr. Stewart on April 22, 2013 and complained of left knee pain since pulling herself on a stool in physical therapy on March 29, 2013 Dr. Stewart diagnosed the Petitioner with left knee pes anserine bursitits and restricted her from work activities. Dr. Stewart recommended additional physical therapy and a left knee x-ray. Petitioner testified that she continued to have right and left knee pain during physical therapy but that the focus of her physical therapy shifted to her left knee. The Petitioner's left knee x-ray on April 22, 2013 was reported to show tri-compartamental osetoarhritis. Dr. Stewart then recommended a left knee MRI which was performed on June 25, 2013 and was reported to demonstrate a small partial radius tear of the medial meniscus, osteoarthritis and a large joint effusion.

On July 15, 2013 the Petitioner returned to Dr. Stewart who diagnosed Petitioner with a left knee medial meniscus tear and recommended left knee surgery and work restrictions. The Petitioner testified that she has not seen Dr. Stewart since July 15, 2013 and that she has not had the prescribed left knee surgery. The Petitioner testified that she continues to have right and left knee pain and that that Dr. Stewart has not released her to return to work.

Based upon the foregoing and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that on March 29, 3013 an accident did occur which arose out of and in the course of the Petitioner's employment with the Respondent. The Arbitrator further finds that timely notice of the injury was provided to the Respondent.

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

The Arbitrator finds that Petitioner's current condition of ill-being in her left knee is causally related to the accident of March 29, 2013. In so finding, the Arbitrator notes the Petitioner's testimony as to a lack of left knee complaints prior to the physical therapy incident and the corroborative testimony of Petitioner's treating doctor, Dr. Stewart, and Petitioner's physical therapist, Jon DeBord.

Dr. Stewart testified that the act of Petitioner using her heels to move across carpeting while in physical therapy caused the onset of Petitioner's pain and left knee condition. Dr. Stewart testified that his findings from his examination of Petitioner after both of Petitioner's injuries were consistent with the mechanics of the injury itself. Dr. Stewart testified that according to this record, it appears that Petitioner had an onset of pain while engaging in the stool walking physical therapy exercise. Dr. Stewart opined that the Petitioner's physical therapy activities on March 29, 2013 caused the onset of the Petitioner's left knee condition

and the need for the surgery he has prescribed for the Petitioner's left knee. Dr. Stewart testified that when he last saw the Petitioner on July 15, 2013 her right knee had healed but she was still in need of the left knee arthroscopy that he had prescribed for her. Dr. Stewart testified that if the Petitioner's left knee symptoms remained the same as they were in July of 2013, then he would recommend an arthroscopy of the left knee with a mensical tear debridement.

Physical therapist Jon DeBord testified that the Petitioner did not have any left knee problems or complaints prior to her incident in physical therapy on March 29, 2013. DeBord also testified that the mechanics of the Petitioner's March 29, 2013 injury in physical therapy were consistent with her left knee complaints. Mr. DeBord opined that the Petitioner's left knee condition was aggravated by the exercises of March 29, 2013.

While the Arbitrator notes the opinions of Dr. Lieber, the Arbitrator finds those opinions to be less reliable and less persuasive than the opinions of Dr. Stewart in the instant matter. Dr. Lieber's testimony that under no circumstances could the physical therapy incident have caused Petitioner's left condition is not persuasive in light of the credible testimony of Petitioner and her physical therapist regarding the onset of left pain following the March 29, 2013 and the absence of left knee problems prior to the physical therapy exercise. Based on the above, the Arbitrator finds that Petitioner has proven causal relationship with regard to her injury on March 29, 2013 and the condition of ill-being in her left knee. The Arbitrator further finds that the left knee arthroscopy prescribed for the Petitioner by Dr. Stewart is reasonable, necessary and causally related medical treatment for which the Respondent is responsible.

The Arbitrator notes that no medical opinions relating to the Petitioner's back or hip complaints, or evidence of any recommendation or prescription for treatment to the Petitioner's hips or back, was offered into the record. The Arbitrator finds, therefore, that the Petitioner failed to prove any condition of ill-being in her hips or her back which is causally related to either the December 12, 2012 work injury or the March 29, 2013 injury. Additionally, the Arbitrator finds that the Petitioner failed to prove that she is in need of or entitled to any prospective medical treatment for her hips or her back.

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 as Petitioner's Exhibit 2, evidence of medical expenses incurred as a result of her work related injuries. The Respondent introduced as Respondent's Exhibit 6, evidence of the medical expenses the Respondent has paid on behalf of the Petitioner. The parties stipulated that the Respondent is entitled to credit for any and all of the medical expenses it has paid on behalf of the Petitioner.

The Arbitrator finds that the medical services that were provided to the Petitioner for

her left knee were reasonable and necessary. Based on the Arbitrator's findings with regard to Issue (F), the Arbitrator finds that Respondent is liable for the medical bills included within Petitioner's Exhibit 2 limited to the Illinois Medical Fee Schedule. Respondent shall be given a credit for all medical bills it has paid as indicated in Respondent's Exhibit 6.

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

The Arbitrator finds Petitioner was already being kept off work by Dr. Stewart on March 29, 2013 following her previous right knee arthroscopic procedure on March 14, 2013. The Arbitrator finds that Dr. Stewart continued the Petitioner off work in his follow-up examinations between April 22, 2013 and July 15, 2013. Dr. Stewart testified that Petitioner has been kept off work since his last examination on July 15, 2013 and the Petitioner testified that, as of the date of hearing, Dr. Stewart has not released her to return to work.

Based on the testimony of Dr. Stewart and the Petitioner and in light of the Arbitrator's findings and conclusions relating to the issues of Accident and Causation, the Arbitrator finds that the Petitioner has remained temporarily and totally disabled as a result of her March 29, 2013 accidental injury since July 15, 2013 through the date of the Arbitration hearing on January 27, 2015.

08WC51604

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

Alfred Joiner

Petitioner,

vs. No. 08 WC 51604

Ceco Concrete Construction,

Respondent. **16IWCC0091**

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to multiple filings:

1) The Petitioner's Petition for Review, as was filed on July 27, 2015;
2) The Motion to Vacate the Settlement Contract as was approved on July 24, 2015, by Petitioner's former counsel, Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel, P.C., and;
3) The Petition for Penalties and Fees filed on October 22, 2015, by Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel, P.C.

FACTS AND PROCEDURAL HISTORY

The Commission believes that a recitation of the procedural history is necessary to understand the issues in this matter.

Petitioner filed an Application for Adjustment of Claim on November 21, 2008. Petitioner claimed that he suffered a work-related injury to his low back on September 15, 2008. At the time, Petitioner was represented by Neal Wishnick of Sostrin & Sostrin, P.C.

On June 24, 2010, Petitioner discharged Sostrin & Sostrin, P.C., and retained Andrew Leonard of the Leonard Law Group. On July 1, 2010, Sostrin & Sostrin, P.C., filed a Petition for Attorney's Fees and Costs. On August 24, 2010, Arbitrator Joseph Prieto continued the hearing on the fee petition until disposition of the case.

On September 9, 2014, Petitioner filed a Stipulation to Substitute Attorneys, indicating that Petitioner would be represented by Francine Fishel of Brill & Fishel, P.C., and discharging the Leonard Law Group from further representing Petitioner. Subsequent to its discharge, Leonard Law Group filed a Petition for Fees, which was deferred to the disposition of the case.

On June 29, 2015, Brill & Fishel, P.C., received a settlement offer from Respondent of $290,000.00, which it conveyed to Petitioner.

08WC51604

On July 9, 2015, Petitioner terminated the services of Brill & Fishel, P.C. That same day, Brill & Fishel, P.C., filed a Petition for Fees.

Running concomitantly was Petitioner's Common Law action pending in the Circuit Court of Cook County under Case Nos. 10 L 10589 and 13 L 4355, as described in the documents listed below. Said matters included multiple defendants, including Ceco, the workers' compensation Respondent.

On July 21, 2015, Petitioner, represented by Mr. Thomas Plouff of Costello, McMahon, Burke & Murphy, Ltd., who was present at the negotiations, entered into a Global Settlement Agreement and Release which consisted of three pages. Said Global Settlement Agreement and Release (hereinafter "Global Agreement") was thereafter attached to and made part of the Settlement Contract Lump Sum Petition and Order (hereinafter "Settlement Contract"), with Respondent, represented by Michael E. Rusin of Rusin & Maciorowski, Ltd. Said Global Settlement indicated that Petitioner was receiving a combined settlement of $750,000.00, with $430,000.00 being paid by Alko, et al and $320,000.00 being paid by Ceco.

The aforementioned Settlement Contract attached a copy of the Global Agreement and made it a part thereof. This Settlement Contract was submitted to an Arbitrator for approval.

On the Settlement Contract form, Respondent's counsel scratched out the sentence: "I attest that any fee petitions on file with the IWCC have been resolved." The Global Agreement states in pertinent part:

> "This global settlement also resolves Joiner's pending Workers Compensation claim for one dollar ($1.00). Joiner has filed an Illinois workers compensation claim against Ceco Concrete Construction that is pending before the Illinois Workers Compensation Commission as case number 08 WC 51604. Joiner agrees to settle the third party case *of Joiner v. Alko Construction and Development, Inc., et. al.,* Circuit Court of Cook County Law Division (Case No. 10 L 10589) for the above total sum and agrees to execute a lump sum settlement contract in the form attached hereto as Exhibit A (a copy of the Settlement Contract)....Joiner acknowledges that he must resolve all attorney fee petitions and issues. No additional sums will be paid by Releasees for attorney fees which are solely Joiner's responsibility.
>
> In addition, as set forth in the settlement contract, CECO does hereby agree to waive its worker's compensation lien against Joiner it its entirety. In consideration of the waiver of the workers compensation lien and the payment made by CECO to Joiner as described above...Joiner agrees to hold harmless and indemnify the Releasees from all claims, damages, costs, expenses, attorney's fees, demands, liens, actions, subrogation or suit brought by Joiner or anyone on Joiner's behalf or subrogating to Jointer's interest as a result of the aforementioned occurrence. Joiner also agrees to pay his own attorney's fees in this matter....Joiner further agrees and

affirmatively states that he has read all of the terms and provisions of this Global Settlement Agreement and Release and affirmatively states that he is being represented by legal counsel in this matter and understands all of the terms used and their significance and that this Global Settlement Agreement and Release has been signed voluntarily."

As a result of the execution of these documents, the parties submitted Settlement Contracts to an Arbitrator for approval.

Also on July 21, 2015, Mr. Thomas Plouff sent a letter to Francine Fishel regarding the Settlement Contract and Global Agreement, as well as Ms. Fishel's attorney's fee. In the letter, Mr. Plouff stated that it was in Petitioner's "best interests to settle the workers compensation case for $1.00, with a lien waiver" but failed to explain his opinion. Plouff then indicated that: "...[U]nder the terms of your fee agreement with [Petitioner] you would be entitled to 20% of $1.00." Mr. Plouff notified Ms. Fishel by written correspondence that: "Mr. Rusin will appear this Friday at 9:00 a.m. before Arbitrator Kane to obtain approval of a lump sum settlement contract for $1.00, with a hearing at a later date on filed fee petitions. Mr. Rusin we understand will provide to you formal notice for the July 24, hearing." Said correspondence was attached to and made a part of the Amended Petition for Fees that was filed by Brill & Fishel on July 24, 2015.

By the same correspondence, Plouff explained that he felt Fishel's fee for her services is $.20 and noted that he offered her $10,000.00 for her fees as a "professional courtesy." Mr. Plouff explained that his "offer to pay you and your firm $10,000.00, which will come out of our attorney fee on the third party case, which legally you have no interest in, expires as of 5:00 p.m. on July 23, 2015. This amount is in full satisfaction of any attorney fees you claim because of working for [Petitioner]....Should you not accept this offer, [Petitioner] will argue that your attorney fee is $.20."

On July 24, 2015, Arbitrator David Kane held a hearing on the Settlement Contract submitted by Rusin & Maciorowski, Ltd., and the fee petitions filed by Petitioner's former attorneys, as all were present. Arbitrator Kane noted at hearing that Petitioner's workers' compensation case "was settled on the third-party basis, and there was apparently a lack of agreement or lack of understanding with regard to the fees due under Workers' Comp with a third-party attorney." (July 24, 2015-T.3) The Arbitrator further noted that he spoke to Petitioner, off the record, and asked him if he agreed with the settlement contract, the attorney's fees, and the division of attorney's fees, to which Petitioner testified that he agreed. (July 24, 2015-T.4-5)

Petitioner testified that prior to discharging Brill & Fishel, P.C., Francine Fishel had conveyed to him an offer of settlement on the workers' compensation case of $290,000.00 and that Ms. Fishel indicated that they would continue to negotiate the amount. (July 24, 2015-T.6) Petitioner testified that Ms. Fishel was later informed that Petitioner had retained counsel, Thomas Plouff, on the common law case stemming from the work accident. (July 24, 2015-T.6) Petitioner explained that Mr. Plouff was going to contact Ms. Fishel regarding Petitioner's case. (July 24, 2015-T.6-7) Petitioner later became aware that Mr. Plouff failed to contact Ms. Fishel prior to mediation on the common law claim. (July 24, 2015-T.7)

Petitioner testified that during mediation, Mr. Plouff called Ms. Fishel, with Petitioner's knowledge and understanding, and advised Ms. Fishel that there was an offer on the table for $350,000.00, with $175,000.00 coming from the third-party defendant and the other $175,000.00 from Respondent with a waiver of the Workers' Compensation Lien. (July 24, 2015-T.7-8) Petitioner testified that Ms. Fishel then called him and explained that she was representing him on the Workers' Compensation claim and advised Petitioner not to sign anything regarding the Workers' Compensation claim without calling her first. (July 24, 2014-T.8) Petitioner agreed to call Ms. Fishel, but never did again. (July 24, 2015-T.8)

Plouff ultimately settled all claims for $750,000.00, $320,000.00 from Respondent for the Workers' Compensation claim, together with a waiver of the Workers' Compensation Lien. (July 24, 2015-T.8-9) Petitioner signed the Global Agreement on July 7, 2015, on Plouff's advice. (July 24, 2015-T.9) The Petitioner fired Brill & Fishel as his Workers Compensation attorney on July 9, 2015, by letter.

Petitioner testified that he read the Global Agreement and the Settlement Contract presented to the Arbitrator and that he understood that the agreement did not include future medical benefits and that his Medicare benefits may be affected by the settlement. (July 24, 2015-T.10-11) Petitioner testified that he was aware that he was responsible for attorney's fees regarding his Workers' Compensation case per the fee agreement he signed with each of his Workers' Compensation attorneys. (July 24, 2015-T.11-12) Petitioner testified that he was aware that had he settled his Workers' Compensation claim separate from the common law claim he would have paid a total of $64,000.00 in Workers' Compensation attorney's fees to Sostrin & Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel, P.C. (July 24, 2105-T.12)

Respondent's counsel, Michael Rusin from Rusin & Maciorowski, Ltd., stated on the record that part of the overall settlement agreement includes a $320,000.00 contribution from the Workers' Compensation Insurer. (July 24, 2015-T.4) The Arbitrator noted that the $320,000.00 was the "basis for which the fee would have to be determined." (July 24, 2015-T.4)

After an off the record discussion regarding a Proposed Order, regarding the payment and distribution of fees in the workers' compensation matter, Petitioner agreed to pay Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel upon receipt of the settlement proceeds as set forth in the order. (July 24, 2015-T.16) Arbitrator Kane then agreed to approve the Settlement Contract and the Order indicating that Petitioner was to pay his prior Workers' Compensation attorneys $21,333.33 each within 30 days of receipt of the settlement proceeds. (July 24, 2015-T.16-17)

The Settlement Contract was approved by Arbitrator David Kane on July 24, 2015, at the conclusion of the hearing. The Arbitrator's Order indicating that Petitioner was to pay Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel $21,333.33 each within 30 days of receipt of the settlement proceeds, though executed by the Arbitrator that day, was officially filed with the Commission on July 27, 2015.

On August 12, 2015, Petitioner retained Mark Whiteside as his fourth workers' compensation counsel. Mr. Whiteside filed his Appearance of Representative on August 13, 2015 at the Commission, this despite the entry of the approved settlement.

On August 13, 2015, Petitioner filed a Petition for Review of the Arbitrator's July 27, 2015 Order.

On August 19, 2015, Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel, P.C., filed a Motion to Vacate the Settlement Contract approved by Arbitrator Kane on July 24, 2015.

On October 22, 2015, a Petition for Penalties and Fees was filed by Brill & Fishel, P.C.

On October 30, 2015, Commissioner Michael Brennan conducted a hearing, with counsel present, and continued the matter to allow the parties time to file briefs on the Petition for Review and responses to the Petition for Penalties and Fees and Motion to Vacate the Settlement Contract.

FINDINGS OF THE COMMISSION

It is well established that while a case brought before the Commission is, in essence, an appeal, the Commission has original jurisdiction in all cases which come before it. *Caterpillar Tractor Co. v. Industrial Commission*, 215 Ill.App.3d 229, 237 (1991). Furthermore, "since the Commission has original jurisdiction…the Commission can, unlike the appellate court, consider a new theory of recovery in a case brought on review." *Caterpillar*, 215 Ill.App.3d at 238. The Commission must decide a case on the evidence presented and on the merits of the case before it and must not be restricted to the information provided on a form. But, it must also make certain that a party's substantive rights not be prejudiced by the Commission's relaxation of its requirements. *Caterpillar*, 201 Ill.App.3d at 239-240.

In *Alvarado v. Industrial Commission*, 215 Ill.2d 547, 554 (2005), the Illinois Supreme Court explained that the Act authorizes the Commission to award attorney's fees and to resolve fee disputes. The Court further noted that Section 16(a) of the Act reads, in pertinent part:

> "'Any and all disputes regarding attorneys' fees, whether such disputes relate to which one or more attorneys represents the claimant or claimants or is entitled to the attorneys' fees, or a division of attorneys' fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorneys' fees or contracts for attorneys' fees, shall be heard and determined by the Commission after reasonable notice to all interested parties and attorneys.' *820 ILCS 301/16a(J)* (West 2002)."

Furthermore:

> "With regard to attorney fees, the Act does authorize the Commission to award attorney fees and to resolve fee disputes. For example, *section 16* of the Act states that 'the Commission shall have the power to determine the reasonableness and fix the amount of any fee of compensation charged by any person, including attorneys ***, **for any service performed in connection with this Act, or for which payment is to be made under this Act or rendered in securing any right under this Act.**' *820 ILCS 305/16* (West 2002)." (emphasis added) *Alvarado v. Industrial Commission*, 216 Ill.2d at 554.

Determining and awarding attorney's fees is one of the many powers given to the Commission under the Act. So too is the right of the Commission to interpret settlement contracts put before it.

> "Contract interpretation is a question of law subject to *de novo* review. *Cincinnati Insurance Co. v. Gateway Construction Co.*, 372 Ill. App. 3d 148, 151, 865 N.E.2d 395, 310 Ill. Dec. 71 (2007). The principal goal in construing a contract is to ascertain and give effect to the intent of the parties at the time they executed the document. *Shields Pork Plus, Inc. v. Swiss Valley Ag Service*, 329 Ill. App. 3d 305, 310, 767 N.E.2d 945, 263 Ill. Dec. 219 (2002). In determining the parties' intent, the contract must be construed as a whole, viewing each provision in the light of the other provisions. *Thompson v. Gordon*, 241 Ill. 2d 428, 441, 948 N.E.2d 39, 349 Ill. Dec. 936 (2011). Where the language of a contract is plain, it provides the best evidence of the parties' intent and will be enforced as written. *Carey v. Richards Building Supply Co.*, 367 Ill. App. 3d 724, 727, 856 N.E.2d 24, 305 Ill. Dec. 492 (2006). Nevertheless, we are mindful that a court may properly disregard even unambiguous language when it is clear that the parties meant something different than what was said. *United Airlines, Inc. v. City of Chicago*, 116 Ill. 2d 311, 318-19, 507 N.E.2d 858, 107 Ill. Dec. 705 (1987)." *Loyola University of Chicago v. Illinois Workers' Compensation Commission*, 2015 IL App (1st) 130984WC, ¶23.

In reviewing the Arbitrator's Order and the Settlement Contract, the Commission notes that while the total amount of settlement is listed as $1.00 on one page of the Lump Sum Settlement and Order, the Terms of the Settlement are listed on the Lump Sum Settlement and Order as totaling $750,000.00, $430,000.00 of which was paid by Alko et. al. and $320,000.00 of which was paid by Ceco, Respondent in the workers' compensation claim. The Commission further notes that the Global Agreement which is attached and made a part of the Settlement Contract states that:

> "[A]s set forth in the settlement contract, CECO does hereby agree to waive its worker's compensation lien against Joiner in its

> entirety. In consideration of the waiver of the workers compensation lien and the payment made by CECO to Joiner as described above...Joiner agrees to hold harmless and indemnify the Releasees from all claims, damages, costs, expenses, attorney's fees, demands, liens, actions, subrogation or suit brought by Joiner or anyone on Joiner's behalf or subrogating to Jointer's interest as **a result of the aforementioned occurrence. Joiner also agrees to pay his own attorney's fees in this matter**....Joiner further agrees and affirmatively states that he has read all of the terms and provisions of this Global Settlement Agreement and Release and affirmatively states that he is being represented by legal counsel in this matter and understands all of the terms used and their significance and that this Global Settlement Agreement and Release has been signed voluntarily." (emphasis added)

The Commission further notes that the Lump Sum Settlement and Order clearly distinguishes the payment for the civil case ($430,000.00) and the payment for the workers' compensation case ($320,000.00). Finally, the Commission notes that the $320,000.00 paid by Ceco was paid by its workers' compensation insurer for the settlement of Petitioner's workers' compensation claim, which was verified both at the July 24, 2015 hearing and at oral argument by Respondent's counsel, Rusin & Maciorowski, Ltd. (July 24, 2015, T.3-4) The Terms of Settlement and the Global Agreement, both of which are within the "four corners" of the Lump Sum Settlement and Order, and the actions of Ceco and its workers' compensation carrier indicate that the workers' compensation claim was settled for $320,000.00 and not $1.00.

Aside from the "four corners" of the Settlement Contract, the Commission notes that fee petitions were filed by Petitioner's prior attorneys in 2010 and 2014 and on July 9, 2015, prior to the approval of the Settlement Contract. A hearing on the fee petitions was held on July 24, 2015. Petitioner had ample notice of the pending fee petitions well within the 10 day notice requirement of Rule 7080.10(a)(2), despite Petitioner's claim to the contrary. Furthermore, Petitioner was present at said hearing, so clearly the notice requirement was met.

In his Response to the Motion to Vacate the Settlement Contract, Petitioner explains that a fundamental principle of contract law is that there is no contract, and as such no settlement, without both an offer and acceptance. The Commission agrees with this and questions Petitioner's attempts to renege on the contract he entered into on July 24, 2015 before Arbitrator Kane when he agreed to pay Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel upon receipt of the settlement proceeds as set forth in Arbitrator Kane's order. (July 24, 2015-T.16)

At the hearing, Petitioner agreed that he was responsible for attorney's fees regarding his workers' compensation case, that he had signed three separate fee agreements with his three prior attorneys in the workers' compensation claim and that he agreed with the Settlement Contract, the attorney's fees, and the division of attorney's fees. (July 24, 2015-T.4-5,10-12) But now that the settlement monies have been paid, Petitioner has decided to question the order that was entered based on his declarations at hearing and under oath. Furthermore, the Commission notes that Petitioner signed the Settlement Contract, including the Global Agreement indicating

that Petitioner was responsible for and agreed to pay all of his attorney's fees, and declared to Arbitrator Kane that he would pay the attorneys' fees while represented by Mr. Plouff, again contrary to Petitioner's claim that he was *pro se* at the hearing.

Rather than attend the hearing, Plouff decided to send Ms. Fishel a letter about the Settlement Contract and upcoming hearing. Plouff also left Mr. Rusin to "formally" notify Ms. Fishel of the hearing. Plouff's decision not to attend the hearing and Petitioner's decision to go forward at hearing without Mr. Plouff is not an acceptable defense against having to pay the agreed to attorneys' fees. Petitioner's now asserted "pro se" status is much like the child convicted of murdering his parents and begging for the status of an orphan. The Commission notes that Petitioner has repeatedly throughout his case moved forward without and against his workers' compensation counsels' advice.

At hearing, the Arbitrator made it very clear that he was approving the Settlement Contract based on Petitioner's agreement to pay the attorneys' fees. (July 24, 2015, T.15-16) As previously noted, Petitioner agreed to pay Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel upon receipt of the settlement proceeds as set forth in the order. (July 24, 2015-T.16) At no point during the hearing did Petitioner indicate that he did not then understand or that he was confused. The Commission finds it wholly disingenuous for him to claim that he did not understand what he was agreeing to now. Furthermore, under the doctrine of estoppel, Petitioner is now barred from claiming that he is not required to pay the attorneys' fees per the Order since it contradicts his prior testimony indicating that he had to and would pay the fees; testimony that was relied upon by the Arbitrator.

Regarding the amount of Petitioner's settlement, the Commission finds that the Settlement Contract was for $750,000.00, $320,000.00 of which was for the settlement of Petitioner's workers' compensation claim. As previously noted, the $320,000.00 was paid by Ceco's workers' compensation insurer for the settlement of Petitioner's workers' compensation claim. It is clear that Petitioner's workers' compensation claim was settled for $320,000.00 and not $1.00.

It is within the province of the Commission to "resolve conflicts in the evidence and to draw reasonable conclusions and inferences from the evidence." *Glover v. Industrial Commission*, 140 Ill.App.3d 361, 366 (1985). Furthermore, when there is a variance between pleadings and proof, wide latitude is allowed the Commission. *McLean Trucking Co. v. Industrial Commission*, 96 Ill.2d 213, 218-219 (1983). Amending a pleading to conform to the evidence already in the record is within the province of the Commission. *Reliance Elevator Co. v. Industrial Commission*, 171 Ill.App.3d 18, 22 (1988).

The evidence establishes that Petitioner's workers' compensation claim was settled for $320,000.00. The evidence further establishes that Petitioner agreed to pay Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel $21,333.33 each within 30 days of receipt of the settlement proceeds. However, the Settlement Contract was inartfully drafted to show two settlement amounts. The Commission notes that the most detailed portions of the Settlement Contract clearly distinguish the common law claim and the workers' compensation claim and that the Settlement Contract clearly delineates that the workers' compensation claim was settled for $320,000.00. Therefore, pursuant to *Glover*, *McLean* and *Reliance*, the Commission hereby

amends the Settlement Contract Lump Sum Petition and Order approved by Arbitrator Kane on July 24, 2015 to reflect that the workers' compensation claim was settled for $320,000.00 and that Petitioner shall pay Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel $21,333.33 each, for a total of $64,000.00 in attorney's fees.

It is important to note that Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel all filed appearances at the Commission. Attorney Thomas Plouff has never filed an appearance at the Commission nor is there any fee agreement between Petitioner and Mr. Plouff on file at the Commission. As such, Mr. Plouff has no legal claim to attorney's fees regarding the $320,000.00 workers' compensation settlement entered into by Petitioner and Ceco.

By his theory now pending before the Commission, Petitioner would retain the benefit of the settlement, to the extent that he would receive $320,000.00, together with certain lien waivers, in settlement of his workers' compensation claim, but then argue that his former attorneys are not entitled to equally rely upon said document. At best his argument is disingenuous and at worst it perpetrates a fraud upon the Commission.

Joiner's appearance before the arbitrator was for one purpose: the approval of the Settlement Contract, so that he could reap the benefit of the Global Agreement and receive his share of the combined $750,000.00. As part of that appearance, Joiner was required to confront his three former attorneys and deal with their fee petitions. When he appeared, Joiner took the easy way out, and agreed that he owed the attorneys twenty per cent (20%) of the $320,000.00 that was paid in settlement of his workers compensation claim. Equally, Plouff took the easy way out, as he never appeared and never executed a fee agreement as required by the Illinois Workers' Compensation Act.

In an apparent case of "Buyer's Remorse," Joiner now wishes to repudiate all that occurred on July 24, 2015, and all that was required as impetus for the arbitrator's approval of the Settlement Contract. If the Commission were to ratify Joiner's actions, it would result in a miscarriage of justice and allow Petitioner's greed to absolve him of his legal responsibilities.

Cleverly, the Petitioner has now filed a Petition for Review and attempted to limit the inquiry of the Commission to that of the Fee Order of the arbitrator. The record is patently clear that the Settlement Contract and the separate fee Order of Arbitrator Kane are so inextricably intertwined that they are in fact one in the same document. Neither the settlement contract nor the fee Order would have been entered and approved by the arbitrator without the other.

Therefore, the Commission affirms the Arbitrator's Order, entered on July 27, 2015, and denies the Motion to Vacate the Settlement Contract approved by Arbitrator Kane on July, 2015.

As a final item, the Commission must consider the Petition for Penalties that has been filed by Joiner's past counsel. Section 19(k) of the Act reads, 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 this Act equal to 50% of the amount payable at the time of such award." 820 ILCS 302/19(k) (2013).

Webster's Dictionary defines honesty as: *a:* fairness and straightforwardness of conduct *b* : adherence to the facts : sincerity. It defines integrity as: *a:* the quality of being honest and fair.

Mr. Joiner was neither honest nor acting with integrity on the day that he appeared before the arbitrator on July 24, 2015, if it was his intent to merely gain the approval of the Settlement Contract and later repudiate his obligation to pay the fees at a later date. The Commission cannot say unequivocally that this was Joiner's intent. Rather, the Commission must speculate as to his intentions.

Since the Commission is left to speculate as to Joiner's conduct, it will not find that he has acted in a vexatious manner, as to his failure to pay the agreed upon fees. For this reason, the Commission denies the Petition for Penalties filed by Joiner's former counsel.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Order, dated July 27, 2015, is hereby affirmed.

IT IS FURTHER ORDERED BY THE COMMISSION that the Motion to Vacate the Settlement Contract is denied.

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

Dated: FEB 3 - 2016
O-01/12/15
MJB:ell
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Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

STATE OF ILLINOIS)
)SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alfred Joiner,	)	
	)	
Petitioner,	)	
vs.	)	NO. **08WC 51604**
	)	
Ceco Concrete Construction,	)	**16IWCC0091**
	)	
Respondent.	)	

ORDER

This cause coming to be heard on multiple Petitions for attorney fees regarding the above matter. All parties have been given notice of this hearing. The Arbitrator after considering the arguments of all the parties present orders:

1. That Petitioner has retained the following law firms for representation in the above matter:
   a. Sostrin & Sostrin, P.C.
   b. Leonard Law Group
   c. Brill & Fishel, P.C.

2. That Respondent tendered $320,000.00 on the settlement at mediation to resolve their liability in this matter.

3. That the above law firms are entitled to attorney fees in the amount of 20% of the amount tendered or $64,000.00 for their efforts in this matter.

4. That all of the law firms listed in paragraph 1 have done all things necessary to move this case forward and were responsible due to their efforts for a settlement offer of $320,000.00 offered by Respondent, Ceco at the mediation hearing of this matter.

5. That the distribution of said fees is to be as follows:
   a. $21,333.33 to Sostrin & Sostrin, P.C.
   b. $21,333.33 to Leonard Law Group
   c. $21,333.33 to Brill & Fishel, P.C.

6. That ~~Respondent~~ Alfred Joiner + the firm of Costello, McMahon, Burke + Murphy is ordered to forward these amounts to the Petitioner's firms as set forth in paragraph 5 within 30 days from receipt of settlement proceeds.

16IWCC0091

7. That Respondent should forward the balance of the $320,000.00 settlement to Petitioner.

David C. Kane
Signature of arbitrator or commissioner

July 24, 2015
Date

JUL 27 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☒ Rate Adjustment Fund (§8(g))
☐ Reverse 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 Conroy,
Petitioner,

vs. NO: 08 WC 25778

City of Chicago,
Respondent.

16IWCC0092

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, with correction and clarification, said decision attached hereto and made a part hereof.

The Commission notes a clerical error found at page 13 of the arbitrator's decision wherein reference was made to "permanent temporary disability benefits." The Commission hereby corrects the decision in this respect to show "permanent total disability benefits." Furthermore, the Commission clarifies the arbitrator's decision to show that Petitioner was entitled to maintenance benefits from 10/5/11, the day after the last §19(b) hearing, through 8/15/13, the day before the commencement of PTD benefits, for a period of 97-2/7 weeks, and that Petitioner was entitled to PTD benefits in the amount of $1,178.24 per week for life commencing 8/16/13 pursuant to §8(f) of the Act.

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,178.24 per week for a period of 97-2/7 weeks, that being the period of maintenance benefits under §8(a) of the Act.

16IWCC0092

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,178.24 per week for life, commencing 8/16/13, as provided in §8(f) of the Act for permanent and total disability benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in §8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,447.88 for medical expenses under §8(a) of the Act, including APAC Medical Center ($475.44), Petitioner out-of-pocket ($268.80) and Midwest Operating Engineers Benefit Fund Subro ($703.64).

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: FEB 3 - 2016

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-01/20/16
jdl/pmo
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CONROY, JAMES
Employee/Petitioner

Case# 08WC025778

CITY OF CHICAGO
Employer/Respondent

16IWCC0092

On 5/12/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0391 HEALY SCANLON LAW FIRM
MATTHEW J HEALY
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

0010 CITY OF CHICAGO
MICHELLE BRYANT
30 N LASALLE ST 8TH FL
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JAMES CONROY
Employee/Petitioner
v.
City of Chicago
Employer/Respondent

Case # 08 WC 25778

16IWCC0092

An *Application for Adjustment 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 **April 21, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **January 31, 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 $ **91,902.72** ; the average weekly wage was $ **1,767.36**

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $**319,977.47** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**319,977.47**.

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

ORDER

Permanent Total Disability

Respondent shall pay Petitioner permanent and total disability benefits of $**1,178.24**/week for life, commencing **August 16, 2013**, as provided in Section 8(f) of the Act.

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

Medical Bills

Respondent shall pay medical bills presented per the medical fee schedule (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.

David A. Kane
Signature of Arbitrator

May 11, 2015
Date

MAY 12 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION OF ILLINOIS

JAMES CONROY, Petitioner,	)	
v.	)	No. 08 WC 25778
CITY OF CHICAGO, Respondent.	)	ARBITRATOR DAVID KANE

16IWCC0092

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT:

The Petitioner has testified three times previously at 19b hearings. Each time the Respondent had either terminated TTD and/or withheld medical benefits. The Arbitrators found in the Petitioner's favor each and every time. The Arbitrator awarded penalties as a result of one of the denials when the Respondent had denied prescription medications that were designed to alleviate the Petitioner's neuropathic pain arising out of his work related injury. The Petitioner has been in pain management since February, 2010. The prior decisions show that the Petitioner underwent a L2-5 laminectomy with instrumental fusion on December 17, 2008 performed by Dr. Frank Phillips. Dr. Phillips ordered the Petitioner into pain management to get his pain under control. The Respondent has once again terminated TTD/Maintenance and refused to authorize pain management.

THE PETITIONER'S TESTIMONY

The Petitioner last testified on October 4, 2011. The Petitioner followed up with Dr. Thomas Pang, a pain management doctor. The Petitioner testified he has been prescribed various medications over the years by Dr. Pang in the attempt to alleviate his pain. He has also had had injections from Dr. Pang. The treatment didn't alleviate his pain and some made it worse. Petitioner has continuing pain in his low back and legs and numbness in his legs going down into his feet. The Petitioner testified that he experiences pain and numbness in low back and legs if he sits, stands or drives too long. Dr. Pang told the Petitioner on August 15, 2013 that he was permanently and totally disabled.

The Petitioner was asked to rate his level of pain on a 0-10 scale on good days and bad days, with 0 being no pain and 10 being his hair on fire. The Petitioner rated his pain on a 4 on a good day with medication and an 8 on a bad day with medication. Petitioner testified that when he has an 8, he is required to lie down for hours on end. Petitioner testified that he has no way of knowing when he is going to have a good day or a bad day. Petitioner testified that he has been using a cane for several years following his discharge from his surgeon, Dr. Frank Phillips.

The Petitioner testified that the City of Chicago required him to engage in a job search. The Petitioner presented over 400 job contacts between 2010 and 2013. (PEX"D") Petitioner also attended two interviews held by the City of Chicago. The Respondent hired MedVoc in 2013 after the Petitioner had spent three years looking for a job. The jobs at MedVoc were jobs in restaurant greeting. The Petitioner has testified that he has worked in construction type jobs and mechanic like jobs all his life. The Petitioner attended the trial wearing a flannel shirt, jeans and boots. Petitioner denied owning any business causal clothes, although the record shows that MedVoc encouraged him to dress business casual for interviews. The Respondent on cross examination asked the Petitioner about discontinuing his vocation rehabilitation with MedVoc. Petitioner admitted that he got frustrated and depressed with the job search.

DR. PANG

The records from Dr. Pang says the patient has post laminectomy pain syndrome with some neuropathy, stenosis and degeneration of the lumbar spine as well as chronic pain syndrome and myofacial pain with radiculopathy. The patient is complaining of slightly worsened pain most likely due to some arthritic conditions on top of his current issues. (PEX "A", pg. 10)

Dr. Pang reported the following in August, 2012:

The patient is a 64 year old white male, who comes in very aggravated and frustrated. He had a work injury while working for the city and was seen at Mercy Works. While he was at Mercy Works, he stated the company doctor put him into therapy for several months and he just felt worse. He failed injections and was not getting better and searched out a spine surgeon. He ended up meeting Dr. Frank Phillips, who did his surgery and the patient feels that the surgery is okay. He does not feel shifting or any other pathology, but the remaining parts of his buttock and back still hurts. (PEX "A", pg. 151) He was subsequently referred over to our practice with Dr. Chang in February, 2010. Dr. Chang has tried him on multiple oral medications and his workers' compensation verbally would deny them, not approve of them or the patient would not tolerate them and when I asked him about his past tolerance to medications, again he was frustrated and says I cannot really remember the reactions. He would be started on other medications that would initially be approved and then not approved. (PEX "A", pg. 151)

This patient is having significant soft tissue pain, which is related to muscle spasms, myofascial pain due to the suboptimal body habitus with flexion across the knee, hip and protuberant abdomen. Tissues involve include the thorasic paraspinal muscles, insertion of these muscles to the iliolumbar fascia and bilateral piriforms muscles. (PEX "A", pg. 152)

Dr. Pang reported the following in January, 2013:

The patient is an angry gentleman, who complains of pains ever since an injury in 2008 resulting in back and buttock pain. The patient is a 65 year old gentleman, who I have not seen in some time secondary to Workers' Compensation insurance issues. He comes with a whole list of questions interjected by complaints. Our interaction lasted over an hour and 10 minutes.

He takes include tramadol 50 mg q.i.d., Valium 2 mg q.h.s., Naprelan 750 mg b.i.d. which he feels helps him the most and Flector patch.

I tried to answer a number of his questions. He still complains of low back pain with symptoms of numbness to both legs, which occur especially after he sits for any prolonged period of time. When he is standing due to the numbness, he has fallen. He complains of stiff neck with no relief on the medications and his balance is off to an abnormal gain when his legs have pins and needles sensation. Right leg hurts more than the left leg after prolonged sitting He has not had significant weight loss. He complained about the initial city referral to their work comp doctor, who did not do anything but put him in physical therapy for the first few months. The patient recalls having had epidural steroid injections, but never had injections subsequently.(PEX "A", pg. 146)

Dr. Pang put the Petitioner on permanent total disability on August 15, 2013. (PEX "A", pg. 136) Dr. Pang refuted Dr. Lanoff, Respondent's Section 12 examiner, in a narrative report of April 4, 2013. (PEX "A", pp. 144 & 145)

MED VOC

There are a number of evaluations from MedVoc. The biographical data from MedVoc said that the Petitioner was 65 years of age with a high school diploma and a below average student. The Petitioner indicated he had no additional training after high school. No military experience. MedVoc was concerned that the Petitioner had a learning disability or required special education classes. The vocational history for the Petitioner shows that he was a hoisting engineer mechanic for the Respondent since December of 1999 working as a heavy equipment mechanic.

The Petitioner advised MedVoc at the first meeting that he is not a people person and he prefers to keep to himself and not be around people and he had no computer experience. MedVoc sought positions for the Petitioner in employment such as a greeter at Ghiradelli, a greeter at McCormick and Schmidt's Restaurant, an information clerk at a mall, a greeter at a car dealership as well as some security guard type jobs. The wages vary from $8.25 per to $14.25 per hour with a mean entry level wage of $10.25 per hour. MedVoc sought positions for the Petitioner that required no lifting over 23 pounds occasionally 6 inches to the waist, no lifting over 38 pounds from waist to shoulder, no lifting over 35 pounds occasionally overhead. There appeared to be no consideration of the Petitioner's treating physician's opinions which stated that he was permanently and totally disabled.

MedVoc was unable to place the Petitioner. MedVoc has advised that the Petitioner was periodically uncooperative and unprepared for interviews including refusing or being unable to wear professional business like attire. The Petitioner testified that he did not own professional business like attire and could not afford to purchase such. There is no indication that Respondent offered a clothing allowance for such interviews.

The Respondent submitted a letter from a Ms. Ashley Pack of the City of Chicago's Department of Water Management asking the Petitioner to fill out a

questionnaire on which a position as a watchman was contingent. The letter says that the questionnaire must be successfully completed confirming his readiness to perform duties of this position. The Petitioner testified that he completed the questionnaire to the best of his ability in an attempt to "play ball with the City." The Petitioner answered multiple times that he was willing to do certain activities but other activities he was unable to do. Most if not all of the questions would require a medical rather than a laymen's opinion. The Petitioner's responses are consistent with the medical diagnosis from his treating physicians. The Petitioner testified that he was never offered a position with the City of Chicago.

JAMES BOYD, VOCATIONAL COUNSELOR, PEX "C"

The Petitioner saw Jim Boyd a vocational counselor. Mr. Boyd met with the Petitioner on June 5, 2014. He interviewed the Petitioner and administered vocational testing. Mr. Boyd found the Petitioner was a 66 year old, high school graduate with no further formal education other than a 6 week mechanical course in General Motors training. Mr. Boyd felt that the Petitioner was not competitively employable. The Petitioner's age, injury and extended time away from work were all detriments to his employability. Mr. Boyd said that the Petitioner demonstrated skills, production speed and physical /emotional symptoms that were not compatible with any full or part time jobs and a transferable skills analysis did not yield any job matches.

MARK REULE

Mark Reule has known the Petitioner for 25 years. Mr. Reule owns F&F, a mechanic shop in Posen IL. The shop is three miles from Petitioner's home. The Petitioner has never worked for F&F repair, nor has F & F ever paid the Petitioner. The Petitioner stops into see Mr. Reule to make small talk, sometimes multiple times a week depending on his physical condition. There are weeks where he does not visit at

all. He spends much of the time sitting down. He does not work. Mr. Reule, the Respondent's witness, confirmed that this was the Petitioner's typical attire of uniform.

DR. LANOFF, SECTION 12 REPORTS

The Respondent submitted two Section 12 reports from Dr. Martin Lanoff. Dr. Lanoff acknowledges that on December 17, 2008 the Petitioner had his lumbar spine fused from L2 through L5 and a froaminotomy from L2 to S1. Dr. Lanoff admits that having a 3 level fusion is a disabling phenomenon in and of itself independent of any pain. In addition, Dr. Lanoff notes Dr. Phillips stated that the Petitioner was doing poorly from his lumbar decompression and fusion in June of 2010 two years after the surgery. Dr. Lanoff then refers to exams, reports and evaluations of the Petitioner which he believes calls into question the Petitioner's level of effort. Each of the exams which are referenced by Dr. Lanoff occurred prior to the Petitioner's testimony in October 4, 2011 and the 19(b) decision of October 11, 2011.

VIDEO SURVEILLANCE

The Respondent submitted video surveillance of the Petitioner. The surveillance reinforces the Petitioner's permanent total disability claim rather than weakening it. The video surveillance was taken over three days in October of 2014. The surveillance confirms that the Petitioner has severe restrictions on his physical limitations. Each of the video tape days shows the Petitioner using a cane to assist him in going about his basic day activities. In one instance the Petitioner was shown shopping in a supermarket and using a shopping cart to maintain his balance.

The Respondent submitted in support of the video surveillance a report dated October 3, 2014. The report indicates that the Petitioner was observed on October 2, 2014 walking with and without a cane. The Arbitrator did not observe the Petitioner walking without a cane and certainly not for any length of time or with any purpose or meaning. The report is contradictory. The summary the report of the October 2 says

that the Petitioner was observed walking without a cane. The minute by minute report does not mention any observations of the Petitioner walking without a cane. In fact it says the Petitioner was leaning on a shopping cart in a grocery store to support his walking.

CONCLUSIONS OF LAW:

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

There are three prior decisions which confirm that the Petitioner has chronic lumbar and leg pain for multiple years as a result of a 3 level fusion that was performed due to his work related injury. It is the law of the case.

The law of the case doctrine applies to matters before the Workers' Compensation Commission. Guerra I McShane Const. Corp, 07 ILWC 36628 (2011). Under the law of the case doctrine, a court's unreversed decision on an issue that has been litigated and decided settles the question for all subsequent stages of the action. Help at Home v. Ill. Workers' Comp. Comm'n, 305 Ill.App.3d 1150, 1151 (4th Dist. 2010). The Commission decision becomes the law of the case for subsequent stages of the litigation. Id.

The Petitioner testified four times to identical complaints of pain and numbness in his low back and leg. The Petitioner has already been found to be credible on these complaints three different times by two different Arbitrators.

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the work related injury of January 31, 2008.

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

The Petitioner is a 65 year old high school educated hoisting mechanic with severe if not permanently disabling restrictions. He has a work history which is exclusively requiring physical medium to heavy type work. By all evaluations the Petitioner has limited communication and personal skills. The Petitioner has engaged in 4 years of vocational and job seeking activities to no avail. Even putting aside the Petitioner's treating doctor opinion that he is permanently totally disabled, it is highly unlikely that there is a reasonably stable job market for someone with the Petitioner's age, education, work history and physical limitations. The Arbitrator had the opportunity to review the Petitioner's physical demeanor during the hearing. The Petitioner was obviously experiencing pain and discomfort during the two hour hearing.

Our Supreme Court summarized that which renders an employee wholly and permanently disabled, is in the case of *Ceco Corp. V. Industrial Commission.* (1983), 95 Ill.2d 278, 447 N.E.2d 842, 69 Ill.Dec. 407 as follows: an employee is totally and permanently disabled when he "is unable to make some contribution to the work force sufficient to justify the payment of wages." (e.g., *Gates Division, Harris-Intertype Corp., v. Industrial Commission*, (1980), 78 Ill.2d 271, 275, 35 Ill.Dec.778, N.E.2d 1306.)

The claimant need not, however, be reduced to total physical incapacity before a permanent total disability award may be granted. *Interlake, Inc. v. Industrial Com.* (1981), 86 Ill.2d 168, 176, 56 Ill.Dec.23, 427 N.E.2d 103; *Inland Robbins Construction Co. v. Industrial Com*, (1980) 78 Ill.2d 271, 275, 35Ill.Dec. 778, 399 N.E.2d 1306). Rather, a person is totally disabled when he is incapable of performing services except for those which there are no reasonably stable market. (*A.M.T.C. Of Illinois, Inc., v. Industrial Commission*, (1979), 77 Ill.2d 482, 487, 34 Ill.Dec. 132, 389 N.E.2d 804). Conversely, an employee is not entitled to total and permanent disability compensation if he qualified for and capable of obtaining gainful employment without serious risk to his health or life. (*E.R. Moore Co. V. Industrial Commission*, (1979), 77 Ill.2d 353, 362, 17 Ill.Dec. 207,

376 N.E.2nd 206). In determining a claimant's employment potential, his age, training, education and experience should be taken into account. A.M.T.C. Of Illinois, Inc., v. Industrial Commission, 77 Ill.ed 482, 489, 34 Ill.Dec 132, 397 N.E.2d 804; *E.R. Moore Co. v. Industrial Commission*, (1978), 71 Ill.ed353, 362, 17 Ill.Dec. 207, 376 N.E.2d 206.

In considering the propriety of a permanent and total disability award, the Ceco court stated:

"If the claimant's disability is limited nature so that he is not obviously unemployable, or if there is no medical evidence to support of total disability, the burden us upon the claimant to establish the unavailability of employment to a person. However, once the employee has initially established that he falls in what has been termed the 'odd-lot' category (one who, though not altogether incapacitated for work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market (2 A. Larson, Workmen's Compensation sec. 57.5 1, at 10-164.24 (1980), then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant (2A. Larson, Workmen's Compensation sec. 57.61 at 10-164.97 (1980). (Emphasis added). *Valley Mould & Iron Co. V. Industrial Commission,* (1981), 84 Ill.2d 538, 546-47 50 Ill.Dec. 710, 419 N.E.2d 1159; *Interlake Inc., v. Industrial Commission,* (1981), 86 Ill.2d 168, 177, 56 Ill.Dec. 23, 427 N.E.2d 103.

The Petitioner has successfully shifted the burden to the Respondent to demonstrate that some kind of work is regularly and continuously available to the claimant. The Respondent has not met that burden.

Section 8(f); PTD Benefits states as follows:

In case of complete disability, which renders the employee wholly and permanently incapable or work, or in the specific case of total and permanent disability as provided in subparagraph 18 of paragraph (e) of this Section, compensation shall be payable at the rate provided in subparagraph 2 of paragraph (b) of this Section for life.

An employee entitled to benefits under paragraph (f) of this Section shall also be entitled to receive from the Rate Adjustment Fund provided in paragraph (f) of Section 7 of the supplementary benefits provided in paragraph (g) of this Section 8.

Section 8(b)(2) states as follows:

The compensation rate in all cases other than for temporary total disability under this paragraph, (b), and other than for serious and permanent disfigurement under paragraph (c) and other than for permanent partial disability under subparagraph (2) of paragraph (d) or under paragraph (e), of this Section shall be equal to 66 2/3% of the employee's average weekly wage computed in accordance with the provisions of Section 10. The Petitioner's average weekly wage has been established as $1,767.36.

Based on all of the foregoing including but not limited to Dr. Pang's opinion that the Petitioner is permanently and totally disabled, the Respondent shall pay the Petitioner permanent and total disability benefits of $1,178.24 per week for life commencing August 16, 2013, as provided in Section 8(f) of the Act. The Respondent shall receive a credit for amounts previously paid.

MAINTENANCE

The Respondent withheld TTD / Maintenance for the Petitioner since May, 2014 based on a perceived lack of cooperation with the vocational rehabilitation specialists. By the Arbitrator's count, this was the 4th year of the Petitioner engaging in vocational activity. There were no job offers during this time and few if any interviews other than those provided by the Respondent. There are over 500 job searches from the years 2010 through the years 2013 which were submitted directly to the Respondent. The job searches are detailed providing dates, names, contact information and responses as well as phone numbers. The Respondent was clearly satisfied with job search as they continued benefits during this time until they hired MedVoc. Moreover, the Respondent would not hire the Petitioner despite the fact that the Respondent is a well known large employer/municipality. The MedVoc job search required the Petitioner to physically attend interviews. The medical history and the video surveillance demonstrate the difficulty of this requirement.

However, pursuant to the previous findings the Arbitrator has found that the Petitioner was permanently and totally disabled beginning August 16, 2013. All benefits due and owing since that date are in the form of permanent temporary disability benefits. The Respondent shall receive a credit for payments made as maintenance through May 2nd, 2014.

MEDICAL BILLS – PEX "E"

1. APAC Medical Center - $475.44,
2. Petitioner out-of-pocket - $268.80 and
3. Midwest Operating Engineers Benefit Fund Subro- $703.64

The bills are reasonable and necessary for the treatment of the Petitioner's pain. The Arbitrator directs the Respondent to pay these outstanding bills directly to the providers along with the outstanding balance to Blue Cross Blue Shield in the amount of $6,765.00 pursuant to the medical fee schedule. This reflects an agreement of the parties regarding these bills. Respondent hall have credit for all 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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Carlos Jimenez,
Petitioner,

vs.

NO: 11 WC 09238

16IWCC0093

Village of Brookfield,
Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission hereby corrects several clerical errors in the Arbitrator's decision to show the following: (a) Petitioner was 38 years old, married with two dependent children at the time of the accident, (b) Respondent is entitled to a credit for TTD paid in the amount of $80,084.00, and (c) Petitioner's request for additional compensation pursuant to §19(k) and attorneys' fees pursuant to §16 of the Act is denied (deleting the reference to §19(l)). Furthermore, the Commission corrects the Arbitrator's decision by replacing all references to "Dr. Endara" with "Dr. Alan Chen". Finally, the Commission clarifies the basis for the denial of Dr. Chen's medical bills by finding that the visit was essentially a §12 examination requested by Petitioner and as such Respondent is not liable for same.

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,243.00 per week for a period of 64-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

16IWCC0093

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 61.5 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused the loss of use of 30% of the left hand.

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: FEB 3 - 2016

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-01/20/16
jdl/pmo
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

JIMENEZ, CARLOS
Employee/Petitioner

Case# 11WC009238

VILLAGE OF BROOKFIELD
Employer/Respondent

16IWCC0093

On 8/4/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.16% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0728 THOMAS W DUDA
CRAIG MILLMAN
330 W COLFAX ST SUITE A
PALATINE, IL 60067

0507 RUSIN & MACIOROWSKI LTD
DANIEL W ARKIN
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Carlos Jiminez
Employee/Petitioner

v.

Village of Brookfield
Employer/Respondent

Case # 11 WC 09238

Consolidated cases: _____

16IWCC0093

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica A. Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **12-10-14**. 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 **Referral to the Comission pursuant to Section 4(c) of the Act.**

FINDINGS

On **10-5-10**, 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 $**95,954.00**; the average weekly wage was $**1,864.50**.

On the date of accident, Petitioner was 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 $**N/A** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**N/A**.

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

ORDER

Nature & Extent of the Injury
The Arbitrator finds that Petitioner has suffered a 30% loss of use of his left hand.

Medical Bill(s)
The Arbitrator finds that the Respondent is not liable for Dr. Endara's bill.

Penalties/Fees
The Arbitrator declines to award Petitioner fees/penalties under Section 16, 19(k) and/or 19(l) of the Act. The Arbitrator further declines to refer the matter to the Commission pursuant to Section 4(c) of the Act.

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

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

Signature of Arbitrator

7/30/15
Date

AUG 4 - 2015

IN THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

CARLOS JIMENEZ, Petitioner,	)	
v.	)	Case No: **11 WC 09238**
VILLAGE OF BROOKFIELD Respondent.	)	

16IWCC0093

CORRECTED ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

On December 10, 2014, this matter proceeded to hearing before Arbitrator Jessica A. Hegarty in the City of Chicago, County of Cook. The parties stipulated to all issues except:

- The nature and extent of Petitioner's injury;
- Medical expenses;
- Penalties/attorney's fees

Petitioner is and has been employed by Respondent since 2005 as a firefighter and paramedic.

On October 5, 2010, Petitioner was involved in an undisputed accident when he responded to a warehouse fire in a neighboring town. (T. 12) Petitioner, who is right hand dominant, was wearing gloves at the time his left finger was lacerated on some sheet metal. (T. 13-14)

Petitioner was initially treated at Loyola University Medical Center whose corresponding records reflect a deep laceration to Petitioner's left index finger. The laceration was stitched up and Petitioner was placed in an L-shaped cast/sling from mid-forearm to the tip of his left index finger. (T. 15; PX 1)

On October 11, 2010, Sai Ramasastry, M.D., a plastic/hand surgeon, repaired Petitioner's flexor digitorium sublimis and profundus tendons as well as the radial digitial nerve. (PX 1 & PX 2)

Follow-up care was administered at Loyola Medical Center from October 13, 2010, through December 15, 2010. Petitioner engaged in physical therapy at ATI beginning on October 22, 2010. (T. 20-21; PX 4)

On January 14, 2011, Petitioner consulted with hand specialist Paul Lamberti, M.D., who recommended a second surgery to improve range of motion in Petitioner's left hand. (T. 22-23)

The proposed surgery was subject to an IME exam performed at Respondent's request by Thomas Kieseler, M.D., after which, the treatment plan outlined by Dr. Lamberti was approved. (PX 8, p. 4-5; PX 5-6)

On March 21, 2011, Dr. Lamberti performed the surgery on Petitioner's left hand. The doctor initially noted adhesions and scar tissue on two tendons and the radial digital nerve with a lack of substance and continuity of the A4 annular pulley. A dissection extending from the tip of the left index finger down the carpal canal and into the left forearm was made. Dr. Lamberti indicated the necessity to re-route two tendons, excise significant scar tissue and "debulk" the FDP tendon. (PX 6)

Physical therapy began the day after surgery.

On April 5, 2011, Dr. Lamberti noted that Petitioner was slowly regaining motion. The doctor further noted that Petitioner was at a high risk of a rupture because of the biology of the tendon.

On April 6, 2010, Dr. Lamberti noted a re-rupture of Petitioner's tendon. The doctor outlined two options to deal with the issue either the removal of the index finger at the knuckle in the palm area, or a two stage reconstruction. Petitioner opted for the reconstruction surgery. (T. 26-28)

On April 25, 2011, the first stage of the reconstruction surgery began at Good Samaritan Hospital. The surgical procedure, performed by Dr. Lamberti, required a zigzag incision to free up the A4 pulley. Proximal to the wound, an incision was opened well into the distal palm with some maneuvers and light tenolysis. A track was found through the carpal canal and a four millimeter Hunter rod was placed from the tip of the left index finger down the carpal canal and into the forearm. (PX 6)

On August 19, 2011, Dr. Lamberti performed the second stage of the reconstruction procedure. The surgical records indicate that the doctor took a tendon from Petitioner's wrist and grafted it to the left index finger. (PX 6) Petitioner began physical therapy the next day which continued through December 29, 2011.

From the date of the accident through the fourth surgery and the periodic therapy that followed, Petitioner was off of work. (T. 29-30)

On December 29, 2011, Petitioner was released, full duty with no restrictions, by Dr. Lamberti. Petitioner returned to work on January 2, 2012, in his pre-injury capacity for the Respondent and continued in that capacity through the date of the hearing.

With respect to permanency, Petitioner testified to atrophy, cramping, a lack of mobility and a loss of dexterity in his left index finger and left hand. Petitioner further testified to discoloration, sensitivity and numbness in his left index finger that radiates into his left palm. Petitioner testified that he has had to adjust the way in which he works due to the loss of mobility and dexterity in his left digit and left hand. He testified that when he is working with IV's, he uses only part of his left hand, relying more on his right. Petitioner testified that he works without complaining to Respondent and that he has not had any performance or disciplinary problems as a result of the work accident at issue.

The Arbitrator inspected Petitioner's left hand and noticed an apparent lack of mobility in the left index finger. The Arbitrator noted that the surgical scarring extends from the left wrist to the beginning of the left forearm.

Petitioner's co-worker, Michael Teska, testified that he was hired by the Respondent on October 14, 2012, and has worked alongside the Petitioner both before and after the accident. Mr. Teska testified that Petitioner has adjusted how he physically performs some job duties since returning to work. According to Mr. Teska, Petitioner now has difficulty typing information on the computer used to generate reports of medical calls because he only uses a couple of fingers to type. With respect to IV's and drawing medication, Mr. Teska testified that the Petitioner has difficulty handling small vials and has to rest the object within the palm of his left hand and manipulate his fingers in a certain way in order to insert the syringe.

CONCLUSIONS OF LAW

The foregoing Findings of Fact are incorporated into the following Conclusions of Law.

L. Nature and Extent of the Injury

Petitioner is a 42-year-old firefighter/paramedic who is right hand dominant. Before his October 5, 2009, work accident, he had no injuries or systemic problems with his left hand. On the accident date, Petitioner suffered a deep, severe laceration to his left index finger severing two tendons as well as a laceration to his radial digital nerve. On October 11, 2010, Sai Ramasastry, M.D., a plastic/hand surgeon, repaired Petitioner's flexor digitorium sublimis and profundus tendons as well as the radial digitial nerve.

Due to his lack of progress in recovery, Petitioner consulted with hand specialist, Paul Lamberti, M.D., who performed three additional surgeries that involved Petitioner's left index finger, left palm as well as the left forearm. After therapy, Petitioner was able to return to his regular employment, full duty with no restrictions.

The Arbitrator found Petitioner to be a very credible witness. Petitioner presented at the hearing as open and honest. His testimony with respect to his medical treatment and complaints are corroborated by the medical records in evidence. With respect to permanency, the Arbitrator credits the Petitioner's testimony as to the significant interference with his work that the injury and multiple surgeries have caused. The Arbitrator also credits his complaints of sensitivity to cold and cramping that he now experiences. The loss of dexterity in his left hand is confirmed by Petitioner's Exhibit 8, and Dr. Lamberti's medical records (PX 5 & PX 6). Petitioner is a relatively young man who will have to suffer the loss of dexterity and mobility in his left hand throughout his career.

The Arbitrator observed the Petitioner's left hand and noted an obvious range of motion deficit of that extremity.

The treatment and recovery kept Petitioner off of work for over one year. The physical limitations that Petitioner now experiences at work are found to be significant.

After careful consideration of the evidence contained in the record, the Arbitrator finds that Petitioner has sustained a 30% loss of use of his left hand.

J. Medical Services

The only disputed medical bill is from Dr. Endara whom Petitioner consulted with on September 23, 2014. Dr. Endara's office visit occurred after the case was pre-tried on August 15, 2014, during which time the Arbitrator provided the parties with settlement recommendations. Petitioner testified that his consult with Dr. Endara was necessitated by increased deformity and cramping in his hand and because he "knew the case was coming to a close."

Based upon the timing of this consult, which occurred after the case was pre-tried and while settlement negotiations were ongoing and based upon Petitioner's testimony that he sought the consult, in part, because the case was coming to an end, the Arbitrator finds this office visit was in preparation for litigation and not for medical treatment. Accordingly, the Respondent is not liable for the bill.

At the time of trial, Respondent objected to Dr. Endara's report based on hearsay. The Arbitrator deferred ruling on this objection, indicating she would address the issue in her written findings. The Arbitrator finds the report inadmissible and sustains Respondent's objection.

M. Petitioner's Motion for Penalties & O. 4(c) Referral

The Petitioner, through his counsel, filed a Petition for Penalties pursuant to Sections 19(k) and 16 of the Act, and has requested that this matter be referred to the Illinois Workers' Compensation Commission for hearing pursuant to Section 4(c) of the Act.

Petitioner alleges that Respondent engaged in unreasonable and vexatious conduct and utilized frivolous defenses that did not present a real controversy within the meaning of Section 19(k).

In April of 2014, Respondent requested a pre-trial conference which the Petitioner's counsel objected to until certain issues were resolved. Petitioner wanted the deposition of his treating doctor to proceed and the exam by the Respondent's IME doctor to be scheduled before engaging in a pre-trial conference. The Petitioner memorialized his objections in a letter to Respondent dated April 17, 2014. (Petition for Penalties, Exhibit 2)

The Respondent agreed to waive any hearsay objection to the admission of Petitioner's Section 12 report, and declined the opportunity to have Petitioner examined by an IME doctor of their choosing. The Petitioner then agreed to a pretrial conference. (Petition for Penalties, Exhibit 2 & 3) The Respondent acknowledged this agreement in correspondent dated July 14, 2014. (Pet. For Penalties, Ex. 4)

A pre-trial conference was conducted and the Respondent presented settlement contracts. The Petitioner found certain language within the proposed contract objectionable. This particular contract language was the subject of another dispute, between the same law firms, in another case and was referenced by Petitioner's attorney's letter to Respondent dated August 9, 2014.

Respondent's attorney withdrew their previous agreement to waive their hearsay objection to Dr. Cronin's Section 12 report and indicated the case would proceed to trial.

Respondent asserted that the objectionable language contained in the settlement contract was contained in past settlement contracts executed by the respective law firms without objection.

Attorney Craig Millman was questioned at the hearing regarding past acceptance of settlement contracts, specifically the case of *Julie Clark v. Bartlett Firefighters Pension Fund*. Mr. Millman noted in his testimony that the Clark case was different than the case at bar in that the Clark case was a pension case and that the two respective law firms engaged in extensive discussions regarding the language to be contained within the settlement contract. Mr. Millman further testified that it was only with respect to settlement contracts with the Insurance entity of IRMA, that the refusal to negotiate the objectionable settlement language arose.

The Arbitrator notes that this case had previously been set for trial on November 13, 2014. Petitioner was in court and ready to proceed. Respondent requested a continuance as their witness was unavailable. The Arbitrator granted Respondents request and the case was set for trial on December 10, 2014.

Between November 13, 2014 and December 10, 2014, Respondent presented an amended settlement contract to Petitioner. Petitioner found the amended contract failed to address his concerns with respect to Sections 4 and 19. Petitioner drafted a letter to Respondent on August 14, 2014, memorializing his objections to the amended contract.

The Arbitrator notes that the Respondent requested and obtained two, pre-trial conference dates and obtained settlement authority consistent with the pre-trial recommendations of the Arbitrator. The fact that the attorneys could not negotiate certain terms within the settlement contract seems to boil down to basic philosophical difference between the respective attorneys and/or law firms.

The evidence submitted by the Petitioner demonstrated the breakdown in communication and civility between the respective attorneys but does not rise to the threshold level required by the Act.

Based on a careful review of the evidence contained in the record, the Arbitrator declines to find in favor of the Petitioner pursuant to Sections 19(k) and 16 of the Act. Petitioner's request this matter be referred to the Commission for hearing pursuant to Section 4(c) is denied.

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

☐ 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

JEANIE FASSERO,

Petitioner,

16IWCC0094

vs.

NO: 10 WC 46867

BI-STATE REPORTING, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of procedural grounds and medical expenses and being advised of the facts and law, reverses and vacates the Decision of the Arbitrator as stated below and remands the matter for reassignment and a new trial.

Following the May 30, 2014, arbitration hearing but before the issuance of the Decision of the Arbitrator, the presiding arbitrator, then-Arbitrator Brandon Zanotti, resigned. Arbitrator Stephen Fruth was then assigned to author the Decision of the Arbitrator. Prior to writing the decision, on December 9, 2014, Arbitrator Fruth, via e-mail, contacted the attorneys representing both parties and requested they send him their proposed decisions. Respondent's attorney, Sarah Tripp, then commented to Petitioner's attorney, Doug Mendenhall, via e-mail, "I'm guessing there is no option to re-try the case." On December 11, 2011, Mr. Mendenhall e-mailed Arbitrator Fruth and asked if Arbitrator Fruth would like to have a "brief telephone conference to allow [the parties' attorneys] to summarize [their] positions and clarify the format of the proposed decisions." By all indications, Arbitrator Fruth did not respond to Mr. Mendenhall's December 11, 2011, e-mail. There is also no indication that either party requested of Arbitrator Fruth, formally or informally, to re-try the case. On May 30, 2014, the Decision of the Arbitrator was issued and, in said decision, Arbitrator Fruth indicated that he relied on the transcript of the May 30, 2014, proceedings and the evidence submitted by both parties to arrive at the Decision of the Arbitrator.

The Decision of the Arbitrator was issued on March 16, 2015, and in said decision, Arbitrator Fruth found Petitioner failed to prove her current condition of ill-being to be causally

16IWCC0094

related to her undisputed compensable accident. On that basis, Arbitrator Fruth denied Petitioner the prospective medical treatment she was prescribed. Arbitrator Fruth, however, found Petitioner entitled to 183-4/7 weeks of temporary total disability benefits and awarded the same accordingly. As noted above, Petitioner took timely appeal of the Decision of the Arbitrator and specifically challenged its findings as it pertained to causal connection, prospective medical treatment, temporary total disability as well as the issuance of a decision without the parties being afforded the opportunity to have re-try or discuss the claim with Arbitrator Fruth in light of then-Arbitrator Zanotti's resignation.

"[D]ue process of law contemplated that all evidence should be submitted before a single judge or master who may see the witnesses, weigh their testimony and determine their credibility." *Trzebiatowksi v. Jerome*, 24 Ill. 2d 24, 25-26, 179 N.E.2d 622 (1962). In this instance, the evidence was elicited before one arbitrator but interpreted by another.

Having a successor trier of fact conduct a new trial may "be warranted where critical determinations necessarily hinge upon the credibility of one witness or set of witnesses over another." *In re Marriage of Sorenson*, 127 Ill. App. 3d 967, 969, 469 N.E.2d 440, 82 Ill. Dec. 906 (5th Dist 1984). In the present matter, Arbitrator Fruth, on the basis of the transcripts of the proceedings, deemed Petitioner to be "prone to exaggeration and magnification of her symptoms." In light of the preference under Illinois case law for the trier of fact to personally determine the credibility of a witness, the Commission finds it appropriate to reverse the findings of the Decision of the Arbitrator and remand this matter for reassignment and a new trial so that Petitioner's credibility, and those of any other witnesses, may be ascertained by one in their presence.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator be vacated in its entirety.

IT IS FURTHER ORDERED BY THE COMMISSION that this matter is to be remanded for reassignment and a new trial be conducted.

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

DATED: FEB 3 - 2016
KWL/mav
O: 11/09/26
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

16IWCC0094

FASSERO, JEANINE
Employee/Petitioner

Case# 10WC046867

BI-STATE REPORTING
Employer/Respondent

On 3/16/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0487 SMITH ALLEN MENDENHALL ET AL
DOUG MENDENHALL
510 E 6TH ST PO BOX 8248
ALTON, IL 62002

2027 RUSIN & MACIOROWSKI LTD
SARAH TRIPP
231 W MAIN ST SUITE 2E
CARBONDALE, IL 62901

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* §19(b) ARBITRATION DECISION**

16IWCC0094

Jeanine Fassero
Employee/Petitioner

v.

Bi-State Reporting
Employer/Respondent

Case # 10 WC 046867

An *Application for Adjustment 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 Zanotti**, Arbitrator of the Commission, in the city of **Belleville**, on **5/30/14**. After reviewing all of the evidence presented, Arbitrator **Steven Fruth** hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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 _____

16IWCC0094

FINDINGS

On the date of accident, **3/16/09**, 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 of chronic and debilitating headaches ***is not*** causally related to the accident.

Petitioner ***is not*** entitled to the prospective decompression surgery of the right occipital nerve recommended by Dr. Richard Hagan.

In the year preceding the injury, Petitioner earned $**81,594.24**; the average weekly wage was $**1,569.12**.

On the date of accident, Petitioner was **49** 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 $**160,965.60** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,046.09/week for 183 4/7 weeks, commencing 3/17/2009 through 9/21/2012, as provided in Section 8(b) of the Act. Respondent shall have credit for TTD to date.

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

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

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

Signature of Arbitrator

3/13/15
Date

MAR 16 2015

Jeanine Fassero v. Bi-State Reporting, Inc.
10 WC 46867
CORRECTED March 13, 2015

INTRODUCTION

This matter proceeded to hearing on May 30, 2014, before Arbitrator Brandon Zanotti pursuant to Petitioner's § 19(b) Request for Hearing. The disputed issues were: **F)** Is Pettioner's current condition of ill-being causally related to the work injury? **K)** Is petitioner entitled to any prospective medical care? **L)** What TTD benefits are in dispute?

By agreement of the parties this matter was randomly assigned to Arbitrator Steven Fruth to prepare a decision based on review of the transcript of hearing on May 30, 2014, and the documentary evidence submitted by the parties.

FACTS

On March 16, 2009, Petitioner was employed as a court reporter with Respondent. She was involved in an undisputed motor vehicle accident while returning from a deposition. Following the accident Petitioner was initially transported to Alton Memorial Hospital. Due to the severity of her injuries Petitioner was transferred to Barnes Jewish Hospital (Barnes) in St. Louis. On admission to Barnes Petitioner presented with a history of loss of consciousness and extrication in excess of 20 minutes. She was alert and oriented x 3 but seemed confused. Petitioner was lethargic and lapsed into situationally inappropriate speech. She had a poor memory of her accident.

Petitioner was diagnosed with a right acetabular fracture, a grade III laceration of the spleen, a pulmonary embolism, and a laceration of the right wrist. Petitioner also sustained right-sided facial trauma including a laceration about the eye. Petitioner underwent an open reduction with internal fixation for her acetabular fracture. On March 24, 2009, Petitioner was transferred to St. Anthony's Health Center (St. Anthony's) in Alton for further care closer to her home in Bunker Hill.

Petitioner's Barnes records had nursing notes that recorded Petitioner's disclosure that her motor vehicle accident had not in fact been accidental. It was further noted that friends of Petitioner reported that she had been withdrawn over the last few weeks and had not engaged in her routine activities. In addition, an attending physician's note on March 16, 2009, recorded the report from Petitioner's husband that she had a 30-pound weight loss over the prior 6 weeks, and had been sleeping up to 16 hours a day and had been "not right". Petitioner had a psychological consultation at St. Anthony's where it was noted she was taking anti-depressant medication. Petitioner would not comply with a formal evaluation but denied mood problems and suicidal

ideation. The psychologist found no indication of depression but recommended continuation of anti-depressants.

At trial Petitioner testified that following the accident she developed headaches across her eyebrows, the sides of her cheekbones down to her chin, across her eyes from her eyebrows to the base of her skull, and up across the back of her head. Petitioner testified that her head pain was 6/10 on the pain scale, worse of the right side. She denied any prior history of headaches of this nature. The headaches are debilitating and prevent her from engaging in her profession as a court reporter. The headaches have also adversely affected activities of daily living as well as recreational activities such as gardening. Petitioner testified that she is now sensitive to bright lights and loud sounds. She often wears sound suppressant earwear. Petitioner further testified that since the accident she has experienced issues with her memory, attention, and mumbling speech. Her medical records also reflect complaints of word finding difficulty.

She has headache pain continuously. Her pain medications include Naproxen and Hydrocodone. She lies down during the day. She stays quiet and uses a heating pad in bed. She stays in bed for up to 12 hours though her sleep is interrupted. She slept only four to six hours before the accident. As a court reporter she might travel to Springfield in the morning and St. Louis in the afternoon. She would take several depositions in a day, working 80 to 100 hours per week. She typed, proof read and edited transcripts. She did all the billing and binding. She handled all the work without difficulty before the accident. She cannot perform that work now.

After release from hospital Petitioner sought treatment with Dr. Joseph Dooley on July 6, 2009. He found no lasting alteration in memory or intellectual abilities. There was no difficulty in language functioning. Petitioner's mental status appeared to be normal. Dr. Dooley assessed Petitioner with post-concussion headaches but noted she was functioning well mentally. Petitioner returned on August 24, 2009, with complaints of persistent headache along the hairline. On exam Dr. Dooley noted a flat affect and drowsiness. When he touched Petitioner's left face and forehead she complained of tingling, although pinprick was normal over the same areas. Dr. Dooley last saw Petitioner on December 11, 2009. At that time her mental status was normal and her neurological exam was also normal. He ordered an MRI of the brain, which was done December 29, 2009. The MRI was essentially normal although showing mild volume loss. In January 2010 Dr. Dooley discussed the normal MRI but advised her in that he had nothing further to offer since she had not responded to medication.

Petitioner came under the care of Dr. Richard Hagan on April 19, 2010. Dr. Hagan testified by evidence deposition on February 25, 2011. He testified that Petitioner was tender over the supraorbital nerves, right greater than left, tender over the zygomatic nerves, and tender over the right posterior occiput. He stated that it would be difficult for Petitioner to concentrate on her work with her headaches, based

on the level of pain she was describing. As of his first consultation with Petitioner he felt it was appropriate for her to remain off work pending the proposed surgeries (Stage I and Stage II). He also opined that it was very possible that the vehicle trauma Petitioner suffered caused the posttraumatic headache he diagnosed. On cross examination he described the mechanism of her injury as "one would probably be a blunt force component and the other is a shear and/or traction-type injury." He went on to describe soft tissue swelling and compression on the nerves; as the swelling resolves there can be hardening and scarring of the tissues around the nerve.

Dr. Hagan stated Petitioner's disability was severe and considered the severity to include effects on activities of daily living. He acknowledged there was no objective or standardized method to measure headache severity. Dr. Hagan's diagnoses were post traumatic supraorbital rim syndrome and occipital neuralgia with overlying compression neuropathy. He gave her nerve block injections on April 19 and August 24, 2010. Petitioner had only temporary relief from the nerve blocks. He recommended a two stage procedure: Stage I being a frontal nerve decompression and Stage II being occipital nerve decompression surgery. Dr. Hagan testified that it was "very possible" that the accident could have caused or aggravated her headache condition.

Dr. Hagan's recommended Stage I and Stage II procedures was initially not approved. On December 12, 2011, he noted that he had reviewed the notes form Dr. MacKinnon (*sic*), Dr. Ducic, Dr. Peeples, and Dr. Guarino. He confirmed his diagnoses and recommendation for surgery. He administered diagnostic nerve blocks in January 2012 which provided only temporary relief. Approval for decompression surgery was finally given and Dr. Hagan performed the Stage I surgery on February 22, 2012, and the Stage II procedure on May 23, 2012. Petitioner had limited relief, so Dr. Hagan did another diagnostic nerve block on July 17, 2012, which again provided temporary relief. On July 17, Dr. Hagan opined in his report that he then recommended a 3rd surgery, involving excision and burial of the right occipital nerve. His opinions and the bases for the opinions regarding the 3rd recommended surgery were not tested by sworn testimony at deposition. The 3rd surgery has not yet been approved. Petitioner testified that she want the 3rd surgery recommended by Dr. Hagan.

Petitioner testified at hearing that following the 1st surgery her forehead and eyebrow pain was gone, but returned approximately "a year ago". She testified that following the 2nd surgery the pain on the left side was gone but the right sided pain remained. She had a good result from the surgeries. She had decreased eyebrow pain but it has returned now. The pain on the sides of her face is gone.

Alan Fassero, Petitioner's husband of 34 years, testified at trial. He has noticed changes in her since the accident. He noticed that she will forget things. Her discomfort causes mood changes. Her energy level is less. As to Petitioner's sleeping before the accident, he told someone he was concerned about her hours; that she was wearing out,

that she was just over doing it. The psychiatrist at the hospital put a sitter with her in intensive care because she said she didn't feel like she wanted to live anymore while in the hospital. He told the psychiatrist that he was worried about the long working hours, 16 hours a day. He did not know what was meant by the note that Petitioner was "withdrawn" before the accident. If she wasn't engaging, it was because she was busy and tired.

According to her husband Petitioner now sleeps every bit of 12 hours a day, 7 days a week. Examples of memory problems include failing to return phone calls, and not remembering where she put her phone. She left her keys in a restroom recently and had to go back and ask where her keys were. Her memory before the accident was fantastic. She used to work 60 hours plus a week typing and transcribing 1000 plus pages, but can longer do that.

Petitioner was seen for a § 12 exam with Dr. David Peeples on June 14, 2010. She reported that her injuries other than headaches had improved over time. Her benefits were cut off at that point. She did not feel she could do her job at that time. She could not concentrate or focus on what people are saying. The job requires hearing and typing what people are saying and she just can't do it. Petitioner reported "24/7 headache pain that is worse than labor and childbirth". She reported her pain as 10/10. Dr. Peeples noted that Petitioner sat comfortably while giving the history of her complaints. When he pointed this out Petitioner revised the level of her complaints, indicating a hyperbolic component to her subjective complaints. On exam, Dr. Peeples found no reproducible tenderness over occipital, trigeminal, or supraorbital nerves. He found no impairment in concentration, flow of thought, language function, or other aspects of higher cortical function.

He stated that she had sustained a head injury and concussion as a result of the accident. He noted that the accident appeared to be the prevailing factor with regards to her ongoing headache complaints. He did not feel she was at MMI. Petitioner reported that Dr. Hagan had recommended decompression surgery of various nerves. Dr. Peeples could not enthusiastically recommend that surgery in that he was not familiar the procedures or with good outcomes in this particular presentation. Even so, he thought decompressive surgery may not be unreasonable if medication trials fail. He opined that the only factor limiting Petitioner's work capabilities were subjective symptoms and that there were no objective findings preventing her from working. He found no objective findings to indicate that she could not attempt to work if so inclined.

Petitioner applied for Social Security Disability in October 2010. Her Function Report to Social Security was consistent with her trial testimony. Petitioner was examined by Dr. Raymond Leung in furtherance of her disability application. Dr. Leung recorded that Petitioner complained of migraines all over her head with constant 10/10 pain. She also stated that she was sleepy. On exam Dr. Leung found Petitioner had

intact memory and normal fund of knowledge. He did note a flat affect. Dr. Leung's impression was a compressed cranial nerve, but did not specify which one.

Petitioner was also examined by Dr. Susan Mackinnon on May 3, 2011. Dr. Mackinnon had reviewed Petitioner's records from Barnes, Dr. Dooley and Dr. Hagan. She also reviewed Dr. Hagan's deposition. She noted Petitioner's history of her accident as travelling at 55 mph when she crossed into the opposing lane and collided head-on with a truck, although Petitioner said she had no recollection of the accident. Dr. Mackinnon

On exam, Dr. Mackinnon noted there was no Tinel's sign over any nerve in the head and no tenderness over cranial nerves, including those contemplated for decompression by Dr. Hagan. She took note that her exam findings were unlike Dr. Hagan's findings. Dr. Mackinnon opined that Petitioner's symptoms were unusual for headaches that would respond to nerve decompressions. She recommended either referral to the Ryan Headache Clinic or a second opinion with Dr. Ivica Ducic, who Dr. Mackinnon felt had the greatest experience and had actually published on nerve decompression for headaches.

Dr. Ivica Ducic of Georgetown University Hospital conducted a records review on August 8, 2011. Dr. Ducic stated that if both nerve tenderness on exam and positive effect of nerve blocks are observed, a patient can be considered for surgery. Dr. Ducic noted that while Petitioner did have tenderness over the examined nerves during Dr. Hagan's exam, Dr. McKinnon failed to note any nerve tenderness. Dr. Ducic stated that "absence of tenderness over examined nerves significantly increases risk of surgery failure". Dr. Ducic recommended medical management with headache specialists prior to surgical intervention. Petitioner testified that she was referred to the Ryan Headache Clinic; however, that facility did not accept workers' comp patients.

Petitioner was examined by Dr. Anthony Guarino, a pain management specialist at Washington University School of Medicine, St. Louis, on October 24, 2011. Petitioner complained of pain in her whole head except for her nose and chin. He noted Petitioner's history of the accident and the onset of headaches along with treatment by Dr. Dooley. Petitioner reported significant, but temporary, relief from Dr. Hagan's nerve block injections. He noted the proposed surgery by Dr. Hagan. Petitioner reported that she sleeps "1.5 days at a time". On examination he noted that cranial nerves were normal and that there were "no Tinel's detected at supraorbital or GON bilaterally." His assessment was chronic daily headache and that she was not at MMI until the issue of whether decompressive surgery will work was addressed. If there was a question he recommended that nerve injections be repeated. In his letter of October 28, 2011 to the case manager he stated that he was unclear whether Petitioner could return to work as a court reporter based on her clinical presentation. He deferred an

opinion on MMI until determination of whether decompressive surgery would work. He thought nerve injections should be repeated.

Petitioner was seen for another § 12 exam with neurologist Dr. Karen Levin on September 21, 2012. Dr. Levin testified by evidence deposition on April 30, 2013. Dr. Levin testified that Petitioner reported frontal headaches. On exam, Petitioner did not exhibit any specific pain behaviors or pain reactions, and did not have any increased tenderness to touch throughout her head. There was no tenderness to palpation over any specific nerve in Petitioner's head. She noted inconsistencies between Petitioner's subjective complaints of light and noise sensitivity and her behavior in the doctor's office. Dr. Levin further testified that Petitioner had generalized headaches that were not referable to any one nerve and did not fit any clinical headache pattern. She did not believe Petitioner had occipital neuralgia or pain related to any facial nerve. Dr. Levin felt it was an unusual examination and recommended a neuropsychological evaluation for possible malingering or other symptom magnification. She testified that Petitioner did not have a neurological condition related to the work accident and that she felt that further surgical intervention was not medically necessary. She opined that Petitioner was capable of working her regular duties and that she had reached maximum medical improvement.

Petitioner was examined by board certified neuropsychologist, Dr. Robert Fucetola on December 12, 2012. Dr. Fucetola testified by evidence deposition on May 15, 2014. Dr. Fucetola testified that based on interviews with Petitioner and her husband, his examination, and the neuropsychological testing there was no evidence of cognitive or psychological deficit as a result of the work accident. Further, he testified that Petitioner was over-reporting her physical symptoms. He testified that from a neuropsychological standpoint there was nothing preventing her from returning to work as a court reporter and that Petitioner had reached MMI.

Dr. Fucetola concluded that Petitioner had a pain disorder associated with both psychological factors and a general medical condition which were chronic. He felt psychological factors were playing "a very important role in the severity and maintenance of the pain." He did not feel Petitioner needed any additional testing or treatment. He did not think there was objective evidence supporting her reports of memory problems. He could not identify any residual cognitive symptoms related to the 2009 trauma. He found no frank fabrication of symptoms but did note a strong style of somatization.

Dr. Fucetola agreed that there was no compromise of the testing if Petitioner had no knowledge of the specific tests being given and had done no research as to this type testing. He acknowledged that Petitioner reported a level of pain typical of age-matched individuals with chronic pain and she reported memory interference from pain that was typical of populations with chronic pain. He agreed that interpreting

neuropsychological tests involves complex statistical analysis, which is subject to differing interpretations from one neuropsychologist to another.

On February 7, 2013 Dr. Hagan provided a disability statement indicating Petitioner was unable to work pending the final surgery needed for the right occipital nerve.

At the request of Petitioner's counsel, Petitioner was examined by licensed clinical psychologist Dr. Beverly Matthews on July 22, 2013. She had reviewed Petitioner's records of various physicians who treated or examined Petitioner, records provided by Petitioner's attorney. Dr. Matthews performed a wide variety of psychological testing. Dr. Matthews testified by evidence deposition on February 4, 2014. Dr. Matthews testified that she felt Petitioner had a traumatic brain injury as a result of the work injury and was in need of cognitive rehabilitation.

Dr. Matthews was critical of Dr. Fucetola, for example, indicating an interpretation of significant weakness for Petitioner in the area of processing speed. She felt additional testing was necessary and recommended various tests and estimated the costs of those tests.

Dr. Matthews tested Petitioner July 22, 2013. The results of that testing and details of her evaluation were reported to Petitioner's attorney. Dr. Matthews summarized her impressions, reviewing the injuries to Petitioner and her desire to have surgery to alleviate pain. She did not feel there was any malingering on the testing. Petitioner showed significant difficulty on measures that were timed. There were impairments in general memory performance. The scores on one of the tests for Petitioner's presentation were similar to those for individuals with traumatic brain injury. Dr. Matthews did not believe Petitioner was feigning and felt that Petitioner has chronic pain behaviors. Petitioner's functioning on various timed tests was impaired. Her life has been affected and she has deficits in memory, speed of processing, and right hemisphere functioning. Dr. Matthews did not address the evidence of Petitioner's behavioral changes before the accident. She did not address the absence of pain behavior noted in the records of Petitioner. She did not address the suicidal ideation noted in records. Dr. Matthews recommended pain management and further treatment to help with Petitioner's condition. Dr. Matthews felt that Petitioner's ongoing complaints are related to the accident and traumatic brain injury. Petitioner was not at MMI and could benefit from rehabilitation services. Based on this Petitioner would not likely be able to return to her employment as a court reporter.

On cross examination Dr. Matthews admitted she is not a board diplomat neuropsychologist. She does have a certificate in clinical neuropsychology allowing her to do that testing.

CONCLUSIONS

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

The Arbitrator finds Petitioner's claimed condition of ill-being, namely ongoing complaints of chronic and debilitating headaches, is not causally related to the alleged work injury of March 16, 2009.

Petitioner presented evidence in support of her claim that her current condition of ill-being is causally related to her work-related motor vehicle accident on March 16, 2009. That evidence included Petitioner's testimony at hearing May 30, 2104, before Arbitrator Brandon Zanotti. Petitioner's husband Alan Fassero also testified at hearing. In addition, Petitioner also presented documentary evidence in the form of medical records and evidence depositions. In rebuttal Respondent also presented documentary evidence in the form of medical records and evidence depositions.

Taken as a whole the Arbitrator finds that Petitioner has been prone to exaggeration and magnification of her symptoms. She often complained of 10/10 pain, the worst she ever had. However, there was no evidence that in response to such severe pain that she sought immediate care at a hospital emergency department or from her treating physician. One would expect someone experiencing the worst pain they ever had to seek some sort of immediate relief. Also, Petitioner claims that her chronic headaches have caused significant behavioral changes due to the chronic and severe nature of her pain. Petitioner's medical chart from Barnes-Jewish Hospital documents reports from Petitioner's husband and friends that some of the behavioral changes claimed by Petitioner to be the result of her accident injuries were present for some time before the accident.

Much of the evidence presented by the parties came from retained expert witnesses. The Arbitrator takes note that retained experts may have a bias in favor of the party who retained them. This is accepted advocacy. On the other hand, a treating physician may also have a bias in order to bolster a diagnosis or course of treatment. Therefore, in weighing the reliability and credibility of competing opinions the record must be examined for consistency or inconsistency.

As noted above the Arbitrator found that Petitioner's evidence regarding behavioral changes was inconsistent with other evidence, notably records from Barnes. Respondent's § 12 experts, Dr. Peeples and Dr. Levin, noted a lack of pain behavior when they examined Petitioner. When Petitioner was challenged with that contradiction by Dr. Peeples she revised her 10/10 pain complaint. The Arbitrator also notes that despite possible bias the exams by Dr. Peeples and Dr. Levin were more

thorough and comprehensive than exams documented by physicians Petitioner relies on to support her claim.

Clinical examinations by Dr. Dooley, Dr. Peeples, Dr. Mackinnon, Dr. Guarino, and Dr. Levin all note observations that demonstrated inconsistencies between Pettioner's subjective complaints and objective findings. The Arbitrator takes note that Dr. Hagan seemed to be the only physician of all examining physicians who found tenderness on palpation of various nerves about Petitioner's head. Due to this discrepancy, Dr. Hagan's opinions are not persuasive in comparison to others, in particular Dr. Levin.

Dr. Fucetola, Respondent's retained neuropsychologist, found no evidence of cognitive or psychological deficit. He opined that Petitioner had reached MMI, as did Dr. Levin. They also opined that Petitioner was able to return to work as a court reporter. Petitioner's expert, Dr. Matthews, came to opposite opinions. However, the Arbitrator takes note that Dr. Matthews did not address the documentation of suicidal ideation or pre-existent behavioral changes in clinical records. Dr. Matthews did not address Petitioner's tendency to exaggerate or magnify subjective complaints or the clinical notes of the absence of pain behavior observed by Dr. Peeples and Dr. Levin. These factors are a significant component of Petitioner's claim. Dr. Matthews' opinions are seriously undermined by these omissions. In this light the Arbitrator finds Dr. Fucetola's opinions more persuasive that those of Dr. Matthews.

Because of the inconsistencies and contradictions stated above the Arbitrator concludes that Petitioner did not sustain her burden of proof that her claimed condition of ill-being, namely chronic and debilitating headaches, was causally related to the work-relate motor vehicle accident on March 16, 2009. The Arbitrator concludes, based on the evidence taken as a whole, that Petitioner was at MMI as of Dr. Levin's examination on September 21, 2012.

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

Dr. Hagan, Petitioner's surgeon, has performed 2 decompression surgeries to nerves about Pettioner's head in order to alleviate Pettioner's complaints of headache. The prior surgeries provided only temporary or limited relief of Petitioner's complaints. Some of Petitioner's pre-surgical complaints have returned. Dr. Hagan's opinion for the necessity of a 3rd nerve decompression surgery is based on clinical findings not observed by other physicians who examined Petitioner. Dr. Hagan's recommendation has not tested by sworn testimony and cross-examination. In light of the Arbitrator's conclusions stated above regarding causation and the questionable efficacy of the proposed 3rd surgery, the Arbitrator finds that Petitioner is not entitled to the requested prospective nerve decompression surgery.

Issue (L): What TTD benefits are in dispute?

The Arbitrator finds that, based on the evidence, Petitioner is entitled to TTD benefits from March 17, 2009, through September 21, 2012, a total of 183 4/7 weeks. Respondent shall receive a credit for all TTD previously paid. Petitioner failed to meet her burden of proof by a preponderance of the evidence that she is entitled to further TTD benefits after attaining MMI September 21, 2012.

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

KATARAZYNA WISNIEWSKI,

Petitioner,

16IWCC0095

vs.

NO: 13 WC 28784

JOLLY MAID,

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 prospective medical, 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).

Respondent appealed the April 13, 2015 19(b) Decision of Arbitrator Hegarty finding that Petitioner, a 23 year-old cleaning lady, sustained accidental injuries arising out of and in the course of her employment on August 22, 2013, that Petitioner provided timely notice of the accident, that Petitioner's current condition of ill-being with respect to her cervical and lumbar spine is causally related to the accident, that Petitioner was temporarily totally disabled for a period of 72-4/7 weeks, from August 22, 2013 through January 13, 2015, at the rate of $283.88 per week under Section 8(b), that Petitioner is entitled to $160,933.49 for necessary medical

expenses under Section 8(a) and pursuant to Section 8.2, and that Respondent shall authorize and pay for the reasonable and necessary prospective medical services, an anterior cervical discectomy and fusion at C5-6 and continued post op therapy for her lumbar spine as recommended by Dr. Sokolowski, pursuant to Section 8(a) and subject to Section 8.2 of Act. The Arbitrator further denied Petitioner's request for an award of penalties and fees, based upon Respondent's reasonable reliance on the Utilization Review and the Section 12 examination of Dr. Gleeson in denying medical benefits and TTD benefits.

Based upon a review of the record as a whole, the Commission affirms the Arbitrator's finding of causal connection between Petitioner's August 22, 2013 work injury and her current cervical condition of ill-being, and award of prospective medical in the form of an anterior cervical diseconomy and fusion at C5-6, recommended by Dr. Sokolowski,. However, the Commission modifies the Arbitrator's Decision, and finds that Petitioner failed to prove that her current condition of ill-being with respect to her lumbar spine is causally related to her August 22, 2013 work-related injury. Based upon the Commission's finding with respect to causal connection, the Commission further vacates the Arbitrator's award of medical expenses related to Petitioner's lumbar spine condition, and the Arbitrator's award of prospective medical services in the form of continued post-operative therapy for her lumbar spine.

The Commission places great significance on the lack of any evidence of lumbar complaints or objective findings related to the lumbar spine from the date of injury, August 22, 2013, through September 6, 2013, despite Petitioner having received medical services with three different providers during that period of time.

On the date of injury, Petitioner was attended to by the Summit Fire Department Emergency Medical Services, at which time she reported she struck her head against the head seat rest, and complained of pain at the back of her head and dizziness. The EMS technician further recorded that Petitioner denied any neck or back pain. (PX1).

Upon arrival at the MacNeal Hospital Emergency Room, Petitioner was seem in triage, and reported head pain, dizziness, left arm pain, and denied any loss of consciousness. The nursing assessment subsequently performed indicated Petitioner complained solely of head and neck pain, and Petitioner again denied any loss of consciousness. Petitioner was evaluated by the Emergency Room physician, Dr. Lauren Dawson, at which time she reported a possible loss of consciousness. Petitioner further complained of an occipital headache that radiated upwards, neck stiffness with no focal neck pain. On physical examination, Petitioner was noted to have a normal ENT exam, no cervical spine tenderness to palpation, no pain on passive or active range of motion, no midline back pain, no tenderness to palpation, no step-off. Her neurological examination indicated no focal weakness, good coordination, and a normal gait. Petitioner's musculoskeletal examination indicated normal extremities with adequate strength and full range of motion, without lower extremity swelling or edema, and normal back alignment. The attending physician further indicated in the progress notes, that Petitioner's complaints were limited to an occipital headache radiating upward, and neck stiffness, without focal neck pain,

midline neck pain, or pain with movement. Petitioner denied focal numbness, tingling, or weakness. Dr. Dawson further noted that Petitioner reported no other complaints. Following a CT scan of her head, which was negative for a fracture, Petitioner was diagnosed with head injury status post motor vehicle accident, and discharged home and advised to follow up with her primary care physician, or with Dr. Guo, an internist. The medical records of MacNeal Hospital fail to reflect that Petitioner complained of any lower back complaints, that Petitioner had any significant lower back findings on examination, or that Petitioner was provided with any diagnosis with regard to her lower back. (PX2).

On August 24, 2013, Petitioner sought treatment with Dr. Forys, at Central Medical Clinic, at which time Petitioner complained of headache, dizziness, neck pain, and upper back pain. On examination she was noted to have a 15 cm linear abrasion on her left cheek, a left arm abrasion measuring 20 cm, with a 5cm x 7cm ecchymosis. Petitioner's neck was noted to be diffusely tender over the facets, decreased range of motion in all planes, with moderate trapezius muscle spasms bilaterally. Petitioner's lumbosacral spine was noted to be non-tender. Dr. Forys diagnosed contusion/abrasions, concussion, headache, whiplash, and situational anxiety due to the motor vehicle accident. Dr. Forys recommended a cervical x-ray, pain medication, and that Petitioner remain off work. (PX3).

On cross examination Petitioner admitted that on August 26, 2013 she signed an Application for Adjustment of Claim in this matter, 13 WC 28784, contained within the Commission file. (T42-43). The Application was filed on September 3, 2013, alleging that August 26, 2013 she injured her injured "neck, upper back, left arm." The Application for Adjustment of Claim is also void of any mention of an injury to Petitioner's lower back.

Petitioner followed up with Dr. Forys on August 30, 2013, at which time her complaints were limited to headaches, pain in the neck and upper back, and paresthesia of both hands. The office visit note is void of any lower back complaints or of any lower back examination findings. Dr. Forys again diagnosed a concussion, headaches, whiplash and situational anxiety, and continued Petitioner off work. When Petitioner returned to Dr. Forys on September 6, 2013, she again complained of pain headaches, neck pain, dizziness and paresthesia in her hands, without mention of any low back symptoms. Petitioner's September 6, 2013 physical examination failed to reveal any findings with regard to her lumbar spine. She was diagnosed with a concussion and whiplash, and was advised to start physical therapy and follow up in one week. (PX3).

On September 13, 2013, Petitioner presented to Dr. Forys, at which time she provided a history that she had "developed lower back pain w/ paresthesia of R LE." On physical examination Dr. Forys noted a tender lumbosacral spine, with a positive straight-leg raise on the right. Dr. Forys diagnosed cervical radiculopathy, sciatica, and post-concussion headaches. sciatica as well. (PX3).

On cross-examination, Petitioner admitted that the first time she complained of lower back pain following her August 22, 2013 work injury was on September 19, 2013, when she saw Dr. Forys. Petitioner also admitted she had no lower back complaints during her Emergency Room visit, or during her office visits with Dr. Forys on August 24, 2013, August 30, 3013, and September 6, 2013. (T41-45). Petitioner further admitted on cross-examination that from the date of accident through September 19, 2013, she was off work and resting in bed, and all of the sudden one day her lower back started hurting. (T44-45).

The Commission is unable to reconcile Petitioner's testimony regarding a low back injury at the time of her August 22, 2013 motor vehicle accident with the significant lack of any lower back symptoms, examination findings, or diagnoses from the date of injury until September 19, 2013. The Commission concludes the overwhelming evidence supports a finding that Petitioner failed to prove her current condition of ill-being with regard to her lumbar spine is causally related to her August 22, 2013 work-related injury. Accordingly, the Commission reverses the Arbitrator's finding of a causal connection between the work injury and her lumbar spine condition, vacates the Arbitrator's award of medical expenses related to the lumbar spine, contained within PX6 through PX12,
and vacates the Arbitrator's award of prospective medical, post-operative rehabilitation, related to the lumbar spine.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 13, 2015, 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 $283.88 per week for a period of 72-4/7 weeks, for the period of August 22, 2013 through January 13, 2015, that being the period of temporary total incapacity for work under §8(b) 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 the Arbitrator's award under §8(a) of the Act, medical expenses contained within PX6 through PX12 related to Petitioner's lumbar condition of ill-being, is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award under §8(a), prospective medical care in the form of an anterior cervical discectomy and fusion at C5-6 recommended by Dr. Sokolowski, is hereby affirmed.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award under §8(a), prospective medical care in the form of lumbar post-operative rehabilitation recommended by Dr. Sokolowski, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for an award of penalties and fees under Sections 19(k), 19(l) and 16 is 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.

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: FEB 3 - 2016
KWL/kmt
O-12/08/15
42

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0095

WISNIEWSKI, KATARZYNA
Employee/Petitioner

Case# 13WC028784

JOLLY MAID
Employer/Respondent

On 4/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2234 CHEPOV & SCOTT LLC
MASHA A CHEPOV
5440 N CUMBERLAND AVESUITE 150
CHICAGO, IL 60656

1596 MEACHUM STARCK & BOYLE
JAMES JANNISCH
225 W WASHINGTON ST SUITE 1400
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 **16IWCC0095**

Katarzyna Wisniewski
Employee/Petitioner

Case # 13 WC 028784

v.

Consolidated cases

Jolly Maid
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 **Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **January 13, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS **16IWCC0095**

On **August 22, 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 $**22,142.12**; the average weekly wage was $**425.81**.

On the date of accident, Petitioner was **23** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $ **5,596.49** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $5,596.49.

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

ORDER

- Petitioner sustained injuries arising out of and in the course of her employment with Respondent on August 22, 2013. Petitioner's current condition of ill-being is causally related.

- Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $16,315.00 to Dr. Victor Forys, $2,619.00 to Edgebrook Radiology, $19,097.00 to Dr. Mark Sokolowski, $23,116.00 to Dr. Neema Bayran, $36,985.75 to Illinois Neck and Back Institute, $8,777.90 to Ashland Medical Specialist, $6,601.75 to Prescription Partners, $43,867.09 to Westlake Hospital, $3,480.00 to Neuromonitoring Services, and $74.00 to Illinois Laboratory Medicine Associates, as provided in Sections 8(a) and 8.2 of the Act.

- Respondent shall pay Petitioner temporary total disability benefits of $283.88/week for 72 4/7 weeks, commencing August 23, 2013 through January 13, 2015, as provided in Section 8(b) of the Act.

- Respondent shall pay reasonable and necessary prospective medical services as recommended by Dr. Sokolowski, as provided in Sections 8(a) and 8.2 of the Act.

- No penalties or fees are awarded.

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

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

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

Signature of Arbitrator

1/8/15
Date

APR 13 2015

IN THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

KATARZYNA WISNIEWSKI, Petitioner,	)	**16IWCC0095**
	)	Case No: 10 WC 028784
JOLLY MAID., Respondent.	)	Arbitrator Hegarty

ADDENDUM TO THE DECISION OF ARBITRATOR

This matter was proceeded to arbitration pursuant to §19B of the Illinois Workers' Compensation Act "the Act" on January 13, 2015, before Arbitrator Jessica A. Hegarty.

The disputed issues in the arbitration proceeding are: (F) Whether Petitioner's current condition of ill-being is causally related to the injury; (J) Whether the medical services provided to Petitioner were reasonable and necessary; (K) What amount of compensation is due for temporary total disability; (M) Should penalties or fees be imposed upon Respondent; and (O) Whether Petitioner is entitled to prospective medical care.

FINDINGS OF FACT

On the date of accident, Petitioner, was 23 years old. During her sophomore year of high school, Petitioner left school in order to help her family financially. Petitioner stated that she initially went to work with her mother who was a cleaning lady for residential homes. She worked with her mother for a few months while she learned to clean. Thereafter she went to work for a cleaning service, working at two other companies before coming to Respondent Jolly Maid approximately one year before the accident. As a cleaning lady for Respondent, Petitioner testified her job duties included driving long distances, dusting, mopping, vacuuming, moving furniture and lifting mattresses to change sheets. She further explained that all these activities required her to routinely bend, kneel, stoop, twist and lift, push and pull heavy household objects.

Petitioner testified that prior to her work accident, she was in good health. She testified that until the age of 18 she was regularly examined by her family doctor. Petitioner testified she never suffered from any pain nor received any medical treatment to her neck, upper back, lower back or for headaches. She also testified that she never experienced any symptoms of radiculopathy in the upper or lower extremities. Petitioner she was able to perform her daily activities and laborious work duties without any difficulties or pain prior to her accident.

On August 22, 2013, Petitioner was driving her co-worker home when they were involved in a motor vehicle accident in which they were hit from behind. She testified that at the time of the collision she was at a complete stop with both hands on the steering wheel and not expecting the impact. Petitioner testified that as a result of the impact her body was first jolted backwards, forcefully striking her head and neck against the headrest and seat, then being pushed forward, causing her to lose consciousness. When she regained consciousness after a few minutes, she testified she was in shock, felt pain in the back of her head and burning in the left arm. Petitioner testified that she was bleeding from a cut on her left check that was immediately swollen and also had two cuts on the upper portion of her left arm. She testified that upon getting out of the car she noticed that the entire back window shattered and that the back of the car had extensive damage. (PX 13). Petitioner further testified that she felt a throbbing pain in the back of her head and that she was experiencing dizziness; prompting her to call 911 and request an ambulance.

Petitioner was transferred from the scene via ambulance to MacNeal Hospital. (PX 1). At the emergency room Petitioner complained of headache, dizziness and neck pain. (PX 2 at 11). Examination included cleaning of her wounds and a CT scan of the head after which, Petitioner was released home. (PX 2). Petitioner testified that she was released with pain medications and instructions on how to care for concussion syndrome, head injury and her neck pain. (Also see discharge instructions as contained in PX 2 at 5-9). She also testified that she was instructed to follow with a primary physician if she had any symptoms or pain in the days following the accident. Petitioner testified that after being brought home from the emergency room by her husband, she took another dose of pain medication and went to bed.

Upon waking the next morning, Petitioner testified that she felt stiffness throughout her body and had pain with simple movements. She most notably had pain in her neck, the area between her shoulder blades in the upper back, headache and dizziness. As her pain continued to worsen that day, her mother called to schedule an appointment for her with Dr. Victor Forys at Central Medical Clinic.

On August 24, 2013, Petitioner was examined by Dr. Forys. Medical records document complaints of neck and upper back pain, headaches and dizziness. VAS scale was reported as 8/10 for headaches and 9/10 for the neck, increasing with activity. (PX 3 at 23). Physical exam was positive for tenderness over the facets of the neck and upper spine, tenderness of the sternocleidomastoid and trapezius muscles bilaterally and decreased range of motion in all planes. (Id. at 22). The doctor also noted a 15cm abrasion on the left side of the cheek, 2 abrasions with ecchymosis on the left arm measuring 20cm and 5x7 cm. (Id). Dr. Forys' working diagnosis was multiple contusions/abrasions, concussion and whiplash. He referred Petitioner for x-rays of the cervical spine, prescribed Ibuprofen and Vicodin and advised Petitioner to rest and remain off work. Petitioner testified that until the time of surgery she took her pain medication every 4 to 6 hours for pain.

Petitioner testified that she saw Dr. Forys numerous times over the next few months and that her symptoms continued to worsen. At the August 30, 2013 examination with Dr. Forys, it is noted that Petitioner began experiencing paresthesia of both hands.

Petitioner also testified that approximately two and a half weeks after the accident she began experiencing pain in the lower back, shooting into the buttocks with symptoms of numbness and tingling down the right leg into the knee and foot and weakness of the leg. She stated that she woke up one morning and noticed the pain. Petitioner further explained that since the time of the accident she had been careful with her movements and did not sustain any new trauma or suffer abrupt pains.

Notes from the September 13, 2013, office visit with Dr. Forys note these symptoms as well as no history of new trauma. (Id. at 16). The examination revealed tenderness over the lumbar spine, positive straight leg raises on the right and Spurlings sign. (Id.). The new diagnoses of cervical radiculopathy and sciatica were added. Petitioner was referred to physical therapy for both her cervical and lumbar symptoms and advised to continue pain management with prescribed medications.

Petitioner began physical therapy on September 13, 2013. After an initial evaluation, therapy consisted of e-stim, massage therapy, hot packs and exercises for stretching and strengthening. (PX 3). Petitioner testified that therapy helped decrease her pain by relieving stiffness and soreness in her spine. Unfortunately, it did not improve her radicular symptoms as significantly.

At trial, Petitioner testified that her pain during this time was constant, despite incremental relief with pain medication every four to six hours. She explained that the pain in her neck and upper back would shoot into the area between her shoulder blades and that her lower back pain producing shooting pain into the buttock and down her right leg into her toes. Petitioner further described the nature of her pain as a burning sensation, with tingling and numbness in the bilateral arms from the elbow into the hands and in the right leg and foot.

When Petitioner's symptoms failed to improve with physical therapy and pain medications, Petitioner was referred for MRIs of the cervical and lumbar spine. Petitioner testified that initially only the lumbar MRI was approved by the Workers' Compensation carrier. The imaging was performed at Edgebrook Radiology on October 9, 2013 and revealed a subligamentous posterior disk herniation at L4-L5 measuring 3-4 mm elevating posterior longitudinal ligament and indenting ventral surface of thecal sac. (PX 4 at 7-8). After reviewing the MRI, Dr. Forys referred Petitioner for an orthopedic consult with spine surgeon Dr. Mark Sokolowski.

Petitioner was first examined by Dr. Sokolowski on October 14, 2013. Subjective complaints included neck pain with radiation to the bilateral periscapular regions, bilateral upper extremity numbness and tingling, lumbar pain with radiation to right buttock and right lower extremity. (PX 5 at 110-111). VAS score were recorded as 7-8/10 in the lower back, right leg pain at 4/10, neck pain at 7-8/10 and bilateral arm pain at 4/10.

Physical examination revealed an antalgic right sided gait pattern with positive sagittal profile, restoration to neutral sagittal profile reproduced concordant back pain with radiation to right buttock and right leg, positive Spurlings sign bilaterally for reproduction of concordant periscapular and arm pain, decreased sensation in C6-C8

dermatomal distributions bilaterally, pain with resisted bilateral supraspinatus strength test, bilaterally positive Neer and Hawkins impingement signs and tenderness to palpation over the thoracic spine. (Id.).

Dr. Sokolowski's working diagnosis was lumbar pain with radiculopathy and cervical pain with radiculopathy. He referred Petitioner for MRIs of the cervical and thoracic spine, prescribed a Medrol Dosepak, continued physical therapy and fitted Petitioner for a semi-ridged lumbosacral support. (PX 5 at 112).

Four days later at her follow-up with Dr. Forys, it was noted that Petitioner was now experiencing pain and radicular symptoms going into the bilateral legs, right greater than left. (PX 3 at 7).

At this juncture additional physical therapy and the MRIs were denied pending utilization review. Petitioner continued to have documented symptoms that were severe in nature. The treatment was subsequently approved following peer review. (PX 5 at 102-104).

The November 6, 2013, MRI of the cervical spine revealed a 2-3 mm C6-C7 subligamentous posterior disk herniation measuring elevating the posterior longitudinal ligament and indent ventral surface of thecal sac. (Id. At 101). The thoracic MRI performed on December 19, 2013 was unremarkable. Petitioner also resumed physical therapy. Following review of the MRI films at the December 20, 2013, visit, Dr. Sokolowski referred Petitioner to Dr. Bayran at Pain Centers of Illinois to begin interventional pain management for her cervical and lumbar pain. (PX 5 at 85). Petitioner was also given a prescription for dedracin to supplement her Norco for pain.

On January 7, 2014, Petitioner underwent an Independent Medical Examination with Dr. Thomas Gleason, admitted as Respondent's Exhibit 1. Petitioner testified that while she told Dr. Gleason of the impact, when she started to describe what happened to her body inside the car Dr. Gleason instead began the physical examination. Petitioner further testified that the examination conducted by Dr. Gleason was brief, lasting no more than five minutes, consisting mostly of measuring her extremities as detailed in the report. She stated that she was asked to walk back and forth in the exam room, the examiner pushed on her spine, checked range of motion and reflexes. The report notes normal gait, tenderness over the lower cervical spine and lower lumbar spine, para-cervical and lower para-lumbar tenderness, negative Spurlings and straight leg raise tests, normal strength and reflexes. (RX 1 at 2). The diagnosis was resolved cervical, thoracic and lumbar strains or in the alternative, temporary aggravation of a pre-existing condition. The report goes on to opine that Petitioner could return to work full duty based on the lack of objective findings on examination.

Following the results of the IME, Petitioner attempted to return to work on January 16, 2014. She testified that after contacting Respondent, she was told they did not have an open position for her. Petitioner then began looking for new employment and secured employment with another cleaning service. The new job, similar to that with Respondent, was residential cleaning where Petitioner worked in a team with a co-

worker. She explained that prior to this day she was not engaged in any strenuous activities outside of physical therapy and that she was limiting her activities of daily life due to pain.

Petitioner testified that once at her new job she attempted to do some light housework in the form of dusting, vacuuming and mopping without too much bending and no heavy lifting, but that she had immediate and significant increase in her symptoms. She testified that the pain in her neck, upper and lower back as well as her radicular symptoms required her to take constant breaks and sit in an effort to alleviate her pain. Petitioner testified that she called her new employer at the end of the day explaining that unfortunately she could not return to work because of the pain and that her inability to do her share of the work was unfair to her co-worker.

The following morning Petitioner called Dr. Sokolowski for an emergency appointment due to her severe pain. Dr. Sokolowski recommended Petitioner proceed with her previously suggested epidural injection with Dr. Bayran. In his office note of January 17, 2014, in an effort to secure approval for the epidural injection, Dr. Sokolowski summarized the specific findings of lumbar radiculopathy on his multiple examinations as: 1) positive sagittal profile and antalgic gate; 2) reproduction of concordant pain to right buttock and right leg (and now bilateral lower extremities) with restoration to neutral; 3) bilaterally positive straight legs raise at 45 degrees; and 4) sensory deficits in the right L4 and L5 dermatomes. (PX 5 at 74). Dr. Sokolowski further stated that these findings corresponded with the MRI findings of L4-L5 disc herniation with resultant neural impingement. (Id.) He also opined that the ongoing findings of cervical radiculopathy were consistent with the disc herniation identified on MRI. (Id.).

On January 18, 2014, Petitioner was examined by Dr. Bayran. Subjective complaints were documented as neck pain with radiation into the shoulder blades and bilateral upper extremities and hands, right greater than left, numbness and tingling in both hands, lower back pain with bilaterally radiation to the sides, posterior thigh and calf and numbness and tingling from the knee into the foot. (PX 6 at 17). Physical examination noted tenderness over the paraspinal and midline muscles bilaterally, pain with extension and bending of the head to sides, positive Spurlings sign, positive straight leg raises bilaterally, tenderness over midline at L4-L5 and L5-S1, pain in the lumbar spine with extension, flexion at 40°, and lateral bend at -20°. (Id.) Dr. Bayran's assessment was neck pain secondary to cervical pathology at C5-C6 and lower back pain with bilateral leg pain secondary to disc herniation at L4-L5.

Following the examination, Petitioner underwent a bilateral transforaminal lumbar epidural injection at L4-L5 under fluoroscopic guidance. Petitioner testified at trial and it is documented in Dr. Bayran's office visit of January 29, 2014, that the injection provided 20-30% relief of systems, especially with leg symptoms. (PX 6 at 15).

On February 5, 2014, Petitioner underwent a second injection at L4-L5. At the February 19, 2014, follow up visit with Dr. Bayran it was recorded that the second injection provided further pain relief, decreasing symptoms approximately 60%. (PX 6 at 11). It

was also noted that Petitioner continued to have complaints of neck pain radiating into the area of the bilateral shoulder blades and bilateral numbness and tingling in arms and 3rd-5th digits.

Petitioner was next seen by Dr. Sokolowski on March 3, 2014. VAS score was noted at 3-4/10 in the lower back and 2-3/10 in the lower extremities. Physical examination noted continued diminished sensation in the L4 and L5 and C6 through C8 dermatomal distributions, positive Spurlings signs bilaterally with concordant periscapular and arm pain and only mildly positive straight leg raises bilaterally. (PX 5 at 62). At this juncture with significant diminution of her lumbar pain and symptoms, Dr. Sokolowski referred Petitioner for cervical epidural injections and continued physical therapy. Dr. Sokolowski also noted that Petitioner's improvement following the injections was diagnostically valuable. (Id.)

On March 5, 2014, Petitioner underwent a cervical epidural injection at C6-C7 under fluoroscopic guidance. (PX 6 at 9). At the March 19, 2014, follow up visit with Dr. Bayran, Petitioner reported 10% improvement as well as return of some of her lower back pain. (Id. at 7). A second injection was performed on April 26, 2014. (Id. at 5). At follow up on May 7, 2014, Petitioner reported 20-30% relief of symptoms in the neck and upper extremities. (Id. at 3). Petitioner thereafter underwent a final lumbar transforaminal epidural injection at L4-L5 on May 18, 2014. Petitioner testified at hearing that all the injections provided good relief of her pain, unfortunately, the relief was not long lasting.

Petitioner returned to Dr. Sokolowski on June 24, 2014. Subject complaints included on-going neck pain with radiation into the bilateral periscapular region, numbness and tingling in the bilateral upper and lower extremities and lumbar pain with radiation to the right buttocks and leg. (PX 5 at 50). Petitioner testified that her pain and symptoms were severe and functionally limiting. Physical examination was significant for positive Sagittal profile, reproduction of concordant back pain and radiation to the buttocks and lower extremities with restoration to neutral, positive straight leg raise at 60° seated bilaterally, positive Spurlings sign bilaterally positive and ongoing bilateral paresthesias in the C6-C8 and L4-L5 dermatomal distributions. (Id.).

At this time Dr. Sokolowski opined that Petitioner had exhausted conservative measures and recommended a L4-L5 lumbar decompression.

Petitioner testified that she wanted to proceed with surgical intervention in order to alleviate her constant pain. She explained how after the accident her life completely changed. How she spent every day in pain, managing her symptoms as best she could with pain medications, wearing her semi-rigid belt and home exercises. Petitioner testified her pain, radicular symptoms and weakness in her arms and legs greatly interfered with her ability to perform routine tasks of daily life and impaired her quality of life. She explained how she could not feel her hands the same, causing difficulty with simple tasks like holding small objects and washing her hair, could not bend or twist without pain, could not sit, stand or even lay down in a single position for a long time because of shooting pains and numbness and tingling in her extremities. Petitioner testified that she wanted to return to her life as a healthy young women, to return to

work, to wake up in the morning without pain, to sleep through the night without waking in pain, to stop taking pain medications multiple times a day and to start a family.

In preparation for surgery, Petitioner had an updated MRI of the lumbar spine, x-rays and underwent surgical clearance. The radiologist's reading of the September 5, 2014, was L4-L5 loss of normal height as well as loss of normal hydration of the nucleus pulposus representing desiccation changes, with subligamentous posterior disk herniation and mildly extruded nucleus pulposus with posterior annular tear measuring approximately 3-4 mm, noted to elevate the posterior longitudinal ligament and indent the ventral surface of thecal sac with mild central stenosis. (PX 4 at 1-2).

Dr. Sokolowski also reviewed the MRI films at the September 23, 2014, pre-operative office visit. Dr. Sokolowski's reading of the films was an L4-5 disc herniation with large annular tear with associated impact upon thecal sac centrally causing stenosis. (PX 5 at 15).

Petitioner underwent surgery with Dr. Sokolowski on October 7, 2014, at West Lake Hospital. (PX 10 at 130-131). Following surgery Petitioner was admitted to the hospital for a period of three days.

At her first post-operative visit with Dr. Sokolowski on October 22, 2014, Petitioner was noted to have decreased radicular symptoms in the lower extremities and VAS scores of 5-6/10 for back and neck pain and leg/buttock pain at 1-2/10. Petitioner was referred for physical therapy and her prescriptions of Hydrocodone and Gabapentin were refilled. (PX 5 at 10).

Petitioner began therapy on November 4, 2014, and at the time of trial had undergone sixteen sessions. Therapy consisted of stabilization, strengthening and flexibility exercises, functional and neuromuscular retraining, postural education, gait and balance training, cardiovascular conditioning, manual therapy and ice. Petitioner testified at trial that her lower back pain and radicular symptoms are significantly improved following surgery and therapy.

At the November 25, 2014, visit with Dr. Sokolowski Petitioner was prescribed a TENS unit which she testified further helped alleviate pain. (Id. at 6). Dr. Sokolowski also ordered physical therapy to include treatment for the cervical spine.

Petitioner was last examined by Dr. Sokolowski on December 30, 2014. At this visit she reported continued improvement with her lower back pain but complained of continued neck and periscapular pain with radiculopathy. (Id. at 1). Dr. Sokolowski advised continued physical therapy for the cervical and lumbar spine for another month and noted that he would like to transition to work hardening, however expressed concern that the patient's significant cervical symptoms would hinder such transition. Dr. Sokolowski opined that if Petitioner remains persistently symptomatic with respect to her cervical spine he would seeking approval for anterior cervical discectomy and fusion at C5-C6. (Id. at 1-2).

Petitioner testified at trial that she continues to experience pain in the neck and upper back on a daily basis. She rated her neck pain at a 7/10 and explained that her symptoms include shooting pains into the middle of her back and between the shoulders, numbness and tingling in her forearms and hands as well as burning sensations. Petitioner testified she wants to return to work and activities of daily life without pain or limitations. She explained that after discussing surgery with Dr. Sokolowski, if her symptoms persist, she wishes to proceed with cervical surgery in hopes it will relieve her pain as the lumbar surgery has.

Petitioner testified that since the accident, she has not returned to work other than the one day in January 2014, she has not engaged in any strenuous activities outside of therapy nor has she suffered any falls or new injuries.

CONCLUSIONS OF LAW

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

The Arbitrator adopts her findings of fact contained above and incorporates them herein by this reference.

Petitioner testified that on August, 22, 2013, she suffered an injury while involved in an undisputed work accident. Petitioner's non-contributing medical history and prior good health is documented throughout the medical records submitted as Petitioner's Exhibits 1 through 10, as well as Respondent's Exhibit 1. The Arbitrator finds credible the testimony of Petitioner that prior to the accident she never suffered any injury or pain in her neck, middle or lower back, never experienced any symptoms of radiculopathy or numbness and tingling in the upper or lower extremities

Petitioner further testified that since the accident she has not engaged in any strenuous activities and did not suffer any new injuries. While Petitioner returned to work for one day in January 2014 per the recommendations of Respondent's IME physician, Petitioner testified she wore her lumbar support and was careful with her movements.

Throughout the medical records submitted by Petitioner, there is a clear history of a work related accident followed by consistent complaints of pain, radicular symptoms and disability. Medical records from the emergency room at MacNeal Hospital document headaches, dizziness, pain in the neck and back of the head. (PX 2 at 11-13). At the first examination with Dr. Forys there is documented complaints of severe neck pain and associated radicular symptoms going into the area of the shoulder blades and upper extremities. (PX 3 at 22).

Although Petitioner did not have any immediate symptoms in her lower back, she testified that she noticed the pain upon waking in the morning approximately a week and a half after the accident. The Arbitrator notes Dr. Forys' records of September 13, 2013, contain a consistent atraumatic history of the start of Petitioner's lower back pain and symptoms into the right leg. (PX 3 at 18). Arbitrator further notes Respondent's

Exhibit 1 does not contain any opinions from Dr. Gleason stating that the short delay in the appearance of lumbar pain and symptoms affected his opinions on causation of the injury.

The Arbitrator finds persuasive opinions regarding causation as contained in the medical records of Dr. Forys as well as Dr. Sokolowski. Dr. Forys' causally related diagnoses are concussion with headache, whiplash, multiple abrasions and ecchymosis, situational anxiety, cervical radiculopathy and sciatica. (PX 3 at 16 and 22). Dr. Sokolowski's casually related diagnoses are lumbar pain, lumbar radiculopathy, cervical pain, cervical radiculopathy and thoracic pain. (First noted in PX 5 at 110-111).

Dr. Sokolowski credibly relates Petitioner's current conditions of ill-being to the work-injury based on the mechanism of injury as well as the temporal onset of pain. He opined that the mechanism of injury, that being a rear end collision, and resulting whiplash type injury to the cervical and lumbar spine, combined with the onset of continuous pain is consistent with Petitioner's symptoms and pathology found on imaging. He further stated that the imaging studies correlated with Petitioner's subjective complaints and objective findings on physical examination.

The Arbitrator finds Respondent's Exhibits 1, the Independent Medical Examination report of Dr. Gleason unpersuasive. Dr. Gleason concludes in his report that Petitioner suffered a soft tissue strain and or temporary aggravation of her pre-existing condition of the cervical and lumbar spine. (RX 1 at 6). Dr. Gleason based his opinion regarding causation on his examination failed to elicit any objective findings.

The Arbitrator notes that Dr. Gleason's report contains no history of prior injuries, symptoms, condition or treatment to the cervical or lumbar spine prior to the work accident. Arbitrator finds important the findings by Dr. Gleason that Petitioner showed no evidence of any psycho-social or medial co-morbidities contributing to her complaints of pain. (Id.). This Arbitrator also notes that Dr. Gleason acknowledged the finding of pathology in both the cervical and lumbar MRIs and further stated that the findings demonstrate potential objective anatomic sources of pain which would be consistent with Petitioner's subjective complaints. (Id at 5-6).

Dr. Gleason fails to provide any medical explanation for Petitioner's ongoing pain complaints and radicular symptoms other than to say his singular examination did not illicit any objective findings on examination. (Id.). Dr. Gleason provides no justification or basis to contradict the multiple documented objective findings on examination by Dr. Forys, Dr. Sokolowski and Dr. Bayran. This Arbitrator finds the documented findings from the numerous examinations conducted by Petitioner's multiple treating physicians to be more credible.

Dr. Gleason's opinion of a temporary aggravation of a pre-existing condition is not persuasive. Dr. Gleason's report fails to state any evidence or statistics of degenerative conditions for Petitioner's age group. This Arbitrator instead finds more credible the opinion of Dr. Sokolowski that he is unaware of any peer-review journal which suggests the routine presence of degenerative pathology in the general population of Petitioner's

age. (PX 5 at 53-54). Additionally, the Arbitrator notes that Dr. Gleason considered the degenerative findings on MRI to be clinically insignificant. (RX 1 at 6).

Arbitrator also agrees with Dr. Sokolowski's assessment that Petitioner's temporary relief of pain and radicular symptoms following epidural injections was diagnostically valuable and positively prognostic; especially given Petitioner's testimony of further improvement after surgery. (PX 5 at 53 and 62). This reliable finding is objective evidence in contradiction to Dr. Gleason's opinion that Petitioner did not have any objective pain complaints.

Based on the above, and after reviewing the entire record, the Arbitrator finds that Petitioner's condition of ill-being in the lumbar and cervical spine with accompanying radicular symptoms are casually related to the work accident of August 22, 2013.

(J) Were the medical services provided to Petitioner reasonable and necessary?

The Arbitrator adopts her findings of fact and conclusions of law contained above and incorporates them herein by this reference.

Having determined that Petitioner's condition of ill-being is casually related, the Arbitrator finds all of the treatment provided and bills submitted for these conditions as detailed in Petitioner's Exhibits 1 though 12 were reasonable and necessary for treatment of Petitioner's work related injuries.

The Arbitrator does not find persuasive the opinions contained in Respondent's Utilization Reviews submitted as Exhibits 2-4.

The utilization review authored on January 13, 2014, failed to conduct a peer to peer review as requested by Dr. Sokolowski. The Arbitrator notes a written request by Dr. Sokolowski for a peer to peer which specifically stated three dates with the doctor's availability for multiple hours per day. (PX 5 at 86). Dr. Sokolowski further documented that although a single message was left for him he returned the call but that call was never returned. (Id. at 73).

Without a proper peer to peer the reviewer denied the requested injections by concluding that the medical records he reviewed documented no evidence of radiculopathy. The Arbitrator notes and finds persuasive Dr. Sokolowski's written response detailing the numerous document objective findings of radiculopathy throughout his multiple examinations those being: positive sagittal profile and antalgic gate, and reproduction of concordant pain to right buttock and right leg (and now bilateral lower extremities) with restoration to neutral, bilaterally positive straight legs raise at 45 degrees and sensory deficits in the right L4 and L5 dermatomes. (Id. at 74).

Regarding Respondent's Exhibits 3 and 4, the Arbitrator notes that the reviewer failed to document what medical records he reviewed in making his determination. It is notable that in the Summary of Treatment section, the reviewer states that Petitioner

had only one epidural injection at L4-L5 in May 2014. However, by the date of the report, Petitioner had in fact undergone three injections at this level as well as two injections in the cervical spine as documented in the medical records of both Dr. Sokolowski and Dr. Bayran. Therefore, the Arbitrator concludes that the reviewer's determination was based on incomplete medical records.

The Arbitrator further notes that the reviewer denied the request for L4-5 decompression despite acknowledging that Petitioner remains symptomatic following conservative treatment based solely on the opinions of the IME physician. The Arbitrator finds more persuasive the opinions and studies detailed by Dr. Sokolowski of the *North American Spine Society*, which recommend surgical intervention for disc herniation in the presence of "pattern of radiculopathy explained by imaging," and "6-12 weeks of non-operative treatment," both criteria met by Petitioner. (Id. at 54).

Lastly, the Arbitrator notes that the reviewer did not view the updated MRI of the lumbar spine taken on September 5, 2014. Both the radiologist and Dr. Sokolowski noted central stenosis. (PX 4 at 1-2) and (PX 5 at 15). This was a finding that according to the reviewer and the ODG guidelines cited was an important finding indicating necessity of surgery.

Based on the above, and after reviewing the entire record, the Arbitrator finds Petitioner's Exhibits 1 through 12 contain medical records and bills incurred as a result of the August 22, 2013 work injury. The Arbitrator awards Petitioner's medical bills to be paid by Respondent pursuant to Sections 8(a) and 8.2 of the Act.

(K) What amount of compensation is due for temporary total disability?

The Arbitrator adopts her findings of fact and conclusions of law contained above and incorporates them herein by this reference.

Petitioner claims she was temporarily totally disabled from August 23, 2013 to the hearing date of January 13, 2015, a total of 72 4/7 weeks. The necessary off-work documentation from medical providers is contained in the medical records of Dr. Forys, Petitioner's Exhibit 2 and Dr. Sokolowski, Petitioner's Exhibit 5.

The Arbitrator therefore finds that Petitioner was temporarily totally disabled for this period.

(M) Should penalties and fees should be imposed upon Respondent?

The Arbitrator adopts her findings of fact and conclusions of law contained above and incorporates them herein by this reference.

The Arbitrator declines to award penalties and fees in this case. The Arbitrator finds that Respondent submitted the disputed medical treatment to Utilization Review, as seen in their Utilization Review reports, which were entered as Respondent's Exhibits 1, 3 and 4, and reasonably relied on the results of the Utilization Review in non-certifying the

medical procedures requested. The Arbitrator finds Respondent adhered to Section 8.7(j) of the Illinois Workman's Compensation Act. Respondent entered into evidence and relied upon Utilization Review reports as well as an IME report in denying petitioner's medical benefits and temporary total disability benefits. This Arbitrator finds Respondent reasonably relied on these Utilization Review reports and IME report, and used all 4 reports as the basis to deny the medical treatment and payment for said treatment in good faith. Petitioner's request for fees and penalties is denied pursuant to Section 8.7(j) and no penalties are assessed against Respondent accordingly.

(O) Is Petitioner is entitled to prospective medical care?

The Arbitrator adopts her findings of fact and conclusions of law contained above and incorporates them herein by this reference.

Based on Petitioner's on-going subjective complaints, objective findings on exam, MRI results, positive response to the L4-L5 decompression and cervical epidural injections, Dr. Sokolowski has recommended Petitioner continue post-operative therapy for her lumbar spine and subsequently undergo an anterior cervical discectomy and fusion at C5-C6.

Petitioner testified at arbitration that she wishes to proceed with Dr. Sokolowski's recommendations in order to alleviate her pain and symptoms and to be able to return to work and her daily routines of life.

The Arbitrator, having found the Petitioner's condition of ill-being regarding the cervical and lumbar spine to be casually related to the accidental injury of August 22, 2013, hereby orders Respondent to authorize treatment recommended by Dr. Sokolowski as well as all pre-operative and rehabilitative treatment necessitated by the recommended surgeries.

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

MARTIN ALVAREZ,

Petitioner,

16IWCC0096

vs.

NO: 12 WC 36753

ILLINOIS CRANE INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical treatment, including prospective medical treatment, 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).

On September 15, 2012, Petitioner drove a JLG lift into a pothole and caused an injury to his lumbar spine. He subsequently treated, first, at MacNeal Hospital and then continued his treatment with his primary care physician, Dr. Siddiqui. He subsequently came under the care of Dr. Alexander Ghanayem, an orthopedist, on October 29, 2012. Dr. Ghanayem diagnosed Petitioner's condition as broad-based disc herniations at L4-L5 and at L5-S1 and a small disc herniation at L4-L5 and then treated Petitioner's lumbar spine symptoms conservatively, employing physical therapy and an epidural steroid injection. The conservative treatment failed to resolve Petitioner's complaints, and Dr. Ghanayem, on February 19, 2013, performed an anterior lumbar discectomy at L5-S1, a decompression of the spinal canal as well as an interbody fusion at L4-5 and L5-S1. Petitioner testified to sleeping in a reclining chair for approximately

two months postoperatively as he found the chair to be more comfortable than his bed and the chair allowed him to stand without assistance.

Petitioner testified further that on or about April 1, 2013, he awoke in the reclining chair with a pinched neck and both numbness and tingling into his right shoulder and right arm. Four days later, when the symptoms failed to abate, Petitioner contacted Dr. Ghanayem's office and was seen by Dr. Ghanayem's nurse practitioner, Dorota Pietrowski. Petitioner was next seen by Dr. Ghanayein on April 22, 2013. Dr. Ghanayem diagnosed Petitioner as having cervicalgia and had Petitioner undergo an MRI. The MRI revealed Petitioner had a left pericentral disc protrusion at C4-5 and a right pericentral disc protrusion at C5-6. Physical therapy was ordered to address Petitioner's cervical spine symptoms, and Petitioner undertook the prescribed physical therapy but achieved no relief. A return visit to Dr. Ghanayem on April 22, 2013, resulted in a recommendation for a cervical discectomy and fusion at C5-6.

At the request of Respondent, Petitioner underwent a Section 12 examination with Dr. Avi Bernstein on October 3, 2013. The examination addressed both Petitioner's lumbar and cervical spine. Dr. Bernstein declared Petitioner to be at maximum medical improvement with respect to the lumbar spine and agreed with Dr. Ghanayem concerning the necessity for surgery to address Petitioner's cervical spine symptoms. Dr. Bernstein, however, attributed the condition of Petitioner's cervical spine to degenerative changes and not to Petitioner's September 15, 2012, accident.

Dr. Ghanayem testified on Petitioner's behalf concerning Petitioner's cervical spine symptoms and his recommendation to surgically address those symptoms. Dr. Ghanayem, having testified that a protrusion is the same as a herniation, indicated that a disc herniation can be the result of sleeping "funnily" on a couch or a reclining chair and opined this is what Petitioner had experienced. He indicated that sleeping in such a manner can result in a neck losing muscle tone that results in the neck falling to one side and this, in turn, strains the annulus and can result in a tear. Dr. Ghanayem related Petitioner's cervical spine symptoms to Petitioner's September 15, 2012, accident, noting that Petitioner slept in the reclining chair in response to the discomfort he experienced following the lumbar spine surgery that was necessitated by the September 15, 2012, accident.

The proffered evidence does not convince the Commission that Petitioner's protrusions at C4-C5 and C5-C6 were the result of his sleeping in a reclining chair. Ms. Pietrowski, Dr. Ghanayem's nurse practitioner was the first to record Petitioner's complaints concerning his cervical spine and did so on April 5, 2013. She noted Petitioner experienced an exacerbation of cervical symptoms. This entry implies Petitioner had cervical symptoms that could be exacerbated, i.e., a pre-existing condition. The same entry was silent as to a cause for those symptoms. It simply stated Petitioner woke up, was unable to move his neck and had radicular symptoms affecting his right upper extremity. The notes taken upon Petitioner's return to Dr. Ghanayem's office on April 22, 2013, also do nothing explain how Petitioner's cervical spine came to be symptomatic. Dr. Ghanayem, who wrote the record from that visit, noted only that Petitioner continued to have on-going cervical pain with some referral of that pain to his right shoulder girdle. Petitioner was subsequently seen by Dr. Ghanayem's office for his cervical spine symptoms on May 6, 2013, June 10, 2013, July 25, 2013, August 22, 2013, November 4,

2013, and June 16, 2014, and was never recorded attributing his cervical spine symptoms to anything. Though no history of Petitioner's cervical spine symptoms was found in his notes, Dr. Ghanayem nevertheless testified that he understood, as of April 22, 2013, that Petitioner's cervical spine symptoms were the result of Petitioner "sleeping funny" in a recliner chair. This claim was made on July 6, 2014, during his evidence deposition. The Commission finds Dr. Ghanayem's testimony, made more than a year after his April 22, 2013, examination of Petitioner, unconvincing.

The Commission notes the existence of histories of Petitioner's cervical spine symptoms being related to the manner in which he slept following his September 13, 2012, lumbar spine surgery are found in Petitioner's physical therapy records from ATI Therapy. ATI Therapy drafted a Plan of Treatment on May 7, 2013, and a second Plan of Treatment on August 1, 2013. In both, references were made to Petitioner's cervical complaints being attributed to way he slept following his September 15, 2013, lumbar surgery. The Commission finds these records dispositive of nothing. Petitioner was seen by Dr. Ghanayem on May 6, 2013, the day before he presented to ATI Therapy, but did not provide Dr. Ghanayem the history he would provide ATI Therapy the following day. Petitioner saw Dr. Ghanayem on July 25, 2013, approximately a week before Petitioner was seen at ATI Therapy on August 1, 2013, and, again, did not relate the history he later provided to ATI Therapy. The Commission, despite the history contained in the ATI Therapy physical therapy notes, cannot reconcile that history with the history, or lack thereof, Petitioner provided to Dr. Ghanayem and his staff. Couple this with the delayed recitation of that history, the Commission cannot adopt that history as the cause of Petitioner's protrusions at C4-5 and C5-6.

The Commission, therefore, modifies the Decision of the Arbitrator with respect to the issue of a causal relationship existing between Petitioner's September 15, 2012, accident and the ill-condition of his cervical spine and, accordingly, vacates the awards pertaining to his cervical spine, including medical fees incurred treating Petitioner's cervical spine complaints as well as the order instructing Respondent to pay for the surgery proposed by Dr. Ghanayem. The Commission finds no reason to disturb the Decision of the Arbitrator further and affirms and adopts the findings concerning all other issues.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $519.92 per week for a period of 109-2/7 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 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 for the reasonable and necessary medical services as set forth in Petitioner's Exhibit #10 except for medical services related to Petitioner's cervical spine.

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

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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: FEB 3 - 2016
KWL/mav
O: 12/07/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

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ALVAREZ, MARTIN R
Employee/Petitioner

Case# **12WC036753**

ILLINOIS CRANE INC
Employer/Respondent

On 1/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1609 BOTTO GILBERT GEHRIS
FRANCISCO BOTTO
970 McHENRY AVEN
CRYSTAL LAKE, IL 60014

0507 RUSIN & MACIOROWSKI LTD
DANIEL R EGAN
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

16IWCC0096

Martin R. Alvarez,
Employee/Petitioner

v.

Illinois Crane, Inc.,
Employer/Respondent

Case # **12** WC **36753**

Consolidated cases: **none**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Geneva**, on **10/23/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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FINDINGS

On the date of accident, **9/15/12**, 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 **$40,553.76**; the average weekly wage was **$779.88**.

On the date of accident, Petitioner was **27** 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 **$30,155.42** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$30,155.42**.

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 $519.92 per week for 109-2/7 weeks, commencing 9/16/12 through 7/21/13 and from 7/25/13 through 10/23/14, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 9/16/12 through 10/23/14, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $30,155.42 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services as set forth in PX10, as provided in §8(a) and §8.2 of the Act.

Petitioner is entitled to prospective medical treatment as prescribed by Dr. Ghanayem with respect to both the lumbar and cervical spine conditions, and Respondent shall pay the reasonable and necessary medical expenses associated therewith, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

12/30/14
Date

ICArbDec19(b)

JAN 13 2015

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STATEMENT OF FACTS:

The Arbitrator notes that at the commencement of trial, Petitioner withdrew his Amended Application for Adjustment of Claim, at least with respect to the claimed date of accident noted therein (9/14/12) and indicated that he was alleging the date of accident claimed in the original Application, or September 15, 2012. Respondent is not disputing accident. (Arb.Ex.#1). Respondent also indicated that it was not disputing Petitioner's lumbar spine injury, but instead disputes causation as it relates to the cervical spine. Finally, Respondent's counsel represented that payment records reflect Petitioner was paid benefits up through October 3, 2013, or the date of Dr. Bernstein's §12 examination. However, Respondent agreed that if any outstanding balances exist for medical treatment occasioned prior to that date, Respondent would pay any such outstanding balances pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

Petitioner, a 27 year old inspection and maintenance worker, testified that on September 15, 2012 he was driving a JLG lift when he went over a pothole. He noted that he released the pedal at that time which should have stopped the machine. However, the machine did not stop and he was bounced up and down forcefully as the lift machine continued over the pothole. Petitioner testified that he felt pain after this incident and notified his site manager, Dan Pope that same day. A photo of the crane in question was admitted at PX14. He indicated that he was approximately 4-5 feet off the ground as he was driving the lift. Accident is not in dispute. (Arb.Ex.#1).

The next day, September 16, 2012, Petitioner sought treatment at MacNeal Hospital Emergency Room. (PX6). At that initial visit Petitioner stated that he ran over a pothole in his lift machine and that he has been feeling pain ever since. (PX6). He was initially diagnosed with a low back strain and was instructed to follow up with his primary care physician. (PX6).

On September 18, 2012 Petitioner followed up with his primary care physician, Dr. Siddiqui, at Edward Hospital and Health services. At that time it was recorded that his back pain began after the September 15, 2014 lift accident, that his pain was extremely high and that it radiated down his left leg to his toes. (PX9). At that time an MRI of the lumbar spine was ordered and he was taken off of work. (PX9). He again followed up at Edward Hospital on September 21, 2012 where he was given work restrictions of no bending, no climbing stairs or ladders, no lifting more than 5 lbs., no pushing or pulling, and sitting work 50% of the time. (PX9). On September 25, 2012 Petitioner's work status was changed to being off work after a follow up appointment at Edward Hospital. (PX9). An MRI performed on September 27, 2012 revealed disc herniations at L5-S1 and L4-L5. (PX9). On October 2, 2012 Petitioner returned to Dr. Siddiqui at Edward Hospital at which time he was referred to an orthopedic surgeon given the results of the MRI. (PX9).

Petitioner testified that he subsequently visited Dr. Alexander Ghanayem on October 29, 2012 at the suggestion of the insurance adjuster. At that time Petitioner gave the same history of accident to Dr. Ghanayem as he had to his previous physicians. (PX4). Dr. Ghanayem diagnosed Petitioner with a broad based disc herniation at L5-S1 and a smaller disc herniation at L4-L5. (PX4). Dr. Ghanayem recommended physical therapy 2-3 times per week for four weeks. (PX4). On November 19, 2012 Petitioner returned to Dr. Ghanayem and received an epidural steroid injection. (PX4). Petitioner followed up again on November 26, 2014 reporting that he did not have a good result with the injection and Dr. Ghanayem recommended continued physical therapy with an option for surgery if the physical therapy does not improve Petitioner's symptoms. (PX4).

Petitioner treated at ATI physical therapy and eventually returned for follow up with Dr. Ghanayem on December 27, 2012. (PX4). At that time, Dr. Ghanayem stated that since Petitioner had not improved with

conservative management, he recommended surgery consisting of lumbar fusion at L4-L5 and L5-S1, and instructed Petitioner to remain off of work. (PX4).

On February 19, 2013 Dr. Ghanayem performed surgery consisting of an anterior lumbar discectomy L5-S1, decompression of the spinal canal as well as anterior lumbar interbody fusion at L5-S1 and L4-L5 using interbody prosthetic devices and anterior plate stabilization. (PX4). Petitioner was discharged from the hospital on February 24, 2013. (PX4). Petitioner followed up post-surgery on March 18, 2013 and was progressing well by beginning to walk daily, although formal physical therapy had not begun yet. (PX4). Petitioner testified that post-surgery he had difficulty sleeping on his bed because it was difficult to get up without help, and the straight-backed position of sleeping on a bed caused him pain. As a result of this difficulty, Petitioner began sleeping on a reclining chair because it was easier to get up without help, and much more comfortable because it kept his body in a "V" position. He indicated that he slept on the recliner for about 2 months after the surgery.

On or about April 1, 2013 Petitioner woke up from sleeping on his recliner and was unable to move his neck. He testified that he had a severe pinch in his neck as well as numbness and tingling down his right shoulder and arm. Several hours later, when the symptoms did not recede, he called Dr. Ghanayem's office and reported the problems. On April 5, 2013, Petitioner returned to Dr. Ghanayem's office for examination regarding his cervical symptoms and was diagnosed with cervicalgia. (PX4). Dr. Ghanayem's office also instructed him to limit his physical activity at that time. (PX4). On April 22, 2013 Petitioner followed up with Dr. Ghanayem for his cervical issues at which time an MRI of the cervical spine was prescribed. (PX4). The MRI of the cervical spine subsequently performed on April 29, 2013 revealed a left pericentral disk protrusion at C4-5 as well as a right pericentral disk protrusion at C5-6. (PX4).

Petitioner continued to follow up with Dr. Ghanayem for both his lumbar and cervical spine conditions. Dr. Ghanayem treated Petitioner's cervical injuries by prescribing physical therapy for both conditions beginning on May 6, 2013. Petitioner was eventually discharged from physical therapy July 8, 2013. (PX3). After following up with Dr. Ghanayem on July 8, 2013, Petitioner underwent a functional capacity evaluation ("FCE") relating to his lower back at ATI Physical therapy on July 12, 2013. (PX7). The FCE was valid and demonstrated Petitioner's ability to work within the light to medium physical demand level with restrictions of no lifting more than 15 lbs. overhead, 19 lbs. from the floor and 22 lbs. at the waist. (PX4). On July 18, 2013 Dr. Ghanayem reviewed the FCE, stated that Petitioner was at MMI and that his restrictions were permanent. (PX4).

After the FCE Petitioner returned to work under the stated restrictions and almost immediately his cervical symptoms returned. (PX4). Petitioner testified that after two days on the job doing light duty office work he felt the same symptoms as the first day he woke up on the chair unable to move his head. He described at the hearing that his right cheek became stuck or glued to his right shoulder and that he couldn't turn his head. He also indicated that he had numbness down his arm and that he was in a lot of pain. On July 25, 2013 Petitioner returned to Dr. Ghanayem due to his cervical symptoms. At that time Dr. Ghanayem prescribed physical therapy and stated that if conservative management failed Petitioner would be a candidate for an anterior cervical discectomy and fusion at the C5-C6 level. (PX4). He was also taken off work at this time. (PX4).

On August 22, 2013 Petitioner returned to Dr. Ghanayem after completing the prescribed physical therapy. (PX4). At that time Dr. Ghanayem stated that Petitioner's neck motion was better but that he was still having pain on the right side. As a result Dr. Ghanayem recommended a cervical discectomy and fusion at the C5-C6 level. (PX4).

Petitioner subsequently visited Dr. Avi Bernstein on October 3, 2013 at the request of Respondent for purposes of a §12 examination. (RX3). Dr. Bernstein stated that Petitioner was at MMI for his lumbar spine injury as of October 3, 2013 and was capable of working within the confines of the FCE. (RX3). Dr. Bernstein also noted that Petitioner was a surgical candidate for his cervical problems. (RX3). However, Dr. Bernstein was of the opinion that the cervical injuries were unrelated to the work injury in question. (RX3).

Petitioner followed up with Dr. Ghanayem on November 4, 2013 for his cervical condition. Dr. Ghanayem continued to recommend surgery at that time and stated that he believed the cervical problems were related to the original September 15, 2012 injury and subsequent recovery from lumbar surgery. (PX4). Dr. Ghanayem continued to recommend that Petitioner stay off of work until surgery. (PX4). Petitioner has remained off work since that time pending authorization of surgery.

Petitioner followed up with Dr. Ghanayem on June 16, 2014. Dr. Ghanayem continued to recommend surgery at that time. (PX4). However, due to Petitioner's financial situation, Dr. Ghanayem indicated that he would allow Petitioner to return to work on a light duty basis to see how it went. (PX4). Petitioner testified that he did attempt to go back to work at that time. He stated that his employer, and specifically Kent Carver, Respondent's general service manager, contacted him by phone and informed him that he needed to be 100% with no restrictions before being allowed to return to work. Mr. Carver was present at the arbitration hearing but was not called to testify.

Petitioner's final visit with Dr. Ghanayem prior to hearing on this matter was October 6, 2014. (PX2). At that time Dr. Ghanayem once again recommended cervical spine surgery due to Petitioner's ongoing neck pain and right sided arm and periscapular pain. (PX2).

Petitioner testified that he was off of work from September 16, 2012 through July 22, 2013 and July 24, 2013 through October 23, 2014, the date of arbitration, due to his physician's orders. Petitioner was also asked about a posting on his Facebook page dated April 28, 2014 wherein it was noted that he was working in Green Bay. Petitioner admitted making the post, but denied that he ever went to Green Bay to work. Instead, he indicated that he had made a bet with a family friend on a soccer game and had lost, and that he had made the post in response to his friend's post asking him where he had been hiding. Petitioner testified that he did not have the money to pay his friend, and that he didn't know what to say, so he lied to his friend about his whereabouts. Petitioner testified that he was not working anywhere at that time, and that he has not worked since he last worked for Respondent.

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

Petitioner testified that he was working as a lift driver for Respondent on September 15, 2012 when his lift machine failed to stop and rolled over a pot-hole, causing him to be jarred up and down, resulting in immediate pain in his back. Accident is not in dispute, nor is the causal relationship between said accident and Petitioner's lumbar spine condition. (Arb.Ex.#1). What is in dispute is whether or not Petitioner's spine condition, which manifested itself following his cervical spine surgery and allegedly due to Petitioner sleeping in a recliner, was causally related to said accident.

The evidence shows that on February 19, 2013 Petitioner underwent surgery consisting of an anterior lumbar discectomy L5-S1, decompression of the spinal canal as well as anterior lumbar interbody fusion at L5-S1 and L4-L5 using interbody prosthetic devices and anterior plate stabilization. (PX4). Petitioner testified that during his recovery from this surgery he was sleeping on a reclining chair so as to assist him in standing up and to

relieve the pain of being in a flat-back position. He noted that one morning he woke up in his reclining chair and felt immediate pain, numbness and tingling in his neck and down his right side. At that time, Petitioner's physical therapy had barely begun and his only physical activity was a doctor monitored walking program to increase his maneuverability after surgery. Petitioner testified that he had never injured or received treatment for his neck prior to April of 2013. He also noted that he had never slept on a reclining chair prior to his lumbar surgery and that the only reason as to why he slept on a chair rather than his own bed was due to the lumbar surgery and the problems posed by the recovery of said surgery. Petitioner's testimony as to these facts was not challenged or impeached in any way. More importantly, Petitioner's history of events and the mechanism of injury are corroborated by Dr. Ghanayem in his deposition testimony. Along these lines, Dr. Ghanayem testified that "... the most proximate cause of the disc herniation is sleeping goofy on the recliner for a number of days in a row. The root cause for him having him sleep funny on the recliner is recovering from spine surgery. The root cause of that is the low back injury. (PX1, p.23). Dr. Ghanayem went on to note that "[w]hen you sleep sort of semi sitting up you lose your neck muscle tone, it kind of goes off to one side, and it puts a little strain on the corner of the annulus and that can tear from that because torsion and side bending is the mechanism by which you can do that. It's not you know, glorious trauma but it is an event where people tell you I was watching TV, I fell asleep, woke up with my head kinked, and had terrible arm and neck pain. It just happens." (PX1, pp.39-40).

In a report dated October 3, 2013, Respondent's §12 examining physician, Dr. Bernstein, indicated that he did not feel that Petitioner's cervical disc abnormality was "... in any way related to his work incident or subsequent surgery. Clearly, this patient has chronic preexisting degenerative change, and I believe that this may have become symptomatic through the course of daily living." (RX3). The Arbitrator is not persuaded by Dr. Bernstein's opinion in this regard, given that the course of daily living at the time was focused primarily on recovering from major surgery. More to the point, the Arbitrator finds Petitioner's claim that he felt the onset of cervical symptoms after having slept in a recliner for several weeks following his lumbar surgery, and that he had done so not only to assist him in getting up from a supine position but also to avoid the pain he otherwise felt from lying flat, to be both credible and an understandable response to his post surgical needs. The Arbitrator likewise finds Dr. Ghanayem's opinion to the effect that such a mechanism of injury was a contributing factor in his subsequent cervical condition to be reasonable and persuasive under the circumstances.

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner's current conditions of ill-being with respect to both his lumbar and cervical conditions are causally related to the accident on September 15, 2012.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner submitted into evidence medical bills at PX10. Respondent also agreed to pay any outstanding balance in relation to the lumbar spine and incurred prior to October 3, 2013 pursuant to the fee schedule.

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Petitioner is entitled to reasonable and necessary medical expenses as contained in PX10, and Respondent shall pay said medical services pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

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

The Arbitrator finds that Respondent's defense of this claim was neither unreasonable nor vexatious so as to warrant the imposition of penalties, especially in light of the very real dispute as to whether or not Petitioner's cervical condition was causally related to the accident in question. Therefore, Petitioner's request for additional compensation pursuant to §19(k) and §19(l) as well as attorneys' fees pursuant to §16 of the Act is hereby denied.

Furthermore, 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.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Once again, the main issue in this case was whether or not Petitioner's current condition of ill-being with respect to his cervical condition was causally related to the accident on September 15, 2012. Having found in Petitioner's favor on this question, the Arbitrator finds that Petitioner is entitled to prospective medical treatment as prescribed by Dr. Ghanayem with respect to both his lumbar and cervical spine conditions. Respondent is therefore ordered to pay the reasonable and necessary medical expenses associated with said treatment pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that he was taken off work on September 16, 2012 and returned to work on July 22, 2013. He then worked several days before being taken off work again on July 25, 2013.

Petitioner testified that he eventually asked Dr. Ghanayem to release him to light duty work on June 16, 2014 given that he was at risk of losing his house. Petitioner testified that he subsequently presented the note to Respondent and was eventually told that he needed to be 100% with no restrictions in order to be allowed back to work.

Petitioner testified that Dr. Ghanayem has continued to keep him off work for his neck through the date of his last office visit on October 6, 2014. Petitioner also testified that he has not worked anywhere else since he last worked for Respondent.

Respondent entered into evidence images from Petitioner's Facebook page, including a post wherein he noted that he had been working in Green Bay. (RX2). Petitioner admitted that it was his page, and that he had made the post. However, Petitioner credibly testified that the posting was not true, that he had never been to Green Bay, and that he had only made the post in response to a family friend's inquiry as to where he had been and why he still had not paid off on a bet on a soccer game that Petitioner had lost. While the Arbitrator would agree that such an excuse would appear rather silly on its face, there is no evidence that Petitioner ever actually worked in Green Bay, or for that matter would have to travel such a distance in order to find work. More to the point, this Facebook posting would appear to be more of a spur of the moment and admittedly lame attempt to explain his failure to pay on a gambling debt than a factual accounting of Petitioner's whereabouts and work history during the time in question. Indeed, one would be hard-pressed, in this day and age, to claim that everything posted on Facebook, or the internet for that matter, is true and accurate. Thus, the Arbitrator finds this posting to be less than dispositive on the question of ongoing TTD.

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner was temporarily totally disabled from September 16, 2012 through July 21, 2013 and from July 25, 2013 through October 23, 2014, the date of arbitration, for a period of 109-2/7 weeks.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD COLUZZI,

Petitioner,

16IWCC0097

vs. NO: 13 WC 12376

TREMCO, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

Petitioner appealed the May 4, 2015 19(b) Decision of Arbitrator Steffen finding that Petitioner, a 59 year-old roofer, sustained accidental injuries arising out of and in the course of his employment on October 31, 2012, that Petitioner provided timely notice of the accident, that Petitioner's current condition of ill-being is not causally related to the accident, that Petitioner was temporarily totally disabled for a period of 22-6/7 weeks, from November 1, 2012 through April 9, 2013, at the rate of $637.99 per week under Section 8(b), that Respondent is entitled to a credit of $10,532.39 for temporary total disability benefits paid, that Petitioner's request for

penalties and attorney fees is denied, and that Petitioner's request for an award of prospective medical in the form of a lumbar fusion, and vocational rehabilitation, is denied.

Based upon a review of the record as a whole, the Commission modifies the Arbitrator's Decision to find that Petitioner is entitled to vocational rehabilitation and maintenance under Section 8(a) of the Act. Section 8(a) of the Act provides that the employer shall "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) (West 1992).

The Commission affirms the Arbitrator's finding that Petitioner reached maximum medical improvement on April 9, 2013 based upon the reasoning stated therein, namely the more persuasive testimony of Dr. Troy, Respondent's Section 12 examiner, and the treating records of Dr. Salehi. However, on March 15, 2013, Dr. Salehi, Petitioner's treating neurosurgeon, recommended Petitioner undergo a Functional Capacity Evaluation ("FCE"), and stated that Petitioner would be released to return to work based upon the results of the FCE. (PX2). On March 25, 2013 FCE, Petitioner underwent the FCE which placed him at the light physical demand level, and noted that he failed to meet the physical demand level required of a roofer. (PX4).

Based upon the results of the FCE and Dr. Salehi's recommendation that Petitioner be released to return to work pursuant to those restrictions, the Commission concludes Petitioner is unable to return to his prior occupation. The record is void of any evidence that Petitioner was ever contacted by his employer regarding a return to work within his March 25, 2013 restrictions set out in the FCE, which clearly indicate Petitioner is unable to return to his prior job with Respondent as a roofer. In addition, vocational rehabilitation was never initiated. Accordingly, the Commission finds Petitioner is entitled to an award of maintenance benefits for the period of April 10, 2013 through the date of hearing, March 4, 2015, at the rate of $637.99 per week, and is entitled to vocational rehabilitation.

Based upon the Petitioner's inability to resume his regular work duties in which he was engaged at the time of his injury, the Respondent, in consultation with the Petitioner and Petitioner's attorney, shall prepare a written assessment of the course of medical care and rehabilitation required to return the Petitioner to employment, as mandated by Section 7110.10 of the Rules and pursuant to Section 8(a) of the Act.

With regard to the issue of prospective medical treatment, the Commission affirms the Arbitrator's denial of an award for the low back surgery contemplated by Dr. Lorenz and Dr. Slack, based upon the treatment notes of Dr. Salehi, the opinions of Dr. Troy, as well as the November 7, 2013 and December 3, 2013 office visit notes of Dr. Lorenz, which clearly indicate Petitioner did not wish to proceed with the lumbar surgery proposed at that time. (PX5).

Following his October 31, 2012 work injury, Petitioner sought treatment with Concentra Occupational Health, was diagnosed with a lumbar strain, and began a course of conservative care consisting of physical therapy, pain and anti-inflammatory medication, and restricted duty. Petitioner began a course of physical therapy on November 7, 2012, and underwent 33 sessions of physical therapy through February 28, 2013. On December 21, 2012, Petitioner began treating with Dr. Salehi, a neurosurgeon. Dr. Salehi diagnosed lumbar degenerative disc disease, recommended continued physical therapy and one to two epidural steroid injections at L5-S1, as well as light duty. At the time of his February 28, 2013 physical therapy visit Petitioner reported pain of 2 on a scale of 1 to 10. On January 18, 2013, Dr. Salehi noted Petitioner had undergone the epidural steroid injection and reported reduced right-sided radicular pain, but subsequent left sided low back pain. At the time of Petitioner's March 1, 2013 office visit with Dr. Salehi he complained of low back pain across his back and down into his right buttock, rated as 1 on scale of 1 to 10, and that went up to 1.5 when leaning backwards or putting pressure on his right leg or when pushing a 50 pound sled in physical therapy. Petitioner described his pain as an "annoying ache." Dr. Salehi noted that Petitioner's symptoms had improved secondary to his lumbar degenerative disc disease at L5-S1 and foraminal stenosis at L5-S1, that Petitioner rated his pain as 1 on scale of 1 to 10, and that because Petitioner's pain was no longer significant he did not require an additional epidural steroid injection.

Dr. Salehi recommended a 2 to 4 week course of work conditioning, 5 times per week, followed by a FCE to determine if permanent restrictions would be required. At the time of Petitioner's follow up visit with Dr. Salehi on March 15, 2013 he reported that following one session of work conditioning about 10 days ago, he felt sharp pain in his low back, with pain of 4 on scale of 1 to 10. Dr. Salehi examined Petitioner, diagnosed lumbar degenerative disc disease and lumbar spondylosis at L5-S1, and opined that Petitioner had sustained an exacerbation of his lumbosacral spondylsosis during work conditioning. He recommend that Petitioner discontinue additional work conditioning, that he proceed with the FCE, that he follow-up afterwards for a release based on the FCE if a valid evaluation, and that Petitioner continue light duty work and his medications. (PX3). Petitioner subsequently underwent a FCE on March 25, 2013, which indicated he did not demonstrate the ability to return to work as a roofer, as he was functioning at the light physical demand level. (PX4). The Commission notes the record is void of any surgery recommendation from Dr. Salehi subsequent to the March 25, 2013 FCE.

Petitioner subsequently underwent as Section 12 examination with Dr. Troy, on April 9, 2013. Dr. Troy testified that Petitioner sustained an exacerbation of pre-existing degenerative changes to his lumbar spine, that he underwent appropriate treatment with epidural steroid injections and physical therapy, and that he required no addition treatment or testing. (RX1, T9-12, 14-15). Dr. Troy testified that Petitioner sustained a lumbar strain, that had resolved, and that presently Petitioner has subjective symptomatology secondary to a pre-existing, longstanding, degenerative disc disease at L5-S1. (RX1, T12-17).

The Commission is also persuaded by the November 7, 2013 and December 3, 2013 office visit notes of Dr. Lorenz, both of which clearly document that Petitioner did not wish to

proceed with the lumbar surgery proposed by the doctor at that time. At the time of Petitioner's November 7, 2013 office visit, Dr. Lorenz recommended an FCE, and recorded: "The patient, at this point in time, has decided that he was not going to contemplate surgical intervention, which is absolutely fine." At the time of Petitioner's December 3, 2013 office visit, Dr. Lorenz recorded: "He does not want surgery at this time. He will continue to follow with pain management. He is given a work note with restrictions based on the FCE. He will return p.r.n." (PX5).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 4, 2015, 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 $637.99 per week for a period of 22-6/7 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, in consultation with Petitioner and Petitioner's attorney, shall prepare a written assessment of the course of medical care and rehabilitation required to return the Petitioner to employment, as mandated by Section 7110.10 of the Rules and pursuant to Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay maintenance benefits for the period of April 10, 2013 through March 4, 2015, the date of hearing, at the rate of $637.99 per week under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for vocational rehabilitation pursuant to §8(a) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for medical expenses, itemized in AX1, for medical treatment incurred after April 2013 under §8(a) of the Act is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for prospective medical care in the form of lumbar surgery under §8(a) of the Act is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for an award of penalties and fees under Sections 19(k), 19(l) and 16 is 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $67,400.00. 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: FEB 3 - 2016
KWL/kmt
O-12/07/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

16IWCC0097

COLUZZI SR, RICHARD
Employee/Petitioner

Case# 13WC012376

TREMCO INC
Employer/Respondent

On 5/4/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% 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:

0274 HORWITZ HORWITZ & ASSOC
MARK WEISSBURG
24 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

0445 RODDY LAW LTD
JOHN MAGIERA
303 W MADISON ST SUITE 1500
CHICAGO, IL 60606

STATE OF ILLINOIS)

)SS.

COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))

☐ Rate Adjustment Fund (§8(g))

☐ Second Injury Fund (§8(e)18)

☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

19(b)

16IWCC0097

Richard Coluzzi, Sr.

Case # 13 WC 12376

Employee/Petitioner

v.

Consolidated cases: n/a

Tremco 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 **Ketki Steffen**, Arbitrator of the Commission, in the city of **Chicago**, on **3/4/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ☐ TTD

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

N. ☒ Is Respondent due any credit?

O. ☐ Other

FINDINGS

On the date of accident, **10/31/12,** 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 $**47,834.93**; the average weekly wage was $**956.99**.

On the date of accident, Petitioner was **59** 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 $**10,532.39** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**10,532.39**.

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 $637.99/week for weeks, commencing 11/1/2012 through 4/9/13, as provided in Section 8(b) of the Act.

Respondent shall receive credit for TTD payment made to date.

Penalties

Request for Penalties is declined.

Medical benefits

Petitioner's medical care from October 31, 2012 relating to the treatment for his back is found to be reasonable and necessary. Petitioner does not seek payment of those bills. The medical bills that are requested by the Petitioner and attached as an exhibit to AX1 are denied.

Request for prospective care in the form of back surgery and request for vocational rehabilitation 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.

Kelli Steffen — Signature of Arbitrator

5/4/15 — Date

ICArbDec19(b)

MAY 4 – 2015

FACTUAL HISTORY

Petitioner, Richard Caluzzi Sr., was 59 years old at the time of his injury. He had worked as a roofer for over 40 years. He testified that he was working as a roofer for his employer, Respondent Tremco Incorporated, on October 31, 2012 and was injured on the job. He stated that he was attempting to install was attempting to use a 4 foot length of pipe to pry a duct and felt pain in his back.

On October 31, 2012 Petitioner consulted with Dr. Charlotte Albinson at Concentra Medical Center. Petitioner was diagnosed with a lumbar strain and Dr. Albinson noted a history of prior cervical spine injury form the late 70's. Petitioner was released with restrictions and pain medication and went back to work within his restrictions. Subsequently Petitioner was sent for physical therapy and reported that his symptoms were improving.

A few days following that, Petitioner's wife filled out an accident report for him.

On December 21, 2012 Petitioner had a consultation with neurosurgeon Dr. Sean Salehi. Petitioner reported shooting pain with tingling and pain in his groin area. Dr. Salehi diagnosed him with lumbar degenerative disk disease and stated that his mechanical pain and right radicular pain was secondary to his degenerative condition. He prescribed physical therapy and steroid injections.

At a follow up appointment on March 1, 2013, Dr. Salehi, noted that the Petitioner's pain on that date was only 1/10. Petitioner described his condition as an "annoying ache". Dr. Salehi diagnosed lumbar degenerative disc disease and lumbosacral spondylosis and noted that the Petitioner's pain complaints were "not significant". Dr. Salehi did not believe that the Petitioner required another epidural steroid injection, and he suggested an FCE.

The physical therapy notes from Concentra indicate that Petitioner had undergone 33 sessions and stated that his pain was a 2/10. Petitioner started work conditioning at NovaCare Rehabilitation in March, 2013 but cancelled after the 1st session due to pain. In March, 2013 Petitioner also underwent a FCE at NovaCare which showed that Petitioner was unable to continue heavy physical demand work as a roofer.

On April 9, 2013 Petitioner underwent an IME with Dr. Daniel Troy. Dr. Troy reviewed his prior medical history with included chronic bilateral shoulder pain followed by surgical intervention.

Dr. Troy also reviewed Dr. Salehi's report from March 1, 2013 noted his findings in his report dated April 9, 2013 (RX2) In Dr. Troy's opinion the Petitioner had returned back to his pain free status and had, at that time, returned to "baseline". Dr. Troy was of the further opinion that the Petitioner was at MMI as of March 1, 2013.

At his deposition (RX1), Dr. Troy testified that when he examined the Petitioner, there were no objective findings, only subjectively-based complaints. (RX1 at Page 8). Further, he

testified that the Petitioner's MRI disclosed end-stage degenerative changes at L5-S1, and that there were no acute traumatic findings. (PX1 Pages 8-9).

Dr. Troy also testified that the Petitioner had suffered an exacerbation of his pre-existing degenerative changes to his lumbar spine (RX1 at Page 9). Dr. Troy, based on the Petitioner's MRI films, thought that the Petitioner "most probably had a high probability of having pain prior to his injury because of his profound pre-existing degenerative changes at the L5-S1 disc space. (RX1 at Pages 10-11).

Dr. Troy further testified that, in his opinion, the Petitioner was able to return to full time full duty work as of March 1, 2013. (RX1 at Page 11). Dr. Troy also testified that the Petitioner, following the accident, was treated appropriately with physical therapy and an epidural steroid injection, and that he was returned to his pre-injury level as of the March 2013 visit with Dr. Salehi (RX1 at Page 12).

Dr. Troy further testified that the Petitioner had suffered an injury to his back in the accident, but that there was no way to prove whether it was just a strain or if it was an exacerbation of pre-existing degenerative changes. He further testified that the Petitioner had subjectively-based pain after the back injury, that Petitioner was treated appropriately and aggressively with physical therapy and epidural steroid injection, and that as of March 2013, Petitioner had returned back to his pre-injury status. (RX1 at Pages 20-21).

Petitioner was examined by Dr. Mark Lorenz who diagnosed his with degenerative disc disease that was aggravated by the lifting work accident.

Petitioner also went to a pain management specialist in May, 2013 who opined that he cannot return to work as foremen and noted a reported pain level of 2/10.

Petitioner continued to treat with steroid injection and medication.

In July, 2013 he underwent a discogram procedure with Dr. Anas Alzoobi at the L3-L4, L4-L5 and L5-S1 level. The discogram revealed mild bulge, narrowing of the right neural foraman and some stenosis.

On a follow-up visit at Hinsdale Orthopaedics, Dr. Monica Strand noted that the extension of the lumbar spine is causing the right leg pain. She recommended surgery at the L5-S1 but wanted to see the report from the discogram to make a recommendation regarding the L4-5 level.

Petitioner underwent a MRI at Chicago Ridge Radiology which showed mild to moderate stenosis at the L3-L4, L4-L5 and L5-S1 level.

On February 3, 2014 Petitioner was examined by Dr. Charles Slack of the Illinois Bone and Joint Institute. His assessment and findings are as follow:

Assessment: He has a persistent symptomatic aggravation of his degenerative lumbar disc disease at the L5-S1 level. It appears that he was asymptomatic prior to his incident on the job of 10/31/2012 and subsequent at that time, his preexistent DDD became symptomatic and has continued to cause pain and limitation of his activity without any pain free intervals since that time up into the present.

Plan: At this point he has exhausted conservative treatment options but has ongoing pain response. Consider for lumbar spine surgery for nerve decompression and instrumented fusion at the L5-S1 level in attempt to stabilize that level and attempt to decrease his pain and upward his functional abilities. The treatment he has had to date has been reasonable and necessary for his condition and has been related to the incident on the job of 10/31/2012. He is a good candidate.

Following the surgical recommendation Petitioner also continued on going treatment for pain management.

Petitioner is seeking prospective medical care in the form of spine surgery per the recommendation of his physicians. Petitioner has also requested vocational rehabilitation.

FINDINGS/ANALYSIS

WITH RESPECT TO "C", DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING:

The Petitioner testified that he was working for the Respondent as a roofer on the day of his accident. He testified that he hurt his back when while using a pipe to raise up ductwork on a roof. He sought treatment at Concentra and the medical reports corroborate the accident. Petitioner's wife also filled out an accident report for him to document the accident. In light of the above, the Arbitrator finds that the Petitioner sustained an accident arising out of and in the course of his employment with the Respondent on October 31, 2012.

WITH RESPECT TO "F", IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS THE FOLLOWING:

The medical records and evidence from Concentra Occupational Health (PX2), Rush Oak Park Hospital (PX3), and Nova Care (PX4) support both the Petitioner's underlying degenerative low back condition, but also an aggravation of that underlying condition in the accident of October 31, 2012. However there is no acute injury and Petitioner received extensive and appropriate treatment to alleviate his sprain/aggravation. In fact, Petitioner received 33 physical therapy sessions, medication, and a steroid injection and reported a marked improvement in his condition. On March 1, 2013, Dr. Salehi noted that the Petitioner's pain on that date was only 1/10.

To give some perspective to the matter, Petitioner was 59 years old at the time of the accident. He had been in a heavy duty physical laborer for most, if not all, of his working life. The documentation of a severe chronic degeneration of his spine is well documented as is his

prior back injury from a fall. Petitioner's body is showing signs of his long and distinguished but labor heavy work life. He had prior surgeries in his right shoulder, left shoulder and his left elbow (2003-2005). His medical condition in this regards was chronic.

Based on this reasoning as well as a review of the medical evidence the Arbitrator finds that Petitioner's current condition is not causally connected to his work accident. The Arbitrator finds that Petitioner did suffer a temporary aggravation of his symptoms but that his condition had returned to the baseline on or about the IME exam by Dr. Troy on April 9, 2013

The Petitioner claims that his condition did not return to baseline but rather progressed as a result of the accident to the point where there are now surgical recommendations from Petitioner's doctors, Dr. Slack and Dr. Lorenz. The Arbitrator disagrees and notes as follows:

The March 1, 2013 report of neurosurgeon, Dr. Salehi, lists Petitioner's pain on that date as 1/10 and notes that Petitioner described his own pain as an "annoying ache". Dr. Salehi diagnosed lumbar degenerative disc disease and lumbosacral spondylosis and noted that the Petitioner's pain complaints were "not significant". Dr. Salehi did not believe that the Petitioner required another epidural steroid injection, and he suggested an FCE.

Respondent's IME doctor, Dr. Troy, per his report dated April 9, 2013 (RX2) read Dr. Salehi's report from March 1, 2013, and determined that the Petitioner was, in Dr. Troy's opinion, returned back to his pain free status and had, at that time, returned to "baseline". Dr. Troy was of the further opinion that the Petitioner was at MMI as of March 1, 2013.

At his deposition (RX1), Dr. Troy, a board certified spinal surgeon, testified that when he examined the Petitioner, there were no objective findings, only subjectively-based complaints. (RX1 at Page 8). Further, he testified that the Petitioner's MRI disclosed end-stage degenerative changes at L5-S1, and that there were no acute traumatic findings. (PX1 Pages 8-9).

Dr. Troy also testified that the Petitioner had suffered an exacerbation of his pre-existing degenerative changes to his lumbar spine (RX1 at Page 9). Dr. Troy, based on the Petitioner's MRI films, thought that the Petitioner "most probably had a high probability of having pain prior to his injury because of his profound pre-existing degenerative changes at the L5-S1 disc space. (RX1 at Pages 10-11).

Dr. Troy further testified that, in his opinion, the Petitioner was able to return to full time full duty work as of March 1, 2013. (RX1 at Page 11). Dr. Troy also testified that the Petitioner, following the accident, was treated appropriately with physical therapy and an epidural steroid injection, and that he was returned to his pre-injury level as of the March 1, (15?) 2013 visit with Dr. Salehi (RX1 at Page 12).

Dr. Troy further testified that the Petitioner had suffered an injury to his back in the accident, but that there was no way to prove whether it was just a strain or if it was an exacerbation of pre-existing degenerative changes. He further testified that the Petitioner had subjectively-based pain after the back injury that Petitioner was treated appropriately and

aggressively with physical therapy and epidural steroid injection, and that as of March 2013, Petitioner had returned back to his pre-injury status. (RX1 at Pages 20-21).

Following Petitioner's examination by Dr. Troy on April 9, 2013, Petitioner for the first time began treating with his doctors including Dr. Lorenz, Dr. Watson (pain doctor), and ultimately was examined by his Dr. Slack.

The Arbitrator adopts the opinions of Dr. Troy, and finds that the accident caused a temporary exacerbation of the Petitioner's severe pre-existing and underlying degenerative disc disease at L5-S1, and /or that the Petitioner sustained strain injuries in the accident aggravating his underlying degenerative condition, but that that condition had returned to baseline as of March 1, 2013. The Arbitrator finds that the Petitioner did not require further medical treatment or testing in regards to his work accident following Dr. Troy's examination of April 9, 2013. The Arbitrator further finds that the Petitioner was at MMI as of the date of the Dr. Troy exam of April 9, 2013.

WITH RESPECT TO "L" RELATING TO TEMPORARY TOTAL DISABLITY PAYMENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner is requesting temporary total disability benefits of $637.99/week for 122 weeks, commencing 11/1/2012 through 3/4/15, the date of trial, as provided in Section 8(b) of the Act.

Based on the Arbitrator's finding regarding causal connection, the Arbitrator finds that Petitioner was at MMI as of the date of the Dr. Troy exam of April 9, 2013. The Arbitrator is persuaded by Dr. Troy's opinion and finds that the Petitioner was no longer disabled from working due to his work accident as of that day.

Therefore, the Arbitrator declines to award the requested TTD from 11/1/12 through 3/4/15 due to restrictions related to his work accident.

WITH RESPECT TO "M" SHOULD PENALTIES OR FEES BE IMPOSED ON RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Respondent paid $10,532.39 in TTD (RX3), representing 23 weeks of TTD based upon a presumed average weekly wage of $686.90 and a TTD rate of $457.93.

Prior to trial, the parties had agreed that the more proper average weekly wage was $956.99, based upon copies of actual paycheck stubs provided by Petitioner's attorney to attorney for Respondent. Although the Petitioner did not waive or compromise his request for penalties based on this reassessment, both attorneys stated this agreement on the record.

The Arbitrator declines to award penalties based on what clearly was an underpayment of TTD for the initial 23 week period, as the underpayment was apparently inadvertent and based upon the complexities of the manner in which the Petitioner was actually paid by the employer.

Given the Arbitrator's finding with respect to causal connection, as above, Respondent certainly had a good-faith basis to rely upon the opinions of its IME doctor, Dr. Troy, as evidenced in his report and deposition, with respect to claimed TTD and need for future medical after the date of Dr. Troy's examination on April 9, 2013.

Ketki Steffen 5/4/15

Signature of Arbitrator Ketki Shroff Steffen Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Scott Thompson,

Petitioner,

vs. NO: 12 WC 41568

16IWCC0098

Campus Cooks LLC,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical expenses, notice, 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 affirms and adopts the Arbitrator's decision in all respects, except with regard to notice. For the reasons set forth below, the Commission modifies the Arbitrator's decision and finds that Petitioner did give timely notice of his alleged work accident to Respondent. The Commission further concurs with the Arbitrator's finding that the Petitioner failed to establish an accident arising out of and in the course of his employment.

The Petitioner's alleged date of accident was October 21, 2012. His supervisor, Martin Romero, testified that he knew by the following Wednesday (October 24, 2012) that Petitioner had called Respondent to give notice of a work accident. (Tr. 49). Given this testimony, the Commission finds that the Respondent had timely notice of Petitioner's alleged work accident.

16IWCC0098

IT IS THEREFORE ORDERED BY THE COMMISSION that compensation is denied.

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 the 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: FEB 4 - 2016

TJT/ gaf
O: 12/07/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

THOMPSON, SCOTT
Employee/Petitioner

Case# **12WC041568**

CAMPUS COOKS LLC
Employer/Respondent

16IWCC0098

On 4/15/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

1315 DWORKIN AND MACIARIELLO
DOMENIC MACIARIELLO
134 N LASALLE ST SUITE 1515
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
BRIAN J KOCH
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

16IWCC0098

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)

Scott Thompson
Employee/Petitioner

v.

Campus Cooks LLC
Employer/Respondent

Case # **12 WC 41568**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **February 9, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0098

FINDINGS

On the date of accident, **10/21/12**, 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 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 **$36,400.00**; the average weekly wage was $700.00.

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

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

Respondent shall be given a credit of **$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

As Petitioner failed to establish an accident arising out of and in the course of his employment, compensation is hereby denied.

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

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

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

Signature of Arbitrator

4/14/15
Date

ICArbDec19(b)

APR 15 2015

16IWCC0098

IN THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

SCOTT THOMPSON, Petitioner,	)	
	)	Case No: **12 WC 041568**
CAMPUS COOKS., Respondent.	)	

ADDENDUM TO THE DECISION OF ARBITRATOR

This matter proceeded to hearing pursuant to §19B of the Illinois Workers' Compensation Act (the "Act") before Arbitrator Jessica A. Hegarty on February 9, 2015. The disputed issues include date of accident, accident, notice, causal connection, medical bills, TTD and prospective medical.

Findings of Fact

Petitioner was employed by Respondent as a Chef in a sorority house at Northwestern University on the alleged date of accident and had been so employed for almost 6 months.

Petitioner testified that on October 21, 2012, while preparing a meal, he leaned over a prep-table and attempted to open a window because he was hot. Ss he applied force to open the window, which was stuck, he heard a "pop" and immediately felt pain in his right shoulder. Petitioner testified he was in a bent over position with his arms extended in front of him at the time of the injury.

Martin Romero, Petitioner's supervisor, testified that he received a telephone call on the evening of October 21, 2012, from Petitioner, who advised that he was in the hospital emergency room. According to Mr. Romero, Petitioner didn't provide any further details with respect to how or where he was injured during that phone call. Mr. Romero reminded Petitioner to call the office first thing in the morning. Mr. Romero testified that Petitioner did not appear for work on October 22, 2012, nor did he call the office to advise that he had sustained an accident while at work or that he would not be working that day. Petitioner was a "no call/no show" for two days and was terminated on October 23, 2012. Mr. Romero testified to making several calls to Petitioner on October 22, 23 and 24 with no return calls from Petitioner.

On October 21, 2012, Petitioner presented to Resurrection Health Center with complaints of shoulder pain for the last eight hours of which he described as sharp, aching and non-radiating. Petitioner denied any symptoms in the past. Petitioner reported "that he was attempting to open a window and felt a pop/snap sensation."(Px.1). Petitioner reported taking Motrin for approximately six hours with

minimal relief before reporting to the emergency room. Petitioner's x-rays were unremarkable. He was diagnosed with a right shoulder strain and was sent home with pain meds and instructions to follow up with his own doctor. (Px.1).

On November 19, 2012, Dr. Alexander Goldvekht examined Petitioner at Advanced Physical Medicine. Petitioner complained of pain to his right shoulder after opening a window while working as a Chef. (Px.4). He was diagnosed with RTC syndrome of the right shoulder, and prescribed an MRI and physical therapy. (Id.).

On November 20, 2012, Petitioner presented to Dr. Ronald Silver noted for an initial consult. (Px.2). Petitioner reported a history of reaching over a table to open a window and feeling a pop in his right shoulder. (Px.2). The doctor noted complaints of severe pain and limited range of motion in his right arm. (Id.). Upon exam, Dr. Silver diagnosed Petitioner with rotator cuff impingement with possible tearing. The doctor administered a subacromial cortisone injection with 40 milligrams of Kenalog and 4 ccs of Lidocaine with a Betadine preparation. Dr. Silver recommended therapy, Vicodin for pain, Meloxicam for inflammation and Omeprazole for gastrointestinal protection. Dr. Silver recommended an MRI scan and noted Petitioner was temporary totally disabled Petitioner from work for approximately four weeks. (Id.)

Petitioner initiated therapy on November 29, 2012 with a date of onset listed at October 28, 2012.

On November 28, 2012, an MRI revealed mild rotator cuff tendonitis/bursitis involving the distal supraspinatus. (Px.3).

On December 10, 2012, Dr. Goldvekht confirmed the results of the MRI as showing an intact rotator cuff with mild tendonitis and /or bursitis.

Petitioner participated in therapy at Advance Physical Medicine in Oak Park through December 27, 2012.

On January 3, 2013, Petitioner followed up with Dr. Silver who reviewed the MRI, performed an exam, and noted continued complaints of pain and that the injection only provided about 48 hours worth of relief. The doctor recommended arthroscopic surgery of the right shoulder. (Px.4).

Petitioner testified that he is currently not working and that he wishes to have surgery for his right shoulder pain.

DEPOSITION TESTIMONY OF DR. RONALD SILVER

The deposition of Dr. Ronald Silver was taken on October 9, 2013. Dr. Silver issued a narrative report wherein he causally relates Petitioner's shoulder condition to his claimed work event of October 28, 2012. Dr. Silver testified that, based upon physical examination and Petitioner's complaints he would perform a right shoulder arthroscopy

to repair the pathology he diagnosed in the right shoulder. On cross examination, Dr. Silver conceded that his opinions with regards to causal connection were reliant upon an accurate history as provided by Petitioner. Dr. Silver consistently testified that Petitioner's description of accident while lifting a window on October 28, 2012 was a consistent mechanism of injury for his right shoulder pathology.

DEPOSITION OF DR. LAWRENCE LIEBER

On April 23, 2013, Petitioner presented to Dr. Lawrence Lieber for an Independent Medical Exam ("IME") at Respondent's request pursuant to Section 12 of the Act. (RX 4.)

The deposition of Dr. Lieber was taken on April 17, 2014. Dr. Lieber testified that after reviewing the MRI report and examining Petitioner he came to the diagnosis of rotator cuff syndrome of the right shoulder. (Rx.3). He testified that he never reviewed the actual MRI Films only the report. (Id.) Dr. Lieber found that Petitioner's MRI showed pre-existing degenerative rotator cuff disease with no evidence of acute abnormality within the right shoulder area that could be related to the October 21, 2012, event. Dr. Lieber found no evidence of any objective abnormalities within the right shoulder that could be related to either an October 2012 event or associated with reaching over and lifting a window.

CONCLUSIONS OF LAW

In support of the Arbitrator's decision relating to Accident and Notice:

An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause. *E. Baggot Co. v. Industrial Commission*, 290 Ill. 530, 125 N.E. 254 (1919). An injury "arises out of" one's employment if its origin is in a risk connected with or incidental to employment so that there is a causal connection between the employment and the accidental injury. *Warren v. Industrial Commission*, 61 Ill. 2d 373, 335 N.E. 2d 488 (1975). Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. *Howell Tractor & Equipment Co. v. Industrial Commission*, 78 Ill.2d 567, 573, 38Ill.Dec. 127, 403 N.E.2d 215. (1980). A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties. *Orsini v. Industrial Commission* 117 Ill.2d 38, 45, 109 Ill.Dec. 166, 509 N.E.2d 1005 (1987).

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. *DeHoyos v. Industrial Commission*, 26 Ill.2d 110, 185 N.E.2d 885 (1962). 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. *Material Services Corp. v. Industrial Commission*, 53 Ill.2d 429, 433, 292 N.E.2d 367 (1973).

The Arbitrator finds that the Petitioner has not provided sufficient evidence that an accident occurred at work on the claimed accident date. The medical records from Resurrection Medical Center do not indicate a history of Petitioner suffering an injury at work. The only history noted is that of lifting a window. When asked on cross-examination as to whether Petitioner provided a history of work accident to his examining physician at Resurrection Hospital, he testified that he most did and that the medical records were incorrect in their omission of a work reference.

Mr. Romero testified that he spoke with Petitioner on October 21, 2012, at approximately 11:30 P.M. Mr. Romero testified that Petitioner called him to let him know that he was in the hospital and that he would likely be unable to work the following day. When asked specifically whether Petitioner provided a history of an accident occurring at work, Mr. Romero testified Petitioner did not.

It is not until nearly one month after the alleged accident date that Petitioner does report a work accident to Dr. Alexander Goldvekht where he complained of pain to his right shoulder after opening a window while working as a Chef.

Even assuming that Petitioner did provide ample evidence that he was injured while at work, he failed to sustain his burden with respect to whether his alleged injury arose out of his employment. There is no evidence that this window is unique to Petitioner's employment or that by virtue of his employment, Petitioner was exposed to an increased risk of injury. This window cannot be assumed to be unique to Petitioner's employment simply because it is located at the work place. The Arbitrator finds that this window was a hazard to which the employee would have been equally exposed apart from the employment.

Based on a careful consideration of the evidence contained in the record, the Arbitrator finds the Petitioner did not sustain his burden of proof with respect to whether the injury occurred at work and whether the injury arose out of his employment. Further, the Arbitrator finds a failure in the evidence on the issue of notice.

In support of the Arbitrator's decision relating to the remaining disputed issues, the Arbitrator finds the following facts:

As the Petitioner failed to prove accident by a preponderance of the evidence, the Arbitrator need not address the remaining disputed issues.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIMOTHY SHAUGHNESSY,

Petitioner,

vs. NO: 08 WC 49366

CITY OF CHICAGO,

16IWCC0099

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 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 Commission modifies the Arbitrator's causation determination with regard to Petitioner's slip and fall in his physician's parking lot on December 16, 2008. As a result, the Arbitrator's determinations regarding medical expenses and permanency are also necessarily modified as a result.

The question in this case is whether the Petitioner proved that the work injury (a right foot fracture) caused the subsequent injury (head trauma). The Petitioner, following a December 16, 2008 visit to the physician treating the foot, Dr. Strugala, slipped and fell in the parking lot. The Commission believes that the evidence supports a finding that at least part of the cause of the December 16, 2008 slip and fall was Petitioner's use of walking CAM boot on ice and snow on the ground in the parking lot.

In *Fermi Nat'l Accelerator Lab v. Industrial Comm., 224 Ill.App.3d 899, 586 N.E.2d 750 (1992)*, the Court cited *International Harvester v. Industrial Comm., 46 Ill.2d 238, 263 N.E.2d*

49 (1970), and made several findings that are applicable to the case at bar. First, the Court determined that the Commission's determination in *Fermi* that a subsequent accident/injury was a natural consequence flowing from the original accident was not against the manifest weight of the evidence. Citing *International Harvester*, the court noted: "where the work injury itself causes a subsequent injury, however, the chain of causation is not broken"; and: "If a non-employment related factor is a contributing cause, with the compensable injury, in an ensuing injury or disability, it does not constitute an 'independent intervening cause' breaking the causal connection where it is not brought about by claimant's intentional or negligent misconduct."

In *Fermi*, the claimant was on crutches after suffering an initial work-related accident, and was using them to traverse a wet area at work. The claimant testified that the crutches slipped, causing him to fall and sustain a new injury. In this case, the Petitioner testified that: a) the parking lot was gravel, covered in ice and snow, b) he was wearing his walking boot on his right foot/leg, c) he thinks it was snowing that day, d) he was carrying a folder of his medical records in his left hand, e) testified that he believed he slipped on ice, but was unsure because it was snow covered, f) he slipped with his right foot first, g) asked if he believed he slipped because of the boot or because of the ground, he stated "both", h) the surface was not smooth, but was up and down with holes or standing water in gravel, and i) he walked carefully because the surface was frozen ice and snow covered. (Tr. 11-17, 24-30, 36-39).

Petitioner needed to prove not just that the ground was slippery, but that the prior injury, i.e. the boot, was at least a part of the reason he fell. While the Arbitrator found the evidence lacking, we believe the evidence supports a determination that the Petitioner's prior right foot injury and use of a walking boot contributed to his slip and fall. The Petitioner testified that it was his right foot that slipped, which is the foot he had injured and which had the boot on, and that both the boot and the ground are what caused him to slip. As noted, he also testified that he was being extra careful while traversing the area due to the ground conditions, but the boot still slipped on the icy conditions. We also note that the December 16, 2008 records of both MercyWorks (Px1) and Little Company of Mary Hospital (Px2) specifically note that the Petitioner was using the CAM boot.

While Respondent attempted to rebut this using weather documentation from that date (Rx5), whether it actually snowed that particular day or not doesn't tell us anything about whether there was preexisting ice and snow on the ground. Additionally, the records do indicate some amount of precipitation, albeit a very small amount. Even that small amount could have resulted in adding to the slippery walking conditions.

The Commission finds that the evidence supports the inference that the Petitioner's use of the walking boot made it more likely that Petitioner could slip and fall in the icy conditions he encountered in the doctor's parking lot. But for the work injury involving the right lower extremity, Petitioner would not have been wearing the walking boot. Therefore, we find that this case falls within the reasoning espoused in *Fermi* and *International Harvester* and their progeny.

Based on our findings, the Petitioner is entitled to the reasonable medical expenses related to both the right foot and head trauma, as submitted in Petitioner's Exhibit 5, pursuant to

the Fee Schedule. Respondent shall pay same, with credit for any of the expenses that were paid prior to hearing, as well as any that were paid pursuant to Section 8(j) of the Act.

With regard to the right foot trauma, the Commission finds that the Petitioner sustained the loss of use of 15% of the right foot. This is based on the nature of the injury, including a second metatarsal fracture, and Petitioner's complaints of ongoing foot discomfort with cold weather and the need to keep the foot warm. Dr. Strugala's last report of January 13, 2009 noted the Petitioner had ongoing stiffness in the foot.

With regard to the head trauma, the Commission finds, based on the medical records in evidence (Px1, Px2 & Px4), that the Petitioner sustained a subdural hematoma, right temporal bone fracture, cochlear concussion and possible ruptured right eardrum. The Petitioner testified, consistent with his medical records, that he also had issues with vertigo, and that he had no similar prior symptoms. Dr. Bendok's diagnoses included sensorineural hearing loss, and Petitioner testified that he feels an ongoing hearing loss and tries to focus on his better left ear in conversation. Based on this evidence, the Commission finds the Petitioner has sustained the loss of 10% of the man as a whole based on the head trauma.

The Commission notes that we affirm the credits to Respondent that were awarded by the Arbitrator. However, we note that a TTD credit was awarded despite no TTD being requested or awarded in the case. Thus, it would be our understanding that the parties agreed on the period Petitioner was entitled to TTD, and that it was paid. Respondent's TTD credit is thus not applicable to be taken against the permanency awarded in the case or any medical expenses, unless there was an overpayment of TTD. If there was an overpayment of TTD based on the agreement of the parties regarding the period of TTD Petitioner was entitled to, the Respondent would only then be entitled to credit for such overpayment against the Petitioner's permanency awards.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is modified as noted, and that the Petitioner's December 16, 2008 slip and fall incident is causally related to the October 31, 2008 accident, for the reasons noted above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses contained in Petitioner's Exhibit 5, pursuant to Sections 8(a) and 8.2 of the Act, including expenses related to both Petitioner's right foot and head injuries; Respondent is entitled to credit as indicated in the Arbitrator's Decision.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week, the maximum allowable permanency rate, for a period of 25.05 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 15% of the right foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week, the maximum allowable permanency rate, for a period of 50 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the loss of use of 10% of the man as a whole.

16IWCC0099

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: FEB 4 - 2016
TJT: pvc
O 12/08/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHAUGHNESSY, TIMOTHY
Employee/Petitioner

Case# **08WC049366**

CITY OF CHICAGO
Employer/Respondent

16IWCC0099

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:

0222 GOLDBERG WEISMAN & CAIRO LTD
DEBORAH BAKER
ONE E WACKER DR 39TH FL
CHICAGO, IL 60601

0010 CITY OF CHICAGO-LAW DEPT
ELIZABETH MANNION
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

16IWCC0099

☐ 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

Timothy Shaughnessy
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **08 WC 49366**

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 **David Kane**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **October 24, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 16IWCC0099

On **October 31, 2008**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury of **October 31, 2008**, Petitioner earned $**77,827.52**; the average weekly wage was $**1,496.68**;

On the dates of accident, Petitioner was **60** 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 $**14,580.93** for TTD, **0** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $**14,580.93.**

Respondent is entitled to a credit of $**22,030.35** under Section 8(j) of the Act.

ORDER

For the injuries sustained to Petitioner's right foot, Respondent shall pay petitioner permanent partial disability benefits of $664.72/week for 16.7 weeks, because the injuries sustained caused the 10% loss of the right foot, as provided in Section 8(e) of the Act.

This Arbitrator finds that dates of service 12/2/08 Code 73630/RT and 12/16/08 Code 73630/RT for Midland Orthopedic Associates are related to the Petitioner's right foot injury, and Petitioner shall pay these dates of service directly to the provider, pursuant to the fee schedule, with a credit to Respondent for any payments already made.

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

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

David A. Kane
Signature of Arbitrator

November 7, 2014
Date

NOV 10 2014

Timothy Shaughnessy v. City of Chicago

08 WC 49366

16IWCC0099

FINDINGS OF FACT:

The parties stipulate that the City of Chicago (hereinafter referred to as "Respondent") was operating under the Illinois Workers' Compensation Act on October 31, 2008. On said date Timothy Shaughnessy (hereinafter referred to as "Petitioner") sustained accidental injuries that arose out of and in the course of his employment with the Respondent. On this date, he was 60 years old and working as a lineman for the City of Chicago.

Parties proceeded to hearing on October 24, 2014, with disputed issues as to accident, causation of the injuries and nature and extent of the injuries, and medical bills.

Petitioner testified on October 31, 2008, he was working as a lineman, when a pole he was dissembling fell on his right foot. Petitioner reported to Mercy Works that day, at which time he had an X-ray done, showing a non-displaced fracture of the 2nd metatarsal on the top of his right foot. (Px 1). Petitioner was given a CAM Walker (walker boot), and placed on limited duty. (Px 1).

Petitioner followed up care with Dr. Strugala at Midland Orthopedics, and continued to treat at Mercy Works as well. Petitioner was discharged full duty for his right foot on February 10, 2009, approximately three months following the incident.

Petitioner also testified to an injury that occurred while Petitioner was in the parking lot leaving his December 16, 2008 appointment with Dr. Strugala at Midland Orthopedics. Dr. Strugala's records from December 16, 2008, state the doctor wanted Petitioner to begin weaning out of the walker boot. (Px 3).

Petitioner testified that the parking lot was adjacent to the doctor's office, and it was open to the public and patrons of other surrounding businesses. Petitioner did not report the incident to the doctor's office. Petitioner testified there was snow and ice on the ground, and he was not sure what he slipped on. He testified he slipped with his right foot, on which he was wearing the walker boot. Petitioner had no loss of consciousness. (Px 2)(Px 4).

Petitioner did not call an ambulance; rather he drove his next appointment that day at Mercy Works. The medical records indicate that Petitioner then reported to Little Company of Mary, complaining of bleeding from his right ear and dizziness earlier that day after the fall. (Px 2).

Per the request of Petitioner's sister, a nurse at Northwestern Memorial Hospital, Petitioner was transferred to Northwestern Memorial Hospital that same day, December 16, 2008. (Px 4). At CT scan taken at that time showed a non-displaced right temporal bone fracture. (Px 4). Petitioner was found to have hearing loss in his right ear at that time. (Px 4). Petitioner was discharged from Northwestern Memorial Hospital on December 21, 2008, with the diagnoses of "left frontal acute subdural hematoma, contusion, and right temporal bone fracture and sensorineural hearing loss". (Px 4). While Petitioner was admitted in Northwestern

Memorial, he was also treated and instructed in diabetes self-management on Dec. 18 and 19. (Px 4).

Petitioner testified he followed up three additional times with the neurologist on February 2, 2009, February 26, 2009, and March 2, 2009. Medical records for these treatment dates were not admitted into evidence; however, Petitioner testified he has had no additional treatments for his head or right ear since March 2009. Petitioner has had no additional treatment for his right foot since February 2009. Petitioner testified he has no pending doctor's appointments, and is not on any prescription medication for his claimed injuries.

Petitioner testified he retired from the City of Chicago on February 17, 2009, because he had the maximum amount of time which allowed him to retire.

Petitioner only testified to remaining permanency in his right ear and right foot. On the date of trial, Petitioner testified his right foot was "in good shape," and the only time he notices discomfort is in cold weather. Otherwise, he testified he can do "just about everything." Petitioner did not present evidence of measurable hearing loss, but he testified that he hears better out of his left ear than his right and tries to use his right ear for talking on the phone.

CONCLUSIONS OF LAW:

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

This Arbitrator finds that an accident did occur on Oct. 31, 2008, wherein Petitioner's right foot was injured by a falling pole. This Arbitrator does not find that a separate accident occurred on December 16, 2008, on the date of petitioner's slip and fall. Rather, the issue is one of causation as to whether Petitioner's slip and fall in the public parking lot after leaving his orthopedic doctor's office was related to the work incident.

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

There is no di8spute that the right foot condition is causally related to the accident of October 31, 2008. The causation dispute concerns the injuries to Petitioner's head due to the fall in the parking lot, as set forth above. Petitioner presented no evidence that the fall in the parking lot c=was caused by the prescribed boot he was wearing on the right foot. There is no evidence that Petitioner would not have fallen regardless of the wearing of this boot. As such, Petitioner has failed to meet his burden of proof on this issue.

For these reasons, this Arbitrator finds that the injuries sustained from the slip and fall on Dec. 16, 2008 are not causally related to the underlying work incident.

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?

Petitioner claims outstanding bills in the amount of $1,196.79 for Midland Orthopedic (Arb. Exh. 1)(Px 5).

The following dates of service appear outstanding:

10/31/08 – Code 28470

10/31/08 – Code 99202/25

12/2/08 – Code 73630/RT

12/16/08 – Code 73630/RT

Respondent submitted corresponding proofs of payments to these claimed balances made to Midland Orthopedic for dates of service:

10/31/08 – Code 28470 (Rx 2, p.1)

10/31/08 – Code 99202/25 (Rx 2, p. 1)

This Arbitrator finds that dates of service 12/2/08 Code 73630/RT and 12/16/08 Code 73630/RT are related to the Petitioner's foot injury, and Petitioner shall pay these dates of service directly to the provider, pursuant to the fee schedule, with a credit to Respondent for any payments already made.

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

As a result of Petitioner's work accident of October 31, 2008, Petitioner sustained an injury to his right foot, when a poll he was dissembling fell on it. As a result of the accident, Petitioner sustained a non-displaced fracture of the 2nd metatarsal on the top of his right foot. Petitioner treated with Mercy Works and Midland Orthopedics, and utilized a walker boot while on limited duty. Petitioner's foot was treated conservatively, and he

was released at full duty approximately three months following the incident, in February 2009.

On the date of trial, Petitioner testified his right foot was "in good shape," and the only time he notices discomfort is in cold weather. Otherwise, he testified he can do "just about everything."

For the injuries sustained to Petitioner's right foot, Respondent shall pay petitioner permanent partial disability benefits of $664.72/week for 16.7 weeks, because the injuries sustained caused the 10% loss of the right foot, as provided in Section 8(e) of the Act.

Petitioner failed to meet his burden that his injuries sustained by the slip and fall on Dec. 16, 2008 were causally related to the work incident of Oct. 31, 2008.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Carlos Lopez,

Petitioner,

vs. NO: 14 WC 27884

16IWCC0100

Channel Distribution,

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 temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, with expansion, as stated below, said Decision being attached hereto and made a part hereof.

Not unlike the practitioner's that appear before us, the Commission is equally troubled by the language of the Illinois Supreme Court in the matter of *Interstate Scaffolding v. Workers' Compensation Commission*, 236 Ill.2d 132, 135-36, 923 N.E.2d 266, 268 (2010) and the Appellate Court in its progeny. We have been left with a fact specific decision that has been alleged to be all encompassing and all powerful. To say the least, the decision has left room for great consternation amongst the panels.

In the matter before us, we possess a record that is neither illusive nor unclear. Rather, the record demonstrates that the Decision of the Arbitrator was simple and straight forward.

The primary issue before the Commission is whether or not the Petitioner left his position of employment voluntarily. By his theory of the case, the Petitioner would have us believe that this was either a forced resignation or a firing. The Commission finds it impossible to believe that a resignation is either forced or a firing, when the Petitioner had an opportunity to discuss his status with his then attorney and, after that conversation, decided to separate from the Respondent.

If the Petitioner's decision to terminate was voluntary, how then would he be entitled to receive continuing TTD benefits? To so find would create a legal absurdity. A voluntary resignation vitiates any obligation on the part of the employer to pay TTD, when the Petitioner is capable of light work and has been provided work within his restrictions. To find the opposite would encourage resignations with an expectation of the payment of continuing TTD benefits ad infinitum.

The Commission recognizes the plight of the Petitioner. His employment capacity is extremely limited and he may be entitled to TTD at a point in time in the future. If he is found to be temporarily totally disabled in the future, he will be entitled to TTD.

By the record before us, the Petitioner was not fired and was not forced to resign. He did so voluntarily. He did so with the advice of his counsel. He did so despite the fact that he was only capable of light work. He did so despite the fact that the Respondent was providing work within his restrictions. He did so despite the fact that he was not released to return to work at MMI or full duty. He did so despite the fact that he was given an opportunity to rectify any issues he had with the TSA.

Not unlike the Petitioner, this Commission is also obligated to consider the plight of the Respondent.

Here, the employer was providing light duty work to the Petitioner as he was not at MMI. Here, the Petitioner was notified by the TSA that the Petitioner was legally disqualified from working in any capacity for the Respondent as Petitioner had provided false or invalid identification information. Here, the entire work staff of the Respondent was TSA Certified. Here, other employees who had worked for the Respondent and received similar letters from the TSA were given an opportunity to straighten out their TSA status or they were terminated. Here, the Petitioner was given that same opportunity and instead chose to resign.

Therefore, Petitioner effectively removed himself from his position with Respondent by his own volition, thereby relinquishing his rights to additional temporary total disability benefits subsequent to his resignation. The Commission specifically finds that Petitioner's separation from Respondent's employ did not represent "constructive termination" in that he was allowed the opportunity to rectify the TSA's concern regarding his immigration status, and chose not to. As a result, the Commission views Petitioner's resignation as akin to an individual's retirement or voluntary refusal to work in a position within his restrictions. As such, this case is distinguishable from the cases of *Interstate Scaffolding*, supra and *Matuszczak v. Workers' Compensation Commission*, 22 N.E.3d 341, 387 Ill.Dec. 296 (2nd Dist. 2014), wherein the claimants were terminated from their employment for cause. Accordingly, the Commission affirms the Arbitrator's determination that Petitioner failed to prove his entitlement to ongoing TTD benefits subsequent to his resignation on August 13, 2014.

All else otherwise affirmed and adopted.

16IWCC0100

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's claim for additional temporary total disability benefits from August 14, 2014 through December 9, 2014, the date of arbitration, 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: FEB 4 - 2016

Michael J. Brennan

Kevin W. Lamborn

o:11/24/15
TJT/pmo
51

DISSENT

This case once again presents us with a fact scenario wherein workers' compensation benefits due an injured worker, specifically temporary total disability benefits, have been cut off by an employer and its insurer prior to an individual's attainment of maximum medical improvement for conduct unrelated to his work injury. Since the majority opinion seeks to justify the cessation of these benefits based on an analysis of the circumstances surrounding the termination of employment (i.e. the reasons why he lost his job), and not on the question of whether or not the claimant's condition had stabilized, in clear contravention of the dictates of *Interstate Scaffolding* and *Matuszczak*, infra, I respectfully dissent.

The evidence shows that Petitioner had worked for Respondent for approximately eleven years, driving a forklift and loading containers. At the time of his employment separation and the cessation of TTD benefits, Petitioner was working for Respondent in a light duty capacity following his undisputed work injury. The record shows that pursuant to background checks issued by the TSA in the summer of 2014, Petitioner was asked to submit information concerning his immigration status. Since Petitioner admittedly did not have the proper immigration papers, he was left with the choice of either resigning or being fired. After consulting with his first attorney, Petitioner chose to resign so as to avoid having to explain a firing to future potential employers. Petitioner thereupon signed the preprinted "voluntary" resignation form supplied to him by Respondent on August 13, 2014.

In *Interstate Scaffolding*, the Illinois Supreme Court held that "... when an employee who is entitled to receive worker's compensation benefits as a result of a work-related injury is later terminated for conduct unrelated to the injury, the employers' obligation to pay TTD workers' compensation benefits continues until the employee's medical condition has stabilized and has reached [MMI]." *Interstate Scaffolding v. Workers' Compensation Commission*, 236 Ill.2d 132, 135-36, 923 N.E.2d 266, 268 (2010).

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In attempting to distinguish *Interstate Scaffolding* and *Matuszczak*, the Arbitrator focused on the supposed "volitional" nature of the separation on the part of Petitioner, and the fact that "[t]he claimant's inability to work for his pre-injury employer is linked inextricably to his own personal decisions and actions ..." (Arb.Dec., p.3). However, the court in *Matuszczak* specifically noted that "while the Commission may examine the facts of a particular case and find the claimant refused light-duty work offered by his employer, in doing so, it should consider the claimant's conduct without reference to, or reliance on, his termination from employment. As discussed, ***the simple fact that a claimant committed a voluntary act and, as a result, was properly discharged is not a valid basis for terminating or suspending TTD.***" *Matuszczak v. Workers' Compensation Commission*, 22 N.E.3d 341, 387 Ill.Dec. 296 (2nd Dist. 2014) (Emphasis added). Indeed, the *Matuszczak* court went on to state that "[i]n reaching its decision, the court [in *Interstate Scaffolding*] rejected this court's finding that the critical inquiry in determining a claimant's entitlement to TTD benefits when leaving the workforce was whether the departure was voluntary." *Matuszczak*, 22 N.E.3d at 345; citing *Interstate Scaffolding*, 923 N.E.2d at 268.

In addition, as in *Matuszczak*, this is not a case where the claimant refused work within his physical restrictions. Indeed, Petitioner was working in a light duty capacity for Respondent at the time of his "voluntary" termination and in all likelihood would have continued to do so up to the date of his subsequent surgery.

Furthermore, one has to question whether, as a practical matter, Petitioner was really given much of a choice in the matter, other than his preferred method for ending his employment with Respondent. While Petitioner's failure to maintain the necessary immigration papers can in no way be condoned, there is no requirement under the Act that one show proof of citizenship to be entitled to benefits. In addition, after having already employed Petitioner for approximately eleven years, without the apparent need to verify his immigration status, there is no evidence to show that Respondent did not have jobs available within Petitioner's restrictions in an area that would not be subject to TSA and national security concerns. Indeed, Respondent's human resource administrator, Cyndy Kuborn, acknowledged that at the time of his "resignation" Petitioner had been working a desk job doing paperwork while on light duty, a position where he admittedly would not be left unattended with cargo and which would presumably satisfy the TSA's security concern relative to his regular job as a fork lift driver. And while Ms. Kuborn testified that everyone in the building was TSA certified, there is no evidence that this was necessarily mandated by the TSA for all job classifications, particularly those that did not involve being around cargo.

Instead, Respondent used the TSA's request for immigration papers as a pretext to unilaterally cut off TTD benefits prior to the stabilization of Petitioner's condition, and as such the decision of the Arbitrator should be reversed and TTD benefits awarded from August 14, 2014 through the date of arbitration on December 9, 2014. To the extent the majority opinion attempts to engage in a public policy debate by dwelling on certain moral considerations at the expense of the clear dictates of the appellate and supreme courts in *Interstate Scaffolding* and *Matuszczak*, I dissent.

Thomas J. Tyrrell

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

LOPEZ, CARLOS
Employee/Petitioner

Case# **14WC027884**

CHANNEL DISTRIBUTION
Employer/Respondent

16IWCC0100

On 1/12/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4375 LAWRENCE MACK PC
LARRY MACK
233 S WACKER DR SUITE 2101
CHICAGO, IL 60606

4412 ACCIDENT HOLDINGS INC
NICOLE BUBAN-HANLON
200 W MADISON ST SUITE 3850
CHICAGO, IL 60606

16IWCC0100

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)

Carlos Lopez
Employee/Petitioner

v.

Channel Distribution
Employer/Respondent

Case # 14 WC 27884

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joshua Luskin**, Arbitrator of the Commission, in the city of **Chicago**, on **December 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. [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 _____

16IWCC0100

FINDINGS

On the date of accident, **2/5/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**33,273.24**; the average weekly wage was $**639.87**.

On the date of accident, Petitioner was **37** years of age, ***married*** with **2** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services incurred to date. Prospective medical care has not been disputed as of the date of trial and as such no findings regarding any such services are made at this time.

Respondent shall be given a credit of $**7,922.20** for TTD, $**556.64** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**8,478.84 (all appropriate benefits accrued through 8-13-2014)**.

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

ORDER

For reasons set forth in the attached decision, the respondent is not liable for temporary disability benefits from August 14, 2014 through the date of trial.

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

January 12, 2015
Date

ICArbDec19(b)

JAN 12 2015

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CARLOS LOPEZ, Petitioner,	)	
vs.	)	No. 14 WC 27884
CHANNEL DISTRIBUTION CORP., Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

This matter was heard pursuant to Section 19(b) of the Act. Prior to the hearing, the parties acknowledged that the only matter presently in dispute was the entitlement of the claimant to temporary disability benefits, and that as of the date of trial, the claimant was pending surgery which had previously been authorized by the respondent as causally related to the original injury.

STATEMENT OF FACTS

The petitioner, 37 years old at the time of the accident, began working for the respondent, a warehouse and distributorship, in early 2005. His job involved driving a forklift and loading containers in furtherance of their shipping and receiving activities.

On February 5, 2014, the claimant suffered an undisputed workplace accident, resulting in an ankle surgery with hardware implantation. The respondent paid for the medical care in question as well as temporary disability benefits following the accident. After his accident and during the petitioner's recovery, the claimant was released to light duty work by his medical provider, Dr. Karnezis. The respondent accommodated the claimant's work restrictions at that time. On the date of trial, December 9, 2014, the petitioner testified that he was expecting to undergo a second surgery to remove the hardware and remains on light duty per his doctor's recommendations. See also PX1. The respondent acknowledged and has authorized the hardware removal procedure.

In the summer of 2014, the Federal Transportation Security Administration (TSA) sent letters to the respondent concerning background checks and certification for its employees; as the respondent is involved in international shipping and receiving, TSA certification is required for anyone handling cargo. See also RX4. The petitioner received one such letter, advising his immigration documents were possibly fraudulent, and requesting he submit any information he had regarding this issue. See RX1.

Following the receipt of this letter, the employer advised the claimant on or about August 4, 2014 that he had three options: he could present sufficient proper paperwork to clear the situation with the TSA, he could resign, or he could be fired. See also RX2 and RX3. The claimant left with the letter to consider his options.

The claimant signed his Application for Adjustment of Claim on August 5, 2014; see Arb.Ex.II. He discussed this matter with his first attorney, and admitted at the date of hearing that he did not have proper immigration papers. He believed his options were to resign or to be fired. Following discussions with his attorney, the claimant elected to resign rather than be fired; he testified that he believed it would be better for him to tell potential future employers that he resigned, rather than report that he had been fired. He handed in his resignation on or about August 13, 2014. See also RX2, RX3.

Following his resignation, the TSA sent the claimant another letter suspending his security certification to work with cargo. See RX4.

The petitioner testified that he had no intention to leave his employment, and absent the TSA investigation would not have resigned. At the time the petitioner resigned, he had been working light duty but could not perform his usual job duties. The respondent has not paid temporary disability benefits, whether partial or total, since his resignation. The petitioner is not presently working, nor looking for work, and testified that he expects to undergo the surgical hardware removal in December 2014.

Ms. Cindy Kuborn, the respondent's Human Resources Administrator, testified on behalf of the respondent company. She knew the petitioner as one of the respondent's employees and knew that he had been injured at work. She testified he had returned to work on light duty, which the respondent had a policy to accommodate if possible. She testified the TSA had sent similar letters regarding other employees and that the respondent, following consultation with an employment attorney, had offered its employees leaves of absence to straighten any issues out with the TSA, or offered the employees resignations; she admitted that an employee who refused to do either would have been fired. She testified the handwritten notes on RX3 were her notes. She testified that absent the TSA investigation the claimant would still be working for the respondent.

OPINION AND ORDER

As stipulated by the parties, the sole issue in dispute at this time is the question of the petitioner's entitlement to temporary total disability benefits from August 14, 2014 through the date of trial.

The claimant admitted that he had the meeting regarding his options and received the resignation offer form on August 4, 2014. He testified he discussed his options with counsel and thereafter decided to sign the voluntary resignation form and return it to the employer on August 13, 2014.

The claimant argues that while he did sign and tender the voluntary resignation form, he would have been fired had he not done so. As such, the claimant argues[1], this resignation constituted a constructive termination, and as the claimant is still under medical work restrictions inconsistent with his usual occupation and is not yet at MMI, this case should fall within the holding of *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*, 266 Ill.2d 132, 923 N.E.2d 266 (2010). Accordingly, per that argument, TTD would be due and owing following August 14, 2014.

The Arbitrator also notes the recent case of *Matuszczak v. Industrial Commission*, 2014 IL App (2d) 130532WC (2nd Dist. 2014). There, a Wal-Mart employee was terminated while on light duty after the employer discovered that he had stolen cigarettes on several days. The Commission denied the petitioner's TTD request, finding the claimant's theft (and termination for it) to be a constructive rejection of light duty work. The Appellate Court rejected that analysis and reinstituted the TTD, noting that whether the discharge was justifiable was not material to the workers' compensation case. In doing so, they discounted the notion of a constructive rejection of light duty, and in accordance with that reasoning, a constructive termination argument must similarly be discounted for purposes of this analysis.

The Arbitrator has reviewed the above cases in detail. In each of those above-cited matters, the deciding Court noted that regardless of the justifiability of the basis for the employer's decision to terminate the claimant, the ultimate choice to do so rested with the employer. That is, termination of the employee was a volitional action by the employer. But in this case, however, any termination of the employee by the respondent would not be volitional; rather, the respondent is legally prohibited from keeping him on staff under Federal law regarding both immigration and national security.

Moreover, the Arbitrator observes that the above Courts noted that extraneous actions by the claimant (graffiti in the *Interstate Scaffolding* case, theft in the *Matuszczak* case) were not related to the raw ability to perform employment duties, and therefore not sufficient to terminate TTD eligibility. However, both Courts also noted that a claimant's refusal of accommodated work would still be a reason to terminate TTD, recognizing that an employee does maintain some responsibility for his vocational status.

In this case, the evidence is clear that absent the obstacle posed by claimant's immigration status, a status for which he himself had ultimate responsibility and control, he would still be employed, and because of his failure to secure legal immigration status, his employer would be breaking the law to continue his employment. The claimant's inability to work for his pre-injury employer is linked inextricably to his own personal decisions and actions; therefore, the Arbitrator finds this matter distinguishable from *Interstate Scaffolding* and *Matuszczak*. The requested TTD benefits from August 14, 2014 through the date of trial are denied.

[1] In so arguing, he apparently concedes that if he had legal immigration status (either naturalization or a work visa), he would have been able to resolve the TSA screening concerns and would not have been in the position to have to make such a choice.

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

ANGELINA VALLADARES,

Petitioner,

vs. NO: 11 WC 30709

FEDERAL MOGUL CORP., **16IWCC0101**

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms and adopts the Arbitrator's decision with regard to the issues of causation, medical expenses, TTD and penalties and attorney fees.

Petitioner takes issue with the Arbitrator's admission of the records of St. Francis Hospital (Rx6), based on the argument that the records were uncertified, unauthenticated, incomplete and admitted without adequate foundation.

Pursuant to Section 16 of the Act:

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> "The records, reports, and bills kept by a treating hospital, treating physician, or other treating healthcare provider that renders treatment to the employee as a result of accidental injuries in question, certified to as true and correct by the hospital, physician, or other healthcare provider or by designated agents of the hospital, physician, or other healthcare provider, showing the medical and surgical treatment given an injured employee by such hospital, physician, or other healthcare provider, shall be admissible without any further proof as evidence of the medical and surgical matters stated therein, but shall not be conclusive proof of such matters. There shall be a rebuttable presumption that any such records, reports, and bills received in response to Commission subpoena are certified to be true and correct. This paragraph does not restrict, limit or prevent the admissibility of records, reports, or bills that are otherwise admissible. This provision does not apply to reports prepared by the treating providers for use in litigation."

Section 16, while allowing for automatic admissibility in the case of treating medical records that are certified as true and correct, does not bar the admission of medical records that are not so certified.

Here, the records themselves support the finding that they are related to this particular Petitioner. The Petitioner's Application for Adjustment of Claim reflects that her address was 6120 North Oakley in Chicago. The records contained in Rx6 reflect the name of Angelina Valladares residing at 6120 North Oakley in Chicago. Petitioner also testified that she used to reside on Oakley. (Tr. 59-60). The records also reflect that Elizabeth Brito is Petitioner's daughter. Petitioner testified that she has a daughter named Elizabeth Brito. (Tr. 60-61).

Additionally, the Commission notes that, in reviewing the records submitted as Rx6, that they are typical hospital treatment records, and not records that were in any way prepared in anticipation of litigation, but rather were created during the course of Petitioner's prior treatment.

Given the proof in evidence that the records in Rx6 relate to this Petitioner, and that they were not prepared in anticipation of litigation, we find, pursuant to the reasoning in *Fencl-Tufo Chevrolet, Inc. v. Industrial Commission*, 169 Ill.App.3d 510, 523 N.E.2d 926 (1988), that the records were sufficiently accurate and trustworthy to be admitted into evidence.

In her statement of exceptions on review, Petitioner states that the Arbitrator awarded 10% of the person as a whole under Section 8(d)(2) of the Act for her left shoulder injury, and argues that not only was this award low for the shoulder injury, but also that the Arbitrator erred in finding that the Petitioner's cervical condition was not causally related to her July 12, 2011 accident, and that she is also entitled to permanency for the cervical condition.

This matter was tried pursuant to Section 19(b) of the Act. Pursuant to the stipulations of the parties per the Request for Hearing form (Arbx1), permanency was not at issue at the November 12, 2014 hearing. Additionally, we have reviewed the Arbitrator's decision in detail and note that nowhere in the decision does the Commission find any indication that permanency

16IWCC0101

was awarded. It is unclear how the Petitioner came to the conclusion that permanency had been awarded by the Arbitrator. The Arbitrator properly awarded no permanency in this case, and for the same reason the Commission will not do so. Any permanency can be determined at a hearing following remand. Additionally, based our affirmance of the Arbitrator's decision regarding Petitioner's failure to prove a causal connection of her cervical condition to the accident, the Petitioner is not entitled to a permanent disability award for that condition.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is affirmed and adopted, as indicated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $309.00 per week for a period of 56-1/7 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 medical expenses totaling $12,330.67 pursuant to §§8(a) and 8.2 of the Act.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury, including $9,845.39 in previously paid TTD, and any and all awarded medical expenses that were previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $32,051.21 under §8(j) of the Act, based on previous payments of non-occupational indemnity disability benefits; 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. As noted by the Arbitrator, because this credit appears to include non-occupational benefits paid for a period in excess of the period of unpaid lost time claimed by Petitioner, this §8(j) credit is limited to the TTD awarded between February 8, 2012 and August 9, 2012

16IWCC0101

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $12,400.00. 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: FEB 4 - 2016
TJT: pvc
O 12/08/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

VALLADARES, ANGELINA
Employee/Petitioner

Case# **11WC030709**

FEDERAL MOGUL CORP
Employer/Respondent

16IWCC0101

On 12/15/2014, 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 0.09% 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:

2512 THE ROMAKER LAW FIRM
PATRICK SEROWKA
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

0532 HOLECEK & ASSOCIATES
STUART PELLISH
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

16IWCC0101

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)

Angelina Valladares
Employee/Petitioner

v.

Federal Mogul Corp.
Employer/Respondent

Case # **11** WC **30709**

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 **Stephen Friedman**, Arbitrator of the Commission, in the city of **Chicago**, on **November 12, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0101

FINDINGS

On the date of accident, **July 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$24,102.00**; the average weekly wage was **$463.50**.

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 **$9,845.39** for TTD and up to **$32,051.21** for other benefits, for a total credit of up to **$41,896.60**.

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 $309.00/week for 56 1/7 weeks, commencing July 13, 2011 through August 9, 2012, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$9,845.39** for TTD. Respondent shall also receive credit for non-occupational benefits paid for the period of lost time from February 8, 2012 through August 9, 2012.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $3250.00 to Advanced Diagnostics and $9,080.67 to Lakeshore Surgery Center, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for payments made to these providers and adjustments to the balances appropriate pursuant to the provisions 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 15, 2014
Date

ICArbDec19(b)

Statement of Facts

On July 12, 2011, Petitioner Angelina Valladares was employed by Respondent Federal Mogul as a picker-assembly packer. Petitioner testified that she had been employed by Respondent for five years. Petitioner testified that her job duties included packing parts into boxes, closing the boxes, putting the boxes on a cart and moving the cart to another department. Petitioner testified that the boxes weighed 45 pounds and that she put 20 boxes on the cart. On cross examination, Petitioner testified that she moved the cart with another worker. One would push and the other would pull the cart. The cart had three levels. The cart had wheels. The boxes would be packed with different parts. The smaller parts, such as gaskets would weigh less that the larger parts.

Petitioner testified that on July 12, 2011, she was closing boxes to put on the cart and push the cart when she heard a sound. Petitioner testified that a shelf with parts on it fell on the cart and pushed her on top of a machine. Petitioner testified that she fell to the ground and hit her head on the machine. When she fell she landed on her whole left side. Her arm and head hurt a lot.

Petitioner testified that she was taken by ambulance to St. Francis. The records of St. Francis Hospital were admitted as Petitioner's Exhibit 4. She provided a consistent history of the accident stating she struck her head and shoulder off a metal edge. She denied any loss of consciousness. She complained of pain in the left shoulder and in the neck. She was taken off work for two days.

She was sent by Respondent to Advocate Occupational Health on July 14, 2011. Their records were admitted as Petitioner's Exhibit 7. She complained of pain in her left shoulder, neck and left hip and complained of lightheadedness for the last couple of days, but no longer on the date of the examination. She did complain of a mild frontal headache. Petitioner had an MRI of the left shoulder at Lutheran General Hospital on July 14, 2011 which showed a full thickness tear of the supraspinatus tendon and tendinosis. She remained off work.

Petitioner testified that she saw Dr. Sclamberg for further treatment of her left shoulder. Dr. Sclamberg's records were admitted as Petitioner's Exhibit 1. The records reflect an initial visit on July 25, 2011. Dr. Sclamberg diagnosed an acute supraspinatus tendon tear and recommended an arthroscopy. Surgery was performed on her left shoulder on August 12, 2011 consisting of a rotator cuff repair, subacromial decompression, synovectomy, debridement and distal clavicle resection. Dr. Sclamberg kept her off work. During her post operative care, petitioner was diagnosed with adhesive capsulitis on November 14, 2011. She underwent a manipulation under anesthetic on November 18, 2011. Petitioner continued with post operative care with physical therapy and was kept off work by Dr. Sclamberg. He released her to light duty on February 6, 2012 with no lifting over 5 pounds and no overhead lifting. Her restrictions were modified on May 17, 2012 to allow 10 pounds lifting, no overhead work and no repetitive duty. She was released from care on August 9, 2012 to full duty with respect to her shoulder. Dr. Sclamberg on August 9, 2012 notes current light duty restrictions from Dr. Malek.

Petitioner testified that she saw Dr. Castellanos for her neck on September 19, 2011 The records of Diversey Medical Center were admitted as Petitioner's Exhibit 2. Petitioner's history at that time included the accident on July 12, 2011. She indicated a loss of consciousness. She also describes initial symptoms of headache, dizziness, tinnitus in addition to left shoulder pain. She was complaining of headaches. Physical examination notes tenderness of the parietal and temporal regions of the scalp and the frontal region on the left side. She also had tenderness of her neck and limited motion of the cervical spine secondary to tenderness and pain. Dr. Castellanos' assessment was post concussion syndrome and a neuralgia or causalgia of the left side of the head. Limited cervical range of motion was also noted in the October 3, 2011 notes. An MRI of the cervical spine performed October 15, 2011 was read by Dr. Safvi was showing mild disc bulges at C4-5 and C5-6 with findings suggestive of a C5-6

cord contusion. No significant spinal stenosis was noted. Dr. Castellanos referred the Petitioner to Dr. Malek for her cervical spine on October 24, 2011.

Petitioner testified that she saw Dr. Malek on October 25, 2011. Dr. Malek's records were admitted as Petitioner's Exhibit 8. On October 25, 2011, Dr. Malek takes a history of accident on July 12, 2011 including a loss of consciousness. There is no history of a previous similar injury. Physical examination finds Petitioner is in no acute distress. She has negative Waddell's signs. Dr. Malek finds unrestricted range of motion in the neck. She has significant weakness in grip and elbow extension on the left side. Dr. Malek states that the MRI done on October 15, 2011 shows evidence of spinal stenosis at C4-5 and C5-6 with a lesser degree at C6-7 with evidence of annular tear at C4-5. Dr. Malek's impression is a cervical musculoligamentous sprain, post-concussive syndrome, left shoulder injury and left cervical radiculopathy. He recommends an epidural steroid injection, physical therapy and an EMG.

The EMG was performed by Chiropractic & Neurology Center on December 5, 2011. The impression was that the study was compatible with C5-6 cervical radiculopathy (Px 2). Dr. Malek performed the initial ESI on November 3, 2011 with a reported 50% improvement. Dr. Malek reviewed the EMG/NCV report and opined that Petitioner will likely require surgical intervention, but recommended a second and third injection.

Respondent sent Petitioner to be seen by Dr. Jerry Bauer for an independent medical examination with respect to her cervical condition on December 19, 2011. Dr. Bauer testified by deposition (Rx 11). Dr. Bauer testified as a board certified neurosurgeon. Dr. Bauer reviewed the October 15, 2011 MRI films and testified that there was no evidence of cervical stenosis or any narrowing or pressure on the spinal cord. There was mild degenerative disk disease at C4-5 and C5-6 without evidence of spinal cord compression or nerve root compression. Based upon his examination, Dr. Bauer opined that Petitioner had subjective neck pain without nerve root compression. He opined her decreased sensation may be related to underlying carpal tunnel syndrome that would not be accident related. There is no damage to the cervical spine. Dr. Bauer testified that Petitioner did not suffer any neurologic problems as a result of the July, 2011 accident. Dr. Bauer opined that Petitioner did not need any further treatment, including injections or surgery to her neck. Dr. Bauer opined that Petitioner was capable of working full-time without restrictions with respect to her neck. Dr. Bauer opined that Petitioner was at maximum medical improvement. Dr. Bauer testified that he reviewed the December 5, 2011 EMG report but did not comment on the report because it was performed by a chiropractor and he did not think there was a great deal of validity in the EMG.

Petitioner continued under the care of Dr. Malek (Px 8). Dr. Malek saw Petitioner on an approximately monthly basis awaiting approval for additional injections. Dr. Malek recommended that therapy be shifted to conditioning on May 17, 2012. Throughout his notes, Dr. Malek notes no change in symptoms and finds the physical exam unchanged.

In his December 20, 2012 note, Dr. Malek references an MRI performed on December 15, 2012. No report of this MRI is in his notes nor was it offered into evidence. Dr. Malek records that the MRI showed some bulging at C5-6 but no distinct herniation. Dr. Malek continued medications as needed and continued Petitioner off work. He discussed a shift to a four week conditioning program at the time of the third injection.

Petitioner underwent a second epidural injection on January 10, 2013 with a 50% response reported in Dr. Malek's January 17, 2013 note. He finds her physical exam unchanged. A third epidural injection was performed on February 7, 2013 without any significant improvement per Dr. Malek's February 13, 2013 note. The note states there is no distinct disc herniation. Dr. Malek recommends four weeks conditioning followed by a functional capacity evaluation He would at that time consider intervention versus maximum medical improvement. On March 14, 2013, Dr. Malek states Petitioner's symptoms are significant and recommended a repeat MRI. He notes that Petitioner did not tolerate modified duty. On

April 10, 2013, Dr. Malek states that the repeat MRI was not authorized and recommend a functional capacity evaluation and declares the patient is at MMI. He notes a work status of light duty with a 20 pound weight limit. Dr. Malek's record on May 20, 2013 records that an FCE was done on April 23, 2013 and that the FCE placed Petitioner in the light physical demand level. The FCE report is not in evidence. Petitioner was placed on permanent restrictions of 20 pound lifting. Petitioner continued to see Dr. Malek through a visit on August 26, 2013. He continued to note the symptoms remain unchanged. He placed Petitioner at MMI since further MRI has not been authorized. Work status is unchanged. Petitioner is to take over the counter medication as needed.

Petitioner testified that she did not recall an injury in July, 2010. Records from St. Francis for an admission on July 11, 2010 were admitted as Respondent's Exhibit 6. The record is for Angelina Valladares at Petitioner's address, listing the same social security number, date of birth and telephone number as listed in Petitioner's Exhibit 4. It lists the relative as Elizabeth Brito, daughter. Petitioner testified that she lives with her daughter Elizabeth Brito. The signature on the consent form signed July 11, 2010 appears to match Petitioner's signature on the Application for Adjustment of Claim and the authorization for medical records included in Petitioner's Exhibit 4. The records state the patient suffered a slip and fall the day before admission, hitting the side of her head and complaining of pain in the right shoulder radiating to her neck and left hip. The patient was discharged to follow up with her personal doctor. Petitioner testified that she was working for Respondent in July, 2010. She denied missing any work or having any further treatment at that time.

Petitioner testified that she has not worked since the date of the accident. Petitioner testified that she was told in February, 2012 that Respondent did not have a job for her. She did look for a job at one location. She did not get hired.

Petitioner testified that she can do about 40% of what she did before. Her arm and neck hurt a lot. She has no strength in her arm and hand. Petitioner identified Respondent's Exhibit 8 as photos of her taken July 26, 2012 while walking and carrying a shopping bag, pushing a shopping cart, and lifting and carrying her granddaughter. She is carrying her granddaughter on the right shoulder. Petitioner testified her granddaughter was one year old in July, 2012. She denied every carrying her before the date of the photographs in Rx 8. She testified she goes shopping once or twice a month, but never carries a lot. She does drive but only to take her son to school two times per week.

Conclusions of Law

In support of the Arbitrators Decision with respect to F (Causal Connection), the Arbitrator finds as follows:

Petitioner testified to the accident on July 12, 2011 and being pushed into a machine and striking the ground. The ambulance report confirms statements that she hit her head and had complaints in her left shoulder. There is no dispute that Petitioner's condition of ill being in the left shoulder is causally connected to the accident arising out of and in the course of her employment on July 12, 2011.

Based upon the medical records it is also undisputed that Petitioner suffered a head injury causally connected to the injury sustained on July 12, 2011. She was diagnoses with a post concussion syndrome. There is no evidence submitted that the head injury required additional treatment or that that condition was or is disabling.

With respect to Petitioner's claim that she also suffered an injury to the neck, the Arbitrator notes that the initial ambulance report does not record neck complaints but that, at the St. Francis Emergency

Room on the date of the injury, she advanced complaints of pain into her neck. She advanced complaints of left neck pain as well at Advocate Occupational Health on July 14, 2011 and was also diagnosed with a cervical sprain/strain. The mechanism of injury described by Petitioner's testimony and the medical histories is consistent with an injury to the neck as well as the head and shoulder.

Although Petitioner may have had a July, 2010 injury with complaints in the neck and right shoulder, there is no medical evidence of a continuing condition or treatment to the neck as a result of the condition treated in the Emergency record admitted as Respondent's Exhibit 6. Following the July 12, 2011 accident, Petitioner began a consistent course of treatment. Based upon the testimony and the review of the medical evidence submitted the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that she sustained an sprain injury to the cervical spine as a result of the accidental injuries arising out of and in the course of her employment on July 12, 2011.

The extent of the cervical injury is also in dispute. Petitioner has had continued treatment with Dr. Malek. Dr. Bauer evaluated Petitioner at Respondent's request on December 19, 2011. Dr. Bauer opined that Petitioner had subjective neck pain. He opined that Petitioner did not sustain any neurological problems as a result of the injury on July 12, 2011. She had no nerve root compression or spinal cord compression. She had no neurologic deficit related to any pinched nerve in her neck or spinal cord injury or compression. Dr. Bauer opined that at the time of his examination on December 19, 2011, Petitioner was not in need of any further medical treatment to her neck and opined that Petitioner could return to work full duty.

Based upon the totality of the medical evidence submitted, the Arbitrator finds the opinions of Dr. Bauer more persuasive that those of Dr. Malek. The Arbitrator notes that Dr. Malek's reading of the October 15, 2011 MRI is not in agreement with either Dr. Bauer or the radiologist. Dr. Malek does agree that there is no disc herniation noted on MRI performed in December, 2012. The Arbitrator also notes that Dr. Malek's records do not contain any detailed physical examinations to correlate his opinions with specific clinical findings. The Arbitrator also notes that despite his treatment, Dr. Malek records that Petitioner's complaints remain unchanged. The Arbitrator finds that Petitioner's testimony concerning prior injuries, changed statements with respect to a loss of consciousness at the time of the accident, and her activities as shown in the photographs contained in Respondent's Exhibit 8 raise questions as to her subjective complaints advanced.

Based upon the testimony and exhibits submitted in this matter, the Arbitrator finds that the medical treatment rendered for Petitioner's cervical spine after December 19, 2011, the date of Dr. Bauer's examination, is not causally connected to the accidental injuries sustained on July 12, 2011.

In support of the Arbitrators Decision with respect to J (Medical), the Arbitrator finds as follows:

Based upon the Arbitrator's decision with respect to causal connection, medical bills for treatment to the cervical spine after December 19, 2011 are not causally connected to Petitioner's injury sustained July 12, 2011. Dr. Bauer's persuasive opinion was that further treatment was not reasonable or necessary. With respect to the bills listed in Petitioner's Exhibit 9, the Arbitrator makes the following findings:

Advanced Diagnostics: The charges for the October 15, 2011 MRI of $3,250 are for treatment reasonable, necessary and causally connected to the accident on July 12, 2011. Respondent's Exhibit 9, documents a payment for this bill of $1100.85. Respondent is responsible for the October 15, 2011 charges pursuant to the terms of Sections 8(a) and 8.2 of the Act. Respondent is entitled to credit for all payments made and reductions allowed pursuant to the Act. Based upon the Arbitrator's decision on causal connection, the charges for the December 12, 2012 MRI are denied as not reasonable, necessary or causally connected to the accidental injuries sustained. These charges are further denied

for failure to document the treatment noted. While Dr. Malek refers to this MRI, no record of the MRI or report of this test was submitted into evidence.

Peterson Surgicenter Anesthesia: The unpaid charges are for the epidural injections performed on January 10, 2013 and February 7, 2013 for the cervical spine. Based upon the Arbitrator's decision on causal connection, these charges are denied as not reasonable, necessary or causally connected to the accidental injuries sustained.

Peterson Medical Surgicenter: The unpaid charges are for the epidural injections performed on January 10, 2013 and February 7, 2013. Based upon the Arbitrator's decision on causal connection, these charges are denied as not reasonable, necessary or causally connected to the accidental injuries sustained.

EqMd (2 bills submitted): The bills submitted appear to be for prescription medication. The unpaid portion of the bills is for prescriptions filled beginning in February, 2012. The first bill for $9,020.72 does not specify what doctor prescribed the medications. The second bill for $9,477.46 lists Dr. Malek. Based upon the Arbitrator's decision on causal connection, these charges are denied as not reasonable, necessary or causally connected to the accidental injuries sustained. The Arbitrator notes further that there is no medical record which documents the prescription of the medications listed and therefore further denies these bills for lack of foundation.

Elite Physical Therapy: This bill is for a functional capacity evaluation performed on April 23, 2013. Based upon the Arbitrator's decision on causal connection, these charges are denied as not reasonable, necessary or causally connected to the accidental injuries sustained. The Arbitrator also finds that there were no records of this provider offered into evidence. While Dr. Malek refers to an FCE, no report was offered into evidence. The Arbitrator further denies these charges for lack of foundation.

Lakeshore Surgery Center: The bill submitted shows an unpaid balance of $9,176.92 for a portion of the charges incurred for the August 12, 2011 left shoulder surgery and non emergency transportation. Respondent's Exhibit 14 includes an EOB challenging the unpaid charges, stating the procedure is considered integral to the primary procedure. The Arbitrator finds that the charges for transportation are not reasonable or necessary. The Arbitrator finds that the surgical charge of $9,080.67 is for treatment that was reasonable, necessary and causally connected to the accidental injuries sustained on July 12, 2011. Respondent shall make payment for the charges pursuant to the provisions of Sections 8(a) and 8.2 of the Act. Respondent shall have credit for the payments made to Lakeshore Surgery Center and appropriate reductions pursuant to the Act.

Western Touhy Anesthesia: Although Petitioner's Exhibit 9 includes an alleged bill of $450.00 to this facility, there is no bill included in the exhibit. There were no records of this provider offered into evidence. The Arbitrator denies these charges for lack of evidence and foundation.

Dr. Malek: The bills submitted document that the unpaid charges are for serviced rendered after December 19, 2011. Based upon the Arbitrator's decision on causal connection, these charges are denied as not reasonable, necessary or causally connected to the accidental injuries sustained.

Grey Medical: The bills submitted are for game ready cold therapy rental, CPM plus initial education and interface material. The dates of rental are from August 12, 2011 December 30, 2011. Payments were made and adjustments taken. A balance is noted of $34,066.63. A review of the medical exhibits submitted fails to disclose a prescription for these devices from Dr. Sclamberg or any other treating doctor or facility. The Arbitrator finds that Petitioner failed to prove the reasonableness, necessity or causal connection for the bill and denies that balance claimed.

In support of the Arbitrators Decision with respect to L (Temporary Compensation), the Arbitrator finds as follows:

The undisputed evidence is that Petitioner was disabled from the date of the accident on July 12, 2011 for her injuries to the cervical spine and left shoulder. As more fully addressed above concerning causal connection, the Arbitrator finds the opinions of Dr. Bauer more persuasive that those of Dr. Malek with

respect to the cervical spine injury. Based upon Dr. Bauer's opinions, Petitioner was at MMI and able to return to work with respect to the cervical spine on December 19, 2011.

Dr. Bauer's opinions are limited to the cervical spine injury. He advanced no opinions with respect to the left shoulder injury. As of December 19, 2011, Petitioner was still under active treatment for the left shoulder by Dr. Sclamberg and still disabled. Although Petitioner was released to restricted duty on February 6, 2012, no light duty was offered and Petitioner was not yet at maximum medical improvement with respect to the left shoulder. Dr. Sclamberg released Petitioner to full duty and at maximum medical improvement on August 9, 2012 with respect to the injury to the left shoulder.

Based upon the Petitioner's testimony and the medical evidence submitted, the Arbitrator finds that the petitioner was temporarily totally disabled from July 13, 2011 through August 9, 2012, a period of 56 1/7 weeks. As of August 9, 2012, based upon the opinions of Dr. Bauer and Dr. Sclamberg, Petitioner had been released to return to full duty both the cervical spine and left shoulder conditions.

Respondent shall have credit for the stipulated amount of temporary total disability payments made of $9,845.39. Respondent's Exhibit 10 documents that this amount was for benefits paid from July 13, 2011 through February 7, 2012. The parties have also stipulated that Petitioner has received non occupational disability benefits of $32,051.21, but based upon the claimed period of lost time in Arbitrator's Exhibit 1, it appears that these benefits have been paid for a period in excess of the period of temporary total disability awarded. The Arbitrator awards further credit for the non occupational disability paid to Petitioner, but only to the extent that those benefits cover the remaining period of TTD awarded from February 8, 2012 through August 9, 2012.

In support of the Arbitrators Decision with respect to M (Penalties), the Arbitrator finds as follows:

Based upon the Arbitrator's findings on Causal Connection, Temporary Compensation and Medical, the Arbitrator finds that Respondent's denials were in good faith and based upon competent evidence. Respondent was not unreasonable or vexatious in advancing defenses in this matter. The Arbitrator also recognizes that Petitioner was provided non occupational disability benefits during the disputed lost time. Petitioner's requests for penalties and attorneys' fees are 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

Linda Hodges,

Petitioner,

vs. NO. 12WC010688

State of Illinois/Tamms Correctional Center,

Respondent.

16IWCC0102

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 disability, permanent disability, causal connection, medical expenses, 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 May 18, 2015 is hereby affirmed and adopted.

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

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

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: FEB 4 - 2016
SJM/sj
o-12/10/2015
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HODGES, LINDA
Employee/Petitioner

Case# **12WC010688**

SOI/TAMMS CORRECTIONAL CENTER
Employer/Respondent

16IWCC0102

On 5/18/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

5236 CULLEY FEIST KUPPART & TAYLOR
KREIG TAYLOR
3 S MAIN ST SUITE 2
HARRISBURG, IL 62946

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

0558 ASSISTANT ATTORNEY GENERAL
KYLEE J JORDAN
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CARBONDALE, IL 62901

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

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

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

MAY 18 2015

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

16IWCC0102

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Linda Hodges
Employee/Petitioner

v.

State of Illinois/Tamms Correctional Center
Employer/Respondent

Case # 12 WC 010688

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin**, on **March 13, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0102

FINDINGS

On **March 5, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**47,978.00**; the average weekly wage was $**922.65**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

Petitioner failed to prove she sustained an accident on March 5, 2012 that arose out of and in the course of her employment and that her current condition of ill-being is causally related to said accident.

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

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

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

Nancy Lindsay
Signature of Arbitrator

May 11, 2015
Date

MAY 18 2015

Linda Hodges v. State of Illinois/Tamms Correctional Center, 12 WC 010688

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arbitrator finds:

Petitioner filed an application for adjustment of claim with the Illinois Workers' Compensation Commission. Petitioner alleged that she sustained injuries to her bilateral hands as a result of repetitive duties while working for Tamms Correctional Center. Petitioner has alleged the date of accident as March 5, 2012. This is a repetitive trauma claim and the issues in dispute are notice, accident, causation, temporary total disability benefits, medical bills, and nature and extent.

Petitioner was 60 years old on March 5, 2012, which is her alleged manifestation date for her repetitive trauma claim. Petitioner testified that she has been employed as an office associate at Tamms Correctional Center for 13 years.

On March 5, 2012, Petitioner presented to her primary care provider, Marie N. Wright, APRN, FNP-BC of Southeast Primary Care, with complaints of right wrist numbness and hypertension. Noted onset was two weeks prior. There was no radiation of the pain. There was no reported injury. The pain was aggravated by movement with no relieving factors. She reported night pain, night-time awakening, numbness, tenderness and weakness. There was no bruising, crepitus, decreased mobility, difficulty going to sleep, instability, locking, popping, spasms, swelling or tingling in the arms. Petitioner reported a history of carpal tunnel syndrome in the right wrist in the past. Petitioner was fitted with a cock up splint, and was prescribed Celebrex, and advised to follow up in two weeks.

On March 15, 2012, Petitioner completed a Workers' Compensation Employee's Notice of Injury for Respondent. She claimed an accident date of March 5, 2012, and noted that the accident happened while she was typing in the record office at Tamms Correctional Center. She noted that her hands had been hurting for some time but that on March 5, 2012 her hands started burning down to the tips of her fingers, mainly on the right side.

Also on March 15, 2012, Petitioner's supervisor completed a form titled Supervisor's Report of Injury or Illness. It noted that Petitioner was an Office Associate. It noted that Petitioner had been in her current job title for 22 years. Her job was described as clerical, with duties including typing and filing.

On March 19, 2012, Petitioner followed up with Ms. Wright. Petitioner complained that the symptoms were constant and worsening. Noted onset was one month ago. Petitioner reported that the pain was aggravated by typing and relieved by medication and rest. Ms. Wright ordered a nerve conduction study.

On March 21, 2012, Petitioner underwent a nerve conduction study with Dr. Randall Stahly of Southeast Hospital Department of Clinical Neurophysiology Electromyogram. It revealed right carpal tunnel syndrome and mild left carpal tunnel syndrome.

Petitioner followed up with Ms. Wright on March 29, 2012. It was noted that her pain was aching, throbbing, associated with numbness, and it had begun years ago. The pain was aggravated by lifting and movement. The pain was relieved by medication and rest. Ms. Wright discussed the nerve conduction study and surgical versus medical options. Petitioner was agreeable to surgery, and noted she would be in contact with a surgeon in Herrin, IL.

On April 12, 2012, Petitioner presented to Dr. John Wood of Southern Orthopedic Associates for bilateral hand pain, right greater than left. Dr. Wood noted that Petitioner had symptoms of carpal tunnel syndrome since 2001. Apparently it was fairly significant at that point. Petitioner's work station was modified and her symptoms improved. Petitioner had experienced intermittent problems since then. Petitioner reported that her symptoms had worsened in March of this year when she started a new position that involved a different ergonomically placed keyboard and the symptoms had progressed to the point where she was having frequent night awakening. It was worse with typing or filing. It was noted that Petitioner planned on retiring at the end of June, and she wanted to get it taken care of before then. Her hobbies included crocheting and some other activities at home. Petitioner felt that the work she did, including the keyboard, has been the main factor for her. It was noted that she worked at Tamms Correctional Center for 13 years, and that she worked for the State for 10 years prior to that also doing data entry type work. She was right-hand dominant. Dr. Wood opined that her bilateral carpal tunnel syndrome was related to the work she was doing at Tamms. He also noted that some of her avocational activities may have contributed as well. Surgical options were discussed, and Petitioner wished to proceed.

On March 14, 2013, Petitioner presented to Dr. Richard Tipton of Southeast Primary Care for medical clearance prior to her carpal tunnel surgery. It was noted that Petitioner had a history of hypertension and hypothyroidism. Petitioner was cleared for surgery.

On March 19, 2013, Petitioner underwent a right carpal tunnel release and cortisone injection. At her follow-up appointment on March 29, 2013, Petitioner became pale as her sutures were being removed and had complaints of chest pain. She was taken to the emergency room, and it was noted that she experienced a panic attack.

At her final appointment on April 19, 2013, Petitioner noted a slight soreness over the scar, but was pleased with the surgical results. It was noted that all numbness was gone. Petitioner had a good range of motion. Dr. Wood noted that the soreness was normal and would get better with time. Petitioner was released from care.

Dr. Wood testified via evidence deposition on July 9, 2014. Dr. Wood testified that Petitioner first presented to him on April 12, 2012, at which time she stated that she had been

having numbness and tingling in her hands for approximately 11 years. She had her work station modified, and her symptoms got better. In March of 2012 Petitioner started a new position and her new work station was different. Her symptoms then returned and progressed. Dr. Wood testified that after taking a history of Petitioner's condition and complaints, reviewing the nerve conduction study, as well as performing a physical examination, he diagnosed her with bilateral carpal tunnel syndrome. Given the length of time that her symptoms had been going on, Dr. Wood recommended surgical intervention. Dr. Wood testified that he performed a right carpal tunnel release on March 19, 2013, and Petitioner was released from his care approximately one month later. Dr. Wood testified that Petitioner was to follow up with him if the symptoms on her left side became more pronounced and needed treatment.

Dr. Wood testified that Petitioner is a secretary at Tamms Correctional Center which involved typing and filing. Dr. Wood opined that Petitioner's need for surgery was, at least, aggravated by her work duties. (PX 9, p. 13) On cross-examination, Dr. Wood testified that he was unaware if any of Petitioner's treating physicians had advised her that her condition was work-related, but that Petitioner felt it was related to her work. Dr. Wood testified that Petitioner worked eight hours a day, but admitted he did not know how much of that time was devoted to typing or filing, or if she had any intermittent breaks. Dr. Wood further admitted that he was unaware if Petitioner continued to work after May 2012.

Dr. Wood testified that he did not review the medical records from Petitioner's primary care provider; he only reviewed the nerve conduction study. He further testified that Petitioner told him her symptoms began in 2001 but improved with a change in the ergonomics of her work station. She then described a change in her job activities with a different ergonomic situation resulting in her hands being in a different position when typing and she was reaching different levels for filing. (PX 9, p. 18) Dr. Wood admitted that Petitioner did not demonstrate how she typed, nor did he review the set-up of her work station.

Dr. Wood agreed that if a person is obese he/she would be predisposed to the development of carpal tunnel syndrome. He testified that Petitioner fell into the category of obese. He also testified that older females like Petitioner were at a higher risk for carpal tunnel syndrome, and that hypothyroidism and hypertension were both positively correlated to a higher risk of carpal tunnel syndrome. Dr. Wood further testified that Petitioner's hobbies, specifically crocheting, were an aggravating factor in her condition.

At the request of Respondent, Petitioner underwent a Section 12 evaluation with Dr. Richard Katz on May 16, 2012. Dr. Katz testified via evidence deposition on March 4, 2013. Dr. Katz testified that he is board certified by the American Board of Physical Medicine and Rehabilitation, the American Board of Electrodiagnostic Medicine, and the American Board of Independent Medical Examiners.

Dr. Katz testified that in addition to the physical examination of Petitioner, he reviewed her medical records, a CMS Job Description for Office Associate, as well as the CMS Demands of Job form. Petitioner reported to Dr. Katz that she was hired by CMS in 1998, and that she had been an Office Associate for her entire employment. Her work was clerical in nature and involved typing, filing and bookkeeping, using the telephone, and occasional box assembly.

While Dr. Katz agreed with the diagnosis of carpal tunnel syndrome, Dr. Katz testified that Petitioner had three constitutional risk factors for carpal tunnel syndrome which included obesity, age, and female gender. Petitioner also had two weaker risk factors of hypothyroidism and osteoarthritis. Dr. Katz testified that it is his opinion within a reasonable degree of medical and surgical certainty, Petitioner's job duties did not cause or aggravate her carpal tunnel syndrome. Specifically, Dr. Katz testified that typing, filing and lifting are not the type of activities which cause, exacerbate or aggravate carpal tunnel syndrome, and in his report Dr. Katz provided citations for many medical publications which support his opinion. Dr. Katz clarified under cross-examination by saying that it is not repetitive motion that is associated with carpal tunnel syndrome, but repetitive flexion and extension in the vicinity of 45 degrees in magnitude.

Petitioner testified at arbitration on March 13, 2015. Petitioner testified that she is currently retired, and that she retired from Respondent in June 2012. Petitioner testified that during the 13 years she worked at Respondent she held the position of office associate. Petitioner testified that she first worked in timekeeping at Respondent for two to three years. Petitioner testified that she later transferred to the records office where she worked for the last ten years of her career at Respondent.

Petitioner testified on cross-examination that when fully staffed there were six people working in the records office, three of which were office associates. Petitioner testified that the other office associates did some of the same job duties she did.

Petitioner testified that as an office associate she typed, filed, did retention storage boxes, and answered the phone. Petitioner testified that she worked seven and a half hours a day, and that she was on the computer at least three-fourths of the day. Petitioner testified that on the computer she would type e-mails, letters, restorations, and revocations.

Petitioner agreed on cross-examination that her typing on the computer was intermittent. Petitioner testified that two to three times a week she would be required to type a document that was a couple pages or longer. Petitioner testified that the other documents she was required to type were one page or shorter.

Petitioner testified that when she was not typing she was filing. Petitioner testified that "[w]e had several sheets of paper that you would have to put in inmate records". Petitioner testified that she also answered the phone.

Petitioner agreed on cross-examination that she would do filing intermittently. Petitioner agreed that if she was tired of typing she could go back to filing and that she could change her job duties as she wanted throughout the day.

Petitioner testified that she is right hand dominant, but that she used both hands when performing her job duties. Petitioner testified that her job duties caused her to have pain and numbness, and that typing made her pain worse.

Petitioner testified that she first began to experience pain and numbness in her hands in 2001. Petitioner testified at that time they brought in a table to help with her hand pain. Petitioner testified that the table was a stand that went underneath her desk. Petitioner testified that it helped the pain but it still hurt throughout the day. Petitioner testified that the table "kind of prolonged it for a while," and then it came back. When it came back, it was worse, so she went to the doctor on the 5th of March.

Petitioner testified that March 5, 2012, was the first time she saw a doctor for her hands or wrists. Petitioner testified that her doctor wanted her to wear a splint on her hand, but that Respondent would not allow her to because there was a metal rod in it. Petitioner testified that she wore splints outside of work and that it was helpful but uncomfortable. Petitioner admitted on cross-examination that she was able to wear wrist splints without metal in them at Respondent's facility in 2012.

Petitioner testified that she noticed the pain the most when she was trying to sleep. Petitioner testified that she also noticed the pain a lot when she was doing her job duties, specifically typing and filing. Petitioner testified that when she would go home at night the pain would lessen some but would return. Petitioner later admitted on cross-examination that her hands bothered her any time she used them, including at night, and when she tried to sew, crochet or cook.

Petitioner admitted on cross-examination that she had actually seen a Dr. Eller from Cape Girardeau in 2001 for her right wrist pain, and that the doctor prescribed her the table stand for work and it subsided. Petitioner testified that Dr. Eller did not perform a nerve conduction study then. Petitioner testified that Dr. Eller did tell her she had carpal tunnel syndrome. Petitioner admitted that Dr. Eller related her carpal tunnel syndrome to her work activities. Petitioner testified that she told her employer that she had work-related carpal tunnel syndrome then, but that she could not remember who she told. Petitioner testified that "they" ordered the table and she got it. Petitioner testified that she was diagnosed with left carpal tunnel syndrome at that time as well. Petitioner testified that, except for a couple of months, she has worked in the records office from 2001 through 2012 at the same work station with the table Respondent gave her to accommodate her issues with carpal tunnel syndrome. Petitioner testified that after she received the table in 2001 until she saw the doctor in 2012 she still continued to have symptoms intermittently.

Petitioner testified that she never noticed these issues with her hand prior to her employment with Respondent. However, Petitioner testified on cross-examination that prior to working at Respondent's facility she did not have arthritis, hypertension, or hypothyroidism either.

Petitioner testified that Dr. Wood recommended surgery on both of her wrists. Petitioner testified that she had surgery on her right wrist on March 19, 2013. Petitioner testified that she has not had surgery on her left wrist, and does not plan to have surgery on that hand at the present time. Petitioner testified Dr. Wood released her on April 19, 2013, and that she has not made any appointments with him since then.

Petitioner testified that she no longer has any numbness or pain in her right wrist. Petitioner testified that sometimes her left wrist hurts, but not nearly like her right wrist did. Petitioner testified on cross-examination that her left hand mainly hurts when she is sleeping.

Petitioner testified that when her hand was hurting she could not crochet, and before surgery she hardly crocheted at all due to the pain. Petitioner testified that she can crochet now. Petitioner testified that when her hand was hurting she had to cut down on how much she cooked as well.

Petitioner testified that she has sewed and crocheted for 30 years. Petitioner testified that before she stopped sewing and crocheting due to the pain in her hands, she would perform the activities two to three hours a day. Petitioner testified that since undergoing surgery she has been able to go back to her hobbies of crocheting and sewing.

Petitioner testified that she does not take any pain medication for her hands or wrists.

The Arbitrator concludes:

1. Accident/Causal Connection. Petitioner failed to prove she sustained an accident on March 5, 2012, that arose out of her employment with Respondent. Petitioner failed to prove that her condition of ill-being in her bilateral hands is causally related to her alleged accident of March 5, 2012.

   Petitioner bears the burden of proving each and every element of her case in order to recover under the Workers' Compensation Act. *Shelton v. Industrial Com'n*, 267 Ill. App. 3d 211, 221, 641 N.E.2d 1216, 1224 (5th Dist. 1994). In order to satisfy the "arising out of" portion of the Act the petitioner must show that the injury was derived from some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.App.3d 193, 203, 797 N.E.2d 665, 672 (Ill. 2003). However, "[i]n a repetitive trauma case, issues of accident and causation are intertwined. Therefore, a review of the

evidence allows both issues to be resolved together." *Boettcher v. Spectrum Property Group and First Merit Venture Realty Group*, 97 W.C. 44539, 99 I.I.C. 0961.

The Arbitrator finds that Petitioner failed to meet her burden of proof in that regard.

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. Dr. Wood testified that he did not know how much typing or filing Petitioner did, nor did he know if it was continuous or intermittent. Dr. Wood admitted that he did not know the frequency, intensity, or duration of the job duties Petitioner performed. Petitioner readily testified that she typed, filed, and answered phones intermittently throughout the day, and could change or alter the performance of each task at her leisure.

The Arbitrator finds the opinions of Dr. Katz to be more persuasive than those of Dr. Wood. In addition to the physical examination of Petitioner, Dr. Katz reviewed Petitioner's medical records, a CMS Job Description for Office Associate, as well as the CMS Demands of Job form. Dr. Katz and Dr. Wood were in agreement that Petitioner had several medical factors that would predispose her to the development of carpal tunnel syndrome regardless of work; i.e. her age, gender, obesity, hypothyroidism, and hypertension. Additionally, both doctors agreed that Petitioner's hobby of crocheting played a role in the development and/or aggravation of her condition.

The only difference of opinion the doctors was whether or not Petitioner's job duties were also a factor in the development and/or aggravation of her condition. Dr. Katz credibly testified that typing and filing are not the type of activities that cause, exacerbate, or aggravate carpal tunnel syndrome. Additionally, Dr. Katz provided citations for many medical publications that support his opinion.

The Arbitrator also notes that Dr. Wood never rendered a causation opinion based upon the facts presented to him by Petitioner. Dr. Wood opined there was a causal relationship between Petitioner's work duties and her bilateral carpal tunnel syndrome. However, that was really what Petitioner claimed back in 2001. According to the doctor, in 2012 she changed jobs and had a different ergonomically-designed work station. While Dr. Wood testified that as a result of that job change Petitioner had a different ergonomic station, different position when typing, and different levels for filing (PX 9, p. 18) Petitioner never provided him with any details to support that testimony. She never explained to him how the typing was different or the filing was different and he candidly admitted he had no detailed information concerning that (PX 9, pp. 35, 37-38).

On direct examination, Petitioner provided little, if any, testimony concerning the job change/re-assignment in March of 2012. Petitioner was asked on cross-examination if she

recalled a time between 2001 and 2012 when she might have had her work station changed and she explained that there was a very short period of time when Respondent was short-handed and might have put her in the back for clerical but then she returned. Petitioner initially could not recall when that occurred but when asked if it might have been in March of 2012, she responded that it could have been. Thus, it appears from the totality of Petitioner's testimony that, at arbitration, Petitioner was trying to establish that her work duties for Respondent caused/aggravated her bilateral carpal tunnel syndrome. If such is the case, Petitioner's accident occurred in 2001 as that is when she believed she had a work-related carpal tunnel condition and requested ergonomic changes. Petitioner failed to meet her burden of proving that she sustained an accident on March 5, 2012 that arose out of her employment as a result of any job change. First, her testimony was somewhat contrary to what she initially presented to Dr. Wood. Second, if relying on the "job change" theory, Petitioner failed to explain how her job change in March of 2012 changed her manner of typing and filing. Finally, and, Dr. Wood failed to render a persuasive opinion on causal connection based upon a "job change" theory.

Petitioner's claim for compensation is denied. All other issues are moot.

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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 Employment	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN TURNER SHANKLE III,

Petitioner,

vs. NO: 13 WC 38755

OMEGA DEMOLITION CORP.,

16IWCC0103

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 employment, accident, causation, medical expenses, and temporary total disability, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of employment but adopts the statement of facts from the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the modifications noted below.

The Commission finds that Petitioner failed to meet his burden of proof that he was verbally hired by Respondent or became an employee prior to his accident on October 31, 2013. We find that the preponderance of the evidence shows that Petitioner was still in the process of interviewing for the estimator's position at the time of his accident.

We note that the Arbitrator found that Petitioner was employed by Respondent based, in part, on an analysis of case law relating to whether someone should be considered an employee versus an independent contractor for the purpose of being covered under the Workers' Compensation Act. However, neither party is arguing that Petitioner was an independent contractor during his first week at Respondent's office. Therefore, such an analysis is premature and not relevant because this presumes that Petitioner was actually hired. In other words, if a contract for employment is actually entered into, the "worker" may be considered an employee or an independent contractor, regardless of the label given to the relationship by the parties because other factors need to be considered such as the right to control the manner of work, method of payment, right to discharge, the skill required to perform the work, and who provides the tools, material, and equipment. (See Roberson v. IC, 225 Ill2d 159 (2007)). However, the case law that the Arbitrator

applied does not address whether an individual is an interviewee or an employee, which is the issue in Petitioner's case.

The primary question is whether there was an express or implied contract of employment that was the product of mutual assent or a "meeting of the minds." (See Goodrick v. IC, 237 Ill.App.3d 885 (1992); Crepps v. IC, 402 Ill. 606 (1949)).

Petitioner claims that he was verbally hired by John Smith on Monday, October 28, 2013, and testified that, after going over the first sample estimate that Petitioner had done, Mr. Smith said, "Good job. Hey, it looks like you got the job." (T. 10/10/14 at 31). Petitioner testified that he took that conversation to mean that he was hired and that he accepted the position. (Id. at 32).

Mr. Smith denied this and testified that he did not offer Petitioner a job or tell him that the job was his after the first day. (T. 11/10/14 at 26). Mr. Smith testified that he has no authority to hire someone and never offered a job to anyone at Respondent. (Id. at 15). He testified that Chuck Gerage has the sole authority to hire estimators. (Id.)

We do not find Petitioner's testimony credible that he was offered the job by Mr. Smith on October 28th and that Petitioner accepted it. The situation here is not one where someone or some entity (whether formally structured as a business or not) hires another person to do a job for a short period of time such as mowing the lawn, putting up a fence, or driving a car from an automobile auction. (See, e.g., Goodrick v IC, 237 Ill.App.3d 885 (1992); Ragler Motor Sales v. IC, 93 Ill.2d 66 (1982)). In such cases, it might be reasonable to find that there was a meeting of the minds based solely on an agreed price.

However, this is not the situation with Petitioner. He was considering relocating from Washington, D.C. to the Elgin, IL area if he was hired by Respondent. This was anticipated to be long-term employment and Petitioner was an experienced estimator. Petitioner was not unfamiliar with or naïve in the ways of the business world. He testified that he owned his own business, A-1 Remediation, since 2004 and worked for other demolition companies as a consultant. His most recent job prior to applying at Respondent was working for his own company through a "consulting agreement" with B.S. Environmental in Washington, D.C. Petitioner, himself, requested that the terms of his interview visit to Respondent be put in writing and Chuck Gerage, the President of Respondent, obliged. The e-mail correspondence (Px1) between Petitioner and Mr. Gerage indicates that Petitioner was coming to "test the waters" and the purpose of his visit was for Respondent to "evaluate your estimating skills and abilities." Respondent agreed to reimburse Petitioner for his gas to drive from Washington, D.C. to Elgin, IL and provide a hotel room "during the days of your visit next week." We note that it is clear from the e-mail that Petitioner was expected to be there for multiple "days" (plural). The e-mail is also very clear that, "If Omega is acceptable to your estimating skills and abilities, Omega will make you a **written offer** at such time." (Emphasis added.) It also indicates that the parties were "currently discussing a starting salary of $85,000.00." No other terms of employment were mentioned.

Petitioner had agreed to the terms of his interview visit and knew that if he was going to be hired he would receive a written offer. Instead of asking Mr. Smith for the job offer in writing, when he was allegedly told he got the job on October 28th, Petitioner apparently did nothing to confirm his salary or resolve any of the other terms of employment such as vacation days, sick days, holiday time, health insurance, access to a company vehicle, etc. The evidence shows that these significant issues were not addressed or resolved until Monday, November 4th.

Petitioner claims that he knew what his salary was going to be because of the e-mails prior to his visit. However, those e-mails only reflect that the parties were "currently discussing" a starting salary of $85,000.00. If, after the interview, Respondent did not believe that Petitioner was

worth $85,000.00, it had the right to offer him less and Petitioner would have had the choice to accept or reject it.

Prior to his interview visit, Petitioner's only contact with Respondent was with Mr. Gerage. It was with Mr. Gerage that Petitioner agreed to come for the interview in exchange for gas and lodging. It was by Mr. Gerage that Petitioner was told that if an offer was going to be made it would be in writing. We find it highly unlikely that Petitioner would accept employment, requiring him to relocate from Washington, D.C., based solely on an alleged statement by Mr. Smith and relying on a prior email "discussing," but not confirming, a starting salary and without any discussion of vacation and sick time, health insurance, or other benefits. Respondent eventually did offer Petitioner a job with a starting salary of $85,000.00 as reflected by the written offer on November 4, 2013.

Regarding the length of the interview process, Petitioner testified that he was coming to Respondent's office for a one-day interview on Monday, October 28, 2013, and that it was not for the whole week. (T. 10/10/14 at 81.) Mr. Gerage testified that he and Petitioner had talked about how the visit would be a few days to assess his skills and that Petitioner was aware of this. (Id. at 174). Mr. Gerage testified that it is his standard practice for interviews to take a few days because "I need to have somebody provide me different type of information to make sure I'm secure with their estimating abilities." (Id. at 175). He has hired about a dozen estimators and, in the past few years, about three of the estimator interviews lasted three days. (Id. at 213-14). Only one, a person he knew for 15 years and knew what he was capable of, was hired after one day. (Id.) Mr. Gerage testified that he believed he conveyed sufficiently to Petitioner that the interview process would last a few days and pointed to the emails indicating "days." (Id. at 231). Mr. Gerage testified that Petitioner consented to that and told him that "since he wasn't working and had nothing to do, he had no problem being up...here, and that was it." (Id.)

Mr. Smith testified that it was his understanding that the interview process with Petitioner was going to last a week. (T. 11/10/14 at 27). He has had three or four other interviewees "shadow" him and that process takes a week before they are hired. (Id. at 62). When Mr. Smith was hired by Respondent, he flew to Illinois to meet Mr. Gerage for a meeting that lasted about four hours. Another date was set up for approximately two weeks later, at which time Mr. Smith walked through a building and took measurements to put together an estimate for a project that Respondent had already bid. Mr. Smith returned home "with a set of prints" and worked on the bid for about week. He then submitted his estimate to Mr. Gerage and received a job offer. (Id. at 8-11, 61-62).

Rhonda Lenzi, Respondent's office manager and Human Resources person, testified that from her experience, the interview process for estimators lasts "three days or so" and when she gets the acceptance letter she knows that they are hired. (Id. at 91, 124-25). The Commission finds that the testimony of Mr. Gerage, Mr. Smith, and Ms. Lenzi are supported by the emails between Mr. Gerage and Petitioner, which indicate that the interview visit would last multiple "days."

Also significant regarding whether Petitioner was considered an employee prior to his injury on October 31st, Mr. Smith testified that he asked Petitioner several times after he was injured if he wanted to go to the hospital or doctor but Petitioner told him "no" and said "he was very embarrassed by the fact that he did something like this, and he expressed the opinion that he hoped this didn't affect his being hired, whether he would be hired or not at Omega." (T. 11/10/14 at 45).

Petitioner disputed that Mr. Smith ever offered to take him to the hospital. (T. 10/10/14 at 117). Petitioner testified that he was "in such pain, excruciating pain" at the time but that going to the hospital "didn't even come to my mind." (Id. at 118-19). The Commission finds that the testimony of Mr. Smith is more persuasive than that of Petitioner regarding their conversations after the injury.

Mr. Smith testified that he completed an Initial Incident Report (Rx3), which is done anytime there is an incident "no matter how big or how little" and is done for employees and non-employees alike. (Id. at 48-9). We note that this form asks for the "Injured Party" and not "Injured Employee." Mr. Smith wrote the details of the incident and identified the Injured Party as "John Shankle Prospective Employee." (Id.) We find this credible regarding Mr. Smith's perception of Petitioner's classification at that time.

In addition to Petitioner's claim that he was offered the job by Mr. Smith on October 28th, he also claims that this was confirmed by Mr. Gerage during a meeting in Mr. Garage's office on Friday, November 1st. Prior to this, Petitioner's only contact with Mr. Gerage was a brief introduction on Monday, October 28th and a phone call around 7:30 or 8:00 p.m. on Thursday, October 31st, after Mr. Gerage learned that Petitioner had been injured. (T. 10/10/14 at 87, 121-122, 189).

Petitioner testified that, on November 1st, he arrived at the office at 8 a.m. and asked Mr. Smith where a drug store was located because he had to get a prescription filled. (T. 10/10/14 at 50-51). Petitioner went to Walgreens, returned around 11 a.m., and was called into Mr. Gerage's office. (Id. at 124). On direct examination, Petitioner gave the following testimony:

Q: After you filled your prescription when John Smith told you where a Walgreens was, what happened next?
A: I met with Chuck in his office, and he verified everything.
Q: What did he verify?
A: Verified the employment, you know. I was getting paid that week and everything was fine, that he would see me Monday morning.
Q: Okay. What did you take that to mean?
A: That I was an employee all week.
Q: What did you do the rest of that day?
A: Actually, they had pizza in the lunchroom, and I went back to the hotel because I was in excruciating pain. And I had just taken a pain pill.

(T. 10/10/14 at 54-55). On cross-examination, Petitioner testified:

Q: Okay. And what did you and Chuck discuss?
A: Well, he verified everything; and, you know, told me I was getting paid that week, everything was fine.

And I went back to my – that was it. I went back to my office and I told him – they were having a pizza party in the lunchroom, and he asked me to stay.

And I said: Look, I'm in pain. I'm going to go home. I'll see you Monday morning at 8:00.

...

Q: Okay. This is your first in-person meeting with him outside of the handshake the first day of the week?
A: That's correct.
Q: Okay. And he calls you in and says – he just says: I'm going to pay you this week?
A: No. There was some conversation. I just can't recall what we went through, you know.

John – everything was fine, you know. John – you know, all of that. I just can't recall – you want me to tell you exact times. I can't tell you.

Q: Okay. Did he offer you the job?
A: Did he offer me the job? I already had the job.
Q: Because of what Mr. Smith said?
A: Because I was there all week, and I went to work Tuesday morning officially at 8:00 o'clock a.m.
Q: According to you, correct?
A: According to me and John Smith.

(T. 10/10/14 at 124-26). Later, Petitioner testified:

Q: Okay. Did you talk to Chuck at all that weekend?
A: I don't recall. I don't think so.
Q: And at no point in time prior to October 31st or on the date of October 31st were you provided with a written offer, is that correct?
A: It was a verbal offer. Same thing as a written offer. Verbal. And it's in the email.
Q: What's in the email?
A: The offer, $85,000 a year.
Q: I believe that was discussed – I'm not going to get into an argument.
Okay. That was your understanding, that that was an offer in the initial email?
A: That is correct.
Q: Okay. And you accepted it at the time of the email, then?
A: I wouldn't say I accepted it, but we both know what the base salary is going to be.

(T. 10/10/14 at 128-29). We find it significant that Petitioner was unable to recall much detail regarding his conversation with Mr. Gerage on Friday, November 1st, except that Mr. Gerage allegedly "verified everything" and said that he was going to be paid for that week. The Commission does not find Petitioner's testimony credible in light of the other testimony and evidence.

Mr. Gerage testified that he met with Petitioner in his office on November 1st because Petitioner was asking him "what is he doing, is he getting hired, is he not, should he go back home, what was he doing." (T. 10/10/14 at 190, 193). Petitioner told him that he was in a lot of pain, couldn't finish one of the projects he was interviewing with him on, and wanted to go back to his hotel and rest. (Id. at 190). Mr. Gerage testified that he told Petitioner that he had not had a chance to meet with Mr. Smith yet but that he would meet with him that afternoon and follow up with Petitioner later that evening or the next day. (T.192-93). Mr. Gerage testified that there was no discussion about Petitioner already being an employee, or about workers' compensation insurance, or about receiving payment for the week of October 28th. (Id. at 191).

Mr. Gerage testified that he also had a meeting with Mr. Smith on Friday, November 1st, at which time Mr. Smith told him that he felt they could work with Petitioner. (T. 10/10/14 at 191-92). Mr. Gerage testified that he made his decision to hire Petitioner after this conversation with Mr. Smith. (Id. at 209). Mr. Gerage called Petitioner on Saturday, November 2nd, to offer him the job and Petitioner said "good." (Id.) Mr. Gerage testified that Petitioner did not discuss that it was his understanding that he had already been employed and did not mention any concerns regarding payment for the week of October 28th. (T. 11/10/14 at 194). Mr. Gerage told Petitioner that he would have Ms. Lenzi get him an offer letter and have all of his paperwork filled out and signed and that "I look forward to working with you." (Id.)

Mr. Smith confirmed that he had a meeting with Mr. Gerage on Friday, November 1st regarding Petitioner. (T. 11/10/14 at 55). Mr. Smith did not tell Mr. Gerage that he should or shouldn't hire Petitioner but just that "he had some abilities that I felt we could work with." (Id.) At the end of the meeting, Mr. Gerage had not given any indication as to whether or not Petitioner was hired. (Id.) Mr. Gerage called him over that weekend and mentioned that he was going to offer Petitioner a job. (T. 11/10/14 at 57).

Ms. Lenzi testified that she became aware that Petitioner was hired by Mr. Gerage on November 4th via e-mail. (Id. at 100-102).

We find that the testimony of Mr. Gerage, Ms. Lenzi, and Mr. Smith is supported by the e-mails from Mr. Gerage to Ms. Lenzi on Saturday, November 2nd at 10:20 a.m. indicating certain changes that should be made to the offer letter and Ms. Lenzi's reply e-mail on Monday, November 4th at 10:29 a.m. (Rx8).

Petitioner testified that he thinks he filled out some of the new hire forms on the Wednesday during the week of the 28th through the 1st. (T. 10/10/14 at 133-34). However, all of the employment records in evidence are dated October 4, 2013 or November 4, 2013. Petitioner and Ms. Lenzi both testified that the date on some of the documents is October 4th but it was really November 4th. (T. 11/10/14 at 133, 104-5). We find that those documents dated October 4th were in error and should be November 4th but the fact remains that there is no evidence to support Petitioner's testimony that he filled out forms during the first week. We find that the evidence is consistent with Ms. Lenzi's testimony that she prepared and gave the forms to Petitioner on November 4th. (T. 11/10/14 at 101-106).

Petitioner testified that when he was presented with the written offer by Ms. Lenzi on November 4th, he told her that the date was incorrect but signed it anyway because he didn't have a choice. (T. 10/10/14 at 56-58, 132-33). Petitioner testified that he then called Mr. Gerage and said that he was supposed to have been paid for the first week but Mr. Gerage responded that the first week was a trial period. (Id.) In contrast, Ms. Lenzi testified that Petitioner did not indicate any concern about filling out the paperwork on November 4th or about payment for the week of October 28th through November 1st. (T. 11/10/14 at 106). Mr. Gerage testified that Petitioner did not express to him, on November 4th when the written offer was made, any concerns or expectations about payment for the first week. (T. 10/10/14 at 197). Based on the above, we find Petitioner's testimony unpersuasive. Although we do not base our decision on this, we also find it interesting that Petitioner apparently didn't claim to have confronted Mr. Smith, the person who allegedly offered him the job, about his pay for the first week.

In addition to our determinations regarding credibility as discussed above, we find that the preponderance of the evidence does not support a finding that Petitioner was an employee prior to November 4, 2013. Although it is possible that someone could be performing activities and functions of an employee such that an implied employment relationship exists, we find that is not the case here. Rather, Petitioner remained an interviewee during the first week and, most importantly, at the time of his accident on October 31st.

We note that, during the first week, Petitioner was using his own software and estimating tools to prepare sample proposals, whereas Respondent required its estimators to use Respondent's own program and format. (T. 10/10/14 at 94-95; T. 11/10/14 at 22-23). This supports the testimony of Mr. Gerage that none of the information prepared by Petitioner during the week of October 28th through November 1st was used by Respondent for the purpose of securing business because Respondent had already bid those projects. (T. 10/10/14 at 186).

Petitioner testified that he used Respondent's computer "maybe one time" during the first week using Mr. Smith's access code and that he was "eventually" assigned his own code. (T.

10/10/14 at 154). This is consistent with the e-mail from Ms. Lenzi to "Tech" on Monday, November 4th at 10:39a.m. requesting that Petitioner's computer and e-mail account be setup with his own password. (Rx5).

Mr. Smith testified that he reviewed Petitioner's folder on Respondent's computer, which reflected that Petitioner submitted three proposals between November 4th and the middle of November but that no bids or proposals were prepared by Petitioner prior to November 4, 2013. (T. 11/10/14 at 58-59).

Mr. Smith testified that Petitioner did not go to any sites with him after November 4th and Petitioner was doing his own bids after that date. (Id. at 58). This is consistent with Petitioner's testimony that after November 4th, he was going to sites on his own. (T. 10/10/14 at 135). Petitioner also testified that he did not have access to company vehicles during the first week. (Id. at 156). These facts are consistent with a finding that Petitioner was hired on November 4, 2013.

Mr. Gerage testified that Petitioner was given a phone on November 4th when he was hired. (T. 10/10/14 at 197). Petitioner testified that he didn't recall when he was given a phone. (Id. at 146).

We do not find the fact that Respondent paid for Petitioner's gas and lodging during his stay to be indicative of employment because those were clearly the terms of Petitioner's visit for his interview. Likewise, the fact that Petitioner was given assignments, a work cubicle, and transportation by Mr. Smith to various sites does not show direction and control of Petitioner. Rather, the entire purpose of the interview process was for Petitioner to perform bids on projects, which Respondent had already bid on, to be able to assess Petitioner's abilities. We find that Petitioner performed these tasks and accompanied Mr. Smith voluntarily as part of the interview process in the hopes of obtaining a job.

We do not put much weight in Petitioner's claim that he entered through what he considered to be an "employee entrance." The evidence does not indicate that there was any sign indicating that it was for employees only. Rather, the evidence (Px14) shows that the sign stated, "AUTHORIZED PERSONNEL ONLY DO NOT ENTER". As an interviewee with permission, Petitioner was obviously authorized to enter. We also note that it was an unlocked door and Petitioner had not been given any keys, which might indicate that he was an employee. Just because someone enters through a particular door, even if it was marked "employees only," does not automatically make that person an employee. We find that even if Petitioner was directed by Mr. Smith to use that entrance, this only indicates that Petitioner was authorized to use that entrance.

Finally, the mere fact that Respondent engaged in a hazardous or extra-hazardous business does not automatically convert Petitioner from an interviewee into an employee. Again, we find that Petitioner voluntarily participated in this interview process and could have refused, at any time, to continue. Of course, this may have affected whether he was ultimately hired, but we find that Petitioner's motivation was to obtain a job. The fact that he was, most unfortunately, injured during this process is similar to Barry v. St. Francis Motherhouse, 07 WC 1252 (2008), in which the Commission found that the claimant was not an employee when she was injured during her pre-employment physical.

We next address the Arbitrator's finding that "parts of Respondent's witness testimony [were] somewhat unreasonable. In particular the testimony of Ms. Lenzi that she never comes to work before 9 a.m. due to her son's school schedule is troubling as the Petitioner testified credibly that he arrived for his interview at 8 a.m. and was met by Ms. Lenzi." (Dec. at 19). Petitioner testified that he reported to Respondent's office at 8 a.m. on October 28th. He walked in the front door and after a short time the office manager, Rhonda, escorted him back to Mr. Smith's office.

(T. 10/10/14 at 28, 85). Ms. Lenzi testified that her hours at Respondent are from 9:00 a.m. to 5:30 p.m. and that she doesn't get there before 9:00 a.m. because she has to get her son on the bus to school. (T. 11/10/14 at 92). She had no reason to believe that her hours would have been different during the week of October 28, 2013. (Id. at 93). Ms. Lenzi testified that she believed she met Petitioner during the week of October 28th when John Smith walked Petitioner around the office and introduced him. However, she did not recall specifically meeting Petitioner on October 28th nor showing Petitioner back to the office and introducing him to Mr. Smith. (Id. at 94). Mr. Smith testified that around 8:00 a.m. someone from the front office called him and told him that Petitioner was there to meet him so he went up to the front office and escorted Petitioner back to the estimator's office area. (T. 11/10/14 at 16).

Obviously, all of this testimony is conflicting. Petitioner testified that he arrived at Respondent's office at 8:00 a.m. on October 28th and that Ms. Lenzi escorted him back to Mr. Smith's office. Mr. Smith testified that he went up to the front around 8:00 a.m. and escorted Petitioner back himself. Ms. Lenzi testified that she didn't specifically recall meeting Petitioner at all that day or showing Petitioner to Mr. Smith's office. While we will not speculate as to all of the possible reasons for these discrepancies, we don't agree with the Arbitrator that Ms. Lenzi's testimony is "troubling" or that it reflects poorly on her credibility regarding other aspects of her testimony.

We also disagree with the Arbitrator who found that Mr. Smith "testified that he had no idea that the Petitioner was injured enough to require hospitalization. In the Arbitrator's assessment, Mr. John Smith was clearly impeached by the [October 31, 2013] report when he denied that he know [sic] Petitioner went to the hospital as his own report listed Sherman Hospital as the location when the Petitioner sought medical care." (Dec. at 16-17). On direct examination, Mr. Smith clearly testified:

Q: I'm just asking what your recollection is.
Do you recall if the Petitioner went to the hospital that day?
A: Yes, he did.
Q: Did he go with you?
A: No.
Q: Do you recall who he went with?
A: Jerry Zembroch told me that he was going to take him.

Mr. Rudolfi: Objection.
Arbitrator: Sustained.

Q: Do you know personally, did anybody go with the Petitioner to the hospital, did you observe anyone?
A: I observed Jerry Zembroch taking Mr. Shankle with him to the hospital.

(T. 11/10/14 at 53-54). Although the hearsay objection was sustained as to what he was told, Mr. Smith clearly stated that he observed Jerry Zembroch, another estimator, take Petitioner to the hospital that day. This is consistent with the information contained on the incident report. (Rx3). The discrepancy, relied on by the Arbitrator, took place during cross-examination:

Q: When were you made aware that he went to Sherman Hospital?

A: I didn't know he went to Sherman Hospital, I – again in speaking with Jerry Zembroch, Jerry told me –

Mr. Rudolfi: Objection, asked for hearsay.
Arbitrator: You asked him the question, you're objecting to his answer?
Mr. Rudolfi: Can I rephrase.
Arbitrator: You can rephrase the question.

Q: Rephrase.
When were you made aware that Mr. Shankle went to Sherman Hospital?
A: If you want to get technical call right now.
Q: Today was the first day?
A: Today was the first day I was made aware that he went to Sherman Hospital, specifically.
Q: Very good. I hand you again what's been marked as Respondent's Exhibit No. 3, did you mark down that he went to get medical attention, on October 31st, did you mark down that we went to get medical attention?
A: Apparently I did.
Q: Okay, where did he get medical attention?
A: It says Sherman Hospital, so I must have been made aware before it.
Q: But again your testimony was –
A: Again, it's a year ago, and that apparently I was made aware of that before that, and my recollection is that Sherman Hospital was – I don't recall it being Sherman Hospital.

(T. 11/10/14 at 79-80). We note that the hearsay objection by Petitioner's attorney was not ruled upon by the Arbitrator. From our review of the transcript, the issue is whether Mr. Smith knew, prior to the date of hearing, that Petitioner went to Sherman Hospital specifically as opposed to a different hospital. Although Mr. Smith apparently didn't recall at trial precisely what he had written in the incident report a year prior, it is clear that he had relied, in part, on what he was told by Mr. Zembroch when he prepared the report. This is not a situation where Mr. Smith denied at hearing that Petitioner went to a hospital at all on the date of an accident and was then impeached with his own report indicating that Petitioner actually did. Rather, Mr. Smith was only "impeached" with reference to the specific hospital that Petitioner went. We do not find that this reflects negatively on Mr. Smith's other testimony in this case.

Based on the above and our thorough review of the record as a whole, we find that there was no mutual assent or "meeting of the minds" to create an employment relationship prior to Petitioner's injuries on October 31, 2013. Petitioner's claim that he was hired verbally by Mr. Smith on October 28, 2013 and that this was confirmed by Mr. Gerage on November 1st is not credible. We find that the testimony and evidence shows that Petitioner was not treated like an employee until the written employment offer on November 4, 2013. We find that any belief Petitioner may have had, that he had been already hired and was going to be paid for the first week, is unreasonable under the circumstances. Therefore, Petitioner has failed to prove that he was an employee of Respondent on October 31, 2013 and that his injuries arose out of and in the course of employment. All other issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated February 4, 2015, 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: FEB 4 - 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 12/16/15
49

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

SHANKLE III, JOHN TURNER
Employee/Petitioner

Case# **13WC038755**

OMEGA DEMOLITION CORP
Employer/Respondent

16IWCC0103

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

If the Commission reviews this award, interest of 0.06% 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
JOSHUA RUDOLFI
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

1296 CHILTON YAMBERT PORTER LLP
BRADLEY L BREJCHA
303 W MADISON ST SUITE 2300
CHICAGO, IL 60606

16IWCC0103

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)

John Turner Shankle III
Employee/Petitioner

v.

Omega Demolition Corp.
Employer/Respondent

Case # 13 WC 38755

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 10, 2014 and November 10, 2014.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

ICArbDec19(b) 2/10 100 W. Randolph Street #8-200 Chicago, IL 60601 312/814-6611 Toll-free 866/352-3033 Web site: www.iwcc.il.gov
Downstate offices: Collinsville 618/346-3450 Peoria 309/671-3019 Rockford 815/987-7292 Springfield 217/785-7084

FINDINGS

On the date of accident, **10/31/2013**, 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 $**85,000.00**; the average weekly wage was $**1634.62**.

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 $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**21,000.00** for other benefits, for a total credit of $**21,000.00**.

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of $3,583.20, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $2014.20 to Sherman Hospital, and $1,569.00 to Suburban Orthopedics, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary medical services of $3,583.20, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $0.00 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.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $1,089.75/week for 46 4/7 weeks, commencing November 19, 2013 through October 10, 2014, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from November 19, 2013 through October 10, 2014, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $0.00 for temporary total disability benefits that have been paid

Penalties

The petition for penalties and fees as provided in Section 16 of the Act, Section 19(k) and Section 19(l) of the Act is dendied.

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.

Kelli Steffen
Signature of Arbitrator

2/2/15
Date

ICArbDec19(b)

FEB 4 - 2015

STATEMENT OF FACTS

The petitioner, John Turner Shankle III, was fifty-six years of age on the date of the alleged accident of October 31, 2013. He is a project manager/estimator by trade. (Transcript of Arbitration, pp. 11, hereinafter referred to as "R.") As an estimator he calculates the amount of materials that come out of buildings for renovation projects and calculates the amount of material left over when a building is torn down. (R. at 11-12) The Petitioner has been involved in this field of work for approximately 18 years. (R. at 12) The job of "estimator" is one that is involved with the demolishing of buildings. (*Id.*)

In October 2013 the Petitioner was living in Washington, D.C. and sent a resume to the Respondent, Omega Corporation ("hereinafter Omega") in response to a job posting on the internet. (R. at 13) On October 21, 2013 the Petitioner received an email from Mr. Charles (Chuck) Gerage requesting additional information concerning the Petitioner's work experience and inquiring as to Petitioner's availability to start work in the Chicago land area. (Pet. Ex. #1) The Petitioner provided the requested information that same day, received a reply from Mr. Gerage inquiring about salary, and responded that he would request $85,000 per year. (*Id.*) On October 22, and 23, 2013 the Petitioner sent Mr. Gerage an email containing sample bids that he had previously performed. (*Id.*) On October 24, 2013, the Petitioner inquired as to how quickly Mr. Gerage was looking to hire someone, to which Mr. Gerage replied that he was "looking to hire someone now" and that if the phone interview is a fit that the next step would be to meet at his office. (*Id.*) Following a telephone conversation between the Petitioner and Mr. Gerage on October 25, 2013, Mr. Gerage sent the Petitioner an email indicating that the Petitioner was to come to Elgin, IL in order for the Respondent to evaluate his estimating skills. (*Id.*) Mr. Gerage indicated that the Respondent would reimburse him for gas for the drive from Washington D.C. to Elgin, IL and provide a hotel for the Petitioner. (*Id.*) He further indicated that if the Petitioner's skills were acceptable that a written offer would be made and that the Respondent was currently discussing a starting salary of $85,000. (*Id.*)

The following is the email exhange:

"Chuck good talking to you today, If you could shoot me a e-mail of what we went over today as far as me coming up *next week. I see no problem in being there on Monday 10/28/13 to test the waters so to speak.* I look forward to this new opportunity. Thanks John." (*Emphasis added*).

Per the petitioner's request, Mr. Gerage responded on October 25, 2013;

"John,

Pursuant to our conversation, Omega will reimburse you for the gas to drive from Washington DC to Elgin IL. Omega will provide you a hotel room *during the days of your visit next week. The purpose of your visit is for Omega to evaluate your estimating skills and abilities. If Omega is acceptable to your estimating skills and abilities, Omega will make you a written offer at such time.* We are currently discussing a starting salary of $85,000.00.

We look forward to your visit on Monday October 18th 2013.

Drive Safe!" (*Emphasis added*)

Both parties have agreed and stipulated that in the email, October 18th , was a typo and meant to read October 28th. On October 27th, the petitioner sent a text message to Mr. Gerage indicating that he had made it safely to Elgin, IL. The petitioner testified that he was not provided any maps or directions for locating Omega. Mr. Gerage responded to the petitioner informing him that he would be shadowing John Smith during his visit and that he would meet Mr. Smith the morning of October 28th at Omega. Mr. Smith was one of four estimators working at Omega in October 2013.

Mr. Gerage testified that it was normal for interviews to last few days as it was necessary to properly assess an interviewee's skills and abilities. Omega employs between 100-125 employees. It has four estimators who are all salaried employees and all signed written offers. One of those estimators is Mr. Smith who is the senior estimator as he has been with Omega for ten years. Two other estimators have been with the company approximately five years each. The last estimator, Jerry, had been with Omega five years as of October 2013 but was going to be taking a personal leave. This was the position that the petitioner applied for on Career Builder. Mr. Smith testified that it was normal for interview to last a few days and indicated the he went through a similar process when he was hired ten years earlier. Over the years he had around 3-4 estimators

shadow him but indicated that who the interviewee shadows depends on which department they are applying. Mr. Smith has never hired an estimator and does not schedule interviews. Mr. Gerage, Mr. Smith and Ms. Rhonda Lenzi, Omega's office manager, all testified that Mr. Gerage is the sole person in charge of hiring.

The petitioner testified that he arrived at Omega on October 28, 2013 promptly at 8:00 a.m. where he met Ms. Lenzi and was escorted back to meet Mr. Smith. Ms. Lenzi testified that she would not be in the office at 8:00 am and did not escort petitioner back to meet Mr. Smith. Ms. Lenzi's hours are 9:00 am to 5:00 pm everyday and she has never arrived earlier then 9:00 am. Mr. Smith had been informed by Mr. Gerage that the petitioner would be coming in to shadow him for a few days. Mr. Smith was instructed to have petitioner look at some projects that had previously been bid by Omega. Mr. Smith and Mr. Gerage testified that the purpose of having petitioner bid projects already worked up was to assess his abilities and accuracy with estimating demolition projects by comparing them to those figures previously determined by Mr. Smith.

The first project the petitioner reviewed was located at 37 S. Sangamon Street. The petitioner was provided with a printout from Google Earth as well description of the property. The bid for this property had previously been prepared by Mr. Smith and the petitioner acknowledged that Mr. Smith had already 'worked it up, his numbers' prior to going over the bid with the petitioner. Mr. Smith testified the petitioner had sufficient information for which to prepare a bid without actually visiting the potential job site but that the petitioner wished to view the site in-person. The petitioner was not instructed to visit the site, was not provided any directions, and used his own vehicle. The property at Sangamon was described as a single building which still had tenants occupying the premises. To gain entry to the building required getting buzzed or admitted into the property. There is no indication in the record that the petitioner actually entered the property at 37 S. Sangamon but rather likely observed it from the outside. Petitioner then prepared a bid using his personal computer and his own bidding program. Both Mr. Smith and the petitioner identified that there are a number of programs that estimators can use when preparing a bid. Both parties agree that Omega uses a specific program for preparing

bids and that no bids prepared by the petitioner the week of October 28th utilized this program. Rather all hypothetical bids prepared by the petitioner the week of October 28th were prepared using his personal computer and personal estimating program. The petitioner confirmed that his proposal did not use a program consistent with Omega. All bids prepared by the petitioner after November 4, 2013 did use Omega's estimating program. Regarding the property located on Sangamon, the petitioner's bid for the project was $81,460.00. Mr. Smith's bid prepared previously was $76,240.00, a difference of approximately 5% which Mr. Smith confirmed was sufficient enough to lose a possible job. Mr. Smith confirmed that none of petitioner's work that day was used or relied upon in attempting to secure the project at Sangamon as that bid had been previously prepared by Mr. Smith.

The petitioner testified that after reviewing the bid with Mr. Smith that Mr. Smith told petitioner 'Hey, it looks like you got the job'. Mr. Smith testified that he never made any such statement and that he never would as he had no authority to hire someone. The arbitrator notes that with possibly the exception of a brief greeting, the petitioner did not meet or otherwise speak with Mr. Gerage on October 28, 2013. Mr. Gerage confirmed that he had introduced himself to Mr. Shankle earlier that afternoon but that was the extent of their conversation. The arbitrator further notes that Mr. Gerage was not in the office the majority of this day and did not have any discussions regarding the petitioner with Mr. Smith.

On October 29, 2013 the petitioner again went to Omega. On this day he reviewed take-offs and bids from a previously bid project at the University of Michigan. The petitioner testified that he worked the entire day in a cubicle. Mr. Gerage, Mr. Smith and Ms. Lenzi's testimony confirmed that petitioner was situated in a cubicle the week of October 28th. They further confirmed that estimators worked in actual offices which were located near the cubicles.

On October 30, 2013 the petitioner shadowed Mr. Smith to two different job sites. The petitioner testified that he rode in Mr. Smith's car on this day which he identified as a blue SUV. Mr. Smith confirmed that he

drove the petitioner on this day but has never owned or operated a blue SUV. Both he and Mr. Gerage confirmed that none of the vehicles used or operated by Omega is blue in color. Mr. Smith testified that in October 2013 he would have been driving a silver Ford Escape. Mr. Smith testified that the purpose of having the petitioner shadow him to these projects was to show him the possible project sizes he could be expected to work with should he get hired. The first site the petitioner described as an industrial plant. The petitioner testified that this was Mr. Smith's client and that the petitioner did not do any talking. They then had lunch a barbecue restaurant before proceeding to what has been described as a lime plant. The petitioner testified that he watched a short video that was provided by the lime plant before exiting the building and sitting in Mr. Smith's car. Mr. Smith testified that the petitioner did not have the proper work boots and thus was not permitted into the plant. Mr. Smith testified that work boots are not provided by Omega but rather purchased by the employee. Mr. Smith then performed a walk through while petitioner sat in the car for approximately an hour.

On direct examination, the petitioner testified that Mr. Smith drove him back to Omega. On cross-examination, the petitioner admitted that he had omitted another appointment that same afternoon. On cross-examination, the petitioner admitted that around 2:00 pm the afternoon of October 30, 2013, he accompanied Mr. Smith to a meeting at a restaurant. Mr. Smith testified that this meeting was scheduled by Mr. Michael Libert, a salesperson with Omega, to discuss potential future business. Also in attendance at this meeting was a businessman from Gary, Indiana. Upon arrival at the meeting, the petitioner was asked to leave by Mr. Libert because it was pertaining to potential future business for Omega and the petitioner was not an employee. The petitioner complied and chose to take a seat in the bar where he ordered a beer. The meeting concluded around 3:30 pm after which Mr. Smith drove the petitioner back to his car. The Petitioner and Mr. Smith returned to the office and left for the day around 6:30pm. (R. at 37)

The petitioner did not see Mr. Gerage at all on this day and did not review or prepare any sample bids. On October 31, 2013, the petitioner accompanied Mr. Smith to a site located at 2070 Maple Street in Des Plaines,

IL. Testimony at trial confirmed that this same site is also identified as 1780 Birchwood, Des Plaines, IL. Mr. Smith again drove to the site with the petitioner as a passenger in his silver Ford Escape. Mr. Smith testified that he had previously bid this site on July 25, 2013. Mr. Smith testified that this earlier bid was prepared without doing any actual walk through of the property. He testified that he had been out to the site located at 2070 Maple Street but had never walked through the building. The first time he walked the building was on October 31, 2013 with the petitioner. The building was vacant but was otherwise maintained and had running water and electricity. The petitioner testified that during the walk-thru he opened an interior loading dock door and fell approximately four feet. Mr. Smith testified that he saw the petitioner approaching the door but was unaware that it was an interior loading dock door because it simply looked like a door. He testified that a gate should have been across the door but that it had been left open. Mr. Smith testified that he immediately jumped down from the dock and helped the petitioner back up. Mr. Smith specifically recalled handing the petitioner back his e-cigarette as he recalls the petitioner was trying to quit smoking. Mr. Smith asked the petitioner if he needed to go to the hospital but was told by the petitioner that he did not. The petitioner expressed to Mr. Smith that he was embarrassed for falling and hoped it would not affect his possibly being hired. Mr. Smith took a few more pictures around the building before heading back to Omega. Mr. Smith testified that while driving back he attempted to reach Mr. Gerage to discuss the petitioner's fall but was redirected to Ms. Lenzi. Ms. Lenzi testified that she has been with Omega for around 17 years and often people looking for Mr. Gerage are directed to her when Mr. Gerage is out. Mr. Smith testified that he asked the petitioner numerous times if he would like to go to a hospital but the petitioner declined. Mr. Smith did prepare an incident report which he testified would be prepared for any incident with Omega, employee or non-employee alike. The petitioner is identified as prospective employee where injured party is indicated. Initially, Mr. Smith denied that he knew Petitioner was seeking medical help at the time when he prepared the report. On cross-examination, he acknowledged that the incident report indicated that Petitioner had gone to Sherman hospital.

The petitioner testified that he went to the hospital on October 31, 2013. He followed an Omega employee to Sherman Hospital. The petitioner treated at Sherman Hospital where x-rays were taken of the petitioner's right knee left elbow and left shoulder. All x-rays were normal. Petitioner was diagnosed with a lumbar contusion, ankle sprain and left shoulder sprain. He was given a prescription for Norco. He did not receive any work restrictions. Mr. Gerage contacted the petitioner that night to see how he was doing. The petitioner told him he would be back at Omega on November 1, 2013.

The Evidence shows that the petitioner did prepare a sample bid for the site located at Maple. The bid was prepared using the petitioner's personal computer and personal estimating program. The petitioner's estimated bid for the site was $636,773.00. Mr. Smith's original bid in July 2013 was $470,000.00. His rebid was $498,815.00, a difference of $137,958.00, nearly 25%, between the petitioner's bid and Mr. Smith's rebid. Mr. Gerage and Mr. Smith testified that this sample bid prepared by the petitioner was not used or relied upon in attempting to secure the Maple project.

The petitioner testified that he did go to Omega on November 1, 2013 but left early to get pain pills and go back to his hotel. The petitioner confirmed that he performed no work on November 1, 2013 and left before pizza was delivered for presumably lunch. The petitioner testified that Mr. Gerage met with him before he left and 'verified the employment, you know. I was getting paid that week and everything was fine, that he would see me Monday morning.' Mr. Gerage confirms that he did speak with the petitioner on this date but flatly denies the petitioner mentioning any expectation of pay for the week of October 28th which he acknowledged would be contrary to the scope of the interview agreed upon by the parties. The extent of the conversation between Mr. Gerage and the petitioner consisted of the petitioner informing Mr. Gerage that he was going back to his hotel. Mr. Gerage confirmed that he would be in touch with the petitioner after he had a chance to speak with Mr. Smith that afternoon regarding the petitioner's sample bids from the week. In the afternoon of November 1, 2013 Mr. Gerage and Mr. Smith sat down to discuss the interview with the petitioner for the first

time. Mr. Gerage and Mr. Smith testified that they had possibly discussed the petitioner's activities briefly in the week but that this was the first time they had an extended discussion and the first time Mr. Gerage had a chance to review the petitioner's sample bids. Mr. Gerage testified that he was out more than usual this week attending to a personal matter, a fact that the petitioner was aware of prior to agreeing to come to Omega for the week to 'test the waters'. Mr. Smith went over the two bids with Mr. Gerage and noted that although they were quite a bit off that he would be able to work with the petitioner. Mr. Smith acknowledged that he was not made aware of whether or not Mr. Gerage was going to hire the petitioner at the conclusion of this meeting but rather found out over the weekend. On November 2, 2013 Mr. Gerage contacted the petitioner and offered him the job as estimator.

On November 4, 2013, petitioner reported to Omega where he signed the written offer prepared by Omega. The letter is dated November 4, 2013 and signed by the petitioner. Ms. Lenzi, the office manager, is in charge of providing all new hires with the information contained in the new hire packet. The petitioner was also provided at this time with the new hire packet which included the written offer letter signed by the petitioner, a W4-form signed by the petitioner, an employee eligibility signed by the petitioner, an employee handbook and disclaimer signed by the petitioner, and an emergency contact form signed by petitioner. The date indicated on each of these forms next to the petitioner's signature is 10/4/13 which the petitioner acknowledged should be 11/4/13. Ms. Lenzi has also signed these documents and appropriately addresses them 11/4/13. The arbitrator notes that the petitioner testified that he had received these forms the week of October 28th. Mr. Lenzi testified that she prepares these new hire documents the same day as being informed by Mr. Gerage of a new hire. She received an email from Mr. Gerage on November 4, 2013 regarding the hiring of the petitioner Ms. Lenzi testified that she had perhaps met the petitioner in passing the week of October 28th but had not given him any forms or documents to sign prior to November 4, 2013.

On November 4, 2013 the petitioner moved from the temporary cubicle he was sitting at the previous week to an office. A computer was set up for him as was an email address. This is confirmed in emails exchanged between Ms. Lenzi and the office technician on November 4, 2013. As of November 4, 2013 the petitioner testified that he was preparing his own bids and traveling to potential job sites on his own. He no longer traveled with Mr. Smith and all subsequent bids prepared by the petitioner were prepared using the Omega estimating program. The petitioner worked for Omega for approximately the next two weeks. On November 15, the petitioner testified the he left his phone and any other tools he received from Omega in his office. Petitioner identified this day as a Friday and noted that he did not work this weekend. Upon observing his phone left in his office the following Monday, November 18, 2013, Mr. Gerage and Ms. Lenzi contacted the petitioner to determine his whereabouts. The petitioner told them that if his medical was not going to be paid for by Omega than he was returning home. This was the last conversation between the petitioner and any one from Omega. Mr. Gerage and Ms. Lenzi confirmed that petitioner was not terminated but rather left of his own volition. Payroll records confirm the petitioner was paid for November 4, 2013 through November 17, 2013. His hotel and travel were paid for the week of October 28, 2013.

On November 19, 2013, four days after leaving Omega, the petitioner was examined by Dr. Ankur Chhadia who diagnosed the petitioner with a right knee MCL sprain and possible left shoulder rotator cuff tear. He recommended an MRI and authorized the petitioner off work.

On April 9, 2014, Dr. Chaddadi authored a second off work slip and further indicates that petitioner is unable to travel. There is no report accompanying these two notes as that which was with the November 19, 2013 visit.

On August 12, 2014 underwent an MRI of his right knee and left shoulder. A rotator cuff tear of the left shoulder was indicated as well as suggestions of a chronic injury to the MCL. Dr. Chhadia has a recommended a left reverse total shoulder arthroplasty.

Petitioner has not worked since November 15, 2013.

ANALYSIS/FINDINGS

With respect to issue (B), was there an employee-employer relationship at the time of the petitioner's accident on October 31, 2013, the Arbitrator concludes the following:

The Primary issue in this case is whether the Petitioner, John Shankle, III was an employee of the Respondent Omega Demolition Corporation on the date of the uncontested accident on October 31, 2013. The Respondent proposes that the Petitioner did not become a contractual employee of the Respondent until after the accident when he was given a formal written offer and that on the date and time of the accident he was a mere interviewee out on the field for his week-long interview. The Petitioner argues that he has proven through testimony and other credible evidence that he was hired verbally as an employee prior to this accident and that regardless of the formal written offer to the contrary, he became an employee of Respondent based on the control and direction that the Respondent exercised over him in the time preceding the accident.

The Arbitrator acknowledges that some of the evidence in this case is not clear cut and that the case rests on a fine balance between credibility of the witnesses, case law and the intent and purpose of the Worker's Compensation Act. Ultimately, the Arbitrator finds that formal contractual agreement between the parties (dated after the accident) is not the decisive/controlling factor, but rather, just a factor. The Arbitrator finds that John Turner Shankle, III was an employee of Omega Demolition Corporation on the date of the work accident on October 31, 2013. The Arbitrator finds that the Petitioner has proven that he was verbally hired prior to his accident through his credible testimony and supporting documentary evidence.

The Illinois Workers' Compensation Act defines an employee as a "person in the service of another under any contractor of hire, express or implied, oral or written...." 820 ILCS 305/1(b)(2). "Although the definition of 'employee' contained in the Act is to be broadly construed, there can be no employer/employee relationship and therefore no liability under the Act in the absence of a contract for hire, express or implied. *Normand*

Goodrick v. Industrial Commission, 237 Ill.App. 3d 885, 888 (1992). When the evidence is conflicting and the facts are subject to diverse interpretations, it is within the province of the Industrial Commission to draw inferences from the evidence, ascertain the credibility of witnesses, evaluate conflicting testimony, and resolve whether the claimant has met his burden of proof. *Goodrick v. Industrial Commission*, 237 Ill.App. 3d 885, 888 (1992).

The "employer and employee is a contractual relationship...determined by an application of the principles governing the formation of other contracts". *Crepps v. Industrial Commission*, 402 Ill. 606, 614 (1949). Implicit in such a statement is the requirement that "the relationship is a product of mutual assent, that is, of a meeting of minds expressed by some offer on the part of one to employ or to work for the other and an acceptance on the part of the other." *Id.*

"There is no rigid rule of law for determining whether an employer-employee relationship exists, rather such a determination depends upon the particular facts of the case." *West Cab Co. v. Industrial Comm.*, 376 Ill.App.3d 396, 404, 876 N.E.2d 53 (1st Dist. 2007). Various factors must be considered including "the right to control the manner in which the work is done, the method of payment, the right of discharge, the skill required in the work to be done, and who provides tools, materials, or equipment." *West Cab*, 376 Ill.App.3d at 404 (*citation omitted*). The court expounded that "the right to control the manner in which the work is done is the paramount factor in determining the relationship." *Id.*

"It has been held that the label given by the parties in a written agreement will not be dispositive of the employment status, but that the facts of the case must be considered to determine what the individual's employment status is." *Roberson v. Indust. Comm'n.*, 225 Ill. 2d 159, 183 (2007). In order to determine if a worker is an employee, the following factors should be considered: 1. Right to control the manner in which work may be done; 2. Method of payment; 3. Right to discharge; 4. Skill required to perform the work; and, 5. Who provides the tools, materials or equipment. Of these factors, the right to control the manner in which the

work is done is the most important in determining the relationship. *Yellow Cab Co. v. Indust. Comm'n.*, 238 Ill. App. 3d 650, 652 (1st Dist. 1992). Even if the Petitioner was not specifically hired by Mr. Smith on October 28, 2013, the Petitioner was an employee of the Respondent.

Respondent has produced the written offer prepared by Omega and signed by all parties dated November 4, 2013 as the starting date for the employer-employee relationship. The evidence is uncontested that these forms were signed on November 4th. The Petitioner testified that he received the forms on October 28 and Ms. Lenzi testified that she received an email form the owner, Mr. Gerage on November 4th and prepared and presented the forms the same day to the Petitioner. She acknowledged that she may have met the Petitioner on October 28th but did not give him these forms. Respondent emphasizes that it written instrument that should control the finding in this case. The Arbitrator disagrees with this singular analysis and is cognizant of the holding that " the label given by the parties in a written agreement will not be dispositive of the employment status, but that the facts of the case must be considered to determine what the individual's employment status is." *Roberson v. Indust. Comm'n.*, 225 Ill. 2d 159, 183 (2007). The Petitioner's explanation that there was a verbal offer and acceptance in place prior to the written agreement that followed is persuasive and credible in the Arbitrator's determination. Also the Petitioner's testimony that he signed the agreement under protest as he was injured, living in a hotel for from his home state and under financial duress is plausible.

On the contrary, the actions of Mr. John Smith in hastily preparing an accident report labeling Petitioner as "Prospective Employee" on the incident report of October 31, 2013 is suspect. (Resp. Ex. #3) Mr. Smith testified that he was never made aware on October 31, 2013 that the Petitioner sought medical care at Sherman Hospital. He had personally witness the electric shock and the subsequent fall of a "prospective Employee" under his care and guidance during the alleged interview process. He found the matter serious enough to try to call the company owner and to try to fill out the accident report himself although he was not the human resources manager. Yet, he testified that he had no idea that the Petitioner was injured enough to require

hospitalization. In the Arbitrator's assessment, Mr. John Smith was clearly impeached by the report when he denied that he know Petitioner went to the hospital as his own report listed Sherman Hospital as the location when the Petitioner sought medical care.

Therefore, the Arbitrator is not persuaded by the written employment offer or the label on the accident report. The Arbitrator finds that the Petitioner was an employee based on his credible testimony as well an evaluation of the factors that show that the Respondent exercised control and direction over the Petitioner. The following facts were critical to the Arbitrators assessment and finding on this issue.

1. The Petitioner believed he was in town for an interview and if hired, would be paid for the week's services.

2. Respondent paid for the Petitioner's gas and lodgings.

3. It is undisputed that the Petitioner was directed and controlled by the Respondent in terms of what demolition sites to visit. In fact, the Respondent's agent, Mr. John Smith, drove him to the locations in the company vehicle.

4. The Petitioner submitted several bids which the Respondent found acceptable giving credence to Petitioner's testimony that he was verbally hired.

5. The testimony of Mr. Gerage is credible that he solely determines who gets hired but this does not discount the possibility that Mr. John Smith, who was the Petitioner's direct supervisor and who had overseen Petitioner's work, did not receive such authority to hire the Petitioner from Mr. Gerage. Petitioner's testimony that Mr. Smith examined his work and then shook hand with him to hire him is credible.

6. Petitioner, after the interview and verbal hire, testified that he reported back to the office each morning and entered into the property through the side entrance, or what he labeled the "employee" entrance. The Petitioner produced a Google Maps printout of the side entrance that revealed signs posted that "Authorized

Personnel Only" were permitted in that area and that hard hats must be worn in that area. (Pet. Ex. #14) This area is protected by a gate that is topped with barbed wire and is a controlled entrance. The Arbitrator finds this to be a persuasive fact in the Petitioner favor.

7. Respondent controlled Petitioner's work in that they gave him the client, the nature of the assignment, the work cubicle and the transportation to the job site. Although the Petitioner used a different computer program to arrive at his calculations, the Arbitrator is not swayed by the fact that Petitioner also had some leeway in how to perform his duties. The Petitioner performed "take offs" concerning a University of Michigan project on October 29, 2013 that was assigned to him by the Respondent.

8. On the accident date itself, Petitioner was asked to and reported to Respondent's business at 8:00 am, entered through an employee entrance, was told to accompany Mr. Smith to a building in Des Plaines to perform further work. The project/bid at the Des Plaines site was not completed at the time the Petitioner sustained his accident. This project is therefore different than the Sangamon project from the day before where all of the work had been performed and the Respondent was simply "checking the Petitioner's skills." The Arbitrator finds that the control exercised by the Respondent over the Petitioner during the week of October 28, 2013 and specifically on October 31, 2013 establishes that the relationship between the Petitioner and Respondent was that of employee/employer.

9. Petitioner went to Sangamon site on his own on the first day which was to be his interview day. At all other sites he was accompanied by Mr. Smith as if Petitioner were an employee in training with the senior estimator. This lends support to the proposition that he was an interviewee but then became an employee. In the Arbitrator's estimation this is a very crucial factor that shows the difference between the fact that the first day was an interview where Petitioner went to the location on his own and and prepared a secondary bid to be used in his job application evaluation. All the other days, Petitioner accompanied Mr. Smith where they worked

on bids designed to benefit the Respondent. The Arbitrator finds that the Petitioner's work product was used by the Employer for their purposes and that Petitioner was an employee after the verbal offer and acceptance.

Based on an evaluation of the above factors and the applicable case law, the Arbitrator finds that the Petitioner has met his burden of showing that he was an employee of the Respondent at the time of the accident. In reaching this conclusion, the Arbitrator is especially mindful of the fact that, perhaps, the definition of an employee under the Worker's Compensation Act is more fluid that a written instrument. This matter is largely one of assessing witness credibility and although the Petitioner was often upset and argumentative during his testimony, the Arbitrator found him to be credible. The Arbitrator found parts of Respondent's witness testimony to be somewhat unreasonable. In particular, the testimony of Ms. Lenzi that she never comes to work before 9 a.m. due to her son's school schedule is troubling as the Petitioner testified credibly that he arrived for his interview at 8 a.m. and was met by Ms. Lenzi. The Arbitrator also finds it perfectly possible that the official paper and tax forms may be filled out several days after the offer and acceptance of employment. This is not an unreasonable case scenario. The Arbitrator finds the Petitioner's testimony that he was sent to the Sangamon work site by himself to be credible. The Respondent's witnesses are firm in their belief that employment only began after the written paperwork but the Arbitrator finds to the contrary.

Lastly, it should be noted, that Petitioner and Respondent were engaged in a extra-hazardous activity as defined under Section 3 of the Act. This section provides enumerated occupations that are automatically covered because they are deemed to be "extra hazardous". Subsection 1 reads that automatic coverage under the Act applies to: "The erection, maintaining, removing, remodeling, altering or demolishing of any structure." This is the essence of the Petitioner's work and enter, examine, evaluate dangerous structures, deemed unfit for use and fit for demolition is precisely such an "extra hazardous" activity All of the witnesses at trial testified that the demolition business is hazardous and possibly extra-hazardous.

The Respondent acknowledges that demolition work can be a particularly hazardous type of employment but insists that entering the often abandoned, dangerous site as part of the interview process or to evaluate the site for demolition is not the same as performing any manual labor expended in the actual demolition. Respondent urges that the Petitioner was safely accompanied by a senior estimator at every step and that they have never had an incident during an interview in the fifteen years that Omega has been operating. The Arbitrator is wholly unconvinced by this argument and the factual scenario bears out the what the Petitioner was doing was hazardous and that Mr. Smith was not a safety net during the process. In fact, the testified showed that one of the sites they visited has been marked for demolition pursuant to accident at the site that resulted in a death. All properties had stringent safety requirements of hard hats and special shoes. The Maple street, DesPlaines property where Petitioner was injured was obviously abandoned, had unsafe/dangerous electrical wire that the Petitioner received a shock on and had unmarked bay/loading area that was poorly secured that the Petitioner fell from. The Petitioner was hardly in the safety environment of engaged office work. Accordingly, the Arbitrator finds that the Petitioner and Respondent were operating under the Act and that the Petitioner was engaged in a hazardous activity at the time of his accident.

With respect to issue, was there an accident that arose out of and in the course of employment, the Arbitrator concludes the following:

The Arbitrator finds that the Petitioner was injured in an accident that arose out of and in the course of his employment by the Respondent. The Arbitrator has previously found that the Petitioner and Respondent were in an employee/employer relationship. On October 31, 2013 the Petitioner was walking through the Des Plaines project taking measurement and writing notes in order to compile a bid. This is the essence of the Petitioner's job duties as an estimator. The Petitioner's testimony is supported by the testimony of the Respondent's witness, Mr. John Smith, that the Petitioner was entering a darkened loading dock, attempted to turn on the lights, and fell approximately four feet to the bottom of the dock. As these facts are not in dispute,

the Arbitrator finds that the Petitioner was injured in an accident that arose out of and in the course of his employment by the Respondent.

With respect to issue, is there a causal connection, the Arbitrator concludes the following:

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the work accident. Since the work accident the Petitioner has complained of pain to his left shoulder, left elbow and both knees. The Petitioner's medical records further substantiate these complaints. The Petitioner testified credibly that he had never had medical issues with any of these body parts prior to his work accident. The Petitioner has shown by the preponderance of credible evidence that his current condition of ill-being is causally related to his work accident. The Respondent produced no evidence to rebut the Petitioner's evidence. Accordingly, the Arbitrator finds that the Petitioner's current condition of ill-being is causally related to his work injury.

With respect to issue, was the medical care reasonable and necessary and whether the Respondent is liable for the bills, the Arbitrator concludes the following:

The Arbitrator finds that the Petitioner's medical care has been reasonable and necessary and that the Respondent has not paid all appropriate charges. The Petitioner produced outstanding medical bills from Sherman Hospital (Pet. Ex. #9) and Suburban Orthopedics (Pet. Ex. #11). Accordingly, the Petitioner is awarded these medical bills in the amount of $3,583.20.

With respect to issue (B), what TTD benefits are owed the Petitioner, the Arbitrator concludes the following:

The Arbitrator finds that the Petitioner is entitled to TTD benefits from November 19, 2013 through October 10, 2014, a period of 46 4/7 weeks. On November 19, 2013 the Petitioner was taken off work by Dr. Chhadia until an MRI of the Petitioner's left shoulder could be performed. (Pet. Ex. #10) Following that appointment the Petitioner was unable to continue his medical care due to a lack of insurance approval. Further, the Petitioner testified that he was forced to return home to Louisiana due to his being unable to work.

Following the November 19, 2013 appointment the Petitioner testified that he was informed by Mr. Gerage that the Respondent did not "pay medical." Further, the Petitioner would be stuck paying for his hotel. Rather than pay for the hotel and not be paid to stay off work the Petitioner went back to Louisiana. Since November 19, 2013 the Petitioner has been in an off work status and has been medically unable to work. Further, the Petitioner's condition has not stabilized and he is entitled to TTD benefits. *Interstate Scaffolding v. IL Workers' Comp. Comm'n.*, 236 Ill. 2d 132, 149 (2010). Accordingly, the Arbitrator finds that the Petitioner is entitled to TTD benefits from November 19, 2013 through October 10, 2014, a period of 46 4/7 weeks.

With respect to issue, is the Respondent liable for penalties/attorneys fees, the Arbitrator concludes the following:

The Petitioner is claiming penalties under Section 19(l) of the Act for the Respondent's unreasonable delay in paying benefits to the Petitioner, penalties under Section 19(k) for the Respondent's unreasonable and vexatious conduct, and claiming attorney's fees under Section 16 of the Act.

The Section 19(l) penalty is in the nature of a late fee. Assessment of the penalty is mandatory if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay. *Mechanical Devices v. Indust. Comm'n.*, 344 Ill. App. 3d 752, 763 (4th Dist. 2003) The test for determining whether the employer or its carrier had adequate justification for delaying payment is that of objective reasonableness. *D.J. Masonry Co. v. Indust. Comm'n.*, 295 Ill. App. 3d 924, 935 (1st Dist. 1998) Additionally, where the overwhelming weight of medical testimony is in favor of compensation, the employer's refusal to pay can be deemed unreasonable. (*Id.*)

In this case all of the evidence produced at trial establishes that the Petitioner was injured in an accident. Although evidence of the accident is clear, the issue of Petitioner' employment is not as clear. Although the Arbitrator has found in the Petitioner's case in this case, the Arbitrator concluded that in light of the voluntarily signed, written contractual agreement between the parties, the Respondent's reliance that the Petitioner did not become an employee until this date is reasonable under the circumstances. The Arbitrator finds that the

Respondent did not act in bad faith of against the weight of the evidence. The Respondent may have felt justified in their position because the Petitioner did start out as an interviewee and not as an employee. Based on these factors, the Arbitrator denies the penalty petition under Section 19(k), Section 19(l) and fees under Section 16 of the Act.

With respect to issue, is the Petitioner entitled to prospective medical care, the Arbitrator concludes the following:

Having found accident and causal connection, the Arbitrator finds that the Petitioner is entitled to surgery as prescribed by Dr. Chhadia along with all reasonable and necessary, associated rehabilitative care. The Petitioner's medical records (i.e. MRI examination and doctor's notes) and the evidence produced at trial establish that the Petitioner requires this surgery and that the need for this surgery is related to the work accident.

With respect to the issue (N) is the respondent due any credit?, the Arbitrator concludes the following:

By stipulation between the parties, Respondent has paid $21,000 in advance to the Petitioner. This amount may be credited to the Respondent towards his obligations pursuant to this ruling.

Ketki Steffen
Signature of Arbitrator

2/2/15
Date

16IWCC0103

STATE OF ILLINOIS)
) SS.
COUNTY OF MCCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Charles Shaw,

Petitioner,

vs. NO: 14 WC 00550

Illinois Department of Corrections,

16IWCC0104

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

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

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

16IWCC0104

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 or summons for State of Illinois cases.

DATED: FEB 5 - 2016

MB/mam
o:12/10/15
43

Mario Basurto

David L. Gore

Stephen Mathis

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

SHAW, CHARLES
Employee/Petitioner

Case# **14WC000550**

16IWCC0104

ILLINOIS DEPT OF CORRECTIONS
Employer/Respondent

On 6/2/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

2159 HOEKSTRA LAW OFFICES PC
JOHN A HOEKSTRA
121 N MAIN ST
BLOOMINGTON, IL 61701

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

2159 HOEKSTRA LAW OFFICES PC
JOHN A HOEKSTRA
305 W WASHINGTON ST
PONTIAC, IL 61764

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

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

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

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

JUN 2 - 2015

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

16IWCC0104

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Charles Shaw
Employee/Petitioner

Case # **14** WC **550**

v.

Illinois Department of Corrections
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Bloomington**, on **April 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. [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

16IWCC0104

FINDINGS

On the date of accident, **October 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*** 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 $**67,200.12**; the average weekly wage was $**1,278.13**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **3** dependent children.

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

Respondent shall be given a credit of $**49,666.99** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**49,666.99**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**852.00**/week for **77** weeks, commencing **October 24, 2013** through **October 30, 2013** and **November 6, 2013** through **April 22, 2015**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $**49,666.99** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$2,399 to McLean County Orthopedics, $10,300 to Gray Medical, $6,747.50 to Dr. Edward Pegg and $300 to Oak Lawn Radiology**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay the reasonable and necessary expenses associated with the consultation with Dr. Oakey as prescribed by Dr. Naour, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Arbitrator Anthony C. Erbacci

May 29, 2015
Date

14 WC 550
ICArbDec19(b)

JUN 2 - 2015

16IWCC0104

FACTS:

The Petitioner sustained undisputed accidental injuries arising out of and in the course of his employment with the Respondent on October 23, 2013. The Petitioner testified that he was employed by the Respondent as a correctional officer and that, on October 23, 2013, he was opening the door of a food service elevator when he experienced pain in his right shoulder and down his right arm. The Petitioner described the pain as being like a "bolt of lightning" going down his arm. The Petitioner testified that prior to this incident he had no problems with his right arm or shoulder and had never sought any medical treatment for his right arm or shoulder. The Petitioner testified that he immediately reported his injury and was directed to the Advocate Medical Group for treatment.

The Petitioner was seen at the Advocate Medical Group that same day and was noted to have complaints of right shoulder pain after having hurt his right shoulder while at work trying to open an elevator. The Petitioner was noted to have denied any numbness or tingling in his shoulder or pain in the back of the arm and to have reported that he had not hurt his shoulder or arm previously. The Petitioner was diagnosed with a shoulder sprain and an MRI was recommended. The Petitioner was kept off work the rest of the day and authorized to return to work the following day with restrictions limiting the use of his right arm.

On October 29, 2013 the Petitioner was seen by Dr. Joseph Novotny at McClean County Orthopedics. Dr. Novotny indicated that the Petitioner had significant findings of supraspinatus and possible biceps tendinitis and he administered a subacromial injection. Dr. Novotny also advised work restrictions for the Petitioner for the next two weeks. A right shoulder x-ray was noted to show advanced AC degenerative joint disease.

The Petitioner followed up with Dr. Novotny on November 14, 2013 and was noted to complain of right shoulder region pain and "burning" down to the palm of his hand and auxilla ache. The Petitioner also reported that the injection was of no help. Dr. Novotny continued the Petitioner's right upper extremity restrictions and prescribed a right shoulder MRI. On December 17, 2013 the right shoulder MRI was performed and it was reported to demonstrate moderate degenerative arthropathy at the AC join and partial thickness interstitial tears of the supraspinatus tendon.

At the request of the Respondent, the Petitioner was examined by Dr. Lawrence Li on December 30, 2013. In his report dated January 9, 2014 Dr. Li noted the Petitioner's history of injury, the medical treatment the Petitioner received, and the images and report of the December 17, 2013 MRI. Dr. Li noted the Petitioner had significantly limited range of motion and a positive Neer impingement test. Dr. Li diagnosed the Petitioner as having a right shoulder strain and a secondary adhesive capsulitis and he opined that both conditions were causally related to the Petitioner's October 23, 2013 work injury. Dr. Li recommended another cortisone injection, medications, and physical therapy three times a week for three weeks. Dr. Li further indicated that the Petitioner continued to require restrictions with regard to the use of his right arm and that the Petitioner had not yet reached maximum medical improvement.

The Petitioner followed up with Dr. Novotny on January 9, 2014 and Dr. Novotny noted that the Petitioner's symptoms were "somewhat difficult to isolate to one body part". Dr. Novotny also noted that the Petitioner "certainly seems to have pain in the shoulder on physical exam" and that he had some subjective symptoms and complaints that are consistent with neurologic compression possibly at the cervical level. Dr. Novotny prescribed a cervical spine MRI and an EMG study.

The cervical MRI was done on February 19, 2013 and was reported to demonstrate degenerative changes. The EMG was performed on February 26, 2014 and was reported to demonstrate a right upper trunk or lateral cord brachial plexus injury.

On February 28, 2014, the Petitioner returned to Dr. Novotny who noted that the Petitioner's EMG was consistent with a brachial plexus lateral cord injury and that the Petitioner reported that he continued to have weakness in his hands as well as paresthesias in his thumb, index, and middle fingers consistent with a lateral cord injury. Dr. Novotny referred the Petitioner to Dr. Pegg, a neurologist, and prescribed physical therapy.

The Petitioner testified that at the direction of the Respondent, he saw Dr. Jacob Tony on April 24, 2014. Dr. Tony noted the Petitioner's history of injury, his complaints of right upper extremity pain, and his complaints of numbness in the right hand. Dr. Tony was able to confirm neurologic impairment at C5, C6, and C7 and, because the Petitioner's symptoms were deteriorating, he ordered a repeat MRI of the cervical spine. Dr. Tony also referred the Petitioner to Dr. Julian Lin, a specialist in brachial plexus injury. The Petitioner testified that the testing recommended by Dr. Tony and the referral to Dr. Lin were not authorized by the Respondent.

At the request of the Respondent, the Petitioner again saw Dr. Li on June 23, 2014. Dr. Li reviewed the Petitioner's medical records and conducted a physical examination of the Petitioner. Dr. Li noted that the Petitioner had complaints of pain with all provocative testing including Neer impingement, biceps load test, and Hawkins impingement, which he attributed to symptom magnification, as well as decreased sensation in the C5-C6 distribution and decreased strength in the C8 distribution. Dr. Li diagnosed the Petitioner as having a right shoulder strain and indicated that the previously noted adhesive capsulitis had "apparently" resolved. Dr. Li also noted that the Petitioner "does have a brachial plexus injury." Dr. Li opined that the right shoulder strain was related to the October 23, 2013 work injury but indicated that the right brachial plexus lesion was "more confusing because he had a normal neurologic exam when I first examined him and he has an abnormal one now." Dr. Li opined that the Petitioner's right shoulder strain had resolved and the Petitioner was not in need of any further medical treatment or work restrictions which would be causally related to the October 23, 2013 work injury.

The Petitioner testified that after he was seen by Dr. Tony on April 24, 2014, he received no medical treatment for his right upper extremity until he returned to Dr. Novotny in September of 2014. The Petitioner did start a course of physical therapy at Champion Fitness on September 2, 2014 which continued through November of 2014.

On September 25, 2014 the Petitioner returned to Dr. Novotny who noted a marked frozen shoulder with limited range of motion and pain with any attempted active or passive motion. Dr. Novotny recommended an exam under anesthesia with manipulation of the right shoulder and possible intra-articular corticosteroid injection. Dr. Novotny also recommended follow-up care with a neurologist and/or neurosurgeon for the lateral cord brachial plexus injury.

The Petitioner underwent the prescribed right shoulder manipulation under anesthesia on October 20, 2014. He returned to Dr. Novotny on October 27, 2014 and Dr. Novotny noted that the Petitioner's shoulder motion was markedly improved but he continued to a significant amount of pain. Dr. Novotny recommended the Petitioner remain off working with the right arm until he is seen by a neurologist and/or neurosurgeon as previously recommended. Dr. Novotny also referred the Petitioner to Dr. Naour for pain management.

On November 4, 2014 Dr. Paul Naour saw the Petitioner for concerns of cervical radiculopathy and "severe ulnar nerve entrapment at the level of the elbow with dysfunction of his right hand." Dr. Naour noted that "This is related to a work accident of 10-23-13 and has been ongoing for greater than a year. This may represent also a component of double crush phenomenon." Dr. Naour also noted that the Petitioner had an EMG which showed brachial plexopathy but no radicular concerns and an MRI which showed a disc herniation with a paracentral extrusion at C5-C6. The Petitioner testified that Dr. Naour prescribed Lyrica which helped with the pain.

The Petitioner was also referred to Dr. Edward Pegg for a repeat EMG test, which was done November 13, 2014. Dr. Pegg compared the repeat EMG to the prior EMG of February 2014 and noted that the EMG showed severe left ulnar nerve entrapment and borderline right ulnar nerve slowing which was "somewhat worse than on the prior study." Dr. Pegg reported that he did not see any evidence that clearly would support a brachial plexitis or a cervical radiculopathy by EMG criteria.

On November 25, 2014 Dr. Naour noted that the repeat EMG showed severe nerve entrapment but no evidence of plexitis or cervical radiculopathy. Dr. Naour recommended the Petitioner consult with a hand specialist, Dr. Oakey at Mclean County Orthopedics, due to the continued dysfunction in the Petitioner's right hand.

The Petitioner testified that Dr. Naour's recommendation for a referral to Dr. Oakey has not been approved by the Respondent and that he has had no further medical treatment for his symptoms as of the date of hearing.

The Petitioner testified that his symptoms of pain from his right shoulder to his right hand have persisted from the date of the accident to the date of hearing. He testified that the lack of range of motion in his right arm gradually worsened from the date of the accident until the frozen shoulder procedure was performed by Dr. Novotny, after which he experienced significant improvement in his range of motion. The Petitioner testified that the frozen

shoulder procedure did not alleviate the pain he had, and continues to experience, in his right arm and into his hand. The Petitioner testified that he currently experiences pain on a daily basis and that his pain is increased with any pulling or lifting with his right arm. He testified that he also currently continues to have some loss of range of motion in his right shoulder and that he continues to have some tingling and numbness in his right hand and arm.

CONCLUSIONS:

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

The Petitioner sustained an undisputed injury to his right upper extremity on October 23, 2013. The Petitioner testified that, prior to that date, he had no injuries to, or problems with, his right shoulder, arm, or hand, nor had he sought any medical treatment for his right shoulder, arm or hand. The Petitioner's testimony in that regard was not contradicted or rebutted by any evidence offered into the record.

Following his work injury, the Petitioner commenced a course of medical treatment with Dr. Novotny which included a subacromial injection, which afforded no improvement, MRI of the shoulder and cervical spine, and EMG testing which noted abnormal findings consistent with a brachial plexus lateral cord injury. The Petitioner continued to report worsening symptoms and the development of numbness in his right arm extending to his hand and right thumb.

At the Respondent's direction, the Petitioner was seen by Dr. Tony on April 24, 2014. Dr. Tony noted numbness from the Petitioner's right shoulder to his right hand and questioned whether the Petitioner's symptoms were related to a cervical condition. Dr. Tony ordered a repeat cervical MRI and he also referred the Petitioner to Dr. Julian Lin, a specialist in brachial plexus injury. Thereafter, the Petitioner received no medical treatment for his right upper extremity until he returned to Dr. Novotny on September 25, 2014. Although the Petitioner had started a course of physical therapy at Champion Fitness, Dr. Novotny noted a marked frozen shoulder and ultimately performed a manipulation of the shoulder under anesthesia on October 20, 2014. Following the manipulation, Dr. Novotny noted improvement in the Petitioner's range of motion but continued complaints of pain. Dr. Novotny then referred the Petitioner to Dr. Naour for pain management and Dr. Pegg for a repeat EMG test.

On November 4, 2014 Dr. Naour saw the Petitioner and noted ulnar nerve entrapment at the level of the elbow with dysfunction of his right hand which he indicated "is related to a work accident of 10-23-13" and might represent a component of "double crush phenomenon". Dr. Naour also noted that the Petitioner's prior EMG showed brachial plexopathy but no radicular concerns and that the prior MRI showed a disc herniation with a paracentral extrusion at C5-C6. The Petitioner testified that Dr. Naour prescribed Lyrica which helped with the pain.

16IWCC0104

The repeat EMG performed by Dr. Pegg on November 13, 2014 was reported to show severe left ulnar nerve entrapment and borderline right ulnar nerve slowing which was "somewhat worse than on the prior study." Dr. Pegg reported that he did not see any evidence that clearly would support a brachial plexitis or a cervical radiculopathy by EMG criteria. Dr. Naour noted that the repeat EMG showed severe nerve entrapment but no evidence of plexitis or cervical radiculopathy. Dr. Naour recommended the Petitioner consult with a hand specialist, Dr. Oakey, due to the continued dysfunction in the Petitioner's right hand. Dr. Naour's recommendation for a referral to Dr. Oakey has not been approved by the Respondent and the Petitioner has had no further medical treatment for his symptoms as of the date of hearing.

The Petitioner testified that his symptoms of pain from his right shoulder to his right hand have persisted from the date of the accident to the date of hearing. He testified that the lack of range of motion in his right arm gradually worsened from the date of the accident until the frozen shoulder procedure was performed by Dr. Novotny, after which he experienced significant improvement in his range of motion. The Petitioner testified that the frozen shoulder procedure did not alleviate the pain he had, and continues to experience, in his right arm and into his hand. The Petitioner testified that he currently experiences pain on a daily basis and that his pain is increased with any pulling or lifting with his right arm. He testified that he also currently continues to have some loss of range of motion in his right shoulder and that he continues to have some tingling and numbness in his right hand and arm. The Respondent presented no evidence to rebut or otherwise challenge the Petitioner's testimony.

The Respondent introduced two reports from Dr. Li from independent medical evaluations of the Petitioner performed on December 30, 2013 and June 23, 2014. During the first evaluation of the Petitioner's right shoulder on December 30, 2013, Dr. Li noted significant reduced range of motion in the right arm and shoulder and a positive Neer impingement test. Dr. Li's diagnosis on that date was a right shoulder strain with secondary adhesive capsulitis which he opined were causally related to the Petitioner's work injury. Dr. Li recommended another cortisone injection as well as anti-inflammatory medications and physical therapy. Dr. Li also recommended work restrictions consistent with those recommended by Dr. Novotny.

At the second evaluation of the Petitioner's right shoulder on June 23, 2014, Dr. Li noted continuing limited range of motion and another positive Neer impingement test. Dr. Li noted a "normal neurologic exam" at the first evaluation, despite having noted a positive Neer impingement test at that time. Dr. Li diagnosed the Petitioner as having a right shoulder strain and indicated that the previously noted adhesive capsulitis had "apparently" resolved, despite his own findings on that date of limited range of motion. The Arbitrator notes that Dr. Novotny continued to note limitation of range of motion in the Petitioner's right shoulder and ultimately was required to perform a manipulation of the shoulder under anesthesia in September, 2014. Dr. Li also noted that the Petitioner "does have a brachial plexus injury" that needed treatment prior to the Petitioner returning to work. Dr. Li opined that the right shoulder strain was related to the October 23, 2013 work injury but indicated that the right brachial plexus lesion was

"more confusing because he had a normal neurologic exam when I first examined him and he has an abnormal one now." The Arbitrator notes that Dr. Li noted significant reduced range of motion in the right arm and shoulder and a positive Neer impingement test when he first examined the Petitioner. Dr. Li opined that the Petitioner's right shoulder strain had resolved and that the Petitioner was not in need of any further medical treatment or work restrictions which would be causally related to the October 23, 2013 work injury.

Although the Arbitrator notes that there is no specific medical opinion in the record which causally relates the Petitioner's current condition of ill-being to the work injury of October 23, 2013, the evidence demonstrates that the Petitioner had no problems, complaints or difficulties with his right arm, shoulder, or hand, nor had he sought or received any medical treatment for his right arm, shoulder, or hand, prior to his undisputed work injury on October 23, 2013. Immediately following that injury, the Petitioner began a course of medical treatment directed to his right upper extremity which has continued from that time through the present and he has been under medical restrictions regarding the use of his right arm which have continued from the date of his injury through the present time. As of the date of hearing, none of the Petitioner's treating physicians has released the Petitioner from care and additional medical consultation has been recommended. While the Arbitrator notes the opinions of Dr. Li, those opinions seem to be somewhat self-contradictory and unsupported by the findings and recommendations of the Petitioner's treating physicians. The Arbitrator does not place significant weight on the opinions of Dr. Li when compared with the findings of the Petitioner's treating physicians as set forth in the medical records and the Petitioner's contradicted testimony.

The Arbitrator finds that, in the instant matter, the undisputed temporal sequence of events, which includes a state of relative good health followed by an undisputed injury and a continuing course of medical treatment, together with the records of the Petitioner's medical treatment and the Petitioner's unrebutted testimony, are sufficient to support a conclusion that the Petitioner's current right upper extremity condition of ill-being is causally related to the work injury of October 23, 2013.

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 accident of October 23, 2013.

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 owing to McLean County Orthopedics in the amount of $2,399 (Pet. Ex. 11), Gray Medical in the amount of $10,300 (Pet. Ex. 12), Dr. Edward Pegg in the amount of $6,747.50 (Pet. Ex. 13), and Oak Lawn Radiology in the amount of $300 (Pet. Ex. 14). The amount owed to McLean County

Orthopedics includes charges for services rendered by Dr. Novotny and Dr. Naour from September 25, 2014 through November 25, 2014 and the procedure for the shoulder manipulation. The shoulder manipulation procedure was authorized by the Respondent. The Arbitrator finds that the medical treatment provided to the Petitioner by Dr. Novotny and Dr. Naour was reasonable, necessary, and causally related to the Petitioner's medical condition and that the Respondent is liable for payment of those expenses subject to the limitations of the Medical Fee Schedule provided for in the Act.

The evaluation by Dr. Pegg was also authorized by the Respondent and the Arbitrator finds that the medical treatment provided to the Petitioner by Dr. Pegg was reasonable, necessary, and causally related to the Petitioner's medical condition. The Arbitrator finds that the Respondent is liable for payment of the charges of Dr. Pegg subject to the limitations of the Medical Fee Schedule provided for in the Act.

The amount owed to Oak Lawn Radiology relates to the MRI testing performed on December 17, 2013 and the Arbitrator finds that that testing was reasonable, necessary, and causally related to the Petitioner's medical condition The Respondent is liable for payment of those expenses subject to the limitations of the Medical Fee Schedule provided for in the Act.

The manipulation chair described by the Petitioner in his testimony to assist with therapy to his right arm and shoulder following the manipulation procedure is also found to be reasonable, necessary, and causally related to the Petitioner's medical condition. The Respondent is found liable to pay the charges of Gray Medical, Inc. subject to the limitations of the Medical Fee Schedule provided for in the Act.

In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator relating to the issue of causation are adopted and incorporated herein.

Dr. Naour has recommended that the Petitioner be seen by a hand specialist given the Petitioner's persistent and on-going complaints of numbness and weakness in his right arm and hand. The treatment Petitioner has received thus far has not improved this condition. Based upon the testimony of Petitioner and the findings and reports from his treating physicians, the Arbitrator finds that the Petitioner has not yet reached a state of maximum medical improvement and the Arbitrator further finds that the recommendation of Dr. Naour for consultation with the hand specialist, Dr. Oakey, is reasonable under these circumstances.

Accordingly, Respondent shall authorize and pay the reasonable and necessary expenses associated with a consultation with Dr. Oakey, subject to the limitations of the Medical Fee Schedule provided for in the Act.

16IWCC0104

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

The findings and conclusions of the Arbitrator relating to the issue of causation are adopted and incorporated herein.

From the date of the accident on October 23, 2013, the Petitioner has been under work restrictions which limit the use of his right arm. Dr. Novotny and Dr. Naour continued the same work restrictions throughout their treatment of the Petitioner through the present time. Dr. Li, the Respondent's examining physician, recommended and confirmed those work restrictions. Dr. Tony also confirmed the restrictions. The Petitioner testified he is not able to return to his former work with the Respondent as the Respondent is unable to accommodate the restrictions. The Respondent did not rebut or challenge this testimony. Other than the approximate one week when Petitioner attempted to work, he has been off work from the date of accident to the date of hearing. Accordingly, the Arbitrator finds that the Petitioner is entitled to Temporary Total Disability benefits from October 24, 2013 through October 30, 2013 and from November 6, 2013 through April 22, 2015, the date of hearing, a total period of 77 weeks.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michele Edwards,
Petitioner,

vs.

NO: 14 WC 5745

Chicago Transit Authority,
Respondent.

16IWCC0105

DECISION AND OPINION ON REVIEW

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

The Commission finds that there was a sufficient dispute to justify Respondent's nonpayment of temporary total disability benefits from February 22, 2014 through March 21, 2014 and the Commission vacates the Arbitrator's award of additional compensation and attorneys' fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $834.93 per week for a period of 30-5/7 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.

16IWCC0105

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,651.80 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of additional compensation and attorneys' fees is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit in the amount of $10,684.23 for payment of temporary total disability benefits paid to or on behalf of Petitioner on account of said accidental injury.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $17,700.00. 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: FEB 5 - 2016

MB/jm

O: 1/21/16

43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

EDWARDS, MICHELE
Employee/Petitioner

Case# **14WC005745**

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

16IWCC0105

On 6/29/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% 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
200 N LASALLE ST SUITE 2820
CHICAGO, IL 60601

0515 CHICAGO TRANSIT AUTHORITY
ANDREA ZECHMANN
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

16IWCC0105

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Michelle Edwards
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # 14 WC 05745

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

DISPUTED ISSUES

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

16IWCC0105

FINDINGS

On the date of accident, **2/7/2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$65,124.80**; the average weekly wage was **$1,252.40**.

On the date of accident, Petitioner was **39** 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 **$10,684.23** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$10,684.23**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$834.93** per week for **30-5/7** weeks, commencing **2/8/2014** through **9/10/2014**, as provided in § 8(b) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services of **$2,651.80**, as provided in §§ 8(a) and 8.2 of the Act and as set forth below.

Respondent shall authorize and pay for the right shoulder arthroscopy offered by Dr. Nuber, along with all related services, in accordance with §8(a) and §8.2 of the Act.

Penalties

Respondent shall pay to Petitioner penalties of **$1,669.86**, as provided in §19(k) of the Act; **$6,030.00**, as provided in §19(l) of the Act and Attorneys' Fees in the amount of **$1,539.97**, as provided in § 16 of the Act.

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

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

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

Signature of Arbitrator

June 22, 2015
Date

JUN 29 2015

FINDINGS OF FACT

Petitioner has been employed by Respondent as a bus operator since 1996.

On February 7, 2014 at about 10:00 pm, Petitioner injured her right shoulder driving a deadhead bus. She had started her shift at 3:00 pm. She made a left turn from westbound Foster onto southbound Broadway. The road was slick with snow and ice. She pulled on the steering wheel to steer the bus and her right shoulder popped and re-set. She pulled the bus over and called control. Petitioner's supervisor and CFD paramedics came.

Petitioner denied prior right shoulder problems. Petitioner had fallen in December and had another fall on February 6, 2014. Both falls were slip and falls on ice in Respondent's parking lot. Petitioner did not report these accidents to Respondent because she did not want to be assessed points for excessive accidents. Petitioner had a prior Workers' Compensation claim for an injured knee.

The history given to the paramedics was of a sudden onset of right shoulder pain while driving the bus. Her shoulder popped when she turned the wheel. (PetEx. 1)

Petitioner was transported to Swedish Covenant Hospital, where she was treated in the Emergency Room. The history was of a sudden onset of right shoulder pain making a left turn driving a bus. She heard her shoulder pop when making a turn. She denied a fall or injury. The pain was in the top of the shoulder and the back of the arm. She denied prior shoulder injuries. The physical exam revealed limited range of motion, severe pain with shoulder extension and UE abduction. There was moderate pain with forearm extension. X-rays were said to be within normal limits. The discharge diagnosis was right shoulder pain. Petitioner was instructed to limit use of the shoulder and ice it. She was given a sling, RTC instructions and Norco and Motrin. She was to follow up with a physician. (PetEx. 1)

The bus was checked out and there was no defective condition noted. (ResEx. 2 & 3) Petitioner completed an Injury on Duty Report on February 8, 2014. The IOD report is consistent with petitioner's testimony and the medical records. (ResEx. 4) Respondent did not submit on-board films of the event.

Petitioner was next seen in the Emergency Room at Evanston Hospital on February 9, 2014. The history given was that she slipped and fell 2 nights prior and fell with an outstretched arm, causing pain in her right shoulder. She then felt a popping sensation in her right shoulder driving a bus last night. She had pain over the deltoid and the posterior aspect of the right shoulder. The diagnosis was acute muscle strain of the right shoulder. It could be a rotator cuff tear, but the doctor did not think so. She was instructed to continue to use the sling, apply heat, do some home exercises and take 600 mg of Motrin 3 times a day. She should follow up with orthopedics. (PetEx. 6)

Petitioner next had treatment with her PCP, Dr. Rebecca Weiss Coleman, on February 9, 2014. She presented with complaints of 8/10 right shoulder pain and a history of a slip and fall on ice in the parking lot at work on 2/6/2014, falling on her right shoulder and of increased right shoulder pain when she felt a pop while turning a bus on 2/7/2014. She did not seek medical attention after the 2/6 fall, but did go to the Swedish ER on 2/7. The physical exam showed right shoulder limitations. The diagnosis was right shoulder sprain. Petitioner was instructed to use the sling and see an orthopedic specialist. She was taken off work. (PetEx. 3)

Petitioner then had treatment at Work Care Medical Center with Dr. Luis Munoz, starting on February 11, 2014. She had seen this physician before for a right knee injury. The history given was of an injury on February 7, 2014, driving a bus for the CTA. She moved her arm rapidly in trying to avoid an accident and she felt a pop and pain in her shoulder. She had immediate pain in her shoulder. The physical exam revealed pain, decreased range of motion and significant tenderness. The diagnosis was: 1.) Right shoulder RTC injury, sprain; 2.) Right arm sprain-biceps tendon sprain/strain; and 3.) Deconditioning. Petitioner was taken off work, given medications, instructions for home exercise and was told to continue the sling and begin PT. She continued treatment with Dr. Munoz through June 10, 2014. Dr. Munoz excused Petitioner from work from February 11, 2014 through July 14, 2014 (the last scheduled visit in the records). Dr. Munoz charted that the Petitioner's right shoulder condition was causally related to the injury of February 7, 2014. (PetEx. 4)

Petitioner also had treatment with Dr. Gordon Nuber at North Shore Orthopedics, beginning February 11, 2014. Unfortunately, the transcription of or the Doctor's review of his dictation (or perhaps his input into EMR) is sloppy ("Allegedly she has had like 2 falls"). The history is of two falls and the next day after the second fall, she it felt like her shoulder slipped out of joint while rotating her arm and slipped back in. The concern was subluxation, possible rotator cuff pathology. X-rays showed mild narrowing of the A/C joint without further degenerative or acute pathology. Dr. Nuber recommended an MRI arthrogram. (PetEx. 5)

Petitioner had a §12 examination by Dr. Gregory Primus, at the request of Respondent, on April 1, 2014. Petitioner gave the history of feeling her right shoulder pop when she made a left turn. She denied knowing whether the shoulder actually dislocated, but did not remember any attempt at relocation. She denied prior shoulder dislocations. She is awaiting approval for a MRI. She had complaints of pain and instability in the arm. The physical exam revealed mild hyperlaxity, decreased strength and the exam could not be completed secondary to excessive pain complaints. Dr. Primus did not review any medical records. Her had concerns about the injury and the patient's presentation. Gentle therapy and modalities were recommended before any diagnostic studies should be considered. He thought that Petitioner's complaints were not related to the injury suffered when turning the bus wheel. The complaints could be due to psychosocial issues. To simply dislocate the shoulder turning a steering wheel would require that the joint was unstable, with extreme laxity. This was not consistent with the history given by the patient. There could be symptom magnification. Dr. Primus did not have a clear diagnosis that explained Petitioner's extreme pain and dysfunction. He did not think that the complaints and limitations were due to an incident that occurred while turning a steering wheel. Even if a rotator cuff tear occurred, it would be expected that the patient would have near normal range of motion and decreased pain two months after the injury. Petitioner was not able to work at full duty, based upon her presentation. Dr. Primus could not identify a specific work related injury that occurred on 2/7/2014. He could not say that the patient was at MMI, because he did not believe that her symptoms were related to a work injury. (ResEx. 1) Petitioner had the MRI Arthrogram done on May 22, 2014. It showed a SLAP II lesion, moderate supraspinatus tendinosis and mild A/C joint osteoarthritis. Dr. Nuber thought that surgery was appropriate at the follow-up visit of June 10, 2014. Follow-up exams were on July 15 and August 28, 2014. Petitioner remains off work, pending OK for surgery. (PetEx. 5) Dr. Dunlap, who saw Petitioner on August 28, 2014, thought that therapy was indicated, secondary to no authorization for surgery. (PetEx. 1)

Petitioner testified that she has no feeling on the front of her shoulder. She has pain. She has weakness and decreased strength. She can't do overhead tasks. She wants the surgery that has been offered by Dr. Nuber.

TTD was claimed from February 8, 2014 to the date of trial, September 10, 2014 (30-5/7 weeks). TTD was paid from February 8, 2014 through February 21, 2014 and March 22, 2014 through June 4, 2014 (12-5/7 weeks).

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. The Arbitrator finds that Petitioner's testimony was credible. There are some minor inconsistencies in the histories, but the Arbitrator believes that this is due to nervousness, rather than trying to deceive.

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Petitioner sustained accidental injuries which arose out of and in the course of her employment by Respondent on February 7, 2014. She injured her right shoulder turning the wheel on a bus, driving in difficult conditions. The accident happened some seven hours after Petitioner started her shift. She may have hurt her shoulder in the prior falls, but the event that caused Petitioner pain and led to medical treatment occurred as she was turning the bus through the slippery intersection of Foster and Broadway. Dr. Primus' opinions and the lack of a defect in the bus do not persuade the Arbitrator that the injury did not occur as Petitioner described.

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

The Arbitrator finds that Petitioner's current condition of ill-being regarding her right shoulder is causally related to the accidental injuries of February 7, 2014 based upon Petitioner's testimony and the medical records, including the opinion of Dr. Munoz that the shoulder condition is causally related to the injury sustained when driving.

There was no evidence of any prior medical treatment regarding Petitioner's right shoulder. While Petitioner may have injured her shoulder in the two falls, she was able to work her job until the injury of February 7, 2014. Dr. Primus' opinion on causal connection is not persuasive in this case. Significantly, he did not provide a further opinion after the MRI Arthrogram was done.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Based upon the findings above regarding accident and causation, the claimed bills from City of Chicago EMS ($1,051.00) for transportation to Swedish Covenant and EQMD ($1,600.80) for medications are

awarded. Respondent had no objection to these bills and this award is pursuant to §§8(a) and 8.2 of the Act. Respondent is entitled to a credit if the bills have been paid.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the offered right shoulder arthroscopy is reasonable and necessary to cure or relieve the effects of the injury and Respondent should pay for and authorize same based upon the findings above regarding accident and causation. Dr. Nuber is of the opinion that Petitioner is not going to improve with conservative care and arthroscopy will allow him to address Petitioner's shoulder problems. The Arbitrator is persuaded by this opinion.

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

Based upon the testimony of Petitioner, the medical records and the Arbitrator's findings regarding accident, causation and the need for surgery above, Petitioner shall have and receive from Respondent TTD benefits from February 8, 2014 through September 10, 2014 in the amount of $834.93, a period of 30-5/7 weeks. Respondent is entitled to a credit for the $10,684.23 in TTD that it has paid.

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

Respondent disputed accident at trial. Respondent paid TTD from February 8, 2014 through February 21, 2014 and from March 22, 2014 through June 4, 2014 (12-5/7 weeks). Respondent offered no evidence as to why it did not pay TTD benefits from February 22, 2014 through March 21, 2014. Respondent did not comply with Rule 70110.70 (b) for this time period.

The report of Dr. Primus and the medical records are sufficient to justify the non-payment of TTD after June 4, 2014.

Accordingly, the Arbitrator awards Petitioner §19(k) Penalties in the amount of $1,669.86 (4 weeks of TTD from February 22, 2014 through March 21, 2014 = $3,339.72 = $1,669.86).

The Arbitrator awards Petitioner §19(l) Penalties in the amount of $6,030.00 (February 22, 2014 through September 10, 2014 = 201 days x $30.00/day = $6,030.00).

Finally, the Arbitrator awards §16 Attorneys' Fees in the amount of $1,539.97 (20% of the $7,699.86 in Penalties awarded above).

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

Matthew Schaeffer,

Petitioner,

vs. NO: 09 WC 11472

16IWCC0106

Brand Services,

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 4, 2015 is hereby affirmed and adopted.

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

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

IT IS THEREFORE ORDERED BY THE COMMISSION that commencing on August 4, 2014, Respondent pay to Petitioner the sum of $662.67 per week for the duration of Petitioner's disability as provided in §8(d)1 of the Act, for the reason that the injuries sustained

16IWCC0106

permanently incapacitated Petitioner from pursuing the duties of Petitioner's usual and customary line of employment.

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:

FEB 5 - 2016

MB/mam
o:12/10/15
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SCHAEFER, MATTHEW
Employee/Petitioner

Case# **09WC011472**

16IWCC0106

BRAND SERVICES
Employer/Respondent

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

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

4324 LASHLY & BAER PC
ANDREW TOENNIES
714 LOCUST ST
ST LOUIS, MO 63101-1699

1872 SPIEGEL & CAHILL PC
MILES P CAHILL
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

16IWCC0106

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

MATTHEW SCHAEFER
Employee/Petitioner

v.

BRAND SERVICES
Employer/Respondent

Case # **09** WC **11472**

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 **Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **November 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 _____

16IWCC0106

FINDINGS

On **November 17, 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 in part*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**49,225.80**; the average weekly wage was $**946.65**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **1** children under 18.

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

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

Respondent shall be given a credit of $**139,838.40** for TTD, $**0** for TPD, $**17,264.00** for maintenance, and $**0** for other benefits, for a total credit of $**157,102.40**.

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

ORDER

The Respondent shall pay Petitioner permanent partial disability benefits of $622.67/week for the duration of the disability because the injuries sustained caused a loss of earnings as provided in Section 8d1 of the Act.

The Arbitrator awards no TTD or TPD benefits.

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

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

Signature of Arbitrator

1/26/15
Date

FEB 4 - 2015

16IWCC0106

ILLINOIS WORKERS' COMPENSATION COMMISSION

MATT SCHAEFER,

Employee,

v. Injury No.: 09 WC 11472

BRAND ENERGY SERVICES,

Employer.

In support of the Arbitrators decision relating to the issues herein the Arbitrator finds the following facts:

Findings of Fact

The parties stipulated that the Petitioner was employed by the Respondent on November 17, 2008, that Respondent was given notice of the Petitioner's injuries. Petitioner is a 48 year old union carpenter, who was injured on November 17, 2008 when a piece of metal scaffolding fell and hit him in the back of the head. He was diagnosed with a herniated cervical disc at C5-6. He underwent a C5-.6 surgical fusion performed by Dr. Keith Wilkey on May 18, 2009. Following his surgical fusion, Petitioner had limited range of motion and persistent neck pain. On April 11, 2011, Dr. Wilkey stated that in his professional opinion, the patient would benefit from at least a trial of a dorsal column stimulator. Dr. Wilkey recommended pain management treatment, which the Petitioner undertook with Dr. Kaylea Boutwell. Dr. Boutwell's treatment included a weaning of the Petitioner's significant narcotic medication. Petitioner testified that he insisted on being weaned off the pain medications in an effort to go back to work. Dr. Boutwell assisted Petitioner in this endeavor and eventually he was weaned off the pain medications by August, 2011. Dr. Boutwell also indicated in her records that she would seek authorization for a spinal cord stimulator, however, due to the passage of time, she indicated in her November 15,

2011 report that a spinal cord stimulator may not be useful. Dr. Boutwell found the Petitioner to be at MMI as of her November 15, 2011 report

Petitioner's surgeon, Dr. Wilkey, referred Petitioner to Dr. William Thom, a pain management specialist regarding the trial of a spinal cord stimulator. Dr. Thom initially saw Petitioner on November 7, 2011. Dr. Thom eventually implemented the spinal cord stimulator on a trial basis and testified the Petitioner's pain had been reduced by 60%. Dr. Thom also conducted his own examination on Petitioner, focusing on any potential psychological barriers to care. Based on the results of that exam and the Petitioner's improvement following the stimulator trial, Dr. Thom believed Petitioner was a good candidate for the implementation of a permanent spinal cord stimulator. Dr. Thom also testified that the spinal cord stimulator may help in getting the Petitioner back to work. Following a 19(b) hearing before Arbitrator Granada and an appeal the Commission Ordered Respondent to pay reasonable and necessary medical treatment for the implementation of the permanant spinal cord stimulator, Dr. Yazdi surgically implanted the permanent spinal cord stimulator on April 25, 2013.

Petitioner testified that since using the permanent spinal cord stimulator, he has more mobility. He is still taking some medication, but is paying for his medication and treatment on his own or through his wife's insurance - which includes the trial spinal cord stimulator. Petitioner testified that he has continued neck and shoulder pain, he tires easily, everything is difficult and he has to rest through the day.

Respondent sent Petitioner to Dr. Michael Boedefeld for an IME examination. Dr. Boedefeld's examination of Petitioer's neck revealed very limited range of motion in all directions. Dr. Boedefeld's report states that Mr. Schaefer can no longer work as a carpenter. Dr. Boedefeld also stated that Mr. Schaefer has restricted range of motion which would make it difficult to

drive and see cars in his blind spots. Dr. Boedefeld stated that Petitioner cannot return to work as a carpenter but could do less rigorous duties. (Pt. Ex. 14)

Dr. William Thom is a board certified, Mayo Clinic trained Pain Management Physician. He has treated Mr. Schaefer for more than three years and personally met with Mr. Schaefer on each visit. Dr. Thom testified that Petitioner can no longer work as a carpenter. He stated that he would place Mr. Schaefer's work capacity at a light to minimal level. Dr. Thom placed Petitioner at a 20-30 mile driving restriction. Since 2009, Petitioner had been on a 30 minute/30 mile driving restriction by Dr. Keith Wilkey, his surgeon. Dr. Thom testified that Petitioner's restricted range of motion affects his ability to drive. He has weakness, pain, and loss of strength in his neck. Dr. Thom opined that it would be "nearly impossible" for Mr. Schaefer to maintain a full time job. Petitioner can only work 2-3 hours at a time, he can't work overhead, he has balance issues and has difficulty climbing. Dr. Thom testified that he has concerns that an employer would not accommodate Mr. Schaefer's need to get off his feet during work hours.

Dr. Thom ordered a Functional Capacity Evaluation(FCE). The FCE found that Mr. Schaefer gave high levels of physical effort, in fact he had to be told by the therapist to stop from lifting too heavy of weights in order to avoid the possibility of injury. (Pt. Ex. 4, page 9 of FCE) In addition, Mr. Schaefer's clinical testing indicated that Mr. Schaefer's subjective reports matched well with his distraction-based objective findings. The FCE found Petitioner to be in the light to medium work capacity.

Dr. Thom testified that Petitioner would require future medical care for maintenance of the leads and batteries for the spinal cord stimulator.

Jim England, the Petitioner's vocational rehabilitation expert indicated that at most, Petitioner can perform a lower to medium job working as a cashier or clerk earning approximately $10-$12 per hour.

Julie Bose is a vocational rehabilitation expert with MedVoc hired by Respondent. Her office performed a labor market study and attempted to speak with potential employers about whether or not they would hire Mr. Schaefer. Ms. Bose was aware of Mr. Schaefer's driving restrictions at the time her office performed the labor market study. Ms. Bose credibly testified that Petitioner can work making $12.32 per hour (R EX 1, pp 32, line 21).

Logan Roche has been a Union Representative for the Carpenters Local for 24 years. He testified that Petitioner was a great scaffold builder. Mr Roche testified that Mr. Schaefer was the Shop Steward on the job at the Baldwin, IL plant at the time of his injury in November, 2008. Because Mr. Schafer was the Shop Steward he would have been the last union scaffold builder to be taken off the job because of his seniority. Mr. Roche testified that Petitioner was a real good scaffold builder and he was not aware of any disciplinary or other work issues with Petitioner.

He testified that a residential carpenter is the most difficult type of carpentry job because they do not have the equipment large industrial job sites have and a residential carpenter must do repetitive bending, lifting and climbing.

Mr. Roche testified that if Mr. Schaefer was able to work today his hourly wage would be $35.67 per hour averaging 40 hours per week (P EX 15 pps 13 & 16).

Petitioner testified that he has been working selling cars for Steibel Auto Body since August, 2014. There he is earning an average of $601.58 per month which is considerably less than that which Ms. Bose found Petitioner capable of earning, supra.

Legal Analysis

Petitioner has met his burden for a wage differential award. To qualify for a wage differential award under Section 8(d)(1) a claimant must prove (1) partial incapacity which prevents him from pursuing his "usual and customary line of employment", and (2) an impairment of earnings. Gallianetti v Industrial Commission, 248 Ill.Dec. 554, 315 Ill. App. 3d 721, 734 N.E.2d 482(2000). Under Gallianetti, these are the only two questions that must be asked. If a petitioner shows that he affirmatively meets these two criteria, then he has fulfilled his burden and is entitled to a Wage Differential under Section 8(d)(1). Benyon v Perillo BMW, 00 IL. W.C. 29298 (2008). In General Electric Co. v Industrial Commission, 89 Ill.2d 432, 438, 60 Ill.Dec.629, 433 N.E.2d 671 (1982) our supreme court expressed a preference for wage-differential awards over scheduled awards.

This type of award is based on the presumption that, but for the injury, the employee would be in the full performance of his duties. Albrecht v Industrial Commission, 271 Ill.App.3d 756, 759, 208 Ill.Dec. 1, 648 N.E.2d 923 (1995). If claimant's injury does not prevent him from pursuing his usual type of employment, he is not entitled to a wage differential award. Similarly, if claimant's injury does not reduce his earning capacity, he is not entitled to a wage differential award.

The evidence presented showed that Petitioner can no longer work as a carpenter. Respondent's IME physician Dr. Boedefeld stated Petitioner could no longer work as a carpenter. The testimony of Logan Roche determined what Petitioner would be earning i.e. $35.67 per hour for 40 hour week, if he were not injured. The testimony of Ms. Bose determined the Petitioner could currently earn $12.32 for a 40 hour week.

Order

Pursuant to Section 8(d)(1) of the Act, Petitioner is entitled to a wage differential award. Respondent shall pay Petitioner permanent partial disability benefits commencing August 24, 2014 of $622.67 for the duration of the disability because the injuries sustained caused a loss of earnings as provided in Section 8d1 of the Act.

The calculation is as follows: 40 hours x $35.67 per hour =$1426.80; 40 hours x $12.32= $492.80. $1,426.80 minus $492.80 = $934.00 which is the differential. That times 2/3 is $622.67 which the 8d1 award.

Respondent shall pay Petitioner 8d1 benefits that have accrued from August 24, 2014 through the date of this award and thereafter shall pay the remainder of the award in weekly payments.

The Arbitrator awards no TTD or TPD benefits

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

Susan McGill,
Petitioner,

vs.
Luther Oaks,
Respondent,

NO: 08 WC 47783

16IWCC0107

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, medical, wage rate, 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 22, 2015 is hereby affirmed and adopted.

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

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

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

DATED: FEB 5 - 2016

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:12/10/15
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McGILL, SUSAN
Employee/Petitioner

Case# **08WC047783**

16IWCC0107

LUTHER OAKS
Employer/Respondent

On 4/22/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0225 GOLDFINE & BOWLES PC
ATTN: WORK COMP DEPT
4242 N KNOXVILLE AVE
PEORIA, IL 61614

2674 BRADY CONNOLLY & MASUDA PC
JULIA McCARTHY
705 E LINCOLN ST SUITE 313
NORMAL, IL 61761

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

16IWCC0107

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Susan McGill
Employee/Petitioner

v.

Luther Oaks
Employer/Respondent

Case # 08 WC 47783

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Bloomington, Illinois**, on **2-27-15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

16IWCC0107

On **4-13-08**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**7,988.49**; the average weekly wage was $**221.92**.

On the date of accident, Petitioner was **61** 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 $**15,799.90** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $200.00/week for 3-5/7 weeks, commencing April 14, 2008 through April 15, 2008 and from May 23, 2008 through June 16, 2008, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, for Petitioner's conditions of ill-being relating to her contusion to the left elbow, right knee injury for which she underwent arthroscopic surgery on May 23, 2008, her cervical strain and a right foot/ankle soft tissue injury. Respondent is responsible for payment only related to those conditions through November 2008. Respondent shall pay for the EMG/NCV and MRI recommended by Dr. Holmes. The Arbitrator notes that if Medicare made conditional payments for any of the above referenced conditions, Respondent shall reimburse Medicare for said payments.

Respondent shall pay Petitioner permanent partial disability benefits of $200/week for 68.94 weeks, because the injuries sustained caused 20% loss of use of the right leg (43 weeks), 5% loss of use of the right foot (8.35 weeks) 3% loss of use of the left arm/elbow (7.59 weeks) and 2% permanent partial disability for her cervical strain (10 weeks), as provided in Sections 8(e) and (d)2 of the Act.

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

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

Signature of Arbitrator

4/21/15
Date

APR 22 2015

FINDINGS OF FACT

16IWCC0107

Petitioner testified that on April 13, 2008 she was employed with Respondent, Luther Oaks, as a concierge. on a part-time basis. Her job duties included sitting at a desk, signing in guests, directing guests to residents' rooms. Petitioner also testified that she was concurrently employed by the Internal Revenue Service as a clerk.

Petitioner testified that as she was ending her shift on April 13, 2008, she slipped and fell on water that had been present in the hallway. Petitioner provided that as she fell, her right foot was turned underneath her. She also fell on her right ankle, right knee and left elbow. She was jarred and landed on her butt.

Petitioner sought immediate attention at OSF in the emergency room. X-rays were carried out of the left elbow, right knee, right ankle and cervical spine. No fractures were seen with respect to the left elbow and right knee. Degenerative changes were noted on the knee. X-rays of the right ankle revealed questionable tiny avulsion at the level of the tip of the lateral malleolus. Also noted was a possible old avulsion fracture at the medial malleolus. Regarding the cervical spine, the x-rays showed mild degenerative changes at C3-7 levels with no fractures noted. Petitioner was diagnosed with left elbow contusion, right ankle and knee strain, as well as cervical strain. Petitioner was taken off work and advised to follow up with Occupational Health. (PX 1)

Petitioner was seen by the physicians at OSF St. Joseph Occupational Health on April 17, 2008. Petitioner provided a history consistent with her testimony at arbitration. At this visit, Petitioner complained of pain in her right knee, right ankle, left elbow and neck. Records show she had abrasions her right knee and right ankle as well as a large bruise on her left elbow. Petitioner was diagnosed with cervical strain, right ankle sprain, and contusions of the left elbow and right knee. She was released to return to work performing sit-down work only. (PX 2) Petitioner testified that Respondent accommodated the aforementioned restriction.

Petitioner continued with OSF Occupational Health. On May 6, 2008 she was referred to Dr. Lawrence Li at the Orthopedic Sports and Medicine Center in Normal, Illinois. Petitioner saw Dr. Li on May 7, 2008. His records show Petitioner complained of pain over the lateral aspect of the right foot and ankle. She had no numbness or tingling in the upper extremities. She complained of pain over the medial aspect of the right knee and also neck stiffness and discomfort. Dr. Li's assessed neck pain from cervical sprain; left elbow traumatic olecranon bursitis; right knee pain felt to be due to possible medial meniscus tear; right ankle and foot pain and dysfunction felt to be due to persistent dysfunction after sprain. Dr. Li recommended a cortisone injection into Petitioner's left elbow and ordered an MRI of the right knee. (PX 4)

Petitioner next followed up with Dr. Li on May 12, 2008. Dr. Li reviewed the MRI indicating same revealed a tear of the posterior horn of the medial meniscus as well as osteochondral injuries of the medial femoral condyle, patella, and lateral femoral condyle. Dr. Li recommended arthroscopic surgery for the right knee. (PX 4)

Petitioner next presented to Dr. Li on May 20, 2008. Dr Li wrote that Petitioner presented "...for evaluation of right shoulder pain and also right elbow pain that was a work injury that occurred 4/13/08. She has been evaluated here previously from this. However, the pain in the shoulder has been worsening..." Records show Petitioner also complained of right wrist and hand pain, especially at the base of the right thumb. Dr. Li noted Petitioner provided that she had right shoulder pain with above the chest level work and pushing and

pulling. Dr. Li felt her right shoulder pain could be due to a possible rotator cuff tear and recommended a MRI. (PX 4)

Petitioner underwent the surgery recommended by Dr. Li. On May 23, 2008, Dr. Li performed right knee arthroscopy partial medial and lateral meniscectomy and abrasion chondroplasty of the medial femoral condyle, patella and femoral trochies. (PX 4) In addition to performing the surgery noted above, Dr. Li also authored a noted dated May 23, 2008. Dr. Li stated, "When this patient fell, she sustained an injury to her right hand/arm/shoulder. She is complaining of thumb pain around the CMC joint. To treat this injury of acute severe CMC sprain, I suggest a cortisone shot..." (PX 4)

Petitioner continued to treat with Dr. Li post-operatively from her knee surgery. On June 3, 2008, Dr. Li prescribed physical therapy on both the knee and her ankle. He released her to sit down work effective June 16, 2008. Records show Dr. Li ordered MRI's of her right shoulder, cervical spine, and right ankle. These were carried out on June 18, 2008. On June 30, 2008, Dr. Li went over the findings of the MRI's with Petitioner. The doctor provided that her ankle MRI showed a partial tear of the posterior tibialis tendon; the MRI of the right shoulder showed a full thickness tear of the supraspinatus tendon, as well as a partial tear of the biceps tendon; the cervical MRI was found to be normal from a neurological standpoint. At this visit, Dr. Li recorded that her ankle was the most symptomatic. He however indicated that she did have definite pain in the shoulder and had weakness in both supraspinatus and external rotation. She also had positive Neer and Hawkins impingement test. Because of Petitioner's ankle complaint Dr. Li recommended a right ankle arthroscopy, and repair for the torn posterior tibialis tendon. (PX 4)

Petitioner testified she did not have surgery on her right ankle as her right shoulder pain was getting worse. On July 16, 2008, Dr. Li recorded that as a result of being off her Ibuprophen in preparation for ankle surgery, Petitioner noticed intolerable right shoulder pain. As a result, it was decided to proceed with treatment of her shoulder. Dr. Li recommended an arthroscopic right shoulder surgery to repair the rotator cuff tear and bicep tendon tear. Said surgery was carried out on August 1, 2008. (PX 4)

Following the right shoulder surgery, Petitioner continued to treat with Dr. Li. On September 10, 2008, Petitioner began complaining of numbness and tingling in her left hand. Dr. Li wrote, "Since her right shoulder surgery she has been using her left hand much more significantly and has developed numbness and tingling throughout her entire hand..." Dr. Li noted that her right shoulder was progressing in therapy; her right knee was improving; and her right ankle continued with pain, with no significant change. Dr. Li's impression was "Due to lack of function for right arm and overuse of the left arm she has developed carpal tunnel syndrome". Dr. Li recommended an EMG/NCV. (PX 4)

On September 11, 2008, Petitioner presented to Dr. Edward W. Pegg for the recommended EMG/NCV. Dr. Pegg recorded a history of an accident resulting in the fall. Petitioner provided that she hurt both the right knee and right shoulder. She also provided that she had fallen on her outstretched left hand. Petitioner indicated that she had severe pain in the right knee and lesser pain in the right shoulder. Dr. Pegg wrote that she was not aware at the time of the discomfort in the left wrist which was covered up by the pains in both the right knee and shoulder. Once the surgical procedures and been completed she became more aware of discomfort and numbness in the left hand. She did not report any discomfort to her right hand. Dr. Pegg conducted the diagnostic study indicating same demonstrated severe median nerve entrapment on the left and very mild median nerve entrapment on the right. Dr. Pegg felt that based on the history provided, Petitioner most likely sustained a carpal tunnel injury with the fall but was unaware of the symptoms because of the severity of the knee and shoulder pain. (PX 6)

Physical therapy records submitted show Petitioner's right shoulder was progressing in therapy. Records through September 30, 2008 show continual improvement with her range of motions. Her left shoulder range of

motions were within limits. The entry from September 30th also show she reported a recent falling in a friends garage in which she landed on her left knee. Petitioner indicated she was feeling better but was "just all jarred up." (PX 5)

Petitioner returned to Dr. Li on October 22, 2008. The doctor noted that her right shoulder had been progressing nicely. At this visit, Dr. Li wrote that Petitioner still had pain in her left shoulder and that same "still bothers her significantly." Dr. Li recommended a left shoulder MRI. Dr. Li also went over the EMG/NCV findings and recommended a left carpal tunnel release. (PX 4)

On October 22, 2008, Petitioner underwent a left shoulder MRI. Physical therapy records from October 22nd show Petitioner continued improvement with the right shoulder. Also documented that day was a slight decrease with active range of motion and strength in the left shoulder. (PX 4, PX 5)

Dr Li discussed the left shoulder MRI finding with Petitioner on October 24, 2008. Dr. Li felt the studies revealed an undersurface tear of the subscapularis, as well as significant tendinopathy and partial tearing of the supraspinatus and infraspinatus tendon. Also noted was some glenohumeral arthropathy and a medially perched biceps tendon. At that time, Dr. Li recommended a course of physical therapy. (PX 4) In addition to the continuing right shoulder therapy session, Petitioner commenced therapy sessions on the left shoulder on October 28, 2008. (PX 5)

Petitioner returned to Dr. Li on December 3, 2008. At that time, Dr. Li indicated that Petitioner's right knee, ankle and right shoulder were improving. He noted that the left shoulder was significantly worse with therapy. The left elbow was still painful at the olecranon process. The left and right hand continued with numbness and tingling. Dr. Li felt Petitioner should attain full recovery for both the ankle and elbow. He felt the right knee was close to maximum medical improvement. However, he recommended Petitioner proceed with left shoulder arthroscopy with rotator cuff repair and biceps tenodesis as well a left carpal tunnel release. He felt Petitioner's left shoulder and carpal tunnel were aggravated by the fall in April 2008. (PX 4)

Petitioner continued treating with Dr. Li and attending physical therapy sessions in 2009. At Respondent's request, Petitioner underwent a Section12 examination with Dr. George Holmes at Midwest Orthopedics at Rush on July 1, 2009. After obtaining a history, performing an examination and reviewing diagnostic studies, Dr. Holmes opined status post twisting injury that appeared to be a soft tissue injury to the right ankle. Dr. Holmes provided that he could not provide a specific injury that Petitioner sustained as a result of the accident. As a result, he recommended Petitioner undergo an EMG/NCV and a second MRI scan of her left ankle. If the findings on said tests were negative, Dr. Holmes would not recommend any additional treatment. (RX 3)

Consistent with Dr. Holmes recommendation, Dr. Li ordered the additional testing on Petitioner's left ankle. On September 9, 2009, Dr. Li indicated the MRI taken revealed a chronic injury to the deltoid ligament as well as the spring ligament. The EMG/NCV was normal. Dr. Li explained that although the chronic injuries are causing Petitioner's discomfort, there is no additional treatment that would be beneficial for the ankle. Petitioner was at maximum medical improvement for her right ankle. (PX 4)

At Respondent's request, Petitioner underwent a Section 12 examination with respect to her left and right shoulder with Dr. David Raab on November 23, 2009. In addition to performing an examination and obtaining –x-rays, Dr. Raab also reviewed OSF emergency room records, Dr. Li's records and the right and left shoulder MRI's. Dr. Rabb opined that the conditions which Petitioner was suffering in both her right and left shoulder were unrelated to the injury of April 13, 2008. Dr. Raab further opined that neither the surgery which had already been performed, nor the surgery which was being recommended would be related to the accident of April 13, 2008. Dr. Rabb wrote, "...the necessity for surgery on her right shoulder is not causally related to her

work related injury of April 13, 2008. I do believe these findings in her right shoulder at the time of surgery were pre-existing. There is no mention in the emergency room report nor on the orthopeadic surgeon's initial evaluation of her was there a mention of any problems with the right and left shoulder. It is my opinion that the surgery that was performed was secondary to pre-existing problems in her right shoulder and is not causally related to the work related injury of April 13, 2008." The doctor further stated, "...[a]" The doctor further stated, "...[a]ny treatment of her left shoulder is for pre-existing problems in the left shoulder including early degenerative arthritis and rotator cuff tendinopathy..." (RX 2, dep #2)

Petitioner returned to Dr. Li on October 11, 2010. Petitioner reported that ten days prior she experienced severe right knee pain while walking down stairs. She indicated that she had been doing fairly well until that occurrence. Petitioner also provided that she continued with carpal tunnel and left shoulder symptoms which were not progressing. Dr. Li administered a cortisone injection to the knee and decided to proceed with the left carpal tunnel release which was carried out on October 29, 2010. Subsequent thereto, on November 23, 2010, Dr. Li also performed a left shoulder arthroscopy with rotator cuff repair, arthroscopic subacromial decompression, debridement of degenerative labral tear and debridement of arthritis in the glenohumeral joint. The post operative diagnosis was left shoulder rotator cuff tear, degenerative anterior and superior labral tear, Grade II and Grade III changes on the humeral head and glenoid and impingement syndrome. (PX 4)

Post operatively, Petitioner underwent physical therapy through June 2011. On June 27, 2011, Dr. Li recorded that she had completed occupational and physical therapy. He recommended a home exercise program indicating he anticipated gradual improvement and released her from his care. (PX 4) Petitioner returned to the doctor on October 26, 2011 stating she woke up with right knee pain. Petitioner denied any new injuries. Dr. Li assessed underlying osteoarthritis with acute aggravation and administered a cortisteroid injection and again released her from care. (PX 4)

Petitioner testified that she next sought a second opinion with regard to her right hand and right knee. Records show that her family physician, Dr. John Poag, referred her to the physicians at McLean County Orthopedics. On April 10, 2012, Petitioner was seen by Dr. Mark Hanson with complaints of right knee pain. Petitioner provided that she had been experiencing knee pain and burning since March 24, 2012 when she moved "sideways." Dr. Hanson assessed severe right knee osteoarthritis and administered an injection of Synvisc. The doctor felt that a total knee replacement was the only treatment that would ultimately make her feel good. (PX 7)

Petitioner returned to McLean County Orthopedics where she saw Dr. Jerome Oakey on August 16, 2012. Petitioner complaints were right hand pain and numbness. Based upon his physical examination, as well as the review of the 2008 EMG, Dr. Oakey recommended a right carpal tunnel release. (PX 7)

Petitioner returned to Dr. Oakey on August 27, 2012. The doctor noted Petitioner had pain in both the middle finger and thumb. Also noted was that Petitioner felt that her symptoms were related to a fall (presumably the April 2008 fall) and multiple other falls independently jamming several fingers. The doctor opined that the most likely scenario for her problem was degenerative given the diffused pattern. On September 4, 2012, Dr. Oakey performed a right open carpal tunnel release and right middle finger trigger release. After a brief course of physical therapy, Petitioner was released from Dr. Oakey's care on October 15, 2012. (PX 7)

Petitioner continued to treat with Dr. Hanson for her right knee complaints. On May 13, 2013, Dr. Hanson performed a right total knee athroplasty. The doctor also performed a manipulation under anesthesia on June 11, 2013. (PX 7) Petitioner testified that Dr. Hanson released her to sedentary work duty on August 7, 2013.

At the request of Respondent, a records review was performed by Dr. Lawrence Lieber on March 7, 2014. In his report dated same, Dr. Lieber provided that he reviewed the medical records of OSF Hospital & Occupational Health Clinic; the records of Dr. Li; the records of Dr. Hanson at Mclean County Orthopedics. Dr. Lieber opined that Petitioner's current right knee condition showed no direct relationship to the April 13, 2008 event. The doctor indicated that upon review of the diagnostic studies as well as the operative report findings of Dr. Li, there appeared to be no evidence of any isolated injury to the right knee area in association with April 2008 accident that would have caused any increase acceleration or any permanent aggravation of the underlying degenerative arthritis to cause the need for the subsequent total knee replacement surgery. The doctor, relying on the records of Dr. Li, opined that Petitioner reached maximum medical improvement for her work related right knee condition in October/November of 2008. (RX 1, dep #2) **16IWCC0107**

Petitioner testified at arbitration that she continues to experience problems with her right knee. Specifically, she complained of weakness, pain with activity, and an inability to kneel or do any climbing. With regards to her right ankle, Petitioner testified that she continues to have weakness in said ankle. With regards to her right and left hand, Petitioner testified to a continuing weakness with grip strength but otherwise felt she was doing okay. With regards to her left shoulder, she testified to continued weakness and difficulty with activities above shoulder level. Regarding the right shoulder, she testified that it was better than her left shoulder but continues to be weak. Finally, with regards to the left elbow, she complained of pain with any lifting activities, as well as an inability to rest said elbow on hard surfaces. Petitioner denied any injuries involving the multiple body parts prior to April 13, 2008 and/or subsequent to that date.

On cross examination, Petitioner testified that after two days off from the emergency room, she did return to her work in her job as a concierge at Luther Oaks on April 16, 2008. She continued to work up until her right knee surgery of May 23, 2008. Petitioner was then off until June 16, 2008 at which time she again returned to work as a concierge. Petitioner also testified that she had a vacation planned at the end of June 2008. She testified that her last day of work was June 25, 2008. Following her vacation she never returned to work for Respondent.

Dr. Li testified via deposition in this matter on February 3, 2010. Dr. Li testified that he first saw Petitioner on May 7, 2008. Petitioner reported that she sustained an injury at work on April 13, 2008 wherein she injured her right foot/ankle, right knee, left elbow and cervical spine. At that time, an examination revealed some tenderness over her cervical spine; she had some tenderness over the elbow and her knee showed positive medial McMurray's test which was suggestive of a torn meniscus. Ultimately, Dr. Li's assessed neck pain from cervical sprain, left elbow traumatic olecranon bursitis, right knee pain felt to be due to possible medial meniscus tear, right ankle and foot pain and dysfunction due to persistent dysfunction after sprain. Dr. Li testified that after ordering an MRI of the right knee and reviewing same he recommended arthroscopic knee surgery. (PX 8)

Dr. Li testified that Petitioner presented to him on May 20, 2008 and wanted to have her right shoulder evaluated. The doctor provided that Petitioner had previously told him about her elbow pain, but she complained of worsening pain in the right shoulder. He felt Petitioner possibly had a rotator cuff tear, elbow contusion and injury to her first metacarpal joint in the wrist. A MRI of the right shoulder was ordered and demonstrated a full thickness rotator cuff tear. Dr. Li testified that he felt Petitioner's right shoulder condition was related to the fall Petitioner described to him as occurring on April 13, 2008. Dr. Li stated, "Well, I think there's a couple of things. First, she had pains in a lot of different areas, and certainly the shoulder was not the most dominant finding at first, and I think that it became more noticeable to her later." The doctor added that his causation opinion would not change in spite of the fact that Petitioner didn't make any right shoulder complaints until May 20, 2008, approximately five (5) weeks after the accident. (PX 8, pp.8-9)

Dr. Li performed a right knee arthroscopy on May 22, 2008, which he testified was related to the fall. Dr. Li also recommended that Petitioner undergo MRI's of her right shoulder, cervical spine, and right ankle. Dr. Li felt the ankle MRI showed a partial tear of the posterior tibialis tendon; the right shoulder MRI showed a full thickness tear of the supraspinatus tendon, as well as a partial tear of the biceps tendon; and the cervical MRI was normal from a neurological standpoint. Based on these test results, Dr. Li recommended and scheduled right ankle arthroscopy, and repair for the torn posterior tibialis tendon. However, prior to the scheduled surgery, Petitioner saw Dr. Li on July 16, 2008 complaining that her right shoulder had become much more painful. As such, it was decided she would undergo an arthroscopic shoulder surgery to repair the rotator cuff tear and bicep tendon tear. Petitioner underwent this surgery on August 1, 2008. Dr. Li stated that both conditions, i.e., the rotator cuff tear and bicep tendon tear, were caused by the April 2000 fall. (PX 8, pp.11-12)

Dr. Li testified that while treating post-operatively from her shoulder surgery, Petitioner began to complain of numbness and tingling in her left hand. Dr. Li stated that he concluded that "due to lack of her right arm and overuse of the left arm, she developed carpal tunnel syndrome..." (PX 8, p.14) An EMG/NCV obtained demonstrated severe median nerve entrapment on the left and mild median nerve entrapment on the right. Dr. Li testified that he felt that Petitioner's carpal tunnel syndrome in her left and right hand were related to the fall of April of 2008. Dr. Li stated, "I think it would have been aggravated from the - - again, from the overuse afterwards. There may be some relationship to the fall. She may have had pre-existing carpal tunnel syndrome, but I think the symptoms were aggravated." (PX 8, p.15) Dr. Li went on to state that he definitely felt the right hand carpal tunnel could be related to the fall and that the left hand carpal tunnel was due to increase use of the left hand because of her post-operative right shoulder condition. (PX 8, pp.15-16)

Dr. Li testified that additionally, Petitioner began to complain left shoulder pain. A left shoulder MRI was ordered which indicated partial tearing of the supraspinatus and infraspinatus tendons. Dr. Li recommended Petitioner undergo a course of physical therapy for her left shoulder. Dr. Li testified that he believed her shoulder and her carpal tunnel were aggravated by the fall that she suffered at work in April of 2008. The doctor stated, "It would be related to the increased use on the left upper extremity after treatment of her - - after her other surgeries." (PX 8, p.17) Dr. Li testified that he recommended that Petitioner undergo surgery to repair the rotator cuff as well as undergo bilateral carpal tunnel releases. (PX 8, p.19)

With respect to the left ankle, Dr. Li testified that he obtained another EMG/NCV and MRI of the ankle which didn't demonstrate any tear in the posterior tibialis tendon. As a result, he saw no benefit of surgery and instead felt same should be managed nonoperatively. The doctor provided that although he didn't officially release her from his care, he felt the ankle was at maximum medical improvement. (PX 8, p.21) Dr. Li further stated that she was at maximum medical improvement for the right knee sometime in the Fall of 2008. He also provided that Petitioner was at maximum medical improvement for the right shoulder in December of 2008. (PX 8, p.25)

On cross examination, Dr. Li testified that Petitioner told him she injured her right upper extremity at the time of the accident on April 13, 2008. During the deposition, the doctor reviewed the emergency room records and agreed that the ER report does not indicate an injury to the right upper extremity. (PX 8, pp. 34-36)

Dr. Raab testified via deposition in this matter on May 3, 2010. Dr. Rabb performed a Section 12 examination with respect to Petitioner's bilateral shoulders at the request of Respondent. Dr. Rabb testified that he reviewed the emergency room records dated April 13, 2008. He provided that the records did not show of a report of an injury to the right or left shoulder. He noted that he specifically asked Petitioner if she injured her shoulders on the date of injury and she replied that she was not aware of injuring her shoulders. He indicated that she specifically stated that her shoulders began to bother her after her right knee surgery. He noted that Dr. Li's records show a first complaint of shoulder problems occurred on May 20, 2008 which actually preceded Petitioner's statement that she began noticing shoulder problems after the right knee surgery. (RX 2, pp.10-11)

Dr. Rabb testified that he reviewed the right shoulder MRI taken on June 18, 2008. He opined that the MRI did not show evidence of an acute injury. He stated the findings were pre-existing and predated the work-related date of injury. Dr. Rabb also stated that he reviewed Petitioner's left shoulder MRI dated October 22, 2008. The doctor provided that the findings were wear and tear and degenerative. He indicated same were not causally related to the accident. (RX 2, pp.14-17)

Dr. Rabb stated that it was his opinion that the treatment and surgery on the right shoulder were not causally related to the accident of April 2008. His also opined the fall didn't aggravate the shoulder. His opinion is based on his review of all the records as well as his physical examination and information obtained from Petitioner. The doctor further stated that Petitioner's left shoulder complaints were not secondary to the fall. (RX 2, pp.19-23) Dr. Rabb also testified that the reason for his opinion on the lack of causation for causal connection on the shoulder is multifactorial including the Petitioner's history, lack of documentation and the findings on the MRI. (RX 2, p.29)

Dr. Hanson testified via deposition in the matter on September 11, 2013. Dr. Hanson testified regarding his treatment of Petitioner from August 10, 2012 through August 17, 2013. Petitioner was first seen by Dr. Mark Hanson on April 10, 2012 for right knee pain. Dr. Hanson diagnosed severe right knee osteoarthritis and administered a Synvisc injection. (PX p, pp.6-8) Dr. Hanson testified that ultimately he performed a right knee replacement procedure on May 13, 2013. Dr. Hanson was asked whether he had an opinion as to whether or not the fall which occurred on April 13, 2008 caused or aggravated Petitioner's severe osteoarthritis in her right knee. Dr. Hanson responded that he believed it did not cause it, but did aggravate it. Dr. Hanson provided, "Yes. It could aggravate it to a point where it sped up the eventual need for replacement where maybe she would have had it 4 years later. Maybe if she didn't reinjure it, it could have been later than that." (PX 9, pp.20-21)

On cross examination, Dr. Hanson testified that when Petitioner was first seen she filled out a patient questionnaire indicating the onset of her symptoms was March 24, 2012 and that her knee never stopped burning or hurting since that time. He provided that nowhere within his records did Petitioner relate her complaints to a work injury of April 2008; nor was there a history of a work related injury of April 2008 in his records. Dr. Hanson testified that throughout his records his diagnosis was osteoarthritis. Nowhere in his records did he relate her conditions for which he carried out knee replacement surgery to an injury of April 2008. (PX 9, pp.25-26) Dr. Hanson also testified that he would not be able to testify with a degree of certainty as to when Petitioner would have needed knee replacement surgery with or without the incident of April 2008. (PX 9, p.34)

Dr. Lieber also testified via deposition in this matter. Dr. Lieber performed a records review at the request of Respondent. Dr. Lieber testified that based on the mechanism of injury, the MRI findings of May 2008 as well as the records of Dr. Li, including his opinion of MMI as of October and November 2008 as well as the operative findings from the May 23, 2008 surgery, as well as the four year absence of treatment from 2008 until 2012 and Dr. Hanson's findings at the time of surgery, the knee replacement was carried out to address the osteoarthritis and Petitioner's subjective complaints. The doctor added that there is no evidence that the work injury in 2008 accelerated or aggravated the knee for the May 2013 knee replacement. (RX 1, pp.14-15)

In Support of the Arbitrator's decision regarding (F) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

Petitioner's sustained a fall on April 13, 2008 falling onto her right foot/ankle, right knee and left elbow.

Petitioner initially received emergent medical care. Nowhere in the initial records are there any complaints with regard to Petitioner's shoulders, hands or wrists. Petitioner was diagnosed with left elbow contusion, right ankle and knee strain, as well as cervical strain.

Petitioner next treated at OSF St. Joseph Occupational Health on April 17, 2008. At this visit, Petitioner complained of pain in her right knee, right ankle, left elbow and neck. Petitioner was diagnosed with cervical strain, right ankle sprain, and contusions of the left elbow and right knee.

On May 7, 2008, Petitioner began treating with Dr. Lawrence Li at the Orthopedic Sports and Medicine Center. His records show Petitioner complained of pain over the lateral aspect of the right foot and ankle. She had no numbness or tingling in the upper extremities. She complained of pain over the medial aspect of the right knee and also neck stiffness and discomfort. Dr. Li's assessed neck pain from cervical sprain; left elbow traumatic olecranon bursitis; right knee pain felt to be due to possible medial meniscus tear; right ankle and foot pain and dysfunction felt to be due to persistent dysfunction after sprain. Dr. Li ordered an MRI of the right knee which revealed a tear of the posterior horn of the medial meniscus as well as osteochondral injuries of the medial femoral condyle, patella, and lateral femoral condyle. Dr. Li recommended arthroscopic surgery for the right knee.

Prior to the recommended surgery, Petitioner next presented to Dr. Li on May 20, 2008. Dr Li wrote that Petitioner presented "...for evaluation of right shoulder pain and also right elbow pain that was a work injury that occurred 4/13/08. She has been evaluated here previously from this. However, the pain in the shoulder has been worsening..." Petitioner also complained of right wrist and hand pain, especially at the base of the right thumb. Dr. Li felt her right shoulder pain could be due to a possible rotator cuff tear and recommended a MRI.

Petitioner underwent the surgery recommended by Dr. Li on May 23, 2008. Post surgery, Petitioner underwent a MRI of the right shoulder on June 18, 2008. The doctor provided the MRI showed a full thickness tear of the supraspinatus tendon, as well as a partial tear of the biceps tendon. Dr. Li recommended an arthroscopic right shoulder surgery to repair the rotator cuff tear and bicep tendon tear. Said surgery was carried out on August 1, 2008.

On September 10, 2008, Petitioner began complaining of numbness and tingling in her left hand. Dr. Li wrote, "Since her right shoulder surgery she has been using her left hand much more significantly and has developed numbness and tingling throughout her entire hand..." Dr. Li's impression was "Due to lack of function for right arm and overuse of the left arm she has developed carpal tunnel syndrome". Dr. Li ultimately recommended surgery to the left shoulder which was carried out in November 2010.

While Petitioner began treating for her right shoulder in June 2008, it was the testimony of Dr. Li, that she had advised him she injured her right shoulder in the initial fall. Upon reviewing the ER records during his deposition Dr. Li admitted the ER records reflected no injury to the right shoulder. Further, upon review of the records there is no indication of injury to the left shoulder or either hand or wrist.

The evaluation by Dr. Raab including his review of all the medical records and his opinion finding Petitioner's right and left shoulder conditions not related to the April 13, 2008 fall, is supported by the medical records and Petitioner's initial history of her fall. Further, Dr. Raab testified that based on the findings during the surgery of both shoulders, he does not find the shoulder surgeries related to the April 13, 2008 injury.

Petitioner had a full thickness tear of the right shoulder rotator cuff and there is nothing in the ER records or Petitioner's history of injury/fall to indicate any such injury to her right shoulder. Further, the operative report from the left shoulder surgery which was not carried out until November 23, 2010, over two years after the accident, reflects a post operative diagnoses of a left shoulder rotator cuff tear, degenerative

anterior and superior labral tear, Grade II and Grade III changes of the humeral head and glenoid and impingement syndrome.

Dr. Raab specifically noted that the basis for his opinion that Petitioner's shoulder injuries were not related and were multi-factorial including the findings during surgery.

With regard to Petitioner's bilateral carpal tunnel syndrome there is no indication in the initial records that Petitioner in any way injured her hand/wrist during her fall on April 13, 2008. In October 2010 over two years after the accident, Dr. Li diagnosed chronic bilateral carpal tunnel syndrome. Surgery for the left hand was then carried out October 29, 2010. While Petitioner advised she experienced numbness in her left hand in September 2008 following her right shoulder surgery as she was using her left hand more again, Petitioner provided an inaccurate history to Dr. Li that she has injured her right upper extremity in the fall of April 2008.

As Dr. Li's records and opinions are based on an inaccurate representation from Petitioner, his opinion on causation is outweighed by Dr. Raab finding no causal connection regarding both shoulders. Further, as Dr. Li's opinion regarding the left hand numbness onset was following the right shoulder surgery and the right shoulder was not related to the work injury of April 13, 2008, it follows that the left hand is not related to the injury of April 13, 2008.

With regard to Petitioner's right carpal tunnel release which was not carried out until September 4, 2012 along with right middle trigger finger release at the same time, Dr. Oakey's office note of August 27, 2012 reflects that Petitioner had concerns regarding her carpal tunnel release and trigger finger surgery. The doctor noted she felt it stemmed from a fall and she had had multiple falls and had independently jammed several fingers. At no time does Dr. Oakey relate the condition to the fall of April 13, 2008. Further, the medical records do not reflect any injury to Petitioner's right hand/wrist or any of Petitioner's fingers in April 2008. Additionally, Dr. Oakey goes on to comment that most likely the scenario is degenerative given the diffuse pattern of her complaints.

The Arbitrator finds Petitioner's right carpal tunnel syndrome and right middle trigger finger release are not related to the fall of April 13, 2008. The Arbitrator relies on Dr. Oakey's records as well as the medical records and history from April 13, 2008.

With regard to Petitioner's right knee replacement surgery carried out in May 2013, five years after the accident, the Arbitrator notes Dr. Hanson performed that surgery and while he testified during his deposition that the fall on April 13, 2008 may have aggravated or accelerated her underlying degenerative condition and the need for the knee replacement surgery, Dr. Hanson also testified that he could not testify with any degree of certainty as to the relationship between the surgery and the fall of April 2008. Further, the doctor admits that his records reflect Petitioner provides a history of onset of March 2012. Petitioner makes no mention of an April 2008 incident throughout his course of treatment. Further, his records do not provide any opinion regarding causation to the April 13, 2008 injury. He admits the surgery was carried out for degenerative condition and osteoarthritis. Furthermore, Dr. Lieber supports the opinion that the total knee replacement surgery was carried out for the osteoarthritis and degenerative condition and not related to the fall of April 13, 2008.

Based on Petitioner's history of injury of her fall and the medical records taken as a whole, the Arbitrator finds that as a result of the April 13, 2008 injury Petitioner sustained a contusion of her left elbow. Petitioner testimony and the medical records show that any treatment to her left elbow was minimal.

The Arbitrator finds Petitioner sustained injury to her right knee resulting in right knee arthroscopic surgery carried out May 23, 2008. Petitioner was released to return to sedentary duty which was her normal work capacity June 16, 2008. Further, Petitioner was placed at MMI by her treating orthopedic surgeon, Dr. Li,

as of the fall of 2008 per his deposition testimony. It is noted that the arthroscopic procedure on May 23, 2008 involved partial medial and lateral menisectomy and abrasion chondroplasty of the medial femoral condyle, patella and femoral trochlea.

With regard to Petitioner's right foot/ankle, it was the opinion of Dr. Holmes that Petitioner sustained a soft tissue injury of the right foot/ankle from which no residuals were anticipated. No surgery was recommended. The Arbitrator notes that following Dr. Holmes' opinion, Dr. Li no longer recommended surgery for the right foot/ankle.

The Arbitrator notes that approximately six weeks after the accident Petitioner's version of the fall begins to change and subsequently changes and varies the mechanism of the fall and body parts involved to include various new complaints and multiple body parts. The initial ER records do not support the numerous injuries/conditions for which Petitioner treats over the course of approximately six years. The initial ER records support the initial injury to Petitioner's right knee, right foot/ankle, the left elbow contusion and a cervical strain. It is not until approximately six weeks later on May 20, 2008 that Petitioner claims injury to her right upper extremity, right shoulder, wrist and elbow. She then submits a history of landing on her right arm.

As Petitioner's treatment continues and her complaints spread, on September 11, 2008 Dr. Pegg indicates he had a history that Petitioner then recalled at the time of the accident she had fallen on her outstretched left hand. At that time he noted that she is right hand dominant but was complaining of no discomfort in the right hand.

Thus, the injuries related to Petitioner's fall of April 13, 2008 as supported by the medical evidence of a contusion to the left elbow, right knee injury for which she underwent arthroscopic surgery on May 23, 2008, right foot/ankle soft tissue injury and a cervical strain.

In Support of the Arbitrator's decision regarding (G) What were the Petitioner's earnings, the Arbitrator finds as follows:

The parties agree Petitioner's AWW from her earnings with Respondent, Luther Oaks, was $95.11. Further, the parties agree that in the year preceding the accident Petitioner was a temporary worker for the IRS. It is agreed that Petitioner's total earnings from the IRS was $6,594.36.

Petitioner testified that her work with the IRS was short term/temporary. She was aware that it was for a limited time period. Petitioner did not make any claim for any potential for further earnings from the IRS.

As Petitioner's total earnings from the IRS over the 52 week period prior to the date of accident was $6,594.36, Petitioner's AWW from the IRS was $126.81:

> When the employee is working concurrently with two or more employers, and the respondent employer has knowledge of such employment prior to the injury, his wages from all such employersshall be considered as if earned from the employer liable for the compensation. 820 ILCS 305/10.

Per the plain language of the statute involving concurrent employment, Petitioner's earnings from both employers shall be considered as if earned from Respondent employer, liable for the compensation. Petitioner's earnings from Respondent are based on 52 weeks of earnings. As the concurrent employment is to be treated as employment from Responsible employer, the additional earnings should be added to the 52 weeks for calculation of the AWW based on concurrent employment.

Therefore, in the current case as noted, Petitioner's additional earnings from the IRS, $6,594.36, based on as though it was earned from Respondent for whom she worked all 52 weeks, the calculation is $126.81. Combined with her AWW at Respondent of $95.11, Petitioner's AWW, $221.92 pursuant to the language of the Act.

In Support of the Arbitrator's decision regarding (G) What were the Petitioner's earnings, the Arbitrator finds as as follows:

Petitioner was initially off work following the accident from April 14, 2008 through April 15, 2008 for a total of 2/7th weeks of T.T.D. Petitioner testified that she did return to work on April 16, 2008 pursuant to the light duty restrictions. Petitioner was next taken off work effective May 23, 2008 (the date of her arthroscopic knee procedure) and was once again released to return to work by Dr. Li on June 16, 2008. This is an additional T.T.D. period of 3-3/7th weeks. The remaining time Petitioner was off work was due to conditions of ill-being that the Arbitrator has found not to be causally related.

Based on the above, the Arbitrator finds that as a result of accidental injuries sustained on April 13, 2008, Petitioner was temporarily and totally disabled for a period of 3-5/7 weeks. The Arbitrator notes the parties stipulated Respondent paid $15,799.90 in TTD and that Respondent is entitled to credit for said payments.

In Support of the Arbitrator's decision regarding (J) Were the medical services that were provided to Petitioner reasonable and necessary, the Arbitrator finds as follows:

Having found that Petitioner's conditions of ill-being, i.e., contusion to the left elbow, right knee injury for which she underwent arthroscopic surgery on May 23, 2008, a right foot/ankle soft tissue injury and cervical strain, are related to the accident sustained on April 13, 2008, the Arbitrator finds that Respondent is responsible for payment only related to those conditions through November 2008, the timeframe Dr. Li testified that Petitioner right knee condition had attained MMI. The Arbitrator further finds that Respondent shall pay for the EMG/NCV and MRI recommended by Dr. Holmes. Said payments shall be made consistent with the fee schedule. The Arbitrator notes that if Medicare made conditional payments for any of the above referenced conditions, Respondent shall reimburse Medicare for said payments.

In Support of the Arbitrator's decision regarding (L) What is a nature and extent of the injury, the Arbitrator finds as follows:

Petitioner suffered injury to her right knee. She underwent right knee arthroscopy involving a partial medial and lateral menisectomy and abrasion of the chondroplasty. She was released to sedentary duty which was her regular occupation.

Based on the injury to Petitioner's right knee, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 20% of the right leg.

With regard to Petitioner's twisting injury of the right foot/ankle, Dr. Holmes, an orthopedic surgeon specializing in the care of treatment of the foot and ankle, found Petitioner sustained a soft tissue injury with no residuals. The Arbitrator finds Petitioner sustained permanent partial disability of 5% of the right foot.

With regard to Petitioner's left elbow contusion, Petitioner testified and the medical records show had minimal treatment. The Arbitrator finds Petitioner sustained permanent partial disability of 3% of the left arm.

With regard to Petitioner's cervical condition, all the records show she sustained and was treated for a cervical strain. The Arbitrator finds Petitioner sustained permanent partial disability of 2% man as a whole under Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JANET CARAWAY,

Petitioner,

vs. NO: 13 WC 39289

16IWCC0108

SOUTHERN ILLINOIS UNIVERSITY, CARBONDALE,

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, prospective medical, and notice, and being advised of the facts and applicable law, reverses the Decision of the Arbitrator for the reasons stated below.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent. The Commission finds that Janet Caraway failed to prove an accident arising out of and in the course of her employment on July 23, 2013. Petitioner's claim for compensation is, therefore, denied. A separate decision has been issued for case 14 WC 43373.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. Janet Caraway worked for Rainbow's End Child Development Center for 13 years. T.17. Petitioner testified that her right knee pain became noticeable after 6 months of working for the respondent. T.26.

2. Beginning in 2001 and continuing for 7 years, Petitioner worked full-time in the infant room. There was 1 teacher to every 4 infants. She would sit and play with the children on the floor, rock them, pick-up toys, and change diapers. T.18. She would also get on her hands and knees once a week to clean the carpet. T.19. She was up and down off the floor numerous times per day. All the infants slept in cribs. T.41

3. Thereafter, Caraway worked in the toddler classroom for three years. She would bend down to pick up toys, kneel down to put the children to sleep on the cots every day, and sit on the floor and read to them. There were 12 children in the classroom. There were both cribs and cots. The teacher to child ratio was 1 to 4. T.39-T.40.

4. Petitioner then went to the older toddler room where there were no cribs. T.23. She would put the cots on the floor and her duties were similar to the toddler classroom. There were 15 students. T.24.

5. Petitioner testified, on cross-examination, that there were student workers who would come in and out throughout the day, and throughout the year. T.40.

6. Janet Caraway then returned to the infant room and her duties were exactly the same as before. T.23. She was there one year.

7. Respondent offered the job description for a Child Development Associate into evidence. The description does not mention anything about bending, kneeling or squatting. RX.4. Petitioner typed a description of her job duties indicating that she performed a lot of bending, stooping and kneeling throughout the day.

8. Petitioner had an unrelated accident in December 2013 when she ruptured her left Achilles tendon. She testified that she did not fall on her right knee. T.34. She was released back to work in May 2014 and retired. T.35.

9. Ms. Drust is the Director at Rainbow's End. She stated that there are teachers and student workers. T.57. No one teacher would take care of everything. *Id.* She stated that toys are picked-up throughout the day. T.56.

10. Ms. Drust testified that the teachers are not on their knees for extended periods of time. T.59. When the children nap, the teachers will sit next to them versus kneeling. T.59.

11. On January 25, 2013, Caraway was seen by Bianca Bottiaux PAC of the Center for Medical Arts for right knee pain that had been present for 1 year. Her pain was

aggravated by climbing stairs and movement. X-ray of the right knee revealed moderate narrowing of the medial meniscal compartment with small osteophytes and subchondral sclerosis of the tibial plateau. The impression was degenerative joint disease and small joint effusion. The diagnosis was degenerative arthritis of the right knee. She was to follow-up with Dr. Migone in two weeks. PX.2.

12. Petitioner was seen by Gretchen Mason PAC and Dr. Ronald Barr of Orthopaedic Institute of Southern Illinois on May 21, 2013 for right knee pain that had been present for several years but was progressively getting worse. She reported it was in the medial aspect of her knee. Petitioner was 5 feet tall and weighed 160 pounds. She had pain and swelling. She had x-rays and an MRI of her knee. Petitioner denied any injury; just that her condition had progressively gotten worse. She had mild swelling of the right knee and a slight varus alignment. She was very tender to palpation along the medial joint line. She had mild crepitation with range of motion. X-rays revealed advanced medial compartment osteoarthritis with bone-on-bone articulation medially and spurring in the patellofemoral and lateral compartments. The diagnosis was advanced osteoarthritis of the right knee, and right Achilles tendinitis. He recommended a trial of cortisone. Dr. Barr explained that Petitioner's condition was a degenerative type problem that was mostly genetic to normal wear and tear, and the demands of getting up and down maybe exacerbate her symptoms, but were not the cause of the arthritis. PX.1.

13. Petitioner presented for follow-up with Bianca Bottiaux PAC on August 2, 2013 seeking a referral to Dr. Nathan Mall for a second opinion as her right knee pain was severe. PX.3. Petitioner testified that she wanted a second opinion from Dr. Mall as her granddaughter had seen him and had good results.

14. Petitioner completed a Notice of Injury on August 5, 2013. She reported that she had right knee damage due to repetitive trauma while working. Per the report, petitioner reported her condition to her supervisor on July 23, 2013. PX.3. Petitioner testified that Ms. Durst stated that they were looking into new flooring that had more padding. T.32.

15. Caraway was seen by Dr. Nathan Mall of Regeneration Orthopedics on August 19, 2013. Petitioner completed a job history form and listed her job as "manual labor which including kneeling, squatting, climbing and carrying, etc. (construction labor)," and "moderate-including walking, climbing stairs, on her feet and some time on your feet." Petitioner reported that she worked in an early childhood program performing a lot of sitting and standing, and had been doing this more over the last few months. She was now in the room in which kids take naps and had to kneel down on her knees and pat several children to sleep. This seemed to exacerbate or aggravate her symptoms making them worse over the last few months. Dr. Mall noted that the x-rays revealed near complete loss of the joint space in the medial compartment of the right knee. The left knee had mild osteoarthritis. Dr. Mall noted that petitioner did not do a lot of other activities outside of work that could potentially cause an exacerbation. While petitioner was

predisposed to having osteoarthritis, her job as an early childhood teacher, in which she did a lot of sitting and standing, and back and forth from a kneeling position to a standing position in a repetitive nature, likely expedited this process and made it occur faster than it normally otherwise would have given the normal genetic course of this disease. Her work activities aggravated her symptoms. She needed a total knee replacement. PX.3.

16. Per the Supervisor's Report of Injury or Illness completed by petitioner's supervisor on September 2013, Ms. Drust reported that petitioner visited her office in either July or August 2013 and reported that her knee sometimes bothered her. She denied any specific trauma. Petitioner stated that she wanted to start a paper trail in case she ever needed a knee replacement. She thought the pain might be caused from being on her feet a lot and also from her age. She mentioned arthritis runs in her family. RX.2.

17. Petitioner followed-up with Dr. Mall on March 10, 2014. Petitioner was off work for an unrelated injury resulting in a left Achilles tendon repair. She reported that her right knee got better during this period despite walking somewhat unevenly and having a lot of stress on it. Her right knee pain was returning however, as she started to walk normal. Dr. Mall reiterated his causation opinion and need for surgery. PX.3.

18. Petitioner underwent a Section 12 examination with Dr. Richard Hulsey of Orthopedic Associates on May 2, 2014. The petitioner provided Dr. Hulsey with a work history document relative to her repetitive trauma of the right knee. She reported a lot of sitting, standing, and kneeling. Petitioner emphasized that she frequently had to get up and down off the floor in order to care for the infants and toddlers as well as clean the room and floors at the end of the day. She had to frequently kneel and squat throughout the day. She also felt that the toddlers would press on the inside of her knee with their feet. Petitioner reported that her pain gradually became more severe over the past year. The impression was end stage osteoarthritis. She needed a total knee replacement. He opined that her right knee pain was strictly a degenerative process that was very common in her age group. Her work activities did not cause or accelerate the arthritic process. If it did she would have had similar findings in her left knee. With the severity of changes, any activity of daily living could exacerbate the pain. The degenerative changes were present long before July 2013. The need for a total knee replacement was not related to her job. PX.6.

19. Dr. Hulsey was deposed September 8, 2014 and is board certified in orthopedic surgery. RX.7. pg.6. He stated that end stage osteoarthritis generally develops within 5 to 10 years after osteoarthritis. He stated that Petitioner described her job duties and that she had to frequently be on her knees, squat up and down, and clean the floor. She testified that she knelt and squatted for much of the day. RX.7. pg.13. She did not have any left knee issues, which he noted was not uncommon and was consistent with a degenerative condition. RX.7. pg.14. He diagnosed petitioner with degenerative advanced osteoarthritis of the right knee. RX.7. pg.15. Her job duties did not cause or accelerate her

condition; it was a long term process probably involving genetics, her weight (as she was moderately overweight) and other factors. Her job duties would not significantly accelerate the process or the severity of changes that she had in her knee. *Id.* He stated that daily activities of prolonged sitting, walking, or stair climbing would make her more symptomatic. *Id.* Her medical treatment was related to her underlying arthritis. She did not require any work restrictions. RX.7. pg.16. Any further medical treatment would not be related to any work injury. *Id.* He did not feel her job activities accelerated her pain. She was in need of a total knee replacement. RX.7. pg.24.

20. On cross-examination, Dr. Hulsey stated that high impact activities can accelerate the process a lot more than just kneeling, squatting or walking. RX.7. pg.18. He did not feel she did enough kneeling or squatting to hasten the disease process. RX.7. pg.19. He stated that any activity would cause pain given the severity of her condition. *Id.* While a lot of activities caused her discomfort, it did not necessarily accelerate the process or the need for a knee replacement. *Id.*

21. Dr. Hulsey was asked whether petitioner's job duties "no matter how minute, anything at all to do with what you say she needs, which is a total knee." Dr. Hulsey answered, "If you put it that way, then yes, I would say it played a role in the sense that it's part of her everyday activity." RX.7. pg.21. Dr. Hulsey later testified, however, that he was not aware of any study that suggested that kneeling on a floor or squatting accelerated or caused a problem. RX.7. pg.22. While she may not have been at end stage when she started working, she has a progressive disorder which will get worse no matter what the activity.

22. Petitioner testified that she has difficulty getting in and out of bed. Her knee pain awakens her on occasion. She can only walk short distances or about 10 minutes. She would like to undergo the total right knee replacement.

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

To obtain compensation under the Act, a petitioner bears the burden of showing, by a preponderance of the evidence, that she has suffered a disabling injury which arose out of and in the course of her employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 266 Ill. Dec. 836, 775 N.E.2d 908 (2002). "In the course of employment" refers to the time, place and circumstances surrounding the injury. *Lee v. Industrial Comm'n*, 167 Ill. 2d 77, 81, 212 Ill. Dec.

250, 656 N.E.2d 1084 (1995). It is not enough, however, to simply show that an injury occurred during work hours or at the place of employment. The injury must also "arise out of" the employment. *Parro v. Industrial Comm'n*, 167 Ill. 2d 385, 393, 212 Ill. Dec. 537, 657 N.E.2d 882 (1995). The "arising out of" component of establishing entitlement to benefits is primarily concerned with causal connection such that it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003).

There are three types of risks to which employees may be exposed: (1) risks that are distinctly associated with employment; (2) risks that are personal to the employee, such as idiopathic falls; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 116 (2007); *Homerding v. Industrial Comm'n*, 327 Ill. App. 3d 1050, 1056 (2002). With respect to the third category, "[i]njuries resulting from a 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." *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC. The increased risk may be either qualitative (*i.e.*, when some aspect of the employment contributes to the risk) or quantitative (such as when the employee is exposed to the risk more frequently than members of the general public by virtue of his employment). *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1014 (2011).

The Commission finds that Caraway failed to prove that her work duties were repetitive in nature or that she was exposed to a risk greater than the general public. The petitioner testified that she performed tasks that included kneeling, squatting, and bending while working in all of the rooms. In support of her testimony, petitioner offered into evidence a self-produced job description that listed all of her daily activities. The Commission reviewed petitioner's job description along with Respondent's exhibit four, the job description for a Child Development Associate. The job description for a Child Development Associate makes no reference to the frequency at which petitioner had to kneel, squat, or bend. The Commission notes, however, that the teacher-to-child ratio was 1 to 4 in the classrooms. The Commission further notes that student helpers were present in the classrooms throughout the day. This information was not contained in Petitioner's self-produced job description. Additionally, Ms. Drust testified that no one teacher would take care of everything. The Commission finds this information pertinent as it reduces the frequency in which petitioner had to kneel, squat, or bend.

Based upon the evidence and testimony of record, the Commission finds that the petitioner was not exposed to a risk more frequently than the general public or that her employment contributed to her condition.

The Commission further finds that Petitioner failed to prove causal connection. The evidence establishes that petitioner was diagnosed with end state osteoarthritis. When she sought medical treatment in January 2013 and May 2013, petitioner was advised by Dr. Barr that her

condition was the result of a degenerative process and was related to normal wear and tear. Petitioner, however, then sought a second opinion from Dr. Mall who ultimately found causal connection. The Commission is not persuaded by Dr. Mall's opinion.

Dr. Mall diagnosed petitioner with degenerative osteoarthritis. The x-rays revealed a near complete loss of the joint space in the medial compartment of the right knee and mild osteoarthritis of the left knee. Dr. Mall's August 19, 2013 report indicated that while petitioner was predisposed to osteoarthritis, her job duties likely caused her knee to degenerate faster than it normally otherwise would have given the normal genetic course of this disease process. The Commission finds Dr. Mall's opinion generic and not persuasive. Dr. Mall essentially opined that because petitioner did a lot of bending, kneeling, and squatting at work, her degenerative condition was hastened by her work duties. Dr. Mall's opinion does not address the frequency at which petitioner was required to squat, bend, or kneel. His report further does not allude to whether he was familiar with the teacher to student ratio or that student workers were present in the room, which reduces the frequency in which Caraway was required to perform her duties. As such, the Commission is not persuaded by Dr. Mall's opinion.

Petitioner's argument that Dr. Hulsey found causation is not persuasive. When asked by petitioner's counsel if petitioner's work "had anything, no matter how minute, anything at all to do with what you say she needs, which is a total knee," Dr. Hulsey stated that "if you put it that way, then yes, I would say it plays a role in the sense that it's part of her everyday activities." The Commission, however, notes that petitioner failed to point out that Dr. Hulsey stated there was no study that he knew of that would suggest that kneeling on a floor or squatting would accelerate or cause a problem.

Dr. Hulsey reiterated his opinion that Caraway's condition was degenerative in nature. Dr. Hulsey further noted that if Caraway's condition was related to her employment she would have experienced symptoms in both knees. The fact that she had pain in one knee only demonstrated a classic degenerative condition. Dr. Hulsey further noted that petitioner's condition was a long term process involving her genetics, weight, and any life activity would cause her pain given the severity of her condition. While many activities caused her discomfort, Dr. Hulsey noted that it did not accelerate the process or the need for a knee replacement. The Commission finds Dr. Hulsey's opinion persuasive as it demonstrates a better understanding of a degenerative process, and a better understanding of petitioner's job duties and the impact of activities of daily living.

The Commission therefore finds that petitioner failed to prove an accident arising out of and in the course of her employment, and failed to prove that her condition is causally related to her work duties.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 5, 2015 is hereby reversed. Petitioner's claim for compensation is therefore denied.

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: FEB 8 - 2016

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
O: 12-14-15
052

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

CARAWAY, JANET
Employee/Petitioner

Case# **13WC039289**

14WC043373

16IWCC0108

SIU-C
Employer/Respondent

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

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

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

1239 KOLKER LAW OFFICES PC
JASON R CARAWAY
9423 W MAIN ST
BELLEVILLE, IL 62223

0558 ASSISTANT ATTORNEY GENERAL
NICOLE M WERNER
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

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

MAY 5 = 2015

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Janet Caraway
Employee/Petitioner

v.

SIU-C
Employer/Respondent

Case # **13** WC **39289**

Consolidated cases: **14 WC 43373**

16IWCC0108

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin**, on **March 11, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0108

FINDINGS

On the date of accident, **7/23/13**, 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 **$21,285.00**; the average weekly wage was **$409.33**.

On the date of accident, Petitioner was **62** 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 general credit for any medical bills paid through its group medical plan for which credit is allowed under Section 8(j) of the Act.

ORDER

Respondent shall authorize and pay for the knee replacement surgery recommended by Dr. Nathan Mall.

Respondent shall pay reasonable and necessary medical expenses as set forth in Petitioner's Exhibit 9 pursuant to the applicable Fee Schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be a given a credit for any medical bills paid by it or its group medical plan and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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.

Nancy Lindsay
Signature of Arbitrator

May 3, 2015
Date

ICArbDec19(b)

MAY 5 - 2015

16IWCC0108

Findings of Fact and Conclusions of Law

At the commencement of the hearing Petitioner presented a Motion to Consolidate her two claims and without objection from Respondent, the claims were consolidated. The parties requested one decision for both cases[1]. The only difference between the two claims is the alleged date of accident, with the case of 13 WC 39289 having a date of accident of July 23, 2013 and the case of 14 WC 43373 having a date of accident of August 19, 2013. Both cases allege repetitive trauma injury to Petitioner's right knee.

In this case Petitioner alleges she sustained a repetitive trauma injury to her right knee which manifested on July 23, 2013 due to her job duties as a day care worker for Respondent. The issues in dispute are accident, notice, causation, prior medical treatment and prospective medical treatment. Two witnesses testified at the hearing: Petitioner and Linda Drust. Respondent had a representative, Jenny Batson, present throughout the hearing.

The Arbitrator Finds:

On January 25, 2013, Petitioner presented to Bianca Bottiaux, PAC at the Center for Medical Arts. (PX2). Petitioner complained of right knee and left foot pain. (PX2). Petitioner indicated that the right knee pain radiated into the right lower leg and the onset of pain was one year prior. (PX2). Petitioner had recently returned from Colorado. Petitioner indicated that the pain was aching and throbbing and aggravated by climbing stairs and movement. Petitioner denied any injury. Her pain was relieved by bracing. (PX2). Petitioner further indicated that associated symptoms were swelling, crepitus, and joint tenderness. (PX2). Ms. Bottiaux noted Petitioner was 61 years old, 60 inches tall, and weighed 169 pounds. (PX2). Petitioner's left ankle revealed crepitus. Petitioner was referred for an orthopedic consult for right knee degenerative arthritis and left Achilles tendonitis. An appointment/follow-up with Dr. Mignone was scheduled for February 11, 2013. (PX2).

On January 25, 2013, Petitioner underwent an x-ray of her right knee. (PX2). The findings indicated that there was no change from January 13, 2012. (PX2). The impression was: 1) degenerative joint disease and 2) small joint effusion. (PX2).

On May 21, 2013, Petitioner presented to Dr. Roland Barr at the Orthopaedic Institute of Southern Illinois. (PX1). Petitioner complained of pain (primarily medially) that had been going on for several years, but was progressively worsening. Petitioner also

[1] Despite the request of the parties, the Arbitrator is issuing separate decisions as recently requested by the Chairwoman of the IWCC with regard to all consolidated cases.

complained of "quite a bit of heel pain" as well and thought the two might be associated with one another. (PX1). On physical examination, Petitioner had mild swelling of the right knee and a slight varus alignment. (PX1). Petitioner had mild crepitation with range of motion, but range of motion was full. Petitioner also had quite a bit of heel pain which she associated with her knee pain. Petitioner reported having previously undergone x-rays and an MRI. (PX1). Dr. Barr noted that review of Petitioner's right knee x-rays showed advanced medial compartment osteoarthritis with bone-on-bone articulation medially and also spurring of the patellofemoral and lateral compartments. Petitioner was very tender to palpation over her left Achilles tendon. (PX1). Dr. Barr assessed Petitioner with advanced osteoarthritis of the right knee and right Achilles tendonitis. (PX1). Dr. Barr recommended a cortisone injection, which was given at that time. (PX1). Dr. Barr noted that Petitioner asked a lot of questions about whether her right knee problems were associated with her job with Respondent. (PX1). Dr. Barr further noted:

> I explained to her in depth that this is a degenerative type problem that is mostly genetic to normal wear and tear and the demands of getting up and down maybe exacerbate her symptoms, but were not the cause of her arthritis.

Dr. Barr recommended stretching for Petitioner's Achilles tendonitis. (PX1). Petitioner was to follow up in six weeks for her right knee. (PX1).

On July 23, 2013, Petitioner reported to her supervisor Linda Drust that she suffered repetitive trauma to her right knee due to her job duties. (RX1; PX 3).

On July 28, 2013 Petitioner signed her Application for Adjustment of Claim in case # 13 WC 039289. (AX 3)

On August 2, 2013, Petitioner followed up with Bianca Bottiaux, PAC, regarding complaints of right shoulder pain and right knee pain. (PX2). Petitioner indicated that she wanted a second opinion regarding her right knee. (PX2). Petitioner indicated that her right knee symptoms began years earlier and that they had gradually been worsening. (PX2). Ms. Bottiaux noted Petitioner had advanced osteoarthritis in her right knee and that Petitioner had requested a referral to Dr. Nathan Mall in Chesterfield, Missouri. (PX2). Petitioner indicated she would make her own appointment. (PX2).

On August 5, 2013, Petitioner filled out a Workers' Compensation Employee's Notice of Injury form indicating she had injured her right knee through repetitive trauma. (RX1). On this form, Petitioner indicated she notified her supervisor, Linda Drust, of said injury on July 23, 2013. (RX1; PX 3)

Respondent also tendered a "Supervisor's Report of Injury or Illness" at hearing. (RX. 2) This report was filled out by Petitioner's supervisor, Linda Drust. This form also indicates that, "In either July or August 2013, Janet visited my office to report that her knees sometimes bothered her...." (RX. 2)

On August 19, 2013, Petitioner presented to Dr. Nathan Mall at Regeneration Orthopedics. (PX4). Prior to seeing Dr. Mall, Petitioner completed a new patient intake

form. (PX4). On this form, Petitioner indicated that her reason for the visit was for workers' compensation for her right knee. (PX4). Petitioner indicated that she had been injured at work and had previously seen a doctor for her complaint. (PX4). Petitioner indicated that she heard of Dr. Mall's office through her attorney, Jason Caraway. (PX4). Petitioner marked that her problem began due to work injury/work overuse and that she had had this problem before. (PX4).

Dr. Mall noted that Petitioner had been diagnosed with osteoarthritis of the right knee. (PX4). Petitioner indicated that she had worked for many years in an early childhood program doing a lot of sitting, standing, and kneeling. (PX4). Petitioner indicated that her symptoms had been getting worse over the last few months. (PX4). Petitioner also indicated that she had gotten approximately two and a half months of relief from the cortisone injection from Dr. Barr, but that her pain was returning. (PX4). Petitioner denied any prior right knee surgeries or past significant pain in the knee. Petitioner also didn't think she'd ever been to an orthopedic surgeon before going to Dr. Barr. Petitioner denied any prior right knee surgeries or past significant pain in her right knee. Petitioner was noted to be 62 years old, five feet tall, and weighed 175 pounds. (PX4). On physical examination, Petitioner's right knee had full range of motion, tenderness on the medial and lateral side, mild effusion, some patellofemoral crepitus, but no patellar instability. (PX4). Dr. Mall noted that x-rays of the right knee demonstrated near complete loss of the joint space in the medial compartment and that the left knee had some mild osteoarthritis. (PX4). Dr. Mall's assessment was right knee osteoarthritis. (PX4). Dr. Mall recommended physical therapy and strengthening exercises, anti-inflammatory medication, and occasional cortisone injections. (PX4). A cortisone injection was given to Petitioner that day. (PX4). Dr. Mall also indicated that a total knee arthroplasty will likely be needed eventually. (PX4). Petitioner was to return on a p.r.n. basis when her cortisone shot wore off. (PX4). Petitioner was given no work restrictions. (PX4).

Dr. Mall added a note addressing causation at the end of the August 19, 2013 medical record. (PX4). Dr. Mall indicated that while Petitioner was predisposed to having osteoarthritis in her right knee, he believed that her job duties as an early childhood teacher likely expedited the process and made it occur faster than it normally would have. (PX4). Dr. Mall further stated that even if it was determined that this was a pre-existing condition; he believes that her work activities exacerbated her condition. (PX4).

A copy of Petitioner's Application for Adjustment of Claim in case # 13 WC 39289 was mailed to Respondent on November 20, 2013. (AX 3)

Petitioner's Application for Adjustment of Claim in case # 13 WC 039289 was filed with the Commission on November 26, 2013. (AX 3)

On March 10, 2014, Petitioner followed up with Dr. Mall. (PX4). Petitioner indicated that she had been doing well with the cortisone injection, but that it was starting to wear off. (PX4). Petitioner also indicated that she had been off work for her left Achilles tendon which had been repaired. Petitioner reported that her knee actually got

better while off work despite walking on it somewhat unevenly and having it bear a lot of stress. Now that she was walking more normally, Petitioner was noting more right knee pain as well. On physical examination, Petitioner's right knee pain had full range of motion, varus deformity more so on the right than the left, medial joint tenderness, mild effusion, and no patellar instability. (PX4). Dr. Mall's assessment was right knee osteoarthritis. (PX4). Dr. Mall noted that he wanted to give her additional time to see how she does after she no longer had to wear the boot for her left ankle. (PX4). Dr. Mall indicated that he would continue to follow Petitioner and treat with cortisone injections as long as she was getting three months relief from them, after that she will likely need a total knee arthroplasty. (PX4). Again, Dr. Mall noted he believed Petitioner's work duties aggravated her condition. (PX4). Petitioner was given no work restrictions. (PX4).

On May 2, 2014, Petitioner underwent a Section 12 examination with Dr. Richard E. Hulsey regarding Petitioner's right knee. (RX6). In anticipation of the exam Petitioner had prepared a detailed description of her work duties and their impact on her right knee. (PX 8) Dr. Hulsey performed a physical examination, reviewed Petitioner's medical records, and took a verbal history from Petitioner. (RX6). Petitioner also gave Dr. Hulsey a typewritten description of her job duties for Respondent. (RX6, PX8). Petitioner indicated that she would frequently get up and down off the floor in order to care for the children and clean the room. (RX6). Petitioner also told Dr. Hulsey that she would have to kneel and squat frequently throughout the day. (RX6). Petitioner further indicated that she did not have a specific injury, but rather that pain developed over the last several years and gradually became worse. (RX6). On physical examination, Petitioner walked without support, was able to get in and out of her chair without difficulty, had pronounced genu varum deformity of the right knee, lacked full extension, flexed to approximately 125 degrees, tenderness over joint lines, and light crepitation with flexion and extension. (RX6). Dr. Hulsey took x-rays of Petitioner's right knee which showed severe osteoarthritis with total obliteration of the medial compartment and varus deformity, and moderate osteophyte formation off the patella and lateral compartment. (RX6). X-ray of the left knee showed mild changes. (RX6). Dr. Hulsey opined Petitioner had end-stage osteoarthritis in her right knee and would need a total knee replacement. (RX6). Dr. Hulsey further opined that Petitioner's right knee condition is strictly a degenerative process that is common in her age group and that the work activities that she described did not cause or accelerate the arthritic process. (RX6). Dr. Hulsey opined that with the severity of the changes seen on the x-rays any activities of daily living could exacerbate her pain and that Petitioner's need for a total knee replacement was not related to her job duties for Respondent. (RX6).

On May 5, 2014, Petitioner followed up with Dr. Mall. (PX4). Petitioner indicated that she continued to have right knee pain. (PX4). Petitioner also indicated that she had been off work for an Achilles tendon injury and had been somewhat better in terms of her right knee. (PX4). Petitioner was noted to be five feet tall and weigh 185 pounds. (PX4). Petitioner had varus deformity more so on the right than the left, medial joint tenderness, and limited range of motion of the right knee from about five degrees short of full extension to 110 degrees of flexion. (PX4) Dr. Mall's assessment was right knee osteoarthritis aggravation. (PX4). Dr. Mall recommended another cortisone injection that

performed that day and additional physical therapy for quadriceps strengthening. (PX4). Dr. Mall noted that Petitioner's complaints seemed somewhat better while being off work and "this is an indication that her job duties are aggravating her osteoarthritis in her right knee." (PX 4) He believed she would need a total knee replacement eventually. (PX4). Petitioner was to return in three months or when her pain returned. (PX4). Petitioner was given no work restrictions. (PX4). No further medical records were admitted into evidence.

Dr. Hulsey was deposed on September 8, 2014. (RX7). Dr. Hulsey is an orthopedic surgeon board certified in orthopedic surgery. (RX7, p. 6) Dr. Hulsey testified that Petitioner described her job duties as taking care of infants and toddlers, frequently being on her knees, squatting up and down, and cleaning the room at the end of the day. (RX7, p. 13). Dr. Hulsey also testified that Petitioner provided him with a written job description of her duties that he reviewed. (RX7, p. 13). Dr. Hulsey testified that Petitioner did not have any significant complaints or symptoms with her left knee, which he stated was consistent with a degenerative condition, as one side is frequently more affected than the other. (RX7, p. 14). Dr. Hulsey testified that Petitioner had advanced osteoarthritis of the right knee. (RX7, p. 15). He further testified that Petitioner's job duties did not cause or accelerate her condition. (RX7, p. 15). Dr. Hulsey testified that the basis of his opinion was that the degree of kneeling or squatting would not have accelerated the process as this is a long-term degenerative process involving genetics, Petitioner's weight, and other factors. (RX7, p. 15). Dr. Hulsey testified that any activities of daily living could exacerbate her degenerative condition. (RX7, pg. 15). Dr. Hulsey testified that Petitioner's age and weight would be risk factors that could affect her right knee condition. (RX7, p. 16). Dr. Hulsey testified that if Petitioner underwent a total knee replacement it would not be due to her alleged work-related injury or repetitive trauma. (RX7, p. 16). On cross-examination, Dr. Hulsey testified that there are activities that can accelerate the osteoarthritis process, like high impact activities such as running and jumping where the knees see more stress than kneeling and squatting. (RX7, p. 18). Dr. Hulsey further testified that he did not know of any study that suggests kneeling on a floor or squatting accelerated or caused osteoarthritis. (RX7, p. 22). Dr. Hulsey testified that he did not believe that Petitioner's job duties accelerated her osteoarthritis and that she would have needed a knee replacement regardless of her job. (RX7, p. 24).

On cross-examination, Dr. Hulsey was asked if Petitioner's work could have caused her to have symptomatic pain related to her osteoarthritis. Dr. Hulsey responded, "Again, any activity I think she does, whether it's at her job or at home would cause increasing pain and discomfort." (RX 7, p. 20) Dr. Hulsey was asked if Petitioner's work "had anything, no matter how minute, anything at all to do with what you say she needs, which is a total knee?" (RX 7, pp. 20-21) Dr. Hulsey responded, "If you put it that way, then yes, I would say it plays a role in the sense that it's part of her everyday activities." (RX 7, p. 21) He went on to state that activities can aggravate her knee. (RX. 7, p.22)

On December 18, 2014 Petitioner signed her Application for Adjustment of Claim in case # 14 WC 043373. A copy of the Application was sent to Respondent that same

day. The Application for Adjustment of Claim was filed with the Commission on December 24, 2014. (AX 4)

At the hearing Petitioner testified that she has worked at Rainbow's End Child Development Center on the campus of SIU Carbondale for thirteen years. During her time at the day care facility she worked in a number of different classrooms.

Petitioner first worked in the "infant room" for seven years. During this time Petitioner would sit on the floor with the children, rock them to sleep and change their diapers. Petitioner testified she frequently bent to pick up various toys. As Petitioner was the closing teacher, she was charged with cleaning the classroom at the end of each day. This involved picking up toys off the floor, disinfecting them and returning them to the shelves. Each Friday, Petitioner would get down on her hands and knees to clean the thin mat the children played on. Petitioner testified this job in the infant room required her to get up off and down onto the floor a number of times each day.

After her seven years in the infant room, Petitioner was transferred to the "younger toddler" classroom. She worked in this classroom for three years. Again, Petitioner was tasked with picking up toys throughout the day. In this classroom some of the children slept close to the floor on cots. Petitioner testified she was up and down off the floor to assist with picking up and cleaning toys and putting the children to sleep on the cots and reading to them. Petitioner explained she would also kneel to care for the children. There were twelve children in this classroom.

After three years in the "younger toddler" classroom, Petitioner was transferred back to the "infant" room. She returned to the infant room for one year. While back in the infant room for this assignment, her duties did not change from her previous time in the classroom.

Petitioner next worked in the "older toddler" classroom. Again, Petitioner would bend down and get up and off the floor to assist the children while going to sleep on cots. Petitioner also got up and down off the floor to read to the children. Again, Petitioner was charged with cleaning the classroom and would bend down to pick up toys so that they could be disinfected. Once again, Petitioner would get up and down from the floor to read to the children. There were fifteen children in this classroom.

Petitioner further testified that in each of her assigned classrooms there were other teachers as well. Petitioner also testified that she was not solely responsible for putting all of the children in her classrooms to sleep.

Prior to beginning work for Respondent Petitioner suffered no major trauma or accident to her right knee. Petitioner testified that her knee pain became noticeable after approximately six months of employment with Respondent. She testified this knee pain worsened over her thirteen year career at the day care facility and occurred while performing her job duties for Respondent.

Petitioner testified she sought active medical care for her right knee in 2013. She first treated with her primary care physician, Dr. Migone, on January 25, 2013. She

acknowledged that she said nothing specific about her knee pain being associated with her work activities at that time.

Petitioner then saw an orthopedist, Dr. Barr, on May 21, 2013. Petitioner testified that while she was at her appointment with Dr. Barr and that she asked him if her knee pain was related to her work and that he did not inform her that her current condition was work-related.

Sometime after this appointment, Petitioner received a letter from Dr. Barr's office with a copy of the medical record dictated from her appointment on May 21, 2013. Petitioner testified that within thirty days or so of receiving this report she had a formal conversation with her supervisor, Linda Drust. Petitioner testified she spoke to Ms. Drust on July 23, 2013, regarding her right knee problem. Petitioner testified that in this conversation, Ms. Drust indicated that she had been checking into some new flooring for the classrooms.

After seeing Dr. Barr, Petitioner returned to see her primary care physician, Dr. Migone, on August 2, 2013. (PX 2) Petitioner testified that Dr. Migone referred her to Dr. Mall. Petitioner testified that her granddaughter had seen Dr. Mall. Petitioner's granddaughter is the child of Petitioner's attorney, Jason R. Caraway.

Over the course of her treatment with Dr. Mall, Petitioner has received three injections to her right knee which she testified only provided temporary relief of her symptoms. In addition, Petitioner underwent a month of physical therapy as ordered by Dr. Mall as well.

Petitioner testified that while being treated by Dr. Mall, she had a non-work-related accident in December of 2013 when she fell and tore her Achilles tendon in December 2013. Petitioner testified she did not fall on her right knee in this accident and did not injure her right knee in any way. Petitioner ultimately underwent surgery for her Achilles injury and was off work for an extended period of time. Petitioner was released to return to work for her Achilles injury in May of 2014. Petitioner did not return to work, however, and, instead, decided to retire due to her achilles tendon.

On cross-examination, Petitioner admitted that she was not the only teacher in any of the rooms that she worked in. Petitioner also admitted that the teacher to child ratio was one teacher to four children in both the infant and the toddler rooms. Petitioner admitted that there were always other teachers in the room with her and that student workers would come in and out throughout the day. Petitioner also admitted that she was not responsible for putting all of the children to sleep. Further, Petitioner admitted that in the infant room there were only cribs, in the smaller toddler room there were both cribs and cots, and in the older toddler room there were only cots. Petitioner testified that she worked eight years in the infant room, which did not have cots. Petitioner testified that there were adult size chairs to sit in in all the rooms.

Petitioner presently has trouble getting in and out of bed and can only walk short distances. She occasionally feels a sharp pain in her knee. She would like to undergo the surgery recommended by Dr. Mall.

Petitioner acknowledged being examined by Dr. Hulsey and she identified Petitioner's Exhibit 8 as the job description she typed up and gave to Dr. Hulsey to review.

Linda Drust was called by Respondent to testify. Ms. Drust is the current director of the day care Petitioner was employed by. Ms. Drust began her employment at the day care in March 2012. Ms. Drust testified that Petitioner did report a work place injury on July 23, 2013 and that her "son wanted her to start a paper trail". Ms. Drust testified that in addition to other teachers being present in Petitioner's classrooms, student workers also were present. Ms. Drust testified that while getting up and down was a significant part of Petitioner's job, it did not require her to be directly on her knees for extended periods of time. When asked about Petitioner's cleaning duties, Ms. Drust testified at the time Petitioner performed these duties, she was not employed by Respondent. Ms. Drust further testified she had no direct personal knowledge of Petitioner's job prior to 2012.

The Arbitrator Concludes:

Issue (C) Accident and Issue (F) Causal Connection:

Petitioner sustained an accident on July 23, 2013 that arose out of and in the course of her employment with Respondent. It was on July 23, 2013 that Petitioner reported her right knee problems to her employer and stated her belief that they were caused by her job duties. While Petitioner may have begun treating for her right knee problems before that date, the records from those doctors fail to contain any reference to a discussion with Petitioner regarding the etiology of her right knee complaints or (as in the case of Dr. Barr) indicate that Petitioner inquired about work-relatedness but was advised her condition was most likely degenerative. A doctor's opinion as to causation is not absolutely necessary in order for a manifestation date to occur. In this instance it was Petitioner herself who believed she had sustained an "accident" to her right knee as a result of her job and reported same to her employer. With regard to the "arising out of" element, the Arbitrator finds Petitioner's job duties over thirteen years for Respondent exposed her to a greater risk of knee problems than that of the general public. It is clear from the testimony of Petitioner, and the exhibits regarding her job duties, that her job duties required a significant amount of bending, stooping and kneeling. The Arbitrator finds the causation opinion of Petitioner's treating physician, Dr. Mall to be more persuasive on the issue of accident and causal connection than that of Respondent's Section 12 examiner, Dr. Hulsey.

Petitioner's current right knee condition is causally connected to her work for Respondent over thirteen years. Petitioner's undisputed testimony is that she did not have right knee pain when she began her employment with Respondent and her pain gradually increased over time with her work activity. Further, the Arbitrator finds the opinions of Dr. Mall more persuasive than those of Dr. Hulsey regarding whether Petitioner's work was a factor in her current condition of ill-being. While Dr. Mall was not deposed his records reflect his understanding that Petitioner worked for many years in an early childhood program performing a lot of sitting, standing and kneeling. Thus, he was familiar with Petitioner's general duties. Respondent could have deposed Dr. Mall

regarding his knowledge but did not do so. Additionally, Dr. Hulsey conceded on cross-examination that Petitioner's activities could aggravate her osteoarthritis. A careful reading of his deposition testimony reveals that he was very careful to opine that Petitioner's job did not cause or accelerate her osteoarthritis in her knee. On cross-examination, however, he was asked about the relationship between aggravation and activities and ultimately conceded that activities, including Petitioner's job duties, could aggravate her knee.

Issue (E) Was timely Notice provided:

Petitioner provided timely notice of her accident. With regard to the July 23, 2013 accident, Petitioner provided notice that same date. (See RX 1, PX 3)

Issue (K) Prospective Medical Care:

Respondent shall authorize and pay for the treatment recommended by Dr. Mall. The Arbitrator finds Petitioners' pending right knee replacement with Dr. Mall to be reasonable and necessary. There is no dispute in any of the evidence presented at hearing about whether or not Petitioner is in medical need of a right knee replacement.

Issue (J) Medical Expenses:

Petitioner is awarded the medical bills found in Petitioner's Exhibit 9 subject to the Medical Fee Schedule. Said bills are found to be reasonable and necessary. There is no dispute in any of the evidence presented at hearing about whether or not Petitioner's conservative medical care prior to hearing was reasonable and necessary.

****

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

JANET CARAWAY,

Petitioner,

vs. NO: 14 WC 43373

SOUTHERN ILLINOIS UNIVERSITY, CARBONDALE,

16IWCC0109

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission issued a separate decision for case 13 WC 39289. The Commission notes that the lone difference between case 13 WC 39289 and 14 WC 43373 is the date of manifestation. The facts for both cases are otherwise identical in that they alleged a repetitive trauma injury due to repetitive bending, squatting, and kneeling. The Commission therefore incorporates and adopts its findings of fact and conclusions of law from case 13 WC 39289. The Commission affirms the Arbitrator's finding that petitioner failed to provide timely notice of her alleged August 19, 2013 accident. The Commission further finds that Petitioner failed to prove accident and causal connection for the reasons set forth in case 13 WC 39289. Petitioner's claim for compensation is therefore denied.

16IWCC0109

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed May 5, 2015, is hereby modified as stated above, and otherwise affirmed and adopted.

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

DATED: FEB 8 - 2016

MJB/tdm
O: 12-14-15
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

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

JANET CARAWAY
Employee/Petitioner

Case# **14WC043373**

13WC039289

SIU-C
Employer/Respondent

16IWCC0109

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

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

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

1239 KOLKER LAW OFFICES PC
JASON R CARAWAY
9423 W MAIN ST
BELLEVILLE, IL 62223

0558 ASSISTANT ATTORNEY GENERAL
NICOLE M WERNER
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

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

MAY 5 - 2015

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Janet Caraway
Employee/Petitioner

v.

SIU-C
Employer/Respondent

Case # 14 WC 43373

Consolidated cases: 13 WC 39289

16IWCC0109

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin**, on **March 11, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **8/19/2013**, 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.

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

In the year preceding the injury, Petitioner earned $**21,285.00**; the average weekly wage was $409.33.

On the date of accident, Petitioner was **62** 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 general credit for any medical bills paid through its group medical plan for which credit is allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove that she provided timely notice of her accident to Respondent. Petitioner's claim for compensation is denied and no benefits are awarded.

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

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

Nancy Lindsay
Signature of Arbitrator

May 3, 2015
Date

ICArbDec19(b)

MAY 5 - 2015

Findings of Fact and Conclusions of Law

At the commencement of the hearing Petitioner presented a Motion to Consolidate her two claims and without objection from Respondent, the claims were consolidated. The parties requested one decision for both cases[1]. The only difference between the two claims is the alleged date of accident, with the case of 13 WC 39289 having a date of accident of July 23, 2013 and the case of 14 WC 43373 having a date of accident of August 19, 2013. Both cases allege repetitive trauma injury to Petitioner's right knee.

In this case Petitioner alleges she sustained a repetitive trauma injury to her right knee which manifested on August 19, 2013 due to her job duties as a day care worker for Respondent. The issues in dispute are accident, notice, causation, prior medical treatment and prospective medical treatment. Two witnesses testified at the hearing: Petitioner and Linda Drust. Respondent had a representative, Jenny Batson, present throughout the hearing.

The Arbitrator Finds:

On January 25, 2013, Petitioner presented to Bianca Bottiaux, PAC at the Center for Medical Arts. (PX2). Petitioner complained of right knee and left foot pain. (PX2). Petitioner indicated that the right knee pain radiated into the right lower leg and the onset of pain was one year prior. (PX2). Petitioner had recently returned from Colorado. Petitioner indicated that the pain was aching and throbbing and aggravated by climbing stairs and movement. Petitioner denied any injury. Her pain was relieved by bracing. (PX2). Petitioner further indicated that associated symptoms were swelling, crepitus, and joint tenderness. (PX2). Ms. Bottiaux noted Petitioner was 61 years old, 60 inches tall, and weighed 169 pounds. (PX2). Petitioner's left ankle revealed crepitus. Petitioner was referred for an orthopedic consult for right knee degenerative arthritis and left Achilles tendonitis. An appointment/follow-up with Dr. Mignone was scheduled for February 11, 2013. (PX2).

On January 25, 2013, Petitioner underwent an x-ray of her right knee. (PX2). The findings indicated that there was no change from January 13, 2012. (PX2). The impression was: 1) degenerative joint disease and 2) small joint effusion. (PX2).

On May 21, 2013, Petitioner presented to Dr. Roland Barr at the Orthopaedic Institute of Southern Illinois. (PX1). Petitioner complained of pain (primarily medially) that had been going on for several years, but was progressively worsening. Petitioner also

[1] Despite the request of the parties, the Arbitrator is issuing separate decisions as recently requested by the Chairwoman of the IWCC with regard to all consolidated cases.

complained of "quite a bit of heel pain" as well and thought the two might be associated with one another. (PX1). On physical examination, Petitioner had mild swelling of the right knee and a slight varus alignment. (PX1). Petitioner had mild crepitation with range of motion, but range of motion was full. Petitioner also had quite a bit of heel pain which she associated with her knee pain. Petitioner reported having previously undergone x-rays and an MRI. (PX1). Dr. Barr noted that review of Petitioner's right knee x-rays showed advanced medial compartment osteoarthritis with bone-on-bone articulation medially and also spurring of the patellofemoral and lateral compartments. Petitioner was very tender to palpation over her left Achilles tendon. (PX1). Dr. Barr assessed Petitioner with advanced osteoarthritis of the right knee and right Achilles tendonitis. (PX1). Dr. Barr recommended a cortisone injection, which was given at that time. (PX1). Dr. Barr noted that Petitioner asked a lot of questions about whether her right knee problems were associated with her job with Respondent. (PX1). Dr. Barr further noted:

> I explained to her in depth that this is a degenerative type problem that is mostly genetic to normal wear and tear and the demands of getting up and down maybe exacerbate her symptoms, but were not the cause of her arthritis.

Dr. Barr recommended stretching for Petitioner's Achilles tendonitis. (PX1). Petitioner was to follow up in six weeks for her right knee. (PX1).

On July 23, 2013, Petitioner reported to her supervisor Linda Drust that she suffered repetitive trauma to her right knee due to her job duties. (RX1; PX 3).

On July 28, 2013 Petitioner signed her Application for Adjustment of Claim in case # 13 WC 039289. (AX 3)

On August 2, 2013, Petitioner followed up with Bianca Bottiaux, PAC, regarding complaints of right shoulder pain and right knee pain. (PX2). Petitioner indicated that she wanted a second opinion regarding her right knee. (PX2). Petitioner indicated that her right knee symptoms began years earlier and that they had gradually been worsening. (PX2). Ms. Bottiaux noted Petitioner had advanced osteoarthritis in her right knee and that Petitioner had requested a referral to Dr. Nathan Mall in Chesterfield, Missouri. (PX2). Petitioner indicated she would make her own appointment. (PX2).

On August 5, 2013, Petitioner filled out a Workers' Compensation Employee's Notice of Injury form indicating she had injured her right knee through repetitive trauma. (RX1). On this form, Petitioner indicated she notified her supervisor, Linda Drust, of said injury on July 23, 2013. (RX1; PX 3)

Respondent also tendered a "Supervisor's Report of Injury or Illness" at hearing. (RX. 2) This report was filled out by Petitioner's supervisor, Linda Drust. This form also indicates that, "In either July or August 2013, Janet visited my office to report that her knees sometimes bothered her...." (RX. 2)

On August 19, 2013, Petitioner presented to Dr. Nathan Mall at Regeneration Orthopedics. (PX4). Prior to seeing Dr. Mall, Petitioner completed a new patient intake

form. (PX4). On this form, Petitioner indicated that her reason for the visit was for workers' compensation for her right knee. (PX4). Petitioner indicated that she had been injured at work and had previously seen a doctor for her complaint. (PX4). Petitioner indicated that she heard of Dr. Mall's office through her attorney, Jason Caraway. (PX4). Petitioner marked that her problem began due to work injury/work overuse and that she had had this problem before. (PX4).

Dr. Mall noted that Petitioner had been diagnosed with osteoarthritis of the right knee. (PX4). Petitioner indicated that she had worked for many years in an early childhood program doing a lot of sitting, standing, and kneeling. (PX4). Petitioner indicated that her symptoms had been getting worse over the last few months. (PX4). Petitioner also indicated that she had gotten approximately two and a half months of relief from the cortisone injection from Dr. Barr, but that her pain was returning. (PX4). Petitioner denied any prior right knee surgeries or past significant pain in the knee. Petitioner also didn't think she'd ever been to an orthopedic surgeon before going to Dr. Barr. Petitioner denied any prior right knee surgeries or past significant pain in her right knee. Petitioner was noted to be 62 years old, five feet tall, and weighed 175 pounds. (PX4). On physical examination, Petitioner's right knee had full range of motion, tenderness on the medial and lateral side, mild effusion, some patellofemoral crepitus, but no patellar instability. (PX4). Dr. Mall noted that x-rays of the right knee demonstrated near complete loss of the joint space in the medial compartment and that the left knee had some mild osteoarthritis. (PX4). Dr. Mall's assessment was right knee osteoarthritis. (PX4). Dr. Mall recommended physical therapy and strengthening exercises, anti-inflammatory medication, and occasional cortisone injections. (PX4). A cortisone injection was given to Petitioner that day. (PX4). Dr. Mall also indicated that a total knee arthroplasty will likely be needed eventually. (PX4). Petitioner was to return on a p.r.n. basis when her cortisone shot wore off. (PX4). Petitioner was given no work restrictions. (PX4).

Dr. Mall added a note addressing causation at the end of the August 19, 2013 medical record. (PX4). Dr. Mall indicated that while Petitioner was predisposed to having osteoarthritis in her right knee, he believed that her job duties as an early childhood teacher likely expedited the process and made it occur faster than it normally would have. (PX4). Dr. Mall further stated that even if it was determined that this was a pre-existing condition; he believes that her work activities exacerbated her condition. (PX4).

A copy of Petitioner's Application for Adjustment of Claim in case # 13 WC 39289 was mailed to Respondent on November 20, 2013. (AX 3)

Petitioner's Application for Adjustment of Claim in case # 13 WC 039289 was filed with the Commission on November 26, 2013. (AX 3)

On March 10, 2014, Petitioner followed up with Dr. Mall. (PX4). Petitioner indicated that she had been doing well with the cortisone injection, but that it was starting to wear off. (PX4). Petitioner also indicated that she had been off work for her left Achilles tendon which had been repaired. Petitioner reported that her knee actually got

better while off work despite walking on it somewhat unevenly and having it bear a lot of stress. Now that she was walking more normally, Petitioner was noting more right knee pain as well. On physical examination, Petitioner's right knee pain had full range of motion, varus deformity more so on the right than the left, medial joint tenderness, mild effusion, and no patellar instability. (PX4). Dr. Mall's assessment was right knee osteoarthritis. (PX4). Dr. Mall noted that he wanted to give her additional time to see how she does after she no longer had to wear the boot for her left ankle. (PX4). Dr. Mall indicated that he would continue to follow Petitioner and treat with cortisone injections as long as she was getting three months relief from them, after that she will likely need a total knee arthroplasty. (PX4). Again, Dr. Mall noted he believed Petitioner's work duties aggravated her condition. (PX4). Petitioner was given no work restrictions. (PX4).

On May 2, 2014, Petitioner underwent a Section 12 examination with Dr. Richard E. Hulsey regarding Petitioner's right knee. (RX6). In anticipation of the exam Petitioner had prepared a detailed description of her work duties and their impact on her right knee. (PX 8) Dr. Hulsey performed a physical examination, reviewed Petitioner's medical records, and took a verbal history from Petitioner. (RX6). Petitioner also gave Dr. Hulsey a typewritten description of her job duties for Respondent. (RX6, PX8). Petitioner indicated that she would frequently get up and down off the floor in order to care for the children and clean the room. (RX6). Petitioner also told Dr. Hulsey that she would have to kneel and squat frequently throughout the day. (RX6). Petitioner further indicated that she did not have a specific injury, but rather that pain developed over the last several years and gradually became worse. (RX6). On physical examination, Petitioner walked without support, was able to get in and out of her chair without difficulty, had pronounced genu varum deformity of the right knee, lacked full extension, flexed to approximately 125 degrees, tenderness over joint lines, and light crepitation with flexion and extension. (RX6). Dr. Hulsey took x-rays of Petitioner's right knee which showed severe osteoarthritis with total obliteration of the medial compartment and varus deformity, and moderate osteophyte formation off the patella and lateral compartment. (RX6). X-ray of the left knee showed mild changes. (RX6). Dr. Hulsey opined Petitioner had end-stage osteoarthritis in her right knee and would need a total knee replacement. (RX6). Dr. Hulsey further opined that Petitioner's right knee condition is strictly a degenerative process that is common in her age group and that the work activities that she described did not cause or accelerate the arthritic process. (RX6). Dr. Hulsey opined that with the severity of the changes seen on the x-rays any activities of daily living could exacerbate her pain and that Petitioner's need for a total knee replacement was not related to her job duties for Respondent. (RX6).

On May 5, 2014, Petitioner followed up with Dr. Mall. (PX4). Petitioner indicated that she continued to have right knee pain. (PX4). Petitioner also indicated that she had been off work for an Achilles tendon injury and had been somewhat better in terms of her right knee. (PX4). Petitioner was noted to be five feet tall and weigh 185 pounds. (PX4). Petitioner had varus deformity more so on the right than the left, medial joint tenderness, and limited range of motion of the right knee from about five degrees short of full extension to 110 degrees of flexion. (PX4) Dr. Mall's assessment was right knee osteoarthritis aggravation. (PX4). Dr. Mall recommended another cortisone injection that

performed that day and additional physical therapy for quadriceps strengthening. (PX4). Dr. Mall noted that Petitioner's complaints seemed somewhat better while being off work and "this is an indication that her job duties are aggravating her osteoarthritis in her right knee." (PX 4) He believed she would need a total knee replacement eventually. (PX4). Petitioner was to return in three months or when her pain returned. (PX4). Petitioner was given no work restrictions. (PX4). No further medical records were admitted into evidence.

Dr. Hulsey was deposed on September 8, 2014. (RX7). Dr. Hulsey is an orthopedic surgeon board certified in orthopedic surgery. (RX7, p. 6) Dr. Hulsey testified that Petitioner described her job duties as taking care of infants and toddlers, frequently being on her knees, squatting up and down, and cleaning the room at the end of the day. (RX7, p. 13). Dr. Hulsey also testified that Petitioner provided him with a written job description of her duties that he reviewed. (RX7, p. 13). Dr. Hulsey testified that Petitioner did not have any significant complaints or symptoms with her left knee, which he stated was consistent with a degenerative condition, as one side is frequently more affected than the other. (RX7, p. 14). Dr. Hulsey testified that Petitioner had advanced osteoarthritis of the right knee. (RX7, p. 15). He further testified that Petitioner's job duties did not cause or accelerate her condition. (RX7, p. 15). Dr. Hulsey testified that the basis of his opinion was that the degree of kneeling or squatting would not have accelerated the process as this is a long-term degenerative process involving genetics, Petitioner's weight, and other factors. (RX7, p. 15). Dr. Hulsey testified that any activities of daily living could exacerbate her degenerative condition. (RX7, pg. 15). Dr. Hulsey testified that Petitioner's age and weight would be risk factors that could affect her right knee condition. (RX7, p. 16). Dr. Hulsey testified that if Petitioner underwent a total knee replacement it would not be due to her alleged work-related injury or repetitive trauma. (RX7, p. 16). On cross-examination, Dr. Hulsey testified that there are activities that can accelerate the osteoarthritis process, like high impact activities such as running and jumping where the knees see more stress than kneeling and squatting. (RX7, p. 18). Dr. Hulsey further testified that he did not know of any study that suggests kneeling on a floor or squatting accelerated or caused osteoarthritis. (RX7, p. 22). Dr. Hulsey testified that he did not believe that Petitioner's job duties accelerated her osteoarthritis and that she would have needed a knee replacement regardless of her job. (RX7, p. 24).

On cross-examination, Dr. Hulsey was asked if Petitioner's work could have caused her to have symptomatic pain related to her osteoarthritis. Dr. Hulsey responded, "Again, any activity I think she does, whether it's at her job or at home would cause increasing pain and discomfort." (RX 7, p. 20) Dr. Hulsey was asked if Petitioner's work "had anything, no matter how minute, anything at all to do with what you say she needs, which is a total knee?" (RX 7, pp. 20-21) Dr. Hulsey responded, "If you put it that way, then yes, I would say it plays a role in the sense that it's part of her everyday activities." (RX 7, p. 21) He went on to state that activities can aggravate her knee. (RX. 7, p.22)

On December 18, 2014 Petitioner signed her Application for Adjustment of Claim in case # 14 WC 043373. A copy of the Application was sent to Respondent that same

day. The Application for Adjustment of Claim was filed with the Commission on December 24, 2014. (AX 4)

At the hearing Petitioner testified that she has worked at Rainbow's End Child Development Center on the campus of SIU Carbondale for thirteen years. During her time at the day care facility she worked in a number of different classrooms.

Petitioner first worked in the "infant room" for seven years. During this time Petitioner would sit on the floor with the children, rock them to sleep and change their diapers. Petitioner testified she frequently bent to pick up various toys. As Petitioner was the closing teacher, she was charged with cleaning the classroom at the end of each day. This involved picking up toys off the floor, disinfecting them and returning them to the shelves. Each Friday, Petitioner would get down on her hands and knees to clean the thin mat the children played on. Petitioner testified this job in the infant room required her to get up off and down onto the floor a number of times each day.

After her seven years in the infant room, Petitioner was transferred to the "younger toddler" classroom. She worked in this classroom for three years. Again, Petitioner was tasked with picking up toys throughout the day. In this classroom some of the children slept close to the floor on cots. Petitioner testified she was up and down off the floor to assist with picking up and cleaning toys and putting the children to sleep on the cots and reading to them. Petitioner explained she would also kneel to care for the children. There were twelve children in this classroom.

After three years in the "younger toddler" classroom, Petitioner was transferred back to the "infant" room. She returned to the infant room for one year. While back in the infant room for this assignment, her duties did not change from her previous time in the classroom.

Petitioner next worked in the "older toddler" classroom. Again, Petitioner would bend down and get up and off the floor to assist the children while going to sleep on cots. Petitioner also got up and down off the floor to read to the children. Again, Petitioner was charged with cleaning the classroom and would bend down to pick up toys so that they could be disinfected. Once again, Petitioner would get up and down from the floor to read to the children. There were fifteen children in this classroom.

Petitioner further testified that in each of her assigned classrooms there were other teachers as well. Petitioner also testified that she was not solely responsible for putting all of the children in her classrooms to sleep.

Prior to beginning work for Respondent Petitioner suffered no major trauma or accident to her right knee. Petitioner testified that her knee pain became noticeable after approximately six months of employment with Respondent. She testified this knee pain worsened over her thirteen year career at the day care facility and occurred while performing her job duties for Respondent.

Petitioner testified she sought active medical care for her right knee in 2013. She first treated with her primary care physician, Dr. Migone, on January 25, 2013. She

acknowledged that she said nothing specific about her knee pain being associated with her work activities at that time.

Petitioner then saw an orthopedist, Dr. Barr, on May 21, 2013. Petitioner testified that while she was at her appointment with Dr. Barr and that she asked him if her knee pain was related to her work and that he did not inform her that her current condition was work-related.

Sometime after this appointment, Petitioner received a letter from Dr. Barr's office with a copy of the medical record dictated from her appointment on May 21, 2013. Petitioner testified that within thirty days or so of receiving this report she had a formal conversation with her supervisor, Linda Drust. Petitioner testified she spoke to Ms. Drust on July 23, 2013, regarding her right knee problem. Petitioner testified that in this conversation, Ms. Drust indicated that she had been checking into some new flooring for the classrooms.

After seeing Dr. Barr, Petitioner returned to see her primary care physician, Dr. Migone, on August 2, 2013. (PX 2) Petitioner testified that Dr. Migone referred her to Dr. Mall. Petitioner testified that her granddaughter had seen Dr. Mall. Petitioner's granddaughter is the child of Petitioner's attorney, Jason R. Caraway.

Over the course of her treatment with Dr. Mall, Petitioner has received three injections to her right knee which she testified only provided temporary relief of her symptoms. In addition, Petitioner underwent a month of physical therapy as ordered by Dr. Mall as well.

Petitioner testified that while being treated by Dr. Mall, she had a non-work-related accident in December of 2013 when she fell and tore her Achilles tendon in December 2013. Petitioner testified she did not fall on her right knee in this accident and did not injure her right knee in any way. Petitioner ultimately underwent surgery for her Achilles injury and was off work for an extended period of time. Petitioner was released to return to work for her Achilles injury in May of 2014. Petitioner did not return to work, however, and, instead, decided to retire due to her achilles tendon.

On cross-examination, Petitioner admitted that she was not the only teacher in any of the rooms that she worked in. Petitioner also admitted that the teacher to child ratio was one teacher to four children in both the infant and the toddler rooms. Petitioner admitted that there were always other teachers in the room with her and that student workers would come in and out throughout the day. Petitioner also admitted that she was not responsible for putting all of the children to sleep. Further, Petitioner admitted that in the infant room there were only cribs, in the smaller toddler room there were both cribs and cots, and in the older toddler room there were only cots. Petitioner testified that she worked eight years in the infant room, which did not have cots. Petitioner testified that there were adult size chairs to sit in in all the rooms.

Petitioner presently has trouble getting in and out of bed and can only walk short distances. She occasionally feels a sharp pain in her knee. She would like to undergo the surgery recommended by Dr. Mall.

Petitioner acknowledged being examined by Dr. Hulsey and she identified Petitioner's Exhibit 8 as the job description she typed up and gave to Dr. Hulsey to review.

Linda Drust was called by Respondent to testify. Ms. Drust is the current director of the day care Petitioner was employed by. Ms. Drust began her employment at the day care in March 2012. Ms. Drust testified that Petitioner did report a work place injury on July 23, 2013 and that her "son wanted her to start a paper trail". Ms. Drust testified that in addition to other teachers being present in Petitioner's classrooms, student workers also were present. Ms. Drust testified that while getting up and down was a significant part of Petitioner's job, it did not require her to be directly on her knees for extended periods of time. When asked about Petitioner's cleaning duties, Ms. Drust testified at the time Petitioner performed these duties, she was not employed by Respondent. Ms. Drust further testified she had no direct personal knowledge of Petitioner's job prior to 2012.

The Arbitrator Concludes:

Issue (E) Was timely Notice provided:

Petitioner failed to provide timely notice of her alleged August 19, 2013 accident to Respondent. Notice of an injury must be given within 45 days of the alleged accident. Notice of an alleged accident cannot be given before the accident has occurred. Petitioner failed to provide any testimony as to when and how she provided notice of her August 19, 2013 accident to Respondent. Petitioner's claim for compensation is denied.

Issue (C) Accident and Issue (F) Causal Connection:

Based upon the Arbitrator's determination on notice above, the issues of accident and causal connection are moot.

Issue (K) Prospective Medical Care:

Based upon the Arbitrator's determination on notice above, the issue of prospective medical care is moot.

Issue (J) Medical Expenses:

Based upon the Arbitrator's determination on notice above, the issue of medical expenses is moot.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Terri Robbins,

Petitioner,

vs. NO: 13 WC 28754

Jo-Ann Stores, Inc.,

16IWCC0110

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, extent of temporary total disability, maintenance, wages and rate, nature and extent of permanent disability, medical expenses, and a motion to strike the deposition and report of Dr. Watson 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 affirms the Arbitrator's finding that Respondent failed to show that Dr. Watson's estimate during his deposition testimony that he reviewed 6 to 7 inches of Petitioner's medical records, when it was actually 1 inch of records, is a sufficient basis upon which to bar his entire testimony. The Commission affirms the Arbitrator's finding that Dr. Watson's estimate that he reviewed 6 to 7 inches of records was simply a mistake and his testimony during his deposition is consistent with Petitioner's medical records offered into evidence by Petitioner and not objected to by Respondent. The Commission further affirms the Arbitrator's finding that Respondent failed to show that there was any testimony during Dr. Watson's deposition from which one could reasonably infer that it was based on medical records of Petitioner that were not offered into evidence. The Commission affirms the Arbitrator's denial of Respondent's Motion to Bar the Testimony of Dr. Watson. The Commission affirms all else.

16IWCC0110

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's Motion to Bar the Testimony of Dr. Watson is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $538.67 per week for a period of 26-6/7 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 $538.67 per week for a period of 7-6/7 weeks, that being the period of maintenance under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable and necessary medical services for treatment of Petitioner's lumbar spine from June 26, 2013 through March 5, 2015, as provided in §8(a) and §8.2 of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits commencing March 24, 2014 of $179.69 per week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in §8(d)1 of the Act.

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 $14,313.12 in TTD benefits and $5,817.60 for indemnity advance, for a total credit of $20,130.72.

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

16IWCC0110

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $7,600.00. 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: FEB 8 - 2016
MB/maw
o12/10/15
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROBBINS, TERRI
Employee/Petitioner

Case# **13WC028754**

16IWCC0110

JO-ANN STORES INC
Employer/Respondent

On 3/24/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

0834 KANOSKI BRESNEY
CHARLES EDMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

1872 SPIEGEL & CAHILL PC
MILES P CAHILL
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

16IWCC0110

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

TERRI ROBBINS,
Employee/Petitioner

v.

JO-ANN STORES, INC.
Employer/Respondent

Case # **13** WC **28754**

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 **Quincy**, on **3/5/14**. 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 **Motion to Strike deposition of Dr. Watson**

FINDINGS

On **6/26/13**, 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 $**42,016.00**; the average weekly wage was $**808.00**.

On the date of accident, Petitioner was **42** 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 $**14,313.12** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**5,817.60** for indemnity advance, for a total credit of $**20,130.72**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Respondent's Motion to Bar the Deposition of Dr. Watson is denied.

Respondent shall pay Petitioner temporary total disability benefits of $538.67/week for 26-6/7 weeks, commencing 6/26/13 through 7/20/13, and commencing 8/18/13 through 1/27/14, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $538.67/week for 7-6/7 weeks, commencing 1/28/14 through 3/23/14, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services for her lumbar spine from 6/26/13-3/5/15, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner permanent partial disability benefits, commencing 3/24/14, of $179.69/week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, 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.

Signature of Arbitrator

3/20/15
Date

MAR 24 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 42 year old manager, sustained an accidental injury to her low back that arose out of and in the course of her employment by respondent on 6/26/13. As a manager for respondent petitioner oversaw all aspects of the business, including bringing merchandise in, stocking the shelves, customer service scheduling, hiring, firing, self audits and ordered supplies. Petitioner started working for respondent on 4/15/13.

Prior to 6/26/13 petitioner had undergone a fusion of her low back in 2007. This procedure was performed by Dr. Reynolds, a neurosurgeon. Petitioner testified that following her discharge from care by Dr. Reynolds in 2007 she had no ongoing problems with her back that required her to follow up with him, or any other doctor. However, petitioner did state that she underwent an MRI of her low back in 2010. This test was ordered by Dr. Raif. Petitioner testified that she was not sure why she had the MRI of her low back in 2010. Petitioner denied any back pain in 2013 prior to the accident. She also testified that she was not under any restrictions when she went to work for respondent.

On 7/19/10 petitioner presented to Dr. Raif, her primary care physician. She reported that she heard a pop in her low back when she was bent over picking something up the day before. She reported pain and difficulty ambulating. She stated that her right leg felt weak and she had radiating pain down her leg. She was assessed with low back pain and right sciatica. She was prescribed Flexeril. An MRI of the low back was ordered. She was restricted from lifting. There are no further records in the Quincy Medical records regarding any follow-up after this incident until the accident on 6/26/13.

In addition to her job with respondent, petitioner lives on a farm and operates her farm. She testified that she was limited when she worked the farm before the accident on 6/26/13.

On 6/26/13 petitioner arrived early at work to unload freight from a semi-truck that had come in the night before that they did not get done. Both the operations and merchandising managers also arrived early to help. At one point, petitioner went back to the office to get cash together for the deposit. She then went to the office where all the merchandise was. While walking there she passed the bathroom and noticed no one had cleaned the bathroom floors the night before. As a result, she went and got the commercial grade janitor mop bucket to fill with chemicals and water. As she was filling the mop bucket, with the squeegee handle off to the side, she leaned forward to grab the metal handle. The handle was stuck. She gave it a pull and felt a pop in her back. She experienced excruciating pain in her back. It was a sharp stabbing pain in her low back on the right side. She held onto the mop handle and hollered for someone to help her. Her co-workers came to her assistance.

Petitioner's husband took her to see Dr. Raif, that same day. She was also seen by Karen Powers, FNP. She gave a consistent history of the accident that day. Petitioner was assessed with back pain with radiation and lumbar disc disorder due to prior surgery with pin and screws. Petitioner underwent a Toradol injection and was prescribed medication. She was also referred to her prior neurosurgeon for possible movement of hardware after prior surgery. Petitioner was taken off work pending recheck.

On 6/27/13 petitioner underwent x-rays and a CT scan of her lumbar spine. The impression was postsurgical change without acute osseous abnormality. These films were reviewed by Dr. Reynolds.

On 6/28/13 Dawn Kindle, LPN, from Dr. Reynolds office, called Dr. Raif's office regarding Dr. Reynold's review of the CT scan performed 6/27/13. It was noted that Dr. Reynolds was of the opinion that the imaging was okay. In a report dated 6/28/13 he noted that petitioner had a left L5-S1 TLIF, and the fusions were solid. He noted that there was no hardware complication. He was of the opinion that it was certainly some kind of muscular event. He saw no concern.

On 7/2/13 petitioner was reexamined and continued to complain of pain in her low back. She was prescribed a course of physical therapy and continued off work. On 7/9/13 petitioner followed up with Dr. Raif. It was noted that Dr. Reynolds had reviewed the CT scan, and petitioner was still in therapy. She reported that her pain was improving, but she still had difficulty with moving and changing positions frequently. She was assessed with a sprain/strain of the lumbar spine. Petitioner was continued in physical therapy and off work.

On 7/16/13 petitioner followed up with Powers. She noted that she was doing better. She was continued in physical therapy and on prescription medication. She was released to work with a ten pound weight restriction, and 80% desk work effective 7/21/13. On 7/22/13 petitioner noted that physical therapy had been helping. She stated that she had been working 45 hours a week, and her boss had given her more desk time. She felt 9 hours a day was too much because by the end of the day she was real sore. Petitioner was prescribed a home TENS unit by Powers, and returned to work with restrictions on working only 4 hours a day, 5 days a week. She was continued in physical therapy. On 8/5/13 her condition was essentially unchanged and her restrictions were continued, with an additional 10 pound weight restriction. Her assessment remained the same.

Petitioner testified that while working 4 hour days leaning forward to cut materials hurt her back. She also testified that reaching overhead hurts her back. She stated that awkward positions and twisting bothered her and caused her pain.

On 8/19/13 petitioner returned to Dr. Raif's office and reported that she still had her TENS unit and was still in therapy. She reported that she still had a lot of muscle tension and did not feel she was progressing well.

She denied any radicular symptoms. She stated that she was still having difficulty at work with prolonged sitting and standing.. Her assessment remained unchanged. Dr. Raif took petitioner off work.

On 9/4/13 petitioner followed-up with Dr. Raif. She reported that she was feeling better and ambulating better. She reported that she had been discharged from therapy. Petitioner has some residual muscular pain. She was instructed to continue with her home exercises and TENS unit. She was restricted to work with a 20 pound weight restriction. Dr. Raif told petitioner that she may need to consider a change in work if she continues to have persistent low back pain. He told her she may need to consider more sedentary work if she continues with persistent low back pain. Dr. Raif noted that he would consider lessening petitioner's restrictions on her next visit if she was better.

Petitioner testified that after she got these restrictions she talked to Amy McCartney with respondent. She testified that McCartney told her that they had no position to offer her within her restrictions. She testified that respondent never offered her any vocational rehabilitation. As a result, petitioner began looking for a job within her restrictions. She testified that she did most of her job searches online. She testified that she went to Monster.com a lot to look for a job.

On 10/7/13 petitioner followed up with Dr. Raif. Petitioner reported that she had primarily muscular pain in the right gluteal, was only using Motrin as needed, had completed therapy, was still having some pain and stiffness with activity, was ambulating okay with occasional sharp pain activity related, no radicular pain, no weakness, and a pain level from 4 to 7 on a scale of 10. Petitioner was still off work pending a Functional Capacity Evaluation (FCE). Dr. Raif examined petitioner and was of the opinion that she was slowly improving and had probably reached maximum medical improvement. He recommended continued use of medications and TENS unit as needed. He noted that if her pain persisted she might want to consider trigger point injections. He continued petitioner's 20 pound weight restriction until she has her FCE. Respondent did not authorize the FCE.

On 1/10/14 petitioner underwent a Section 12 examination by Dr. Mirkin, an orthopedic surgeon and spinal specialist, at the request of the respondent. Dr. Mirkin reviewed her medical records including the MRI report for the MRI of the lumbar spine taken 7/20/10. He noted that it revealed postoperative changes at L5-S1, and mild degenerative changes at L4-L5. Petitioner complained of occasional tightness in the right buttock. He noted that she told him that she wanted to return to work. Dr. Mirkin also performed a physical examination. His impression was preexisting degenerative spine disease, disc protrusion at L4-L5, and signs of a fusion at L5-S1. He was of the opinion petitioner sustained a lumbar strain as a result of the work accident on 6/26/13, and was now doing very well. He was of the opinion that petitioner's lumbar strain had resolved. He opined that petitioner sustained an aggravation of her preexisting back condition and a lumbar strain as a result of the work

injury. He was of the opinion that petitioner had reached maximum medical improvement and was capable of returning to full duty work without restrictions.

On 3/3/14 petitioner underwent a FCE at Quincy Medical Group. She gave a maximum voluntary effort and no extreme overt pain behaviors were seen during the evaluation. The Waddell testing was negative for nonphysical low back pain. Petitioner's gait deficit was not consistent. Petitioner was found to be capable of lifting 20-25 pounds and working at the Medium Physical Demand Level. Work conditioning was recommended. It was noted that petitioner's current job was not at this physical demand level.

On 3/5/2014 petitioner was extended a job offer as In-House Agent Assistant from Whitetail Properties Real Estate, LLC. The position was a full time position. Petitioner accepted the offer and began working on 3/24/14.

On 3/10/14 Dr. Raif gave petitioner permanent weight restrictions of 20-25 pounds. He noted that petitioner had pain with repetitive activity and lifting, that is controlled with medications.

On 3/26/14 Dr. Mirkin drafted an addendum report after reviewing records and petitioner's FCE. He opined that the restrictions placed on the petitioner in the FCE were not reasonable and/or necessary. He did not believe there was any objective reason petitioner needed permanent restrictions. He did not believe petitioner needed to limit sitting to 20 minutes, standing to 5 minutes, and walking for 30 minutes. He noted that petitioner sat for more than 20 minutes in his waiting room. He reiterated his opinion that petitioner could return to work without restrictions if she so desired.

On 6/24/14, the General Manager at Whitetail Properties, proposed a 90 day increase. It was an increased salary of $26,500. This increase was agreed to by Jeff Propst, Mark Williams, and Gabe Adair on 6/23/14 via email. From January through December 2014 petitioner earned $5,776.53.

On 7/8/14 respondent had MedVoc perform a file review and Labor Market Survey. This was performed by Julie Bose, Rehabilitation Counselor. Bose reviewed the records provided, and reviewed the job description of petitioner's current position as an in-house broker assistant, and her job description with respondent. She also reviewed the personnel records from Christopher and Banks, as well as Claire's Boutique, and petitioner's resume. Based on all this Bose was of the opinion has acquired skills transferable to positions such as a retail store manager and retail district manager trainee. Bose found petitioner was petitioner was currently employable as a retail store manager or retail district manager trainee at an entry level salary of $38,633 per year.

Bose provided her Labor Market Survey Results. She noted that she contacted 34 prospective employers. Of the 34 prospective employers contacted, 16 did not respond. 18 prospective employers agrees to participate in the Labor Market Survey. Of the 18 that participated, 3 indicated that petitioner would not be an appropriate candidate for a position in their organization, 2 indicated that they would be unable to accommodate petitioner's work restrictions, and 3 indicated that they require a bachelor's degree. 15 prospective employers were of the opinion that petitioner had the work history and residual functional capabilities necessary to perform work at their organization. Of these 15, 8 indicated that they were hiring, and 7 stated that they did not have a hiring need. Of the 8 that indicated that they were hiring, the salary range varied from $30,000 to $50,000 annually. Bose identified the mean salary of the positions targeted as $38,633. Bose was of the opinion that petitioner was employable within the restrictions outlined in the FCE as a retail store manager or retail district manager trainee. Bose was of the opinion that petitioner could anticipate a starting salary of $38,633 per year, and this salary would increase with advancement and promotion opportunities. The prospective employers were identified in Bose's report. These prospective employers included The Cash Store, Russell Stover Candies $30,000 - $35,000 annually; Denver Mattress Co. $40,000 to $45,000 annually; and Sleep Number, $45,000 to $50,000 annually. Petitioner testified that these jobs were in Springfield, IL, which is 90 miles from her home.On 10/7/14 petitioner underwent a Section 12 examination by Dr. Michael Watson, an orthopedic surgeon, at the request of her attorney, Charles Edmiston. Petitioner reported that she currently worked for Whitetail Properties, a real estate group, as a broker specialist. She reported that the majority of her day is spent using a computer, managing emails, faxing, and other clerical duties. Petitioner testified that her job does not require any lifting, and she is able to change positions and move around to take walks whenever needed. Dr. Watson noted that Dr. Raif's office notes indicate that petitioner was evaluated for low back pain by him on 7/19/10, but there were no office notes for that visit provided. Petitioner complained of pain in the right buttock region that radiates dnto the sciatic notch, with tightness. He noted no significant radiation of pain into the leg or radiculopathy. Dr. Watson noted that petitioner was uncomfortable throughout her examination and requested that she be allowed to change positions and sit and stand at times, to relieve her discomfort. Petitioner was tender in the right lumbosacral region and in the sciatic notch. She had pain with straight leg raising that was limited to the sciatic notch only, with no radiculopathy. No focal weakness was noted in the right lower extremity. She could bend to her knees. Beyond that she had severe pain. She also had pain with hyperextension and lateral bending.

Upon completion of his record review and examination of petitioner, Dr. Watson's diagnosis was degenerative disc disease. He believed this was preexisting , and the work injury as described, accelerated and aggravated this condition to the point where she needed treatment, and to that point continues to have pain, and will likely continue to have pain. He based this opinion on the fact that petitioner had been asymptomatic for

years, and since the injury she has continued to have pain in the low back which has not improved despite conservative treatment. Dr. Watson believed that petitioner's treatment had been reasonable and necessary and causally related to the work related injury. He believed petitioner needs work restrictions, and those restrictions are causally related to the work related accident.

Based on her history, her physical examination and her work capacity evaluation, Dr. Watson believed that petitioner's work restrictions should include no lifting greater than 15 pounds occasionally, and no lifting greater than 5 pounds frequently. He was of the opinion that petitioner could do sedentary work, but be able to stand or walk occasionally, perhaps every 10-15 minutes of each hour to alleviate her low back pain. Dr. Watson believed petitioner's prognosis was fair. He also believed she was at maximum medical improvement, and these restrictions were permanent. Dr. Watson noted that he reviewed Dr. Mirkin's Section 12 examination of petitioner. He noted that petitioner told him that Dr. Mirkin's statements that on several occasions she was doing well and that she had been requesting to return to work without restrictions, were untrue. He noted that she never told this to Dr. Raif and Dr. Raif never denied such requests because they were never made.

Petitioner offered into evidence her Job Search records from mid January 2014 through 2/23/14. Petitioner applied for jobs online. These applications/resumes were sent to US Bank Sales & Service, Quincy Compressor, CGB Grain Division/CGB Enterprises, Inc., Fifth Gear, Bartlett and Company, Quincy Herald, Clearing Building Corp, Bank of Springfield, GSHQ, State Farm, Maschhoffs, Harpole's Heartland Lodge, Pike Highway, and Home Depot.

On 12/29/14 the evidence deposition of Dr. Mirkin was taken on behalf of the respondent. Dr. Mirkin sees patients in his office three days a week and does elective spinal surgeries two days a week. Occasionally he does some general orthopedic surgery as well. He spends about 10% of his practice doing medical reviews on patients he does not treat. Dr. Mirkin noted the L4-L5 bulging disc on the July 2010 MRI was the same as that seen on the April 2006 MRI, and the CT scan taken following the injury. He opined that it was just an anatomic finding. Dr. Mirkin opined that petitioner sustained a lumbar strain at work in June 2013, and her strain resolved. He opined that this was a temporary aggravation. He stated that it is common for patients who have lumbar fusions and disc bulges and protrusions to have episodal back pain. Dr. Mirkin opined that petitioner had no physical reason why she could not return to work as a manager for respondent if she wanted to. He testified that petitioner told him in her initial interview that she wanted to return to work and did not know why she was off work. Dr. Mirkin questioned the findings of the FCE because on the first page it says she is capable of working at the medium physical demand level, and later in the report states she can work at the sedentary level. He also noted that there were recommendations for further treatment, which is not the role of the FCE provider.

He saw no physical reason why petitioner should be restricted to lifting only 25 or 26 pounds. Dr. Mirkin opined that there were no changes in her physical abilities from the date of the injury that would make her be able to do less now than she could before the date of the injury.

On cross-examination Dr. Mirkin testified that people with a disc bulge may or may not have associated pain. He agreed that petitioner's injury could have aggravated or flared-up her preexisting condition. He was of the opinion that if petitioner's testimony, that she had no pain in the year preceding her injury was true, and she had pain after the injury, then the accident could possibly be a contributing cause of the flareup and symptoms. Dr. Mirkin was of the opinion that petitioner only had very mild subjective complaints when he examined her, and for that reason was of the opinion that she did not have to change her career. Dr. Mirkin stated that he has done previous examination for Spiegel & Cahill, including about 1-3 in the last six months.

On 1/28/15 the evidence deposition of Dr. Watson was taken on behalf of the petitioner. He testified that 10% of his practice is taking care of spine cases. He also reported that he does approximately one Section 12 examination a week, primarily for workers' compensation cases, with approximately 50% for petitioner and 50% for respondents. In the past it was primarily for petitioners. Dr. Watson opined that petitioner had degenerative disc disease that was preexisting and accelerated or aggravated by the work accident. He opined that the accident made her asymptomatic condition symptomatic. He opined that the treatment she received for her low back since the accident has been causally related to the accident. He further opined that petitioner was restricted from lifting greater than 15 pounds occasionally, and no lifting greater than 5 pounds frequently. He opined that petitioner could do sedentary work, but be able to stand or walk occasionally, perhaps every 10-15 minutes of each hour to alleviate her low back pain. Dr. Watson opined that these restrictions were permanent.

On cross examination Dr. Watson estimated that he reviewed 6-7 inches of records for petitioner. He testified that over the past ten months he stacked up all his records in his basement. His intent to was to start throwing them away or shredding them after a year. He testified that he went to that pile to look for petitioner's records and they were not there. Dr. Watson testified that he did not used to keep records for independent medical evaluations because all his records are electronic, and he does not consider these people his patients. He stated that he did not know the legality of keeping these records. Dr. Watson testified that he did not do any independent gathering of records for petitioner. He testified that he was forwarded the records. Dr. Watson noted that there were no acute changes when petitioner's scan from 2006 and 2013 were compared, based on the radiologist's report. Dr. Watson testified that he has not been involved in any spine surgery since 1991. Dr. Watson testified that petitioner was not taking pain medications when he examined her. Dr. Watson was of the opinion that the ability to forward flex would be impacted by a fusion. Dr. Watson was of the opinion that

symptoms can wax and wane and just because someone is determined to be at maximum medical improvement does not necessarily mean that they are not going to get any better. He was of the opinion that petitioner could improve.

On 2/3/15 petitioner's attorney Edmiston, drafted a letter to Miles Cahill, respondent's attorney. The letter stated "Enclosed are the records you requested that were sent to Dr. Watson prior to the IME appointment for our client Terri L. Robbins." Attached to this letter were the referenced records which were about 1 inch thick.

Petitioner testified that she currently earns $28,000 annually. She testified that she has her own office and can come and go as she pleases because she is salaried. She testified that she can also work from home. Petitioner does not do any lifting, and can stand and sit as needed.

Petitioner testified that she can sit for a period a time before she needs to get up and walk and stretch. She reported difficulty with vacuuming and cleaning carpets. She stated that making beds causes her pain. She testified that she is not nearly as active as she used to be and has gained a lot of weight. She also testified that she used to help out a lot more on the farm than she has over the last couple years. She testified that her job was driving the tractors but the motion bothers her now. She testified that she does not ride motorcycles a lot anymore. She also stated that physical things with her husband are not the same. Petitioner takes Tylenol and Motrin as needed, about 2-3 times a week. Petitioner also has a TENS unit that she wears at night depending on her activity that day. She stated that she may use it once a week or can go many weeks without using it. She testified that if she tries to drive a truck on the farm, she has pain over the next couple of days. She complained of tense muscles on the right side of her low back. Petitioner complained of pain daily, with some days worse than others. Petitioner denied any problems before the accident, but stated that her pain has been real bad since she got hurt on 6/26/13.

Petitioner testified that prior to 2014 she was a volunteer for the volleyball league and helped with fundraising. She testified that she only drives the tractor or 2 ton truck if needed. She stated that the tractor has air seats. She testified that she drove the truck 3 times in 2014, but did not drive it in 2015.

Petitioner testified that she did not see Reynolds after the accident on 6/26/13. She testified that she had no surgical recommendation or injections after the accident. She further testified that after her initial course of physical therapy following the accident, she did not have any other therapy.

Gary Robbins, petitioner's husband, was called as a witness by petitioner. He testified that he was present when Dr. Mirkin examined petitioner. He testified that petitioner did not tell him that she wanted to return to work without restrictions. He testified that she told him she would like to return to work, but for the pain and

restrictions. Mr. Robbins testified that Dr. Mirkin checked reflex action in the knees. He testified that Dr. Mirkin's told petitioner to go back to work, and that she would have pain for the rest of her life.

Medical records prior to the accident on 6/26/13 show that petitioner presented to Dr. Reynolds on 5/23/06 for a herniated disc after she fell off a trailer. Dr. Reynolds then performed a one level fusion in the summer of 2006. On 8/31/06 petitioner told Dr. Reynolds that she was driving a tractor, using a vacuum and mowing. Dr. Reynolds told her that that was too much activity. On 1/4/07 petitioner reported pain and radiating pain in her back despite reduced activities. On 5/31/07 petitioner was riding motorcycles with her husband and noticed leg numbness. At that time Dr. Reynolds evaluated her fusion to see if it was solid and noticed tissues pressing on the nerve root at L5-S1.

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

The parties stipulate that petitioner sustained an accidental injury to her low back that arose out of and in the course of her employment by respondent on 6/26/13. Differing opinions exist as to whether or not petitioner's injury on 6/26/13 caused a temporary aggravation of her preexisting condition, or caused a permanent aggravation, exacerbation of her preexisting condition. In support of these positions, position offered the opinions of Dr. Raif and Dr. Watson. Alternatively, respondent offered the opinions of Dr. Mirkin.

It is unrebutted that petitioner underwent a one-level fusion to her low back in 2007. This procedure was performed by Dr. Reynolds. Following post-operative treatment petitioner was released to full duty work without restrictions. In 2010 petitioner had some complaints that necessitated the need for her to undergo a MRI of her lumbar spine. Following this, petitioner was again released to full duty work without restrictions.

When petitioner began working as a store manager for respondent on 4/5/13 she did not have any restrictions. In fact, petitioner worked a heavy duty job for respondent that included the unloading of merchandise from the trucks and stocking the shelves. Petitioner worked without incident until she sustained her unrebutted injury to her low back on 6/26/13.

Immediately following the injury petitioner sought treatment and received a Toradol injection. She also underwent a CT scan that was reviewed by Dr. Reynolds. Dr. Reynold's noted that CT scan was okay, and her left L5-S1 TLIF and fusion were solid. He noted no hardware complication, and believed she had sustained some kind of muscular event.

From the date of accident petitioner continued with complaints of lumbar spine pain. She reported difficulty moving and changing positions frequently. Based on her complaints petitioner underwent a course of physical therapy. For a while petitioner was taken off work. Thereafter she was released with restrictions.

Petitioner attempted to work within her restrictions, but continued to experience increased pain. From the date of the injury, through the present date, petitioner has been either authorized off work, or restricted to light duty work by her treating physician, Dr. Raif. She has also continued to complain of increased pain and stiffness with activity, and occasional sharp pain with activity.

On 10/7/13 Dr. Raif was of the opinion that petitioner had reached maximum medical improvement. He recommended continued use of medications and a TENS unit as needed. He gave her a 20 pound weight restriction pending an FCE that respondent would not authorize. Additionally, respondent indicated that they had no work for respondent within these restrictions.

Three months later respondent finally had petitioner examined by Dr. Mirkin, an orthopedic surgeon. He opined that she sustained an aggravation of her preexisting back condition and lumbar strain that had resolved, as a result of the injury on 6/26/13. He believed she was doing very well, had reached maximum medical improvement and could return to full duty work.

On 3/3/14 petitioner finally underwent the FCE recommended by Dr. Raif in October of 2013. It was noted that petitioner gave maximum effort and had no extreme overt pain behaviors. Her Waddell testing was also negative. Petitioner was found capable of lifting 20-25 pounds and working at the Medium Physical Demand Level. Work conditioning was recommended, however, none was provided. Respondent agreed that petitioner's current job did not meet these restrictions. On 3/10/14 Dr. Raif indicated that petitioner would have permanent restrictions in line with the FCE.

After reviewing the FCE, Dr. Mirkin opined that the restrictions placed on the petitioner in the FCE were not reasonable and/or necessary. He found no objective basis for these permanent restrictions.

On 10/7/14 petitioner was examined by Dr. Watson, an orthopedic surgeon. Dr. Watson opined that the injury on 6/26/13 as described accelerated and aggravated her preexisting lumbar spine condition to the point where she needed treatment, and continues to have pain. Dr. Watson found it significant that petitioner had been asymptomatic and had received no treatment for her lumbar spine for years preceding the injury, and in fact worked a heavy duty job for respondent for months before she sustained her injury. He opined that petitioner needed permanent work restrictions, that are causally related to her work injury. He provided work restrictions greater than those outlined in the FCE.

In his deposition Dr. Mirkin opined that since petitioner's MRI results in 2006 and 2010, and the results of the CT scan following the injury were essentially the same, that petitioner had only sustained a strain that had resolved. He saw no physical reason why petitioner could not work her regular duty job for respondent. On

cross-examination Dr. Mirkin agreed that petitioner could have aggravated or flared-up her preexisting condition. He also agreed that if petitioner's testimony, that she had no pain in the year preceding the injury was true, and she had pain after the injury, then the accident could possibly be a contributing cause of her flareup and symptoms. Dr. Mirkin testified that he had performed 1-3 Section 12 examinations for respondent in the last 6 months.

In his deposition Dr. Watson opined that he currently does about 50% of his examinations for petitioner, and 50% for respondent, but in the past had done them primarily for petitioners. He opined that petitioner had a preexisting degenerative disc condition that was accelerated or aggravated by the work accident. He opined that she had been asymptomatic for years prior to the injury on 6/26/13 and has been symptomatic since.

Based on the above, as well as the credible evidence, the arbitrator finds the opinions of Dr. Raif and Dr. Watson more persuasive than those of Dr. Mirkin. The arbitrator finds their opinions are more accurately based on the credible medical evidence. It is unrebutted that petitioner had undergone a prior fusion to her lumbar spine in 2006, and after completing treatment was without any significant complaints since then, other than a short time in 2010 when a repeat MRI was performed that was unchanged from the one taken post surgery. The arbitrator further finds that in the years preceding the accident on 6/26/13 there is no credible evidence to rebut the finding that petitioner was working full duty without restrictions and had sought no medical treatment for her lumbar spine.

It is also unrebutted that following the accident the petitioner has remained symptomatic and unable to perform activities at the level she was able to before the injury. The arbitrator finds it significant that no medical provider had opined that petitioner was malingering or exaggerating her symptoms, and she was found to have performed a valid FCE.

The arbitrator finds Dr. Mirken's opinion that petitioner is able to return to full duty work is not consistent with the credible evidence and the results of the valid FCE, and appears to be based solely on the fact that there were no objective findings to her lumbar spine based on the results of the CT scan. The arbitrator finds that although there were no objective changes seem on petitioner CT scan of her lumbar spine, the credible evidence shows that petitioner has remained consistently symptomatic since the accident.

Based on the opinions of Dr. Raif and Dr. Watson, petitioner's consistent complaints following the injury, and the credible findings of the FCE, the arbitrator finds the petitioner has proven by a preponderance of the credible evidence that her current condition of ill-being as it relates to her low back is causally related to the

injury she sustained on 6/26/13. The arbitrator finds the petitioner is capable of working at the Medium Physical Demand Level.

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

Having found the petitioner's current condition of ill-being as it relates to her low back is causally related to the injury she sustained on 6/26/13, the arbitrator finds all treatment petitioner received for her lumbar spine from 6/26/13 through 3/5/15 was reasonable and necessary to cure or relieve petitioner from the effects of her injury on 6/26/13.

Respondent shall pay reasonable and necessary medical services for petitioner's lumbar spine from 6/26/13 through 3/5/15, as provided in Sections 8(a) and 8.2 of the Act

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

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Petitioner claims she was temporarily totally disabled from 6/26/13-7/20/13, and 8/18/13-3/10/14, a period of 32-6/7 weeks. Respondent disputes this period, and claims petitioner was temporarily totally disabled from 6/26/13-7/20/13, and 8/18/13-1/27/14, a period of 26-6/7 weeks.

Petitioner claims she is entitled to maintenance benefits from 3/11/14-3/23/14, a period of 1-6/7 weeks. Respondent disputes and claims "subject to proof".

The arbitrator finds the parties agree that petitioner was temporarily totally disabled from 6/26/13-7/20/13, a period of 3-4/7, and 8/18/13-1/27/14, a period of a period of 23-2/7 weeks. Therefore the arbitrator will only address the period 1/28/14-3/10/14.

Given the fact that the arbitrator has found petitioner's current condition of ill-being as it relates to her lumbar spine is causally related to the injury she sustained on 6/26/13, that petitioner had reached maximum medical improvement by these dates (1/28/14-3/10/14), and was actively pursuing a job search, the arbitrator finds the petitioner was not temporarily totally disabled during this period, but had reached maximum medical improvement and was entitled to maintenance benefits for this period. Furthermore, since petitioner had attained maximum medical improvement and was still actively pursuing a self directed job search during the period 3/11/14-3/23/14, the arbitrator further finds petitioner is entitled to additional maintenance benefits for this period.

Based on the above, the arbitrator finds the petitioner was temporarily totally disabled from 6/26/13-7/20/13, a period of 3-4/7, and 8/18/13-1/27/14, a period of a period of 23-2/7 weeks, for a total of 26-6/7 weeks, by agreement of the parties. The arbitrator further finds the petitioner was entitled to maintenance benefits for the period 1/28/14-3/23/14, a period of 7-6/7 weeks.

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

Petitioner is alleging that she is entitled to a wage differential pursuant to Section 8(d)1 of the Act. The respondent claims the petitioner is not entitled to a wage differential pursuant to Section 8(d)1 of the Act, but rather a loss of use pursuant to Section 8(d)2 of the Act.

Having found the opinions of Dr. Raif and Dr. Watson more persuasive that Dr. Mirkin, the arbitrator finds the petitioner, as a result of the accidental injury, became partially incapacitated from pursuing her usual and customary line of employment. The arbitrator bases this finding on the fact that petitioner was found capable of working at the medium physical demand level as a result of her valid FCE and petitioner's job with respondent was not within these restrictions.

After petitioner's restrictions, consistent with the findings of the FCE, were made permanent by Dr. Raif, and respondent could not accommodate these restrictions, and did not offer petitioner any vocational rehabilitation, petitioner began her own self directed job search, and on 3/24/14 began a job with Whitetail Properties Real Estate, LLC, as an In-House Agent Assistant. Petitioner is currently earning $28,000 annually.

On 7/8/14, almost 4 months after petitioner secured alternate employment within her restrictions, respondent hired MedVoc to perform a file review and Labor Market Survey. This was performed by Julie Bose, a Vocational Rehabilitaiton Counselor. Bose determined that petitioner could anticipate a starting salary of $38,633 per year, based on the 8 jobs she determined were hiring and were within her restrictions. However, the arbitrator finds the respondent offered petitioner no assistance in trying to acquire these positions, and most of these positions were 90 miles from her home. Therefore, the arbitrator finds Bose's opinion that petitioner could secure a job with a starting salary of $38,633.00 annually, speculative at best. Additionally, the arbitrator finds it significant that respondent made no attempt to assist petitioner at all with her job search. The arbitrator finds the job petitioner secured, based on her own independent job search, is suitable employment upon which to determine a wage differential pursuant to Section 8(d)1 of the Act.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner is entitled to a wage differential pursuant to Section 8(d)1 of the Act. Given the fact that petitioner offered no evidence to support a finding that the average amount she would be able to earn in the full performance of her duties in the occupation

in which was engaged at the time of the accident was greater than the $808.00 a week she was earning in the year preceding the accident, the arbitrator finds the average amount petitioner would be able to earn in the full performance of her duties in the occupation in which she was engaged at the time of the accident was $808.00 per week. The arbitrator further finds the average amount petitioner is earning or is able to earn in some suitable employment or business after the accident is $538.46 a week, based on an annual salary of $28,000. Therefore, the arbitrator finds the petitioner is entitled to a wage differential pursuant to Section 8(d)1 of the Act in the amount of $179.69 per week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

O. IS THE DEPOSITION OF DR. WATSON'S ADMISSIBLE?

Respondent has objected to the admission of Dr. Watson's deposition based on Dr. Watson's testimony during the deposition that he estimated that he reviewed 6-7 inches of records for petitioner. Dr. Watson testified that over the past ten months he stacked up all his records in his basement. His intent to was to start throwing them away or shredding them after a year. He testified that he went to that pile to look for petitioner's records and they were not there. Dr. Watson testified that he did not used to keep records for independent medical evaluations because all his records are electronic, and he does not consider these people his patients. Dr. Watson testified that he did not do any independent gathering of records for petitioner. He testified that the only records he reviewed were forwarded to him by petitioner's attorney.

Petitioner's attorney, Chuck Edmiston, as an Officer of the Court, testified that the only medical records he forwarded to Dr. Watson for review were the medical records that he offered into evidence at trial, that being 1 inch of petitioner's medical records. Attorney Edmiston stated that Dr. Watson's estimate that he reviewed 6-7 inches of petitioner's was simply inaccurate. The arbitrator finds it significant that Respondent did not object to the admission of any of petitioner's exhibits, including Dr. Watson's report of petitioner's Section 12 examination and petitioner's medical records. The arbitrator also finds it significant that respondent could not show any testimony, opinions or findings by Dr. Watson during his deposition, upon which one could reasonably infer that it was related to records outside those that petitioner's attorney sent Dr. Watson for review, and were admitted into evidence.

Based on the above, as well as the credible evidence, the arbitrator finds the respondent has failed to show that Dr. Watson's estimate that he reviewed 6-7 inches of petitioner's medical records, when it was actually 1 inch of records, is a sufficient basis upon which to bar the entire testimony of Dr. Watson. The arbitrator finds Dr. Watson' s estimate that he reviewed 6-7 inches of records, was simply a mistake, and his testimony during

his deposition is consistent with the petitioner's medical records offered into evidence by petitioner, and not objected to by respondent. The arbitrator further finds the respondent failed to show that there was any testimony during Dr. Watson's deposition from which one could reasonably infer that it was based on medical records of petitioner that were not offered into evidence. The arbitrator denies respondent's Motion to Bar the Testimony of Dr. Watson.

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cecil Smith,

Petitioner,

vs. No. 10 WC 19691

City of Elgin,

16IWCC0111

Respondent.

DECISION AND OPINION ON REVIEW

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

Petitioner, who is currently chief of police for a municipality in Florida, testified on direct examination that he worked for Respondent for 25 years. On April 16, 2010, while working for Respondent as a deputy chief of police, Petitioner sustained injuries when he was moving furniture in preparation for the swearing in ceremony for the new chief of police. Petitioner explained that he was stacking some chairs onto a movable dolly when the chairs began to fall. He reached up to grab the chairs to prevent them from falling and felt a pop in his neck and right shoulder, followed by a sharp pain in the neck and the shoulder.

Petitioner admitted previously injuring his right shoulder and neck in 1999, which was a duty-related injury while working for Respondent. As a result of the injury, Petitioner underwent cervical spine surgery in 2001 and shoulder surgery in 2007. Petitioner stated he had no problems with the right shoulder after he recovered from the surgery and returned to work full duty. Before the accident on April 16, 2010, Petitioner also served a tour of duty in the Air

Force and attended a ten week academic and physical training program at the FBI National Academy. Petitioner denied having any limitations relative to the right shoulder.

Petitioner further testified that after the accident on April 16, 2010, he received initial treatment at Sherman Hospital. As part of the diagnostic work-up, he underwent an MRI. He followed up with Dr. Wen for the neck condition and Dr. Berkson for the shoulder condition. After Dr. Berkson retired, Petitioner treated with his partner, Dr. Kazaglis. Following unsuccessful conservative treatment, Petitioner underwent surgery on the right shoulder on December 7, 2012.

The accident report Petitioner completed on April 19, 2010, describes the accident consistently with his testimony. However, Petitioner reported he only "popped" his neck, and the neck pain progressively worsened. The report does not mention an injury or symptoms in the right shoulder.

The medical records in evidence show that on April 20, 2010, Petitioner underwent a cervical MRI at Sherman Hospital after complaining of pain and radiating weakness in the arms. The medical records from Dr. Wen at Elgin Barrington Neurosurgery contain only one office note postdating the accident. On April 26, 2010, Petitioner followed up with Dr. Wen after not seeing him for three years. Petitioner complained of an exacerbation of his neck symptoms "after jerking neck, occiput, interscapular, got worse to a point a few days later he went to SH ER." On physical examination, Dr. Wen noted "fair ROM neck, sl tender lower cervical, *** vague sl pp loss whole rt arm and hand." Dr. Wen's diagnosis related to Petitioner's cervical spine, and not the right shoulder.

The next post-accident doctor's note is dated June 21, 2012. Petitioner returned to Dr. Berkson at Associates in Orthopaedic Surgery for evaluation of his right shoulder condition. Dr. Berkson noted: "He has only had shoulder pain a couple of weeks, although he was treated surgically by me in the past. *** Symptoms are variable in nature and are exacerbated with activity. Pain when present is at a level of 7 on a scale to 10. He definitely notes decreased range of motion. He has some complaints of numbness as well. It should be noted that this patient's original surgical repair was related to a work injury. *** This re-injury is clearly consistent with his prior condition." Dr. Berkson suspected a recurrent rotator cuff tear and referred Petitioner to Dr. Kazaglis. An MRI of the right shoulder performed June 28, 2012, showed, in addition to prior postoperative changes: "Tendinosis and partial tear with attenuated tendon substance at the posterior supraspinatus/anterior infraspinatus, involving less than 25% of tendon substance. There is also tendinosis in the rest of the distal supraspinous tendon at the insertion." On July 19, 2012, Dr. Kazaglis noted the following history: "[The patient] subsequently [after the surgery in 2007] reinjured the shoulder at work moving furniture and has had pain in the right shoulder which has gotten worse since then. He said that over the past two to three months he has had increasing pain and stiffness in the right shoulder." Dr. Kazaglis diagnosed an impingement, "[r]ecurrent chronic partial tearing of the rotator cuff," and AC joint arthrosis.

On October 16, 2012, Dr. Levin, an orthopedic surgeon, examined Petitioner at Respondent's request. Dr. Levin noted a history of "another injury in 2010," in addition to the right shoulder injury in 1999. Petitioner reported the right shoulder pain recurred four months before Dr. Levin's examination. Dr. Levin interpreted the MRI study from June 28, 2012, as showing a chronic rotator cuff tear with some tendinitis. Dr. Levin opined: "Based upon this patient's history, physical exam, and radiographic studies, his current complaints are related to right shoulder pain with AC joint pain and possible recurrent right shoulder rotator cuff tear. * * * In regards to the patient's relationship to injuries back in 1999, the patient did have a rotator cuff tear in the past and underwent surgical intervention. There is what appears to be chronic changes in the same area that he underwent the surgical intervention." Dr. Levin recommended surgery. Dr. Levin did not address whether the accident on April 16, 2010, aggravated Petitioner's preexisting right shoulder condition.

On December 7, 2012, Dr. Kazaglis performed an arthroscopic revision rotator cuff repair and subacromial decompression. Postoperatively, Petitioner made slow progress in physical therapy and had pain with overhead activities. Petitioner last saw Dr. Kazaglis on March 7, 2013, before moving to Florida. He rated the pain a 2/10. On physical examination, he only had a 3/5 strength in the supraspinatus. Dr. Kazaglis instructed Petitioner to continue physical therapy and anticipated maximum medical improvement approximately a year after the surgery. During the arbitration hearing, Petitioner described significant residual problems with the right shoulder.

Pre-accident medical records from Dr. Berkson show that in October of 2007, he performed an open repair of the right shoulder rotator cuff and distal clavicle excision. On December 9, 2008, Dr. Berkson declared Petitioner at maximum medical improvement, noting mild residual symptoms, including "occasional stiffness and achiness and a grating sensation on a variable basis." An arbitration decision filed May 23, 2008, in case No. 99 WC 62832 awards Petitioner permanent partial disability benefits of 30 percent loss of use of the right arm for the 1999 right shoulder injury. Petitioner testified that neither party appealed the arbitration decision.

On cross-examination, Petitioner acknowledged the accident report he completed on April 19, 2010, only mentions an injury to the neck, and not the shoulder. Petitioner confirmed that he continued to work after the accident.

The Commission finds that Petitioner failed to prove his right shoulder condition is causally connected to the accident on April 16, 2010. As noted, the accident report and the medical records do not corroborate Petitioner's claim of an injury to the right shoulder on April 16, 2010. Petitioner first mentioned right shoulder symptoms during a visit to Dr. Berkson on June 21, 2012, more than two years after the accident. Petitioner told Dr. Berkson his symptoms started a couple of weeks before the visit. Likewise, Petitioner reported to Dr. Levin the right shoulder pain recurred four months before the examination on October 16, 2012, *i.e.*, in June of

2012. None of the doctors specifically connected the right shoulder condition to the April 16, 2010, work accident.

Respondent acknowledges that Petitioner's medical rights under section 8(a) of the Workers' Compensation Act (the Act) remain open with respect to the 1999 work accident. Respondent had authorized the revision right shoulder surgery as being related to the 1999 work accident and paid temporary total disability benefits in the sum of $2,889.56. Respondent contends the Commission cannot award any further temporary or permanent disability benefits with respect to the 1999 work accident because Petitioner failed to timely file a petition for review under section 19(h) of the Act. Respondent does not seek reimbursement of the temporary total disability benefits it had paid to Petitioner in connection with the revision surgery, only a finding that no additional temporary total disability benefits are owed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 20, 2015, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is vacated. Pursuant to Respondent's stipulation, Petitioner does not owe a reimbursement of the temporary total disability benefits he received in the sum of $2,889.56.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of permanent partial disability benefits relative to the right shoulder is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $664.72 per week for a period of 5 weeks, as provided in §8(d)2 of the Act, for the reason that the injury to the neck caused the 1 percent disability to the person as a whole.

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

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

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: FEB 10 2016
o-01/21/2016
SM/sk
44

Stephen Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMITH, CECIL
Employee/Petitioner

Case# **10WC019691**

16IWCC0111

CITY OF ELGIN
Employer/Respondent

On 1/14/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

1380 MURPHY AND MURPHY
DANIEL E MURPHY
39 S LASALLE ST SUITE 720
CHICAGO, IL 60603

5541 FRED J BEER LAW OFFICES
2295 VALLEY CREEK DR
SUITE K
ELGIN, IL 60123

16IWCC0111

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Case # 10 WC 19691

Consolidated cases: N/A

Cecil Smith
Employee/Petitioner

v.

City of Elgin
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 **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Geneva**, on **November 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 April 16, 2010, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did* sustain accidents 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 this accident as explained *infra*.

In the year preceding the injury, Petitioner earned $86,122.23; the average weekly wage was $1,656.20.

On the date of accident, Petitioner was 50 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 $2,889.56 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $2,889.56.

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

ORDER

Temporary Total Disability

As stipulated by the parties, Respondent shall pay Petitioner temporary total disability benefits of $1,500.00/week for 3 and 6/7th weeks, commencing December 7, 2012 through January 2, 2013, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $2,889.56 for temporary total disability benefits that have been paid.

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 75 weeks, because the injuries sustained caused the 15% loss of the person as a whole, as provided in Section 8(d)2 of the Act, for the injury to the right shoulder.

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 5 weeks, because the injuries sustained caused the 1% loss of the person as a whole, as provided in Section 8(d)2 of the Act, for the injury to the neck.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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 5, 2015
Date

JAN 14 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Cecil Smith
Employee/Petitioner

v.

City of Elgin
Employer/Respondent

Case # **10** WC **19691**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute in this case include causal connection 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 he is currently employed as the Chief of Police of Sanford in Sanford, Florida. Previously, he worked at the Elgin Police Department for a little over 25 years. On April 16, 2010, Petitioner was employed as the Deputy Chief of Police and he had been so employed for approximately four years. He is right-hand dominant.

Petitioner injured his neck, throat and right shoulder before this accident in November of 1999 while working for Respondent. He explained that he was in a foot pursuit with an individual whom he chased for a mile and a half. Petitioner underwent a discectomy at C5-C6 in 2001. A decision was issued after arbitration on May 23, 2008 in Case No. 99 WC 62832, which was not reviewed by either party with the Commission. PX6.

According to Petitioner's testimony, the arbitration decision, and medical records, on February 27, 2001, Dr. Wen performed a discectomy surgery and fusion of C5–C6. PX2 at 17-19; PX6 at 4. On October 9, 2007, Petitioner also underwent an open right rotator cuff repair with subacromial decompression and distal clavicle excision with Dr. Berkson. PX3 at 46-47. The Arbitrator in Case No. 99 WC 62832 awarded Petitioner 30% loss of use of a man as a whole for his cervical fusion injury, 10% loss of a man as a whole for his throat injury, and 30% loss of use of his right arm for his right shoulder injury. PX6.

On October 9, 2007, Petitioner underwent surgery performed by Dr. Berkson to address a rotator cuff tear and impingement syndrome in the right shoulder. PX3 at 45-47. Between 2001 and his accident on April 16, 2010 injury Petitioner testified that he had no limitations to the neck or right shoulder or any medical treatment other than seeing his own physician. Petitioner testified that he was working full duty during this period of time.

Petitioner explained that he was a First Sergent and was called to insulate Turkey and later, between 2008 and 2010, he attended the 10 week academic and physical training camp to be certified with the FBI. Petitioner testified that his injuries did not limit his ability to participate in his military service or FBI participation.

[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.

April 16, 2010

Petitioner was preparing for the promotional ceremony for Chief Svoboda at which time he would be sworn in to the office. He testified that he was in the process of setting up chairs and moving tables with the assistance of a secretary, and in particular he was in the process of restacking chairs on a movable dolly. Petitioner explained that the chairs began to fall and he reached to stop them from falling at which time he felt a sharp pain in his shoulder and neck.

Medical Treatment

A few days later, Petitioner sought medical treatment at Sherman Hospital and saw Dr. Edelson. On cross examination, Petitioner testified that he was injured on April 16, 2010. On April 19, 2010, Petitioner completed an employee injury report. RX2.

Petitioner underwent a recommended MRI of the neck on April 20, 2010. PX1 at 4. The neck MRI showed post-surgical changes at C4-C6 with no focal disc herniations or evidence of compression or nerve encroachment. *Id.*

Petitioner saw Dr. Dennis Wen at Elgin Barrington Neurosurgery on April 26, 2010. PX2 at 2-4. Dr. Wen noted that Petitioner had previously had occasional episodes of severe neck pain that usually resolved on their own, but recently had an exacerbation episode. *Id.* He also noted Petitioner's report that these previous episodes did not affect his whole hand and arm as this last episode did. *Id.* Dr. Wen ordered physical therapy and medications, and diagnosed Petitioner with a cervical strain. *Id.*

On October 7, 2010, Petitioner underwent another cervical MRI and a thoracic MRI. PX2 at 73-74. The interpreting radiologist noted the following with regard to the cervical spine: (1) post-surgical changes with a solid bony fusion at C5-C6; (2) focal midline herniated disc at T3-C4; (3) bulging discs at C5-C6 and C6-C7 with bony encroachment on intervertebral foramina bilaterally at C6-C7 most prominent on the left; (4) no pathologic areas of enhancement; and (5) a bulging disc at T3-T4. *Id.* With regard to the thoracic spine, the radiologist noted the following: (1) a prominent herniated disc at T6-T7 that compressed on the thoracic spinal cord; (2) bulging discs at multiple levels; (3) anterior osteophytes at multiple levels; and (4) no pathologic areas of enhancement. *Id.*

On June 21, 2012, Dr. Berkson ordered another MRI of the right shoulder. PX3 at 35-36. Petitioner underwent the recommended MRI on June 28, 2012, which the interpreting radiologist found to show post-surgical changes of the right shoulder, tendinosis and partial tear with attenuated substance at the posterior supraspinitus/anterior infraspinatus involving less than 25% of the tendon, and tendinosis in the rest of the supraspinous tendon at insertion. PX3 at 55-56.

When Dr. Berkson retired, Petitioner transitioned his treatment to his partner, Dr. Kazaglis.

Petitioner returned to Dr. Kazaglis on July 19, 2012, he administered a subacromial cortisone injection. PX3 at 31-34. Petitioner testified that the injection temporarily relieved his pain for about 30 days. As of August 21, 2012, Dr. Kazaglis noted that Petitioner's right shoulder had been in pain ever since the incident moving furniture at work, and that the pain had been increasing over the past five months. PX3 at 28-30. He noted that Petitioner's right shoulder pain had persisted despite activity modification, anti-inflammatory medication, and a subacromial injection and he recommended right shoulder surgery. *Id.*

Petitioner testified that, at this time, his right shoulder tingled and he had weakness and inability to completely raise his right arm. With regard to his neck, he had some difficulty turning his head left and right, numbness and tingling into his right hand, and headaches.

Section 12 Examination – Dr. Levin

Petitioner submitted to an independent medical evaluation at Respondent's request with Dr. Mark Levin on October 16, 2012. RX1. After taking a history from Petitioner, reviewing various medical records from his current treatment and prior treatment to the neck and shoulder, and examining Petitioner, Dr. Levin rendered various opinions. *Id.*

Specifically, Dr. Levin diagnosed Petitioner with right shoulder pain with AC joint pain and possible recurrent right shoulder rotator cuff tear. *Id.* He indicated that surgery and post-operative physical therapy would be appropriate. *Id.* He also indicated that Petitioner's condition was in the same area of the shoulder related to Petitioner's prior injury in 1999. *Id.*

Continued Medical Treatment

On December 7, 2012, Petitioner underwent an arthroscopic revision of a right rotator cuff repair and subacromial decompression surgery with Dr. Kazaglis for a chronic right rotator cuff tear and subacromial impingement. PX3 at 19; PX7.

Dr. Kazaglis ordered post-operative physical therapy for six weeks. PX3 at 12-14. Petitioner's work restrictions were graduated during visits on January 3, 2013 through February 7, 2013. PX3 at 15-18.

On March 7, 2013 Petitioner reported continued pain with overhead reaching. PX4 at 10. Dr. Kazaglis indicated his expectation that Petitioner would reach maximum medical improvement approximately one year after surgery. *Id.* Petitioner was then discharged from physical therapy on March 26, 2013 after one more scheduled visit. PX4 at 7. He reported that he continued to have weakness in his right arm, but that he felt he was getting stronger. *Id.* His greatest limitation was with repetitive resistive activities and overhead flexion or abduction. *Id.*

Petitioner underwent an additional MRI of the cervical spine on October 29, 2014. PX9 at 3-4. The interpreting radiologist noted cervicothoracic dextroscoliosis, straightening of the upper cervical lordosis, and broad based disc bulges or herniations at several levels with varying levels of stenosis. *Id.*

Additional Information

After returning to work in January of 2013, Petitioner testified that he had some difficulty lifting the arm, weakness, and difficulty sleeping on the right side. With regard to his neck, he had some neck pain, swelling, difficulty turning his lead left to right, and a throbbing pain in the back of his neck.

Petitioner testified that he experiences some sharp neck pain that radiates into his right hand to the index and middle fingers, pain under the right biceps, sharp shoulder pain and a numbing feeling when sleeping. He also wakes up in the middle of the night and sleeps on his back with his right arm elevated. Petitioner testified that this pain has been constant over the last three weeks.

Petitioner testified that his right shoulder and neck pain have not completely resolved since his injury. He explained that his current job it is a more sedentary role, but acknowledged that he must qualify with several firearms and pass a physical fitness exam each year. He explained that he adjusts to meet the requirements of his job.

Petitioner also testified that he types a great deal and is hunched over so he gets pain in the right side of the neck and shoulder. He has difficulty swimming, playing baseball or basketball, or fishing. He has difficulty raising his right arm above his head, and difficulty with continuous rotation as when he is fishing. He also knows when the temperature is changing and testified that he feels more crepitus or arthritis then. Petitioner testified that he is stronger in the left arm than in the right arm.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's claimed current conditions of ill-being in the neck and right shoulder are causally related to the injury sustained at work on April 16, 2010. In so concluding, the Arbitrator relies on the credible testimony of Petitioner which is corroborated by contemporaneous medical records and Petitioner's incident report as well as the lack of evidence of active medical treatment for neck or right shoulder symptoms for approximately a year and a half before this accident.

To recover in a preexisting condition case, a claimant need only establish a causal connection between his work-related injury and claimed current condition of ill-being by showing that his injury aggravated or accelerated the preexisting disease. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 204-206, (2003) (*citing Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36-37 (1982) (an accidental injury will be deemed compensable if it can be shown that the employment was also a causative factor)). It has long been held that an employer takes its employees as it finds them. *Sisbro*, 207 Ill. 2d at 205 (*citing Baggett v. Industrial Commission*, 201 Ill.2d 187, 199 (2003)). As in this case, even where an employee has a pre-existing condition that renders him more vulnerable to an injury, "recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." *See Sisbro*, 207 Ill. 2d at 205 (*citing Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d at 36; *Williams v. Industrial Commission*, 85 Ill. 2d 117, 122 (1981); *County of Cook v. Industrial Commission*, 69 Ill. 2d 10, 18 (1977)).

While the treating medical records reference Petitioner's 1999 injury and the chronic changes seen post-operatively after each surgery, Dr. Berkson explicitly notes that Petitioner re-injured the right shoulder in this work-related accident and there no persuasive evidence was presented that the neck and right shoulder symptoms that arose after April 16, 2010 were due to solely to non-occupational or chronic, pre-existing factors. To the contrary, Petitioner continued to work without limitation from the time of his last surgery for the shoulder in 2007 meeting all of the physical demand requirements of his job until he felt the pop in his neck and shoulders while moving chairs at work on April 16, 2010. Thus, the medical records taken in conjunction with

Petitioner's uncontroverted testimony reflect that Petitioner's neck and right shoulder conditions were stable after the prior work-related injury to the neck and shoulder stemming from a 1999 accident, and establish that Petitioner's current neck and right shoulder conditions are causally related in part to the accident on April 10, 2010 which aggravated his conditions such that he required medical treatment.

Based on all of the foregoing, the Arbitrator finds that Petitioner's conditions of ill-being with respect to his neck and right shoulder are causally related the work accident he sustained on April 16, 2010.

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 underwent an arthroscopic revision of a right rotator cuff repair and subacromial decompression surgery followed by post-operative physical therapy and an eventual return to full duty work, but with significant continued symptoms and lifestyle changes—the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 15% loss of use of the man as a whole pursuant to Section 8(d)2 for his right shoulder injury.

Based on the record as a whole—which reflects that Petitioner felt a pop in his neck resulting in one instance of medical treatment and a cervical strain diagnosis with no further medical treatment specifically noted for the neck, but with continued minimal ongoing symptoms and lifestyle changes—the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 1% loss of use of the man as a whole pursuant to Section 8(d)2 for his neck/cervical spine injury.

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

Linda Gray,

Petitioner,

vs. NO: 13 WC 14188

Bank Of America,

16IWCC0112

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

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

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

DATED: FEB 10 2016

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:12/17/15
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GRAY, LINDA
Employee/Petitioner

Case# **13WC014188**

16IWCC0112

BANK OF AMERICA
Employer/Respondent

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

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

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

2988 CUDA LAW OFFICES
ANTHONY CUDA
6525 W NORTH AVE SUITE 204
OAK PARK, IL 60302

0238 WOLF & JACOBSON LTD
PETER W JACOBSON
25 E WASHINGTON ST SUITE 700
CHICAGO, IL 60602

16IWCC0112

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

LINDA GRAY
Employee/Petitioner

v.

BANK OF AMERICA
Employer/Respondent

Case # **13** WC **014188**

Consolidated cases: **None**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joshua Luskin**, Arbitrator of the Commission, in the city of **Chicago/Wheaton**, on **12/1/14 & 2/18/15**. The matter was subsequently reassigned to Arbitrator Doherty following Arbitrator Luskin's appointment to the Commission. After reviewing all of the evidence presented, Arbitrator Doherty hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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. xxx Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. xxx Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. xxx What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance xxx TTD
L. xxx 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 _____

16IWCC0112

FINDINGS

On **4/13/13**, 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 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 $**113,999.60**; the average weekly wage was $**2,192.30**.

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 $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**TBD** for other benefits, for a total credit of $**0**.

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

ORDER

The Arbitrator finds the Petitioner did not sustain an accident arising out of and in the course of her employment on April 13, 2013. Benefits under the Act 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.

Cecilyn D Nardy
Signature of Arbitrator

5/1/15
Date

MAY 5 - 2015

The Arbitrator notes that this matter was tried by Arbitrator Luskin in December 2014 and February 2015. Following Arbitrator Luskin's subsequent appointment to the Commission the matter was assigned to Arbitrator Doherty who issues the following Decision.

FINDINGS OF FACT

At trial, Petitioner testified that she has worked 25 years for Respondent. Petitioner has held the title of Project Manager for 10 years and as such is responsible for operation control. Petitioner works between 45 and 50 hours per week. Petitioner testified that her concurrent title with Respondent is Co-Chair Bank of America Community Volunteers Team Illinois. As such, Petitioner is responsible for establishing relationships between the bank and the community, including non-profits as well as different lines of businesses within the bank. Petitioner supervises 30 bank employees as part of this program which encompass five different committees involved with the program. T. 13. Petitioner testified that the volunteer network operates as the "face of the bank" to the community and essentially performs marketing for the bank. T. 17.

Petitioner testified that she is reimbursed as "part of her salary" for the services she performs as co-chair of the community volunteers team. T. 18. Petitioner explained that her salary stays the same regardless of whether she volunteers. T. 76. Other employees are paid up to two hours per week paid for volunteer work. However, as long as the volunteer time is approved by a manager, the volunteer is paid for the time spent on volunteer projects which could exceed the two hours. T. 18. Petitioner testified that the target volunteer hours she is responsible for fulfilling is 45,000 hours per year. T. 18. As co-chair, Petitioner is required to volunteer. Other employees are encouraged to volunteer to meet the 45,000 hour goal. T. 80. As part of her own corporate development plan Petitioner chose to act as co-chair. The development plan covers both her position as project manager and her co-chair position. T. 81.

Petitioner further testified that the volunteers are required to keep track of their hours, including Petitioner, so that volunteer awards can be given to employees and grants given to non-profits. All of the employees report their hours to a cyber branch. T. 19-21. Petitioner identified PX 11 which contained expense reports she submitted for her attendance at various volunteer events in 2013. T. 24-25. Petitioner submitted the expense reports to her manager Sam Schwartz. T. 25. Petitioner testified that when she attends these events she passes out her business cards to non-profit organization representatives as well as peers in order to network for the Respondent. T. 30. PX 11 also contains Petitioner's 2013 performance review which references her volunteer work. Finally, PX 11 contains corporate documentation of the Bank's promotion of volunteer work by its employees on behalf of the bank including step by step instructions and guides on how to volunteer and plan volunteer events. T. 34-35. PX 11 contains documentation of extensive volunteer work references as volunteering pertains to an employee's "Developmental Planning." PX 11 also contains Bank documents which state the "Volunteerism is woven into the culture of Bank of America." PX 11, p. 648. On cross, Petitioner was asked, "Obviously, it appears you volunteer a lot?" and she responded "It is my job." T. 88.

PX 11 also contains an email dated April 6, 2013 which was written by Zammy Arcos, the individual leading the organization of a volunteer event to take place on April 13, 2013 for the Girl Scouts Camp Cleanup. The document explaining the event does not reference Bank of America as a sponsor of the event but does reference the event as a Girl Scouts of America

event. PX 11, p. 685. Bank of America volunteers as well as friends and family were invited to attend. Petitioner received the email and appeared at the event on April 13, 2013 in order to pick up branches and hand them to the operator of a wood chipper. The event took place at a Girl Scouts camp in Woodridge, Illinois. T. 42. Petitioner testified the event was sponsored by Bank of America and she was scheduled to be there from 9 am to noon. T. 43. 15 to 20 Bank of America employees appeared to volunteer at the event and they were given gloves to wear when picking up branches. T. 45. Some of the volunteers including Petitioner wore red shirts supplied by Zammy Arcos and bearing the logo of Bank of America Community Volunteers. T. 47. The Respondent Bank of America pays for the t-shirts. T. 50. Petitioner further testified that non-employee friends and family members were encouraged to volunteer in order to meet the hours goal and were present at the April 13, 2013 event. T. 90.

On April 13, 2013, Petitioner was at the event and picking up branches when she fell backwards and broke her left leg. Petitioner testified that the bone was sticking out of her leg and her leg was bleeding. T. 52-53. Petitioner was taken by ambulance to the ER at Edward Hospital. Petitioner underwent emergency surgery to her leg during which the leg was repaired using a rod, plates and screws. T. 56. The rod extends from her left knee down to her left ankle. T. 56. Thereafter, she remained in the hospital through April 15, 2013 and remained non weight-bearing thereafter for 2 months. During that period she had 24 hour care as she could not get out of bed without assistance. Petitioner also underwent PT at home through July 1, 2013. Thereafter when her weight bearing increased, she continued PT at an ATI office through November 9, 2013. Petitioner was driven to and from PT by ATI. T. 61-64. During PT Petitioner used crutches and a cane.

At her visit with her treating doctor, Dr. Kim, on November 9, 2013, Dr. Kim ordered a left ankle MRI which indicated a healing ankle bone with continued swelling. Petitioner was advised to keep the leg elevated. T. 65. Petitioner's last visit with Dr. Kim was on June 13, 2014. Dr. Kim kept Petitioner off work from April 13, 2013 through September 30, 2013 during which time she was paid disability. T. 66. Petitioner testified that her leg is currently painful and stiff with weather changes. Walking on her leg for more than a half mile around the park causes pain. She has no difficulty with stairs. She no longer can wear high heels. Petitioner testified that her leg and ankle injury has not affected her work ability as she works from home. T. 69. She still physically attends volunteer events but is not as active or hands on as she was before the accident. T. 70. The weather is the main trigger of her pain and if her pain is great she will use her cane. T. 71. When she has pain she uses Motrin over the counter. T. 71.

Respondent called Zammy Arcos to testify at trial. Ms. Arcos currently works for Respondent as a portfolio manager for commercial real estate lending. T. 96. In April 2013, Ms. Arcos worked for Respondent as a sales support associate and as such was required to input her hours worked. T. 97. She has never worked with directly with Petitioner but has attended events with Petitioner. T. 99. In April 2013, Ms. Arcos was a member of LEAD, the Leadership Enterprise Advancement and Development for women which she described as a "volunteer employee network." T. 99. She testified that she is not paid for her participation in LEAD. T. 100. Participation in the group is offered to all bank employees and information on the events is distributed through the bank to all employees, which numbers in the thousands. T. 101. She is familiar with the Community Volunteers Team and testified that it is the "biggest volunteer employee network for the Chicagoland area." T. 102.

Ms. Arcos arranged the Girl Scouts clean up event for April 13, 2013. She was told only 30 volunteers would be needed at the event. T. 104. She testified that Petitioner's Community Volunteer program ordered the t-shirts and anyone who participated at the event, including non bank employees, received a t-shirt. T. 105. Family members and friends are welcome to join the event. T. 106. She does not recall passing out her own business cards at the event. T. 106. Ms. Arcos testified that the Bank does not require its employees to volunteer at the event but if they do participate, the Bank asks the employee to sign a waiver. T. 107. This event took place on a Saturday. She has never felt any pressure from the Bank to participate and her raises and promotions were not contingent on participating. T. 108. If she volunteered on a week day during business hours then she put in for PTO pay for up to two hours as was company policy for non-exempt salaried employees. T. 109. She testified that the Bank keeps track of how many hours an employee is volunteering "whether its bank related or not" on a website where volunteer hours are reported. T. 109. Bank of America does have a goal number of volunteer hours and the LEAD hours get counted toward the Bank goal. T. 110. She is not aware of any negative repercussions if the goal is not met. T. 110. She considers her role in LEADS as completely separate from her role as a bank employee and testified that "it is something personal. It has nothing to do with how I am doing in my job. It is a personal choice." T. 111. She further testified that although the Bank promotes volunteerism through the employee networks, her participation is not "tied" to her job. T. 111.

On cross exam, Ms. Arcos testified that she does not go to the events to develop business opportunities but her "purpose there is to meet other employees and to learn more about what the bank is doing." T. 113. She denied receiving any financial compensation for her participation. T. 115. She does not know of anything in writing which prohibits an employee from getting PTO for volunteering outside of work hours. T. 117.

Respondent called Shanna Bentley to testify at trial. Ms. Bentley is a vice president and business analysis for Bank of America and has worked 29 years for Respondent. She is a salaried exempt employee as is Petitioner. T. 124. She is a friend of Petitioner's and has volunteered with Petitioner but has not worked directly with Petitioner at the Bank. T. 125. She has worked with several Bank volunteer networks. T. 126. Ms. Bentley was the Chair of LEAD and now has an advisory position with LEAD which is still considered a leadership position. T. 127. She was at the Girl Scouts event on the date of Petitioner's accident. In her opinion, between 10 and 25 employees show up on average at an event like the Girl Scouts event. T. 132. 6,000 Bank employees receive the invitation to volunteer. T. 132. There are no written or unwritten Bank requirements for volunteering. T. 133. She has never been told that her compensation is tied to volunteering. T. 133. She explained the PTO policy for non-exempt and exempt salaried employees to mean that with a manager's approval "you're allowed two hours a week to use towards volunteer time." T. 134. Weekend volunteering is not included in PTO. T. 135,140-141. She further testified that the employee recognition program is not generally tied to volunteerism but rather going above and beyond in her job. T. 137. Ms. Bentley further testified that friends and family were invited to the Girl Scouts event. T. 137.

On cross-exam, Ms. Bentley testified that she has no way of knowing whether Petitioner received employee recognition rewards from volunteering as the recognition comes from a manager. T. 139. She further refused to agree that Respondent Bank of America receives any corporate or professional benefit from its employee participation in the volunteer organizations.

T. 149-158. Ms. Bentley is not familiar with the structure and operation of Bank of America Community Volunteers as she is a member but is not involved in a leadership role. T. 165.

Respondent also presented the testimony of Mr. Sam Schwartz via evidence deposition. RX 1. The evidence deposition was taken via video conference on August 11, 2014. Mr. Schwartz testified that he currently works for Respondent as a program delivery lead and that as such he managers different project managers for the Bank all over the country. RX 1, p. 5. Petitioner is one of the Bank employees that he manages. Petitioner is active in the Bank volunteer program and he is aware that she was a co-chair of the "local chapter that represents the Bank of America volunteer programs." RX 1, p. 8. There is no written Bank policy that require employees to participate in any volunteer programs. RX 1, p. 13. The Bank encourages employees to participate and volunteer to give back to the community and volunteer hours are logged but there are no requirement or mandates attached. He further testified that there is no recognition or reward for volunteer hours. RX 1, p. 13. He further testified there is no compensation given for volunteer hours put employees are given PTO for up to two hours per week of volunteer time taken away from normal work hours. RX 1, p. 14. This is to show the Bank's support for employee volunteerism. RX 1, p. 15. Petitioner was paid her same salary regardless of whether she volunteered. RX 1, p. 15. To his knowledge, volunteering on a Saturday is outside of work hours. Further, to his knowledge, Petitioner did not receive extra compensation for her volunteer work on Saturday April 13, 2013 nor should she have received reimbursement for personal expenses associated with her volunteer time. RX 1, p. 17. As Petitioner's manager, all of Petitioner's expense requests go through him. RX 1, p. 17. The Bank encourages volunteering but does not require or compensate employees for volunteering. RX 1, p. 18-20.

On cross-exam, Mr. Schwartz testified that volunteer hours are tracked for the purpose of quantifying the total number of volunteer hours for the Bank. He does not believe the Bank expects a benefit from the volunteer programs other than to have the employees "feel comfortable with their organization encouraging and supporting them in their ability to participate in community involvement." RX 1, p. 23. At the Girl Scouts event on April 13, 2013, the Bank provided water to the volunteers but he is not aware of t-shirts being provided. RX 1, p. 24. The volunteer opportunity was advertised to all Bank employees. RX 1, p. 25. With regard to the Girl Scouts event, Mr. Schwartz testified that the Bank did not sponsor the event but rather the Bank participated in a "community sponsored event." The Bank was participating in the event through its volunteer program. RX 1, p. 28. The Bank encourages, through the volunteer program, to attend and participate in the Girl Scout park clean up day. RX 1, p. 29. Employees are not paid to attend the event but will get two hours of PTO if the event is during a work day. RX 1, p. 31. As Petitioner's manager, he testified that he does not look at her volunteer hours when completing her performance review. He only looks at her job performance as criteria. RX 1, p. 35. Petitioner did not coordinate her attendance at the Girl Scout event through Mr. Schwartz and he had no knowledge of her attendance at the event until after the event when he learned of her injury. RX 1, p. 41.

At trial, Respondent's counsel requested leave to take another evidence deposition of Mr. Schwartz in rebuttal to Petitioner's live testimony at trial given on December 1, 2014. The request was granted and the trial was bifurcated for this purpose. Mr. Schwartz presented rebuttal testimony via evidence deposition taken on January 28, 2015. RX 2. In rebuttal, Mr. Schwartz testified that Petitioner's role as co-chair of the "BACCV internal organization in

Illinois" is in no way part of her job description. Petitioner is not required to inform him or ask his permission to do volunteer work other than when requesting time away from her daytime responsibility as a project manager to do volunteer work. RX 2, p. 6. The primary focus of his review of Petitioner's job performance is her job performance as a project manager. He also looks at competencies that Petitioner demonstrates as a project manager. Mr. Schwartz mentioned Petitioner's extensive volunteer work in her 2013 job performance review as he felt it indirectly enhanced her competency and ability to communicate with work partners. RX 2, p. 7.

Mr. Schwartz further testified that any reimbursement for mileage expenses incurred by Petitioner in traveling to a volunteer event which he approved as reflected in PX 11 was done in error and against bank policy. RX 2, p. 7-8. This error determination was made in 2014 and not at the time the expenses were submitted in 2013. RX 2, p. 12-13. Finally, he testified that the employee recognition program was to recognize employees who go above and beyond in their normal bank jobs and is not intended to recognize participation in volunteer events. RX 2, p. 9.

At the bifurcated hearing on February 18, 2015, Petitioner was called to testify in rebuttal to the rebuttal testimony of Sam Schwartz. She testified that Sam Schwartz knew that her expense request was for volunteer time expenses and the he approved the expenses. The first time she learned that volunteer expenses could not be submitted was in December 2014. T. 179. PX 14 is Petitioner's 2014 job performance review prepared by Petitioner and Mr. Schwartz. The 2014 review again references Petitioner's desire to promote philanthropy as a major goal of her management plan. T. 183. Mr. Schwartz signed the review.

RX 3 is Respondent's Global Expense Standard explaining the Bank's policy on how to submit expenses. Petitioner testified that Mr. Schwartz referred her to Section 14 of RX 3 in advising her that her volunteer expenses were not covered. Specifically, since Petitioner worked from home on the Bank's flexible work plan, Petitioner reviewed Section 14 of RX 3 which addresses expenses covered for an employee working flexibly. Section 14 does not address expenses for volunteer work. However, Petitioner testified that Section 14 does address reimbursement for employee parking and states that parking, mileage and other transportation expenses are not reimbursable. Section 14 then refers the reader to Section 9.72.11 Employee parking which is not found in RX 3. Rather, Petitioner found Section 9.7.10 that states parking fees incurred at the employee's primary office location are non-reimbursed and that non-travel related parking expenses will be rejected unless approved by a band two manager. RX 3, p. 52. Mr. Schwartz is a band 4 manager which Petitioner testified is not above a band two manager. T. 190. Mr. Schwartz previously approved Petitioner's parking expenses. T. 190.

Petitioner again testified that she was rewarded under the Global Recognition Awards System with a certificate and a dollar amount reward for her volunteering. T. 191. She further testified that she made Mr. Schwartz aware of every occasion on which she volunteered including Saturday volunteer work as she was a salaried employee paid to work 24/7. T. 193. She further testified that she believed her presence at the volunteer Girl Scouts event benefitted the Bank as she was the face of the Bank and connected with non-profit organizations. T. 196. Her purpose as co-chair was to network for the Bank and to advise non-profits of Bank opportunities at these events. T. 197. Again, she testified that the Bank highly encourages volunteer work. T. 201. PX 15 is a portion of the Bank's Annual Report which references "volunteerism" as one of the strategic ways the Bank can "increase the impact" of its services. Illinois has met its goal of

45,000 volunteer hours. T. 203. Petitioner again testified that volunteering was part of the Bank's strategic goals. T. 205.

CONCLUSIONS OF LAW

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

Pertaining to (C), whether an accident occurred that arose out of and in the course of the Petitioner's employment, the Arbitrator finds as follows:

Based on the preponderance of the credible evidence at trial, the Arbitrator finds the evidence insufficient evidence to show that Petitioner's injury occurred from an activity that was compulsory or occurred in the course of her employment. In so finding, the Arbitrator notes that Petitioner was neither ordered nor assigned to participate in any volunteer program or activity by Respondent and specifically was neither ordered nor assigned to participate at the Girls Scouts event on April 13, 2013 where she was injured. Rather, the Arbitrator notes that Petitioner's participation at this event was purely under her own volition and not mandated by Respondent.

In so finding, it is not lost on the Arbitrator that Respondent Bank of America undeniably promoted and encouraged its employees to volunteer in the community via participation in its elaborate volunteer system. Petitioner clearly testified that volunteerism was promoted and encouraged by Respondent and that she avidly participated in the volunteer network. Petitioner testified that she did so because she enjoyed volunteering and included her volunteer committee activities in her own corporate development plan, which was also encouraged by Respondent. Further, she testified that the volunteer programs "increase the impact" of the Bank's services in the community and thus the Bank derives benefit from employee attendance at these events. However, the Arbitrator finds the fact that Petitioner was not paid any extra salaried compensation for her participation and that her corporate salaried compensation and performance reviews were not tied to her volunteer participation to be more relevant to this analysis under the Act. The Arbitrator finds that any recognition program or PTO policy is not tantamount to compensation but rather only acts as further evidence of Respondent's encouragement of employee volunteerism and does not elevate the opportunity to volunteer to the level of mandate. Furthermore, the Arbitrator notes that the Girls Scouts event was not sponsored by Bank of America. Rather, Respondent's volunteer core was a participant at the event, with employee family and friends invited to attend in addition to the employee. Finally, the fact that Respondent's corporate presence in the community may have resulted in some benefit incidental to its actual business of banking is too tenuous and intangible to be persuasive in this case.

Finally, the Arbitrator notes that Petitioner's capacity with Respondent is one of project manager. She was not hired or compensated for her role as co-chair of the Bank of America Community Volunteer Committee and as such her co-chair position was again of her own volition. Her duties as project manager were in no way related to her position as a volunteer co-chair. Petitioner's volunteer work was cited in her performance review. However, there is no credible evidence to suggest that the reference enhanced her project manager performance review nor any evidence to suggest her review as a project manager would suffer without the volunteer work. Lastly, the Arbitrator further notes that the decision to volunteer is up to the individual employee and that many other Bank employees choose not to participate in the volunteer networks without negative effect.

Based on the above, the Arbitrator finds that Petitioner did not sustain an injury arising out of and in the course of her employment on April 13, 2013. Compensation is denied under the Act. Accordingly, all remaining issues are rendered 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

Erma Thomas,

Petitioner,

vs. NO: 14 WC 09904

Aramark,

16IWCC0113

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 4, 2015 is hereby affirmed and adopted.

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

DATED: FEB 10 2016

MB/mam
o:2/9/16
43

Mario Basurto

David L. Gore

Stephen Mathis

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

THOMAS, ERMA
Employee/Petitioner

Case# **14WC009904**

16IWCC0113

ARAMARK
Employer/Respondent

On 3/4/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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CHICAGO, IL 60602

16IWCC0113

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)

Erma Thomas
Employee/Petitioner
v.

Aramark
Employer/Respondent

Case # **14** WC **9904**

An *Application for Adjustment 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 **February 19, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 15, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**12,800.32**; the average weekly wage was $**246.16**.

On the date of accident, Petitioner was **31** years of age, ***single*** with **3** dependent children.

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

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

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

ORDER

- *Petitioner failed to establish that she sustained an accident arising out of and in the course of her employment.*
- *Benefits are thereby 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.

David A. Kane
Signature of Arbitrator

March 4, 2015
Date

ICArbDec19(b)

MAR 4 - 2015

Erma Thomas v. Aramark
14 WC 9904

Statement of Facts

On March 15, 2014 Petitioner worked for Aramark at the Field Museum. She had worked there since August 2013. Her duties included stocking wine, beer, and milk which required bending, lifting and moving these items on a cart about 200 feet. She stocked coffee and condiments associated with coffee. She needed to fill, lift, and carry a gallon ice bucket, and dump the ice in a cooler. She also had to sweep and clean tables.

Saturday March 15, 2014 was St. Patrick's Day and they were quite busy. She arrived at noon and went to the catering area. She spoke with an employee from the early shift to learn what was needed. She then took the necessary steps to stock the beer, wine and milk. About 3:00 p.m. she was in the process of cleaning tables. While cleaning the fourth table, she bent down to wipe off a chair. When she straightened up, she felt pain in the middle of her low back. She told her supervisor, Kendrick, and two co-workers about the injury. She asked for pain medication, and a co-worker provided her with pain medication.

She called Thad, another supervisor, on Monday March 17, 2014 and told him that she was in pain. He directed her to Concentra. She could not get in until March 18, 2014. She saw a physician on March 18, 2014 who restricted Petitioner to lifting up to one pound and ordered physical therapy.

Petitioner started physical therapy on March 19, 2014. She returned to the physician at Concentra on March 20 and the restrictions were repeated. She took the restrictions to Aramark, and they were unable to accommodate the restrictions. She followed-up with Concentra on April 3 and April 10, 2014.

Petitioner presented to Dr. Kopsian, a chiropractor. Dr. Kopsian ordered physical therapy and an MRI. Petitioner attended the MRI on April 16, 2014. On April 21, 2014 Petitioner presented to Dr. Neeraj Jain. (Petitioner's testimony on cross-examination was that Dr. Jain had referred her to Dr. Kopsian.) Dr. Jain prohibited Petitioner from working, ordered an epidural steroid injection (ESI), ordered an EMG, and prescribed medications. She underwent the EMG on April 23, 2014. On April 28, 2014 Petitioner returned to Dr. Jain and ordered a brace. The Respondent denied authorization of the brace.

Dr. Jain administered an injection at L4-5, L5-S1 on the left on May 27, 2014. The pain alleviated Petitioner's symptoms for two days, but then the pain returned.

On June 4, 2014 Petitioner presented to Dr. Julie Wehner at the request of the Respondent. Petitioner described the examination as lasting 15 minutes and included Petitioner walking three feet with her shoes off and lifting her leg. (On cross-examination, she agreed that Dr. Wehner asked how she felt and asked how the accident occurred.)

Petitioner returned to Dr. Jain on June 16, 2014, and he recommended a second injection. She returned to Dr. Jain on five occasions through October 20, 2014 and again on February 16, 2015. On each occasion she had the same complaints, and Dr. Jain had the same recommendations.

She has been off work since March 15, 2014. She remains an employee of Aramark and wants to return to work. She currently has low back pain and tingling in the left leg. She has had these symptoms since March 15, 2014. She walks on a treadmill and rides a stationary bike. She also takes Tramadol—a narcotic pain medication. If it were authorized, she would resume medical care.

Dr. Jain testified at a deposition. He is board certified in anesthesia and pain management. Petitioner first presented to him on April 21, 2014. Dr. Jain recorded a history that Petitioner "was bent over whacking the chair off". He was not certain of the typographical error, but it seems likely that Petitioner said she was "wiping a chair off". (PX 1, p. 6, 30, 31.) She had an onset of back pain going to both legs. The pain was immediate and severe. Examination was positive for a markedly antalgic gait with difficulty bearing weight on the left side. Strength and reflexes were diminished on the left. Dr. Jain did not know if he reviewed the April 16, 2014 MRI films but concluded that the MRI was abnormal with disc herniations at L3-4, L4-5, and L5-S1. On cross-examination, Dr. Jain acknowledged that the MRI findings are consistent with the normal findings of a 31 year old. Dr. Jain agreed that the radiologist did not describe herniations in his MRI report. (PX 1, p. 33.) He recommended left sided injections to alleviate symptoms from an inflammatory reaction to the disc herniation. He prohibited

Petitioner from working because she was "basically unable to bear weight" on her left side. He offered an opinion that Petitioner's condition was caused by the March 15, 2014 accident. (PX 1, p. 6-11.) Petitioner's April 23, 2014 EMG showing moderate left lumbar radiculopathy was consistent with a disc herniation and subjective complaints.

On May 27, 2014 Dr. Jain administered an injection, and Petitioner assessed her relief at 70% to 80%. The pain had returned to some extent by the June 16, 2014 office visit. However, the initial 70% to 80% pain relief suggests the location of the injection is the source of Petitioner's pain, and the injections are appropriate treatment for the condition. (PX 1, p. 15, 16.) Before the injection on May 27, 2014, Petitioner assessed her pain at 6/10. When she returned on June 16, 2014, she again assessed her pain at 6/10. (PX 1, p. 35, 36.) He recommended a second injection on June 16, 2014. When Petitioner returned on August 14, 2014, she assessed her pain at 6/10. (PX 1, p.25.) He reviewed Dr. Wehner's June 4, 2014 IME report and did not think it was valid. "She was obviously motivated to deny the care, regardless of what the findings were." (PX 1, p. 21.) Dr. Jain suggests Dr. Wehner was offering an opinion favorable to the Respondent to justify her fee. He testified that he performs 1,200 injections per year but was unable to provide an estimate of his fee for these injections. (PX 1, p. 38.) Dr. Wehner noted Petitioner had marked pain with light palpation. She considered this to be symptom magnification. Dr. Jain could not answer whether he would expect Petitioner to have marked pain with light palpation. (PX 1, p. 37.)

When Petitioner returned on August 14, 2014, she assessed her pain at 6/10. (PX 1, p. 25.)

Dr. Wehner testified at a deposition on December 17, 2014. She is a board certified orthopedic surgeon limiting her practice to treatment of the spine (RX 4, p. 5.) She examined Petitioner at the request of the Respondent on June 4, 2014. This examination lasted approximately 45 minutes. (PX 4, p. 18.) She authored a follow-up report on September 17, 2014 after reviewing the EMG report. (RX 4, p. 14, 15.) Petitioner provided Dr. Wehner a history of an onset of low back pain while helping to move tables and chairs. (RX 4., p. 7.) Her June 4, 2014 examination was positive for Petitioner having marked pain with light palpation and tingling in the left leg with left hip rotation and left leg straight leg raising. Strength testing was noted to be normal. (RX 4, p. 8-11.) Dr. Wehner reviewed the MRI films and thought they were normal. (PX 4, p. 20, 21.) After reviewing the MRI films and records, Dr. Wehner diagnosed low back pain. She disagreed with Dr. Jain's diagnosis of a herniated disc. (RX 4, p. 12, 13.) She thought six to 12 therapy visits were appropriate. (PX 4, p. 13, 14.) Dr. Wehner did not think the EMG results of left sided radiculopathy made any medical sense. It does not fit with the subjective complaints, clinical exam, or MRI findings. (PX 4, p. 15, 16.) Dr. Wehner did not think the EMG was medically necessary. (RX 4, p. 27.) Petitioner was able to return to full duty work on June 4, 2014. (RX 4, p. 29.)

Conclusions of Law

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

Section 1(d) of the Act mandates as follows: "To obtain compensation under this Act, an employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment."

The Supreme Court addressed the "arising out of" component in *Greater Peoria Mass Transit District v. Industrial Commission*, 81 Ill. 2d 38 (1980). The Supreme Court stated, "there must be a showing that an injury, to be considered compensable, was due to a cause connected with the employment or incidental to it."

In the case at bar, Petitioner testified to an onset of pain attributable to a specific time and place. Specifically, she was straightening up after bending to wipe off a navel high chair. She testified to her job duties but neither her job duties nor her medical histories support a claim for a repetitive trauma.

Petitioner's activity of straightening from a bent position is an activity of daily living. This activity alone does not create an increased risk. See *Willinda Burns v. Sears Holding Corp.*, 12 WC 8204, 12 I.W.C.C. 1336. Because Petitioner's injury does not arise from a risk incidental to employment, Petitioner failed to establish that she sustained an accident arising out of her employment.

The Arbitrator has reviewed *Young v. IWCC*, 13 N.E.3d 1252 (2014) and concludes that it does not apply to the facts of the instant case. In *Young*, claimant was reaching into a 16x16x33 inch box to retrieve an object weighing between 12 and 20 pounds when his shoulder popped. According to the employer's analysis of the incident, claimant had "over extended reaching limits" when reaching deep into the box. The employer noted that one of the options to prevent the injury from recurring to other employees was to decrease the size of the box. 13 N.E.3d at 1254. The appellate court deemed claimant's injury to arise from a risk distinctly associated with his employment and specified that claimant reached farther than a person would typically reach when he tried to retrieve the object from the box.

In the case at bar, Petitioner straightened up from a slightly bent position when she had the onset of pain. This is an activity of daily living and not associated with a risk incidental to her employment. The Arbitrator concludes Petitioner failed to establish that the accident arose out of her employment. Therefore benefits are denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Colleen Mackey,

Petitioner,

vs.

NO: 14 WC 24305

16IWCC0114

Aramark, Inc.,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, 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 May 28, 2015 is hereby affirmed and adopted.

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

16IWCC0114

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 10 2016

MB/mam
o:12/17/15
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

MACKEY, COLLEEN
Employee/Petitioner

Case# **14WC024305**

16IWCC0114

ARAMARK INC
Employer/Respondent

On 5/28/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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16IWCC0114

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(A)

Colleen Mackey
Employee/Petitioner

v.

ARAMARK, Inc.
Employer/Respondent

Case # **14** WC **24305**

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 **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Geneva**, on **May 11, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0114

FINDINGS

On the date of accident, **June 13, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**29,445.00**; the average weekly wage was $**566.25**.

On the date of accident, Petitioner was **25** years of age, ***single*** with **0** dependent children.

The parties have stipulated and agreed to reserve the issue of medical bills at this time. ARB EX 1.

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

The parties have stipulated and agreed to reserve the issue of any 8(j) credit due respondent at this time.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ 377.50/week for 5-3/7 weeks, commencing 06/14/2014 through 07/21/2014, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for the medical treatment prescribed by Dr. Chudik including the left shoulder diagnostic arthroscopy with capsular release and manipulation under anesthesia and its attendant care pursuant to Sections 8 and 8.2 of the Act.

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

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

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

Signature of Arbitrator

5/27/15
Date

ICArbDec19(b)

MAY 28 2015

FINDINGS OF FACT

Petitioner, a 25 year old left hand dominant food service worker, testified that she worked for Respondent cooking and serving food in a cafeteria line. Petitioner is approximately 5' 1" tall. As part of her serving duties, she is required to stand behind a food preparation board and then reach over a glass partition to place a customer's order for pick up onto the glass partition. Specifically, Petitioner testified there are three rows of food and a preparation board in front of her where she stood. PX 1, RX 3. Petitioner prepared the customer order and then reached over the food and the preparation board to place the order on the glass counter top which was above the prep board and the food. PX 1, RX 3. Petitioner testified that the glass counter was as high as her forehead and thus she was required to stand on her toes while reaching out with her left hand and arm to place the food order on the glass counter. On 6/13/14, Petitioner had worked 4 months for Respondent in this capacity. Petitioner testified that four days prior to 6/13/14, she gave Respondent notice of her intent to leave the job. Her intent was to work for two more weeks after giving her notice. Prior to 6/13/14, Petitioner did not have any problem with her left arm or shoulder.

Petitioner testified that she placed the food order plate onto her open left palm with her palm under the plate while lifting the plate to the counter. Petitioner testified that her left thumb is over the lip of the plate but all four fingers and palm were out flat and under the plate. The plates are Styrofoam and Petitioner described them as "flimsy." RX 4. Petitioner testified that the empty Styrofoam plate weighs very little at approximately 1 ounce. Petitioner testified that the plate holding an omelet weighed little more at approximately 5 ounces. Petitioner testified that her left arm and hand are the only support for the weight of the plate as she stands on her toes lifting and extending her left arm over the counter for plate placement. She lifts the plate to the height of her forehead. At trial, Petitioner demonstrated her plate lifting mechanics using her right arm. Petitioner demonstrated her stance and her full arm extension while reaching over the counter to place the plate.

Petitioner testified that on 6/13/14, she started work at 6 am preparing food and serving breakfast. Petitioner testified that she reached across the counter to place plates approximately 40 to 50 times that morning until 7:45 am. At that time, Petitioner was holding a Styrofoam plate containing an omelet performing the same motion of reaching up and over the place the plate on the glass counter when she heard and felt a pop in her left shoulder. Petitioner noticed immediate pain and was unable to move her left arm away from her body. Petitioner also felt pain in her left neck and numbness in her left hand.

Petitioner testified that she told her supervisor of her injury and he sent her to Concentra on 6/13/14. The Concentra records noted that Petitioner's left shoulder popped while lifting a plate. PX 2. She was diagnosed with shoulder strain, provided a sling for her left arm, prescribed ibuprofen and ice packs and told to remain off of work that day, Friday. PX 2. Petitioner testified that by Sunday, June 15, 2014, her pain had not subsided and she was experiencing swelling in the left side of her neck and into the fingers of her left hand. Petitioner's mother took her to Lutheran General Hospital's emergency room. PX 3. Those records indicate that Petitioner reported left shoulder pain after lifting something "light" with her arms stretched out in front of her at work a few days prior and that she felt a pop in her left shoulder. PX 3.

Petitioner reported complaints of pain, swelling in her fingers and loss of motion. X-rays of her shoulder were negative. She was prescribed Norco and excused from work through June 18, 2014. PX 3. Petitioner was to follow up with an orthopedic doctor. PX 3.

Petitioner returned to Concentra on June 16, 2014. Her complaints included pain in the left shoulder radiating down the left arm and exacerbated by movement of the left arm. PX 2. She also reported intermittent numbness and tingling of the left fingers. The treating physician at Concentra prescribed an MRI of her left shoulder. The workers' compensation carrier denied same. She was released for one handed duty. It is unrebutted that the petitioner notified her supervisor of her restrictions. Petitioner was informed that she would be advised when light duty was available. She was never provided light duty.

Petitioner continued under the care of Concentra on June 16, 20, 27 as well as July 4 and 11. At each visit she voiced the same complaints of pain, lack of motion and swelling. At each visit the physicians at Concentra advised an MRI of her left shoulder. At no time was the MRI approved.

On July 17, 2014 the petitioner was sent to Dr. Lawrence Lieber of M&M Orthopaedics pursuant to Sec. 12 of the Act. RX 1. It is unrebutted that during his examination Dr. Lieber asked the petitioner what she was doing at the time of her injury. He never asked her to recreate or simulate her actual movements. Dr. Lieber reviewed a formal job description from Respondent. On cross exam, Petitioner testified that if Dr. Lieber's records indicate that she estimated the weight of the plate with an omelet at 3 pounds that weight estimate was too high. During his exam Dr. Lieber acknowledged no prior history of left shoulder problems. He noted that currently the petitioner experiences consistent pain in her left shoulder which awakens her at night. She has swelling and popping as well as numbness in her arm along with neck pain. Dr. Lieber's report documented a severely restricted range of motion of petitioner's left shoulder both passively and actively due to pain. She is tender to palpation throughout the shoulder. Dr. Lieber found a positive impingement test, positive O'Brien's test, positive reverse O'Brien's test, positive Speeds test, positive liftoff test and positive apprehension test. He diagnosed the petitioner with shoulder pain and noted that her prognosis is guarded.

Dr. Lieber acknowledged that Petitioner's current complaints appear to be associated with the June 13, 2014 incident. However, Dr. Lieber noted, "... based upon the mechanism of injury, there does not appear to be a significant amount of force having been placed on the left shoulder area to cause Ms. Mackey's current subjective complaints. Based upon the mechanism of injury, this event did not cause the petitioner's current subjective complaints and inability to use the left upper extremity." RX 1. Dr. Lieber concludes that the petitioner requires no further treatment associated with the June 13, 2014 event and that she can return to full duty employment. Lastly, Dr. Lieber found the petitioner to be at maximum medical improvement with regard to the June 13, 2014 event. RX 1. Respondent has denied all benefits under the Act based upon Dr. Lieber's opinions.

Petitioner was seen by Dr. Chudik at her choice on July 18, 2014. Petitioner testified that Dr. Chudik did ask her to demonstrate with her right arm the motions she performed with her left at the time of her injury. Similarly to Dr. Lieber, Dr. Chudik noted no prior problems with petitioner's left shoulder and arm. Dr. Chudik noted tenderness to palpation, painful range of

motion and loss of strength. It was Dr. Chudik's opinion that the petitioner suffered an acute injury at work on June 13, 2014 which required an immediate MRI. PX 5. Petitioner was again seen at Concentra later this same day voicing the same complaints. PX 2.

On July 23, 2014, Petitioner underwent an MRI at Hinsdale Ortho. PX 5. That MRI noted mild supraspinatus and infraspinatus insertional tendinosis with peritendinous fluid near the supraspinatus myotendinous junction without evidence of a rotator cuff tear. On August 4, 2014 Dr. Chudik noted ongoing complaints as well as a positive Neer's and Hawkins impingement tests. Petitioner was diagnosed with adhesive capsulitis. Petitioner's shoulder was aspirated and injected with lidocaine. Petitioner was also prescribed physical therapy. Petitioner testified that the injection provided no long term benefit.

Petitioner remained in physical therapy through January 16, 2015. PX 4. Petitioner testified that the physical therapy also provided no long term benefit. On January 19, 2015, Petitioner returned to Dr. Chudik. Petitioner testified that she was still in constant pain in her neck through her left shoulder joint. She was unable to lift her arm more than a few degrees away from her body. She was unable to straighten her arm to shoulder level or lift it straight up above her shoulder. Dr. Chudik opined that Petitioner had failed conservative management while continuing to have debilitating symptoms. Dr. Chudik diagnosed Petitioner as suffering from adhesive capsulitis. On January 19 and February 27, 2015, Dr. Chudik recommended diagnostic arthroscopic surgery with possible capsular release and manipulation under anesthesia. He further found, based upon a reasonable degree of medical certainty, that Petitioner's condition and need for treatment was causally related to her June 13, 2014 injury. PX 5.

Dr. Chudik completed an addendum to his records in support of his opinions and recommendations. Those opinions and recommendations are reiterated in his report of March 16, 2015. PX 6. Dr. Chudik opined that Petitioner's diagnosis is post-traumatic stiff shoulder refractory to conservative treatment following a work-related injury on June 13, 2014. Further, he opined that Petitioner's left shoulder complaints and current condition of ill-being are a direct result of the June 13, 2014 incident.

Dr. Chudik opined that Dr. Lieber's opinion, that the mechanism of injury did not provide "a significant amount of force having been placed on the left shoulder area to cause Ms. Mackey's current subjective complaints", is flawed. In response Dr. Chudik stated:

> To the common lay person or one not experienced in the field of shoulder biomechanics, Ms. Mackey's mechanism of injury appears to be minor. However, compressive forces across the shoulder joint with the arm in an extended position are approximately 80 percent of a person's body weight and are multiples higher when an object of any weight is held at an arm's length from the body (large moment arm). Minor perturbations with the arm in this susceptible position with significant compressive joint forces commonly result in shoulder injuries like Ms. Mackey's, and often require treatment.

Dr. Chudik then noted that Dr. Lieber had not reviewed the MRI or subsequent treating records before making his opinions in his report of July 17, 2014. PX 6.

Respondent offered into evidence a second report authored by Dr. Lieber dated April 16, 2015. RX 2. In it, Dr. Lieber stated that the report of Dr. Chudik did not change his opinions. Dr. Lieber reviewed the MRI and found no abnormality of an acute nature that could be related to the June 13, 2014 event based on the reported biomechanics of the event. Specifically, he concluded that "... there is no evidence that lifting one's arm from waist to shoulder level holding 1 to 3 pounds could cause enough force across the shoulder area to cause any significant traumatic event to the shoulder that would cause 10/10 pain and inability to relieve the symptoms associated with this event without conservative treatment." RX 2.

Petitioner testified that she returned to work with a different employer on 7/22/14. Petitioner worked a rooftop grill overlooking Wrigley field. She testified that she cooks and bartends without using her left arm. Petitioner also testified that she performed seasonal work in the winter months for the Village of Rosemont. Petitioner also testified that she has played softball in the past with the last time being in September 2013. She testified that she has never hurt her left shoulder playing softball.

At trial, Petitioner testified that she continues to notice shooting pain from the mid left shoulder ball joint up toward the left side of her neck. She experiences swelling in her neck once per week. She does not have pain down the left arm. Petitioner demonstrated that she is only able to lift her left arm with elbow bent to approximately mid sternum height. Petitioner is not able to straighten her left arm to extend the arm outward. Petitioner testified that her condition continues and she wishes to undergo the treatment recommended by Dr. Chudik including a left shoulder diagnostic arthroscopy with capsular release and manipulation under anesthesia.

CONCLUSIONS OF LAW

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

B. Did an accident occur that arose out of and in the course of Petitioner's employment by the Respondent?

The Arbitrator finds that Petitioner sustained accidental injuries arising out of and in the course of her employment on June 13, 2014. Further, the Arbitrator finds Petitioner to be candid and credible in her testimony. There is no question that Petitioner's injury occurred during the course of her employment as Petitioner was performing her regular job duties of food service at the time of her injury. The Arbitrator finds that at the time of her injury, Petitioner was standing behind the food preparation counter holding a plate of food while extending her dominant left arm to forehead level to lower a plate of food onto the serving counter as depicted in PX1 and RX 3. Petitioner credibly testified that in order to place the plate on the glass countertop she had to stand on her toes while extending out her left arm at forehead level while balancing the plate of food on her upraised fingertips and palm while holding the plate secure with her thumb. During that maneuver Petitioner felt a pop in her shoulder followed by immediate pain in her left

shoulder. Since that time, Petitioner has consistently complained of pain in the left shoulder area, left neck, left arm and intermittent numbness in her left fingers. She has consistently treated for these complaints since June 13, 2014.

In further finding that Petitioner sustained an accident arising out of her employment, the Arbitrator notes that Petitioner was exposed to a risk distinctly associated with her job as a food service worker as the act of standing, balancing a food plate and reaching over the counter to place the food plate squarely comprised Petitioner's job duties. No evidence to the contrary was provided.

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

The Arbitrator finds that Petitioner's current condition of ill-being as diagnosed by Dr. Chudik is causally related to her work accident of June 13, 2014. Dr. Chudik has diagnosed Petitioner as suffering from post-traumatic stiff shoulder refractory to conservative treatment. In finding causal connection, the Arbitrator finds Petitioner to be credible in her testimony that prior to her work injury she had never experienced any pain, soreness, swelling or lack of range of motion to her left arm. All the medical records confirm that immediately after her injury Petitioner first complained of severe pain, stiffness and lack of motion to her left arm. She has documented swelling of the hand and neck on the left side which continue at present.

In finding causal connection for Petitioner's current condition of ill-being, the Arbitrator assigns greater weight to the opinion of Dr. Chudik than to the opinion of Dr. Lieber who opines against causal connection based upon his understanding of the mechanics of Petitioner's injury. Dr. Chudik makes quite clear in his addendum to his records dated February 27, 2015 (Px5), as well as in his narrative dated March 16, 2015 (Px6) that those forces exerted by Petitioner while reaching to place the plate on the counter create substantial forces on the shoulder. Dr. Chudik explains:

> To the common lay person or one not experienced in the field of shoulder biomechanics, Ms. Mackey's mechanism of injury appears to be minor. However, compressive forces across the shoulder joint with the arm in an extended position are approximately 80 percent of a person's body weight and are multiples higher when an object of any weight is held at an arm's length from the body (large moment arm). Minor perturbations with the arm in this susceptible position with significant compressive joint forces commonly result in shoulder injuries like Ms. Mackey's, and often require treatment. PX 6.

In finding causal connection the Arbitrator further notes that both doctors noted the same physical conditions on exam. Multiple exams revealed positive impingement, O'Brien's, reverse O'Brien's, Speed test, liftoff, and apprehension tests. Dr. Lieber noted tenderness throughout the petitioner's shoulder area and strength deficits. He diagnosed Petitioner with shoulder pain and found her prognosis guarded. The Arbitrator notes that without further comment or consideration of the positive findings, Dr. Lieber blankly opines against causal connection citing the mechanics of the injury provided to him on one occasion during a Section 12 exam. The

Arbitrator notes that Petitioner did not demonstrate the mechanics of injury to Dr. Lieber but was only asked for a verbal description. The Arbitrator assigns greater weight to the opinion of Dr. Chudik as his opinion is buttressed by the medical record histories as well as the credible testimony of the Petitioner regarding the biomechanics of her injury as requiring more than "lifting from waist to shoulder" and her lack of prior left shoulder pain or problem. Therefore, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to her work injury of June 13, 2014.

L. What temporary benefits are in dispute?

Based on the findings of accident and causal connection, the Arbitrator further finds that Petitioner is entitled to TTD benefits from June 14, 2014 through July 21, 2014. The records of Concentra note that Petitioner was taken off of work at the time of her initial visit on Friday, June 13, 2014, the date of the accident. Petitioner was seen at Lutheran General Hospital's emergency room on June 15, 2014. (Px3) Those records excuse the petitioner from work through June 18, 2014. By June 16, 2014 Petitioner had returned to Concentra who released petitioner for one handed work. It is unrebutted that the petitioner presented for work within these restrictions and was informed that no suitable light duty was available. Petitioner testified that she returned to one-handed work with a different employer on July 22, 2014.

K. Is Petitioner entitled to any prospective medical care?

Based on the findings of accident and causal connection as stated above, the Arbitrator further finds that Petitioner is entitled to the treatment recommended by Dr. Chudik. The Arbitrator finds that Respondent shall authorize and pay for the treatment prescribed by Dr. Chudik including the left shoulder diagnostic arthroscopy with capsular release and manipulation under anesthesia and its attendant care pursuant to Sections 8 and 8.2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Anthony Sutor,

Petitioner,

vs.

NO: 10 WC 48451

16IWCC0115

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, extent of maintenance, nature and extent of permanent disability and §8(d)1 wage differential 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 finding that Petitioner failed to prove he was entitled to maintenance benefits for the periods that he was not assisted with job placement with MedVoc. Although Petitioner testified to a self-directed job search when not with MedVoc, he did not bring any documentation of such to the arbitration hearing. Petitioner testified he did not keep a jog log, but would write down who he applied with. Petitioner did not bring this documentation to the arbitration hearing. The March 14, 2013 initial vocational rehabilitation report by MedVoc indicated Petitioner reported that he had been participating in a job search through the City of Chicago for approximately one year and that he dropped off his job logs every Monday. However, Petitioner did not submit into evidence any copies of his documentation for those periods he was not with MedVoc. The Commission affirms the Arbitrator's finding that Petitioner was temporarily totally disabled from August 26, 2010

16IWCC0115

through March 24, 2011, the date that Dr. Goldberg opined Petitioner had reached maximum medical improvement, a period of 30-1/7 weeks. The March 14, 2013 MedVoc report indicates that Petitioner began job placement assistance with MedVoc on March 11, 2013. MedVoc continued job placement assistance through November 1, 2013. Therefore, the Commission finds Petitioner entitled to maintenance benefits from March 11, 2013 through November 1, 2013, a period of 33-5/7 weeks. Job placement assistance with MedVoc resumed on June 5, 2014, according to the July 24, 2014 MedVoc report. MedVoc closed Petitioner's case on March 9, 2015. Therefore, the Commission finds Petitioner entitled to maintenance benefits again from June 5, 2014 through March 9, 2015, a period of 39-5/7 weeks. The total period of maintenance benefits is 73-3/7 weeks. The Commission vacates the Arbitrator's award of maintenance benefits from March 25, 2011 through March 10, 2013 and from November 2, 2013 through June 4, 2014. The Commission also corrects the clerical error on the face sheet to reflect the award of TTD benefits under §8(b), not TPD under §8(a). The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award of maintenance benefits from March 25, 2011 through March 10, 2013 and from November 2, 2013 through June 4, 2014 are hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $938.67 per week for a period of 30-1/7 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 $938.67 per week for a period of 73-3/7 weeks, that being the period of maintenance under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on March 10, 2015, Respondent pay to Petitioner the sum of $624.53 per week for the duration of his disability, as provided in §8(d)1 of the Act, for the reason that the injuries sustained permanently incapacitated Petitioner from pursuing the duties of his usual and customary line of employment.

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 Commission notes that Respondent paid $28,160.10 in TTD benefits and $193,510.95 in maintenance benefits.

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

There is no bond for the removal of this cause to the Circuit Court by Respondent pursuant to §19(f)(2) of the Act. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 10 2016
MB/maw
o12/17/15
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SUTOR, ANTHONY
Employee/Petitioner

Case# **10WC048451**

16IWCC0115

CITY OF CHICAGO
Employer/Respondent

On 5/4/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% 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:

4963 NEWLAND & NEWLAND LLP
DANA N BLUMTHAL
121 S WILKE RD SUITE 301
ARLINGTON HTS, IL 60005

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

16IWCC0115

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Anthony Sutor
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **10** WC **48451**

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 **Stephen Friedman**, Arbitrator of the Commission, in the city of **Chicago**, on **March 13, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0115

FINDINGS

On **August 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 $**73,216.00**; the average weekly wage was $**1,408.00**.

On the date of accident, Petitioner was **42** 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 $**28,160.10** for TTD, $**0.00** for TPD, $**193,510.95** for maintenance, and $**0.00** for other benefits, for a total credit of $**221,671.05**.

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

ORDER

Respondent shall pay Petitioner temporary partial disability benefits of $938.67/week for 30 weeks, commencing August 26, 2010 through March 24, 2011, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner maintenance benefits of $938.67/week for 206 4/7 weeks, commencing March 25,2011 through March 9, 2015, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of $**28,160.10** for TTD and $**193,510.95** for maintenance benefits, for a total credit of $**221,671.05**. Respondent shall receive further credit against permanency for any additional weekly benefits paid to Petitioner after the date of the trial herein.

Respondent shall pay Petitioner permanent partial disability benefits, commencing March 10, 2015, of $624.53/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.

Signature of Arbitrator

May 4, 2015
Date

MAY 4 - 2015

Statement of Facts

Petitioner Anthony Sutor testified that on August 25, 2010 he was employed by Respondent City of Chicago in the Department of Transportation as a laborer. He had been employed by Respondent since 1991. Petitioner testified that he graduated from St. Rita High School in 1986. School was not easy for him. His duties as a laborer on the date of the accident were in the tear down department. His duties were manual labor including digging ditches and operating a jackhammer. Petitioner testified he did not perform clerical duties.

Petitioner testified he had a prior back injury in 1998. He filed a Workers Compensation claim for that injury. He was treated by Dr. Goldberg and underwent a fusion. Respondent offered the Commission printout for that injury, case number 99 WC 10739 (Rx 1). The date of accident was December 22, 1998. The case was settled on October 24, 2002 for $75,000 representing 32.21% loss of use of the man as a whole. The medical records confirm that Petitioner had a lumbar spine fusion (Px 5). Petitioner testified that he had returned to full duty and was working with no restrictions.

Petitioner testified that on August 25, 2010, he was working with the plumbers. He was earning $37.45 per hour working full time. He was acting foreman on that date, but was only supervising himself. Petitioner testified that he was in a ditch, walking backwards, when he fell into a catch basin that had been covered with rotten plywood. His right leg went into the catch basin and his left leg stayed out. Petitioner testified he felt pain in his low back and left leg. He reported the incident to his superintendant the next day and was sent to MercyWorks for treatment.

The records of MercyWorks were admitted as Petitioner's Exhibit 1. Petitioner was seen by Dr. Diadula on August 26, 2010. He provided a consistent history of accident and complained of low back pain radiating into the right leg and non radiating neck pain. Petitioner was diagnosed with a low back contusion and neck strain. He was taken off work. The August 31, 2010 note records low back pain with radiation into the left leg with numbness and tingling in the toes. Petitioner states he is to see Dr. Goldberg (his orthopedic specialist of choice) who did his prior surgery. Per Dr. Goldberg's request, Dr. Diadula sent Petitioner for an MRI of the lumbar spine, which was performed on September 22, 2010. The report shows post surgical changes at L4-S1, a disc protrusion at L5-S1 with mild/moderate left foraminal stenosis, but no displacement of the left S1 nerve, a small right disc protrusion at T11-T12, and narrowing at the L3-L4 due to facet arthrosis with no focal disc herniation or nerve root impingement (Px 3).

Petitioner saw Dr. Goldberg beginning September 27, 2010. Records of Midwest Orthopedics at Rush were admitted as Petitioner's Exhibit 5. Dr. Goldberg took an initial history of the accident with the development of acute low back pain. He notes the initial neck pain. Petitioner's complaints on September 27, 2010 were of low back pain and left leg radicular-type symptoms. Dr. Goldberg's impression was a spondylolisthesis and mild stenosis causing low back and left leg pain. He recommended physical therapy and epidural injections. He related the condition to the work accident. Petitioner proceeded with physical therapy and underwent two epidural injections on November 29, 2010 and December 15, 2010.

On January 17, 2011, Petitioner was seen by Dr. Goldberg reporting continued pain across the low back radiating down the back of his left leg. His pain is increased with prolonged sitting or walking. He noted no relief from the injections. The physical examination noted a normal gait. Petitioner appeared in pain with lumbar flexion and extension. Straight leg raising was negative. Strength was 5/5. Dr. Goldberg notes Petitioner appears to be suffering from axial low back pain at the L3-4 level with some left L4 radiculopathy.

He notes no improvement with physical therapy or injections. He records that Petitioner has no interest in surgery. He referred Petitioner to Rush Pain Center. Petitioner testified he felt surgery was not in his best interest because there was no guarantee on the result. He testified Dr. Goldberg told him he could be the same or worse.

Petitioner returned to Dr. Goldberg on March 11, 2011. He had not gone to the pain center. Dr. Goldberg reviewed a job description for a foreman to supervise watchman. He stated Petitioner could return to work in that position. Petitioner applied for a watchman position on August 19, 2011 (Rx 3). On the questionnaire he stated he was unable to remain alert at all times.

Petitioner had a Functional Capacity Examination performed on March 16, 2011 at Athletico (Px 5, Px 7). Petitioner's regular job as a Construction Laborer was determined to be in the very heavy demand level. Petitioner's test placed him in the medium physical demand level. He was determined to be unable to return to his previous employment. Dr. Goldberg last saw Petitioner on March 23, 2011. He noted the valid FCE. Physical examination was unchanged. Dr. Goldberg place Petitioner at maximum medical improvement and on permanent restrictions per the FCE. No further appointments were scheduled since Petitioner was not interested in surgery. Future pain management was to be addressed by MercyWorks (Px 5).

Petitioner was seen by Dr. Graf at Respondent's request on March 3, 2011. Dr. Graf disagreed with Dr. Goldberg's assessment of L3-L4 being the area of his problem. He recommended an injection at L5-S1. Dr. Graf agreed Petitioner could do light duty, noting the restrictions could be deceased as he improved (Rx 2).

Petitioner returned to Dr. Diadula on June 1, 2011 for refill on his Vicodin. He was seen on June 26, 2012 for a Pension Board visit. He was found on each occasion to be at MMI and discharged with restrictions per the FCE (Px 1).

Petitioner testified he went back to the doctor with worsening pain in his back and left leg with numbness. He saw Dr. Vucicevic one time on October 17, 2013 (Px 9). He was complaining of pain in the lower back and left leg. He stated he could not get out of bed and had trouble driving any distance. He stated he tried to get up when his leg gave way and he fell and could not get up. He had gained weight. It was listed as 280 pounds. He was walking with a left sided limp. The physical examination notes normal neurological exam with some loss of motion and a mildly positive left straight leg raising. Dr. Vucicevic notes Petitioner is genuine and his problem needs to be further defined. He recommends a repeat MRI and an EMG. Petitioner testified the tests were not performed because they were not paid for. Petitioner was provided with Norco. He was also strongly encouraged to begin a weight loss program (Px 9). A prescription for a cane was issued. Petitioner testified the cane was helpful. He can walk longer with less pain.

Petitioner also saw Dr. Buvanedran at the Rush Pain Center in 2014. Hand written notes were admitted as Petitioner's Exhibit 11. On June 13, 2014, Petitioner was complaining of back pain 9/10 at night and when sitting for long periods. He was diagnosed with left L5-S1 radiculopathy. The plan was to wean him from Norco and start alternate medications. He was given a work release for additional restrictions of 4 hours per day and was to return in four weeks. The July 11, 2014 note states that Petitioner did not tolerate the combination of drugs proposed. He was returned to Norco. The note states the patient does not want a spinal cord stimulator. He was to follow up in two months. Petitioner testified that there was a discussion of a pain pump. He testified that he did not want the pain pump.

Petitioner was seen at his attorney's request by Dr. Chmell on July 26, 2014 (Px 13). Petitioner was now 341 pounds. He was noted to have a prominent limp on the left side and used a cane. Petitioner had positive straight leg raising on the left. Dr. Chmell records atrophy of the left thigh and calf with diminished sensation and reduced left knee reflex and loss of strength. Dr. Chmell opines that Petitioner would be a surgical candidate, but otherwise is at Maximum Medical Improvement. He agrees with the restrictions including the 4 hour per day limitation for part time work only. He believes Petitioner is a fall risk, and opines that Petitioner is not employable (Px 13).

Petitioner testified following his discharge by Dr. Goldberg, he was instructed by Respondent to look for jobs. He testified he looked for ten jobs per week and would drop the paperwork off each Friday. He was provided no classes or training. He looked for jobs in the auto industry including parts counter person, clerk and service advisor. He did this job search for six months. He testified he does not have any records of this search.

Petitioner testified that he was then set up to meet with MedVoc. He met with Lauren Egle. He testified he was excited to meet with her and wanted her help. He had an initial meeting to discuss paperwork, how to address people, how to interview, to prepare a resume and review his job history. He testified he did not have any computer skills. He testified he asked about computer classes and was told they would look into it. He testified that the revised resume was untruthful, included supervisory and computer skills he lacked and made his position look more clerical that laborer. This was 75% fixed. He never received any computer course. Petitioner testified that Ms. Egle was not a nice person and he felt he was set up to fail. She sent him on jobs that were above his restrictions or included clerical skills he lacked. He felt embarrassed and degraded. He testified he was instructed not to tell employers about his injury and to say he was looking for less physical work because he was getting older.

The records of MedVoc were admitted as Respondent's Exhibit 6. The records document an initial evaluation was performed on March 14, 2013. The report confirms Petitioner advised he had a high school education with some remedial courses, limited computer skills. He confirmed a valid driver's license but would need to stretch after 45 minutes. The medical and job history with the city and current restrictions are accurately noted. The consultant noted that he would be a candidate for the automotive jobs he had been seeking. A resume and cover letter were to be prepared. An April 17, 2013 labor market survey found jobs available from $8.25 to $18.25 per hour with mean wage of $11.78 per hour. Petitioner was instructed to follow up on leads developed by MedVoc and to additionally contact ten leads per week which he was to develop on his own, with five being in person. The job placement efforts continued until they were suspended on November 1, 2013. The records disclose continues disputes between Petitioner and Ms. Egle over the documentation of Petitioner's job search. There are repeated episodes of the follow up by MedVoc failing to confirm the person to whom Petitioner reported delivering his resume, either the contact person not existing at the employer listed or the employer not having the resume on file. There is also criticism of the online documentation provided by Petitioner. There is also criticism of Petitioner demeanor either when dropping off resumes or at interviews. He was challenged to be more outgoing and friendly and to get complete information rather than rushing out without names for follow up or details about the job. In July, 2013, there is noted an issue over whether he submitted applications to Jewel and Dominick's and whether computer kiosks existed at the locations (Rx 6, p 78). There were also repeated issues with his receipt of items from MedVoc and their receipt of his logs in a timely manner. In the October 10, 2013 report, Ms. Egle suggests that Petitioner is falsifying his reports and that continuing to do so will be viewed as non cooperation (Rx 6, pp 116-126). The job placement efforts were suspended shortly thereafter (Rx 6, p 134).

Job placement with MedVoc was resumed on June 5, 2014 (Rx 6, p 148). Petitioner advised of his use of a cane and the additional 4 hour per day restrictions after his visit with Dr. Buvanendran on June 13, 2014. There were soon issues with the documentation of job leads, particularly the names of the contact individuals. The job leads from MedVoc expanded to include restaurant hostess and delivery jobs, in part to accommodate the need for part time work. Additional disagreements between Petitioner and Ms. Egle arose over whether job leads continued to exist, the physical requirement of the job leads identified, and feedback from contacts. Disputes also arose over Petitioner's discussion of his back injury (Rx 6, p 205). In the March 9, 2015 report, Ms. Egle, after recapping the most recent job placement efforts, documents her opinion that Petitioner is not cooperating and that the file should be closed (Rx 6, pp 266-271).

Petitioner was seen at his attorney's request by Vocamotive for a vocational evaluation. The report was admitted as Petitioner's Exhibit 14. The counselor, Ms. Helma, conducted a personal interview with Petitioner, including his physical complaints and limitations, vocational history, socioeconomic status and reviewed the medical records, including Dr. Buvanendran limitations and Dr. Chmell's opinion that Petitioner is unemployable. She opined, based in large part upon the 4 hour per day limits, that Petitioner has lost access to any viable labor market.

Conclusions of Law

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

Petitioner had a prior low back injury. He testified to the prior treatment including the lumbar fusion. The Commission printout documents the settlement of that matter in July, 2002 for a loss of use of the man as a whole. Petitioner's unrebutted testimony is that he returned to his full duty capacity and worked without restrictions in a very heavy manual labor position until his accident on August 25, 2010. There is no evidence that he has any medical treatment between 2002 and 2010 for his low back.

Following the August 25, 2010 accident, Petitioner sought immediate medical treatment. Dr. Goldberg provides an opinion that the condition of ill being is due to the work-related accident in his September 27, 2010 record. Dr. Chmell also opines causal connection. Dr. Graf does not provide any contrary opinion as to causation.

The "chain of events" supports a finding of causal connection. The "chain of events" can establish causation in cases involving aggravation of a pre-existing condition. Petitioner, despite the prior surgery, was able to perform his full duty job without seeking any medical care until the August 25, 2010 accident. Thereafter he was disabled and underwent additional medical care. Further, the only medical opinions on causal connection state that the accident was the cause of the current treatment and disability.

Based upon the record as a whole, including the testimony of the Petitioner and the medical exhibits submitted, the Arbitrator finds that, as a result of the accidental injuries sustained on August 25, 2010, Petitioner sustained an aggravation of his pre-existing condition of ill being in the low back and that the treatment and disability thereafter is causally connected to said aggravation.

In support of the Arbitrator's decision with respect to (K) Temporary Compensation-Maintenance, the Arbitrator finds as follows:

The Petitioner was found to be at maximum medical improvement by Dr. Goldberg following the FCE performed and discharged from his care on March 24, 2011. Dr. Goldberg released Petitioner to return to work pursuant to the restrictions of the FCE.

Thereafter, Petitioner was engaged in an ongoing job search through the termination of vocational services by MedVoc on March 9, 2015. He testified that initially he submitted his logs directly to the Respondent, and thereafter to MedVoc when they began placement services in March, 2013. In October, 2013, the MedVoc file was "placed on hold." Petitioner sought additional medical treatment with Dr. Vucicevic around this time. He testified that he continued to look for work for two and a half years submitting over 2000 resumes. Petitioner returned to job placement with MedVoc in June, 2014. The MedVoc records note his expressed confusion, since he thought his case was being tried or settled. He continued though the termination of job placement services on March 9, 2015. At that time Ms. Egle reported that termination of services were due to "issues with cooperation and following MedVoc protocols." While Petitioner testified that he has not given up on his job search since that time and is still looking for work, he provided no updated logs to corroborate his efforts since the termination of the MedVoc efforts.

Based upon the record as a whole and in accordance with the stipulation of the parties, the Arbitrator finds that Petitioner is entitled to temporary total disability for the period of 30 weeks from August 26, 2010 through March 24, 2011. The Arbitrator further finds that Petitioner is entitled to maintenance benefits for a period of 206 4/7 weeks for the period from March 25, 2011 through March 9, 2015.

In support of the Arbitrator's decision with respect to (N) Credit, the Arbitrator finds as follows:

Pursuant to the stipulation of the parties, Respondent is entitled to credit for all benefits paid up to the date of the hearing in this matter of $221,671.05 and is entitled to further credit against the permanent compensation awarded herein for any additional weekly compensation paid to Petitioner after the trial date herein.

In support of the Arbitrator's decision with respect to (L) Nature and Extent, the Arbitrator finds as follows:

Permanent Total Disability: Petitioner is seeking compensation for permanent total disability. An employee need not be reduced to complete physical incapacity to be entitled to PTD benefits. Instead, a PTD award is proper when the employee can make no contribution to industry sufficient to earn a wage. A person is not entitled to PTD benefits if he is qualified for and capable of obtaining gainful employment without seriously endangering his health or life.

Petitioner has submitted the report of Dr. Chmell to support the position that petitioner is medically unable to perform gainful employment. The Arbitrator finds this opinion unpersuasive. Dr. Chmell does not review the recent notes of Dr. Buvanedran, but simply accepts the additional restriction of 4 hours per day as an ongoing limitation. His opinion that Petitioner cannot work outside the home because he is a fall risk is not addressed in any other records, nor did Petitioner testify to ongoing issues of repeated falling. His opinion is further contradicted by Petitioner's ongoing activities as testified to and

documented in his job search in the MedVoc records and his testimony. The Arbitrator also notes that Petitioner's decision to seek the additional treatment with Dr. Buvanedran and the setting of the examination with Dr. Chmell corresponds to the renewed efforts by Respondent at job placement with MedVoc where Petitioner expressed confusion since he thought he was getting ready to try or settle his case. The Arbitrator finds the restrictions of Dr. Goldberg and the Functional Capacity Evaluation more persuasive as to the Petitioner's physical capabilities. Dr. Goldberg and the FCE found Petitioner able to perform work in the medium physical capacity.

Even if he is capable of some gainful employment, Petitioner can still obtain a permanent total disability under the "odd lot" category. The odd-lot category for purposes of a PTD award arises when a claimant'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. In these situations, the claimant can establish that he is entitled to PTD benefits under the "odd-lot" category by proving the unavailability of employment to persons in his circumstances. The claimant ordinarily satisfies his burden of proving that he falls into the odd-lot category in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market." If the claimant establishes that he fits into the odd-lot category, the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists.

Based upon the Petitioner's testimony and the vocational records submitted, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that he is an "odd lot" permanent total disability.

Petitioner testified to and the MedVoc records document an extensive job search. But the mere volume of contacts does not equate to a diligent job search. In *Levato v. Ill. Workers' Comp. Comm'n, 2014 IL App (1st) 130297WC; 14 N.E.3d 1195; 2014 Ill. App. LEXIS 477; 383 Ill. Dec. 584 (1st Dist, 2014),* the Court notes that 10 contacts per week with a total of 200 was unimpressive based upon the search itself. In the present case, the MedVoc records document recurring and ongoing inability to verify Petitioner's contacts. While Petitioner claims that he was being set up, and the records clearly demonstrate escalating conflict between Petitioner and Ms. Egle, there is no dispute that, despite specific requirements of how to document his contacts, Petitioner repeatedly failed to provide the proper documentation per the protocol, both proper verification of online contacts and necessary information on his in-person contacts. The records also document episodes where outside individuals corroborate the inaccuracy of Petitioner's reporting such as the Jewel and Dominick's kiosks and the conversation with Kayla at LaSalle Network. There were also documented repeated episodes of Petitioner not taking the extra effort in personal interaction to succeed in an interview by being more flexible or more engaging. While some initial inaccuracies or misunderstandings could be excused, the consistent, ongoing failure of Petitioner to provide the necessary information in a timely, accurate manner demonstrates a lack of commitment to the process as outlined by MedVoc.

The Arbitrator also notes that following June, 2014 additional issues arose as to the limitation to part time work and Petitioner's apparent lack of flexibility in that regard. The Arbitrator views Petitioner's effort in conjunction with the evidence of Petitioner's receipt of his pension, his decision to reject every medical recommendation for treatment to improve his physical condition including surgery, and thereafter weight reduction, even though he had previously undergone successful surgery. The

Arbitrator also notes the timing of his return to treatment in June, 2014, apparently only for the purpose to obtain additional restrictions, since he rejected the proposal for a trial of a spinal cord stimulator and did not follow up as requested following July, 2014. Petitioner's motivation must be considered in evaluating the interaction with Ms. Egle. Having heard Petitioner's testimony and observed Petitioner's demeanor and the documentary evidence submitted, the Arbitrator finds that, despite the number of contacts and the extended period of the search, Petitioner failed to establish that he engaged in a diligent job search.

The Arbitrator also finds that Petitioner failed to establish by a preponderance of the evidence that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. The MedVoc labor market survey documented many areas in which Petitioner could be employed and found multiple job openings for Petitioner to apply to. When the job search efforts were restarted in June, 2014, job leads were located even with the part time restrictions. As discussed above, the Arbitrator finds Dr. Buvanedran's June 13, 2014 four hour work date limitation unpersuasive. The June 13, 2014 note was in conjunction with a change of medication. When this was unsuccessful, Petitioner was put back on Norco. Follow up was scheduled but Petitioner did not comply. The Arbitrator does not find that the June 13, 2014 restriction for four hours per day was a permanent increase in Petitioner's limitations. The Vocamotive report finds no stable job market in large part based upon this part time restriction. The Arbitrator finds the opinions of MedVoc more persuasive as to the job market for Petitioner and finds the initial labor market survey more persuasive and supported by the ongoing, multiple job leads identified and Petitioner's testimony that he believed he could perform various job duties, and still wanted to return to work.

Based upon record as a whole including the medical evidence, Petitioner's testimony and the vocational records and reports, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he is permanently totally disabled either medically or as an "odd lot."

Wage Differential Pursuant to Section 8(d)1: Section 8 of the Act governs the "amount of compensation which shall be paid to the employee for an accidental injury not resulting in death." Section 8(d) details two types of compensation for employees who are permanently and partially disabled; subparagraph 1 provides for a wage differential award and subparagraph 2 provides for a percentage of the person as a whole award. The Supreme Court has expressed a preference for wage differential awards. See *Gallianetti v. Industrial Comm'n, 315 Ill. App. 3d 721, 727, 734 N.E.2d 482, 487, 248 Ill.Dec. 554 (2000).* The Supreme Court explained that "[i]t is often easier to calculate how much a claimant's earnings have decreased since the accident than to assign a percentage partial loss of use." *General Electric Co., 89 Ill. 2d at 437, 433 N.E.2d at 673-74.* The Appellate Court held that "the plain language of section 8(d) prohibits the Commission from awarding a percentage-of-the-person-as-a-whole award where the claimant has presented sufficient evidence to show a loss of earning capacity." *Gallianetti, 315 Ill. App. 3d at 728, 734 N.E.2d at 488.*

In order to qualify for a wage-differential award under section 8(d)(1) of the Act, a claimant must prove (1) a partial incapacity which prevents him from pursuing his "usual and customary line of employment" and (2) an impairment in earnings. A claimant must prove his actual earnings for a substantial period before his accident and after he returns to work, or in the event that he is unable to return to work, he must prove what he is able to earn in some suitable employment.

The restrictions imposed by Dr. Goldberg pursuant to the Functional Capacity Evaluation prevent Petitioner from returning to his usual and customary line of employment. The release to the medium physical capacity is below the very heavy capacity needed to perform his regular duties for Respondent. Respondent did not offer Petitioner return to work at his prior employment after Dr. Goldberg's release from care.

Petitioner presented sufficient evidence to establish the impairment of earnings. The parties stipulated that the Petitioner's average weekly wage at the time of his injury was $1408.00 per week. This is in general agreement with Petitioner's testimony that he was earning $37.45 per hour on the day on the date of the accident. The average weekly wage at the time of the accident has been used to establish earnings before the accident. *Levato v. Ill. Workers' Comp. Comm'n, supra.* The Arbitrator finds the MedVoc labor market survey persuasive as to the potential earning potential of the Petitioner following the accident and in accordance with the restrictions imposed by Dr. Goldberg and the FCE. The mean wage was established as $11.78 per hour. A full time job at this hourly rate would result in earnings of $471.20 per week.

The wage differential would therefore be $1408.00 minus $471.20 or $936.80 resulting in a benefit under Section 8(d)1 of two thirds or $624.53 per week.

Based upon the record as a whole, including the Petitioner's testimony, the medical evidence admitted and the vocational records admitted, the Arbitrator finds that Petitioner has established entitlement to permanent disability pursuant to Section 8(d)1 of the Act in the amount of $624.53 per week for the duration of the 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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Audrey Roberts,

Petitioner,

vs. NO: 08 WC 42751

Rich Lee Vans,

16IWCC0116

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical, permanent disability, penalties pursuant to §19(l), §19(k) and §16 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 there is no causal connection between Petitioner's accident on February 8, 2008 and her left ulnar neuropathy. The Commission also finds that Petitioner is entitled to payment for all medical bills as they pertain to her face, neck, and low back through the end of physical therapy in April of 2008.

The Commission modifies the Arbitrator's award of permanency to 5% person as a whole.

All else is affirmed.

Petitioner was involved in a motor vehicle accident on February 8, 2008. She was treated at Northwest Community Hospital on that date complaining of generalized pain including neck and jaw pain. She also had pain to her lower back. At the emergency room, she received x-rays

to her lumbar/sacral spine, which showed mild degenerative spurring. She also had a CT scan of her pelvis. These two tests were negative. She also received a CT scan of her brain, which was normal. (Petitioner Exhibit 1)

She came under the care of Dr. Moline on February 18, 2008 and saw him on and off through September 16, 2008. She only started to complain of her left hand problems on August 8, 2008 and August 14, 2008. (Petitioner Exhibit 2) When Petitioner was sent to Dr. Kornblatt for an independent medical exam on April 8, 2008, she gave no history of any pain or numbness in her left hand. (Respondent Exhibit 1)

The Commission finds that Petitioner's left hand neuropathy is not causally connected to the accident on February 8, 2008 because it took 6 months from that date for her symptoms to appear. Dr. Munoz, a neurosurgeon, found the cervical injury could be causally connected to the accident on February 8, 2008 but felt that Petitioner's neuropathy of her left ulnar was not. (Petitioner Exhibit 5)

The Commission further finds that Respondent is liable for all medical bills pertaining to Petitioner's face, neck, and lower back through the end of her physical therapy in April 2008. All of her medical bills for treatment of her left hand are the responsibility of the Petitioner.

The Commission finds that Petitioner is entitled to 5% loss of use of the person as a whole or 25 weeks. Dr. Munoz on January 8, 2009, found that Petitioner did not give full cooperation and showed a low level of compliance in his tests. He further indicated that there did not appear to be a good patient effort. He did note a herniated disc at C6-7 on MRI, but based on his examination it is of dubious significance due to the patient's lack of cooperation. Munoz further stated, "I do not think that her left elbow tenderness has anything to do with the herniation." (Petitioner Exhibit 5)

Petitioner's request for penalties under §19(l) and §19(k) are denied. Petitioner's request for attorney's fees under §16 is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $260.00 per week for a period of 8 5/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $260.00 per week for a period of 25 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the permanent loss of use of the person as a whole to the extent of 5%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the Petitioner for medical expenses under §8(a) of the Act and 8-2 as they pertain to her neck, back and face through the end of her physical therapy in April 2008.

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

16IWCC0116

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 $6,800.00. 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: FEB 1 1 2016

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

HSF
O: 12/15/15
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROBERTS, AUDREY
Employee/Petitioner

Case# **08WC042751**

RICH LEE VANS
Employer/Respondent

16IWCC0116

On 11/13/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0307 ELFENBAUM EVERS & AMARILIO PC
KAROLINA M ZIELINSKA
940 W ADAMS ST SUITE 300
CHICAGO, IL 60607

0208 GALLIANNI DOELL & COZZI LTD
ROBERT J COZZI
20 N CLARK ST 18TH FL
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Audrey Roberts
Employee/Petitioner

v.

Rich Lee Vans
Employer/Respondent

Case # **08** WC **42751**

16IWCC0116

An *Application for Adjustment 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 **July 18, 2014 and August 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. ☒ 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 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 ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**20,090.72**; the average weekly wage was $**386.36.**

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

Respondent shall be given a credit of $ **2,502.17** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $ **2,502.17**.

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 $**260.00**/week for **8 5/7**^{ths} weeks, commencing **February 8, 2008** through **April 7, 2008**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **February 8, 2008** through **April 7, 2008**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $**2,502.17** for temporary total disability benefits that have been paid.

Respondent shall pay $**68,059.07** 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 group health insurance provider and shall provide payment information to Petitioner relative to any credit issue. 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 $**260.00**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.

Petitioner's request for penalties and attorney's fees are denied, because that Respondent was reasonable in its reliance on Dr. Kornblatt's opinions.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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

November 12, 2014

Date

NOV 13 2014

FACTS

Petitioner was employed by Respondent as a school bus driver. On February 8, 2008, she was being driven to the bus yard by a fellow bus driver in one of Respondent's buses. The bus was hit by a truck causing her to hit her head several times on the bus window. An ambulance took Petitioner to Northwest Community Hospital where she was admitted. No fractures were evident on radiology studies. Petitioner was discharged on February 10, 2010. Pet. Ex. 1)

Petitioner then was seen by primary care physician, Dr. Bryan G. Moline, on February 18, 2008. She complained of neck and back pain. She was given medication and sent for physical therapy for her neck and back. (Pet. Ex. 2)

Petitioner was examined at the request of Respondent by orthopedic surgeon, Dr. Michael Kornblatt, on April 7, 2008. Dr. Kornblatt opined that the petitioner sustained cervical and lumbar strains, that she was capable of returning back to work, and that she should finish her physical therapy over the next one to two weeks at which time she will be at maximum medical improvement. (Resp. Ex. 1)

Petitioner was examined by Dr. Moline of April 18, 2008. Dr. Moline found tenderness of the lower back. Dr. Moline released her to return to full duty work. Petitioner was seen by Dr. Moline on June 16, 2008 and made no complaints of her neck and back. Petitioner saw Dr. Moline on August 14, 2008 complaining of numbness in the left fourth and fifth finger as well as neck and low back pain. He ordered an EMG which revealed ulnar mononeuropathy, diagnosed left ulnar neuropathy, and referred her to neurologist, Dr. Lenny Cohen. (Pet. Ex. 2)

Petitioner was examined by Dr. Cohen on September 2, 2008. He found sensory deficits in the left ulnar distribution and mild weakness of the left upper extremity. He noted the EMG study showed a left ulnar mononeuropathy and mild left C5-6 and C8-T1 abnormalities. He ordered an EMG of the lower extremity which was normal. An MRI was performed on October 10, 2008 which showed degenerative changes as well as a disc herniation at C6-7. On 11/7/08, Dr. Cohen diagnosed Petitioner with cervical radiculopathy, neck pain, C6-C7 herniated disc with central canal stenosis and left ulnar mononeuropathy. (Px 3, p. 18). Dr. Cohen referred the petitioner to orthopedic surgeon, Dr. Lorenzo Munoz. (Pet. Ex. 3)

Petitioner saw Dr. Munoz on January 8, 2009. Dr. Munoz advised Petitioner that depending on her level of pain, she may want to consider cervical spine surgery (Px 5, p. 3-5). Petitioner did not have the surgery. Petitioner testified that she was afraid to have the surgery after the procedure and risks were explained to

her. She testified that she was told there was no guarantee that she would be better after surgery and it was possible that she would not be able to speak or use her neck.

Petitioner returned to Dr. Cohen on September 16, 2009. The examination revealed tenderness to the left forearm on palpation. He diagnosed myositis and ordered blood work to determine the etiology of her complaints. In the spring of 2010, Petitioner underwent epidural steroid injections to the cervical spine. She testified that these did not help.

Petitioner continues to notice neck and back pain. She has difficulty with stairs, washing dishes, and sleeping.

On further questioning, Petitioner stated she has not seen a doctor the injuries she sustained in the accident for over four years. She continued working as a bus driver through 2010. Each year she had to undergo Illinois of Department of Transportation physicals and each time she was cleared to drive a school bus. The records of Stroger Hospital (Resp. Ex. 4) reflect that she had injured her back in August of 2007, when she fell. (Resp. Ex. 4, p 2)

CAUSATION

Petitioner's treating physician, Dr. Cohen, opined that Petitioner suffered from more than just cervical and lumbosacral strains as a result of her work-related motor vehicle accident. Dr. Cohen opined Petitioner's injuries included a C6-C7 disk herniation, cervical radiculopathy, cervical neuroforaminal stenosis and left ulnar mononeuropathy for which she required epidural injections.

The Arbitrator is persuaded by Dr. Cohen's opinions. The Arbitrator finds that Petitioner has met her burden of proof by a preponderance of the evidence that her condition of ill-being with respect to her neck and low back is causally related to her work accident.

MEDICAL AND TTD

These disputes are premised on causation, which has been resolved in favor of Petitioner. Therefore, these claimed benefits are awarded.

NATURE AND EXTENT

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

PENALTIES AND FEES

Respondent based its denial of further benefits and compensation on the opinion of orthopedic surgeon, Dr. Kornblatt. The Arbitrator finds that Respondent was reasonable in its reliance. Therefore, Petitioner's request for penalties and attorney's fees are 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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JONATHAN MALLEY,

Petitioner,

vs. NO: 12 WC 21425

MENARD CORRECTIONAL CENTER, **16IWCC0117**

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses and permanency, and being advised of the facts and law, reverses the Decision of the Arbitrator in part, as stated below.

The Petitioner, a correctional officer working for Respondent on June 3, 2012, was involved in an altercation where he was attacked by two inmates on June 3, 2012. He sustained a neck injury, and underwent surgery on November 5, 2012 with Dr. Raskas, involving removal of hardware from a prior C5/6 fusion, a new anterior C4/5 and C6/7 fusion with plating from C4 to C7, and a C4/5 discectomy. The Petitioner was awarded medical expenses and 35% of the person as a whole as a result of the cervical injury. The Petitioner also alleged that he suffered post-traumatic stress disorder (PTSD) as a result of this incident. The Arbitrator determined that Petitioner had failed to prove that his work activities caused PTSD, and thus awarded no benefits in this regard.

As to the latter determination, the Commission reverses the Arbitrator and finds that the Petitioner's PTSD diagnosis was causally related to the June 3, 2012 accident.

The Petitioner testified that he suffered from nightmares, flashbacks and anxiety because of the attack at the prison, and continues to take Prozac for PTSD. (Tr. 10-11, 17-19). His initial visit to Chester Memorial Hospital (Px3) on the date of accident indicated Petitioner was assaulted by two inmates, resulting in multiple injuries and diagnoses, including head trauma. On June 4, 2012, Petitioner reported having vision issues and headaches. By June 8, 2012, he indicated to the Chester Eye Clinic that when he bent over he would see "what looks like someone running towards him, but when he looks up there is no one there". (Px4).

At his second visit with Dr. Molnar on June 13, 2012 (Px5), Petitioner was diagnosed with likely post-concussive syndrome, and he reported increased forgetfulness. On August 7, 2012 Petitioner told Dr. Molnar that he had anxiety issues that had not previously been present, noting frequent visualizations of the two inmates who attacked him. Dr. Molnar diagnosed PTSD, noting Petitioner "certainly would have reason to have (it)." Petitioner had anxiety about returning to work at the prison, and he was referred for psychological counseling.

Petitioner began counseling with psychologist Dr. Plumb on August 30, 2012. Dr. Plumb testified (via deposition on June 28, 2013, Px13) that his initial intake indicated Petitioner had no known preexisting conditions or prior mental health issues. Petitioner reported symptoms of re-experiencing the attack, both while awake and while dreaming. Dr. Plumb testified that PTSD occurs with a trauma where one feels threatened and frightened for their life, with a characteristic set of symptoms, including a loss of control over one's usual belief system with consequent anxiety and possible depression (pp. 10-12). He further testified that the National Center for PTSD indicated four types of symptoms: 1) reliving the event, 2) avoidance of reminders of the event, 3) negative changes in beliefs or feelings, and 4) hyperarousal. (pp. 29-31). Dr. Plumb indicated that anxiety from this type of an incident normally would arise within a day or two, but at times it could take several months to appear. (pp. 35-36). He noted that the both Petitioner and his wife informed him that Petitioner's symptoms arose prior to August, 2012. (pp. 36-37).

Petitioner reported to Dr. Plumb that he was not taking psychotropic medication due to a fear based on a prior incidence of medication dependence. Dr. Plumb indicated he hadn't referred Petitioner to a psychiatrist for this reason, and when he attempted to do so, Petitioner refused. (pp. 24-25, 34-35). Dr. Plumb noted that Petitioner would develop panic symptoms when thinking about returning to the prison, or even driving by it. (pp. 12-14). When he last saw the Petitioner on June 18, 2013, he was improved but had persistent nightmares. He had begun to participate in some personal activities that he had been avoiding, and he had obtained new employment outside of the prison. (pp. 14-15). Dr. Plumb did not believe the Petitioner was malingering, and noted that while he doubted Petitioner could return to work again as a prison guard as he had previously, he could possibly work among inmates again at some time in the future. (pp. 15-16, 17-19).

Petitioner's treatment for PTSD appears to have consisted of a prescription for Prozac and counseling with Dr. Plumb. (Tr. 23-24). He testified that since he changed jobs out of the prison, his hypervigilance and nightmares have improved, but nevertheless continue. (Tr. 26-27).

16IWCC0117

The Commission finds that the Petitioner proved that he developed PTSD as a result of the June 3, 2012 accident. The June 3, 2012 incident involved a significant attack and beating that left Petitioner severely injured. While it appears he did not initially report his anxiety type symptoms, we note the multiple areas of trauma the Petitioner was dealing with, particularly his neck. We also note that Dr. Plumb testified that while symptoms normally appear within days of such incident, they can occur months later. Thus, whether the Petitioner complained of such symptoms immediately or not until August, 2012, our conclusion is the same.

The Commission further finds, however, that the Petitioner's refusal to take prescribed psychotropic medication or referral to a psychiatrist indicates that the PTSD condition abated. This is further supported by the testimony of Petitioner and Dr. Plumb, in that Petitioner has obtained a new job, has started to participate in his normal recreational activities and has begun to interact with his friends again. This is further documented by the comments of Dr. Plumb regarding his last visit with the Petitioner prior to his deposition testimony. That last visit occurred on June 18, 2013.

The Commission notes that the Petitioner did testify that when he was attacked by the inmates, "two guys just jumped me with homemade knives and started pounding away" and tried to stab him (Tr. 19-20), and the Arbitrator noted this in finding Petitioner failed to prove a causal connection of PTSD. While we agree that no other contemporaneous evidence supports the attackers having knives or weapons, we do not believe that this discounts the significant beating that the Petitioner sustained, or our finding that his PTSD diagnosis is causally related to the June 3, 2012 accident. He also testified that he had never been attacked previously, had no prior psychological treatment and took no medications for psychological treatment. (Tr. 20-21). We also do not agree with the Arbitrator's determination that Dr. Plumb's opinions are not valid because he is a psychologist, and not a psychiatrist and medical doctor. Dr. Plumb was entitled to testify within a reasonable degree of psychological certainty, as that was the basis of his expertise. It is the province of the Commission to then determine the weight to be given to such opinions.

We also note with interest that, based on the testimony of Petitioner and Dr. Plumb, that the Respondent had the Petitioner evaluated psychologically in February, 2013. The record indicates Respondent did not attempt to submit the report of this evaluation into evidence. Dr. Plumb's testimony indicates that he reviewed the report, as he noted that it appeared consistent with what the Petitioner told him. (Px13, p. 17). He also agreed that Respondent's examiner had recommended MMPI-2 testing, but Dr. Plumb did not feel that the expense of such testing was warranted.

With regard to permanency, the Commission finds that in addition to the 35% of the person as a whole awarded by the Arbitrator for Petitioner's cervical condition, he is further entitled to an additional 10% of the person as a whole based on his condition of PTSD. This results in a total permanency award of 45% of the person as a whole pursuant to Section 8(d)(2) of the Act.

16IWCC0117

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is reversed in part to find that the Petitioner's PTSD condition was causally related to the June 3, 2012 accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses previously awarded by the Arbitrator under §§8(a) and 8.2 of the Act, as well as additional medical expenses of Dr. Plumb incurred through June 18, 2013.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $688.01 per week for a period of 225 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the permanent loss of 45% 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: FEB 11 2016
TJT: pvc
O 12/14/15
51

Thomas J. Tyrrell

Michael J. Brennan

DISSENTING OPINION

I respectfully dissent. The decision of the Arbitrator with regard to PTSD was sound and should have been affirmed by this panel.

There is no question that the Petitioner was brutally attacked by two inmates on June 3, 2012. However, the Petitioner appears to have had no complaints relating to PTSD until his August 7, 2012 visit to Dr. Molnar. Dr. Molnar specifically pointed out that Petitioner had made no such complaints prior to that time. While Dr. Plumb opined that PTSD can surface months after a triggering event, he also opined that this was a rare occurrence and that normally it surfaces within days. Here, there was no evidence whatsoever that Petitioner was suffering from any type of anxiety until August, 2012.

Reviewing the records of Dr. Plumb thereafter, it appears Petitioner's complaints were rather contrived and exaggerated. In 2014 Dr. Plumb noted that Petitioner's alleged PTSD condition had backtracked, not as a result of the attack, but rather because of the pendency of his workers' compensation claim. It is my impression that while Petitioner suffered some level of mental distress as a result of the June 3, 2012 incident, it did not rise to the level of PTSD. The Petitioner's testimony regarding the attackers attempting to stab him with knives further evidences a focus by the claimant to make the attack sound more dangerous for purposes of making his allegations of a PTSD diagnosis. The contemporaneous evidence at the time of the accident and in the immediate aftermath does not support that the attackers had knives, or that Petitioner had symptoms of PTSD. I would affirm the Arbitrator's decision.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MALLEY, JONATHAN
Employee/Petitioner

Case# **12WC021425**

MENARD CORRECTIONAL CENTER
Employer/Respondent

16IWCC0117

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

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

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

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

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

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

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

1350 CENTRAL MANAGEMENT SYSTEMS
WORKERS' COMP CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

APR 2 - 2015

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

16IWCC0117

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JONATHAN MALLEY
Employee/Petitioner

v.

MENARD CORRECTIONAL CENTER
Employer/Respondent

Case #12WC 021425

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **02/11/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **6/3/12**, 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 $**59,628.00**; the average weekly wage was $**1146.69**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **2** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$688.01**/week for **175 weeks**, because injuries sustained to Petitioner's cervical region caused a **35%** loss of Man as a Whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay reasonable and necessary medical services listed in Arbitrator's Exhibit 3, with the exception the Out of Pocket Expenses in the amount of 50.96 as Petitioner has not met his burden of proof as to these chargers, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.
Respondent shall pay said award in weekly payments beginning on May 16, 2013.

Respondent shall be given a credit of all TTD/Maintenance from May 16, 2013 to February 11, 2015.

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

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

Signature of Arbitrator

3/30/15
Date

APR 2 - 2015

16IWCC0117

The Arbitrator makes the following findings of fact:

The issues in dispute are causation, medical care and nature and extent of injury.

The petitioner, a 41-year-old Correctional Officer for Respondent who worked at Menard Correctional Center (Arb. Ex. 2)

On June 3, 2012, Petitioner attacked by several inmates while working for respondent. The Petitioner testified "2 guys jumped me with home made knives...". (Transcript line 8, page 19). The accident or incident reports did not refer to home made knives nor did the histories in the medical records.

Following the attack, Petitioner was examined at the Chester Memorial Hospital. Petitioner then followed up on June 4, 2012 with Chester Eye Care with complaints of flashes and floaters in his eye. He was diagnosed as having a vitreous detachment of his eye. At trial he testified that he still has some floaters in his eyes.

On June 5, 2012 Petitioner saw his family physician, Dr. James Molnar. At that time he had complaints of double vision. Petitioner returned to Dr. Molnar on June 13, 2012. At that time he had complaints of flashing lights in his eyes and right sided neck pain. Dr. Molnar referred Petitioner to Dr. David Raskas an orthopedic surgeon for his neck pain. On July 3, 2012, Petitioner had an appointment with Dr. Molnar but did not attend. On July 7, 2012, Petitioner returned to Dr. Molnar and had complaints of vision problems and neck pain. Petitioner next saw Dr. Molnar on August 7, 2012. At this visit, Dr. Molnar noted that Petitioner first complained of anxiety from the attack. Petitioner was referred to psychology for his anxiety.

Petitioner began treating with a psychologist, Gordon Plumb. Dr. Plumb is not a medical doctor. Dr. Plumb testified via deposition. Dr. Plumb did not review any of the emergency room records, records of Dr. Molnar or Dr. Raskas. Dr. Plumb took a history from Petitioner and based upon his subjective complaints, diagnosed Petitioner as having post-traumatic stress disorder. Dr. Plumb recommended Petitioner to see a Psychiatrist to treat Petitioner with anti-depressants; however, Petitioner declined the referral and refused to take anti-depressants.

Dr. Plumb testified that Petitioner and his wife reported that Petitioner suffered symptoms consistent with post-traumatic stress immediately after the accident. Dr. Plumb stated that persons with post-traumatic stress disorder generally experience symptoms within one or two days after the event. Dr. Plumb stated that Petitioner experienced symptoms immediately after the incident.

Petitioner saw Dr. Raskas on June 20, 2013. Dr. Raskas noted that Petitioner had a previous C5-6 anterior fusion in 1993. Dr. Raskas diagnosed Petitioner as having

a disc herniation at C6-7 as a result of this accident and keep Petitioner off work. Petitioner failed conservative treatment and Dr. Raskas performed surgery on November 7, 2012. Dr. Raskas performed a decompression fusion at C4-5 and C5-6 and placed biomechanical spacer at C4-5 and C6-7.

Following surgery, Petitioner continued to treat with Dr. Raskas. On May 6, 2013, Petitioner was released to full duty no restrictions to return to work as a correctional officer as it pertained to his neck and was at maximum medical improvement.

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

A claimant must prove by the preponderance of credible evidence all elements of the claim in order to receive compensation under the Act. Orisini v. Industrial Commission, 117 Ill. 2d 38, 44-45, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987).

Petitioner must prove that he suffered a condition from the alleged incident based upon a reasonable degree of medical certainty. Benecke v. Illinois Department of Employment Security, 14 I.W.C.C. 4294. In Benecke, the Commission held that Petitioner's treating psychologist's was not a medical doctor and her opinions as to post-traumatic stress disorder were not based upon a reasonable degree of medical certainty as required by law. Id.

In this case, Dr. Plumb was asked, "did you within a reasonable degree of psychological certainty reach an assessment or diagnosis? A: Yes. Q. What would that be, please? A: It would be posttraumatic stress disorder, chronic . . . . " (Px. 13, pg. 10)

Further, Dr. Plumb did not review any records of the previous treating providers. Dr. Plumb opinion is based upon the history that Petitioner suffered symptoms immediately after the accident. Dr. Molnar's records show that Petitioner did not have any of this complaints until August 7, 2012, more than two months after the accident. Dr. Plumb testified that he is an advocate for his patient.

The evidence suggests the assailants were not carrying home made knives opposite to what the Petitioner had testified, supra.

Based on the above, Petitioner has failed to meet his burden of proof that his work activities caused his post traumatic stress disorder.

The Arbitrator finds that Petitioner suffered a disc herniation at C6-7 as a result of the June 3, 2012 incident. This was surgically treated by an anterior fusion at C4-5 and C6-7 with anterior plating from C4-C7. (PX11).

J. Were 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 Act requires employers to provide all reasonable and necessary medical care required to diagnose, relieve, or cure the effects of an injury that is causally related to a work accident. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d 13 (2nd Dist. 2000); *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill.App.3d 527, 758 N.E.2d 18 (1st Dist. 2001).

Based upon the above findings as to causal connection, Respondent shall pay the medical expenses outlined in Petitioner's group exhibit 1, as all of the expenses therein were necessary to diagnose, relieve or cure the effects of Petitioner's work-related accidental injury. Respondent shall be given credit for any amounts previously paid through its group carrier and shall hold Petitioner harmless from any claims made by any healthcare providers for which Respondent is receiving this credit, as provided in §8(j) of the Act.

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a Correctional Officer at the time of the accident The Arbitrator finds this work to be physically demanding and considering Petitioner's injury gives significant weight to this subsection.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner's job change is not related to the accident. Because of the voluntary job change, the Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner complaints of disability coupled with the treatment of cervical fusions as set forth in the records The Arbitrator therefore, gives *great* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 35% loss of use of Man as a Whole pursuant to §8(d)2 of the Act.

Therefore, the Arbitrator concludes that:

1. Petitioner failed to prove that he suffered posttraumatic stress disorder as a result of the June 3, 2012 incident.
2. That Petitioner suffered 35% loss of use of Man as a Whole.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANDREA DUNN,
Petitioner,

16IWCC0118

vs.

NO: 14 WC 010571

CHESTER MENTAL HEALTH CENTER,
Respondent.

DECISION AND OPINION ON REVIEW

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

Petitioner claims to have sustained two accidental injuries arising out of and in the course of her employment. The first is claimed to have occurred on January 29, 2014. The second is claimed to have occurred on May 15, 2014. An Application for Adjustment of Claims was filed with the Commission for the respective accidents with each claim being assigned to Arbitrator Edward Lee. The Commission finds no evidence of the claims being formally consolidated. Each claim, however, was presided over concurrently by Arbitrator Lee in an arbitration hearing on March 24, 2015. Each claim was subsequently addressed in a single Decision of the Arbitrator. In the Decision of the Arbitrator, Arbitrator Lee found Petitioner, for both claims, failed to prove that she experienced accidents that arose out of and in the course of her employment and denied Petitioner benefits. Petitioner filed a Petition for Review for each claim. These petitions were not consolidated and were assigned and a heard by separate Commission panels. This Decision and Opinion on Review addresses the injuries Petitioner claims to have occurred her right arm/elbow and right hand on January 29, 2014, and was assigned case number 14 WC 010571.

As noted above, Arbitrator Lee denied Petitioner compensation for her claimed January 29, 2014, accident. In support of his decision, Arbitrator Lee noted he found Petitioner's

testimony to be suspect and not credible. Specifically, he found the job description Petitioner gave to her treating physicians to have been inaccurate and her claim to the amount of rehabilitation work she performed on her home to be contradicted by her co-worker. The Commission, in reviewing the evidence, arrives at the opposite conclusion with respect to Petitioner's testimony, finding Arbitrator Lee misconstrued Petitioner's testimony concerning her employment activities as well as her testimony and timeline concerning the rehabilitation of Petitioner's home.

In the Decision of the Arbitrator, Arbitrator Lee noted "Petitioner told each doctor that she lifted cassettes 40 times a day." A review of the histories Petitioner provided the medical professionals reveals only once was this recorded and was done so by Gerald Cameron, a physician's assistant at Murphysboro Health Center. The history Petitioner provided to Dr. Clare Fadden, her primary care physician who also works at Murphysboro Health Center, was of lifting cassettes up to forty times a day. To Dr. Matthew Smith of Washington University Physicians, Petitioner stated she lifted cassettes at work repeatedly. The intake form Petitioner completed before seeing Dr. Smith indicated that the problem for which she presented stemmed from lifting 25-pound cassettes for eleven years. Petitioner informed Dr. George Paletta that she handled cassettes up to forty times a day. Dr. Andrew Sudekum, after conducting an independent medical examination pursuant to Section 12, recorded that Petitioner said that she, on average, lifts 25-pound cassettes up to forty pounds a day. The Commission finds the history as recorded by PA Cameron to be an outlier and inconsistent with the histories recorded by the other medical professionals. The Commission incidentally notes further that, before Arbitrator Lee, Petitioner testified to lifting cassettes sometimes up to forty times a day. The Commission finds Petitioner proved to its satisfaction that her employment activities resulted in an injury to her right arm/elbow.

Arbitrator Lee, in the Decision of the Arbitrator, also questioned Petitioner's claim that she did not personally perform the remodeling of her home and referenced the postings Petitioner made on Facebook to support his position. Petitioner testified that she might have supplemented the labor performed by the contractors she hired with her own labor as well as that of two high school students and her ex-boyfriend. The Commission finds Petitioner's use of the pronoun "we" on her Facebook postings concerning her home rehabilitation to indicate the work was performed through the collaborative efforts of Petitioner and others. Nothing posted on Petitioner's Facebook account causes the Commission to conclude Petitioner performed the rehabilitation of her home alone. Assuming *argumendo* Petitioner did perform all the rehabilitation work herself, it is Petitioner's testimony the rehabilitation of her home was performed in the summer of 2013. The Facebook postings corroborate this. Petitioner's claim is that the onset of her right upper extremity symptoms began on January 29, 2014, at least four months after the work was performed on her home. The length of time between when the work was performed on Petitioner's home and the onset of her symptoms, absent any information to the contrary, is too great to reasonably conclude any work Petitioner personally performed on her home resulted in an injury to her right arm/elbow.

For the reasons expressed in the two paragraphs immediately above, the Commission reverses the finding contained in the Decision of the Arbitrator with respect to accident. Petitioner's employment activities resulted in repetitive trauma to her right arm/elbow that manifested itself on January 29, 2014.

16IWCC0118

The Commission, having found accident, addresses those issues deemed moot by Arbitrator Lee as the result of his finding Petitioner failed to prove that she sustained a compensable accident.

Petitioner maintains she provided timely notice of her injury. Entered into evidence were several reporting documents that indicated Petitioner's injury was sustained on January 29, 2014. These documents were subsequently filed with Respondent within two weeks of the claimed accident. Respondent did not contest Petitioner failed to give timely notice of the injury. The Commission, accordingly, finds notice of the injury was within the timeframe set forth in the Act.

Petitioner's Application for Adjustment of Claim alleges she sustained injuries to her right arm/elbow and right hand. After thoroughly reviewing Petitioner's medical records, both her complaints and her physicians' examination findings, the Commission finds no evidence of Petitioner sustaining any injury to her right hand save only a single complaint of pain radiating down the forearm to the wrist. The Commission does find evidence to support there to be a causal connection between Petitioner's right arm/elbow complaints and her employment activities effective January 29, 2014.

PA Cameron, on February 17, 2014, diagnosed Petitioner as having tendonitis in her right elbow but did not attribute it to any particular cause. Dr. Fadden, on March 17, 2014, found the condition of Petitioner's right elbow to be consistent with a repetitive motion injury and likely from repeatedly lifting. Given Petitioner's employment activities, the Commission finds Dr. Fadden's assessment, combined with Petitioner's testimony, reasonably demonstrates there to be a causal connection between Petitioner's employment activities and the condition of her right arm/elbow. The Commission, however, finds this causal connection existed only from January 29, 2014, through April 21, 2014.

Petitioner was repeatedly seen at Murphysboro Health Center from February 17, 2014, through April 21, 2014. On April 21, 2014, Petitioner presented there and was recorded as claiming to be pain-free a majority of the time. The accompanying examination found Petitioner experienced a pulling sensation in the right supinator but no pain nor any pain with palpation or on pronation or supination. Dr. Fadden stated the tendonitis, now identified as epicondylitis, appeared to have resolved. Petitioner was discharged with instructions to continue home exercise regimen and to follow-up if the symptoms should reoccur. The Commission finds Petitioner to be at maximum medical improvement as of April 21, 2014, on account of being relatively pain-free on that day and without a return visit to Dr. Fadden scheduled.

Though the manifestation date of Petitioner's injury is January 29, 2014, Petitioner did not seek medical attention until February 17, 2014. From that date through April 21, 2014, she treated repeatedly at Murphysboro Health Center and underwent physical therapy at Chester Memorial Hospital. She was also seen at Southern Illinois Healthcare on February 17, 2014, for an x-ray of her elbow and by Dr. Smith on March 21, 2014. The Commission finds the treatment Petitioner received from February 17, 2014, through April 21, 2014, to have been reasonable and necessary in addressing Petitioner's injury.

16IWCC0118

Petitioner first sought medical treatment for her symptoms on February 17, 2014, and was seen by PA Cameron. PA. Cameron released Petitioner to work with restrictions effective February 19, 2014. Petitioner credibly testified that Respondent did not accommodate the restrictions imposed upon her by PA Cameron on February 17, 2014, and, as a result, she did not work until being released to work without restrictions on April 22, 2014. The Commission finds Petitioner, as result of this, to be entitled to temporary total disability benefits from February 19, 2014, through April 21, 2014.

The Commission takes notice that Petitioner returned to Dr. Fadden on May 22, 2014, with complaints that included her right elbow. Notice is also taken of Petitioner's second Application for Adjustment of Status, dated July 11, 2014, indicating those complaints are related to a repetitive trauma Petitioner sustained on May 22, 2014. Accordingly, the Commission takes this history as further proof that Petitioner's right arm/elbow injury from January 29, 2014, had resolved as of April 21, 2014.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1336.91 per week for a period of 8-2/7 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 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 medical expenses incurred between February 17, 2014, and April 21, 2014, 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.

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: FEB 11 2016
KWL/mav
O: 12/14/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

16IWCC0118

DUNN, ANDREA
Employee/Petitioner

Case# 14WC010571

SOI/CHESTER MENTAL HEALTH CENTER
Employer/Respondent

On 5/20/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4075 FISHER KERHOVER & COFFEY LO
JASON E COFFEY
PO BOX 191
CHESTER, IL 62233

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

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

1745 CMS - RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

MAY 20 2015

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0118

Andrea Dunn
Employee/Petitioner
v.
State of Illinois/Chester Mental Health Center
Employer/Respondent

Case # **14** WC **010571**

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

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident 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 _____

16IWCC0118

FINDINGS

On the date of accident, **January 29, 2014 & May 15, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was 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 $**123,948.00**; the average weekly wage was $**2,383.62.**

On the date of accident, Petitioner was **42** 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 $**IF ANY** under Section 8(j) of the Act.

ORDER

Petitioner failed to prove she sustained an accident on January 29, 2014 and May 15, 2014, that arose out of and in the course of her employment or that her current condition of ill-being is causally related to said accident. Petitioner's claim for compensation is denied and no benefits are awarded.

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

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

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

Signature of Arbitrator

5/11/15
Date

ICArbDec19(b)

MAY 20 2015

Andrea Dunn v. State of Illinois/Chester Mental Health Center, 14 WC 010571 & 14 WC 024947

Petitioner filed two applications for adjustment of claim with the Illinois Workers' Compensation Commission. Petitioner first alleged that she sustained injuries to her right arm/elbow and right hand as a result of repetitive duties while working for Chester Mental Health Center. (AX2) Petitioner has alleged the date of accident as January 29, 2014. (AX2) Petitioner next alleged that she sustained injuries to her right elbow, right shoulder, left elbow, and left shoulder as a result of repetitive duties and stress while working for Chester Mental Health Center. (AX3) Petitioner alleged a date of accident of May 15, 2014. (AX3) This is a repetitive trauma claim and the issues in dispute are accident, notice, causation, medical bills, prospective medical, and temporary total disability. (AX1)

Petitioner was 42 years old on January 29, 2014 and May 15, 2014, which are her alleged manifestation dates for her repetitive trauma claims. Petitioner testified that she has worked as a clinical pharmacist at Chester Mental Health Center for the past twelve years.

On February 17, 2014, Petitioner presented to Gerald Cameron, PA at the Murphysboro Health Center with complaints of pain radiating into her right forearm. (PX1) Petitioner reported that the onset of her pain began three weeks ago and occurred occasionally. Petitioner reported that her pain was aggravated by lifting. On physical examination Mr. Cameron reported that Petitioner's right arm was tender on the lateral radial aspect of the proximal forearm/tendon at the radial collateral ligament. Petitioner was assessed with tendonitis of the elbow or forearm. Petitioner was given naproxen and x-rays of the right elbow were ordered. Petitioner was given work restrictions. Petitioner was restricted from use of the right arm for any lifting, pushing, or pulling activities for two weeks.

On February 17, 2014, Petitioner underwent an x-ray of her right elbow. (PX1) The findings were of normal bone mineralization, no fracture or dislocation, the joint space was maintained, and no focal soft tissue abnormality was seen. Dr. Justin Hodge advised Mr. Cameron to consider an MRI if further evaluation was needed.

On February 25, 2014, Petitioner followed up with Mr. Cameron. (PX1) Petitioner reported that the naproxen was not helping much. Mr. Cameron recommended physical therapy for Petitioner's right forearm. Mr. Cameron continued Petitioner's restrictions for three weeks.

On March 17, 2014, Petitioner presented to Mr. Cameron in follow up. (PX1) Petitioner reported a history of lifting "med boxes", 40 boxes per day weighing 20-25 lbs. each. Petitioner reported her pain had progressively worsened since January 2014. Mr. Cameron noted that Petitioner's pain seemed to be central to the common extensor tendon area of the forearm and was consistent with a repetitive motion injury, likely from a repeated lifting and strain of the tendons. Petitioner was given restrictions, and only permitted to walk, stand, occasionally lift a

maximum of five pounds with the right arm, no repetitive activities with her right arm, and no repetitive gripping with her right hand.

On March 21, 2014, Petitioner presented to Dr. Matthew Smith with complaints of right elbow and shoulder pain. (PX5) Petitioner reported that she thought her pain was related to lifting cassettes at work repetitively. Petitioner reported that her pain radiated down her forearm into her wrist. Petitioner advised that her shoulders had started bothering her more over the last week. Dr. Smith obtained x-rays of Petitioner's right elbow and forearm and her right shoulder. Petitioner's x-rays showed a normal examination of right shoulder, elbow, and forearm. Dr. Smith noted that Petitioner's right shoulder pain was likely related to impingement, and her right elbow pain was consistent with lateral epicondylitis with associated radial tunnel syndrome. Dr. Smith reported that Petitioner would benefit from continued physical therapy and that it would likely take several months for her conditions to completely resolve. Petitioner was advised to follow up in three months if she did not get better with physical therapy. Dr. Smith noted that Petitioner "has been diagnosed with lateral epicondylitis. This diagnosis **could** be due to the repetitive lifting of 25 pound medication cassettes within her position at work". (PX5, emphasis added)

On April 21, 2014, Petitioner presented to Mr. Cameron in follow up. (PX1) Petitioner reported that her pain had lessened since her last appointment. Petitioner reported that she wanted to return to work and see how she did, and that she was pain free the majority of the time. Petitioner reported that she had seen an orthopedic doctor, Dr. Matthew Smith, who gave her the diagnosis of epicondylitis and advised her that it was likely due to lifting. Mr. Cameron assessed Petitioner with epicondylitis which appeared to be resolved. Petitioner was advised to continue home flexibility and strengthening exercises and to follow up if her symptoms recurred. Petitioner was returned to work without restrictions on April 22, 2014.

On May 22, 2014, Petitioner presented to Dr. Clare Fadden at the Murphysboro Health Center. (PX2) Petitioner reported complaints of pain in her elbows and shoulders. Dr. Fadden noted that Petitioner had tendonitis in her elbows and shoulders. Petitioner gave a history of being off work for two months and being pain free, but when she went back to work she had recurrent pain in her shoulders and elbows. Petitioner reported that she had been taking ibuprofen and tramadol because she had been waking up at night with increased pain. Dr. Fadden noted that Petitioner had ulcerative colitis and was on Remicaid and also had some osteopenia so Petitioner had concerns about steroid use. Petitioner was referred for physical therapy and given a restriction for no lifting.

Petitioner underwent a Section 12 examination with Dr. Anthony Sudekum on June 23, 2014, at Respondent's request. (RX6)

On July 7, 2014, Petitioner presented to Dr. Fadden with a history of shoulder pain which began six months prior. (PX2) Petitioner reported that the pain in her shoulder radiated to her

elbow and was burning and dull. Petitioner reported that the pain was aggravated by lifting and pushing. Dr. Fadden planned for Petitioner to continue physical therapy and to watch her weight lifting.

On August 7, 2014, Petitioner reported pain in her bilateral shoulders, which she described as constant but improving. (PX2) Petitioner reported that the pain was aggravated by lifting, movement, and pushing. Petitioner reported that her pain was relieved by physical therapy. Petitioner was advised to continue therapy and weight restrictions at work.

On September 16, 2014, Petitioner presented to Mr. Cameron in follow up. (PX2) Petitioner reported that over all her pain was much better but she still had intermittent pain in both shoulders and elbows, especially the right elbow, when she tried to lift things. Petitioner was to continue light duty restrictions for one month pending physical therapy.

On October 13, 2014, Petitioner presented to Dr. George Paletta . (PX7) Petitioner gave a history of an onset of right elbow pain which began in January, 2014. Petitioner reported that she had to lift and deliver cassettes of medication up to forty times per day and that the cassettes weighed approximately twenty-five pounds. Petitioner reported that the cassettes were on a cart for her to deliver. Dr. Paletta noted that Petitioner's pain was mainly confined to the lateral aspect of the elbow in the extensor wad, but did not go all the way down the forearm or into the dorsum of the hand. Dr. Paletta assessed Petitioner with mild chronic lateral epicondylitis and possible associated radial tunnel syndrome. Dr. Paletta planned for Petitioner to undergo an MRI scan of the elbow, and if the MRI indicated significant lateral epicondylitis with or without a partial tear then Petitioner may be a candidate for an injection. Dr. Paletta further noted that if Petitioner was reluctant to consider an injection because of her osteopenia then her other options might be for a Tenex procedure or for a partial lateral epicondylectomy. Dr. Paletta concluded that based upon the history provided to him by the Petitioner and the correlation of onset or worsening symptoms with work activities that required repetitive lifting, it was his opinion that Petitioner's right elbow condition was causally related to her work activities. Dr. Paletta gave Petitioner restrictions of no lifting more than ten pounds.

Dr. Sudekum testified via evidence deposition on November 13, 2014. (RX8) Dr. Sudekum testified that he reviewed records from Murphysboro Health Center, Dr. Smith, Dr. Donald Bishop, and x-rays as part of his preparation for the exam.

Dr. Sudekum testified that at the time he examined Petitioner she did not have any physical indication of left lateral epicondylitis. Dr. Sudekum testified that since there was no objective evidence of any disease he had to make a differential diagnosis. Dr. Sudekum testified that in Petitioner's case there were some physical exam findings which could potentially be consistent with lateral epicondylitis, but with a differential diagnosis you had to look at the patient as a whole and look at other positive pathologic entities that could be causative of Petitioner's symptoms. Specifically in Petitioner's case, Dr. Sudekum testified that Petitioner

suffered from ulcerative colitis. Dr. Sudekum testified that ulcerative colitis is an inflammatory bowel disease, and that with that disease there were symptoms and pathologic entities outside the intestines, specifically musculoskeletal pain is one of the more common symptoms. Dr. Sudekum testified that most studies indicated that 20 – 40% of patients with that condition will have some significant musculoskeletal complaints. Dr. Sudekum testified that Petitioner takes Remicade for her ulcerative colitis, and could also be a causative factor in her conditions. He further testified that Petitioner had pain in her deltoid muscles, her upper arms, her elbows, and her forearms which is more indicative of a generalized entity rather than simple lateral epicondylitis. With that in mind, Dr. Sudekum testified that generalized myositis, fibromyalgia, or a generalized tendinitis condition of an unknown etiology would also be a differential diagnosis. Additionally, Dr. Sudekum testified that another differential diagnosis could be osteoarthritis because it could also be present with those conditions. Dr. Sudekum testified that in order for him to be able to give a more definitive diagnosis he would have to review an MRI scan of the Petitioner.

Dr. Sudekum testified that Petitioner's age, condition of ulcerative colitis, and use of the medication Remicade could predispose her to the development of the symptoms she presented with and the condition of lateral epicondylitis. Dr. Sudekum testified that he did not believe that Petitioner's work activities caused or aggravated her underlying pathology. Dr. Sudekum testified that Petitioner's job could have provoked symptoms, similar to someone who had hip arthritis that felt pain when walking up the stairs at work, but he did not think the type of work she described would cause a pathologic change. Dr. Sudekum testified carrying grocery bags probably induced the same type of symptoms she had when lifting cassettes at work.

Dr. Sudekum testified that tearing out 2,000 feet of carpet could potentially cause an acute onset of Petitioner's pathology. Dr. Sudekum testified that hand scraping wallpaper off walls could certainly have an effect on the development of pathology for lateral epicondylitis. Dr. Sudekum testified that painting walls in a house could also have a similar effect in the development of the pathology. Dr. Sudekeum testified that "[t]hose types of activities would be much more likely, frankly, to be associated with the development of a condition like lateral epicondylitis than would lifting cassettes." Dr. Sudekum also testified that if Petitioner used a miter saw to cut hardwood flooring on a sustained or repetitive basis over several hours it would be more likely to have caused or contributed to lateral epicondylitis pathology or symptomology.

Petitioner testified at arbitration on March 24, 2015. Petitioner testified that she works as a clinical pharmacist at Chester Mental Health, and has done so for 12 years. Petitioner testified that clinical pharmacists fill cassettes on a daily basis for a 24 hour supply of medication for the patients which they then deliver to each unit every day. Petitioner testified that each cassette weighs 23.6 pounds and is pushed on a cart to deliver medication. Petitioner testified that there are 6 units that the pharmacists deliver to on a daily basis. Petitioner testified that depending on what day of the week it was and how the facility was staffed, she would lift the cassettes

sometimes up to 40 times per day. Petitioner testified that filling and delivering the cassettes is her primary job duty.

On cross-examination Petitioner testified that, including herself, there are three full-time clinical pharmacists. Petitioner testified that there had also been temp pharmacists at some time. Petitioner testified that while there are 6 units to deliver medication to, she would only deliver to 1 – 2 units per day. Petitioner admitted that she personally only filled 6 cassettes per day, but testified that it could be fewer as well. Petitioner also admitted that she lifted her 6 cassettes only 18 times unless it was Thursday or Friday. Petitioner testified that on Thursday and Friday they double filled cassettes since the pharmacists would not be there on the weekend. On those days Petitioner testified that she could lift her cassettes as many as 40 times, but it could be fewer. Petitioner estimated it would only take her 10 seconds to lift a cassette on and off the cart she used to take the medication to the unit.

Petitioner testified that she first saw her primary care physician for medical treatment for her repetitive injury in February, 2014. Petitioner testified that she completed an employee's notice of injury on February 7, 2014. (RX2) Petitioner testified that she filled out the employee's notice of injury on the same day she saw the doctor.

On cross-examination Petitioner advised that her first doctor's appointment was actually February 17, 2014, not February 7, 2014. Petitioner was then asked why she would have completed an employee's notice of injury prior to seeing a doctor. Petitioner testified that it was because she felt that she had tendonitis in her elbow from overuse and repetition. Petitioner testified that she thought it was work related because she did not have any extra-curricular activities. However, Petitioner admitted that she is right hand dominant and used her right hand for everything she does.

Petitioner admitted that she has two dogs, an 80 pound dog and a 60 pound dog. Petitioner testified that she doesn't walk her dogs on a leash because they "don't do well on a leash". Petitioner admitted that by not doing well on a leash, it meant the dogs yank and pull while on a leash.

Petitioner testified that she bought a 2400 square foot house in 2013. Petitioner was asked about Respondent's Exhibits 10(A), 10(B), and 10(C). Petitioner admitted that the pictures were of her Facebook status, of her, and of her home. Petitioner was asked specifically about 10(A), her Facebook status, which read "Thanks everyone! Today was the first 'labor of Love' day. With some great help, we ripped out about 2000 square feet of carpet, pad, and baseboards among some other projects. It's going to be a manual labor kinda week for this girl!" Petitioner was asked if she ripped out 2,000 square feet of flooring. Petitioner testified that she personally did not rip out flooring. Petitioner testified that she "helped where needed" but didn't personally take on any projects herself. Petitioner was then asked about Respondent's Exhibit 10(B) and admitted that it was a picture of her using a saw to cut boards. Petitioner testified that

she helped her contractor "cut a couple of boards" and that she helped to lay "maybe of few boards" of flooring. Petitioner denied ever hand-scraping wallpaper off the walls. Petitioner testified that except for her entryway, she hired someone to do all the painting.

Respondent called Jeffrey Sauzek to testify. Mr. Sauzek testified that he works as a clinical pharmacist at Chester Mental Health Center. Mr. Sauzek testified that he and Petitioner worked the same days and performed the same job duties, and that the only difference between their positions is that he starts the day one hour earlier than Petitioner and she stays one hour later than him.

Mr. Sauzek testified that he was aware that Petitioner remodeled her house because she talked about it at work. Mr. Sauzek testified that Petitioner told him that she personally did the flooring, painted, and maybe stripped wallpaper.

Therefore, the Arbitrator concludes:

1. The Petitioner failed to prove she sustained an accident on January 29, 2014 and May 15, 2014, that arose out of her employment with Respondent. Petitioner failed to prove that her condition of ill-being in her right elbow is causally related to her alleged accidents of January 29, 2014 and May 15, 2014.

   Based upon Petitioner's testimony, it is apparent that her job duties are not repetitive in nature. Additionally, none of Petitioner's treating physicians had an accurate understanding of how often she was performing the task alleged to be repetitive. Petitioner told each doctor that she lifted cassettes 40 times per day. However, when questioned on cross-examination Petitioner testified that three days per week she only lifts the cassettes 18 times. Petitioner testified that two days per week she lifted them up to 40 times, but admitted it could be less. Petitioner testified that it only takes her 10 seconds to lift a cassette on and off the cart used to deliver the medication. Therefore, three days per week Petitioner spends approximately three minutes lifting cassettes and two days per week Petitioner spends approximately six minutes of her day lifting cassettes. It is clear from the medical records that this was not what Petitioner relayed to her treating physicians.

   "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 203, 797 N.E.2d 665, 671 (2003). Preponderance of the evidence is "evidence which is of greater weight or more convincing than the evidence offered in opposition of it; it is evidence which as a whole shows that the fact to be proved is more probable than not." *Gonzales v. United Airlines, Inc.*, 03 IL.W.C. 30483, 09 I.W.C.C. 0458 (2009), citing *Jones v. J. Rubin Co*, 98 IL.W.C. 7779, 02 I.I.C. 0142 (2002). "Among the factors to be

considered in determining whether a claimant has sufficiently carried his burden is his credibility." Id. At trial, a "witness' credibility is always in question." *Bish v. Guiseppe's Pizza*, 07 IL.W.C. 27341, 09 I.W.C.C. 0382 (2009). Credibility is the quality of a witness which renders his evidence worthy of belief. *Gonzales*. It is the Arbitrator's duty to evaluate a witness' credibility, as well as, "the witness's demeanor and internal and external inconsistencies in his testimony." *Id.*

A claimant's testimony, "standing alone, may support an award where all of the facts and circumstances do not preponderate in favor of the opposite conclusion." *Sieber v. Indus. Comm'n*, 82 Ill.2d 87, 97, 411 N.E.2d 249 (1980). However, "when the claimant's testimony is virtually the only evidence favoring an award, and that testimony is repeatedly contradicted by the record, then it is this court's duty to disallow the claim." *Caterpillar Tractor Co. v. Indus. Comm'n*, 73 Ill.2d 311, 315, 383 N.E.2d 220, 222 (1978).

Petitioner's testimony that she did not personally perform any of the remodeling on her home is contradicted by her own Facebook page and the testimony of her co-worker. Therefore, the Arbitrator finds her testimony to be suspect and not credible. Respondent's Section 12 examiner testified that those specific activities could cause or aggravate the condition of Petitioner's right elbow.

Therefore, Petitioner's claim for prospective medical treatment for her right upper extremity is denied.

2. Petitioner's claim for compensation is denied. All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Strong,
Petitioner,

vs. No: 01 WC 61996

Spherion,
Respondent.

16IWCC0119

DECISION AND OPINION ON REVIEW

Petitioner, *pro se*, seeks review of Arbitrator Huebsch's December 12, 2014 order denying his motion for reinstatement. The Commission, after considering the record, hereby affirms the Arbitrator's order. In support, the Commission makes findings of facts and conclusions of law as follows:

1. On November 8, 2001, Petitioner, *pro se*, filed his Application for Adjustment of Claim.

2. On October 3, 2012, Arbitrator Kane, the then-presiding hearing officer, dismissed the case for want of prosecution. The case was reinstated on January 20, 2013.

3. On March 14, 2014, the parties appeared before Arbitrator Heubsch for pretrial and discussion. The Arbitrator recommended that Petitioner settle the case or retain counsel, and advised Petitioner that the case was subject to dismissal in the event that no progress was made.

4. On June 4, 2014, the parties appeared before Arbitrator Heubsch for trial set on this date, but Petitioner advised that he was not prepared to proceed. The Arbitrator granted a continuance and returned the case to his August 18, 2014 call. Petitioner was again advised that he must be prepared to proceed with the case.

5. On August 18, 2014, the parties appeared before the Arbitrator at status call. Petitioner requested a trial date, and same was set for September 12, 2014.

6. On September 12, 2014, the parties appeared before the Arbitrator for trial. Petitioner requested another continuance in order to take the evidence deposition of a Dr. Fink. Respondent requested dismissal. The Arbitrator issued an order of dismissal for want of prosecution.

7. On November 10, 2014, Petitioner timely filed a motion for reinstatement and indicated that, at the September 12, 2014 hearing, he had been "ready to proceed with his own testimony, but did not know if there was an option where he could present his testimony and then submit records and the doctor's deposition at a later time."

8. On December 12, 2014, the parties appeared before the Arbitrator at hearing of the motion for reinstatement. Petitioner submitted his un-notarized "affidavit" suggesting that Respondent's counsel agreed during a phone conversation that the trial that had been scheduled for September 12, 2014 could be continued so that Petitioner could take the deposition of Dr. Fink. The Respondent disagreed with these representations of Petitioner. The Arbitrator, having considered the arguments of the parties, denied reinstatement.

9. On January 12, 2015, Petitioner timely filed a Petition For Review of the Arbitrator's denial of reinstatement.

10. On March 30, 2015, Respondent filed a motion to dismiss the petition for review, citing Petitioner's failure to pay for and furnish the required transcripts of the September 12, 2014 and December 12, 2014 hearings.

11. On April 1, 2015, Petitioner filed a *in forma pauperis* petition under Section 20, requesting permission to proceed without the payment of costs for the required transcripts.

12. On May 20, 2015, the parties appeared before before Commissioner Luskin for hearing of Petitioner's Section 20 petition and Respondent's motion to dismiss.

13. On June 22, 2015, Commissioner Luskin granted Petitioner's Section 20 petition.

14. On July 16, 2015, a notice of briefing schedule (Notice of Return Date) was sent to both parties, indicating that Petitioner's Statement of Exceptions and Supporting Brief under Rule 7040.70 was September 11, 2015.

15. On September 10, 2015, Petitioner filed a motion for extension of time, requesting that the date for submission of his Rule 7040.70 brief be extended 30 days.

16. On September 22, 2015, Commissioner Luskin granted Petitioner an extension of 45 days for the filing of Petitioner's brief.

16IWCC0119

17. On September 24, 2015, a notice regarding the new briefing schedule was sent to both parties, indicating that Petitioner now had until November 9, 2015 to file his brief.

18. On November 25, 2015, Respondent filed a motion to dismiss review and oral arguments, citing Petitioner's failure to file his Rule 7040.70 brief. The motion was noticed for hearing on December 17, 2015.

19. On December 17, 2015, a hearing of Respondent's motion to dismiss review and oral arguments was held before Commissioner Luskin. Petitioner did not appear. As to Respondent's motion, Commissioner Luskin denied oral arguments, but did not dismiss the review.

The granting or denying of a petition for reinstatement rests in the sound discretion of the Commission; the standard is the same whether the dismissal takes place at arbitration or on review. Bromberg v. Industrial Commission, 97 Ill.2d 395 (1983). With respect to whether the Petitioner has shown justification for reinstatement, the Commission finds that he has not.

Arbitrator Heubsch's September 12, 2014 dismissal of the case for want of prosecution was appropriate. Despite at least one previous dismissal and being advised multiple times of the importance of making progress on this nearly 13-year-old case, Petitioner on that day sought another continuance. As well, Arbitrator Huebsch's denial of Petitioner's motion for reinstatement on December 12, 2014 was appropriate, the Arbitrator having noted that due process required finality in the disposition of cases.

Petitioner now claims that he had been ready to proceed with his own testimony at the trial that was scheduled for September 12, 2014. However, his conduct over the course of the past years suggests that he was not ready then and will never be ready. The Commission notes that his Petition For Review was filed a year ago. Since then, he has postponed the resolution of this petition by first claiming inability to pay for transcripts. After he was ultimately granted relief in this regard and a new briefing schedule set, at the last minute he requested a 30-day extension to file his Rule 7040.70 brief. Commissioner Luskin granted him more than what was requested, giving him until November 9, 2015 to file his brief (the original due date was September 11, 2015).

Since then, there has been no brief filed by Petitioner. In fact, there has been no communication at all by Petitioner to the Commission. Significantly, while Petitioner had appeared for previously scheduled status calls and trial dates, he failed to appear at the December 17, 2015 hearing on Respondent's motion to dismiss the review.

Ultimately, a party must exercise due diligence in pursuing his or her claim before the Commission. Contreras v. Industrial Commission, 240 Ill. Dec. 14 (1999). Given Petitioner's excessive delaying tactics and demonstrated unwillingness or inability in prosecuting this case, the Arbitrator's denial of reinstatement was appropriate.

16IWCC0119

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's order of December 12, 2014 is hereby affirmed.

No bond is required for removal of this cause to 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:

FEB 11 2016

Joshua D. Luskin

Charles J. DeVriendt

o-01/20/16
jdl/ac
68

Ruth W. White

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

Debra Dammerman,

Petitioner,

vs. NO: 12WC 33665

Lakeland College ,

16IWCC0120

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent, herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, 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 March 6, 2015, is hereby affirmed and adopted.

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

16IWCC0120

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 $12,392.00. 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: FEB 11 2016
MJB/bm
o-02/08/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

DAMMERMAN, DEBRA
Employee/Petitioner

Case# **12WC033665**

LAKELAND COLLEGE
Employer/Respondent

16IWCC0120

On 3/6/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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
RICHARD K JOHNSON
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602-2983

0180 EVANS & DIXON LLC
KIM M PARKS
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

16IWCC0120

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

- [ ] 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)

DEBRA DAMMERMAN,
Employee/Petitioner

v.

LAKELAND COLLEGE,
Employer/Respondent

Case # **12** WC **33665**

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 **Champaign**, on **2/11/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0120

FINDINGS

On the date of accident, **8/21/12**, 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 $**22,369.36**; the average weekly wage was $**430.18**.

On the date of accident, Petitioner was **50** 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 $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $286.79/week for 42-6/7 weeks, commencing 4/18/14 through 2/11/15, as provided in Section 8(b) of the Act.

The Respondent shall pay reasonable and necessary medical services for treatment of petitioner's right knee from 6/21/13 through 2/11/15, 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.

Signature of Arbitrator

3/3/15
Date

ICArbDec19(b)

MAR 6 - 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Although this hearing is being held pursuant to Section 19b of the Act, the parties stipulate that should the arbitrator find the petitioner has reached maximum medical improvement as a result of her injury, the arbitrator can make findings as to the issue of the nature and extent of petitioner's injury.

Petitioner, a 50 year old employee of Lakeland College, sustained an accidental injury to her right knee that arose out of and in the course of her employment by respondent on 8/21/12 when she caught her foot on a rubber mat on the floor and fell on both her knees and then struck her left hip. This claim was initially heard pursuant to Section 19b on 6/20/03 by the Honorable Douglas McCarthy. The issues in dispute at that time were causal connection, medical, prospective medical and temporary total disability. On 7/29/13 Arbitrator McCarthy issued his decision and found that petitioner's right knee condition was causally related to the injury she sustained on 8/21/12. Arbitrator McCarthy found that the findings and opinions of respondent's Section 12 examiner Dr. Kostman, that petitioner's right knee condition was not related to her injury, were based on an incorrect understanding of the petitioner's mechanism of injury which was corroborated by her history to her employer in her accident report, and the history she provided her initial treating doctors. He awarded petitioner temporary total disability benefits from 9/17/12 through 6/20/13 (the date of hearing) and authorized the surgery for petitioner's right knee that was recommended by Dr. McKenchnie. Arbitrator McCarthy found petitioner was only capable of doing light duty after her work injury, and remained in effect as of arbitration. Arbitrator McCarthy also awarded petitioner medical bills related to her right knee treatment.

At the hearing on 2/11/15 the parties stipulated that respondent has paid petitioner temporary total disability benefits and medical benefits from 6/21/13 through 4/17/14. During this period petitioner continued to treat with Dr. McKenchie. Dr. McKenchie continued petitioner off work pending surgery. Petitioner also remained in physical therapy at Central Illinois Physical Therapy up to the time of surgery.

The evidence deposition of Dr. McKenchie was taken by respondent on 3/11/13. Although this deposition took place prior to the hearing by Arbitrator McCarthy, its admission into evidence was not objected to by respondent's counsel. The arbitrator notes that since this evidence is dated prior to the hearing by Arbitrator McCarthy on 6/20/13, the proper time for this evidence to be admitted was prior to the hearing on 6/20/13. Having noted that Arbitrator McCarthy found petitioner's right knee condition on 6/20/13 causally related to the injury on 8/21/12, the arbitrator finds all opinions rendered by Dr. McKenchie in this deposition only relate to his treatment of petitioner through 3/11/13, which is incorporated into Arbitrator McCarthy's decision dated 7/29/13.

On 11/5/13 petitioner underwent an arthroscopy, lateral meniscectomy, abrasion chondroplasty, and microfracture medial, lateral, and patellofemoral compartments. The procedure was performed by Dr. James McKenchie. Petitioner's pre-operative diagnosis was internal derangement of the right knee. Petitioner's post-operative diagnosis was tear, right lateral meniscus, traumatic arthritis, and chondromalcia of the right knee. Petitioner followed up post operatively with Dr. McKenchie and underwent a course of physical therapy at Central Illinois Physical Therapy through April of 2014, when it was stopped being paid for by respondent based on the opinions of its Section 12 examiner Dr. Nogalski. Petitioner had some improvement with her symptoms following the surgery and physical therapy, however, she did report some swelling in her knee when in physical therapy. Dr. McKenchie noted on 3/11/14 that petitioner's right knee was slowly improving, although she had significant popping beyond 15 degrees extension of the knee limiting her ability to full straighten the knee.

On 4/7/14 the petitioner underwent a Section 12 examination by Dr. Michael Nogalski, at the request of the respondent. Petitioner reported that she was not working and had last worked sometime in September of 2012, when she was laid off by respondent as part of a reduction of force. Dr. Nogalski reiterated the accident history Dr. Kostman had in his records that petitioner fell on her left hip and then onto both knees, which Arbitrator McCarthy found on 6/20/13 to not be corroborated by the credible evidence. Petitioner reported ongoing weakness and stated that she was working to strengthen her knee. She stated that it was hard to lift her leg, and she has swelling. Petitioner told Dr. Noglaski that although she used to play extensive amounts of tennis and basketball she did not really recall any problems with the right knee. Following an examination and record review Dr. Noglaski's impression was status post right knee arthroscopy with debridement of multiple zones and microfracture. Dr. Nogalski was of the opinion that petitioner had reached a plateau and continues to have consistent objective findings relative to subjective complaints. He noted that petitioner showed solid eccentric muscle control, but not active control, which he found was inconsistent findings. He believed she could do more with her right leg. Dr. Nogalski noted severe osteoarthritis of the lateral and patellofemoral compartment, and fairly classic valgus knee with patellofemoral and lateral compartment osteoarthritic issues. Dr. Nogalski was of the opinion that "it is not clear that she did, indeed, sustain a specific "injury" to the knee and her bone marrow signal findings as noted in the MRI of October 29, 2012 would more reasonably be correlated with degenerative issues within the knee especially in the absence of any specific contusion or objective documentation of a distinct injury to the knee on that date". Dr. Nogalski believed that it appeared that petitioner was not clearly benefitting from medical treatment, does not require any further treatment, and had reached maximum medical improvement with respect to her right knee. He again questioned the fact

that petitioner sustained an injury to her right knee on 8/21/12. Dr. Nogalski opined that petitioner could work full duty, despite the fact that she would have some difficulty with her knee because of her severe osteoarthritis. He recommended weight loss and low impact exercise.

Following the examination by Dr. Nogalski respondent terminated all of petitioner's medical and temporary total disability benefits.

On 4/21/14 Dr. McKenchie noted only limited improvement in petitioner's right knee. Petitioner was able to flex to 120 degrees but had the dry grinding with extension beyond approximately 30 degrees, due to severe erosion of the articular cartilage in the patella femoral joint. Dr. McKenchie was of the opinion that petitioner was still not able to return to work because she could not stand for extended times and could not kneel, squat or climb. He told petitioner she might need to have a patellectomy done at some time in the future, but wanted petitioner to have an opportunity to improve by continuing with the exercises. He was of the opinion that petitioner had not yet maximum medical improvement.

On 5/19/14 Dr. McKenchie was of the opinion that petitioner was better able to fully extend her knee with less crepitus than before. X-rays showed a spur along the medial margin of the patella in the patella femoral joint, and a medial spur of the femur at the joint line and lateral spurs of the femur and tibia at the joint line. Dr. McKenchie was of the opinion that given the degree of degenerative change it was likely that petitioner would benefit from a total knee arthroplasty rather than a patellectomy. He noted that petitioner was still not able to kneel, squat, or climb. He continued her off work and prescribed Norco.

On 6/20/14 petitioner returned to Dr. McKenchie. She continued to be significantly limited by the symptoms in her knee. She could not fully extend her knee, or hold a position of full extension when resisting the weight of her leg against gravity. Petitioner had marked patella femoral grinding. Dr. McKenchie was of the opinion that petitioner would have to have something done surgically, either a patellectomy or complete knee replacement. Petitioner was given a new prescription for Norco. Since Dr. McKenchie was retiring she indicated that she would be continuing treatment with Dr. Jones. He continued petitioner off work indefinitely.

On 9/11/14 petitioner presented to Dr. Tyler Jones at Edmund W. Raycraft M.D. and Tyler N. Jones, for her right knee pain. Petitioner reported that her knee improved temporarily after surgery. Petitioner reported that she failed to get better postoperatively in therapy. She reported that she had not had any injections or NSAIDS post operatively. Petitioner reported that at some point she stopped

improving and has had no further improvement. Dr. Jones examined petitioner and noted that at the time of the scope she had areas of osteoarthritis that were bone on bone. He recommended a steroid injection. He noted that petitioner was headed for a replacement, but she wanted to try a steroid injection first. Dr. Jones took some right knee x-rays that showed both medial and lateral moderate and severe osteoarthritis, joint space narrowing and periarticular osteophytes. Petitioner was told to contact his office in two weeks if no improvement.

On 11/19/14 Dr. Frank Petkovich performed a Section 12 examination and impairment rating of petitioner, at the request of the respondent. Petitioner reported that she tripped and fell to the floor injuring her right knee. Following an examination and record review, Dr. Petkovich noted no right knee joint effusion and no muscle atrophy in her right leg. He noted pain on range of motion consistent with some degenerative arthritic changes. He noted no acute findings. He diagnosed a tear of the right lateral meniscus, and degenerative arthritis of the right knee. He was of the opinion that the tear of the right knee lateral meniscus occurred as a result of the accident on 8/21/12; that her degenerative arthritis in her right knee was present prior to the incident, and that the accident did not cause any aggravation or acceleration of the preexisting degenerative arthritic changes in her right knee that were present prior to 8/21/12. Dr. Petkovich opined that no further treatment was needed for petitioner's right knee as a result of the accident on 8/21/12, and that she had reached maximum medical improvement. Dr. Petkovich was of the opinion that petitioner could work her regular duty job without restrictions. Dr. Petkovich was of the opinion that petitioner has a 3% impairment of her right lower extremity as a result of the accident on 8/21/12.

On 1/22/15 petitioner returned to Dr. Jones. She noted that she does not work outside the home. She reported that she got about 10 weeks of relief from her injection, and takes Norco 10 occasionally. She denied any new injury. A repeat injection was performed.

Petitioner offered into evidence the treating records of Dr. Janice Venderveer, her primary care physician. All records made reference to her right knee pain.

At trial petitioner testified that she has lost a lot of strength in her right knee. She testified that it buckles quite often and for this reason she has a disability card, and uses a cane for stability. Petitioner reported constant pain in her right knee and stated that her right knee is bowed and shaped differently. Petitioner testified that her knee was swollen at trial. The arbitrator and counsel looked at petitioner's right knee with her jeans on and agreed that it appeared to be larger than her left knee. Petitioner testified that she does home exercises that includes an exercise bike and exercise band, and has recently joined the

YMCA. Petitioner is trying to wean herself off Norco, and uses a cane when she has to walk far distances. She also testified that she has a walker at home. Petitioner denied any problems with her right knee prior to 8/21/12.

Petitioner testified that she has not been released to work by any of her treating doctors, and for that reason has not looked for any work. Petitioner denied any reinjury to her right knee since 8/21/12.

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

In his decision dated 7/29/13 Arbitrator McCarthy found petitioner's current condition of ill-being as it relates to her right knee is causally related to the injury she sustained on 8/21/12. He based this decision in part of the fact that he found the accident history Dr. Kostman based his opinions on flawed and not supported by the credible evidence. He even went so far as to find that petitioner's history that she fell and landed on both knees was corroborated by her history to respondent in the accident report, as well as the history she provided to her initial treating doctors.

The evidence respondent offered into evidence on the issue of casual connection during this hearing were the opinions of Dr. Nogalski, their Section 12 examiner, and Dr. Petkovich, another Section 12 examiner who was also asked to provided an AMA impairment rating. Both Dr. Nogalski and Dr. Petkovich opined that petitioner's current condition of ill-being as it relates to her right knee is not causally related to the injury on 8/21/12. The arbitrator gives no weight to the causal connection opinion of Dr. Nogalski given the fact that his opinions are based on the same erroneous accident history that Dr. Kostman relied on, namely that "petitioner fell on her left hip and then onto both knees". The arbitrator reiterates that this accident history was found not to be accurate by Dr. McCarthy, and this arbitrator sees no credible evidence to support any change in petitioner's accident history. Although Dr. Petkovich diagnosed a tear of the right knee lateral meniscus and opined that it occurred as a result of the accident on 8/21/12, Dr. Petkovich then went on to opine that petitioner's degenerative arthritis in her right knee was present prior to the accident, and the accident did not cause any aggravation or acceleration of the preexisting degenerative arthritic changes in her right knee. The arbitrator gives lesser weight to Dr. Petkovich's opinion based on the fact that petitioner presented unrebutted evidence that she did not sustain any injury her right knee prior to the accident on 8/21/12; that she did not have any treatment for her right knee prior to the injury on 8/21/12; that she did not sustain any reinjury to her right knee after the injury of 8/21/12; that she used to play extensive amounts of tennis and basketball and did not really recall any problems with the right knee; and that she has been either off work or on restricted duty since the accident on 8/21/12.

Given the fact that the issue of whether or not petitioner's current condition of ill-being as it relates to her right knee being causally related to the injury she sustained on 8/21/12 was decided in the affirmative by Arbitrator McCarthy in his decision dated 7/29/13, and the arbitrator finds the causal connection opinions of Dr. Nogalski are based on a flawed accident history, and the opinions of Dr. Petkovich are inconsistent with the credible evidence, the arbitrator finds petitioner's current condition of ill-being as it relates to her right knee is still causally related to the injury she sustained on 8/21/12.

The arbitrator further finds the fact that petitioner has remained off work since 6/20/13, the fact that her condition has only temporarily improved intermittently since that time with surgery and ongoing conservative treatment, and the fact that no credible evidence exists to support a finding of an intervening accident, all support the finding that petitioner's current condition of ill-being as it relates to her right knee is still causally related to the accident on 8/21/12.

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

Having found the petitioner's current condition of ill-being as it relates to her right knee is still causally related to her injury on 8/21/12, the arbitrator finds all medical treatment petitioner received for her right knee from 6/21/13 through 2/11/15 was reasonable or necessary to cure or relieve petitioner from the effects of the injury she sustained on 8/21/12.

The Respondent shall pay reasonable and necessary medical services for treatment of petitioner's right knee, 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.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Petitioner claims she was temporarily totally disabled from 4/18/14 through 2/11/15. Respondent claims petitioner was not temporarily totally disabled after 4/17/14 based on the findings and opinions of Dr. Nogalski and Dr. Petkovich. Having found the petitioner's current condition of ill-being as it relates to her right knee is still causally related to the injury she sustained on 8/21/12, the arbitrator finds the petitioner is entitled to temporary total disability benefits from 4/18/14 to 2/11/15, a period of 42-6/7 weeks.

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

Having found petitioner's current condition of ill-being as it relates to her right knee is causally related to the accident on 8/21/12; that petitioner has remained under active treatment since 8/21/12; that petitioner has not sustained any intervening accident to her right knee since 8/21/12; that petitioner has not been released to work by any treating physician as of 2/11/15, the arbitrator finds it is premature for this arbitrator to make any findings as to the nature and extent of petitioner's right knee injury.

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

Corey Martin,
Petitioner,
vs.
WATCO,
Respondent,

NO: 14WC 11240

16IWCC0121

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, permant 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 19, 2015, is hereby affirmed and adopted.

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

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

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.

DATE: FEB 11 2016
MJB/bm
o-2/8/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MARTIN, COREY
Employee/Petitioner

Case# **14WC011240**

16IWCC0121

WATCO
Employer/Respondent

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

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

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

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

2904 HENNESSY & ROACH PC
MICHAEL J HOLT
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

16IWCC0121

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Corey Martin
Employee/Petitioner

v.

Watco
Employer/Respondent

Case # 14 WC 11240

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **March 25, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0121

FINDINGS

On 2/19/2014, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $41,600.00; the average weekly wage was $800.00.

On the date of accident, Petitioner was 36 years of age, *single* with 4 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 $5,139.46 under Section 8(j) of the Act as to medical benefits.

ORDER

The Petitioner failed to prove accident. All benefits 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

5/18/15
Date

MAY 19 2015

FINDINGS OF FACT APPLICABLE TO ALL DISPUTED ISSUES

Corey Martin testified that he works for Respondent as a welder/Car Man. The job involves welding and cutting metal parts off of railroad cars. On February 19, 2014, he was swinging a 10-pound, long-handled sledgehammer and missed. He felt a pop in his left shoulder. It is not disputed that Petitioner treated with Dr. Poos initially, a family doctor, who referred him to Dr. Doerr, an orthopedic surgeon. Petitioner was treated conservatively by Dr. Doerr, including physical therapy and shoulder injections. Petitioner was released back to full duty work in his former capacity, and he currently works for Watco as a Car Man. He is completing his regular job duties but still complains of left shoulder pain.

One of the significant trial issues was the content of the February 20, 2014 medical record of Dr. Poos, whose records were admitted at Petitioner Exhibit 2. The office note dated February 20, 2014 contains the history that Petitioner had left shoulder pain for several weeks; no known injury. This history appears twice in the typewritten office note. On the other hand, Dr. Poos' office note of February 25, 2014 references a history of Petitioner swinging a sledge hammer at work on February 18, 2014 and injuring his left shoulder.

At trial, Petitioner testified that Dr. Poos may not have understood what he told him. Petitioner testified he had experienced problems before with the left shoulder and the sledgehammer incident made it worse. Petitioner did not believe the Dr. Poos office note was accurate. Dr. Poos was not deposed.

The second major issue at trial concerned Watco's "point" system. Petitioner testified to his understanding that a worker is assessed a half on full point for being tardy or absent without excuse. Petitioner agreed that, on the day of his alleged injury, he had accumulated 11.5 points out of a permitted 12 points. If an employee accumulated 12 points in a year, the employee could be terminated. Petitioner agreed that, if he had showed up late for work without excuse on the alleged accident date, he would have received a half point which would put him at the 12 point mark. A worker does not receive any points if their tardiness or absence is because of a work injury.

Respondent called Jorel Grant who is the environmental health and safety manager for Respondent. Mr. Grant explained that the Watco point system is part of the collectively bargained agreement with the union. It is a "no fault" based system. There is a 12-point maximum during a rolling calendar year that can be incurred before termination. If a worker calls in before 6:06 a.m., only a half point is assessed, but a call after this time results in a full point assessment. If the worker is tardy because of a medical appointment arising from a work accident, no points are assessed or a prior point assessed is removed. On February 19, 1014, Petitioner had 11.5 points out of a permitted 12 points. Mr. Grant identified Respondent's Exhibit 3 as a print out of the points Petitioner had accumulated as of February 19, 2014. Petitioner was very close to "pointing out," on the alleged accident date. Per Mr. Grant, Petitioner was frequently late to work and assessed points.

A third major issue at trial concerned Petitioner calling in before his shift to advise Respondent that he injured his shoulder and would be seeing his doctor. Petitioner testified that he called Rick Bauman at work before his shift began and told him that he injured his shoulder at work.

Respondent called Rick Bauman as a witness, who is a supervisor to Petitioner. Mr. Bauman denied that Petitioner told him that he injured his left shoulder at work. Mr. Bauman completed Respondent's Exhibit 5 on February 21, 2014, and it is a handwritten statement indicating that Petitioner did not report when he injured his shoulder or that it was "on the job or off the job."

Petitioner's injury happened in mid-afternoon. Petitioner agreed he did not report the incident to Watco the day it occurred, and this was against the Watco reporting policy that all accidents are to be immediately reported. Mr. Grant and Mr. Bauman both testified that all accident are to be immediately reported, and workers are trained on this protocol. However, the work is physical in nature, and workers do not always report every minor injury that happens.

Petitioner completed an accident report on February 21, 2014. (Px. 8.) It references a left shoulder injury at work while swinging a sledge hammer. Petitioner also called Jeff Allred, a co-worker, who testified to being present when Petitioner missed with the sledgehammer. Mr. Allred completed a written statement about the accident consistent with Petitioner's testimony. (Px. 10.) Mr. Allred has three pending worker's compensation cases himself against Watco, all denied.

Therefore, the Arbitrator finds as follows:

1. The Arbitrator denies Petitioner's claim. First, the Arbitrator finds the most objective piece of evidence to be the contemporaneous office note of Dr. Poos dated February 19, 2014. It clearly reflects Petitioner reporting shoulder pain for a number of weeks with no known injury. Second, suspicion of the legitimacy of the alleged accident exists because Petitioner was very near termination due to having accumulated 11.5 points out of a permitted 12. If Petitioner's absence from work on February 20, 2014 was due to a work injury, Petitioner would not be assessed any points so he could keep his job. If the absence was due to a personal health condition, Petitioner would have "pointed out" due to an unscheduled work absence and he could be terminated. Sufficient doubt exists in the Arbitrator's mind as to whether Petitioner suffered the alleged work injury.

2. All other issues are moot in light of the conclusion above. Benefits are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Timothy Ooms,
Petitioner,
vs.
The Anderson's Inc.,
Respondent,

NO: 14WC 13639

16IWCC0122

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b), having been filed by the Petitioner, herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, 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 26, 2015, is hereby affirmed and adopted.

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

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

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

DATED: FEB 11 2016
MJB/bm
o-2/8/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

OOMS, TIMOTHY
Employee/Petitioner

Case# **14WC013639**

14WC005682

16IWCC0122

THE ANDERSON'S INC
Employer/Respondent

On 5/26/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

0333 SHAY & ASSOCIATES
KATHERINE WOOD
260 E WOOD ST
DECATUR, IL 62523

2904 HENNESSY & ROACH PC
PAUL N BERARD
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

16IWCC0122

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)

TIMOTHY OOMS,
Employee/Petitioner

v.

THE ANDERSON'S INC.
Employer/Respondent

Case # **14** WC **13639**

Consolidated cases: **14 WC 5682**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **4/17/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0122

FINDINGS

On the date of accident, **2/28/14**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned **$21,379.10**; the average weekly wage was **$593.86**.

On the date of accident, Petitioner was **49** 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 **$38.10** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$38.10**.

Respondent is entitled to a credit of **$00.00** under Section 8(j) of the Act.

ORDER

The petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his bilateral arms/hands due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 2/28/14, or that his current condition of ill-being is causally related to the alleged injury on 2/28/14. Petitioner's claim for compensation is denied.

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

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

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

Signature of Arbitrator

5/20/15
Date

ICArbDec19(b)

MAY 26 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 49 year old bagger, alleges he sustained an accidental injury to his lumbar spine due to repetitive work activities that arose out of and in the course of his employment by respondent that manifested itself on 2/28/14. This case was heard in consolidation with case 14 WC 5682, with an alleged accident date of 12/4/13. A separate decision has been issued with respect to this claim.

On 8/21/12 petitioner underwent a physical at Decatur Memorial Hospital, performed by Dr. Barnes. This was a pre-placement examination for ADM Birkbeck Grain Elevator EA9. Petitioner's examination was normal.

Petitioner worked for respondent through a temporary agency from November 2012 through March 2013. In March 2013 petitioner was hired full-time by respondent and continued to work for respondent until 12/5/13.

Petitioner was a bagger for respondent. His duties included taking a bag off the table, putting it on the spout of the hopper by clamping the bag onto the hopper, then pulling down the lever with his right hand to fill the bag with corncob. When 50 pounds filled the bag, the hopper would automatically stop. Petitioner would then flip the lever off, release the clamps, and the bag would fall on the conveyor. Petitioner would then step on a pedal that would move the conveyor. The bag would move to the sew area, 20 inches away. Petitioner would fold down the top of the bag together, press another pedal and the sewing machine would sew the top of the bag. Petitioner would then cut the string off the sewing machine right at the end of the sewing machine. Once the bag was filled and sewed, petitioner would pick the bag off the conveyor and place it on the pallet. Other duties that petitioner performed included running the pay loader and man lift, sweeping floors, scooping product, blowing off machines, and doing repairs. He testified that he has a lot of duties, but his primary job is bagging.

Petitioner stopped working on 12/5/13 due to an alleged unrelated low back injury. Petitioner did not work from 12/6/13 through 2/6/14.

On 2/6/14 petitioner returned to Dr. Kureishy staggering while walking. He complained of numbness in his right side, glut and hip area radiating down his side. He also complained of numbness in his left little finger. Dr. Kureishy noted a right ulnar nerve entrapment shooting down the outer right forearm. He recommended an EMG/NCV. Petitioner was continued off work. On 2/21/14 petitioner continued to complain of back pain, and hand/arm numbness/tingling. Petitioner stated that his carpal tunnel syndrome was related to repetitive motion at work.

On 2/28/14 petitioner presented to his cardiologist, Dr. Jyothinagaram. He reported that his activity had decreased over the last few months due to a backache. He also stated that he had carpal tunnel syndrome and was scheduled for carpal tunnel surgery and elbow nerve relief surgery. Petitioner noted that he was a smoker from 1983 to 2001, and would smoke one pack a day. After petitioner stop smoking cigarettes he started chewing tobacco, and graduated to chewing snuff. He was instructed to discontinue use of snuff.

On 2/28/14 petitioner also presented to Dr. Robert Krause at Decatur Neurosurgery Associates, for low back pain. His chief complaint was low back pain, and bilateral hand numbness and tingling. Petitioner reported that his lower back pain developed sometime in December. He related a work injury where he was twisting his back and developed symptoms. He complained of pain about his right lower back, that occasionally travels into the leg. He reported that he had been using Norco, Valium, and Neurontin, without any significant relief. Petitioner denied any left leg symptoms. He stated that therapy exacerbated his pain. Petitioner also complained of bilateral arm numbness and weakness, with most of the pain about his right elbow, and numbness and tingling in the fourth and fifth digits. Dr. Krause saw no obvious weakness in petitioner's hands, but petitioner reported that he had diminished grip strength. Petitioner reported some symptoms in his left hand, but was more worried about the right hand. Petitioner did not report any nocturnal pain. Dr. Krause reviewed the results of petitioner's MRI of the lumbosacral spine dated 1/15/14. He was of the opinion that it showed mild arthritic changes about the low back. No evidence of disc herniation was seen. He also reviewed the EMG nerve testing performed 2/13/14 which revealed bilateral severe carpal, and moderate to severe, right greater than left, cubital tunnel syndrome. Dr. Krause's impression was lumbosacral sprain/strain with mild arthritic changes of the lumbosacral spine; morbid obesity; bilateral carpal tunnel syndrome, right greater than left; cubital tunnel syndrome. Dr. Krause saw no need for spinal surgery. He recommended physical therapy and a referral to the pain clinic. He released petitioner to light duty activities. He also released petitioner on an as needed basis with respect to his low back. He continued treating petitioner for his bilateral carpal and cubital tunnel syndrome.

On 3/7/14 petitioner returned to Dr. Kureishy. His history included acute back lumbar sacral pain, sudden onset one month ago, radiating down the right leg, moderate in severity. Dr. Kureishy's diagnoses included chronic low back pain, chronic sciatica, and chronic carpal tunnel syndrome. Then on 3/20/14 petitioner returned to Dr. Kureishy. He complained of back pain since he received a shot in his back. He complained of right-sided pressure on his butt, and stated that his left side felt like a knife following the injection. Petitioner's low back pain complaints included not only the right side but the left side. He

reported that they were acute and moderate in severity. He reported that the exacerbating factors are activities. Dr. Kureishy's diagnoses were chronic low back pain and chronic sciatica. Dr. Kureishy noted that petitioner's physical therapy was stopped because it was making things worse. It was noted that petitioner was taking Norco and diazepam.

On 3/21/14 petitioner underwent a right median nerve decompression at the wrist, and right ulnar nerve decompression without transposition, performed by Dr. Krause. Petitioner's postoperative diagnoses were right carpal tunnel syndrome, and right cubital tunnel syndrome. Petitioner followed up postoperatively with Dr. Krause.

On 4/1/14 petitioner related improvement of his right fourth and fifth digit numbness. He noted no adverse events after the decompression. He reported discomfort in the right and pain in his left hand along his wrist, and numbness and tingling along his left fourth and fifth digits. Petitioner made no complaints of any back pain. Dr. Krause released petitioner to driving, and continued petitioner's lifting restrictions at 20 pounds.

On 4/23/14 petitioner returned to Dr. Krause with multiple complaints and concerns. He complained of severe lower back pain and severe pain about his left elbow. He also related numbness along his right fifth digit. Dr. Krause ordered a course of occupational therapy. He released petitioner back to work with lifting restrictions of 50 pounds. His prognosis for petitioner was poor. He suspected secondary gain issues.

On 7/23/14 petitioner followed up with Dr. Krause. He reported concerns regarding his lower back. He stated that he had been undergoing various injections but did not think they had been helpful. He stated that he was still on Percocet and Neurontin. He stated that his hand symptoms were improving, but he still had some discomfort about his left wrist. He did not voice significant digit features, and related numbness along the right elbow. Petitioner did not relate any elbow pain. Dr. Krause reviewed the MRIs from 1/15/14 and 7/1/14 and noted that there were minimal arthritic changes of the mid lumbar segments. A generalized disc bulge was noted. His impression was low back pain, and status post right median and ulnar nerve decompression. Although petitioner related limitations of lower back pain, Dr. Krause did not think there was a surgery that would improve his disposition there. He believed that petitioner would be best treated in a pain management program, which he noted petitioner was doing. He also indicated that weight reduction, chiropractic treatments, and nonsteroidals would all be helpful. He did not believe that petitioner would be able to go back to work because of pain limiting symptoms. However, from his standpoint, Dr. Krause did not have any particular restrictions for petitioner. With respect to petitioner's

peripheral nerve entrapment, Dr. Krause believed petitioner was improving. He noted that petitioner did have some pain and numbness about the elbow area, but suspected that it would improve over the next several months. He had no limitations regarding petitioner's peripheral nerve entrapments. He believed petitioner was tolerating his left side quite well, and did not appear to require surgery at that time. Dr. Krause released petitioner on an as needed basis, and noted that he may continue to work with the pain clinic and his family practitioner for chronic pain management programs. On 7/28/14 Dr. Kureishy noted that petitioner should be off for one month.

On 8/11/14 petitioner underwent a Section 12 examination performed by Dr. William Strecker, at the request of the respondent. Petitioner's chief complaint was pain and numbness in the ring and small fingers. Petitioner gave a history of sustaining a back injury on 12/5/13, and approximately 2 weeks later developed numbness and tingling to the ring and small finger of both hands, more so on the right than the left. Petitioner complained of intermittent numbness of the ring and small fingers on the left. He reported that his job duties are as a bagger, and he is required to fill bags with approximately 50 pounds of corncobs. He then flips the bag, sews it shut, cuts the string, and stack the bag on the pallet. He stated that he usually stacks five bags per layer, eight high, on each pallet. Petitioner reported that prior to his back injury he had been working "shutdown" where he would do a double shift and then a 12 hour shift, seven days a week since August. Petitioner reported that he can typically can do 2 bags in a minute, and was doing approximately 7 tons of material per day during this period. Petitioner reported that he had to maintain his elbows in a fixed and flexed position. Following an examination and record review Dr. Strecker was of the opinion that petitioner had bilateral cubital tunnel syndrome and an asymptomatic, but electrophysiologically positive, bilateral carpal tunnel syndrome. He opined that the treatment to date had been reasonable and necessary. With respect to petitioner's right upper extremity, Dr. Strecker recommended a repeat of his nerve conduction study to ascertain why petitioner had persistent parathesias in the fifth finger, hand and forearm. With respect to his left upper extremity, Dr. Strecker felt that petitioner was most likely going to require decompression of his median nerve at the wrist, as well as decompression and possible transposition of the ulnar nerve at the left elbow. Dr. Strecker was of the opinion that petitioner could work limited duty, not greater than 50 pounds on a non-repetitive basis. With respect to causation, Dr. Strecker was of the opinion that there seemed to be some discrepancies. He opined that while repetition and force have been shown to be a contributing factor for the development of carpal tunnel syndrome, for which petitioner was asymptomatic, there is no evidence that it is an aggravating or contributing factor to cubital tunnel syndrome, of which petitioner had complaints. Dr. Strecker noted that while petitioner described that his elbows were maintained in a fixed hyper flexed

position, neither his job description or the video confirmed this. He also noted that petitioner had no complaints of parathesias for two months after his last day of work, as well as only having a limited exposure since he began working full time for respondent, and had not worked since December 2013. Based on the limited duration and lack of temporal relationship, Dr. Strecker did not feel that petitioner's job duties caused, contributed or aggravated his carpal or cubital tunnel.

On 1/15/15 the evidence deposition of Dr. Strecker, an orthopedic surgeon, was taken on behalf of the respondent. Dr. Strecker noted that when he examined petitioner he still had numbness of the small finger, as well as numbness in the ulnar aspect, or the small finger side of his hand, and on the inside portion of his forearm, on the right. He opined that petitioner did not have any complaints on the right side that would be consistent with carpal tunnel syndrome, or complaints on the left side that would be consistent with cubital tunnel syndrome. Dr. Strecker opined that there is no correlation between nerve conduction and EMG findings and the clinical diagnosis of carpal tunnel syndrome. Based on what the petitioner told him, and the job videotape, Dr. Strecker was of the opinion that the videotape did not show that petitioner had to maintain his arms in a hyper flexed position for prolonged periods of time. Although Dr. Strecker agreed that petitioner had to flex and extend his elbows all day, he did not have to maintain them there. Dr. Strecker was of the opinion that petitioner did not meet any of the thresholds that one would expect to see in somebody who has cubital tunnel syndrome, such as chronically compressing the ulnar nerve; using vibratory tools; complaints of inflammatory tendinopathy; or maintaining elbows in a flexed position. Dr. Strecker was also of the opinion that the other reason he did not think petitioner's cubital tunnels were related to his job duties was the fact that there wasn't a temporal relationship between petitioner's onset of his complaints and his job. Dr. Strecker noted that petitioner did not have any complaints of numbness and tingling until two months after he finished his last day of work for respondent. Dr. Strecker was of the opinion that obesity is a risk factor for the development of carpal tunnel, and petitioner weighed 340 pounds. Dr. Strecker was of the opinion that even though petitioner had electrical findings of carpal tunnel syndrome he had no symptoms, nor did he have any physical or provocative findings of carpal tunnel syndrome.

On cross-examination Dr. Strecker was of the opinion that the job duties that were explained by petitioner and shown in the job video could cause bilateral carpal tunnel syndrome, but petitioner had no symptoms related to carpal tunnel syndrome.

On 1/23/15 the evidence deposition of Dr. Krause, a neurosurgeon, was taken on behalf of the petitioner. Dr. Krause testified that he treated petitioner for his back, as well as his bilateral hands and arms. Dr. Krause opined that when he initially saw petitioner his symptoms were caused by cubital

tunnel syndrome and carpal tunnel syndrome, with most of it being associated with cubital tunnel. He testified that the only complaints petitioner had with regard to carpal tunnel syndrome was his subjective complaints of hand weakness. Dr. Krause testified that he did not talk to petitioner about his job duties. He further testified that most of what he evaluated petitioner for was his back, and petitioner complained bitterly of back pain from work. Dr. Krause did not take a good detailed history about what was causing petitioner's hand symptoms. Dr. Krause was of the opinion that when you talk about any cubital tunnel activity, flexion of the elbow can cause aggravation. He was further of the opinion that cubital tunnel is not really associated with people doing a lot of flexion activities. He opined that carpal tunnel is highly variable with each person's anatomy and how they carry their arms. Dr. Krause was of the opinion that it was really hard for him to say exactly what was causing petitioner's cubital tunnel troubles. Dr. Krause was of the opinion that when he saw petitioner on 4/23/14 he was not recommending any further surgeries for petitioner. Dr. Krause was of the opinion that if petitioner had undergone injections before he saw him, that would explain why he may not of been having any back pain when he examined him. Dr. Krause noted that petitioner had some degree of complaints about everything on every visit. Dr. Krause opined that any activity can cause pain, but anatomically and structurally there was nothing objectively wrong with petitioner's low back.

On cross-examination Dr. Krause was of the opinion that if petitioner never had any complaints of arm, hand pain, and finger numbness while he was working, and the first time he reported any of the symptoms was two months after his last day of work, that his work duties would not be the cause or aggravating condition of his symptoms. Dr. Krause was of the opinion that petitioner would've been capable of working full duty on 4/23/14 as it relates to his back. Dr. Krause noted that petitioner's MRI of his lumbar spine only showed mild arthritic changes, and no herniations. Dr. Krause did not believe that petitioner was a candidate for surgery on his back. Dr. Krause opined that he could not find a discrete abnormality that would substantiate petitioner's back pain.

Tom Keller, Plant Operations Manager for respondent, was called as a witness by respondent. Keller has worked for respondent for over two years. He has oversight and review of the entire plant. He knows petitioner, and worked with him since 2013. He testified that he is familiar with petitioner's job duties, and agreed with the bagging process as described by petitioner. Keller learned of petitioner's alleged accident on 12/4/13, on 12/9/13.

Keller testified that petitioner was not working alone on 12/4/13. He testified that petitioner was working with Kent Meagher. He testified that they were doing the same job together that day. Keller also testified that the company policy is for the employees to work together in teams, and rotate through

the different jobs which include bagging, driving a forklift, shrink wrapping, and moving freight from production to storage area. Keller testified that the position he saw petitioner working most often was driving a forklift, shrink wrapping, and moving freight from production to storage area. He stated that there has never been an employee that has worked 10 hours alone. Keller testified that if petitioner had been working alone on 12/4/13 he would have known about it. He testified that he walked throughout the facility regularly and routinely on a daily basis. He testified that it is possible that someone may work alone for a short time while the coworker moves a pallet. With respect to petitioner's alleged injury on 2/28/14, Keller did not find out about that injury until April 2014.

Currently petitioner still has symptoms in his back, and uses a Fentanyl patch every three days. He also takes Percocet and diazepam for his back pain. He testified that the medications affect him and make him feel sluggish. He also attributes his memory loss to the medications. Petitioner complained of numbness from his little finger on his right hand to his elbow. He reported that his wrist hurts all the time. He also stated that he has a trigger finger in his right ring finger. With regards to the left upper extremity petitioner reported that his left hand goes numb on a regular basis, and he has aching in the wrist.

Respondent offered into evidence a video job analysis of the bagger job. The arbitrator notes that there were 2 workers working the bagging line. The operator would take a bag off a table, open it up and put it under a clip on the filler spout. The operator then pulls a lever and the bag is filled. When done the operator pulls the lever again and the bag is released and dropped onto the conveyor belt. The operator controls the speed of the belt with a foot pedal. Most often the operator would press the foot pedal to move the bag on the conveyor over so that he could fill another bag. Once that one is dropped onto the conveyor the operator presses the pedal to make the conveyor move the bag to the sewing machine. He fold the tops of the bag the together and presses a pedal so that the conveyor moves the bag through the sewing machine. The operator puts the string through a cutter right at the end of the string. The operator then places the bag on the pallet. There are 5 to a level and up to 8 levels per pallet. Once full the operator will use a forklift to remove the full pallet from the area. These jobs were performed by 2 operators. The speed at which this process was performed was controlled by the operator. The conveyor moved at the speed the operator determined since he controlled it with a foot pedal.

Respondent also entered into evidence an office note from Dr. Kureishy dated 8/15/13. Petitioner complained of back pain. He reported that he has a hard time at work lifting 50 pound bags. Petitioner was 303 pounds, and his BMI was 41.97. On 9/12/13 petitioner told Dr. Kureishy that his back pain was improved on Skelaxin 800 mg.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?
F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

Petitioner is alleging injuries to his bilateral hands/arms due to repetitive work activities, that arose out of an in the course of his employment by respondent, and manifested itself on 2/28/14.

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case ... where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming an injuries to his bilateral upper extremities, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury "manifested itself". These dates could be based on one or more of the following, depending on the facts of the case:

1. The date the petitioner first seeks medical attention for the condition;
2. The date the petitioner is first informed by a physician that the condition is work related;
3. The date the petitioner is first unable to work as a result of the condition;
4. The date when the symptoms became more acute at work;
5. The date that the petitioner first noticed the symptoms of the condition.

Petitioner is alleging an accident date of 2/28/14. The arbitrator finds this is not the first date petitioner sought medical attention for his bilateral hands/arms, that was on 2/6/14 with Dr. Kureishy. It was not the date the petitioner was first informed by a physician that the condition is work related. It was not the date the petitioner is first unable to work as a result of the condition, since petitioner had not worked for respondent since 12/5/13. It was not the date his symptoms became more acute as work, since

he was working on 2/28/13, and had not done so for almost 3 months. Lastly, it was not the date the petitioner first noticed the symptoms of the condition. That would have been on 2/6/14. The arbitrator does not see 2/28/14 as a manifestation date of petitioner's alleged bilateral hand/arm condition.

Beside proving an accurate manifestation date, in order to prove a repetitive trauma accident, petitioner must place into evidence specific and detailed information concerning his work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities. The arbitrator finds the petitioner failed on both counts.

In the case at bar the petitioner outlined the specific duties he performed on the bagging line. Additionally, the respondent offered into evidence a video of the bagging line, and the duties performed. Although petitioner did not agree with the speed the job was performed on the video he did not dispute the activities being performed. However, the frequency, duration and manner of performing these activities was not clearly detailed in the records, especially as it relates to the histories petitioner's treating and examining doctors had. Dr. Krause testified that he did not talk to petitioner about his job duties. He also did not take a good detailed history about what was causing petitioner's hand symptoms. Dr. Strecker testified that the job history petitioner described was not consistent with the job description or video analysis. Additionally, the arbitrator finds discrepancies as to the frequency, duration and manner in which the activities were performed, based on petitioner's testimony versus Keller's testimony.

The arbitrator also finds it very significant that petitioner last worked for respondent on 12/5/13, and no credible evidence was offered to support a finding that petitioner had any problems and/or complaints with respect to his bilateral arms/hands while he worked for respondent, or in 2 months following his last day of work for respondent.

The first credible evidence regarding complaints related to petitioner's bilateral arms/hands was on 2/6/14 when he presented to Dr. Kureishy. At that time petitioner complained of numbness in his left little finger. Dr. Kureishy noted right ulnar nerve entrapment was shooting down the outer right forearm.

Thereafter, petitioner underwent an EMG/NCV of his upper extremities that was performed on 2/13/14. It showed bilateral moderately severe carpal tunnel syndrome, and bilateral moderately severe cubital tunnel syndrome, more on the right side. When petitioner next followed-up with Dr. Kureishy on 2/21/14 he alleged for the first time that his carpal tunnel syndrome was related to his repetitive motion at work.

On 2/28/14 petitioner presented to Dr. Krause, an orthopedic surgeon, complaining of bilateral arm numbness and weakness, with most of the pain about his right elbow, and numbness and tingling in the 4th and 5th digits. Petitioner did not provide Dr. Krause with a detailed and accurate description of his job duties with respondent. Dr. Krause saw no obvious weakness in petitioner's hands. On 4/23/14 Dr. Krause even suspected secondary gains.

On 8/11/14 petitioner was examined by Dr. Strecker, at the request of the respondent. Petitioner gave Dr. Strecker a history of pain and numbness in the ring and small fingers. He gave a history of injuring his low back on 12/4/13 and then 2 weeks later developing numbness and tingling to the ring and small fingers of both hands. The arbitrator finds this onset of bilateral upper extremity complaints unsupported by the credible evidence, which shows the petitioner made no complaints with respect to his bilateral upper extremities until 2/6/14.

Petitioner described his work duties to Dr. Strecker, and told him that he had to maintain his elbows in a fixed and flexed position. Dr. Strecker assessed bilateral cubital tunnel syndrome and an asymptomatic, but electrophysiologically positive, bilateral carpal tunnel syndrome. However, Dr. Strecker was of the opinion that there seemed to be some discrepancies. He opined that while repetition and force have been shown to be a contributing factor for the development of carpal tunnel syndrome, for which the petitioner was asymptomatic, there is no evidence that it is an aggravating or contributing factor to cubital tunnel syndrome, of which petitioner had complaints. Dr. Strecker found petitioner's description that his elbows were in a flexed hyper flexed position, was not confirmed by his job description, or the video of his job that he reviewed. Dr. Strecker also found it significant that petitioner had no complaints of parathesias while he worked for respondent or in the 2 months after his last day of work, as well as only having a limited exposure since he began working full time for respondent. Based on this limited duration and lack of temporal relationship, Dr. Strecker did not feel that petitioner's job duties caused, contributed or aggravated his carpal or cubital tunnel. Dr. Strecker opined that petitioner did not meet any of the thresholds that one would expect to see in someone who has cubital tunnel syndrome, such as chronically compressing the ulnar nerve; using vibratory tools; complaints of inflammatory tendinopathy; or maintaining elbows in a flexed position.

Dr. Kureishy offered no opinions as to whether or not petitioner's bilateral upper extremities are causally related to his work duties.

Dr. Krause opined that carpal tunnel syndrome is not really associated with people doing a lot of flexion activities. He opined that carpal tunnel is highly variable with each person's anatomy and how

they carry their arms, and he did not have a thorough understanding of petitioner's anatomy and how he carried his arms. Additionally, Dr. Krause was of the opinion that it was really hard for him to say exactly what was causing petitioner's cubital tunnel trouble.

Most importantly, Dr. Krause was of the opinion that if petitioner never had any complaints of arm and hand pain, and finger numbness while he was working for respondent, and the first time he reported any symptoms was two months after his last day of work, that his work duties would not be the cause or aggravating condition of his symptoms.

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 he sustained an accidental injury to his bilateral arms/hands due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 2/28/14, or that his current condition of ill-being is causally related to the alleged injury on 2/28/14.

E. WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO 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?
L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his bilateral arms/hands due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 2/28/14, or that his current condition of ill-being is causally related to the alleged injury on 2/28/14, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Timothy Ooms,
Petitioner,
vs.
The Anderson's Inc.,
Respondent,

NO: 14WC 5682

16IWCC0123

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner, herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, 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 26, 2015 is hereby affirmed and adopted.

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

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

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

DATED: FEB 11 2016
MJB/bm
o-2/8/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

OOMS, TIMOTHY
Employee/Petitioner

Case# **14WC005682**

14WC013639

THE ANDERSON'S INC
Employer/Respondent

16IWCC0123

On 5/26/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

0333 SHAY & ASSOCIATES
KATHERINE WOOD
260 E WOOD ST
DECATUR, IL 62523

2904 HENNESSY & ROACH PC
PAUL N BERARD
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

16IWCC0123

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)

TIMOTHY OOMS,
Employee/Petitioner

v.

THE ANDERSON'S INC.
Employer/Respondent

Case # **14** WC **5682**

Consolidated cases: **14 WC 13639**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **4/17/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0123

FINDINGS

On the date of accident, **12/4/13**, 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 not* causally related to the accident.

In the year preceding the injury, Petitioner earned $**2,1379.10**; the average weekly wage was $**593.86**.

On the date of accident, Petitioner was **49** 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 $**3,845.93** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**3,845.93**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his low back due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 12/4/13, or that his current condition of ill-being is causally related to the alleged injury on 12/4/13. Petitioner's claim for compensation is denied.

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

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

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

Signature of Arbitrator

5/20/15
Date

ICArbDec19(b)

MAY 26 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 49 year old bagger, alleges he sustained an accidental injury to his lumbar spine due to repetitive work activities that arose out of and in the course of his employment by respondent that manifested itself on 12/4/13. This case was heard in consolidation with case 14 WC 13639, with an alleged accident date of 2/28/14. A separate decision has been issued with respect to this claim.

On 8/21/12 petitioner underwent a physical at Decatur Memorial Hospital, performed by Dr. Barnes. This was a pre-placement examination for ADM Birkbeck Grain Elevator EA9. Petitioner's examination was normal.

Petitioner worked for respondent through a temporary agency from November 2012 through March 2013. In March 2013 petitioner was hired full-time by respondent and continued to work for respondent until 12/5/13.

Petitioner was a bagger for respondent. His duties included taking a bag off the table, putting it on the spout of the hopper by clamping the bag onto the hopper, then pulling down the lever with his right hand to fill the bag with corncob. When 50 pounds filled the bag, the hopper would automatically stop. Petitioner would then flip the lever off, release the clamps, and the bag would fall on the conveyor. Petitioner would then step on a pedal that would move the conveyor. The bag would move to the sew area, 20 inches away. Petitioner would fold down the top of the bag together, press another pedal and the sewing machine would sew the top of the bag. Petitioner would then cut the string off the sewing machine right at the end of the sewing machine. Once the bag was filled and sewed, petitioner would pick the bag off the conveyor and place it on the pallet. Other duties that petitioner performed included running the pay loader and man lift, sweeping floors, scooping product, blowing off machines, and doing repairs. He testified that he has a lot of duties, but his primary job is bagging.

Petitioner testified that on 12/4/13 he was working all three jobs by himself (filling, sewing and loading the pallet) and the machine was going much faster than normal. He testified that he worked 10 hours that day, and filled seven pallets, each with 50 bags on it. Petitioner testified that throughout the day he was constantly twisting his back, and throwing the lever up and down with his right hand a lot. After he completed his shift petitioner noticed that his back was hurting. He reported the incident to a coworker named Ken Meagher, and to Ed Combs, the production manager. He testified that by the time he got home, which was a 30 minute drive, he could not get out of car because his back hurt. He complained of stabbing pain in his back, and radiating pain through his buttocks and down the backside of his right leg. Petitioner denied any prior problems with his back before this date.

On 12/5/13 petitioner had difficulty getting out of bed, but went into work and told Ed that his back was hurting and his wife was making an appointment for him. Petitioner attempted to run production that day and could not handle it. He worked on the line for about 30 minutes and then went home.

On 12/5/13 petitioner presented to Dr. Kureishy, his primary care physician, with complaints of back pain. He identified the onset of the symptoms as one day ago, and sudden. Petitioner reported that he had taken two Skelaxin. Petitioner reported sciatica with pain shooting down the right leg. Dr. Kureishy ordered physical therapy, and took petitioner off work through Sunday. Dr. Kureishy noted that petitioner had chronic back pain and was taking Skelaxin. On 12/9/13 petitioner returned to Dr. Kureishy and stated that he was not feeling any better. Dr. Kureishy ordered an MRI and took petitioner off work for four days. On 12/20/13 petitioner continued to complain of back pain, and stated that he was unable to sit. Dr. Kureishy continued petitioner off work for 15 days.

On 12/27/13 petitioner completed an Injury Report for Workers' Compensation. Petitioner described his duties as bagging material and stacking 40 to 50 pound bags on a skid, sewing bags with product, cleaning, sweeping, and forklift operator. Petitioner indicated that he worked 50+ hours a week including weekends. Petitioner also indicated that in addition to his job for respondent he had part-time work through November 2013. He stated that he ended this employment due to his increased work hours for respondent. Petitioner identified this concurrent employment as "private care – driving to store, dr. appts, etc." Petitioner noted that he injured himself on 12/4/13 during the duration of the day. He described the injury as back pain and pressure escalating towards the end of the day on the bagging line. Petitioner noted that he reported the injury to Ed Combs first thing on 12/5/13. The history provided was "I had injured my back and 12-4 and was waiting on my wife to get an appointment with doctor. At 8:30 AM I was in too much pain and reported to Ed again that I had hurt my back and was told to go home and see doctor. On 12/6 I gave a report to Tom Keller of what doctor said." Petitioner's symptoms were noted as back pain and stiffness, sharp pain shooting into buttock and right leg, numbness and weakness, tender to light touch with swelling. Petitioner noted that his injury was witnessed by Kent Meagher. He noted that Meagher witnessed him working alone on the bagging line and requesting help during the day on 12/4. Petitioner also noted on the form that on 12/3/13 he worked a double shift for respondent, and on 12/4/13, the date of injury, he worked a 10 hour shift and had made numerous attempts trying to get additional manpower on the bagging line. On 12/5/13 he attempted to go to work but only lasted 1 1/2 hours before the pain was unbearable.

On 1/23/14 petitioner continued to complain of low back pain. Dr. Kureishy recommended a course of physical therapy. He noted that they were still waiting on the MRI of petitioner's low back. Dr.

Kureishy also urged petitioner to lose weight. Petitioner was continued off work. On 1/23/14 petitioner reported that he was still having shooting pains down the right leg, and loses his balance. He complained of pain and numbness in the buttocks.. He stated that he had an appointment with Dr. Krause on 2/28/14.

On 2/6/14 petitioner returned to Dr. Kureishy staggering while walking. He complained of numbness in his right side, glut and hip area radiating down his side. He also complained of numbness in his left little finger. Dr. Kureishy noted a right ulnar nerve entrapment shooting down the outer right forearm. He recommended an EMG/NCV. Petitioner was continued off work. On 2/21/14 petitioner continued to complain of back pain, and hand/arm numbness/tingling. Petitioner stated that his carpal tunnel syndrome was related to repetitive motion at work.

On 2/28/14 petitioner presented to his cardiologist, Dr. Jyothinagaram. He reported that his activity had decreased over the last few months due to a backache. He also stated that he had carpal tunnel syndrome and was scheduled for carpal tunnel surgery and elbow nerve relief surgery. Petitioner noted that he was a smoker from 1983 to 2001, and would smoke one pack a day. After petitioner stop smoking cigarettes he started chewing tobacco, and graduated to chewing snuff. He was instructed to discontinue use of snuff.

On 2/28/14 petitioner also presented to Dr. Robert Krause at Decatur Neurosurgery Associates, for low back pain. His chief complaint was low back pain, and bilateral hand numbness and tingling. Petitioner reported that his lower back pain developed sometime in December. He related a work injury where he was twisting his back and developed symptoms. He complained of pain about his right lower back, that occasionally travels into the leg. He reported that he had been using Norco, Valium, and Neurontin, without any significant relief. Petitioner denied any left leg symptoms. He stated that therapy exacerbated his pain. Petitioner also complained of bilateral arm numbness and weakness, with most of the pain about his right elbow, and numbness and tingling in the fourth and fifth digits. Dr. Krause saw no obvious weakness in petitioner's hands, but petitioner reported that he had diminished grip strength. Petitioner reported some symptoms in his left hand, but was more worried about the right hand. Petitioner did not report any nocturnal pain. Dr. Krause reviewed the results of petitioner's MRI of the lumbosacral spine dated 1/15/14. He was of the opinion that it showed mild arthritic changes about the low back. No evidence of disc herniation was seen. He also reviewed the EMG nerve testing performed 2/13/14 which revealed bilateral severe carpal, and moderate to severe, right greater than left, cubital tunnel syndrome. Dr. Krause's impression was lumbosacral sprain/strain with mild arthritic changes of the lumbosacral spine; morbid obesity; bilateral carpal tunnel syndrome, right greater than left; cubital tunnel syndrome. Dr. Krause saw no need for spinal surgery. He recommended physical therapy and a

referral to the pain clinic. He released petitioner to light duty activities. He also released petitioner on an as needed basis with respect to his low back. He continued treating petitioner for his bilateral carpal and cubital tunnel syndrome.

On 3/5/14 petitioner presented to Dr. Rehman at Decatur Memorial Hospital Millennium Pain Center, for his lower back pain that started on 12/4/13 when he was working a 12 hour shift, and was doing a three-man job by himself. Petitioner reported that he was doing a lot of turning and twisting, and was also lifting/throwing 50 pound bags. Petitioner reported that by the end of that day, he had moved 8 tons of material. He stated that by the time he got home he could not get out of his car. He reported that his back pain radiates down posterior leg to his knee, right worse than left. He reported that the pain in his back is constant, and the pain in his legs is intermittent. He also complained of some numbness in the right side of the buttocks. Petitioner also stated that he stumbles occasionally and has an unsteady gait. He reported his pain as a sharp, stabbing pain that feels like a knife with a baseball on the end of it. Petitioner reported that he just finished therapy, and was discharged because it was making the pain worse, and he was not improving. Petitioner reported that the TENS unit gave him a few hours of relief. Dr. Rehman was of the opinion that petitioner has many multiple pain generators and he would try to address one at a time, starting with an L4–L5 epidural steroid injection bilaterally. Petitioner was also given a back brace, especially for use at work.

On 3/7/14 petitioner returned to Dr. Kureishy. His history included acute back lumbar sacral pain, sudden onset one month ago, radiating down the right leg, moderate in severity. Dr. Kureishy's diagnoses included chronic low back pain, chronic sciatica, and chronic carpal tunnel syndrome. Then on 3/20/14 petitioner returned to Dr. Kureishy. He complained of back pain since he received a shot in his back. He complained of right-sided pressure on his butt, and stated that his left side felt like a knife following the injection. Petitioner's low back pain complaints included not only the right side but the left side. He reported that they were acute and moderate in severity. He reported that the exacerbating factors are activities. Dr. Kureishy's diagnoses were chronic low back pain and chronic sciatica. Dr. Kureishy noted that petitioner's physical therapy was stopped because it was making things worse. It was noted that petitioner was taking Norco and diazepam.

On 3/21/14 petitioner underwent a right median nerve decompression at the wrist, and right ulnar nerve decompression without transposition, performed by Dr. Krause. Petitioner's postoperative diagnoses were right carpal tunnel syndrome, and right cubital tunnel syndrome. Petitioner followed up postoperatively with Dr. Krause.

On 3/31/14 petitioner reported to Dr. Rehman that he had received at least 50% relief from his lumbar L4–L5 epidural steroid injection performed 3/14/14. Dr. Raymond performed a repeat lumbar L4-L5 epidural steroid injection.

On 4/1/14 petitioner related improvement of his right fourth and fifth digit numbness. He noted no adverse events after the decompression. He reported discomfort in the right and pain in his left hand along his wrist, and numbness and tingling along his left fourth and fifth digits. Petitioner made no complaints of any back pain. Dr. Krause released petitioner to driving, and continued petitioner's lifting restrictions at 20 pounds.

Petitioner followed up with Dr. Kureishy on 4/3/14 and 4/16/14. On 4/16/14 petitioner continued to complain of low back pain, with new complaints of radiating pain into the bilateral thighs. He identified the mechanism of injury as twisting daily. Petitioner reported that injections, medication, physical therapy were not providing any long-term relief.

On 4/23/14 petitioner returned to Dr. Krause with multiple complaints and concerns. He complained of severe lower back pain and severe pain about his left elbow. He also related numbness along his right fifth digit. Dr. Krause ordered a course of occupational therapy. He released petitioner back to work with lifting restrictions of 50 pounds. His prognosis for petitioner was poor. He suspected secondary gain issues.

On 4/30/14 petitioner told Dr. Kureishy that he had undergone four shots into his back without any lasting relief. He reported that he would be undergoing an epidural pain shot at the pain center. He reported that his pain was more on the left side with tingling, as opposed to the right side. From this point on Dr. Kureishy's work releases indicated that petitioner could return to work "pending drs release".

On 5/5/14 Dr. Rehman performed a bilateral sacroiliac joint injection. On 5/19/14 petitioner was seen by Keith Cermak, Dr. Rehman's nurse practitioner. Petitioner reported that he received around 50% relief for approximately 4 to 5 days following the injection and then his pain returned. He stated that he no longer had constant numbness in his buttocks, but his back felt like it did before the injections. Petitioner reported that he was still experiencing the same pain as before, but now worse on the left side instead of the right. Dr. Rehman was of the opinion that petitioner had positive facet maneuvers bilaterally. He suspected spinal facet joint syndrome. On 6/10/14 petitioner underwent a left lumbar facet injection at L3-L4, L4-L5, L5-S1. Dr. Rehman's diagnosis was facet arthropathy.

On 6/18/14 petitioner returned to Dr. Krause with prominent complaints of lower back pain. He did not report any like symptoms. He reported that his right arm and hand were doing better. He complained

of some pain and numbness along the fifth digit only. Petitioner reported that he had been working with the Millennium Pain Center with various injections. Dr. Krause continued petitioner's 50 pound lifting restriction. He also reiterated that he did not see anything on petitioner's low back that would require surgery.

On 6/27/14 petitioner reported to Dr. Kureishy that his back pain was continuing, and he had shooting pain in the back down the legs. He told Dr. Kureishy that he was going to be undergoing a nerve ablation.

On 7/1/14 petitioner underwent an MRI of his lumbar spine. The results revealed posterior disc bulging at L2-L3 greater than at L3-L4; degenerative change; mild foraminal encroachment by disc bulge and broad-based herniation on the left at L2–L3, greater than at other lumbar levels.

On 7/9/14 petitioner returned to Dr. Rehman to discuss the results of his new MRI. Petitioner reported that he was having some low back pain, more on the right side. He stated that his pain was worse when he tried to stand from a sitting position. Petitioner reported some swelling in his low back, more on the right side. With respect to the left lumbar facet injection on 6/10/14, petitioner reported that he was unsure if the injection helped because he was having so much pain bilaterally, and he was unable to determine which side was hurting. Dr. Rehman gave petitioner a TENS unit and scheduled epidural steroid injections bilaterally at L2–L3, which petitioner underwent on 7/22/14.

On 7/14/14 petitioner underwent a Section 12 examination performed by Dr. Carl Graf, at the request of the respondent. Petitioner gave Dr. Graf a history of working for a corncob company which grinds corncobs to be used for products such as Kitty litter, spreading on baseball fields, cleanup, etc. Petitioner stated that he worked in the position of a "bagger" on the assembly-line. Petitioner started in November with a temp agency and then on 3/17/13 he was hired full-time by respondent. He stated that his job required him to place the bags under a spout and then once they were filled, line them up and sew the bag shut, then throw it up onto the pallet. Petitioner reported that this is a three-person job, but since the company was short on manpower and he was working alone on 12/3/13 or 12/4/13, and could not keep up with the machine. He stated that he worked a double shift on both days by himself and completed 17 pallets each day, or 14 tons of material. Petitioner stated that his back hurt when he left that day. He stated that the next day he could not get out of bed at first, and then was finally able to get up. He reported that he went into work and reported the injury. He testified that he filled approximately 5 bags, but then left work and has been off work since that time.

Petitioner rated his pain at a 7/10, and stated that he was on Percocet. He described the pain as being in his low back with numbness in the right buttocks, which is constant. He complained of occasional right posterior thigh pain to the level of the knee, and occasional left buttocks numbness rarely. Petitioner denied any prior problems with his back. An examination revealed a very slow, though normal reciprocal gait. Petitioner had no difficulty stepping up on his tip toes or up onto his heels. He had a very minimal ability to squat and raise from a squatting position, noting pressure on his knees. An examination of the lumbar spine revealed pain to palpation that was light, one finger touch on the right side of the low back. He described his pain as 9/10. Petitioner's chief complaint was low back pain.

Dr. Graf noted that petitioner demonstrated the following non-organic pain signs on evaluation: 1) pain to light, one finger touch on the right side of the low back described as a 9/10; 2) pain in the low back with simulated axial rotation rated as an 8 to 9/10; 3) motor improvement with distraction; 4) non-anatomic distribution of symptoms with complete motor loss to the bilateral lower extremities; and, 5) overreaction to pain.

Following a record review and examination Dr. Graf noted that despite petitioner's claim that he never had any back problems prior to the injury, his first visit following the injury noted a history of chronic back pain. As a result Dr. Graf considered petitioner's back pain to be pre-existing and unrelated to his work activities. Dr. Graf was of the opinion that petitioner did not demonstrate any hard neurologic findings. He noted that petitioner demonstrated multiple inconsistencies and nonorganic pain signs with overreaction of pain. Regardless of causation, Dr. Graf was of the opinion that petitioner may benefit from physical therapy addressing his SI joint with a possible sacroiliac joint injection. Dr. Graf did not feel any work restrictions were necessary due to the fact that petitioner's low back pain was chronic in nature. Dr. Graf opined that petitioner's current complaints of chronic back pain were unrelated to his work activities and should be attributed to his pre-existing condition. Dr. Graf opined that petitioner has long been at maximum medical improvement given his pre-existing condition. He opined that the treatment and care petitioner had received was reasonable and medically necessary, although unrelated to the work injury in question. Dr. Graf opined that petitioner was not in need of any work restrictions as they relate to the injury in question.

On 7/23/14 petitioner followed up with Dr. Krause. He reported concerns regarding his lower back. He stated that he had been undergoing various injections but did not think they had been helpful. He stated that he was still on Percocet and Neurontin. He stated that his hand symptoms were improving, but he still had some discomfort about his left wrist. He did not voice significant digit features, and related numbness along the right elbow. Petitioner did not relate any elbow pain. Dr. Krause reviewed the MRIs

from 1/15/14 and 7/1/14 and noted that there were minimal arthritic changes of the mid lumbar segments. A generalized disc bulge was noted. His impression was low back pain, and status post right median and ulnar nerve decompression. Although petitioner related limitations of lower back pain, Dr. Krause did not think there was a surgery that would improve his disposition there. He believed that petitioner would be best treated in a pain management program, which he noted petitioner was doing. He also indicated that weight reduction, chiropractic treatments, and nonsteroidals would all be helpful. He did not believe that petitioner would be able to go back to work because of pain limiting symptoms. However, from his standpoint, Dr. Krause did not have any particular restrictions for petitioner. With respect to petitioner's peripheral nerve entrapment, Dr. Krause believed petitioner was improving. He noted that petitioner did have some pain and numbness about the elbow area, but suspected that it would improve over the next several months. He had no limitations regarding petitioner's peripheral nerve entrapments. He believed petitioner was tolerating his left side quite well, and did not appear to require surgery at that time. Dr. Krause released petitioner on an as needed basis, and noted that he may continue to work with the pain clinic and his family practitioner for chronic pain management programs. On 7/28/14 Dr. Kureishy noted that petitioner should be off for one month.

On 8/11/14 petitioner underwent a Section 12 examination performed by Dr. William Strecker, at the request of the respondent. Petitioner's chief complaint was pain and numbness in the ring and small fingers. Petitioner gave a history of sustaining a back injury on 12/5/13, and approximately 2 weeks later developed numbness and tingling to the ring and small finger of both hands, more so on the right than the left. Petitioner complained of intermittent numbness of the ring and small fingers on the left. He reported that his job duties are as a bagger, and he is required to fill bags with approximately 50 pounds of corncobs. He then flips the bag, sews it shut, cuts the string, and stack the bag on the pallet. He stated that he usually stacks five bags per layer, eight high, on each pallet. Petitioner reported that prior to his back injury he had been working "shutdown" where he would do a double shift and then a 12 hour shift, seven days a week since August. Petitioner reported that he can typically can do 2 bags in a minute, and was doing approximately 7 tons of material per day during this period. Petitioner reported that he had to maintain his elbows in a fixed and flexed position. Following an examination and record review Dr. Strecker was of the opinion that petitioner had bilateral cubital tunnel syndrome and an asymptomatic, but electrophysiologically positive, bilateral carpal tunnel syndrome. He opined that the treatment to date had been reasonable and necessary. With respect to petitioner's right upper extremity, Dr. Strecker recommended a repeat of his nerve conduction study to ascertain why petitioner had persistent parathesias in the fifth finger, hand and forearm. With respect to his left upper extremity, Dr. Strecker felt that

petitioner was most likely going to require decompression of his median nerve at the wrist, as well as decompression and possible transposition of the ulnar nerve at the left elbow. Dr. Strecker was of the opinion that petitioner could work limited duty, not greater than 50 pounds on a non-repetitive basis. With respect to causation, Dr. Strecker was of the opinion that there seemed to be some discrepancies. He opined that while repetition and force have been shown to be a contributing factor for the development of carpal tunnel syndrome, for which petitioner was asymptomatic, there is no evidence that it is an aggravating or contributing factor to cubital tunnel syndrome, of which petitioner had complaints. Dr. Strecker noted that while petitioner described that his elbows were maintained in a fixed hyper flexed position, neither his job description or the video confirmed this. He also noted that petitioner had no complaints of parathesias for two months after his last day of work, as well as only having a limited exposure since he began working full time for respondent, and had not worked since December 2013. Based on the limited duration and lack of temporal relationship, Dr. Strecker did not feel that petitioner's job duties caused, contributed or aggravated his carpal or cubital tunnel.

On 8/15/14 Dr. Rehman diagnosed herniated lumbar disc, and performed repeat L2–L3 epidural steroid injections. On 9/4/14 petitioner returned to Dr. Rehman's nurse practitioner. He stated that on the date of the injection he was in a lot of pain, but about two days later he started feeling better, only to be in more pain the next day. Petitioner reported that the numbness in his right buttocks returned, and he occasionally gets a pain shooting to his knees. Dr. Rehman recommended bilateral lumbar facet blocks. On 9/22/14 petitioner underwent bilateral lumbar facet injections at L3 – L4, L4 – L5, and L5 – S1, performed by Dr. Rehman.

While petitioner continued to treat with Dr. Krause and at Millennium Pain Center, he also followed up regularly with his primary care physician Dr. Kureishy, and provided updates of his physical condition and treatment he was undergoing. Dr. Kureishy's work notices indicated that petitioner could return to work "pending dr release".

On 10/30/14 when petitioner presented to Dr. Kureishy he complained of back pain, but stated that no further treatment was being offered. He reported that he had had facet joint injections, TENS unit, and ice packs.

On 11/5/14 petitioner underwent a bone scan. The impression was no acute bony abnormality. On 12/3/14 petitioner followed up with Dr. Kureishy. Dr. Kureishy noted that on 1/5/15 petitioner was going to see Dr. Grubb for back pain, but noted that it may not be covered as he is out of state. He also noted that Dr. Krause was not wanting to see petitioner anymore. As a result he had arranged an appointment in

St. Louis for petitioner with Dr. Rehman for his left ulnar and median nerve entrapment. Dr. Kureishy was not sure if he could see him because petitioner was on public aid in Illinois.

On 12/5/14 the evidence deposition of Dr. Kureishy, an internist, was taken on behalf of petitioner. Dr. Kureishy is petitioner's primary care physician. Petitioner first started seeing Dr. Kureishy on 6/13/13 for a checkup. The first time he presented for back pain was on 12/5/13. On 12/5/13 petitioner reported an incident at his place of work. Dr. Kureishy was of the opinion that foraminal stenosis at L4-L5 could cause pain and symptoms in the legs. He was of the opinion that spinal stenosis is an arthritic condition in which the whole spine is being narrowed for some reason. Prior to his deposition, Dr. Kureishy viewed a video of petitioner's job duties. Some of the things in the video were not the job that was at issue. Dr. Kureishy was given a hypothetical in which petitioner would fill 10 pallets per day with 50 pound bags stacked five in a row and eight high, at a rate faster than was seen in the video. Based on that hypothetical Dr. Kureishy believed that this activity could cause a disc bulge at L4 – L5. He was of the opinion that filling, lifting, and twisting the bags in the video with no help could cause the disc bulges at L4–L5. Dr. Kureishy was of the opinion that petitioner did okay over a period of time, but there was an acute injury that happened on the 4th when he said he did a double shift and filled about seven pallets. He was of the opinion that this is probably when the injury happened because petitioner had been working for respondent for a year and had some chronic pain. Dr. Kureishy was of the opinion that petitioner should get a second opinion, from Dr. Rehman, a neurosurgeon.

On cross-examination Dr. Kureishy admitted that on 8/15/13 petitioner mentioned back pain and was prescribed 800 mg of Skelaxin three times. Petitioner provided no detailed history of his back pain at the time. On 9/12/13 petitioner mentioned that his back pain was improved. On 12/5/13 petitioner reported an injury on 12/4/13 to his back. Dr. Kureishy noted that petitioner had chronic back pain, and the mechanism of injury was identified as unknown. Then on 12/9/13, Dr. Kureishy identified the mechanism of injury as heavy lifting. On 1/9/14, the mechanism of injury became more detailed and petitioner reported heavy lifting, 50 pound bags. At this time, Dr. Kureishy continued petitioner on 800 mg of Skelaxin. Dr. Kureishy testified that he was treating petitioner based on his subjective pain complaints, and the MRI findings. Dr. Kureishy testified that he would never question a petitioner's pain. He stated that if they're telling him they are in pain it's his duty to give them medicine.

On 1/15/15 the evidence deposition of Dr. Strecker, an orthopedic surgeon, was taken on behalf of the respondent. Dr. Strecker noted that when he examined petitioner he still had numbness of the small finger, as well as numbness in the ulnar aspect, or the small finger side of his hand, and on the inside portion of his forearm, on the right. He opined that petitioner did not have any complaints on the right

side that would be consistent with carpal tunnel syndrome, or complaints on the left side that would be consistent with cubital tunnel syndrome. Dr. Strecker opined that there is no correlation between nerve conduction and EMG findings and the clinical diagnosis of carpal tunnel syndrome. Based on what the petitioner told him, and the job videotape, Dr. Strecker was of the opinion that the videotape did not show that petitioner had to maintain his arms in a hyper flexed position for prolonged periods of time. Although Dr. Strecker agreed that petitioner had to flex and extend his elbows all day, he did not have to maintain them there. Dr. Strecker was of the opinion that petitioner did not meet any of the thresholds that one would expect to see in somebody who has cubital tunnel syndrome, such as chronically compressing the ulnar nerve; using vibratory tools; complaints of inflammatory tendinopathy; or maintaining elbows in a flexed position. Dr. Strecker was also of the opinion that the other reason he did not think petitioner's cubital tunnels were related to his job duties was the fact that there wasn't a temporal relationship between petitioner's onset of his complaints and his job. Dr. Strecker noted that petitioner did not have any complaints of numbness and tingling until two months after he finished his last day of work for respondent. Dr. Strecker was of the opinion that obesity is a risk factor for the development of carpal tunnel, and petitioner weighed 340 pounds. Dr. Strecker was of the opinion that even though petitioner had electrical findings of carpal tunnel syndrome he had no symptoms, nor did he have any physical or provocative findings of carpal tunnel syndrome.

On cross-examination Dr. Strecker was of the opinion that the job duties that were explained by petitioner and shown in the job video could cause bilateral carpal tunnel syndrome, but petitioner had no symptoms related to carpal tunnel syndrome.

On 1/23/15 the evidence deposition of Dr. Krause, a neurosurgeon, was taken on behalf of the petitioner. Dr. Krause testified that he treated petitioner for his back, as well as his bilateral hands and arms. Dr. Krause opined that when he initially saw petitioner his symptoms were caused by cubital tunnel syndrome and carpal tunnel syndrome, with most of it being associated with cubital tunnel. He testified that the only complaints petitioner had with regard to carpal tunnel syndrome was his subjective complaints of hand weakness. Dr. Krause testified that he did not talk to petitioner about his job duties. He further testified that most of what he evaluated petitioner for was his back, and petitioner complained bitterly of back pain from work. Dr. Krause did not take a good detailed history about what was causing petitioner's hand symptoms. Dr. Krause was of the opinion that when you talk about any cubital tunnel activity, flexion of the elbow can cause aggravation. He was further of the opinion that cubital tunnel is not really associated with people doing a lot of flexion activities. He opined that carpal tunnel is highly variable with each person's anatomy and how they carry their arms. Dr. Krause was of the opinion that it

was really hard for him to say exactly what was causing petitioner's cubital tunnel trouble. Dr. Krause was of the opinion that when he saw petitioner on 4/23/14 he was not recommending any further surgeries for petitioner. Dr. Krause was of the opinion that if petitioner had undergone injections before he saw him, that would explain why he may not of been having any back pain when he examined him. Dr. Krause noted that petitioner had some degree of complaints about everything on every visit. Dr. Krause opined that any activity can cause pain, but anatomically and structurally there was nothing objectively wrong with petitioner's low back.

On cross-examination Dr. Krause was of the opinion that if petitioner never had any complaints of arm, hand pain, and finger numbness while he was working, and the first time he reported any of the symptoms was two months after his last day of work, that his work duties would not be the cause or aggravating condition of his symptoms. Dr. Krause was of the opinion that petitioner would've been capable of working full duty on 4/23/14 as it relates to his back. Dr. Krause noted that petitioner's MRI of his lumbar spine only showed mild arthritic changes, and no herniations. Dr. Krause did not believe that petitioner was a candidate for surgery on his back. Dr. Krause opined that he could not find a discrete abnormality that would substantiate petitioner's back pain.

On 2/3/15 Dr. Graf drafted an addendum report after reviewing additional medical records. These records included a job safety analysis and a video job analysis that was purported to reflect petitioner's job duties. Petitioner was not in the video. He also reviewed additional medical records from 7/1/14 through 1/23/15. After reviewing the additional medical records, MRI, and video job analysis, Dr. Graf's opinions were not only unchanged from his Section 12 examination, but further supported what he stated in his initial report.

On 3/11/15 the evidence deposition of Dr. Graf, an orthopedic and spine surgeon, was taken on behalf of the respondent. Dr. Graf was of the opinion that petitioner's complaints of pain throughout the examination were out of proportion, and it led him to believe that petitioner was not putting forth a full effort. Dr. Graf was of the opinion that petitioner's MRI showed normal hydration of the discs, no disc herniation, mild degenerative changes at L2 – L3, L3 – L4, and a mild bulge with no nerve root compression at L2 – L3. Dr. Graf was of the opinion that these findings were pretty normal. Dr. Graf opined that he agreed with Dr. Krause that there was no role for surgery for petitioner. Dr. Graf testified that as part of his first examination of petitioner he did review a job description.

On cross-examination Dr. Graf testified that petitioner did not tell him the exact bag weight. Dr. Graf opined that based on the job activities that were shown in the video, and assuming that petitioner's

report was accurate, that the type of work that petitioner was doing could cause an injury to the low back, because it seemed to be a pretty heavy job. In general terms, he further opined that it is possible that a job like this could exacerbate a pre-existing condition, but he did not believe that was so in this case.

Tom Keller, Plant Operations Manager for respondent, was called as a witness by respondent. Keller has worked for respondent for over two years. He has oversight and review of the entire plant. He knows petitioner, and worked with him since 2013. He testified that he is familiar with petitioner's job duties, and agreed with the bagging process as described by petitioner. Keller learned of petitioner's alleged accident on 12/4/13, on 12/9/13.

Keller testified that petitioner was not working alone on 12/4/13. He testified that petitioner was working with Kent Meagher. He testified that they were doing the same job together that day. Keller also testified that the company policy is for the employees to work together in teams, and rotate through the different jobs which include bagging, driving a forklift, shrink wrapping, and moving freight from production to storage area. Keller testified that the position he saw petitioner working most often was driving a forklift, shrink wrapping, and moving freight from production to storage area. He stated that there has never been an employee that has worked 10 hours alone. Keller testified that if petitioner had been working alone on 12/4/13 he would have known about it. He testified that he walked throughout the facility regularly and routinely on a daily basis. He testified that it is possible that someone may work alone for a short time while the coworker moves a pallet. With respect to petitioner's alleged injury on 2/28/14, Keller did not find out about that injury until April 2014.

Currently petitioner still has symptoms in his back, and uses a Fentanyl patch every three days. He also takes Percocet and diazepam for his back pain. He testified that the medications affect him and make him feel sluggish. He also attributes his memory loss to the medications. Petitioner complained of numbness from his little finger on his right hand to his elbow. He reported that his wrist hurts all the time. He also stated that he has a trigger finger in his right ring finger. With regards to the left upper extremity petitioner reported that his left hand goes numb on a regular basis, and he has aching in the wrist.

Respondent offered into evidence a video job analysis of the bagger job. The arbitrator notes that there were 2 workers working the bagging line. The operator would take a bag off a table, open it up and put it under a clip on the filler spout. The operator then pulls a lever and the bag is filled. When done the operator pulls the lever again and the bag is released and dropped onto the conveyor belt. The operator controls the speed of the belt with a foot pedal. Most often the operator would press the foot pedal to

move the bag on the conveyor over so that he could fill another bag. Once that one is dropped onto the conveyor the operator presses the pedal to make the conveyor move the bag to the sewing machine. He fold the tops of the bag the together and presses a pedal so that the conveyor moves the bag through the sewing machine. The operator puts the string through a cutter right at the end of the string. The operator then places the bag on the pallet. There are 5 to a level and up to 8 levels per pallet. Once full the operator will use a forklift to remove the full pallet from the area. These jobs were performed by 2 operators. The speed at which this process was performed was controlled by the operator. The conveyor moved at the speed the operator determined since he controlled it with a foot pedal.

Respondent also entered into evidence an office note from Dr. Kureishy dated 8/15/13. Petitioner complained of back pain. He reported that he has a hard time at work lifting 50 pound bags. Petitioner was 303 pounds, and his BMI was 41.97. On 9/12/13 petitioner told Dr. Kureishy that his back pain was improved on Skelaxin 800 mg.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?
F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

Petitioner is alleging an injury to his low back due to repetitive work activities, that arose out of an in the course of his employment by respondent, and manifested itself on 12/4/13.

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case ... where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming an injury to his low bac, 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.

When claiming a repetitive trauma injury, the injury is not traceable to a specific traumatic event, but the 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 if the injury was the repetitive stressful activity. In the case at bar the arbitrator finds it significant that petitioner repeatedly reported to the medical experts that his onset of pain was sudden on 12/4/13. Additionally, Dr. Kureishy repeatedly opined that what petitioner sustained was an acute injury on 12/4/13.

In order for petitioner to prove he sustained a repetitive injury it is not enough to describe a sudden onset of pain, the petitioner must place into evidence specific and detailed information concerning his work activities for respondent, 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 gave a description of the three activities that are performed on the bagging line. Respondent offered into evidence a job video that accurately depicted the three job duties on the bagging line. However, the arbitrator finds that the credible record contains discrepancies as they relate to the frequency, duration and manner in which petitioner performed his duties on the bagging line, as well his other job duties. The arbitrator also finds it significant that petitioner testified that his job for respondent also running the pay loader and man lift, sweeping floors, scooping product, blowing off machines, and doing repairs. Petitioner provided absolutely no information regarding the frequency, duration and manner in which he performed these duties.

Given that petitioner is alleging a manifestation date of 12/4/13 petitioner limited the specific and detailed information concerning his work activities to only 12/3/13 and 12/4/13. He did not describe all the duties he performed for respondent and the frequency, duration and manner in which he performed them. Petitioner alleged that on 12/3/13 he worked a double shift on the bagging line, and on 12/4/13 he worked 10-12 hours on the bagging line performing all jobs by himself, loading 7 pallets with 40-50 bags weighing 50 pounds on each. However, respondent offered evidence to rebut this.

First, Keller testified that it is respondent's policy that no employee works the bagging line alone for an entire day. He also testified that the only time someone might be on the line alone is when his co-worker is moving a pallet once it is full. Keller also testified that petitioner was working with Kent Meagher on 12/4/13. Alternatively, petitioner testified that Kent Meagher was not working with him but saw him working alone on 12/4/13. However, in light of Keller's testimony, the arbitrator finds it significant that petitioner did not call Kent Meagher to corroborate his testimony.

Secondly, the arbitrator finds it significant that petitioner did not include any testimony as to the frequency, duration, and manner in which performed his other job duties that included driving a forklift, shrink wrapping, and moving freight from the production to the storage area. The only frequency, duration and manner petitioner provided was with respect to number of bags he allegedly stacked by himself on 12/4/13. Given that this testimony is rebutted, the arbitrator finds the petitioner should have provided the frequency, duration and manner in which he performed all his job duties for respondent to see if his entire job was in fact repetitive in nature.

In addition to placing into evidence specific and detailed information concerning his work activities, including the frequency, duration, manner of performing, etc., it is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities. In the case at bar petitioner received treatment from Dr. Kureishy, Dr. Krause, and Dr. Rehman, and underwent a Section 12 examination performed by Dr. Graf.

Dr. Kureishy's understanding of petitioner's activities was presented to him in a hypothetical during his deposition that described petitioner's duties as filling 10 pallets per day with 50 pound stacks five in a row and eight high on each pallet, at a rate faster than in the video. Based on this understanding, Dr. Kureishy was of the opinion that these activities could cause a disc bulge at L4-L5. Dr. Kureishy was also of the opinion that petitioner was doing okay for a period of time and sustained an acute, injury on 12/4/13. He gave no opinion that petitioner sustained an injury due to repetitive work activities. Despite petitioner's claim to the contrary, the arbitrator also finds it significant that Dr. Kureishy admitted on cross examination that petitioner did in fact have chronic back pain prior to his acute injury on 12/4/13, after stating on direct examination that the first time petitioner presented to him with back pain was on 12/5/13. Given that Dr. Kureishy's opinions are based solely on a hypothetical that does not include a detailed and accurate description of all of petitioner's duties, the arbitrator gives less weight to the opinions of Dr. Kureishy. The arbitrator also finds it significant that Dr. Kureishy's opinions are based only on petitioner's alleged work activities on 12/4/13, and does not include any of the work petitioner performed for respondent prior to 12/4/13, including his duties running the pay loader and man lift, sweeping floors, scooping product, blowing off machines, doing repairs, shrink wrapping, and moving freight from the production to the storage area, and his bagging duties prior to 12/3/13. The arbitrator also finds it significant that on 12/9/13 Dr. Kureishy noted that petitioner had chronic back pain, and the mechanism of injury was unknown.

The arbitrator also gives less weight to the opinions of Dr. Kureishy based on his testimony that he did not review any of Dr. Krause's findings or opinions as they relate to petitioner, even though he

referred petitioner to Dr. Krause. Additionally, the arbitrator finds it significant Dr. Kureishy never personally reviewed the 2 MRI's of the lumbar spine and based his opinions solely on petitioner's subjective complaints. Dr. Kureishy also testified that it is his practice to never question a patient's pain, and if they say they are in pain, it is his duty to give them medicine.

Dr. Krause was also one of petitioner's treating physicians. He is an orthopedic surgeon Dr. Kureishy referred petitioner to. Dr. Krause personally reviewed the 2 MRIs of the lumbar spine. Dr. Krause testified did not talk to petitioner about his job duties. Based on this testimony, the arbitrator finds Dr. Krause could not have had an accurate and detailed description of petitioner's duties. The arbitrator further finds it significant that Dr. Krause was of the opinion that petitioner had some degree of complaints about everything, every time he presented to him. Dr. Krause opined that anatomically and structurally there was nothing objectively wrong with petitioner's low back.

Petitioner gave Dr. Graf a history of working for a corncob company which grinds corncobs to be used for products such as Kitty litter, spreading on baseball fields, cleanup, etc. Petitioner stated that he worked in the position of a "bagger" on the assembly-line. He stated that his job required him to place the bags under a spout and then once they were filled, line them up and sew the bag shut, then throw it up onto the pallet. Petitioner reported that this is a three-person job, but since the company was short on manpower he was working alone on 12/3/13 or 12/4/13, and could not keep up with the machine. He stated that he worked a double shift on both days by himself and completed 17 pallets each day, or 14 tons of material. Dr. Graf testified that petitioner did not provide him with the weight of the bags he filled on the bagging line. Petitioner also did not including the frequency, duration, or manner in which he performed these duties on every day other than 12/3/13 or 12/4/13. Petitioner also made no mention of the other duties he performed including running the pay loader and man lift, sweeping floors, scooping product, blowing off machines, doing repairs, shrink wrapping, and moving freight from the production to the storage area.

The arbitrator finds it significant that Dr. Graf noted that despite petitioner's claim that he never had any back problems prior to the injury, his first visit following the injury noted a history of chronic back pain. As a result Dr. Graf considered petitioner's back pain to be pre-existing and unrelated to his work activities. Dr. Graf was of the opinion that petitioner did not demonstrate any hard neurologic findings, but did demonstrate multiple inconsistencies and nonorganic pain signs with overreaction of pain. The arbitrator finds this significant, especially in light of Dr. Krause's opinion that he suspected secondary gain issues.

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 he sustained an accidental injury to his low back due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 12/4/13, or that his current condition of ill-being as it relates to his low back is causally related to the alleged accident on 12/4/13. The arbitrator bases this opinion on the inconsistencies in the record regarding petitioner's work duties on 12/4/13, and if he worked with anyone on that day; the fact that petitioner did not place into evidence specific and detailed information concerning his work activities other than his work on the bagging line, or the frequency, duration, and manner in which he performed these other duties; the fact that petitioner had been diagnosed with chronic back pain prior to 12/4/13, but denied he had any prior back problems; that Dr. Kureishy opined that petitioner's injury was an acute injury; and the fact that both Dr. Krause and Dr. Graf did not notice any objective evidence that corroborated petitioner's subjective complaints, that Dr. Krause noted that petitioner demonstrated multiple inconsistencies and nonorganic pain signs with overreaction of pain, and Dr. Krause suspected secondary gain issues.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?
K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?
L. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his low back due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 12/4/13, or that his current condition of ill-being is causally related to the alleged injury on 12/4/13, the arbitrator finds these remaining issues moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Garcia,
Petitioner,

vs.

NO: 13WC 21783

Azcon Corporation,
Respondent,

16IWCC0124

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 benefit rates, incurred medical, prospective medical, 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. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 20, 2015, is hereby affirmed and adopted.

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

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

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

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

DATED: FEB 16 2016
o021016
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

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

GARCIA, JOSE
Employee/Petitioner

Case# **13WC021783**

AZCON CORPORATION
Employer/Respondent

16IWCC0124

On 5/20/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4324 LASHLY & BAER PC
ANDREW G TOENNIES
741 LOCUST
ST LOUIS, MO 63101

1337 KNELL LAW LLC
MATT BREWER
504 FAYEET ST
PEORIA, IL 61603

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)

JOSE GARCIA
Employee/Petitioner

v.

AZCON CORPORATION
Employer/Respondent

Case # 13 WC 21783

Consolidated cases: _____

16IWCC0124

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **March 19, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0124

FINDINGS

On the date of accident, **6/18/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**36,468.12**; the average weekly wage was $**701.31**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**21,832.64** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.** for other benefits, for a total credit of $**21,832.64**.

ORDER

- **THE ARBITRATOR FINDS THAT THE PETITIONER'S CURRENT CONDITION OF ILL BEING IS NOT CAUSALLY RELATED TO THE 6/18/13 ACCIDENT.**
- **THE ARBITRATOR FINDS THAT THE PETITIONER REACHED A POINT OF MAXIMUM MEDICAL IMPROVEMENT ON 2/18/14 CONSISTENT WITH THE OPINIONS OF DR. BERNARDI**
- **THE PETITIONER IS NOT ENTITLED TO PROSPECTIVE MEDICAL 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.

Signature of Arbitrator

5/11/15
Date

ICArbDec19(b)

MAY 20 2015

16IWCC0124

FINDINGS OF FACT

The Petitioner is a resident of St. Louis, MO. Petitioner testified that he began working for the Respondent AZCon in January 2010. AZCon Corp. is a scrap metal and recycling company. The Petitioner described running and operating the non-ferrous and non-magnetic metal portion of AZCon's facility. This was described as non-magnetic metals being separated from magnetic metals and this machine ran essentially as an assembly line. Petitioner testified that he operated the entire machine. Petitioner testified that his shift usually started at approximately 2:30 p.m.

On 6/18/13 the Petitioner testified that the metals on the conveyors got stuck. Petitioner then went to remove the metal and climbed on a concrete pillar next to the conveyor. The Petitioner described the conveyor being approximately six feet off of the ground and the concrete pillar he was standing on was approximately two to three feet off of the ground. As the Petitioner went to remove the metal he pulled with his right hand and then fell to the ground landing on his feet. The Petitioner described noticing immediate pain.

The Petitioner did not finish his shift and left early. Petitioner immediately sought treatment on the date of his accident at Barnes Jewish Hospital. Petitioner described having pain in his low back up through his mid back. X-rays were taken and the Petitioner was prescribed pain medicine and a muscle relaxer. The Petitioner was then sent by his employer to Midwest Occupational Medicine.

After the Petitioner appeared at Midwest Occupational Medicine he then presented for treatment with his primary care physician Dr. Ellsworth. Dr. Ellsworth ordered an MRI as well as physical therapy. Petitioner underwent physical therapy at the Rehab Institute of St. Louis. Petitioner testified that the physical therapy did not help.

The Petitioner was then referred to Dr. Rastogi who performed epidural steroid injections as well as facet blocks. The Petitioner testified that the first injection provided him relief for approximately two weeks and thereafter the remainder of the injections did not help much at all.

The Petitioner testified he also had leg pain which continued through the summer of 2013 on his left side. The Petitioner did undergo a total of eight injections which provided him no permanent relief. Petitioner testified he still occasionally experiences leg pain.

Dr. Ellsworth eventually referred the Petitioner to a surgeon however no medical records were submitted into evidence from that visit and the petitioner could not recall the name of the surgeon Dr. Ellsworth referred him to.

The petitioner was eventually sent to Dr. Wilkey. The Petitioner testified that he was sent to Dr. Wilkey by his attorney. Petitioner initially presented to Dr. Wilkey on 4/14/14. An exam was taken and the Petitioner's MRI was reviewed. Dr. Wilkey then ordered a new MRI as he felt the first one was of poor quality. The Petitioner's second lumbar spine MRI was performed in May 2014.

In August 2014 the Petitioner continued to treat with Dr. Wilkey and testified that he experienced improvement of his leg complaints. It was at this time according to the petitioner that Dr. Wilkey indicated that the petitioner could either live with his current condition or surgery would be an option. Dr. Wilkey has recommended that the Petitioner undergo a fusion at L4-5 and L5-S1 which he feels is related to the accident in question.

The Petitioner has not worked since the date of his accident. Petitioner did however testify that he is able to do things around the house. Petitioner described rehabbing a home and being able to go to Home Depot and move 2 X 4s into the cart. Petitioner also described being able to carry propane tanks. These propane tanks were described as being used for a barbeque grill.

Petitioner testified that as of the time of trial he still has pain in the center of his back and into his left side. Petitioner testified that his leg pain is inconsistent. Petitioner testified that he is unable to move quickly and cannot lift heavy things.

The Arbitrator asked the Petitioner whether he wanted the surgery that had been proposed by Dr. Wilkey. The Petitioner testified "yes and no." The Petitioner was apprehensive as to whether or not he wanted to undergo the surgery but he is not satisfied with his current condition. The Petitioner did testify that if Dr. Wilkey called to schedule the surgery that the Petitioner would go forward with it.

The Petitioner was paid TTD from 6/19/13 through 5/6/14. The Respondent also paid $24,915.37 in medical expenses on behalf of the Petitioner.

On cross examination the Petitioner was asked questions in regards to his specific reporting of the accident to not only his employer but to various medical providers. The supervisor's accident report was admitted as Respondent's Exhibits #1. That report states the Petitioner was "pulling a long bar jammed in belt, stating he wrenched his back". Petitioner confirmed that there is no indication in the supervisor's incident report of the Petitioner falling and landing on his feet. The Petitioner also reviewed Dr. Bernardi's IME report which is admitted as Respondents' Exhibit #9. Petitioner again agreed that there is no mention of the Petitioner falling from the conveyor or the concrete pillar contained in Dr. Bernardi's report. Lastly, the Petitioner was asked to review his initial emergency room visit at Barnes Jewish Hospital which was admitted as Respondent's Exhibits #4. The Petitioner confirmed there is again no mention of him falling and landing on his feet in the initial emergency room records. The Petitioner confirmed that the history that he provided at the time of trial and the history that he gave to Dr. Wilkey, is contrary to the incident report, Dr. Bernardi's report, and the initial emergency room records developed in this case.

The Petitioner confirmed that Dr. Ellsworth, his primary care physician released him to return to work without restrictions as of 11/20/13. This is contained in Respondent's Exhibits #7.

The Petitioner confirmed that 11/20/13 was the date that he presented to Dr. Bernardi. Dr. Bernardi did place the Petitioner under work restrictions and the Petitioner did confirm that his TTD was continued at that time. Dr. Bernardi also ordered work hardening. The Petitioner testified that he was not initially aware that Dr. Bernardi had ordered work hardening but the Petitioner did later become aware of this recommendation.

Petitioner testified that he wanted to attend work hardening. The Petitioner also testified that he gave full effort in cooperation with work hardening.

Contrary to the Petitioner's testimony, the work hardening records from Pro Rehab were admitted as Respondent's Exhibit #8. The Petitioner's work hardening entrance evaluation was conducted on January 6, 2014. The Petitioner demonstrated evidence of cogwheeling. Additionally it was noted that the Petitioner provided variable overall effort which was less than the maximal effort during testing according to heartrate analysis. Additionally it was noted that the Petitioner self-limited during material handling. Petitioner also gave high scores on his subjective questionnaires. Furthermore on the Global Effort Rating: Consistency and Quality of Effort Indicators, the Petitioner was found to have 6 out of 13 unexpected results. The unexpected results were under the criterion for pain behavior and function, inappropriate symptoms questionnaire, perceived disability score, fear avoidance believe questionnaire, rapid exchange grip, and heartrate analysis.

The Petitioner's first actual visit with work hardening was on January 17, 2014. A subjective portion of that record states that "worker further went onto state that if he gets in pain he has a lawyer and that he would come after you (this therapist) and this facility." The record form this visit also goes onto state that the Petitioner ended his session early on his own stating "he was not going to do anymore."

The Petitioner ended several work hardening visits on his own quitting early. The work hardening records also show that the Petitioner refused to do various exercises as requested by the work hardening therapists.

On the 1/29/14 work hardening visit it was indicated that the Petitioner had been rehabbing his house and had been going to buy supplies. On 2/3/14 the work hardening therapist observed the Petitioner swinging a piece of wood in a golf club swinging motion several times throughout the 2/3/14 session. As of 2/6/14 the Petitioner informed work hardening that his attorney had given him permission to not come for his work hardening visits anymore because it was "not helping."

Petitioner did not see Dr. Wilkey the first time until two months after he had stopped work hardening. Dr. Wilkey did order an updated MRI and an EMG. The EMG performed was completely normal. Additionally, according to Dr. Wilkey's records the Petitioner reported that his leg pain had resolved and the only remaining pain he was having was in his low back.

Petitioner testified that he has not worked since the date of his accident. Petitioner has testified that he has also not looked for work. Despite this the Petitioner did confirm he was able to do things around his house, is able to carry things including propane tanks and grocery bags. Petitioner is able to drive. Petitioner did also testify that he has been able to rehab his kitchen. Petitioner also testified that he is able to remove snow from his cars. Petitioner also testified that he is was a smoker for 38 to 39 years of his life.

Surveillance reports and video were admitted at the time of trial as Respondent's Exhibit #12. The surveillance was conducted by Sedgwick's in-house investigation team on February 10th, February 14th, and February 17th of 2014. Surveillance was also later conducted on February 20th, 21st, and 24th of 2014. The last surveillance efforts of Sedgwick and the Respondent were performed on June 20th, 24th, and 26th of 2014. The surveillance reports and video admitted into trial do show the Petitioner moving without discomfort. The surveillance video also shows the Petitioner carrying grocery bags from his car into his home.

Dr. Wilkey testified on this matter on behalf of the Petitioner. Dr. Wilkey initially met with the Petitioner on 4/14/14 for the purpose of an independent medical examination at the request of Petitioner's attorney. Petitioner followed up with Dr. Wilkey on 6/2/14 for the purposes of reviewing the MRI which had been recommended by Dr. Wilkey at his initial examination as well as the EMG. The Petitioner reported that his left leg pain at the time was better. Dr. Wilkey further opined at this visit that the work hardening recommendation made by Dr. Bernardi was certainly a reasonable recommendation. On the Petitioner's 8/12/14 visit with Dr. Wilkey his left leg symptoms had resolved. Dr. Wilkey believed that the Petitioner had sustained an aggravation of a preexisting low back condition at the time of his 6/18/13 accident. Dr. Wilkey has recommended that the Petitioner undergo a fusion at L4-5 and L5-S1 which he feels is related to the accident in question.

Dr. Wilkey testified that he felt the Petitioner was credible and was not malingering. Despite this testimony Dr. Wilkey was shown the Petitioner's work hardening records which revealed the Petitioner was self-limiting and put forth less than maximal effort. Dr. Wilkey did not believe that the work hardening evaluation was worth anything.

Dr. Bernardi also testified in this matter. Dr. Bernardi was hired by the Respondent to perform an independent medical examination which occurred on 11/20/13. Dr. Bernardi took a history of the Petitioner's accident as well as reviewed medical records and performed a physical examination. Dr. Bernardi also administered Oswestry questionnaire at the time of his examination which revealed that the Petitioner felt he was severely disabled. Dr. Bernardi also administered a Zung depression index, a modified somatic perception questionnaire as well as a pain disability questionnaire. Dr. Bernardi testified that the Petitioner's scores on these tests were high and indicated the Petitioner felt he was severely disabled.

Dr. Bernardi's physical examination revealed borderline Waddell's signs. Petitioner was neurologically normal and the only positive exam findings made by Dr. Bernardi were tenderness over the greater trochanters as well as pain with hip range of motion testing.

Dr. Bernardi also reviewed the Petitioner's initial 7/29/13 lumbar spine MRI. Dr. Bernardi had the actual films from this study and believed that they were of extremely good quality. Dr. Bernardi noted that the Petitioner appeared to have a partially sacralized L5 vertebra. Dr. Bernardi noted mild degenerative disc disease at L3-4 and L4-5 with loss of disc hydration. The remainder of the lumbar disc were unremarkable. Dr. Bernardi did not feel as though there were any acute abnormalities on the MRI of 7/29/13 nor was there any stenosis at any segment.

Dr. Bernardi testified that the Petitioner's accident would have caused the Petitioner's onset of low back pain. The Petitioner's accident however did not cause the lumbo sacral segmentation abnormality, the Petitioner's degenerative disc disease or the Petitioner's facet disease which were present on the MRI.

Dr. Bernardi could not explain the Petitioner's ongoing complaints based upon the MRI or his physical examination findings. Dr. Bernardi testified there was nothing on the MRI or during his physical examination that would warrant surgery and the Petitioner was not a surgical candidate. Dr. Bernardi did not believe the Petitioner required any additional injections and he could not identify the cause for the Petitioner's ongoing symptomatology.

At the time of his examination Dr. Bernardi recommended the Petitioner undergo a six week program of work hardening. Dr. Bernardi felt the Petitioner could work with a 20 pound lifting restriction.

Following Dr. Bernardi's examination he was later provided additional medical records which included the Petitioner's work hardening records. Dr. Bernardi was also given Dr. Wilkey's initial 4/14/14 record.

Dr. Bernardi noted the findings from the work hardening entrance evaluation. Dr. Bernardi testified that the Petitioner's behavior during work hardening was inconsistent and non-compliant. It was noted that the Petitioner's main limiting factor were his subjective complaints of pain.

Dr. Bernardi was aware at the time of his evidence deposition that Dr. Wilkey felt the initial MRI of the lumbar spine taken on 7/29/13 was of poor quality. Dr. Bernardi was further aware that the repeat MRI was recommended by Dr. Wilkey using a 1.5 tesla magnet. Upon learning this information Dr. Bernardi contacted the facility where the Petitioner's initial MRI of 7/29/13 was conducted. Dr. Bernardi was informed that the MRI machine used for the Petitioner's initial 7/29/13 MRI was taken on a 3.0 tesla magnet. Dr. Bernardi testified that the 3.0 tesla magnet is 2X stronger than the 1.5 tesla magnet that Dr. Wilkey was recommending a repeat MRI be performed on. Again, Dr. Bernardi testified that the Petitioner's initial 7/29/13 MRI was of excellent quality.

Dr. Bernardi also did not feel as though the Petitioner required an EMG study.

Dr. Bernardi was aware that Dr. Wilkey found the Petitioner's subsequent MRI performed on 5/28/14 showed internal disc derangement at L4-5 and L5-S1. The Petitioner however, presented to Dr. Wilkey with a negative straight leg raise as well as normal neurological findings. Dr. Bernardi also noted that the Petitioner's EMG and nerve conduction study were found to be completely normal in regards to the Petitioner's lower extremities.

Dr. Bernardi disagreed with the recommendation for the Petitioner to undergo a fusion. Dr. Bernardi testified that a fusion for a patient with strictly back pain and no radiculopathy should only be performed in two situations, #1 when a patient has bone-on-bone findings at one level in the lumbar spine and the remainder of the lumbar spine is normal, or #2 when there is a spondylolysis. Dr. Bernardi testified that the Petitioner had neither bone-on-bone findings nor a spondylolysis. As such Dr. Bernardi disagreed with Dr. Wilkey's recommendation to perform a two level fusion on the Petitioner. Dr. Bernardi testified that this recommendation would not be unreasonable and unnecessary, but the success rate for such a procedure would be very low.

Dr. Bernardi testified that the Petitioner's subjective complaints did not match his objective findings. Dr. Bernardi testified that the Petitioner would have reached a point of maximum medical improvement at the conclusion of the Petitioner's work hardening in February 2014. Dr. Bernardi also testified that at the conclusion of work hardening in February 2014 the Petitioner would have been at full duty and not require the need for any ongoing work restrictions. Dr. Bernardi did causally relate the Petitioner's medical care from the date of his accident as well as the need for 20 pound work restrictions up through the final work hardening visit of 2/18/14.

ARBITRATOR'S ORDER

1. The Arbitrator finds that the Petitioner's current condition of ill being is not causally related to the 6/18/13 accident. The Petitioner sustained at most a low back sprain/stain at the time of the accident. This is shown by the minimal and non-acute findings on both of the Petitioner's MRI's. Dr. Bernardi's opinions are found to hold greater weight than those of Dr. Wilkey and Dr. Bernardi's opinions are found controlling in this case.

2. The Petitioner is not entitled to prospective medical care and the Arbitrator finds that the Petitioner reached a point of maximum medical improvement on 2/18/14 consistent with the opinions of Dr. Bernardi. No medical care the Petitioner has underwent after he completed work hardening is related to the accident in question. This finding is supported by the Petitioners normal EMG, minimal findings on MRI and on exam.

   The denial of prospective medical care is also supported by the Petitioner's own behavior. Petitioner admitted that he is capable of rehabbing his home, and can carry propane tanks. Petitioner was also found to be swinging a piece of wood like a golf club during work hardening. Although the surveillance video admitted is not superbly probative, it does show the Petitioner to move around fluidly and without discomfort. The Petitioner does not require the large procedure ordered by Dr. Wilkey, that being a two level lumbar spine fusion.

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

Marilyn McCarthy,
Petitioner,

vs. NO: 13 WC 27581

Menard Convalescent Center,
Respondent.

16IWCC0125

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, permanent partial disability, medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

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

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

DATED: FEB 17 2016

Joshua D. Luskin

Ruth W. White

Charles J. DeVriendt

o-02/10/16
jdl/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McCARTHY, MARILYN
Employee/Petitioner

Case# 13WC027581

MENARD CONVALESCENT CENTER
Employer/Respondent

16IWCC0125

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

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

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

2427 KANOSKI BRESNEY
TOM EWICK
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

0385 BONALDI CLINTON & DAVIS LTD
DAVID C DAVIS
2900 FRANK SCOTT PKWY #988
BELLEVILLE, IL 62223

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

Marilyn McCarthy
Employee/Petitioner

v.

Menard Convalescent Center
Employer/Respondent

Case # 13 WC 27581

Consolidated cases: n/a

16IWCC0125

An *Application for Adjustment 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 23, 2015. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On March 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 accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $37,648.00; the average weekly wage was $740.32.

On the date of accident, Petitioner was 59 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 $10,082.52 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $10,082.52.

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

ORDER

Based upon the Arbitrator's Conclusions of Law attached hereto, claim for compensation is denied.

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

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

William R. Gallagher, Arbitrator

April 7, 2015
Date

APR 14 2015

On February 28, 2011, Petitioner began physical therapy at Menard Medical Center. At that time, Petitioner informed the physical therapist that she had been experiencing pain and swelling since the right shoulder surgery. Petitioner rated that pain, at its worst, as 9/10. Petitioner also stated that the pain was better with medication but that she "lives with ice packs." Further, Petitioner stated that the pain caused her to experience sleep deprivation and interfered with activities of both daily living and work. Petitioner stated that her goal for therapy was to "fix her arm." (Respondent's Exhibit 6; p 5).

The physical therapist's examination of February 28, 2011, revealed swelling, pain with range of motion and scapular weakness of the right shoulder. The physical therapist set a number of goals for Petitioner to obtain between two and four weeks (Respondent's Exhibit 6; p 6). At trial, Petitioner testified that prior to the accident of March 3, 2011, the only right shoulder symptoms she had was some swelling.

Petitioner was cross-examined at length regarding the condition of her right shoulder prior to the accident of March 3, 2011. Specifically, Petitioner was questioned about the recorded statement she gave to the adjuster on March 8, 2011. Petitioner stated that when she told the adjuster that she never had any similar complaints to the right shoulder prior to March 3, 2011, it was because she was experiencing a totally different pain. When questioned why she did not tell the adjuster that she just begun physical therapy on February 28, 2011, three days prior to the accident, she responded because her right shoulder was still symptomatic and she could only say that she did not know why.

Respondent's Section 12 examiner, Dr. Milne, was provided with Petitioner's pre-accident medical records. Following his review of these records, Dr. Milne prepared a supplemental report dated August 27, 2012. Based on his review of these records, Dr. Milne recanted his prior opinion regarding causality. He opined that the work accident may have been a temporary aggravation of Petitioner's right shoulder symptoms but that Petitioner had rotator cuff pathology and pain prior to the work injury. He further opined that Petitioner's need for right shoulder surgery was not related to the work accident of March 3, 2011 (Respondent's Exhibit 1; Deposition Exhibit 4).

Dr. Wolters was deposed on October 30, 2013, and again, on May 16, 2014. His deposition testimony was received into evidence at trial. On direct examination, Dr. Wolters opined that the right shoulder pathology was caused by the accident of March 3, 2011, based on his understanding that there was a significant increase in symptoms following the accident and that his review of the records that pre-dated the accident did not show evidence of rotator cuff pathology (Petitioner's Exhibit 2; pp 28-29; 37-39).

On cross-examination, Dr. Wolters stated that he had reviewed Dr. Herrin's office record of January 24, 2011, but that, prior to being cross-examined, he had not reviewed the physical therapy record of February 28, 2011. Dr. Wolters agreed that, as of February 28, 2011, Petitioner's complaints and findings on examination were consistent with the pathology he found during the surgery. When Dr. Wolters reviewed the March 11, 2011 record of Dr. Sharma, he likewise agreed that Petitioner's complaints and findings on examination were similar to what they had been on February 28, 2011 (Petitioner's Exhibit 2; pp 51-58).

Dr. Milne was deposed on September 29, 2014, and his deposition testimony was received into evidence at trial. Dr. Milne's testimony was consistent with his medical reports. In regard to causality, he reaffirmed the opinion stated in his supplemental report of August 27, 2012, that the accident of March 3, 2011, may have temporarily aggravated Petitioner's right shoulder condition for a matter of hours, but that it did not cause any structural difference in Petitioner's right shoulder that precipitated the need for surgery (Respondent's Exhibit 1; pp 21-27).

Conclusions of Law

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

The Arbitrator concludes that Petitioner did not sustain an accidental injury arising out of and in the course of her employment for Respondent on March 3, 2011.

In support of this conclusion the Arbitrator notes the following:

There were discrepancies in the mechanics of how the injury allegedly occurred. At trial, Petitioner stated that she put her right arm underneath the patient's right arm; however, in her recorded statement Petitioner stated that her right arm was behind the patient holding on to the gait belt.

At trial, Petitioner testified that the patient went back down which caused the "sharp pain" in Petitioner's right arm. In the Report of Injury and her recorded statement, Petitioner stated that the patient was pushing against her and the co-worker and that this caused a "pull" in both of her arms.

Petitioner's statements to the medical providers who examined and treated her subsequent to the alleged accident of March 3, 2011, were both self-serving and deceptive.

Petitioner had right shoulder surgery performed on September 1, 2010, approximately six months prior to March 3, 2011; however, on March 11, 2011, she told Dr. Sharma that she had right shoulder surgery one year prior and, on June 28, 2011, she told PA Royer that she had right shoulder surgery a couple of years prior.

Petitioner informed Dr. Sharma that her right shoulder was pain-free and fully functional prior to the accident of March 3, 2011. Petitioner made essentially the same statement to PA Royer stating that she had recovered from the prior surgery and had "no problems."

The preceding is totally inconsistent with the fact that on February 28, 2011, three days prior to the alleged accident of March 3, 2011, Petitioner had just begun physical therapy and rated her right shoulder pain as being 9/10 as well as having other significant right shoulder symptoms.

Petitioner was also deceptive when she gave her recorded statement to the adjuster on March 8, 2011, stating that the prior surgery was about one year ago and that she denied experiencing prior similar complaints.

Further, in spite of the fact that Petitioner underwent a significant surgical procedure on September 1, 2010, when Petitioner gave the recorded statement to the adjuster, she attempted to characterize it as a removal of "calcium deposits." When Petitioner discussed the prior surgery with Dr. Milne, she attempted to characterize the surgery as being for bone spur removal.

When Petitioner was examined by Dr. Milne, she advised the doctor of the prior surgery, but she omitted any reference to her prior shoulder surgeries when she completed the health questionnaire.

It is obvious to the Arbitrator that Petitioner was still experiencing significant right shoulder symptoms just three days prior to the alleged accident.

Although it is not necessary for the Arbitrator to make a determination regarding causality, he does note that the testimony of the Petitioner's primary treating physician, Dr. Wolters, does not support a finding of causality nor does the testimony of Respondent's Section 12 examiner, Dr. Milne.

Based on the preceding, the Arbitrator finds Petitioner was totally lacking credibility.

In regard to disputed issues (F), (J), (K) and (L) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's conclusion of law in disputed issue (C).

William R. Gallagher, Arbitrator

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

Asa McVicker,
Petitioner,
vs.

16IWCC0126

NO: 15 WC 20465

Continental Tire North Amercia,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 28, 2015, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,800.00. 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:
KWL/vf
O-2/8/16
42

FEB 17 2016

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0126

Mc VICKER, ASA
Employee/Petitioner

Case# 15WC020465

CONTINENTAL TIRE NORTH AMERICA
Employer/Respondent

On 8/28/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.20% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1979 LAW OFFICE OF MICHAEL M WOJTAS
PO BOX 1055
ROSCOE, IL 61073

0299 KEEFE & DePAULI PC
JAMES K KEEFE JR
#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 16IWCC0126

Asa McVicker
Employee/Petitioner

v.

Continental Tire North Amercia
Employer/Respondent

Case # 15 WC 20465

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **7/8/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0126

FINDINGS

On 11/1/11, 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 $**34,958.56**; the average weekly wage was $**672.28**.

On the date of accident, Petitioner was **23** 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 $**256.10** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**256.10**.

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

ORDER

Respondent shall pay Petitioner the sum of $**448.19**/week for a further period of **4/7ths** weeks, as provided in Section **8(b)** of the Act, because Petitioner was temporarily and totally disabled from 2/12/15 through 2/18/15 in which the three day waiting period applies.

Respondent shall pay Petitioner the sum of $403.37 per week for a further period of 14.25 weeks, as provided is Section 8(e)(9) of the Act because the injury sustained caused 7½% loss of use of the left hand. Respondent shall pay Petitioner permanency compensation that has accrued from **3/30/15 (MMI)** through **7/8/15**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent is entitled to credit for amounts paid in TTD and PPD.

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

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

Signature of Arbitrator

8/24/15
Date

AUG 28 2015

Before the Illinois Workers' Compensation Commission

Asa McVicker, Petitioner, v. Continental Tire North America, Respondent.	)	**16IWCC0126** Case No.: 15 WC 07164 and 15 WC 20465

FINDINGS OF FACT

Petitioner sustained accidental injuries arising out of and in the course of his employment for bilateral carpal tunnel syndrome. The accident date for the right carpal tunnel condition is July 9, 2014 (15 WC 07164). The accident date for the left carpal tunnel condition is November 1, 2011 (15 WC 20465). The Arbitrator granted Petitioner's oral motion to consolidate the cases on the date of hearing.

Petitioner has worked for Respondent as a Passenger Press Operator since March 2011. The job entails loading tires onto pans in front of a press machine.

On November 1, Petitioner underwent an EMG/NCS that revealed moderate bilateral carpal tunnel syndrome, left worse than right. Respondent referred Petitioner to Dr. David Brown February 15, 2012. Dr. Brown recommended a left carpal tunnel release. Petitioner testified that he did not undergo the surgery because Respondent did not schedule it.

Petitioner returned to Dr. Brown April 2, 2014. On July 19, 2014, Petitioner underwent a right sided EMG/NCS that revealed right carpal tunnel syndrome. Dr. Brown recommended bilateral carpal tunnel releases.

On January 29, 2015, Dr. Brown performed a right carpal tunnel release. Petitioner returned to light duty February 5, 2015. On February 12, 2015, Dr. Brown performed a left carpal tunnel release. Petitioner returned to light duty February 19, 2015.

Dr. Brown released Petitioner to return to work full duty April 6, 2015.

Petitioner last saw Dr. Brown March 30, 2015. Petitioner reported the numbness and tingling in both hands resolved. He reported some soreness and weakness. On exam, he was mildly tender at the scars, which was expected. He had good active range of motion of both wrists and fingers. Grip strength was greater on the right than the left. Dr. Brown recommended continued home exercises and to return as needed.

Petitioner testified that he still experiences tenderness at the scar sites. He has weakness in both hands, particularly when flipping tires at work. Petitioner testified that he cannot do more than five push-ups and he is training to pass a physical to become a police officer. The test is scheduled for December 17, 2015.

Petitioner continues to work for Respondent as a Passenger Press Operator. He makes the same money with the same benefits as before surgery. Respondent has never reprimanded Petitioner for not being able to complete his work activities.

CONCLUSIONS OF LAW
Case No. 15 WC 07164

Disputed Issue K – Temporary total disability

Petitioner missed work for the right carpal tunnel release January 29 through February 4, 2015, or 1 week. The three day waiting period applies and therefore Petitioner is entitled to 4/7ths weeks of TTD benefits at a rate of $513.51. Respondent is entitled to $64.03 in TTD benefits paid.

Disputed Issue L – Nature and extent of the injury

Petitioner suffered an accidental injury involving right carpal tunnel syndrome for which he underwent surgery. While consideration is not given to any single enumerated factor as the sole determinant, the Arbitrator relies on the following five factors pursuant to 820 ILCS 305/8.1(b).

8.1(b)(b-1) Neither party submitted a rating. Therefore, the Arbitrator gives no weight to this factor.

8.1(b)(b-2) Petitioner received a full duty release. He returned to the same job from which he developed the condition and requires regular use of the right hand. Petitioner is right hand dominant. The Arbitrator places more weight on this factor.

8.1(b)(b-3) Petitioner was 26 years of age at the time of injury. There was no evidence submitted that Petitioner was at risk for additional injury or problems. He has a number of working years ahead of him. The Arbitrator places more weight on this factor.

8.1(b)(b-4) Petitioner did not provide any evidence that the injury diminished his future earning capacity. The Arbitrator places less weight on this factor.

8.1(b)(b-5) Petitioner testified he still experiences pain and weakness in the dominant right hand, particularly when performing push-ups while training to become a police officer. Petitioner did not report any hobbies or activities outside of work impacted by the right wrist and hand. The final physical exam from Dr. Brown supported good range of motion and grip strength. The Arbitrator gives some weight to this factor.

Based upon the foregoing, the Arbitrator awards 10% loss of use of the right hand for 19 weeks at a $462.16 PPD rate. Respondent is entitled to credit for amounts paid.

CONCLUSIONS OF LAW
Case No. 15 WC 20465

Disputed Issue K – Temporary total disability

Petitioner missed work for the left carpal tunnel release February 12 through February 18, 2015, or 1 week. The three day waiting period applies and therefore Petitioner is entitled to 4/7ths weeks of TTD benefits at a rate of $448.19. Respondent is entitled to $256.10 in TTD benefits paid.

Disputed Issue L – Nature and extent of the injury

Petitioner suffered an accidental injury involving left carpal tunnel syndrome for which he underwent surgery. While consideration is not given to any single enumerated factor as the sole determinant, the Arbitrator relies on the following five factors pursuant to 820 ILCS 305/8.1(b).

8.1(b)(b-1) Neither party submitted a rating. Therefore, the Arbitrator gives no weight to this factor.

8.1(b)(b-2) Petitioner received a full duty release. He returned to the same job in which he developed the condition and requires regular use of the left hand. The Arbitrator places some weight on this factor.

8.1(b)(b-3) Petitioner was 23 years of age at the time of injury. There was no evidence submitted that Petitioner was at risk for additional injury or problems. He has a number of working years ahead of him. The Arbitrator places more weight on this factor.

8.1(b)(b-4) Petitioner did not provide any evidence that the injury diminished his future earning capacity. The Arbitrator places less weight on this factor.

8.1(b)(b-5) Petitioner testified that he still experiences pain and weakness in the left hand and wrist, particularly when performing push-ups while training to become a police officer. Petitioner did not report any hobbies or activities outside of work impacted by the left wrist and hand. The final physical exam from Dr. Brown indicated less grip strength on the left than on the right, but good range of motion. The Arbitrator gives some weight to this factor.

Based upon the foregoing, the Arbitrator awards 7½% loss of use of the left hand for 14.25 weeks at a $403.37 PPD rate. Respondent is entitled to credit for amounts paid.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Asa McVicker,
Petitioner,
vs.

16IWCC0127

NO: 15 WC 7164

Continental Tire North Amercia,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 28, 2015 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $9,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 17 2016
KWL/vf
O-2/8/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0127

Mc VICKER, ASA
Employee/Petitioner

Case# 15WC007164

CONTINENTAL TIRE NORTH AMERICA
Employer/Respondent

On 8/28/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.20% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1979 LAW OFFICE OF MICHAEL M WOJTAS
PO BOX 1055
ROSCOE, IL 61073

0299 KEEFE & DePAULI PC
JAMES K KEEFE JR
#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 **16IWCC0127**

Asa McVicker
Employee/Petitioner

v.

Continental Tire North Amercia
Employer/Respondent

Case # 15 WC 07164

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **7/8/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0127

FINDINGS

On **7/9/14**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**35,611.33**; the average weekly wage was $**770.27**.

On the date of accident, Petitioner was **26** 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 $**64.03** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**64.03**.

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

ORDER

Respondent shall pay Petitioner the sum of $**513.51**/week for a further period of **4/7ths** weeks, as provided in Section **8(b)** of the Act, because Petitioner was temporarily and totally disabled from 1/29/15 thru 2/4/15 in which the three day waiting period applies.

Respondent shall pay Petitioner the sum of $462.16 per week for a further period of 19 weeks, as provided is Section 8(e)(9) of the Act because the injury sustained caused 10% loss of use of the right hand. Respondent shall pay Petitioner permanency compensation that has accrued from **3/30/15 (MMI)** through **7/8/15**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent is entitled to credit for amounts paid for TTD and PPD.

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

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

Signature of Arbitrator

8/24/15
Date

AUG 28 2015

Before the Illinois Workers' Compensation Commission

Asa McVicker, Petitioner, v. Continental Tire North America, Respondent.	)	**16IWCC0127** Case No.: 15 WC 07164 and 15 WC 20465

FINDINGS OF FACT

Petitioner sustained accidental injuries arising out of and in the course of his employment for bilateral carpal tunnel syndrome. The accident date for the right carpal tunnel condition is July 9, 2014 (15 WC 07164). The accident date for the left carpal tunnel condition is November 1, 2011 (15 WC 20465). The Arbitrator granted Petitioner's oral motion to consolidate the cases on the date of hearing.

Petitioner has worked for Respondent as a Passenger Press Operator since March 2011. The job entails loading tires onto pans in front of a press machine.

On November 1, Petitioner underwent an EMG/NCS that revealed moderate bilateral carpal tunnel syndrome, left worse than right. Respondent referred Petitioner to Dr. David Brown February 15, 2012. Dr. Brown recommended a left carpal tunnel release. Petitioner testified that he did not undergo the surgery because Respondent did not schedule it.

Petitioner returned to Dr. Brown April 2, 2014. On July 19, 2014, Petitioner underwent a right sided EMG/NCS that revealed right carpal tunnel syndrome. Dr. Brown recommended bilateral carpal tunnel releases.

On January 29, 2015, Dr. Brown performed a right carpal tunnel release. Petitioner returned to light duty February 5, 2015. On February 12, 2015, Dr. Brown performed a left carpal tunnel release. Petitioner returned to light duty February 19, 2015.

Dr. Brown released Petitioner to return to work full duty April 6, 2015.

Petitioner last saw Dr. Brown March 30, 2015. Petitioner reported the numbness and tingling in both hands resolved. He reported some soreness and weakness. On exam, he was mildly tender at the scars, which was expected. He had good active range of motion of both wrists and fingers. Grip strength was greater on the right than the left. Dr. Brown recommended continued home exercises and to return as needed.

Petitioner testified that he still experiences tenderness at the scar sites. He has weakness in both hands, particularly when flipping tires at work. Petitioner testified that he cannot do more than five push-ups and he is training to pass a physical to become a police officer. The test is scheduled for December 17, 2015.

Petitioner continues to work for Respondent as a Passenger Press Operator. He makes the same money with the same benefits as before surgery. Respondent has never reprimanded Petitioner for not being able to complete his work activities.

CONCLUSIONS OF LAW
Case No. 15 WC 07164

Disputed Issue K – Temporary total disability

Petitioner missed work for the right carpal tunnel release January 29 through February 4, 2015, or 1 week. The three day waiting period applies and therefore Petitioner is entitled to 4/7ths weeks of TTD benefits at a rate of $513.51. Respondent is entitled to $64.03 in TTD benefits paid.

Disputed Issue L – Nature and extent of the injury

Petitioner suffered an accidental injury involving right carpal tunnel syndrome for which he underwent surgery. While consideration is not given to any single enumerated factor as the sole determinant, the Arbitrator relies on the following five factors pursuant to 820 ILCS 305/8.1(b).

8.1(b)(b-1) Neither party submitted a rating. Therefore, the Arbitrator gives no weight to this factor.

8.1(b)(b-2) Petitioner received a full duty release. He returned to the same job from which he developed the condition and requires regular use of the right hand. Petitioner is right hand dominant. The Arbitrator places more weight on this factor.

8.1(b)(b-3) Petitioner was 26 years of age at the time of injury. There was no evidence submitted that Petitioner was at risk for additional injury or problems. He has a number of working years ahead of him. The Arbitrator places more weight on this factor.

8.1(b)(b-4) Petitioner did not provide any evidence that the injury diminished his future earning capacity. The Arbitrator places less weight on this factor.

8.1(b)(b-5) Petitioner testified he still experiences pain and weakness in the dominant right hand, particularly when performing push-ups while training to become a police officer. Petitioner did not report any hobbies or activities outside of work impacted by the right wrist and hand. The final physical exam from Dr. Brown supported good range of motion and grip strength. The Arbitrator gives some weight to this factor.

Based upon the foregoing, the Arbitrator awards 10% loss of use of the right hand for 19 weeks at a $462.16 PPD rate. Respondent is entitled to credit for amounts paid.

CONCLUSIONS OF LAW
Case No. 15 WC 20465

Disputed Issue K – Temporary total disability

Petitioner missed work for the left carpal tunnel release February 12 through February 18, 2015, or 1 week. The three day waiting period applies and therefore Petitioner is entitled to 4/7ths weeks of TTD benefits at a rate of $448.19. Respondent is entitled to $256.10 in TTD benefits paid.

Disputed Issue L – Nature and extent of the injury

Petitioner suffered an accidental injury involving left carpal tunnel syndrome for which he underwent surgery. While consideration is not given to any single enumerated factor as the sole determinant, the Arbitrator relies on the following five factors pursuant to 820 ILCS 305/8.1(b).

8.1(b)(b-1) Neither party submitted a rating. Therefore, the Arbitrator gives no weight to this factor.

8.1(b)(b-2) Petitioner received a full duty release. He returned to the same job in which he developed the condition and requires regular use of the left hand. The Arbitrator places some weight on this factor.

8.1(b)(b-3) Petitioner was 23 years of age at the time of injury. There was no evidence submitted that Petitioner was at risk for additional injury or problems. He has a number of working years ahead of him. The Arbitrator places more weight on this factor.

8.1(b)(b-4) Petitioner did not provide any evidence that the injury diminished his future earning capacity. The Arbitrator places less weight on this factor.

8.1(b)(b-5) Petitioner testified that he still experiences pain and weakness in the left hand and wrist, particularly when performing push-ups while training to become a police officer. Petitioner did not report any hobbies or activities outside of work impacted by the left wrist and hand. The final physical exam from Dr. Brown indicated less grip strength on the left than on the right, but good range of motion. The Arbitrator gives some weight to this factor.

Based upon the foregoing, the Arbitrator awards 7½% loss of use of the left hand for 14.25 weeks at a $403.37 PPD rate. Respondent is entitled to credit for amounts paid.

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

Lance Fancher,
Petitioner,
vs.

NO: 09WC 49710
11WC 32739

Big Muddy River Correctional Center,
Respondent,

16IWCC0128

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, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

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

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

DATED: FEB 2 3 2016
o020916
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FANCHER, LANCE
Employee/Petitioner

Case# **09WC049710**
11WC032739

BIG MUDDY RIVER CORRECTIONAL CENTER
Employer/Respondent

16IWCC0128

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

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

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

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

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 FL
CHICAGO, IL 60601-3227

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

APR 14 2015

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

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

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

16IWCC0128

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

Lance Fancher
Employee/Petitioner

v.

Big Muddy River Correctional Center
Employer/Respondent

Case # **09** WC **49710**

Consolidated cases: **11 WC 32739**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **February 6, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS (CASE 09 WC 49710)

On **11/25/09**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**57,825.04**; the average weekly wage was $**1,112.02**.

On the date of accident, Petitioner was **39** 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 $**any amounts paid** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $**any amounts paid**.

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

ORDER (CASE 09 WC 49710)

Petitioner failed to prove he sustained an accident on November 25, 2009 that arose out of and in the course of his employment with Respondent or that his condition of ill-being in his right elbow was causally related to his injury. Petitioner's claim for compensation is denied and no benefits are awarded.

FINDINGS (CASE 11 WC 032739)

On **8/17/11**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**57,825.04**; the average weekly wage was $**1,112.02**.

On the date of accident, Petitioner was **40** years of age, *married* with **2** dependent children.

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

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

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

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

ORDER (CASE 11 WC 032739)

Petitioner failed to prove he sustained an accident on August 17, 2011 that arose out of and in the course of his employment with Respondent or that his condition of ill-being in his left elbow was causally related to his injury. Petitioner's claim for compensation is denied and no benefits are awarded.

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

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

Henry Lindsay
Signature of Arbitrator

April 3, 2015
Date

APR 14 2015

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner filed two separate claims for his injuries, which were consolidated and tried as one before the Arbitrator. The parties requested that one decision issue for both cases. Claim 09 WC 49710 alleges repetitive trauma to Petitioner's hands, right wrist, and right elbow. Claim 11 WC 32739 alleges repetitive trauma to Petitioner's left elbow. Each claim has its own Petitioner's Exhibit List and labeled group exhibits, beginning with Petitioner's Exhibit 1. These lists and their corresponding group exhibits were entered into evidence as Arbitrator's Exhibits 4 and 5. Respondent does not dispute notice/manifestation date or the dates of temporary total disability, but disputes accident, causation, liability for medical expenses and temporary total disability benefits, and the nature and extent of the injuries.

Two witnesses testified at the hearing: Petitioner and Respondent's representative, Lt. Harold Schuler.

The Arbitrator Finds:

Petitioner began working for Respondent in 1999. According to Respondent's Time Sheets, Petitioner worked for Respondent as a "Dietary Officer" from April 20, 2009 through May 9, 2009. He was then a "Relief 7" Officer from May 15, 2009 through September 17, 2009. Beginning on September 18, 2009 Petitioner continued working as a "Relief 7" Officer on Wednesdays, a "R-1 A & B" Wing Officer on Sundays and Mondays, a "R1 & 2 Escort" Officer on Tuesdays and an "R-2 Control" Officer on Saturdays. This continued through October 21, 2009. Petitioner was off work on Thursdays and Fridays. Beginning on October 22, 2009 Petitioner began working in the Infirmary. (RX 3)

According to the medical records, Petitioner sought treatment with Dr. David Brown on November 25, 2009. As part of the examination Petitioner completed a questionnaire acknowledging he had already retained an attorney and that he believed he had a work-related injury. Petitioner described his symptoms as "Hands wrist, numb. Elbow numb, comes and goes, but happens when turning keys, and writing reports, driving." (AX 4 -PX 3) He described his job as follows: "My job consists[s] of security of inmates which includes, turning keys to doors, hand cuffs, waist chains, leg restraints, control buttons, doors & cells, writing, I/M disciplinary reports, shake down reports, incident reports, [?] every 30 min., tower logs, control logs, tool log boos, hunger strike log every 15 min., suicide logs every 10 min. My current job, Infirmary Office, turning keyes [sic] , and writing is continuous." (AX 4- PX 3)

Petitioner told Dr. Brown that he was right hand dominant and worked as a correctional officer for Respondent over the preceding ten years. Petitioner worked eight hours a day, forty

hours per week. He told Dr. Brown his job involved the opening and closing of cell doors fifty times per hour and raps bars during the course of his work at Big Muddy River Correctional Center. Petitioner further represented to Dr. Brown that he did not participate in any hobbies or sports. Dr. Brown's note indicates that Petitioner's problems in his hands had evolved over the preceding two years with some pain over the medial aspect of both elbows (right more than the left) and some right wrist pain. He recalled no traumatic injury. On examination Dr. Brown noted good active range of motion of both elbows, wrists, and all digits of his hands. Petitioner was noted to have a partial subluxing ulnar nerve over both elbows but negative Tinel's signs at his elbows. Tinel's was painful over the carpal tunnels bilaterally. Phalen's tests were negative bilaterally. Direct compression produced some discomfort bilaterally. Dr. Brown suspected Petitioner had some symptoms and findings consistent with a "bilateral peripheral compression neuropathy." He recommended a nerve conduction test. In the interim, Dr. Brown suggested Petitioner wear pillow splints at night and take nonsteroidal anti-inflammatory medication. He was to return after the studies were completed. Dr. Brown further noted his belief that Petitioner's work duties for Respondent were in part a contributing and/or aggravating factor in the development of a "possible peripheral compression neuropathy such as carpal tunnel syndrome and/or cubital tunnel syndrome." Petitioner was allowed to continue working full duty without any restrictions. (PX 3)

Petitioner underwent nerve conduction studies with Dr. Phillips on November 25, 2009. They were within normal limits. Petitioner had completed a Patient Questionnaire as part of the exam/testing process. He indicated symptoms of numbness, right and left hands and elbow. His pain drawing reflected these complaints, too. (PX 3, PX 4) After reviewing these studies, Dr. Brown recommended splinting, anti-inflammatory medications and observation. (PX 3)

Petitioner signed his Application for Adjustment of Claim in 09 WC 49710 on November 30, 2009, alleging bilateral hand, right wrist and right elbow injuries. (AX 2)

On January 14, 2010 Petitioner was no longer assigned to the Infirmary and he began working in "Segregation Control." He stayed there until February 3, 2010. (RX 3)

As of February 4, 2010 Petitioner began working as a "Dietary Officer" and he remained in that position through April 7, 2010. (RX 3)

Petitioner returned to Dr. Brown on April 7, 2010, with ongoing complaints of numbness and tingling in both of his hands. All testing was negative except for some discomfort on direct compression. Dr. Brown again suspected Petitioner's symptoms were consistent with a possible peripheral compression neuropathy. A repeat nerve conduction study was ordered and Petitioner was again allowed to continue working full duty without any restrictions. (AX 4- PX 3)

Repeat studies were performed on April 7, 2010 by Dr. Phillips and were normal. As part of the test Petitioner completed a Patient Questionnaire and drawing. Petitioner's symptoms included numbness, right hand and elbow, pain in right elbow, and left hand numbness. His left

elbow was not marked on the pain drawing. (PX 4) After reviewing the repeat testing, Dr. Brown wrote, "At this point I have no further recommendations from a hand surgical point of view." (AX 4-PX 3) Petitioner was to return as needed. (AX 4- PX 3)

As of April 8, 2010 Petitioner was assigned to "R-4 Escort." (RX 3)

Petitioner returned to see Dr. Brown on June 16, 2010 with the primary complaint of ongoing numbness and tingling in the right hand, mainly the little and ring fingers and some right medial elbow pain. Petitioner had good range of motion of his right elbow with partial subluxation of his ulnar nerve. Tinel's induced some discomfort. Dr. Brown felt Petitioner had symptoms consistent with an ulnar neuropathy and again noted he had a partial subluxing ulnar nerve. He recommended continued conservative treatment. No work restrictions were given. Petitioner was to return in three months. (AX 4 -PX 3)

On June 30, 2010 Petitioner began working in the "Visiting Room." (RX 3) He remained there until August 7, 2010. (RX 3)

Petitioner took a leave of absence from his job beginning on August 17, 2010. This continued through May 31, 2011. (AX 5 - PX 7) According to Respondent's Time Sheets (RX 3) Petitioner was not assigned to any position between August 7, 2010 and November 16, 2010. (RX 3)

On September 15, 2010, Petitioner again presented to Dr. Brown with complaints of numbness and tingling in his right little and ring fingers with medial elbow pain. (AX4 -PX3, 9/15/10). On examination, Petitioner continued to have a subluxing ulnar nerve as well as positive Tinel's and direct compression test over the right elbow. *Id.* As Petitioner was recovering from knee surgery Dr. Brown again recommended conservative care. *Id.*

On October 26, 2010, Petitioner saw Dr. Brown with continued complaints of pain and popping over the medial aspect of his right elbow, associated with numbness and tingling in his right little and ring fingers. (AX4 -PX3, 10/26/10). Petitioner continued to show signs of his subluxing ulnar nerve in the right elbow, a positive Tinel's sign, and positive direct compression and elbow flexion tests. Dr. Brown noted that when Petitioner flexed his elbow, his ulnar nerve moved/subluxed out of the condylar groove across the medial epicondyle, causing irritation of his nerve. *Id.* Dr. Brown's impression was chronic ulnar neuropathy of the right elbow with an associated subluxing ulnar nerve. Dr. Brown further noted that this was a "dynamic ulnar neuropathy" that would not necessarily be identified on a nerve conduction study. *Id.* Since Petitioner suffered had from this condition for over three years and failed a year of conservative measures, Dr. Brown recommended surgery. *Id.*

Petitioner was assigned to "R-3 A & B" on November 17, 2010. The next day he was assigned to "Tower 3." (RX 3)

A copy of the communication from Respondent dated November 18, 2010, approving surgery was entered into evidence as Petitioner's Exhibit 6. This correspondence from Respondent's adjustor, Sue Zellers, stated:

> Fyi.....we had previously denied Mr. Lance Fancher's repetitive motion claim (date of injury: 11/25/09). After reviewing Dr. Brown's report, we have changed it to a compensable claim. Work Comp will pay for treatment related to this injury. (AX4 - PX6).

On December 7, 2010, Petitioner underwent a right cubital tunnel release with anterior submuscular transposition of the ulnar nerve and myofascial lengthening of the flexor pronator tendon origin. (AX4 -PX5). Objective intra-operative findings included tight fascial bands at the proximal edge of the cubital tunnel. *Id.* Petitioner's myofascial flaps had to be sutured in a lengthened, loosened fashion over the ulnar nerve to keep the nerve anterior to the medial epicondyle. *Id.* Dr. Brown noted that Petitioner had a good recovery and referred him for physical therapy. (AX4 -PX3, 12/20/10, 1/19/11). Petitioner was off work as of December 7, 2010 until December 20, 2010 when he was released with restrictions. (AX 4 - PX 3)

Petitioner underwent therapy at DuQuoin Health Center for his right elbow beginning December 10, 2010 and ending on January 14, 2011. (AX 4 - PX 7)

Petitioner returned to see Dr. Brown on January 19, 2011. He reported the numbness was gone, he had no pain, and he was doing well. He had good active range of motion of the elbow, wrists, and all digits as well as good grip strength and sensation. He was to continue with his home therapy for an additional four to six weeks and return to full duty work as of January 24, 2011. Petitioner was otherwise released from care with instructions to return on an as needed basis. (AX 4 - PX 3)

According to RX 3, Petitioner did not return to work until January 25, 2011 at which time he was assigned to "Leave Relief 11." He remained in that position through February 18, 2011. (RX 3)

Petitioner did not work between February 18, 2011 and March 1, 2011. As of March 1, 2011 Petitioner worked "R-4 C & D" on Saturdays and Sundays, "R-4 Escort" on Wednesdays, and "R- 4 A & B" on Thursdays and Fridays. He had Mondays and Tuesdays off. This schedule remained in effect through April 10, 2011. (RX 3)

As of April 12, 2011 Petitioner worked the following schedule: "R-4 Escort" on Thursdays; "R-3 Escort" on Sundays and Mondays; and "R-4 Control" on Fridays and Saturdays. Tuesdays and Wednesdays were his days off. This schedule remained in effect through July 27, 2011. (RX 3)

Effective July 29, 2011 Petitioner worked as an "R1 Escort" officer through August 15, 2011. (RX 3)

On August 17, 2011 Petitioner presented to Dr. George Paletta. According to the doctor's notes, Petitioner was a correctional officer for Respondent, having been there for twelve years. Dr. Paletta wrote:

> . . . His job involves the typical duties of a correctional officer including cuffing and un-cuffing inmates, locking and unlocking cell doors, opening and closing cell doors, and at times having to restrain inmates. He presents for evaluation of a chief complaint of left elbow pain as well as numbness and tingling into the lateral digits of the hand. He has a significant past medical history that this has been going on for at least three years. He initially saw Dr. David Brown several years ago. He had initial EMG and nerve conduction studies that were negative. Dr. Brown treated him conservatively, but ultimately he had continued complaints particularly with regard to the right elbow. He underwent ulnar nerve transposition of the right elbow in December 2010. He returned to work after about six weeks. He has done well on the right side. However, he has had continued symptoms on the left side. (AX5 - PX3, 8/17/11).

Petitioner complained of medial elbow pain as well as pain and numbness radiating down into the ulnar border of his hand and into the lateral fingers. Petitioner reported that his symptoms were aggravated by repetitive use of his hand, particularly his job duties, and that he was taking over-the-counter medication as necessary to manage his symptoms. (AX5 -PX3, 8/17/11).

Physical examination of Petitioner's left elbow revealed tenderness at the cubital tunnel, positive Tinel's sign, positive ulnar nerve compression test and positive elbow flexion test. *Id.* Grip strength in Petitioner's left upper extremity was 60 versus 110 on his right surgically repaired side. *Id.* Pinch strength on his left side was also reduced as opposed to his right side. *Id.* Dr. Paletta noted Petitioner had evidence of a "clearly hypermobile subluxing nerve." Petitioner's right elbow was noted to be fine. Dr. Paletta's impression was recurrent left ulnar neuritis in the setting of a hypermobile subluxing ulnar nerve, which he believed was aggravated by Petitioner's repetitive job duties. *Id.* Dr. Paletta made the following recommendations based on his impression:

> Clearly the patient has had persistent ongoing symptoms secondary to hypermobile subluxing ulnar nerve. His previous EMG and nerve conduction studies done a year-and-a-half ago were normal. I recommend that he undergo repeat EMG and nerve conduction studies. However, I would recommend that he consider ulnar nerve transposition irregardless [sic] of what the nerve conduction study show [sic]. This is a mechanical issue due to instability of the ulnar nerve. The ulnar nerve is repeatedly irritated based on his reparative [sic] work activities. The purpose of the EMG and nerve conduction studies is to document whether there has been any interval change in the nerve and to

> document that preoperatively. This would help predict potential recovery. Nonetheless, irregardless [sic] of what the nerve conduction study show [sic], I would recommend he undergo ulnar nerve transposition similar to what was performed on the opposite site [sic]. . . *Id.*

Dr. Paletta stated that Petitioner's left elbow complaints were causally related to Petitioner's job activities, and noted that Petitioner's left elbow condition and symptoms was almost identical to what Petitioner suffered in his right upper extremity. *Id.* Dr. Paletta recommended that Petitioner proceed with surgery, based in part on the success Petitioner had in obtaining relief from his right-sided complaints with same. *Id.* Petitioner was allowed to continue working full duty. *Id.*

Petitioner underwent an EMG and Nerve Conduction Study with Dr. Phillips on August 17, 2011. They were normal. Dr. Paletta reviewed the studies himself on August 25th. His diagnosis remained intermittent ulnar neuritis in the setting of a hypermobile subluxing ulnar nerve and he further described it as a mechanical problem. He again recommended surgery to eliminate the instability of the ulnar nerve and the tendency for recurrent irritation of the nerve. (AX 5 - PX 3)

On August 17, 2011 Petitioner also authored a letter "To Whom It May Concern" discussing his work duties in Dietary, Control Rooms, the Infirmary, the Visiting Room, and Administrative Back Room. He also mentioned writing of reports and cuffing of inmates. (AX 5 - PX 8)

Petitioner completed a Notice of Injury form on August 18, 2011 reporting an injury to his left elbow on August 17, 2011 due to correctional officer duties which had involved "twelve years of keying doors, pushing buttons, cuffing, writing reports and log books." A First Report of Injury form was completed by Respondent on August 18, 2011. (AX 5 - PX 7)

On August 19, 2011 a Demands of the Job form was completed for Petitioner's job. According to it, Petitioner used his hands for fine manipulation less than three times per week and for gross manipulation zero to two hours per day. (AX 5 - PX 7)

From August 19, 2011 through August 24, 2011 Petitioner was assigned to "Tower 3." (RX 3)

Petitioner signed his Application for Adjustment of Claim in 11 WC 032739 on August 23, 2011. (AX 3; AX 5 - PX 7)

On August 25, 2011, Petitioner underwent a subcutaneous ulnar nerve transposition. (AX5 -PX5, PX 6) Intra-operative findings noted a generally normal left elbow except for evidence of a "hypermobile snapping ulnar nerve" which snapped with every cycle of flexion and extension and subluxed over the medial epicondyle. *Id.* Petitioner was taken off work as of August 25, 2011.

Dr. Paletta's post-surgery follow-up note documented significant elbow pain with numbness and tingling into the lateral border of Petitioner's hand in the fourth and fifth fingers. (AX5 -PX3, 9/12/11). Dr. Paletta prescribed Lyrica and Vicodin and began Petitioner's physical therapy. *Id.* Petitioner was returned to full duty work on December 8, 2011, and released from care on January 11, 2012. At the time of his last visit with Dr. Paletta, Petitioner was doing "great" with no significant pain and only a "tiny bit" of numbness at the tip of his fifth finger. Any fourth finger numbness had completely resolved. Petitioner had no swelling and full range of motion. The ulnar nerve was nice and mobile. Dr. Paletta described Petitioner's outcome as "excellent." (AX5 -PX3, 11/30/11, 1/11/12).

Petitioner was off work from August 25, 2011 through January 28, 2012. He returned to work on January 29, 2012 as a "Gym Officer." He remained in that position through February 28, 2012. He was then off work until April 23, 2012 at which time he returned to the Infirmary where he worked through September 1, 2012. (RX 3)

Dr. Paletta testified by way of deposition on February 8, 2013. (AX5 -PX9). Dr. Paletta testified that he was beginning his 16th season as the team physician for the Cardinals, and that he has performed independent medical examinations at the request of the State of Illinois. (AX5 -PX9, p.4). Dr. Paletta testified that Petitioner suffered from irritation of the ulnar nerve as a result of friction caused by hypermobility, and recommended ulnar nerve transposition. *Id.* at 8, 10, 11. Dr. Paletta explained that Petitioner's nerve was slipping in and out of its "groove" and rolling over the medial epicondyle, the bony prominence on the inner side of the elbow. *Id.* 10, 11. Following the transposition, Petitioner suffered from post-surgical causalgia, which was resolved conservatively with Lyrica. *Id.* at 9.

Dr. Paletta described the difference between ulnar neuritis and ulnar neuropathy:

> The basic difference between the two is in ulnar neuritis there will not be EMG and nerve conduction study changes, whereas in ulnar neuropathy there will be abnormalities on the nerve conduction changes. The clinical symptoms will be identical – pain in the elbow, numbness and tingling in the ulnar nerve distribution – but the nerve has not been adversely effected from a functional perspective yet. *Id.* at 11, 12.

Dr. Paletta testified, however, that if left untreated Petitioner's condition could worsen and create chronic changes in the nerve, which would affect the ability of the nerve to conduct signal. *Id.* at 11. Dr. Paletta testified that the condition is aggravated by repetitive flexion and extension under load; and in Petitioner's case, his cuffing and uncuffing inmates, locking and unlocking cells, and opening and closing cell doors qualified as repetitive flexion-extension under load. *Id.* at 12, 13. Dr. Paletta explained that "under load" did not mean heavy weight or significant force, but meant resistance, which could be created with as little as one pound. *Id.* at 15-17.

On cross-examination Dr. Paletta testified that he most commonly sees ulnar neuritis in athletes but, of course, his practice is sports medicine based. He has also seen it in industrial workers and "everyday folks." It's really a consequence of friction on the nerve because of the underlying instability. He further testified that if one just bends and straightens one's arm with out any resistive force against it, the nerve may sublux. However, in his experience the nerve becomes symptomatic when the elbow is being bent and straightened with some type of resistance such as when one throws a baseball or repetitively pushes and pulls a dolly or repetitively opening and closing cell doors where there is some resistance or increased force besides the weight of just their arm or their hand. Dr. Paletta noted, "I see this in little leaguers, too, who don't throw the ball very hard." *Id.* at 16, 17.

Dr. Paletta testified that he reviewed Respondent's materials pertaining to the job duties of a Correctional Officer at Big Muddy Correctional Center, and based on Petitioner's history, clinical examination findings, intraoperative findings and his recovery following his bilateral elbow surgeries, Dr. Paletta opined that Petitioner's job duties did contribute to symptomatic ulnar neuritis of the left elbow. *Id.* at 10. On cross he acknowledged that he hadn't reviewed the aforementioned materials (job site analysis, DVD of Big Muddy) in the last couple of weeks; rather, it had probably been within the last year. *Id. at 18.*

Petitioner attended an examination with Dr. Anthony Sudekum at the request of Respondent on August 29, 2013. Dr. Sudekum testified by way of deposition on December 23, 2013, and began his testimony by pointing out three errors in his report, one of which was substantive. (RX5, p.5, 6). Petitioner testified that the test performed by Dr. Sudekum was vastly different from the one performed by Dr. Phillips. (T.39). Unlike Dr. Brown and Dr. Paletta, Dr. Sudekum believed that evidence of a hypermobile/subluxing nerve should show up on electrodiagnostic studies. (RX5, p.11).

Dr. Sudekum's physical examination findings demonstrated positive Tinel's sign bilaterally over Petitioner's wrists, positive Tinel's sign over Petitioner's left elbow, and borderline Phalen's and grind test over the left wrist. (RX4, p.10). Dr. Sudekum stated that hypermobility and/or subluxation of the ulnar nerve was not caused by any specific accident, repetitive motion or work activity, and that usually, the condition is asymptomatic. (RX4, p.45). He acknowledged, however, that subluxation of the nerve from significant elbow movement can become symptomatic as a result of irritation inflammation and produce elbow pain and paresthesia in the ulnar nerve distribution. (RX4, p.45; RX5, p.7, 8, 11). He indicated that, "The more subluxation, potentially, the more likely the patient is to become symptomatic." (RX5, p.7, 8). Dr. Sudekum stated that very few patients are symptomatic and even fewer patients fail to improve with conservative measures and require surgery. (RX4, p.45-46).

Dr. Sudekum was under the impression that most of the opening and closing of cell doors at Big Muddy River Correctional Center was done electronically through the control pod rather

than manually by Correctional Officers. (RX4, p.13). Dr. Sudekum also indicated that he visited Respondent's Big Muddy facility and observed Correctional Officers performing their job duties; however, he did not indicate whether this was done during the busy day shift or one of the other shifts with less movement. (RX4, p.13, 17; RX5, p.16, 17, 19). Dr. Sudekum also indicated that he performed some of the tasks repeatedly performed by Correctional Officers; however, he failed to indicate how many times he did so or which areas of Respondent's facility he opened doors/chuckholes, turned keys or lifted property boxes. *Id.*

Based on Respondent's exhibits, his review of the video and his visit, Dr. Sudekum did not believe Petitioner's job activities caused or aggravate ulnar subluxation, or resulted in the need for any treatment for same. (RX4, p.50; RX5, p.20, 21). Dr. Sudekum suggested that Petitioner's condition could be related to his cervical spine. Despite stating that he believed Petitioner's persistent left-sided complaints were related to his cervical spine, he testified that they could also be related to the type of surgery performed on Petitioner's left elbow (subcutaneous ulnar nerve transposition), which was different than the procedure performed on Petitioner's right side (submuscular ulnar nerve transposition). (RX4, p.48, 49; RX5, p.14, 15). Rather than recommending cervical intervention, Dr. Sudekum testified that he would recommend revision ulnar nerve surgery with submuscular transposition if Petitioner's left side worsened. (RX5, p.15, 16).

On cross-examination, Dr. Sudekum testified that in the past 3 years, he has performed 138 IMEs, given 71 depositions, and made over $944,000.00 performing medical legal services for the State of Illinois. *Id.* at 21, 22. He testified that he did not believe that the fact that the video provided to him by Respondent was filmed on a different shift than the one worked by Petitioner would impact is causation opinion, even when provided with evidence that the Illinois Workers' Compensation Commission felt differently. *Id.* at 30, 37-40. However, given the fact that he believed that the video was an accurate representation of what he saw, and the testimony of Petitioner and Respondent's witness that the day shift is different than the other shifts, it is evident that Dr. Sudekum did not visit during Petitioner's day shift. *Id.* at 39. He acknowledged that sticking doors would be difficult to operate and pull open, that property boxes are often heavy, and that repetitive motion of the arms and hands is needed to perform property box searches. *Id.* at 26-28. Dr. Sudekum was unaware that the strength demands in Respondent's Job Site Analysis indicated that Petitioner frequently lifted up to 25 pounds, frequent being defined as up to 5 ½ hours per day. *Id.* at 33. He admitted to opining in the case of *Branden Schrader v. SOI/Big Muddy River Corr. Ctr.* that the job duties of a Correctional Officer did not contribute "significantly" to the etiology or exacerbation of bilateral repetitive injury. *Id.* at 36.

Dr. Brown testified by way of deposition taken on February 25, 2014 (09 WC 49710). (AX4-PX8) Dr. Brown trained under Dr. Susan Mackinnon, an internationally recognized expert in the field of peripheral nerve injury and head of the plastic surgery program at Washington University, and Dr. David Green, president of the Hand Society and senior editor of the

international standard textbook on hand surgery, Green's Operative Hand Surgery. (AX4-PX8, p.5). In addition to his practice, Dr. Brown currently serves as the hand specialist for the St. Louis Cardinals, and frequently lectures before medical facilities, judicial bodies, insurance agencies and both petitioner and respondent oriented groups. *Id.* at 6-8. Dr. Brown testified that 95% of his patient referrals come from insurance companies, employers, occupational medical clinics or defense attorneys. *Id.* at 8, 9. Dr. Brown also performed IMEs at the request of the State of Illinois. *Id.* at 9, 10.

Dr. Brown further explained the etiology of a symptomatic subluxing ulnar nerve:

> Subluxing ulnar nerve. Another word for subluxation is dislocation, and if you look at the literature on the subject, sixteen to twenty percent of the population actually has subluxing ulnar nerves. And what that is is the ulnar nerve runs along the inside of the elbow and it runs in a groove between two bones at the elbow and that groove is called the condylar groove. It's between the medial epicondyle and a piece of the olecranon and it is an actual groove. And patients with subluxing ulnar nerves, when they move from extension to flexion, the nerve will actually move out of that groove or dislocate and go over the bony prominence called the medial epicondyle. . . *Id.* at 10, 11.

Dr. Brown testified that there are no comorbid risk factors that can lead to the development of subluxing ulnar neuropathy. *Id.* at 12. The condition is an anatomical abnormality. *Id.* at 12. Hence, his opinion focuses on the specific common factors that exist in the patients that become symptomatic as a result of the condition. *Id.* at 10-12.

Dr. Brown testified that while the majority of patients with this condition are asymptomatic, "A smaller percentage of them are symptomatic and it's a dynamic process that is activity related." *Id.* at 11. He testified that the patients that come to him with symptomatic subluxing ulnar nerves "are either athletes or they're in arm-intensive type jobs." *Id.* at 11. He stated, "They're doing something that is causing it to become symptomatic and so those are the patients that I see with symptomatic subluxing ulnar nerves." *Id.* at 11. When asked what specific type of motion caused the condition to become symptomatic, he stated:

> It's moving from extension to flexion and the nerve will then sublux or dislocate out of the condylar groove over the medial epicondyle and that causes trauma to the nerve, and if they're doing that on a frequent basis, it becomes symptomatic. . . *Id.* at 11, 12.
>
> . . . I see it in athletes or I see it in the industrial Work Comp setting in individuals who are doing arm-intensive type of activities. The come in with symptomatic subluxing ulnar nerves from using their arms all day long. *Id.* at 12.

Dr. Brown testified that Petitioner's attorney's office furnished him with a two page handwritten job description with additional details concerning Petitioner's job. *Id.* 23, 26. He also

reviewed a Job Site Analysis and some videos. The latter items were not that significant to him as they didn't provide much useful information pertaining to Petitioner's job. They did not address the frequency of the activities Petitioner stated he repetitively performed -- key turning and cell door opening/closing. They were silent as to the forces involved also. *Id. 24 - 26.*

Although Dr. Brown testified that this condition in symptomatic form is seen in patients who perform frequent strenuous activities, Dr. Brown did not indicate that the arm-intensive activity had to be forceful activity, and he also indicated that it is seen in individuals who simply use their arms repetitively. *Id.* at 12, 41. Dr. Brown testified that the relevant factors were activity, frequency and duration of exposure. *Id.* at 54, 55. He testified, however, that resistance or added force would add to the irritation sustained. *Id.* at 56.

Dr. Brown also testified that symptomatic nerve irritation resulting from hypermobility of the ulnar nerve does *not* typically show up on nerve conduction studies:

> His answer to paraphrase is basically he's saying that you typically expect to see a nerve conduction study would be positive for changes on it and that's absolutely not true. He doesn't know the medical literature on the subject. As I stated before, in the published series on subluxing ulnar nerves, all of the patients in the most recent series had completely normal nerve conduction studies, so it's extremely uncommon for them to have a positive nerve conduction study no matter how symptomatic they are because it's a dynamic process. It's a dynamic pathology where the nerve is subluxing out of the condylar groove, being irritated by the medial epicondyle and that produces symptoms, so it's very uncommon for them to have positive nerve conduction studies . . . so that statement in his answer is just not true. It's not – it's not consistent with what the medical literature says. *Id.* at 34-35.

Dr. Brown explained why the nerve conduction studies obtained were reasonably necessary:

> . . . The reason I obtained them in this case is basically a way to monitor the patient and if I see any changes on the nerve conduction studies when I'm treating them conservatively, I will tend to operate on them sooner, but in this case, they were negative, so I felt I had time to treat this gentleman conservatively for a whole year, but he failed the year of conservative treatment so we eventually offered him surgery, but normally they're going to be normal. . . *Id.* at 34-35.

Dr. Brown testified that Dr. Phillips did not physically examine Petitioner for a subluxing ulnar nerve because it is an uncommon diagnosis and that was not the indication for the referral. *Id.* at 17, 18.

Dr. Brown found it significant that Respondent's video was taken on a different shift than the day shift which Petitioner most frequently worked, because more activity occurs during the first/day shift. *Id.* at 25. Dr. Brown testified that there were no other activities performed on a frequent enough basis to aggravate his subluxing ulnar nerve outside of his employment

activities, which Petitioner frequently performed for more than 10 years. *Id.* at 27. Hence, Dr. Brown concluded that Petitioner's employment was the only plausible explanation for Petitioner's subluxing ulnar nerve, which is typically asymptomatic, becoming symptomatic and requiring surgical intervention. *Id.* at 27. Dr. Brown noted that the arm-intensive activity performed by Petitioner at Big Muddy River Correctional Center throughout his work day as he repeatedly lifted/flexed his arm to turn keys, open and close doors and cuff and uncuff inmates was beyond the normal "everyday" level of activity, and when done over a prolonged period of time, would aggravate a subluxing ulnar nerve. *Id.* at 43, 44, 53.

Dr. Brown disagreed with Dr. Sudekum's testimony that the procedure performed by Dr. Paletta was somehow inferior to the procedure which he performed, and stated that it was simply a matter of personal preference. *Id.* at 29. Dr. Brown also pointed out that the Neurometrix test performed by Dr. Sudekum was substandard and does not even measure nerve conduction across the elbow. *Id.* at 30-32. He also noted that Dr. Sudekum did not offer a credible explanation for the symptomatic manifestation of a typically asymptomatic condition. *Id.* at 33.

On cross-examination Dr. Brown acknowledged that Dr. Sudekum's Neurometrix testing results were normal as were Dr. Phillips. He also stated that Petitioner's nerve is an anatomical variant that he was born with. He typically sees it in athletes or workers with arm-intensive types of jobs. It's also prevalent with weight lifters. Dr. Brown acknowledged that Petitioner denied any sports activities or hobbies outside of work. *Id. 39 - 42* Dr. Brown felt Petitioner's job was fairly arm intensive in that he turned locks several hundred times a day, pushed and pulled on doors to sure they were locked several hundred times a day, cuffed and uncuffed inmates that were struggling throughout the day and over a prolonged period of time could aggravate someone with a subluxing ulnar nerve. Dr. Brown was told by Petitioner that he turned keys to open and close doors fifty times an hour but based upon Petitioner's handwritten description he didn't think it was every hour. He thought it was 200 to 300 times per day. *Id. at 44.* Dr. Brown agreed that there are various different job assignments with Respondent and that the hand intensity of the assignments could vary. He agreed that there wouldn't be turning of 300 keys per hour on tower duty. Dr. Brown testified that when he saw Petitioner Petitioner was working in the Infirmary on the first shift where he was turning keys fifty times and an hour. Dr. Brown didn't think that was inconsistent with what he read in other reports, referencing the Job Site Analysis in which it was noted that was one of the areas where keys were manually turned. He had also worked in dietary where he turned a lot of keys and did morning counts and property box checks with keying of two hundred cells per day. Petitioner didn't include tower work in the written job description. *Id. 44, 45* Dr. Brown further acknowledged that when he first saw Petitioner, Petitioner provided him with a general job description. Thereafter, Petitioner provided him with more details but he didn't go through an exhaustive, detailed list of every activity he has done for the past ten years with Respondent. Dr. Brown testified that Petitioner gave him a general description that he turned keys and opened/closed cell doors. Petitioner also denied any outside activities or hobbies. He was generally healthy. *Id. 47-48.*

With regard to Petitioner's case, Dr. Brown did not know how Petitioner turned the keys; however, his understanding from other officers was that it was commonplace to use both arms. *Id. 48-49.* He believed different types of keys were used at Respondent's facility and that chuckholes are found in segregation and in the infirmary. Bar rapping is found in segregation and the showers. Petitioner would not have been rapping bars in the infirmary. Dr. Brown was unaware of any bars in the Infirmary. He did not know how long Petitioner had worked in segregation. Dr. Brown felt it took more force to open the chuckholes with the Folger Adams keys. *Id. 49 - 54*

Dr. Brown further testified that the only plausible explanation he had for Petitioner's subluxing ulnar nerve was his work activity because there was nothing non-occupational he could point to as an aggravating factor. *Id. 54* Dr. Brown also testified that any activity, whether at work or weight lifting, can have the same effect on the nerve so it becomes important how frequent one performs the activity and what's the exposure. He explained that his daughter is a volleyball player and has a subluxing ulnar nerve that bothers her when she's playing and then stops after she quits playing. *Id. 55*

At the arbitration hearing Petitioner testified that he began his career with the State of Illinois on September 27, 1999, as a Correctional Officer at Big Muddy River Correctional Center. Petitioner testified that neither his job title nor his job duties have changed in any way since he was hired in 1999. Prior to 2010, Petitioner never missed any time from work because of a workers' compensation injury for his hands or elbows, nor did he require any care or treatment for his hands, wrists or elbows. Petitioner's weight has been consistent for the last 10 to 15 years, and that he does not suffer from diabetes, gout, hypothyroidism or rheumatoid arthritis.

Petitioner testified that he has spent the overwhelming majority of his time working Respondent's 7 to 3 shift, working in the infirmary unit (35%) and in the housing gallery unit (40%). Petitioner testified that there is a distinction between the healthcare unit and the infirmary. The infirmary, which is located in the back part of the unit, is where inmates are kept because of illness or disability. Petitioner used the remaining percentage of his time working as a relief officer in other positions, including segregation (an isolation wing) and dietary. Petitioner testified that working dietary also requires that he open "quite a few doors with bigger keys," because of frequent inmate movement from the kitchen, dish room and bathrooms. Petitioner testified that Respondent's job post roster was not an accurate representation of his actual assignment history, because shift commanders frequently change the assignments indicated on the roster.

Petitioner testified that he reviewed the video of a Big Muddy Correctional Officer offered into evidence by Respondent and testified that it was not taken on the day shift which he most frequently worked. Petitioner testified that most of the movement in Respondent's facility

takes place on the day shift, and the video did not depict any of the activity occurring on the 7-3 day shift.

Petitioner testified that the keys used at the facility were approximately 3 inches in length, which is smaller than a Folger Adams key, but larger than the regular key used by the general public. Petitioner testified that the keys are large enough to require all 5 of his fingers to turn them.

The first thing Petitioner did when he arrived on day shift while working in the infirmary was key open all of the doors for count. When working on the gallery, Petitioner began his day by keying open doors for property box checks. Petitioner described opening the locks as, "You put in the key, and you've got to twist almost 180 degrees, sometimes sticking and then turning it back trying to get that door to unlock." Petitioner testified that the doors at the facility are hinged doors made of heavy steel. Petitioner testified that the doors and locks stick, and on occasions require both hands to open. Petitioner testified that he opens over 100 doors in the first 90 minutes of his shift alone on his gallery assignment. Petitioner testified that he was individually responsible for two wings, each containing 50 cells.

After opening the doors, Petitioner performed property box checks, which involved lifting up the boxes and searching its contents using his upper extremities. Petitioner testified that the property boxes are heavy, because all of the inmates' items are stored in them, including food, clothes, legal materials, magazines and books. Petitioner also lifts mattresses and moves furniture during his search for contraband.

After compliance checks are complete, and he has confirmed that the inmate counts check, Petitioner began running lines for gym, school, and work assignments. Petitioner testified that inmates are sometimes searched and cuffed, and the destination of each inmate must be logged. Petitioner testified that he cuffs and uncuffs inmates on a daily basis, and that it takes 5 separate motions with his upper extremities to do so. Petitioner testified that the locks do not work all of the time, and when they do not work he has to try operating the lock in different positions and/or put in a work order to get the equipment replaced. Respondent employs a full-time locksmith at its Big Muddy River correctional facility. Petitioner also performed wing checks every 30 minutes. Petitioner testified that he pulled on the doors to open them and make sure the inmates were compliant, confirmed the doors were secure, and logged the results.

Petitioner testified that he operated chuckholes on a daily basis throughout the course of his career while working in the infirmary and segregation units. Petitioner testified that the chuckholes at Big Muddy are opened by Folger Adams keys. Petitioner testified that the Folger Adams keys must be turned 180 degrees and require force and grip to operate. Petitioner testified that the chuckholes work "sometimes," but fail to work on other occasions due to paint, rust or inactivity. Petitioner used chuckholes to deliver food and mail, and in the infirmary, for the psychiatrist or staff could talk to the inmate through the chuckhole. Petitioner also restrained

inmates as necessary. Petitioner testified that there was no part of his job as a wing officer that does not involve the use of his arms and hands. Petitioner testified that he has never had a negative performance review in his 15 years of employment. Petitioner testified that the heaviest thing he had to lift was actual inmates.

Petitioner testified that despite the improvement resulting from surgery, he continues to experience symptoms depending on his level of activity. Petitioner testified that his elbows are bothered by performing lengthy chores around the house and driving for long distances. Petitioner testified that he begins to experience pain after driving more than an hour and a half. Petitioner takes Ibuprofen and/or Aspirin as needed for his symptoms. Petitioner testified that his hobbies of archery and fishing have been adversely affected. Petitioner testified that he continues to fish since his surgeries, but that he finds himself having to switch hands a lot. The pictures submitted by Respondent show Petitioner fishing and hunting. (RX6). Petitioner testified that his loss of strength has forced him to change the type of bow he uses.

Petitioner testified that he improved following his right elbow surgery, and returned to work performing the same job duties responsible for his right elbow injury. After returning to work from his right elbow surgery and working full duty for some time, Petitioner began to notice an increase in the intensity of the same symptoms in his left upper extremity. When these increased over time, Petitioner sought treatment with Dr. George Paletta.

On cross-examination Petitioner acknowledged that Respondent's facility opened in 1992 and is 20 - 23 years old. He also voiced no disagreement with RX 3, his staff assignment history. Petitioner agreed that he had probably worked every assignment in Respondent's facility at one time or another and that his job duties varied with some jobs involving more upper extremity activity than others. Petitioner believed that his job as a wing officer was the most hand intensive duty with it taking up approximately 30 to 40 percent of his time. The "Tower Officer" position was only hand intensive ten percent of the time as it mainly involves standing and watching for security breaches. As a "Dietary Officer" Petitioner explained that he maintained the safety and sanitation of the dietary and helped the lieutenants with chow lines. He would open quite a few doors with bigger keys to the dish room and to let inmates go to the bathroom. He worked solely in the dietary unit when assigned there.

Petitioner testified that his work as a "Relief Officer" was the most varied because he would be substituting for someone who was sick or off work. "Escort Officers" help the wing officers if requested and involves staging, walking and escorting inmate lines to and from the housing unit to the gym, yard, school, or health care. Doors at the beginning and end of the line would need to be unlocked but sometimes that was handled by buzzers in the Control Room. According to Petitioner, he primarily walked, used his eyes, and maintained good order in the line. It could be hand intensive if there was a physical altercation but on a day to day basis Petitioner agreed that it did not involve repetitive upper extremity motions.

Petitioner also testified that when working in "R2 Control" he would be the "bubble officer" in a housing unit/control room and keep an eye on the wings and control the panel's toggle switches for opening and closing doors. He agreed that it takes about four ounces of force to push one of the toggle switches which isn't a significant amount of force and he usually pushed it with his thumb.

When assigned to the Visiting Room Petitioner monitored visits between inmates and visitor and provided security. It, too, involves no significant amount of repetitive upper extremity use. Petitioner also explained that as a "Gym Officer" he was essentially providing security within the gym and involved no intensive upper extremity activity.

Petitioner called Lieutenant Harold Schuler, who was present on behalf of Respondent, to testify. Lt. Schuler testified that although he has worked on the same shift as Petitioner, he never worked as Petitioner's supervisor. Lt. Schuler worked in a separate division, internal affairs. Lt. Schuler agreed with Petitioner's testimony that the 7 to 3 shift is a lot busier than the 3 to 11 shift. He also agreed that it takes significantly more wrist turning movement to perform a 180 degree key turn. He also agreed that some of the locks and/or keys and chuckholes stick. Lt. Schuler clarified that the infirmary contains an open ward where the majority of the inmates/patients stay as well as three isolation cells for inmates/patients in segregation status. He further testified that an officer assigned to segregation control would be assigned to a control room and would not open/close chuckholes. Lt. Schuler also testified that he does not trust or respect Petitioner.

Results for the Illinois Team Trail were marked as RX 7. They are not dated. (RX 7)

Respondent's Job Site Analysis dated December 17, 2010 shows that Correctional Officers perform frequent lifting up to 50 pounds and frequent carrying of up to 25 pounds (frequent being defined as up to 5 ½ hours per day); horizontal reaching up to 2 ½ hours per day; pulling up to 2 ½ hours per day; pushing up to 2 ½ hours per day; pinching up to 2 ½ hours per day; grasping up to 2 ½ hours per day; wrist turning up to 2 ½ hours per day; and frequent finger manipulation up to 5 ½ hours per day. The Analysis further notes that the physical work demands are going to vary depending upon shift and assigned position. For more specifics per employee, one is told to refer to their individual locations, job descriptions, and log sheets. The Analysis also indicates that Respondent's facility is a Level 3 high medium security facility in which the inmates are allowed to move freely in and out of their cells for approximately six hours every day to allow them to use facilities such as the yard, gym, school, dining hall and day room. (RX1).

Respondent's Exhibit 2 is compromised of various position description summaries for "SEG Control Officer," Health Care Unit Officer," "Housing Unit Control Officer," "Housing

Unit Wing Officer," "Housing Unit Escort Officer," "Infirmary Officer," "Receiving Wing Officer," and "Segregation Wing Officer." (RX 2)

With regard to Case # 09 WC 49710, The Arbitrator concludes:

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

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

Petitioner failed to prove he sustained an accident on November 25, 2009 that arose out of and in the course of his employment with Respondent or that his current condition of ill-being is causally related to that injury. In particular, Petitioner failed to prove that any accident "arose out of" his employment or that his right elbow condition was causally related to his employment duties for Respondent. While Petitioner's Application for Adjustment of Claim alleges bilateral hand and right wrist injuries, Petitioner failed to prove he sustained any injury to his bilateral hands or right wrist as a result of an alleged accident on November 25, 2009.

In cases such as this one where a claimant's theory of liability is based upon repetitive trauma, the claimant generally relies on medical testimony to establish a causal connection between the claimant's work and the claimed disability. When the question is one specifically within the purview of experts, expert medical testimony is mandatory to show the claimant's work activities caused the condition of which the employee complains. *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 478 (4th Dist. 1987), citing *Westinghouse Electric Co. v. Industrial Commission*, 64 Ill.2d 257 (1976)

Petitioner herein has failed to prove to a medical and surgical certainty via expert testimony that he suffered accidental injuries with a causal link to his duties as a correctional officer for Respondent. Petitioner's case relies upon the opinion of Dr. Brown who has relied on incomplete and incorrect information. Most significantly, Dr. Brown did no have a complete and accurate understanding of Petitioner's work assignments for Respondent. As Petitioner acknowledged on cross-examination he has worked almost all of the available jobs at Big Muddy. His assignments varied and his duties within those assignments varied. Petitioner readily acknowledged that many of them were not upper extremity intensive whatsoever. Looking at Petitioner's job assignments prior to his initial visit with Dr. Brown, it is clear that Petitioner worked as a dietary officer, relief officer, wing officer, escort officer, and control room officer. Some of these positions varied within the work week itself. When initially presenting to Dr. Brown, he was assigned to the Infirmary. Even if

one focuses on the job assignments that involved cell doors and keys, Dr. Brown did not have correct information. Dr. Brown was told that Petitioner opened fifty doors per hour throughout an average workday which is an assertion wholly absent from Petitioner's trial testimony. Dr. Brown related that Petitioner opened two hundred doors every morning as a wing officer, contrary to that of Petitioner at trial. Additionally, Petitioner testified about property box checks. He never discussed that job duty with Dr. Brown, however.

Further troubling is the fact that after the initial visit with Dr. Brown in November of 2009 Petitioner did not return to see him until April 7, 2010. At that time he was assigned as a "Dietary Officer." No definitive diagnosis was reached at either visit. Petitioner then returned to see Dr. Brown on June 16, 2010 at which time he was working as an "Escort Officer." Dr. Brown's records contain no discussion of the job duties associated with these positions. Interestingly, when Petitioner then returned to see Dr. Brown in September and October of 2010, Petitioner was not even working for Respondent as he was on a leave of absence beginning back in August of 2010.

While Respondent has contended in its proposed decision that Dr. Brown's opinion is further unpersuasive because the doctor was misled regarding Petitioner's activities outside of work, the Arbitrator notes that no direct evidence was presented showing that Petitioner was engaged in any recreational hobbies or pursuits during 2009 and 2010. While Petitioner acknowledged photographs of himself (RX 6) and acknowledged bow hunting and fishing, he testified that he did in 2012 and 2013. He was never asked if he was doing so prior to those years. Thus, she is unable to adopt Respondent's contention. However, the line of questioning and photographs did cast suspicion on Petitioner's credibility, especially when he testified that he had to "drop down" to a 50 lb. bow as a result of his surgery. Nevertheless, Dr. Brown's causation opinion in this case is not persuasive for the reasons outlined above. The multitude of assignments and duties performed by Petitioner is a compelling factor in assessing the repetitive nature of his duties for Respondent. The fact that Petitioner performed at least ten different assignments during the period of time in which his upper extremity complaints manifested suggests that his activities were not sufficiently repetitive to constitute an aggravating factor for his congenital condition.

Petitioner's claim for compensation in 09WC 49710 is denied. All remaining issues are moot. No benefits are awarded.

With regard to Case # 11 WC 32739, The Arbitrator concludes:

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

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

Petitioner failed to prove he sustained an accident on August 17, 2011 that arose out of and in the course of his employment with Respondent or that his current condition of ill-being is causally related to that injury. In particular, Petitioner failed to prove that any accident "arose out of" his employment or that his left elbow condition was causally related to his employment duties for Respondent.

In cases such as this one where a claimant's theory of liability is based upon repetitive trauma, the claimant generally relies on medical testimony to establish a causal connection between the claimant's work and the claimed disability. When the question is one specifically within the purview of experts, expert medical testimony is mandatory to show the claimant's work activities caused the condition of which the employee complains. *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 478 (4th Dist. 1987), citing *Westinghouse Electric Co. v. Industrial Commission*, 64 Ill.2d 257 (1976)

Petitioner herein has failed to prove to a medical and surgical certainty via expert testimony that he suffered accidental injuries with a causal link to his duties as a correctional officer for Respondent. Petitioner's case relies upon the opinion of Dr. Paletta who has relied on incomplete and incorrect information. Dr. Paletta's opinions were based upon a job history and understanding of duties that were not based upon full knowledge of the totality of Petitioner's job assignments and duties for Respondent. Dr. Paletta did not have a complete and accurate understanding of Petitioner's work assignments for Respondent. As Petitioner acknowledged on cross-examination he has worked almost all of the available jobs at Big Muddy. His assignments varied and his duties within those assignments varied. Petitioner readily acknowledged that many of them were not upper extremity intensive whatsoever. Looking at Petitioner's job assignments prior to his initial visit with Dr. Paletta, it is clear that Petitioner worked as a dietary officer, relief officer, wing officer, escort officer, and control room officer. Some of these positions varied within the work week itself. Additionally, the Arbitrator notes that while Petitioner alleges repetitive injury to his left, non-dominant elbow, there was very little clear testimony or evidence as to how Petitioner used his left arm/elbow in a repetitive fashion at work. A careful review of Dr. Paletta's office records shows a complete absence of any specific detailed information as to how Petitioner used his non-dominant left arm/elbow at work.

The multitude of assignments and duties performed by Petitioner is a compelling factor in assessing the repetitive nature of his duties for Respondent. The fact that Petitioner performed at least ten different assignments during the period of time in which his upper extremity complaints manifested suggests that his activities were

not sufficiently repetitive to constitute an aggravating factor for his congenital condition.

Petitioner's claim for compensation in 11WC 32739 is denied. All remaining issues are moot. No benefits are awarded.

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STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Debra Rohman,
Petitioner,

vs. NO: 10 WC 34609

State of Illinois,
Dept. of Financial & Professional Regulation,
Respondent.

16IWCC0129

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, 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 21, 2015, is hereby affirmed and adopted.

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

16IWCC0129

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

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

DATED: FEB 2 3 2016

Joshua D. Luskin

o-01/20/16
jdl/wj
68

Ruth W. White

Charles J. DeVriendt

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

ROHMAN, DEBRA
Employee/Petitioner

Case# **10WC034609**

STATE OF ILLINOIS
Employer/Respondent

16IWCC0129

On 1/21/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0333 SHAY & ASSOC LAW FIRM LLC
TIMOTHY S SHAY
1030 S DURKIN DR
SPRINGFIELD, IL 62704

4993 ASSISTANT ATTORNEY GENERAL
AMY S OXLEY
500 S SECOND ST
SPRINGFIELD, IL 62706

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

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

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 6M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JAN 21 2015

Ronald A. Piccia, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Debra Rohman
Employee/Petitioner

Case # 10 WC 34609

v.

Consolidated cases: n/a

State of Illinois
Employer/Respondent

16IWCC0129

An *Application for Adjustment 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 November 19, 2014. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0129

FINDINGS

On the date of accident (manifestation), August 5, 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.

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

In the year preceding the injury, Petitioner earned $44,733.00; the average weekly wage was $860.25.

On the date of accident, Petitioner was 57 years of age, single with 0 dependent child(ren).

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

Respondent shall be given a credit of $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 amounts paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 23, limited to those bills for treatment of Petitioner's right hand, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid 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 prospective medical treatment including right carpal tunnel release surgery as recommended by Dr. Mark Greatting and all reasonable and necessary treatment pertaining to same.

Petitioner's claim for TTD benefits is denied.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

January 16, 2015
Date

JAN 21 2015

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained a repetitive trauma injury arising out of and in the course of her employment for Respondent. The Application alleged a date of accident (manifestation) of August 5, 2010, and that Petitioner sustained repetitive trauma to the "Hands and Nerves" that caused bilateral carpal tunnel syndrome and an aggravation of a cervical injury (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Respondent disputed liability on the basis of accident and causal relationship.

Petitioner testified that she began working for the Department of Financial and Professional Regulation on March 1, 2007. Petitioner's job title was Office Coordinator and her job required her to sit as a desk in a cubicle for six to eight hours a day. Petitioner's job required her to deal with issues concerning licensing and regulation of various professions. When seated at her workstation, Petitioner would type, use a computer mouse, talk on the telephone and hand write. On direct examination, Petitioner reviewed a "Demands of the Job" form which stated that she was required to use her hands for fine manipulation six to eight hours per day (Respondent's Exhibit 3). Petitioner agreed that this was accurate.

Petitioner testified that her first workstation was an oak desk that had both the computer monitor and keyboard located on the top of the desk. There was not a keyboard drawer/extension. She also used an older chair that was not ergonomic. She worked at this workstation from March, 2007, to Fall, 2008.

Petitioner worked at her second workstation from Fall, 2008, to February 1, 2012. Petitioner tendered into evidence photos of this workstation (Petitioner's Exhibit 5). Petitioner testified that the keyboard pad and mouse pad shown in Exhibit were not present when she first started to work at the station and were not obtained until sometime close to January, 2012. The keyboard was on the top of the desk and not on a pullout drawer. Petitioner testified that when she typed, she would pull the keyboard to the edge of the desk and would pull the mouse pad closer to her when she would use the computer. When Petitioner would write, she would push the keyboard forward. The chair seen in the photo is an ergonomic chair; however, Petitioner did not receive this chair until mid December, 2011.

Petitioner began working at her third and current workstation on February 1, 2012. Petitioner tendered into evidence a photo of this workstation (Petitioner's Exhibit 25). The photo does show that the keyboard is located on a pullout drawer and the computer mouse is a "vertical" mouse. Petitioner testified that the extension for the keyboard was not installed until August, 2012.

Petitioner testified that her working at the workstations caused repetitive trauma to her neck and hands. In regard to the neck, Petitioner stated that she would be in one position looking at the computer screen all day and that she did not get up to move around or perform other tasks. In regard to her hands, she stated that excessive use of the mouse and the keyboard placement caused the problems in her hands. Petitioner is right hand dominant. While at work, Petitioner stated that she experienced swelling of her right hand which she attributed to its excessive use.

Petitioner testified that she sustained some prior injuries to her neck in 2003 and 2005 when she was in two motor vehicle accidents. Following both accidents, Petitioner was treated by Dr. David Fletcher, an occupational medicine specialist. Petitioner testified that she sustained "whiplash" type neck injuries following both accidents and did receive some physical therapy after one of them. She also had pain in her jaw and Dr. Fletcher referred Petitioner to a TMJ specialist. No neck surgery was either recommended or performed at that time. Petitioner testified that she recovered from these two prior car accidents, but she still was experiencing some achiness in her neck prior to August 5, 2010.

Dr. Fletcher ordered an MRI of Petitioner's cervical spine which was performed on December 31, 2009. This revealed disc bulges at C2-C3, C3-C4 and C6-C7 as well as disc osteophyte complex on the right side at C4-C5 and C5-C6. Dr. Fletcher saw Petitioner for neck pain on January 18, February 5, March 19, April 16, June 18, and July 16, 2010. With the singular exception of the record of January 8, 2010, Dr. Fletcher's records noted that Petitioner had chronic pain following several MVAs and that the cervical MRI showed objective pathology to explain her pain (Petitioner's Exhibit 9).

Dr. Fletcher referred Petitioner to Dr. Edward Trudeau, who performed EMG/nerve conduction studies on August 5, 2010 (the manifestation date alleged in the Application). The studies were positive for a right C6 radiculopathy and a mild to moderately severe right carpal tunnel syndrome. Left carpal tunnel syndrome was not diagnosed at that time (Petitioner's Exhibit 7).

Dr. Fletcher saw Petitioner on August 25, 2010, and diagnosed Petitioner with carpal tunnel syndrome and cervical radiculopathy. Dr. Fletcher again saw Petitioner on November 2, 2010, and, because of the neck and right upper extremity symptoms, diagnosed Petitioner with Double Crush Syndrome. He opined that Petitioner was a candidate for both right carpal tunnel surgery and a cervical fusion at C5-C6. He attributed both the neck and hand conditions to "cumulative trauma." (Petitioner's Exhibit 6).

Dr. Fletcher referred Petitioner to Dr. Lawrence Li, an orthopedic surgeon, who saw Petitioner on November 12, 2010. Dr. Li confirmed the diagnosis of right carpal tunnel syndrome and he recommended Petitioner have carpal tunnel release surgery. Petitioner was again seen by Dr. Li on August 25, 2011, and he again discussed treatment options with her; however, Petitioner wanted to defer obtaining any treatment for her right hand symptoms because she was waiting to obtain treatment for her neck (Petitioner's Exhibit 8).

Dr. Fletcher referred Petitioner to Dr. Kern Singh, an orthopedic surgeon, primarily for her neck symptoms. Dr. Singh saw Petitioner on December 13, 2010. In the intake form completed by Petitioner, she indicated that the hand problem was work-related but that the neck problem was pre-existing. In connection with his examination, Dr. Singh reviewed the December, 2009, MRI and August, 2010, EMG/nerve conduction studies. Dr. Singh opined that Petitioner had a C5-C6 disc protrusion and recommended that Petitioner have an MRI without contrast to determine if Petitioner's hand problems were from the cervical spine. He noted that Petitioner's pain increased while she was at work; however, he did not opine as to causality (Petitioner's Exhibit 9).

Dr. Fletcher continued to treat Petitioner for both her cervical and right hand conditions. When he saw Petitioner on November 30, 2010, he again opined that Petitioner should have a cervical fusion at C5-C6 and a right carpal tunnel release (Petitioner's Exhibit 6). Dr. Fletcher referred Petitioner to the Center for Living at St. John's Hospital for acupuncture treatment which she received from March 31, 2011, through June 24, 2012 (Petitioner's Exhibit 11). He also referred Petitioner to Dr. Louis DiStasio, a chiropractor, who treated her for neck symptoms from July 27, 2010, through January 18, 2011 (Petitioner's Exhibit 15). Dr. Fletcher also referred Petitioner to Dr. Mark Hale, a chiropractor, who treated Petitioner for neck symptoms from August 5, 2011, through January 9, 2012 (Petitioner's Exhibit 14).

At the direction of Respondent, Petitioner was examined by Dr. Joseph Williams, an orthopedic surgeon, on October 3, 2011. In connection with his examination of Petitioner, Dr. Williams reviewed medical records provided to him by Respondent which included the MRI scan performed in December, 2009. Petitioner informed Dr. Williams of the prior neck problem she had subsequent to the motor vehicle accidents. Dr. Williams noted that Petitioner had right hand symptoms that were atypical for carpal tunnel syndrome; however, he opined that her symptoms may have been attributed to degenerative changes in the cervical spine and not to her repetitive activities at work. Further, he opined that Petitioner should have further conservative treatment prior to any surgical procedures being recommended (Respondent's Exhibit 4).

At the direction of the Respondent, Petitioner was examined by Dr. James Williams, an orthopedic surgeon, on October 5, 2011. In connection with his examination of Petitioner, Dr. Williams reviewed medical records provided to him by Respondent as well as information regarding Petitioner's job duties. Dr. Williams opined that Petitioner had right carpal tunnel syndrome which was mild to moderately severe and right C6 radiculopathy. He opined that these conditions were not related to Petitioner's work, but rather to her previously diagnosed hypothyroidism, her post menopausal status, her increased BMI of 29, her elevated blood sugar and her two prior MVAs. He opined Petitioner should have both carpal tunnel release surgery and a C5-C6 fusion performed (Respondent's Exhibit 6).

Dr. Fletcher ordered another MRI of the cervical spine which was performed on June 28, 2011. The scan revealed disc osteophytes at C4-C5 and C5-C6 (Petitioner's Exhibit 17). In his medical record of that date, Dr. Fletcher opined that Petitioner had right cervical radiculopathy secondary to a right side C5-C6 disc herniation and severe right carpal tunnel syndrome and that both conditions were work-related (Petitioner's Exhibit 6).

Dr. Fletcher subsequently referred Petitioner back to Dr. Trudeau for EMG/nerve conduction studies which were performed on August 28, 2012. This study revealed right C6 radiculopathy increased when compared to the prior test of August 5, 2010; moderately severe right wrist carpal tunnel syndrome, also increased when compared to the prior test of August 5, 2010; and left C6 nerve root irritation relatively mild, but new since the prior study of August 5, 2010. There was no finding indicative of left carpal tunnel syndrome (Petitioner's Exhibit 18).

At trial, Petitioner acknowledged that it was recommended that she have a cervical fusion performed; however, she decided not to have the surgical procedure performed because she knew of other individuals who had fusion surgeries performed on them and she was not impressed with

the results that they obtained. On her own, Petitioner did some research and located a physician in Los Angeles, California, Dr. Michel Levesque, a neurosurgeon. At her request, Dr. Fletcher provided her with a referral to Dr. Levesque.

Dr. Levesque examined Petitioner on October 29, 2012, and reviewed all three MRI scans. He opined that Petitioner had cervical radiculopathy C4-C5 and C5-C6 that failed to respond to conservative measures. Dr. Levesque performed surgery on October 31, 2012, the procedure consisting of microdiscectomies at C5-C6 and C6-C7 (Petitioner's Exhibit 12). Following the surgery, Petitioner was off work for one week, October 31, 2012, through November 6, 2012.

Subsequent to the neck surgery, Petitioner returned to Dr. Fletcher who referred her to Dr. Claude Fortin, a neurosurgeon, who saw Petitioner on December 10, 2012. In regard to the neck, Dr. Fortin ordered Petitioner to continue the physical therapy that had been ordered by Dr. Levesque. In regard to the right carpal tunnel syndrome, Dr. Fortin ordered another EMG/nerve conduction study which was performed on October 18, 2013. This study was positive for mild to moderate bilateral carpal tunnel syndrome (Petitioner's Exhibit 16). This was the first time that carpal tunnel syndrome of the left hand had been diagnosed.

Dr. Fortin referred Petitioner to Dr. Mark Greatting, an orthopedic surgeon in that same office, who saw Petitioner on December 19, 2013. Dr. Greatting confirmed the diagnosis of bilateral carpal tunnel syndrome and recommended splinting, injections and possible surgery. At that time, Petitioner decided not to proceed with any further treatment and to monitor her symptoms (Petitioner's Exhibit 16).

Dr. Joseph Williams was deposed on January 31, 2012, and his deposition testimony was received into evidence at trial. Dr. Williams' testimony on direct examination was consistent with his medical report and he reaffirmed his opinions that Petitioner's conditions may have been solely related to her cervical pathology and that she did not necessarily have right carpal tunnel syndrome. He also testified that Petitioner's cervical condition was pre-existing and was not aggravated by her work activities (Respondent's Exhibit 5; pp 11-13).

On cross-examination, Dr. Joseph Williams agreed that the EMG/nerve conduction studies performed by Dr. Trudeau were consistent with a carpal tunnel syndrome and C6 radiculopathy and that he had no reason to dispute Dr. Trudeau's findings. He also agreed that the slowing of the median nerve at the wrist could be caused by Petitioner's repetitive tasks at work as indicated both by the history she provided and the information provided to him by Respondent. Dr. Williams also agreed that if someone sat at a desk in a "static" position for six to eight hours per day that this could cause an aggravation or exacerbation of a pre-existing degenerative disc disease (Respondent's Exhibit 5; pp 25-26; 30-32).

Dr. Fletcher was deposed on February 1, 2012, and his deposition testimony was received into evidence at trial. Dr. Fletcher reaffirmed his opinion that Petitioner had Double Crush Syndrome based on the C6 radiculopathy and right carpal tunnel syndrome. In regard to causality, Dr. Fletcher testified that he reviewed the photo of Petitioner's second workstation (Petitioner's Exhibit 5) and that the keyboard and mouse were in non-ergonomic locations and that the monitor needed to be closer. He further opined that an individual who was required to set as such

a workstation for six to eight hours per day would have a static posture of her neck and would develop right upper extremity symptoms. He opined that Petitioner's use of the mouse with her right hand was why Petitioner had carpal tunnel syndrome in her right, but not in her left wrist. Dr. Fletcher opined that the non-ergonomic arrangement of Petitioner's workstation and her job duties caused the right carpal tunnel syndrome and aggravated the cervical spine condition (Petitioner's Exhibit 3; pp 8-12; 19-20; 26-28).

On cross-examination, Dr. Fletcher agreed that for Petitioner to develop a carpal tunnel syndrome as a result of repetitive trauma she would need to be exposed to such repetitive trauma for more than two-thirds of the workday. He agreed that switching tasks every 15 minutes or so could reduce this effect (Petitioner's Exhibit 3; pp 41-43).

Dr. James Williams was deposed on April 5, 2012, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Williams' testimony was consistent with his medical report and he reaffirmed his opinions that Petitioner had right carpal tunnel syndrome and right C6 radiculopathy, but that neither condition was related to Petitioner's work activities. He attributed Petitioner's right carpal tunnel syndrome to other risk factors including hypothyroidism, her postmenopausal state, her BMI and the fact that Petitioner may have been diabetic. He opined that the C6 radiculopathy was related to Petitioner's pre-existing degenerative disc disease (Respondent's Exhibit 7; pp 20-27).

On cross-examination, Dr. James Williams agreed that keyboard usage, if repetitive, could cause or contribute to carpal tunnel syndrome if Petitioner was typing continuously six or more hours per day. He also agreed that the position of the keyboard and the absence of a gel pad could have been a contributing factor to the development of carpal tunnel syndrome (Respondent's Exhibit 7; pp 31-33).

At trial, Petitioner testified that the neck surgery relieved many of her symptoms but that she still has some complaints. In regard to the upper extremities, Petitioner still has complaints of tingling in both forearms and the thumbs/fingers of both hands. Petitioner does want to proceed with the bilateral carpal tunnel surgery as recommended by Dr. Greatting.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner sustained a repetitive trauma injury arising out of and in the course of her employment for Respondent to her right hand that manifested itself on August 5, 2010.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony regarding her job duties and the non-ergonomic arrangement of her work station was unrebutted. When keyboarding, Petitioner was required to place her hands/arms in an awkward position because the keyboard was elevated and on the same plane as the computer

screen. Further, the computer mouse was likewise elevated and on the same plane as the computer screen.

Petitioner is right hand dominant and, over time, developed symptoms in her right hand. With the singular exception of Dr. Joseph Williams (one of Respondent's Section 12 examiner's), all of the physicians that have examined or treated Petitioner for her upper extremity symptoms have opined that she does have right carpal tunnel syndrome.

In regard to the etiology of Petitioner's right carpal tunnel syndrome, the Arbitrator finds the opinion of Dr. Fletcher to be more persuasive than that of Respondent's Section 12 examiners, Dr. Joseph Williams and Dr. James Williams. Further, Dr. James Williams agreed that the position of the keyboard could have been a contributing factor to the development of carpal tunnel syndrome.

In regard to the left carpal tunnel syndrome, this condition was not diagnosed until October 18, 2013. When deposed, Dr. Fletcher testified that Petitioner had carpal tunnel syndrome of the right wrist, but not of the left wrist. There is no evidence that Petitioner's left carpal tunnel syndrome condition manifested itself on August 5, 2010.

In regard to Petitioner's cervical spine condition, there is no question that Petitioner had symptoms that preexisted the alleged date of manifestation of August 5, 2010. An MRI was performed on December 31, 2009, and Petitioner received treatment for neck symptoms from January, 2010, through July, 2010. Dr. Fletcher noted in his medical record that the MRI revealed objective pathology to explain Petitioner's complaints. Further, the Arbitrator acknowledges Petitioner had other tasks she performed and it was unlikely that Petitioner kept her neck in a "static" position for six to eight hours per day.

In regard to the etiology of Petitioner's neck condition, the Arbitrator finds the opinion of Respondent's Section 12 examiner, Dr. James Williams, to be more persuasive than that of Dr. Fletcher.

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 in regard to the right hand was reasonable and necessary and that Respondent is liable for payment of medical bills related to treatment of the right hand condition incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 23, limited to those bills for treatment of Petitioner's right hand, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

The Arbitrator concludes Petitioner is entitled to prospective medical treatment including right carpal tunnel release surgery as recommended by Dr. Mark Greatting and all reasonable and necessary treatment pertaining to same.

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

The Arbitrator concludes Petitioner is not entitled to any temporary total disability benefits.

In support of this conclusion the Arbitrator notes the following:

Petitioner's lost time was related to Petitioner's neck condition which the Arbitrator has determined is not work-related.

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

Stephanie Mabry,
Petitioner,

vs. NO: 13 WC 16133

Marshall Browning Hospital,
Respondent.

16IWCC0130

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issue(s) of causal connection, medical expenses and prospective medical treatment, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, with corrections, said decision 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 Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission hereby corrects clerical errors in the Arbitrator's decision to show that Petitioner was temporarily totally disabled from 1/23/13 through 1/29/13, from 1/31/13 through 8/31/14 and from 12/12/14 through 2/4/15, for a period of 91-3/7 weeks.

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $500.72 per week for a period of 91-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

16IWCC0130

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses in the amount of $21,363.89 pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for prospective medical treatment in the form of fusion surgery as recommended by Dr. Kube, pursuant to §8(a) and the fee schedule provisions of §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 $54,000.00. 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: FEB 2 3 2016

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-02/09/16
jdl/pmo
68

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

MABRY, STEPHANIE
Employee/Petitioner

Case# **13WC016133**

MARSHALL BROWNING HOSPITAL
Employer/Respondent

16IWCC0130

On 4/3/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% 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:

0536 RON D COFFEL & ASSOC
502 W PUBLIC SQUARE
PO BOX 366
BENTON, IL 62812

1109 GAROFALO SCHREIBER HART ETAL
JAMES R CLUNE
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Stephanie Mabry
Employee/Petitioner

v.

Marshall Browning Hospital
Employer/Respondent

Case # **13** WC **016133**

Consolidated cases: **N/A**

16IWCC0130

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **February 4, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0130

FINDINGS

On the date of accident, **01/19/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**39,056.16**; the average weekly wage was $**751.08**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of $**13,407.90** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**13,407.90**.

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 **$500.72/week** for **91** weeks, commencing **01/23/13** through **01/29/13**; **01/31/14** through **08/31/14**; and **12/12/14** through **02/05/15**.

Respondent shall be given a credit of **$13,407.90** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of **$21,363.89**, as provided in Section 8(a) of the Act subject to the Medical Fee Schedule.

Respondent shall authorize and pay for prospective medical care in the form of fusion surgery as recommended by Dr. Kube.

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 31, 2015
Date

ICArbDec19(b)

APR 3 - 2015

STEPHANIE MABRY V. MARSHALL BROWNING HOSPITAL,
13 WC 016133 (19(b))

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner was involved in an undisputed accident on January 19, 2013. At the time of arbitration, the disputed issues included: causal connection; medical bills; temporary total disability benefits; and prospective medical care. Petitioner was the sole witness testifying at the hearing.

The Arbitrator finds:

Petitioner, age 39, was employed by Respondent as an emergency room registered trauma nurse. On January 19, 2013, she was walking in the hospital hallway in route to the laboratory to deliver blood vials, when she slipped on a wet floor. Petitioner testified she was coming around a corner and slipped in water. She attempted to catch herself to keep from falling all the way down. In doing so, Petitioner twisted her low back and inverted her left ankle. An accident report was completed. The accident report stated that Petitioner injured her left ankle and twisted her low back when she slipped on the wet floor. The injury occurred at approximately 4:30 p.m. (PX 1) Petitioner completed her shift, which ended at 11:00 p.m., and then went home. Upon arriving back to work the next day (January 20, 2013), Petitioner noticed she was in a lot of pain with respect to her left ankle. As a result she was seen in the emergency room. (PX 4)

On January 20, 2013 the emergency room doctor noted Petitioner's history of twisting her low back and left ankle. At that time, her chief complaint was left ankle pain. On physical examination, she had slight edema noted and there was bruising on the outer aspect of her left ankle. An x-ray of the left ankle was negative for fracture. She was given a differential diagnosis of fracture dislocation of the left ankle versus left ankle strain or sprain. She returned back to work and continued to have difficulty with her left ankle particularly swelling and pain. She was sent home and told to ice and elevate her left ankle. (PX 4)

Petitioner testified that she returned to work on January 23, 2013. In the interim she had remained at home as instructed and sat in a recliner with her ankle wrapped up and iced. When she returned to work on the 23rd Petitioner was again seen in the emergency room. Petitioner testified she was told she had a fracture. At that time, continued left ankle swelling and bruising was noted. Petitioner had no obvious deformity on examination. She complained of a pain level of 5/5 and constant throbbing of the left ankle. A stirrup splint was applied. She was given crutches and medications and taken off work until January 30, 2013. (PX 2; PX 4)

On January 28, 2013 Petitioner came under the care of her family doctor, Dr. Soheil Khan. Dr. Khan treated her conservatively with medications. Dr. Khan diagnosed her with a navicular left ankle bone fracture. He ordered a left ankle x-ray, but it was never done. He gave her a lidoderm patch for her left ankle pain and pain medication. (PX 5)

In a slip dated January 30, 2013 Petitioner was taken off work per Dr. Khan for another two weeks due to her foot fracture. (PX 2)

On February 12, 2013, Petitioner again complained of left ankle pain and back pain which Dr. Khan noted were both secondary to acute trauma. Petitioner was taken off work for two weeks. (PX 2; PX 5) On February 26, 2013, Dr. Khan examined Petitioner's low back and noted reduced range of motion, but no evidence of radiculitis. Dr. Khan also prescribed walking boots. He took her off work completely for another

two weeks. (PX 2; PX 5) She continued to treat with Dr. Khan for back pain, left ankle pain and was maintained on Norco and Flexeril for pain management.

Dr. Khan kept Petitioner off work as of March 19, 2013 due to her left foot being swollen secondary to her fracture. (PX 2; PX 5)

As of April 8, 2013, Dr. Khan kept Petitioner off work. (PX 2; PX 5)

On April 19, 2013, Petitioner was discharged from her employment with Respondent.

At the request of Respondent, Petitioner was examined by Dr. Petkovich on April 30, 2013, concerning her mid and lower back pain and right gluteal pain. Petitioner also had some left hindfoot pain. Petitioner was wearing a walking boot for her foot and was not working. Petitioner denied any prior back or left foot problems. In his written report dated May 2, 2013, Dr. Petkovich commented upon his physical examination, noting some tenderness upon palpation from L1 to L5 and mild restricted range of motion. X-ray reports were reviewed and new films taken. He noted sacralization of Petitioner's fifth lumbar vertebra, a normal variant in the general population. Dr. Petkovich also reviewed Dr. Khan's records and the Hospital radiology and emergency room records. His diagnoses included a muscular lumbar strain and left foot ligament strain (dorsal and lateral aspect) and he believed that both conditions were causally related to Petitioner's work accident. He felt her foot treatment had been excessive as he did not believe she had sustained a fracture. He did not feel Petitioner was at maximum medical improvement yet as she would benefit from four weeks of aggressive physical therapy. Dr. Petkovich also believed Petitioner needed lighter duty activities and he recommended that she not lift more than 20 pounds and that she should be allowed to sit down every hour for approximately ten minutes. She could work up to 6 hours a day. Dr. Petkovich "anticipated" that she would reach maximum medical improvement (MMI) for her spine after the physical therapy and that she could then resume full duty work. He did feel she was at MMI with respect to her left foot and ankle. (RX 1- Res. Ex. 2)

Dr. Khan issued a script for back physical therapy on May 8, 2013. (PX 5)

Petitioner signed her Application for Adjustment of Claim in this matter on May 8, 2013. (AX 2)

On May 13, 2013, Petitioner returned to see Dr. Khan requesting that she be referred to a back specialist as her back was hurting all the time. (PX 5)

Petitioner then underwent a lumbar spine MRI on May 30, 2013 at Advance Diagnostic Imaging. (PX 5) According to the radiologist's report, the MRI showed mild bilateral facet osteoarthritis at L3-4, mild degenerative disc disease at L4-5 along with slight retrolisthesis. The radiologist also thought there was a peripheral annular tear centrally with co-existent small, broad based central disc protrusion but no L5 nerve root displacement or compression. Mild bilateral facet osteoarthritis was also noted. L5-S1 was normal except for a congenital variation as further discussed in the report. (PX 5)

Dr. Khan re-examined Petitioner on June 5, 2013 noting they reviewed the MRI. Petitioner was not having any leg pain at that time. (PX 5) He again wrote a script for physical therapy. (PX 5)

On June 26, 2013, orthopedic spine surgeon, Dr. Richard Kube of Prairie Spine and Pain Institute, examined Petitioner in regard to her low back and left knee complaints. A "Work Flow Checklist" completed at the time of the appointment indicated "thoracic right side pain." Petitioner presented with a work injury history that she slipped on a wet floor and twisted her low back left ankle and left knee. Dr. Kube noted she was in a

left ankle boot and twisted her back while trying to catch herself from falling. Petitioner denied any numbness or tingling in her legs but did note pain in her left thigh, foot, and leg along with weakness in her left ankle, foot, and knee. According to her pain diagram, Petitioner's back pain was located in the center of her spine in the mid area (belt line) and also to the upper right. Petitioner indicated that her problem had worsened in the previous two weeks. On physical examination, Dr. Kube noted point tenderness of the SI joint on the right, positive right Fabers test and positive pelvic compression test. Dr. Kube charted Petitioner's back and left knee pain as at a medium level, and he noted she had problems with balance and tripping frequently due to imbalance dysfunction. Dr. Kube further noted that her back pain was localized in the mid back and right side. Dr. Kube reviewed the ADI L/S MRI of May 30, 2013 and noted that Petitioner had a grade 3 disc at L5, S1, a possible annular tear at this level, but noted no significant lesion on the MRI film.[1] (PX 6)

On July 2, 2013, L/S x-rays ordered by Dr. Kube at Franklin Hospital showed mild right convex mid lumbar curvature, with no acute bone abnormality. (PX 6)

Based upon his physical examination, Petitioner's complaints, and the persistent symptoms, Dr. Kube recommended more aggressive treatment. On July 3, 2013, Dr. Kube performed at SI Joint injection at Surgery Center for Southern Illinois. He gave her a light duty slip. (PX 6)

On July 24, 2013 Dr. Kube completed a "Patient Information" sheet in which he indicated Petitioner could perform light activity as of June 26, 2013. He noted that light duty included frequent lifting up to 10 lbs, no overhead work or floor to waist, rare bending and twisting, and no prolonged sitting or standing position. (PX 2; PX 6)

Dr. Kube re-examined Petitioner on July 29, 2013. Petitioner reported that the injection initially increased her pain but then it diminished the next day. Dr. Kube believed Petitioner's leg pain was more radicular than related to the sacroiliac joint. Given that, along with the L5-S1 annular tear, he recommended an epidural injection on the right at L5-S1. Dr. Kube further noted that Petitioner had been reaching out to her employer about returning to work because she had been eligible for re-hiring when she had been let go. She had tried on multiple occasions to contact Respondent but no one would respond to her and she was increasingly frustrated. Petitioner indicated she was going to look into trying to get her nurse practitioner's degree. (PX 6)

In an Intake Form dated August 21, 2013 Petitioner reported left leg pain. (PX 6)

On July 31, 2013, Dr. Kube performed a lumbar epidural steroid injection on the right at L5, S1 at Surgery Center for Southern Illinois. Injections were unsuccessful in achieving any significant relief of her back and right leg pain. Dr. Kube then charted "given the duration of the symptoms and failure of conservative measures, my recommendation is for a provocative discogram to determine if the L5, S1 disc is the pain generator." (PX 6)

Barbette Manna, "Territory Representative" for Illinois Risk Management Services (Respondent's workers' compensation claim administrator) wrote a letter to Petitioner's attorney on August 8, 2013. In it she wrote,

> Please be advised that your client's ttd benefits are suspended based on the opinion of our IME physician. The additional rec-

[1] Green highlighting in PX 6 was not done by the Arbitrator.

ommended treatment was for physical therapy. (PX 3)

Dr. Kube re-examined Petitioner on August 27, 2013. Petitioner stated the injection had done nothing for her. He recommended a provocative discogram to determine if the L5-S1 disk was the pain generator. (PX 6)

On August 28, 2013, Dr. Kube performed a provocative discogram at L4-5 and L5-S1 at the Surgery Center for Southern Illinois. Kube reported the L4-5 disc was normal. He further reported that the L5-S1 disc was positive with highly concordant pain in the annular tear rated as 9-10/10. He noted that Petitioner demonstrated concordant pain at low pressure starting at 12 or 13 and in the low 20s. He also noted that contrast material leaked out from the annular tear. Dr. Kube concluded that the results of the discogram were consistent with a very chemically irritated region from the disc annular tear and injury. (PX 6) Later that same day, Petitioner followed up with Dr. Kube regarding the discogram results. According to the doctor's notes, her discogram was "very positive" at L5-S1 and "very concordant at one of the lowest pressures I have every [sic] obtained a positive discorgram with." He further noted that the discogram showed contrast material leakage from the annular tear and chemical irritation from the disc at L5- S1 consistent with a very chemically irritated region from the disc tear and injury. Dr. Kube recommended surgical intervention consisting of a right side decompression and minimally invasive interbody fusion. In the interim he was going to try and get her a brace. (PX 6)

Petitioner was again examined by Dr. Petkovich on October 22, 2013 and a written report issued three days later. Dr. Petkovich stated in his written report that Petitioner updated him on events since their first visit with Petitioner reporting that she had returned to see Dr. Khan who did not believe that she needed any physical therapy and, therefore, she did not receive it. Dr. Petkovich also reviewed Petitioner's MRI report noting the findings were all consistent with a degenerative condition. He also commented that Petitioner's L5-S1 disc space was sacralized so there was no specific disc space. Petitioner also reported no relief with the injections given by Dr. Kube. Dr. Petkovich also reviewed the August 28, 2013 discogram. Dr. Petkovich noted Petitioner's primary complaint was persistent pain across her lower back starting at the midline and going slightly to the right. She denied any radicular symptoms throughout her left lower extremity, including numbness or tingling, and she reported no longer having any left foot or ankle pain. As a result of his examination and review of Petitioner's records, Dr. Petkovich diagnosed Petitioner with a muscular lumbar strain and degenerative disc disease at L4-5. He felt her lumbar stain was causally related to the accident at work but her degenerative lumbar disc disease was pre-existing. He wrote, "The degenerative lumbar disc condition may have been exacerbated by the [work accident]. However, I do not believe that the degenerative lumbar disc condition was aggravated or accelerated by [her work accident.]" (RX 1 - Resp. Ex. 3, p. 6) He still felt she should have a course of "intense physical therapy" and that if she had previously undergone the therapy with no relief, the injections would have been necessary. He did not feel the sacroiliac joint injections were necessary because she never had any tenderness in the sacroiliac joint area or signs of pathology in that area. Dr. Petkovich was very adamant that Petitioiner's therapy should be aggressive in nature (2 to 3 times a week for up to six weeks) and at a facility experienced in dealing with injured workers' lumbar spine conditions. He disagreed with the need for surgery at the present as she needs therapy first. He wrote, "If she would, in fact, have persistent pain following an intense physical therapy program, she may ultimately benefit from surgery on her lumbar spine for the degenerative condition in the L4-5 disc space." (RX 1 - Resp. Ex. 3, p. 7) He found her objective findings consistent with her subjective complaints. He did not feel she was yet at MMI. He felt she could continue working (although he noted she wasn't) at a light duty level. (RX 1 - Resp. Ex. 3)

Petitioner was re-examined by Dr. Kube on November 25, 2013. According to his office note, they were still trying to obtain surgical authorization. He noted Petitioner had undergone a "classic discogram" with results consistent with a disc problem. He further noted, "With the provocative discogram and with her symptom onset

and fact that she has a degenerative disk and annular tear is not relevant; however, the fact that she had no pain prior to this work injury suggests that it is likely that the injury occurred at that time. She had very minimal aggravation to the disk and quite possibly injured the disk specifically at that time. Either way, there is a causal relationship between the work injury and her current condition of wellbeing." (PX 2) Dr. Kube still felt a minimally invasive decompression fusion was appropriate. He noted her leg pain was intensifying. "In fact, her left leg is bothering her now quite a bit more so than the right side." He hoped approval would be forthcoming so that he could get her back to work soon. (PX 2; PX 6)

Petitioner returned to see Dr. Kube on April 16, 2014. According to the doctor's notes, surgical authorization was still pending and it appeared there might be some confusion regarding his thought process on the need for surgery. Dr. Kube noted he had expressed a causation opinion back in November and he still believed Petitioner had, at a minimum, an aggravation of her degenerative disc disease and "quite possibly cause of a disk injury at the time of the injury she described." While Petitioner's degenerative disc disease "in and of itself" would not explain her pain, her work accident would -- given the contemporaneous onset of her symptoms. Dr. Kube further noted he did not understand Respondent's continued delay and denial of patient care given Petitioner's desire to return to work and motivation. He wrote, "She has now lost her house as a result of this, and, of course, I grow concerned more and more all the time that the continued irritation she has in this are and the continued nerve compression can and will ultimately lead to chronic nerve damage, thereby creating a much higher level of permanence in this situation." (PX 6)

On June 11, 2014 Dr. Petkovich authored a letter to Ms. Jennifer Kaelin at Illinois Risk Management Services addressing additional questions she had posed to him regarding Petitioner. He did not examine Petitioner. It does not appear that he reviewed any further records subsequent to October 25, 2013. He believed that Petitioner sustained a muscular lumbar strain as a result of her work accident and that it should have resolved by this time. While Petitioner also has degenerative lumbar disc disease and it could have been exacerbated by the work accident it did not cause any aggravation or acceleration of the pre-existing disease as an "exacerbation" is by definition a "temporary phenomenon" as defined by the Sixth Edition AMA Guides. Thus, he felt any exacerbation Petitioner might have sustained should have resolved by this time also. Dr. Petkovich still believed Petitioner might need surgery but it would not be the result of her work accident. Finally, Dr. Petkovich stated, "I believe that [Petitioner] should have reached maximum medical improvement as a result of her work injury by this time.' (RX 1 - Resp. Ex. 4)

The evidence deposition of Dr. Richard Kube was taken on September 24, 2014. Dr. Kube, an orthopedic surgeon with the Prairie Spine and Pain Institute, testified that Petitioner's injury of January 19, 2013 aggravated, exacerbated and made worse Petitioner's degenerative disc at L5-S1 to the extent that fusion surgery was medically necessary. The recommendation for fusion was made to deal with Petitioner's low back complaints from the annular tear. Dr. Kube explained the medical necessity in his deposition was based upon the correlation of failed conservative care, the L/S MRI of Advanced Diagnostic Imaging, the failure of Petitioner to receive relief from the SI joint injection and the LESI at L5-S1, together with the very positive provocative discogram showing very highly concordant pain at the L5-S1 disc. Dr. Kube noted that Petitioner had remained symptomatic for nearly two years after the injury and that "far exceeds the time frame that most people consider adequate prior to entertaining surgical intervention." "We are dealing with someone that has low back pain which is resultant from an aggravated L5-S1 degenerative disc. And she does have some of these intermittent other leg symptoms and pains and things like that, but the predominant feature that we're dealing with is that low back pain coming from what I believe now our diagnostic imaging clearly demonstrates an L5-S1 disc condition." Dr. Kube explained that the contrast leakage from the annular tear showed extravazation at low pressure levels, and suggested a chemical irritation of the L5-S1 disc in general. In the discogram procedure, Dr. Kube observed contrast streaking up through the annular tear at the low pressure of 10 PSI.

Dr. Kube further testified the lower the pressure on discography the more significant that tends to be on determining a symptomatic disc. "It would suggest not only just a pressure component, but also suggest a chemical irritation of the disc in general." Dr. Kube explained that he observed the dye contrast streaking out during the fluoroscopic guided procedure of the discography at a low pressure of 10 psi with very severe concordant pain which was 9 out of 10 on a 1 to 10 point measure scale. (PX 7)

Dr. Kube also testified that the discogram was, in his opinion, objective. He visually observed the contrast leakage. We actually see the contrast material went from inside the disc to now flowing out of the annular tear. The leakage was visually confirmed by fluoroscopic images on the discogram. (PX 7)

The evidence deposition of Dr. Frank Petkovich was taken on October 30, 2014. (RX 1) Respondent had Petitioner examined by orthopedic surgeon Dr. Petkovich, of St. Louis, Missouri, on April 30, 2013 and October 25, 2013. Respondent also sought a clarification opinion on June 11, 2014.

Dr. Frank Petkovich testified that he has not performed spinal surgery in the past three (3) years due to a medical condition. He described his practice as clinical and after he stopped performing surgery he does routine orthopedic services and refers patients requiring surgery to other spine surgeons. In 2011, Dr. Petkovich sought and obtained credentials from the Academy of Independent Medical Examiners and is currently performing IMEs and has a clinical practice.

Dr. Petkovich testified that Petitioner as not at maximum medical improvement as of the dates of his two IME reports from the IME exams of 4/30/13 and 10/25/13 because she needed aggressive physical therapy. As of the date of his deposition he did not believe that physical therapy would be beneficial as he believed she should be "fully recovered." (PX 1, p. 49) Dr. Petkovich was unaware that Petitioner had been terminated from her employment with Respondent on 4/19/13, and was perplexed that her physical therapy recommendation had not been completed. Dr. Petkovich testified that Petitioner needed no further treatment for her back or her ankle as a result of her work accident. (RX 1)

Dr. Petkovich testified that Petitioner's left ankle ligament strain was causally related to her January 19, 2013 accident.

Dr. Petkovich further testified that the twisting mechanism of injury as described by Petitioner could have exacerbated Petitioner's low back degenerative condition. Upon examination in April of 2013, Dr. Petkovich found Petitioner had mildly reduced range of motion in her lumbar spine, forward flexion was reduced by 20 degrees, and extension was mildly decreased. He also found tenderness to palpation at L4-5.

Dr. Petkovich opined that with Petitioner's lack of any history of pre-existing problems, he felt her accident of January 19, 2013 caused an aggravation of her lumbar condition. Dr. Petkovich acknowledged that he did not review the L/S MRI film from Advanced Diagnostic Imaging and that he had no independent review of the actual film. On cross-examination he indicated that he felt the MRI annular tear was described in his interpretation of the radiologist's report as degenerative. He also did not report the radiologist's interpretation of the L/S MRI film stating that Petitioner had a co-existent small broad based central disc herniation because he interpreted that to be a degenerative finding. He said the discogram performed by Dr. Kube showing Petitioner had highly concordant pain with an annular tear could be consistent with the radiologist's interpretation of the L/S MRI dated May 30, 2013.

Dr. Petkovich agreed with Dr. Kube that Petitioner's lumbar disc condition may have been exacerbated by Petitioner's work accident. He also agreed with Dr. Kube that Petitioner may be a surgical candidate and might benefit from definitive surgery of her lumbar spine, if she failed physical therapy. He explained that in his opinion there is a difference of interpretation as to whether the disc was exacerbated, as opposed to aggravated, by the work injury. Dr. Petkovich also testified that in his clarification letter report of June 11, 2014, he clarified that, by definition, the word "exacerbation" implied a temporary phenomena. Upon further examination, he explained that in his opinion a temporary exacerbation would last for six (6) to eight (8) weeks. (RX 1)

Dr. Petkovich testified that Petitioner's annular tear could be an acute finding, but Petitioner's type of annular tear was degenerative. Dr. Petkovich testified there is "no such thing as a permanent exacerbation and that this injury she may have sustained on January 19, 2013 should have resolved, within six to eight weeks." However, he could not state the date the disc was torn.

Dr. Petkovich further testified he is performing 150 independent medical examinations a year. He is on an approved list of independent medical examining physicians and obtains referrals from various companies for second opinions and independent medical examinations. (RX 1)

Respondent requested an URL report regarding the medical necessity for the fusion surgery at L5-S1 as recommended by Dr. Richard Kube. A report by Dr. Aimee Hachigan Gould (hereinafter Dr. Gould) of Physician's Review Network was submitted on November 25, 2014. (RX 2, dep. ex. 2) Dr. Gould was of the opinion that the recommended surgery was not reasonable, necessary, or appropriate. In so concluding Dr. Gould relied upon the Official Disability Guidelines that do not recommend lumbar fusion surgery except in the case of demonstrated dynamic instability due to fracture, dislocation, infection, tumor, spondylolisthesis, anticipated iatrogenic instability as a result of a wide decompression, such as might occur with decompression of an area of lumbar stenosis, scoliosis greater than 50 degrees or spondylolisthesis with either lumbar stenosis or dynamic instability. Dr. Gould believed Petitioner had none of those diagnoses. (RX 2, dep. ex. 2)

As of December 3, 2014 Dr. Kube noted a significant change in Petitioner's left leg pain as it had recently gone numb. Pending surgery Petitioner was being managed on medication. She was being seen about every month and was still experiencing quite a bit of pain. She had recently had an event that kind of "set off her pain, specifically going down the left lower extremity." Petitioner reported lying in bed and feeling something pop and pull in her back and shoot down her left leg, resulting in a feeling of numbness. The numbness had stayed consistent since it occurred a week or two earlier. Meloxicam was added to her list of medications. and she was kept on light duty. (PX 2; PX 6)

On December 12, 2014 the deposition of Dr. Aimee Hachigian-Gould was taken. Dr. Gould, of Physicians Network, is a non- practicing orthopedic doctor from Great Falls Montana. She described herself as an independent contractor for Physicians Network, Inc which is a company located in Phoenix Arizona. She testified she does utilization reviews upon referral from Physicians Review Network. She also fills in on occasion as an administrator for Dr. Zipser, the medical director of Physicians Review Network. (RX 2)

Dr. Gould testified she does URL reviews for various companies but the majority of reviews she performs are in association with Physicians Network, Inc. She estimated that she is preparing about 200 URL reports every month, or about 2,400 URL reports per year on the high end. Her current practice is writing URL reports. She said she is home schooling her twin boys and "I'm not just seeing patients anymore." She does not perform spinal fusion surgeries, which is the procedure that is the subject at issue.

Dr. Gould explained that in the URL she performed, she used the *Official Disability Guidelines* published by the Work Loss Data Institute. She relied on the 18th edition of the *Official Disability Guidelines* in reaching her opinions. She admitted, on cross-examination, that the Work Loss Safety Data Institute Guidelines are not adopted by the state of Illinois Workers' Compensation Commission. Dr. Gould admitted that other guidelines are published including Intracorp, McKesson, American College of Occupational and Environmental Medicine, American Academy of Orthopedic Surgeons. Dr. Gould was unaware of how these guidelines compared to the *Official Disability Guidelines* she employed from the Work Loss Safety Data Institute. She chose to utilize the Work Loss Data Institute guidelines in her URL review concerning the medical necessity for the fusion surgery. (RX 2)

In relying on the Official Disability Guidelines, Dr. Gould was of the opinion that the spinal fusion recommended by Dr. Richard Kube was not medically necessary because the "*Official Disability Guidelines* do not recommend lumbar fusion except in the case of demonstrated dynamic instability due to fracture, dislocation, infection, tumor, spondylolisthesis, anticipated iatrogenic instability as a result of wide compression." She explained, "that is what the guidelines require in order for a lumbar fusion surgery to be medically reasonable and necessary or appropriate." Dr. Gould also states that the guidelines do not recommend minimally invasive fusion surgery for any reason. (RX 2)

Dr. Gould admitted that she was aware that both Dr. Kube, the treating orthopedic surgeon, and IME Dr. Frank Petkovich, opined that fusion surgery may be medically necessary or possibly indicated consisting of a lumbar spine fusion. She was unaware of whether either Dr. Kube or Dr. Petkovich relied on any of the various disability guidelines or the *Official Disability Guidelines* of the 18th Edition published by the Work Loss Data Institute. (RX 2)

Petitioner's Petition for Immediate Hearing was filed with the Commission on January 9, 2015. (PX 9)

In a "Patient Information" sheet dated January 14, 2015 Dr. Kube limited Petitioner to sedentary activity (limited lifting up to ten lbs., no overhead work or floor to waist, rare bending and twisting, no prolonged sitting or standing position). (PX 2)

Petitioner was last seen by Dr. Kube on January 20, 2015. Petitioner reported being "off" for the past couple of weeks but now having increased pain, especially into the low back and central lumbar areas. She also noted radicular-type pain but felt the back pain was more severe. Petitioner had remained on light duty with Petitioner reporting that placing patients in rooms and giving them shots was almost too much for her. On exam Dr. Kube noted central lumbar tenderness on palpation. He modified her work status to sedentary work only.

At arbitration, Petitioner testified that the injections provided by Dr. Kube provided no permanent relief. She further confirmed that Dr. Kube performed a discogram after which he recommended surgery (a fusion) which Petitioner would like to proceed with. Petitioner testified that she remains symptomatic regarding her low back. She said the nature of her pain is stabbing and constant burning. She explained the location of pain as being primarily low back but intermittent down both legs, with left worse than right.

Petitioner testified she was in a generally good state of health prior to the accident at Marshall Browning Hospital on January 19, 2013; that she worked out in the gym 3 to 4 days a week and ran 2 to 3 miles on the average day. Petitioner testified that she is unable to stand or sit for long periods and she has difficulty lifting. Before the accident, she was gainfully employed as a full time emergency room trauma nurse, and was able to work on her feet all day. She never had any prior injuries to her back, never required any medical treatment, never took any medications for back pain, and has no prior history of any work injuries or car wrecks to explain

a pre-existing symptomatic degenerative condition. Petitioner testified that she was very active. Now she requires pain medication and takes Vicodin and Flexeril.

Petitioner further testified that she was examined by Dr. Petkovich on April 30, 2013 and that the doctor recommended additional physical therapy at that time. Petitioner explained that she then returned to see Dr. Khan on May 8, 2013 and he issued a slip for physical therapy. He issued a second slip on June 5, 2013. Petitioner testified that therapy was never approved. Petitioner further recalled returning to see Dr. Petkovich on October 22, 2013 and that he only spent about five minutes with her and was very argumentative regarding why she was even there. Petitioner testified that when she was seen by Dr. Petkovich in October of 2013 she did not deny any radicular pain complaints; rather, she testified that she told him of pain pattern. She said the pain is constant. She further testified that activities of daily living are a problem for her. She cannot perform her usual household chores, and must get help with dishes and laundry.

Petitioner testified that she was terminated from her employment with Respondent when her FMLA expired. Petitioner testified she has looked for work in nursing since her termination, including doctors' offices, Respondent, and Carbondale Memorial Hospital. She acknowledged that she filled out job applications, informed prospective employer she had been injuries, and advised them she had limitations.

Petitioner acknowledged receiving temporary total disability benefits from January 25, 2013 through August 4, 2013. Petitioner testified that her temporary total disability benefits were terminated on August 8, 2013.

Petitioner testified that on September 1, 2014, Petitioner began working light duty work as a nurse for Dr. Lee Peterbee. She explained that the work was within her restrictions. She was working from 4 to 10 hours per day for 1 to 2 days a week. She said although her light duty involved greeting patients and taking them to the examination room, sitting and limited lifting, she was unable to continue working due to her back pain. She was continuing to take pain medication Vicodin and Flexeril prescribed by Dr. Kube. She was unable to work light duty after December 11, 2014.

Petitioner's outstanding medical bills are found in PX 8.

The Arbitrator concludes:

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

   Petitioner's current condition of ill-being in her left ankle and low back is causally related to her January 19, 2013 accident. This conclusion is based upon a chain of events, Petitioner's credible testimony, the treating medical records, and the more persuasive opinion of Dr. Kube over that of Dr. Petkovich or Dr. Gould.

   Petitioner denied any prior low back problems, accidents, injuries, or treatment. While Petitioner's initial treating records with Marshall Browning Hospital do not discuss Petitioner's low back pain, her accident report clearly indicates she complained of twisting her low back at the time of the accident. Understandably, the focus of attention at the emergency room on January 20 and 23, 2013 was on the then-more significant left ankle injury. No physician, including Dr. Petkovich, has ever questioned Petitioner's motivation, sincerity, or credibility. Petitioner's testimony was unrebutted.

With regard to the opinions of Dr. Kube and Dr. Petkovich, the Arbitrator finds the opinions of Dr. Kube more persuasive. Dr. Petkovich was not correct in his understanding of all the facts. As Petitioner credibly testified to, she told him she was having radiating leg pain when examined the second time. Dr. Petkovich stated otherwise. Dr. Petkovich also incorrectly summarized what Dr. Khan had done in terms of Dr. Petkovich's earlier recommendation for physical therapy. He wrote that Petitioner told him Dr. Khan wouldn't authorize physical therapy because he didn't believe in it. However, if Dr. Petkovich was provided with all of Dr. Khan's records, he would have clearly seen that Dr. Khan had issued two scripts for physical therapy. Therapy was not initiated because Dr. Khan didn't believe in it. For whatever reason, it appears Respondent did not authorize the therapy[2]. There is also no evidence that Dr. Petkovich reviewed any additional records from Dr. Kube after his October of 2013 examination. His June of 2014 letter seems to be nothing more than a reiteration of his October 2013 letter/report. Dr. Petkovich also failed to mention (or possibly perform) tests that Dr. Kube had performed during his office visits (ex. a positive Faber and positive pelvic compression sign) so that a comparison could be made. Dr. Petkovich's explanation of the difference between an "exacerbation" and an "aggravation" was unpersuasive in this instance. He believed her condition was an exacerbation because it should have only been temporary. In citing to the Sixth Edition of the *Guides*, he failed to fully set forth the definition. It reads, "The terms 'exacerbation,' 'recurrence,' or 'flare-up' generally imply worsening of a condition temporarily, which subsequently returned to baseline." (*Guides to the Evaluation of Permanent Impairment*, Sixth Edition, p. 25) Petitioner has never returned to her baseline, asymptomatic condition. Hence, she did not sustain just an exacerbation. Had Dr. Petkovich reviewed all of Dr. Kube's records he would have seen that her complaints and symptoms have continued and worsened. It does not appear that he did. Additionally, much of Dr. Petkovich's conclusions were very speculative as he "believed" or "anticipated" Petitioner would be at maximum medical improvement after physical therapy. However, he did not re-examine Petitioner after October of 2013 nor was he provided with any more of her treatment records thereafter. Thus, his opinions as of the date of his June 2014 report and deposition in 2014 were not well informed.

2. 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 incurred treatment expenses in the sum of $21,363.89, as follows: (1) Prairie Spine and Pain Institute - Dr. Kube - $11,783.22; (2) Cape Radiology - $56.00; (3) Surgery Center of Southern Illinois - $1,609.00; (4) Surgery Center of Southern Illinois - $1,609.00; (5) Surgery Center of Southern Illinois - $3,218.00; and (6) Metro Cardiovascular - Dr. Khan $3,088.67. (PX 8)

Consistent with her causation determination as set forth above, the Arbitrator concludes that the foregoing medical bills are reasonable and customary and medically necessary and orders Respondent to pay them directly to the medical providers and pursuant to the Fee Schedule.

3. Issue (K) - Is Petitioner entitled to any prospective medical care?

Consistent with her causation determination as set forth above, Petitioner is awarded prospective medical care as recommended by Dr. Kube. Dr. Kube testified within a reasonable degree of medical

[2] Apparently Respondent knew of the request for physical therapy in August of 2013 as it was referenced in Ms. Manna's letter of August 8, 2013; however, the letter did not address it further.

certainty, that a fusion is medically necessary to cure or correct Petitioner's lumbar spinal condition or to relieve the symptoms of the discogenic low back pain and chemical irritation from the annular tear, as a result of Petitioner's work accident of January 19, 2013. Even Respondent's examining physician, Dr. Petkovich, agreed that Petitioner might be a surgical fusion candidate. The opinion of Dr. Gould is not persuasive considering the opinions of the two orthopedic surgeons.

4. Issue (L) - What temporary benefits are in dispute (TTD)?

Petitioner was employed by Respondent as an ER trauma nurse. After her injury, she was terminated. At the time of the termination, it is undisputed that Petitioner's primary care physician, Dr. Khan, had her off work as of the April 8, 2013 slip.

Respondent continued paying temporary total disability benefits until August 8, 2013, at which time Petitioner's TTD benefits were terminated. By letter that same date to Petitioner's counsel, Respondent stated that Petitioner's TTD benefits were being suspended based on the opinion of Dr. Petkovich. Interestingly, Dr. Petkovich's opinion was rendered back in April of 2013 and he stated at that time that Petitioner was not at maximum medical improvement and needed physical therapy for her work-related lumbar spine condition. He felt she could work light duty. Respondent did not offer Petitioner light duty at that time but continued paying TTD benefits until August 8, 2013 when it unilaterally cut them off relying upon Dr. Petkovich's earlier report. As of August 8, 2013 Petitioner remained under light duty restrictions. No doctor had fully released her.

On her own, Petitioner found employment on a light duty basis as a nurse beginning on September 1, 2014. She remained in that job through December 11, 2014 when she was unable to continue due to pain complaints. As of January 14, 2015, Dr. Kube imposed even greater restrictions -- ie., sedentary duty only.

Respondent has not offered Petitioner restricted work at any point in time. Respondent's own examining physician had also recommended treatment which was not provided by Respondent. Petitioner's testimony regarding her efforts to find work was credible and unrebutted. Petitioner has yet to be released to full duty by her treating physician. She is not at maximum medical improvement. She is in need of further treatment.

Consistent with her causation determination above and the Arbitrator's finding that Dr. Petkovich's opinion regarding Petitioner's current ability to resume full duty is not persuasive, Petitioner is awarded temporary total disability benefits for the following periods of time: (1) 1/23/13 to 1/29/13; (2) 1/31/13 to 8/31/14; and, (3) 12/12/14 to 2/4/15, a period of 91 weeks. Respondent is given credit for TTD benefits paid from 1/25/12 to 8/4/13, a period of 27-2/7ths weeks. Petitioner is not awarded temporary total disability benefits for the date of September 1, 2014 as she testified that was her first day of work for Dr. Peterbee. The Arbitrator also notes that Respondent stipulated to the TTD period of January 23, 2013 through August 4, 2013. (See AX 1)

****

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jacob Bradford,
Petitioner,
vs.

16IWCC0131

NO: 14 WC2351

City of Peoria,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of nature and extent of Petitioner's 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 27, 2015, is hereby affirmed and adopted.

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

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

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

DATED: FEB 24 2016
KWL/vf
O-2/22/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0131

BRADFORD, JACOB
Employee/Petitioner

Case# 14WC002351

CITY OF PEORIA
Employer/Respondent

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

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

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

5354 STEPHEN P KELLY LLC
2710 N KNOXVILLE AVE
PEORIA, IL 61604

0980 HASSELBERG GREBE SNODGRASS
JOHN DUNDAS
124 S W ADAMS ST SUITE 360
PEORIA, IL 61602

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 16IWCC0131

Jacob Bradford
Employee/Petitioner

v.

City of Peoria
Employer/Respondent

Case # **14** WC **2351**

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**, on **April 16, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ 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 _____

16IWCC0131

FINDINGS

On **01/19/2014**, Petitioner ***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*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**98,800.00**; the average weekly wage was $**1,900.00**.

On the date of accident, Petitioner was 32 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.

ORDER

- **The Arbitrator finds that the Petitioner's condition of ill-being was causally related to the work accident of January 19, 2014.**

- **The Petitioner sustained injuries sustained injuries to the extent of 2% loss of use of the man as a whole, in addition to the statutory loss of 12 weeks for the fracture of two vertebra set forth in Section 8 (d) (2) of the Act. The Respondent is entitled to credit for payment of said statutory benefits.**

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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. R. McCarthy
Signature of Arbitrator

May 19, 2015
Date

MAY 27 2015

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

1. The Petitioner was employed as a police officer for the City of Peoria for the past ten (10) years. Petitioner testified his job included doing police work out on the streets in the City of Peoria. This job required him to apprehend suspects, protect the public, and perform general police activities.

2. On January 19, 2014, Petitioner was engaged in work activities and trying to apprehend a suspect. There was snow on the ground when the Petitioner left his vehicle. The Petitioner was traversing a snowy driveway when he fell.

3. Petitioner testified he fell onto his back. Petitioner noted the wind got knocked out of him. Petitioner testified he had pain everywhere.

4. The Petitioner was transported to OSF St. Francis Medical Center immediately. Petitioner was transported on a board with a cervical collar.

5. Petitioner provided a history to OSF St. Francis Medical Center of having the wind knocked out of him when he landed on his back while working. The records reveal the Petitioner was transported by a backboard. (Petitioner's Exhibit #3)

6. Petitioner's complaints were that of a back pain and an x-ray and CT scan were performed. Petitioner was provided Norco by the medical facility on this date. (Petitioner's Exhibit #3)

7. The CT scan from the Petitioner's back revealed the Petitioner sustained a T3 anterior compression wedge fracture, in addition to, a T4 anterior compression wedge fracture, with a suspected compression fracture at T5. (Petitioner's Exhibit #3)

8. Petitioner testified he was released from the hospital on that date and went home. Petitioner testified he was bedridden for approximately a week with the exception of a few visits to the company doctor for the City of Peoria.

9. On January 20, 2014, the Petitioner was seen at the request of the Respondent by the company doctor. Petitioner was seen at OSF Occupational Health. These records reveal Petitioner had continued neck pain and continued back pain. The Petitioner was noted to have over a 15% compression fracture at the T3-T4 level. Petitioner was noted to be moving stiffly and was sent to Dr. O'Leary for an orthopedic consultation. (Petitioner's Exhibit #2)

10. On January 24, 2014, the Petitioner was seen by Dr. O'Leary. Dr. O'Leary is a board certified orthopedic surgeon in the Peoria area. Dr. O'Leary took a history from the Petitioner on January 24, 2014 of having neck and mid-back pain. The Petitioner also informed him that he could not sit very long without tremendous pain.

11. Dr. O'Leary noted that Petitioner sustained a painful injury and that this is a type of injury that you cannot brace. Petitioner was provided with restrictions by Dr. O'Leary and was provided instructions for care. (Petitioner's Exhibit #4)

12. Petitioner testified he was seen on two (2) occasions after Dr' O'Leary's visit at OSF Occupational Health (City doctor). Petitioner was seen on January 29, 2015 and February 25, 2014. The Petitioner is still having pain in the back and neck area that wrapped around his ribs. (Petitioner's Exhibit #2)

13. On March 4, 2014, Petitioner was seen by Dr. O'Leary. At that time, Petitioner was still having pain. Dr. O'Leary returned the Petitioner to work but no wearing the vest. Petitioner testified that his vest would have aggravated his condition of ill-being. (Petitioner's Exhibit #4)

14. The Petitioner returned to work, full-duty, for the City of Peoria sometime in April of 2014. Petitioner has been able to do his work for the City of Peoria since that time.

15. In November of 2014, Petitioner returned to Dr. O'Leary for continued complaints. Petitioner provided complaints of back pain and neck pain to Dr. O'Leary. Dr. O'Leary ordered an MRI. Dr. O'Leary noted that the areas of pain were in the upper back where they had been previously. His examination showed tenderness of the thoracic spine. (Petitioner's Exhibit #4)

16. Petitioner testified at the time of trial that he did not sustain any prior injuries or receive any treatment to his back predating January 19, 2014. Petitioner also did not miss any time from work prior to the work injury.

17. At the time of trial, the Petitioner testified he still continues to have stiffness and pain in his thoracic and cervical area. Petitioner has difficulty performing daily activities due to the pain. Petitioner is very cautious while performing any lifting activity, the pain as never gone away.

18. Wherefore, the Arbitrator finds that the Petitioner's condition of ill-being at the time of trial was causally related to the work accident occurring on January 19, 2014.

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

1. Pursuant to Section 8(1b) of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability, for accidental injuries occurring on or after September 1, 2011:

    a. A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion, loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

b. Also, the Commission shall base its determination on the following factors:
   i. the reported level of impairment;
   ii. the occupation of the injured employee;
   iii. the age of the employee at the time of injury;
   iv. the employee's future earning capacity; and,
   v. evidence of disability corroborated by medical records.

2. With regards to (i) of Section 8(1b) of the Act, the Respondent chose not to have an AMA disability rating in this case. Therefore, this factor will not be discussed.

3. With regards to (ii) of Section 8(1b) of the Act, the Petitioner is employed as a police officer. The Arbitrator notes that this work, as a police officer, does include heavy labor. Petitioner will be put in circumstances that would expose him to dangerous situations such as altercations and protecting citizens.

4. With regards to (iii) of Section 8(1b) of the Act, the Petitioner at the time of injury was 31 years old. The Arbitrator considers the Petitioner to be a younger individual and concludes that the Petitioner's permanent partial disability would be more extensive than that of an older individual because he will have to live with the permanent partial disability longer.

5. With regards to (iv) of Section 8(1b) of the Act, the Petitioner's future earning capacity, at the present time, appears to be undiminished as a result of his injuries, because he has medically been returned to work to his full-time duties.

6. With regards to (v) of Section 8 (1b) of the Act, the Petitioner has demonstrated evidence of disability corroborated by his treating medical records. Records from both Dr. Moody and O'Leary show the petitioner had significant symptoms related to his injury. When released to full duty on March 25, Dr. O'Leary still noted a little pain with palpation at the T4-T5 region. When he returned to Dr. O'Leary on November 11, the doctor noted pain in the same areas as when he was previously seen. His exam showed generalized tenderness in the upper thoracic area. The Petitioner has credibly testified that he currently experiences pain in his low back. This also affects his cervical area. Petitioner also testified that he has problems rotating his neck. The Petitioner testified his complaints are present on a daily basis.

7. Therefore, applying Section 8(1b) of the Act, 820 ILCS 305/8(1b), the Petitioner has sustained accidental injuries that caused 2% loss of use of the man as a whole, in addition to payment of his two statutory fractures, for which he has previously been paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JESUS TRINIDAD,

Petitioner,

16IWCC0132

vs.

NOs: 10 WC 38873
12 WC 18080

CHILI'S & DAN RUTHERFORD AS STATE TREASURER
& EX-OFFICIO CUSTODIAN OF SECOND INJURY FUND,

Respondent.

DECISION AND OPINION ON REVIEW

These matters come before the Commission pursuant to timely filed Petition for Review filed by Respondent, Second Injury Fund. Respondent, Second Injury Fund, appeals the July 16, 2014 "Corrected Decision" of Arbitrator Andros entered in 12 WC 18080 finding that that Petitioner sustained accidental injuries arising out of and in the course of his employment with Chili's, that Petitioner was temporarily totally disabled for a period of 7 weeks, from August 19, 2010 through October 6, 2010, at the rate of $460.00 per week, that Petitioner is entitled to $4,015.00 in medical expenses, that Respondent is entitled to a credit of $1,493.31 for temporary total disability benefits paid, that Petitioner permanently lost 100% loss of use of the right eye under Sec 8(e), 162 weeks at $414.00, with credit to Respondent for payment of $67,068.00 previously paid satisfying the statutory permanent partial disability award, and finding that based upon Petitioner's previously sustaining 100% loss of use of the left eye, Petitioner is eligible for statutory permanent total disability benefits of $466.13 for life, commencing September 22, 2013, as provided under Section 8(e)18. Arbitrator Andros ordered Respondent Chili's to pay

$414.00 per week for 162 weeks commencing August 15, 2010, and that the Second Injury Fund pay $52.13 per week for 162 weeks, to equal the total permanent total disability rate of $466.13, as provided in Section 8(f). Arbitrator Andros further ordered that commencing September 22, 2013, the Second Injury Fund pay Petitioner $466.13 a week for life.

History of Applications for Adjustment of Claim:

On October 7, 2010, Attorney Mario Perez filed an Application for Adjustment of Claim, 10 WC 38873, on behalf of Petitioner alleging a date of accident of August 15, 2010, naming Chili's as Respondent, and alleging a "co-worker kicked a box and it flew up in the air and hit his right eye."

On May 24, 2012, Attorney Richard Hannigan filed an Application for Adjustment of Claim, 12 WC 18080, alleging a date of accident of August 15, 2010, naming Chili's as Respondent. The Application alleges that Petitioner "hit in right eye" and sustained injury to "both eyes."

On November 7, 2012, Arbitrator Lee granted Attorney Richard Hannigan's Motion to Substitute as Petitioner's attorney in 10 WC 38873, based upon the passing of Attorney Mario Perez.

On October 3, 2013, an Amended Application was filed in 12 WC 18080, naming the Second Injury Fund/Illinois State Treasurer as an additional Respondent.

On December 5, 2013, the Illinois Attorney General's Office filed an Appearance of Representative on behalf of Second Injury Fund/Illinois State Treasurer in 12 WC 18080.

On January 4, 2014, a hearing was held on Petitioner's Motion for Hearing and Respondent Attorney General's Motion for Continuance. Petitioner's attorney represented that he was prepared to proceed to hearing, and intended to prove up a statutory permanent total based upon 100% loss of use of an injured right eye, and pre-existing 100% loss of use of the left eye. Petitioner's attorney further indicated he agreed to the Attorney General's request for a continuance to prepare a defense. Arbitrator Andros granted Respondent Attorney General's Motion for Continuance, and the matter was continued to April 2, 2014 for hearing. (PX15).

On April 2, 2014, Arbitrator Andros conducted a hearing in 10 WC 38873 and 12 WC 18080. At that time, a discussion was held on the record whether to consolidate the two claims, or to dismiss the 10 WC 38873 claim, which was the claim former Attorney Perez had filed, and then have one decision issue only thereafter under case 12 WC 18080. Arbitrator Andros recommended that Petitioner dismiss 10 WC 38873, and proceed under case 12 WC 18080. Petitioner's attorney then made an oral Motion to Dismiss 10 WC 38873, and thereafter

Arbitrator Andros dismissed the Application for Adjustment of Claim filed in 10 WC 38873. (ARB 4/2/14, T81-86).

On May 15, 2014, 05/15/14 Arbitrator Andros issued a Decision in 10 WC 38873, despite having dismissed the matter at the time of the April 2, 2014 hearing. The Arbitrator further issued a Decision in 12 WC 18080.

In the 10 WC 38873 Decision issued on May 15, 2014, naming Respondent Chili's, Arbitrator Andros found that Petitioner sustained accidental injuries arising out of and in the course of his employment with Chili's, that Petitioner was temporarily totally disabled for a period of 7 weeks, from August 19, 2010 through October 6, 2010, at the rate of $460.00 per week, that Petitioner is entitled to $4,015.00 in medical expenses, that Respondent is entitled to a credit of $1,493.31 for temporary total disability benefits paid, and that Petitioner permanently lost 100% loss of use of the right eye under Sec 8(e), 162 weeks at $414.00, with credit to Respondent for payment of $67,068.00 previously paid satisfying the statutory permanent partial disability award.

In the 12 WC 18080 Decision issued on May 15, 2014, naming both Chili's and Second Injury Fund, Arbitrator Andros found that Petitioner sustained accidental injuries arising out of and in the course of his employment with Chili's, that Petitioner was temporarily totally disabled for a period of 7 weeks, from August 19, 2010 through October 6, 2010, at the rate of $460.00 per week, that Petitioner is entitled to $4,015.00 in medical expenses, that Respondent is entitled to a credit of $1,493.31 for temporary total disability benefits paid, that Petitioner permanently lost 100% loss of use of the right eye under Sec 8(e), 162 weeks at $414.00, with credit to Respondent for payment of $67,068.00 previously paid satisfying the statutory permanent partial disability award, and finding that based upon Petitioner's previously sustaining 100% loss of use of the left eye, Petitioner is eligible for statutory permanent total disability benefits of $466.13 for life, commencing September 22, 2013, as provided under Section 8(e)18. Arbitrator Andros ordered Respondent Chili's to pay $414.00 per week for 162 weeks commencing August 15, 2010, and that the Second Injury Fund pay $52.13 per week for 162 weeks, to equal the total permanent total disability rate of $466.13, as provided in Section 8(f). Arbitrator Andros further ordered that commencing September 22, 2013, the Second Injury Fund pay Petitioner $466.13 a week for life.

On June 9, 2014, Petitioner's Attorney filed a Motion to Recall the Arbitrator's May 15, 2014 Decision issued under "10 WC 38873" for Clerical Error under Section 19(f). Petitioner's Attorney argued that the Decision May 15, 2014 Decision in 10 WC 38873 incorrectly listed the case number as "10 WC 38873," instead of "12 WC 18080," and that the case 10 WC 38873 was filed by Petitioner's former attorney and was dismissed orally at the beginning of the trial in 12 WC 18080.

On June 25, 2014, the Attorney General's Office filed a Petition For Review with respect to the May 15, 2014 Decision in 12 WC 18080.

On July 16, 2014, Arbitrator Andros Recalled the May 15, 2014 Decision issued in case 10 WC 38873, and issued a July 16, 2014 "Corrected Decision," which was then then renumbered as "12 WC 18080," and named Respondent Chili's. In the July 16, 2014 "Corrected Decision" the Arbitrator found that Petitioner sustained accidental injuries arising out of and in the course of his employment with Chili's, that Petitioner was temporarily totally disabled for a period of 7 weeks, from August 19, 2010 through October 6, 2010, at the rate of $460.00 per week, that Petitioner is entitled to $4,015.00 in medical expenses, that Respondent is entitled to a credit of $1,493.31 for temporary total disability benefits paid, that Petitioner permanently lost 100% loss of use of the right eye under Sec 8(e), 162 weeks at $414.00, with credit to Respondent for payment of $67,068.00 previously paid satisfying the statutory permanent partial disability award.

On October 7, 2014, Petitioner's Attorney filed a Petition for Section 16 and Section 19(k) Penalties & Fees with respect to 12 WC 18080, against Respondent, Second Injury Fund, alleging they failed to pay the accrued and weekly statutory permanent total disability under Section 8(f). On November 10, 2014, Petitioner's Attorney withdrew the Petition for Penalties and Fees, per the Order of Commissioner Lamborn.

On December 2, 2014, Petitioner filed a Petition to Recall the July 16, 2014 "Corrected Decision" issued in 12 WC 18080, under Section 19(f). On December 2, 2014, a hearing was held on Petitioner's Petition to Recall the July 16, 2014 Decision in 12 WC 18080, before Arbitrator Andros. At that time the Arbitrator granted Petitioner's Motion to Recall the July 16, 2014 Decision issued in 12 WC 18080, and reopened proofs. (T8A-12A). On January 22, 2015, Arbitrator Andros recalled the July 16, 2014 "Corrected Decision" in 12 WC 18080 for correction clerical error under Section 19(f), and issued a January 22, 2015 "Amended Decision," naming Respondent Chili's and the Second Injury Fund, and finding that Petitioner sustained accidental injuries arising out of and in the course of his employment with Chili's, that Petitioner was temporarily totally disabled for a period of 7 weeks, from August 19, 2010 through October 6, 2010, at the rate of $460.00 per week, that Petitioner is entitled to $4,015.00 in medical expenses, that Respondent is entitled to a credit of $1,493.31 for temporary total disability benefits paid, that Petitioner permanently lost 100% loss of use of the right eye under Sec 8(e), 162 weeks at $414.00, with credit to Respondent for payment of $67,068.00 previously paid satisfying the statutory permanent partial disability award, and finding that based upon Petitioner's previously sustaining 100% loss of use of the left eye, Petitioner is eligible for statutory permanent total disability benefits of $466.13 for life, commencing September 22, 2013, as provided under Section 8(e)18. Arbitrator Andros ordered Respondent Chili's to pay $414.00 per week for 162 weeks commencing August 15, 2010, and that the Second Injury Fund pay $52.13 per week for 162 weeks, to equal the total permanent total disability rate of $466.13, as provided in Section 8(f). Arbitrator Andros further ordered that commencing September 22,

2013, the Second Injury Fund pay Petitioner $466.13 a week for life. Therein the Arbitrator further stated that "This award and order supersedes all other awards including the original award and any corrected awards issued by this arbitrator."

Findings of Facts and Conclusions of Law:

1. Petitioner testified that on August 15, 2010, a co-worker was kicking a box, that the box hit him in his right eye. Petitioner testified he provided notice of the accident to Curtis. There are no disputes between Petitioner and Respondent's Chili's with respect to the alleged accident arising out of and in the course of his employment, or with respect to Petitioner providing timely notice. (T39)(ARB EX1).

2. Petitioner testified that prior to August 15, 2010, he had been working for Respondent, approximately 30 hours a week as a food prep employee, and for a second employer, Outback Steakhouse, on a full time basis for five years. Petitioner further testified that Respondent's owner, Curtis, knew about his concurrent employment with Outback Steakhouse at the time of his August 15, 2010 work-related injury, and that Curtis adjusted his schedule around his work at Outback. (T34-38). Petitioner testified that contained within PX12 are his concurrent employment pay stubs he received from Outback Steakhouse. (T37). There is no dispute between Petitioner and Respondent Chili's with respect to Petitioner's concurrent employment at Outback Steakhouse, or with respect to the inclusion of those concurrent wages in calculating Petitioner's average weekly wage, as the parties stipulated to an average weekly wage of $690.00. (ARB EX1, T50).

3. Petitioner testified that he was educated in Mexico up to the 6th grade, that he wore glasses in school, that he brought glasses with him when he came to the United States in 2002, and that his vision in his left eye both before and after his August 15, 2010 work-related injury was the same. Petitioner further testified that obtained new eye glasses from his mother when she was in Mexico, that she would send them to him, that he obtained his glasses and contacts without seeing any eye doctor, and that between 2002 and 2010 he regularly wore glasses and contacts but never saw an eye doctor. (T38-39, 76-79).

4. Petitioner testified that on August 19, 2010 he went to Lens Crafter. (T39). At that time Petitioner provided and history of being struck in the right eye, was diagnosed with retinal detachment of the right eye, and was referred to Dr. Shapiro for immediate follow-up. (PX2). Petitioner was examined by Dr. Shapiro, at Retina Consultants later that same day. Dr. Shapiro noted that Petitioner's corrected visual acuity in his left eye was 20/40-2 and pinhole was 20/30-3, and that Petitioner's uncorrected vision in his right eye was of counting fingers at 6 inches, with eccentric fixation. Dr. Shapiro diagnosed a total/subtotal retinal detachment with multiple relatively large retinal breaks of the right

eye, as well as mild lattice degeneration of the left eye. Dr. Shapiro opined Petitioner's retinal detachment was most likely related to his work injury, and that it required surgery. (PX2). Petitioner underwent retinal reattachment surgery on August 20, 2010 at Lutheran General. (PX1).

5. Petitioner continued to follow-up with Dr. Shapiro post-operatively, and was released to return to full duty work for Respondent Chili's on October 7, 2010. Petitioner returned to Dr. Shapiro on December 3, 2010 with complaints of floaters and blurry vision in his right eye, as well as 4/10 pain in both of his eyes. Dr. Shapiro opined that Petitioner's right eye likely required new glasses, that his left eye might need laser-preventative treatment, and that he follow-up in three months or as needed. (PX1).

6. On December 5, 2010, Petitioner was fitted for contact lenses at Lens Crafters. (PX2). Petitioner returned to Dr. Shapiro on May 14, 2012, and reported floaters in both eyes, in right eye greater than left. P also reported pain in both eyes, rated as 7/10, as well as blurring vision in his right eye. On that date Dr. Shapiro performed a laser retinopexy in his left eye for the multiple areas of lattice degeneration. On July 30, 2012 Petitioner followed-up with Dr. Shapiro, at which time he complained of longstanding poor vision in both eyes, with intermittent flashes of light in his right eye, and longstanding intermittent floaters in both eyes. Dr. Shapiro noted the left eye looked satisfactory post laser procedure, and advised Petitioner to follow-up in three months. (PX1).

7. On March 7, 2013 Petitioner underwent a Section 12 Examination with Dr. Gieser at the Wheaton Eye Clinic, at the request of Respondent Chili's. Dr. Gieser documented vision of counting fingers in the right eye and 20/400 in the left eye without correction, as well as atrophy in the right macular region and myopic macular degeneration. Dr. Gieser also noted high myopia in both eyes, and a significant cataract in the right eye related to Petitioner's vitrectomy surgery from retinal reattachment. Dr. Gieser opined that the cause of the decreased vision in Petitioner's eye was the cataract and the myopic macular degeneration. Dr. Gieser also noted that Petitioner's left eye was a very nearsighted eye with no sign of other significant pathology. Dr. Gieser opined a cataract operation would need to be performed in the right eye before the actual vison could be accurately determined, and that the right eye would never see normally regardless because of the myopic macular degeneration. Dr. Gieser also opined that Petitioner's left eye should allow him to function normally, except for night driving. (R Chili's EX2).

8. On August 26, 2013, Petitioner was examined by Dr. LaFranco, at Retina Services of Illinois, at request of his attorney. Dr. LaFranco noted a satisfactory reattachment of the right retina, definite myopic macular degeneration changes, and a significant cataract developing in the right eye. Dr. LaFranco also noted peripheral laser coagulation marks in the left eye with myopic changes in the posterior pole. Dr. LaFranco opined that Petitioner's traumatic right retinal detachment was the cause of the marked decrease in

his right eye vision to counting fingers (20/800), and that it was doubtful removing the cataract would improve his central visual acuity because of the macula detachment at the time of the retinal detachment and the myopic degeneration already present in the right eye. (PX3).

9. On March 12, 2014, Petitioner underwent a Section 12 Examination with Dr. Taub, at the request of the Illinois Assistant Attorney General. On examination, Dr. Taub documented: right eye vision to be limited to only light perception with light projection both with and without correction; left eye vision to be 20/400 without correction and 20/70 with correction. Dr. Taub noted that Petitioner's vision records pre-dating his work injury were not obtainable, and that Petitioner's left eye visual acuity had been stable since the date of the work injury. Dr. Taub diagnosed myopic degenerative changes in both eyes, a healed retinal detachment of the right eye, and prophylactic laser therapy to the left eye. Dr. Taub further opined that Petitioner's right eye is causally related to the August 15, 2010 work accident, that his left eye was not causally related to the accident, and that Petitioner was at maximum medical improvement for his right eye with no need for additional treatment. (R Asst. AG EX1).

10. On March 14, 2014 Dr. LaFranco was deposed. Dr. LaFranco testified that an individual with greater than 20/200 loss of vision is considered legally blind in the State of Illinois. Dr. LaFranco testified that based upon Petitioner's visual acuity of counting fingers, whether corrected or uncorrected vision, Petitioner was legally blind in his right eye as a result of his work-related injury, that the cause of his decreased vision in his right eye was the retinal detachment and subsequent repair. Dr. LaFranco further testified that based upon his review of the treating records from August 19, 2010, four days after Petitioner's right eye injury, Petitioner's left eye was noted to have degenerative myopic macula, meaning profound nearsightedness, and uncorrected vision of 20/400. Dr. LaFranco testified that based upon this August 19, 2010 finding with respect to his left eye vision, it was more likely than not that Petitioner's uncorrected vision would have been greater than 20/400 prior to his August 15, 2010 right eye injury. (PX13, T9-11).

11. Petitioner testified that prior to his August 15, 2010 work injury he could see a little better in his right eye, and that he could see beyond three feet, but that he could not read with his right eye without his glasses. (T43-44). On cross-examination, Petitioner testified he returned to work for Respondent Chili's and Outback Steakhouse for approximately two years, and then began began working only for Outback Steakshouse, full-time, approximately 35 hours a week performing same job as before his accident as a prep cook. (T67-69).

12. On cross-examination Petitioner testified that he continues to drive, that he still has floaters in both of his eyes, that he still has pain in his eyes, and that his eyesight in his left eye has not worsened since his accident. (T69-73).

13. Petitioner and Respondent Chili's stipulated at hearing that Petitioner received $1,493.31 in TTD benefits for the period of August 19, 2010, the date Petitioner was first taken off work, and October 6, 2010, at a weekly rate of $213.33, which did not take into account Petitioner's concurrent employment with Outback Steakhouse. Petitioner and Respondent Chili's further orally stipulated at hearing that Respondent Chili's had already satisfied its statutory obligation to pay permanent partial disability benefits representing 100% loss of use of Petitioner's right eye, totaling $67,068.00, based upon the applicable permanent partial disability rate of $414.00 per week. (ARB EX1, T30-33, 50-51).

14. Petitioner introduced medical bills into evidence, $2,530.00 from Park Ridge Anesthesiology and $1,485.00 from Retina Consultants. (PX4) Respondent Chili's orally stipulated at hearing those bills would be paid. Petitioner stipulated orally at hearing that Respondent Chili's should be entitled to a credit for any outstanding medical bills awarded that have already been paid by Respondent Chili's. (T47-48).

At the time of the April 2, 2014 Arbitration hearing, Petitioner's attorney made a Motion to Dismiss Petitioner's Application for Adjustment of Claim in 10 WC 38873. On that date, Arbitrator Andros granted Petitioner's Motion to Dismiss the Application for Adjustment of Claim in 10 WC 38873. Despite the dismissal of Petitioner's Application for Adjustment of claim in 10 WC 38873, the Arbitrator erroneously issued a Decision in 10 WC 38873 on May 15, 2014. The Commission finds that the Arbitration Decision issued in 10 WC 38873 is *void ab initio,* as it at no time had any legal validity. Accordingly, the Commission vacates the May 15, 2014 Arbitration Decision entered in 10 WC 38873 on May 15, 2014.

On July 16, 2014, the Arbitrator recalled the May 15, 2014 Decision in 10 WC 38873, and issued a "Corrected" Decision renumbering it as 12 WC 18080. The Commission finds that the Arbitrator's July 16, 2014 "Corrected Decision" issued as 12 WC 18080 is also *void ab initio*, as it at no time had any legal validity, given that the original May 15, 2014 Decision in 10 WC 38873 was erroneously entered by the Arbitrator on a claim that had already been dismissed. Accordingly, the July 16, 2014 "Corrected Decision" issued under 12 WC 18080 is hereby vacated.

On January 22, 2015, more than five months after the "Corrected" Decision was entered, the Arbitrator issued a letter recalling the July 16, 2014 Decision under Section 19(f), and issued an "Amended Decision." The Commission finds that the July 16, 2014 "Amended Decision" is *void ab initio* as the matter, 10 WC 38873, was dismissed at the time of the April 4, 2014 Arbitration hearing. The Commission further finds that the Arbitrator lacked jurisdiction to recall the July 16, 2014 "Corrected" Decision and to issue an "Amended Decision" under Section 19(f). Section 19(f) provides that the "Arbitrator or Commission may on his or its own

motion, or on the motion of either party, correct any clerical error or errors in computation within 15 days after the date of receipt of any award by such Arbitrator or any decision on review of the Commission and shall have the power to recall the original award on arbitration or decision on review, and issue in lieu thereof such corrected award or decision." The Commission finds that the Arbitrator was without authority to recall the July 16, 2014 Decision under Section 19(f) of the Act, as the time for recalling the July 16, 2014 "Corrected Decision" had clearly ran by January 22, 2015, more than five months after the "Amended Decision" was issued. Accordingly, the Commission vacates the Arbitrator's January 22, 2015 "Amended Decision,"

Based upon a review of the record, the Commission concludes the only viable Decision entered in this matter is the May 15, 2014 Decision entered in 12 WC 18080.

With regard to the issue of temporary total disability benefits, the Commission finds that Petitioner was temporarily totally disabled for a period of 7 weeks, from August 19, 2010 through October 6, 2010, at the rate of $460.00 per week, totaling $3,220.00, under Section 8(b) of the Act, and that Respondent Chili's shall have a credit against the temporary total disability benefits in the amount of $1,493.31.

With regard to the issue of medical expenses, the Commission finds that Petitioner is entitled to an award of $4,015.00 for necessary medical expenses under Section 8(a) of the Act.

Under Section 8(e)18 of the Act, a "specific loss of both hands, both arms, or both leg, or both eyes, or of any two thereof, or the permanent and complete loss of the use thereof, constitutes total and permanent disability to be compensation according to the compensation fixed by paragraph (f) of this Section." The Section further provides: "Any employee who previously suffered the loss or permanent and complete loss of the use of any such members, and in a subsequent independent accident loses another or suffers the permanent and complete loss of the use of any one of such members the employer for whom the injured employee is working at the time of the last independent accident is liable to pay compensation only for the loss or permanent and complete loss of use of the member occasioned by the last independent accident."

Section 8(f) of the Act provides: "If an employee who had previously incurred loss or the permanent and complete loss of use of one member, through the loss or the permanent and complete loss of the use of one hand, one arm, one foot, one leg, or one eye, incurs permanent and complete disability through the loss or the permanent and complete loss of the use of another member, he shall receive, in addition to the compensation payable by the employer and after such payments have ceased, an amount from the Second Injury Fund provided for in paragraph (f) of Section 7, which, together with the compensation payable from the employer in whose employ he was when the last accidental injury was incurred, will equal the amount payable for permanent and complete disability as provided in this paragraph of this Section."

In Gilbert v. Shughart Painting Contractors v. Industrial Commission, 136 Ill.App.3d 163, 169(1985), the Court addressed a narrow question concerning the loss of use of an eye, where an industrial injury caused the uncorrected vision to be almost totally extinguished but was almost totally restored by the use of artificial lenses. The Court held stated the sum of all the case law is that "there is no mechanical standard and that the Commission may base an award for loss of vision on either corrected or uncorrected vision or a hybrid of both according to the particular circumstances of the case."

The record clearly indicates Petitioner wore glasses prior to leaving Mexico in 2002, and that it is not known what his corrected or uncorrected vision was when those glasses were prescribed. Petitioner testified that prior to his August 15, 2010 work-related injury he saw better with his right eye than his left eye. Presently his uncorrected vision in his right eye is limited to finger count at three feet. Based upon a review of the record as a whole, the Commission concludes that Petitioner has established that prior to his August 15, 2010 work-related injury, he suffered from the complete and permanent loss of use of the left eye. Furthermore, as a result of the August 15, 2010 work-related injury Petitioner sustained the complete and permanent loss of use of the right eye. Dr. LaFranco testified an individual with great than 20/200 loss of vision is considered legally blind in the State of Illinois, and that Petitioner has greater than 20/200 uncorrected vision in his right eye, as a result of his August 15, 2010 work-related injury, and 20/200 uncorrected vision in his left eye that pre-dated his work-related injury. Therefore, Petitioner has established that he has sustained permanent total disability as contemplated by Section 8(e)18 of the Act. Thus, the Second Injury Fund, and Dan Rutherford as State Treasurer and Ex-Officio Custodian of the Second Injury Fund have been made a party to this claim. On December 5, 2013, the Illinois Attorney General's Office filed an Appearance of Representative on behalf of Second Injury Fund/Illinois State Treasurer in 12 WC 18080.

Based upon the Commission's finding that Petitioner had previously sustained 100% loss of use of the left eye, and that as a result of his August 15, 2010 work-related accident Petitioner sustained 100% loss of use of the right eye, Petitioner is eligible for statutory permanent total disability benefits of $416.13 per week for life commencing September 22, 2013, as provided in §8(e)18 of the Act. Accordingly, Respondent Chilli's shall pay Petitioner $414.00 per week for 162 weeks, commencing August 15, 2010, for the loss of the second body part and, during this time, the Second Injury Fund shall pay Petitioner the sum of $ 8,445.06, representing $52.13 per week for 162 weeks, to equal the total permanent total disability rate of $466.13 per week, as provided in §8(f) of the Act. Commencing September 22, 2013, the Second Injury Fund shall pay to Petitioner $ 466.13, weekly, for the life of the Petitioner.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator in 10 WC 38873, filed on May 15, 2014, is hereby vacated for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that the "Corrected Decision" of the Arbitrator in 12 WC 18080, filed on July 16, 2014, is hereby vacated for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that the "Amended Decision" of the Arbitrator in 12 WC 18080, filed on January 22, 2015, is hereby vacated for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $4,015.00 for medical expenses under §8(a) and per §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $460.00 per week for a period of 7 weeks, from August 19, 2010 through October 6, 2010, 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 $414.00 per week for a period of 162 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 100% loss of use of the right eye.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Chili's is entitled to a credit of $67,068.00 for the statutory permanent partial disability benefits already paid under §8(e)13 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Second Injury Fund shall pay Petitioner $52.13 per week for 162 weeks, as provided in §8(f) of the Act, to equal the total permanent total disability rate of $466.13, and that commencing September 22, 2013, the Second Injury Fund shall pay Petitioner $466.13 for life.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for an award of penalties and attorneys' fees under § 16, § 19(k), and § 19(l) of the Act is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that 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.

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.

16IWCC0132

Bond for the removal of this cause to the Circuit Court by Respondent Chili's is hereby fixed at the sum of $5,500.00. 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: FEB 2 4 2016
KWL/kmt
O-01/12/16
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

LORRAINE ORMSBY,

Petitioner,

16IWCC0133

vs.

NO: 12 WC 29753

UNITED AIRLINES,

Respondent.

DECISION AND OPINION ON REVIEW

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

Based upon a review of the record as a whole, and taking into account the criteria and factors pursuant to Section 8.1b of the Act, Petitioner's age, the impact on her ability to earn wages in the future, the AMA impairment rating provided by Dr. Cohen, the occupation of Petitioner, and evidence of disability contained within the medical records, the Commission modified the Arbitrator's permanent partial disability award from 7.5% loss of use of the man as a whole to 10% loss of use of the man as a whole under Section 8(d)2.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 9, 2015, 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

16IWCC0133

the sum of $508.79 per week for a period of 44 weeks, for the period of May 23, 2013 through March 26, 2014, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is given a credit of $22,387.61 for temporary total disability benefits paid to date.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $457.91 per week for a period of 50 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the permanent partial disability to the extent of 10% loss of use of the man as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $23,000.00. 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: FEB 24 2016
KWL/kmt
02/22/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0133

ORMSBY, LORRAINE
Employee/Petitioner

Case# **12WC029753**

UNITED AIRLINES INC
Employer/Respondent

On 7/9/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

0560 WIEDNER & McAULIFFE LTD
ASALYA I AKHMEROVA
ONE N FRAKLIN 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 **16IWCC0133**

LORRAINE ORMSBY

Employee/Petitioner

v.

Case # 12 WC 29753

Consolidated cases: N/A

UNITED AIRLINES, IN

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 **Ketki Steffen**, Arbitrator of the Commission, in the city of **Chicago, IL** , on **April 13, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent

paid all appropriate charges for all reasonable and necessary medical services?

K. ☐ What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ☐ TTD

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

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

N. ☐ Is Respondent due any credit?

O. ☒ Other **Possible nature and extent credit.**

FINDINGS

On **12/21/2011**, 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 $**39,685.36**; the average weekly wage was $**763.18**.

On the date of accident, Petitioner was **55** years of age, ***single*** with **1** dependent children.

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

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

Respondent shall be given a credit of $**22,387.64** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**N/A**.

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

ORDER

Credits

Respondent shall be given a credit of $**22,387.64** for TTD, $**N/A** for TPD, and $ **N/A** for maintenance benefits, for a total credit of $**N/A**.

Medical benefits

Respondent has paid all reasonable and necessary medical services as provided in Section 8(a) of the Act.

Temporary Partial Disability

Respondent shall pay Petitioner temporary total disability benefits of **$508.79**/week for **44** weeks, commencing **5/23/2013** through **3/26/2014**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$22,387.61** for temporary total disability benefits that have been paid.

Permanency

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 7.5 % loss of use of **use of man as a** whole or 37.5 weeks pursuant to **§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.

Ketki Stetten 7/9/15

Signature of Arbitrator Date

JUL 9 - 2015

ICArbDec p. 2

Procedural History

In 2005, Petitioner Lorraine Ormsby suffered a prior work related right shoulder injury which did not result in any surgery being undertaken. (Tr. p. 11-12). She returned to full duty capacity from 2006 until her current 12/21/2001 work related injury . (Tr p 12). Petitioner's Application for Adjustment of Claim for case 06 WC 05215 supports an April 18, 2005 date of accident involving the right arm/shoulder. (RX. 7) The Commission main frame for case 06 WC 05215 shows a settlement for 14% loss of use of the right arm. (RX. 5) The Illinois Workers' Compensation Commission Settlement Contract Lump Sum Petition and Order for case 06 WC 05215 supports injury to the right shoulder. (RX.6)

Petitioner testified that she had no difficulty with her right shoulder after the 2005 injury and prior to the December 2011 accident.

Factual History

In the case at bar, Petitioner was 55 years old at the time of her uncontested work accident of December 21, 2011 while employed by Respondent, United Arilines, Inc. She had been employed by United Airlines as a flight attendant for the last 24 years. (Tr p10-11)

On December 21, 2011 while trying to pull a stuck extended delay kit from the last row of seats, Ms. Ormsby experienced pain in her right shoulder due to the physical exertion employed trying to get this stuck kit dislodged. (Tr p12) The parties stipulated that Petitioner was involved in a work accident. Petitioner testified to experiencing pain

in her right shoulder following this incident. The parties stipulated to timely notice. The parties also stipulated to all TTD and medical being paid by Respondent.

On December 23, 2011, Petitioner sought medical care with her primary care physician, Dr. Brent Petersen. Dr. Petersen advised activity modification and anti-inflammatory medications. Dr. Petersen completed a United Airlines Workers' Compensation Employee Work Status Form releasing Petitioner to work without restrictions. (PX.1)

Petitioner came under the care of Dr. Justin Gent on June 29, 2012. Physical examination revealed near full range of motion except internal rotation that was diminished on the right when compared to the left, some mild loss of rotator cuff strength, and mild degenerative changes at the AC joint and Type II acromion and subacromial cysts in the greater tuberosity of the proximal humerus per X-rays. Dr. Gent recommended an MRI and released Petitioner to unrestricted duty work activities. (PX.2)

The right shoulder MRI, performed on July 2, 2012, revealed moderate hypertrophic degenerative changes of the distal acromioclavicular ("AC") joint; increased signal in the distal supraspinatus tendon at the point of insertion with a focal defect approximately 7 mm from the site of insertion compatible with a full-thickness tear; fluid in the subacromial/subdeltoid bursa; normal tendons of the infraspinatus and Teres minor; degenerative changes in the glenohumeral joint space with narrowing; normal subscapularis tendon; and no joint effusion. (PX. 3)

On July 9, 2012, Dr. Gent believed there was a small full-thickness tear in the supraspinatus tendon. He discussed non-operative versus operative management. Petitioner elected to undergo physical therapy. Dr. Gent released Petitioner to unrestricted duty work activities. (PX.2)

Petitioner followed up with Dr. Gent on October 5, 2012 with persistent complaints. The physical examination remained relatively unchanged. Secondary to persistent pain, Dr. Gent recommended surgical intervention. (PX.2) Dr. Gent's records contain correspondence dated October 24, 2012 requesting authorization for right shoulder arthroscopy rotator cuff repair and AC joint resection. (PX.2)

Ms. Ormsby also attended a number of section 12 exams with Dr. David Garelick. (Tr p15) Following examination and review of medical records, Dr. Garelick diagnosed right rotator cuff tendonitis with a high-grade partial-thickness (possible full-thickness) rotator cuff tear. He opined that the pathology of the right shoulder shown on MRI may have been present prior to the work accident, but that the injuries sustained while working were sufficient to cause the previously quiescent finding to become symptomatic. As such, he believed there was a causal connection between the work accident and Petitioner's present condition of ill-being. Further, he felt it was reasonable she undergo shoulder arthroscopy. (RX.1) Dr. David Garelick believed the right shoulder injury to have been severe enough that he was skeptical Ms. Ormsby would ever be able to return back to work as a flight attendant. (Tr p15)

On November 26, 2012 and February 22, 2013, Dr. Gent completed a United Airlines Workers' Compensation Employee Work Status Forms releasing Petitioner to work without restrictions. (PX.2) During the February 22, 2013 follow up, Dr. Gent discussed surgery with Petitioner. (PX.2)

On March 25, 2013, Petitioner came under the care of Dr. David Anderson. Petitioner testified that she elected to obtain a second opinion for Dr. Anderson. Dr. Anderson assessed shoulder pain with a partial-thickness rotator cuff tear and a rotator cuff sprain and strain. The doctor reviewed the MRI and opined it showed a high-grade, partial-thickness tear of the supraspinatus versus a full-thickness tear. Dr. Anderson discussed the diagnosis and treatment options with Petitioner. Petitioner was to follow up on a "prn" basis. Dr. Anderson also completed a United Airlines Workers' Compensation Employee Work Status Form releasing Petitioner to work without restrictions as of March 25, 2013. (PX. 5)

On May 23, 2013, Petitioner underwent right shoulder arthroscopy with an arthroscopic rotator cuff repair, an arthroscopic subacromial decompression, and an arthroscopic labral debridement, performed by Dr. Anderson. The post-operative diagnoses included a right shoulder rotator cuff tear and Grade 1 tearing of the superior labrum. The operative report confirms findings of a partial-thickness tear of the rotator cuff and Grade 1 fraying of the posterosuperior labrum. (PX.4) Post-operatively, Petitioner attended physical therapy at Accelerated Physical Therapy.

On August 19, 2013, Dr. Anderson recommended continued physical therapy twice a week. (PX.4) A Utilization Review ("UR") of September 3, 2013 does not support certification of physical therapy as Petitioner had exceeded the ODG-TWC

recommended therapy visits with limited evidence of exceptional factors that would support an extended course of care beyond the recommended guidelines. (RX. 4)

On October 11, 2013, Petitioner underwent a repeat IME with Dr. Garelick. At this juncture, the doctor opined that it is common for a patient to continue to have pain complaints and some stiffness four and a half months post-surgery. However, he concurred with the UR physician that additional therapy is probably not the best use of the insurer's resources at this time. Rather, Dr. Garelick recommended three to four weeks of work conditioning, four to five times per week, with concentration on strengthening and overhead lifting. Maximum medical improvement ("MMI") was anticipated in six to eight weeks. (RX.2)

Petitioner followed up with Dr. Anderson on November 11, 2013. Dr. Anderson agreed with the IME physician regarding initiation of work conditioning and instructed a follow up in four weeks. (PX.3-5) Petitioner underwent the course of work conditioning at Centegra Hospital, which was completed on January 3, 2014. (PX.7)

On February 14, 2014, Petitioner presented for a repeat IME with Dr. Garelick. She continued with occasional pain in the right shoulder and difficulty with overhead lifting. Petitioner's subjective complaints included weakness. Dr. Garelick explained that it is impossible to state whether or not the rotator cuff tear was caused by the work injury, but Petitioner did seem to become symptomatic following the work injury. At this juncture, Dr. Garelick recommended an FCE and saw no benefit in additional work conditioning. MMI was anticipated on the date of the FCE. (RX.3)

Petitioner testified that the FCE was never performed. Further, Petitioner testified that she asked Dr. Anderson to release her to full duty work as a flight attendant because she felt she was capable of fulfilling the guidelines of her job.

Petitioner submitted into evidence a United Description of Flight Attendant Job Duties. (PX.4) This document provides for physical requirements of working in aircraft aisles and galleys for periods of up to 14 hours or more, performing duties that require standing walking, climbing, stooping, crouching, squatting, kneeling, reaching, twisting and bending; pushing or pulling movable carts; frequent use of force up to 25 pounds to lift, push, or pull objects, such as beverage stowage bins; occasional use 25 to 55 pounds of force to lift, push, or pull objects; and at times use of forces greater than 55 pounds to lift, push, or pull objects. Some of these push, pull, or lifting forces must be performed with the arms at or above shoulder level, such as in the case of closing or opening overhead bins. (PX.4)

Petitioner testified that she was released to unrestricted duty work effective March 14, 2014. Petitioner testified to returning to work as a flight attendant without restrictions as of March 2014. She also testified that she had to undergo recurrent qualifications and meet the physical demands of the position as a flight attendant in order to return to unrestricted duty work. She testified that United Airlines would not allow her to return to work as a flight attendant if she had any sort of physical restrictions that did not meet the job requirements. Petitioner testified that she continues to work in her regular position as a flight attendant for United Airlines at the time of trial. This is the same position Petitioner held prior to the accident.

Further, Petitioner testified that her shoulder feels different and she has some limitations at work. She reported difficulty with work above the waist, weight-bearing activities and stowing luggage, as well as cleaning, yard work, and sleeping. She testified to experiencing aches, weakness and pain in her right shoulder. Petitioner testified she is right-hand dominant. Petitioner testified that she was not prescribed any additional formal treatment, surgery or medications by her treating physicians since completing care for the right shoulder in March of 2014.

On January 23, 2015, Petitioner underwent an impairment rating evaluation with Dr. James Cohen. Dr. Cohen diagnosed status post right rotator cuff repair. Dr. Cohen opined Petitioner is at MMI and therefore an impairment rating is appropriate. The doctor calculated an impairment rating according to the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition. Dr. Cohen computed 7% upper extremity impairment. This calculated to 4.2% whole person impairment, or up to 5% whole person impairment. (RX.8)

Findings/Analysis

In support of the Arbitrator's Decisions relating the issue of prior credit, the Arbitrator finds as follows:

Petitioner testified to a prior 2005 work injury involving the right shoulder. Petitioner's Application for Adjustment of Claim for case 06 WC 05215 supports an April 18, 2005 date of accident involving the right arm/shoulder. The Commission main frame for case 06 WC 05215 supports a settlement for 14% loss of use of the right arm.

The Illinois Workers' Compensation Commission Settlement Contract Lump Sum Petition and Order for case 06 WC 05215 supports injury to the right shoulder.

In the case at bar, Petitioner suffered an injury to the same right shoulder that she injured in 2005. Respondent argues that under the general rules of application of Section 8(e)17 of the Illinois Workers' Compensation Act ("Act") Respondent is entitled to a credit under section 8(e)17 which provides as follows:

> "In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, had before that time sustained an injury resulting in the loss by amputation or partial loss by amputation of any member, including hand, arm, thumb or fingers, leg, foot or any toes, such loss or partial loss of any such member shall be deducted from any award made for the subsequent injury. For the permanent loss of use or the permanent partial loss of use of any such member or the partial loss of sight of an eye, for which compensation has been paid, then such loss shall be taken into consideration and deducted from any award for the subsequent injury." *820 ILCS 305.*

The Respondent further proposes that the statutory modification of the percentage awarded for an injury is not relevant in determining a credit. Respondent alleges that under the applicable rules of Section 8(e)17 Respondent is entitled to a credit of 35.42 weeks of compensation for the prior right shoulder settlement of 14% loss of use of the right arm against the PPD award in the current case.

The Arbitrator finds little disagreement with Respondent's argument that specific prior loss credit is appropriate and that the statutory modifications of the percentage award does not negate this requirement. The Arbitrator also agrees with Respondent that the calculation method should involve giving a credit for the number of weeks or PPD that was awarded and not the percentage. The Arbitrator, however, disagrees with

the position that Petitioner's permanency award should be reduced by the prior award for the arm or shoulder injury from her 2005 case as a matter of law.

In support thereof, the Arbitrator notes the holding in the case of *Will County Forest Preserve v. IWCC,* 2012 IL App 3(d) 110077WC (rehearing denied 7/5/12), the Illinois Appellate Court determined that shoulder injuries do not qualify as a specific loss under §8(e) but instead fall under the catch all provisions of §8(d)2 of the Act. Since §8(d)2 does not provide credit for prior awards, Respondent in this matter would not be entitled to a credit for a previous award under §8(e) of the Act. Based on the Court's findings, the Arbitrator finds that Petitioner's shoulder injury is not a specific loss but rather, falls under the man as a whole award and Respondent would not be entitled to credit under Sec. 8(e) of the act. Although Respondent's legal arguments regarding specific loss credit and the method of calculating this credit are correct, they are not applicable to the case at bar pursuant to the court's ruling in Will County, id.

Therefore, the Arbitrator denies the Respondent a prior credit of 35.42 weeks relating to the settlement of the April 18, 2005 work injury.

In support of the Arbitrator's Decisions relating to the nature and extent of the petitioner's injury under Section 8(d)2 of the Act, the Arbitrator finds as follows:

This case arises out of a December 21, 2011 accident, a date after the September 1, 2011 amendment of the Act. Post amendment, pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

"(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) the reported level of impairment pursuant to subsection (a);

(ii) the occupation of the injured employee;

(iii) the age of the employee at the time of the injury;

(iv) the employee's future earning capacity; and

(v) evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order." *820 ILCS 305.*

Upon consideration of the above factors, the Arbitrator finds the following:

(i) The level of impairment pursuant to the AMA Guidelines: Dr. Cohen examined Petitioner on January 23, 2015 and issued an impairment rating of 7% upper extremity impairment. This calculated to 4.2% whole person impairment.

(ii) Petitioner's occupation: Petitioner was employed by Respondent as a flight attendant. Petitioner submitted into evidence a United Description of Flight Attendant Job Duties. This document provides for physical requirements of working in aircraft aisles and galleys for periods of up to 14 hours or more, performing duties that require

standing walking, climbing, stooping, crouching, squatting, kneeling, reaching, twisting and bending; pushing or pulling movable carts; frequent use of force up to 25 pounds to lift, push, or pull objects, such as beverage stowage bins; occasional use 25 to 55 pounds of force to lift, push, or pull objects; and at times use of forces greater than 55 pounds to lift, push, or pull objects. Some of these push, pull, or lifting forces must be performed with the arms at or above shoulder level, such as in the case of closing or opening overhead bins.

(iii) Petitioner's age: Petitioner was 55 years of age at the time of the injury. Arbitrator gives this factor less weight as Petitioner's has limited work life left ahead of her.

(iv) The Employee's Future Earning Capacity: Petitioner testified that she was released to unrestricted duty work effective March 14, 2014. Petitioner testified that she continues to work in her regular position as a flight attendant for Respondent at the time of trial. Furthermore, Petitioner's treating physician felt Petitioner was capable of performing her full duty activities as a flight attendant without any formal restrictions and Petitioner has demonstrated a capability to work in a full duty capacity for over a year. Petitioner also testified that she had to undergo recurrent qualifications and meet the physical demands of the position as a flight attendant in order to return to unrestricted duty work. She testified that Respondent would not allow her to return to work as a flight attendant if she had any sort of physical restrictions that did not meet the job requirements. This is the same position Petitioner held prior to the accident. The Arbitrator finds this a favorable factor for the Respondent.

(v) Evidence of Disability: Petitioner sustained a partial-thickness rotator cuff tear of the right shoulder secondary to the work accident of December 21, 2011. The Arbitrator

notes Petitioner reported some residual symptoms at the time of hearing. Petitioner testified her shoulder feels different and she has some limitations at work. She reported difficulty with work above the waist, weight-bearing activities and stowing luggage, as well as cleaning, yard work, and sleeping. She testified to experiencing aches, weakness and pain in her right shoulder. Petitioner testified she is right hand dominant. Petitioner also testified she last sought medical care over a year ago, or in March 2014, as it relates to the work injury.

Dr. Garelick, United's initial section 12 examiner opined in his 2/14/2014 report that "I read the United Airlines job description and it appears that flight attendant's need to on occasion lift up to 55 pounds overhead. This is clearly outside the Petitioner's physical limitations as indicated by the IME. However, Ms. Ormsby elected to forgo a prescribed functional capacity evaluation and returned back to work full duty on 3/27/2014 albeit with physical difficulty. The Arbitrators considers this a favorable factor for the Petitioner as she has chosen to return back to gainful employment.

Lastly, the Arbitrator has given due consideration to the fact that Petitioner did suffer a prior right shoulder injury in 2005, was treated (without surgery) and returned back to full duty work without restrictions. The Arbitrator further notes that the Petitioner was able to fulfill her full duties without restrictions for over 6 years and the Respondent's own IME has found that the Petitioner suffered a new injury and has restrictions that would prevent her from fulfilling some of her duties as a flight attendant.

Therefore, upon consideration of the above factors and in accordance with the facts presented at trial, the Arbitrator concludes Petitioner sustained 7.5 % loss of

person as a whole, or 37.5 weeks of PPD at the applicable PPD rate of $457.91 under Section 8(d)2 of the Act.

Ketki Steffen 7/9/15

Signature of Arbitrator Ketki Shroff Steffen Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joel Sanchez,
Petitioner,

vs. NO: 13WC 34650

Banner Home Construction,
Respondent,

16IWCC0134

DECISION AND OPINION ON REVIEW

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $40,678.80. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 24 2016
MJB/bm
o-2/22/16
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

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

SANCHEZ, JOEL
Employee/Petitioner

Case# 13WC034650

16IWCC0134

BANNER HOME CONSTRUCTION
Employer/Respondent

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

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

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

1072 EPSTEIN, JACK R LAW OFFICES
4346 W 26TH ST
SUITE 2000
CHICAGO, IL 60623

0507 RUSIN & MACIOROWSKI LTD
THEODORE J POWERS
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
19(B) ARBITRATION DECISION

Joel Sanchez
Employee/Petitioner

v.

Banner Home Construction
Employer/Respondent

Case # 13 WC 034650

Consolidated cases: D/N/A

16IWCC0134

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was originally heard in Elgin, Illinois, by then Arbitrator Luskin on January 8, 2015. After Arbitrator Luskin was appointed to the Commission, the matter was reassigned to Arbitrator Molly C. Mason and re-heard by said Arbitrator in the city of **Chicago**, on **March 24, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident 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 **9/12/13**, 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 multiple current conditions of ill-being *are* causally related to the accident.

Petitioner's average weekly wage was **$600**.

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

The medical services Petitioner has received to date were reasonable, necessary and causally related to the accident.

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

Respondent shall be given a credit of **$20,330.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$20,330.00**.

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $114.00 to Illinois Medi-Car, $3,223.02 to Illinois Orthopedic Network, $185.00 to Archer Open MRI, and $2,332.78 to Metro Anesthesia Consultants as provided in Sections 8(a) and 8.2 of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $400/week for 79 5/7 weeks, commencing 9/13/13 through 3/24/15, as provided in Section 8(b) of the Act, with Respondent receiving credit for the temporary total disability benefits it has paid to date.

Prospective Medical Treatment

Respondent shall authorize and pay for prospective care, including but not limited to a left hip consultation with Dr. Domb, as previously recommended by Dr. Sompalli and the lumbar spine surgery recommended by Dr. Dixon.

Penalties and Fees

For the reasons set forth in the attached decision, the Arbitrator declines to award penalties or fees.

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

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

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

Molly C Mason
Signature of Arbitrator

4/14/15
Date

APR 14 2015

Petitioner testified he worked for Respondent for 3 to 4 months before his accident.

Petitioner testified that Francisco, Miguel and a young guy named Rosalio or Rosalino were present at the time of his accident. It is also possible that Adan was there.

Petitioner testified that, immediately before the accident, he was putting glue between sheets of wood in order to begin building walls. He was standing with his left foot on top of a piece of wood to secure it. He began leaning forward in order to begin applying glue when he slipped and fell through a hole that was intended to be a stairwell opening. The hole did not have any kind of safety cover over it. He realized he was falling head first and began turning in the air so as to avoid hitting his head. He fell a distance of about 12 to 14 feet, into the basement. He managed to land on his feet but with most of his weight on his left leg. At impact, his body "responded like a spring" and went to the right. In order to avoid hitting his head, he put his right hand out. He struck his hand against a concrete support structure that had a metal base. He ended up hitting his head but "only a little."

Petitioner testified he felt pain in his left knee, left "fibia," groin, back, right hand and head after the accident. Initially, however, he did not feel too bad. He called out to his co-workers and told them to wait for him because he believed he would be able to resume working after resting a while. By about 40 minutes after the accident, his pain was more intense and he asked Francisco to take him to a hospital. Another individual, the son of "Mr. Walter," ended up driving him to Elmhurst Memorial Hospital. "Mr. Walter" is an individual who assigned work to Respondent at the jobsite.

The Emergency Room records (PX 1) indicate that Petitioner's preferred language is Spanish.

Petitioner testified he gave a history of the accident to hospital personnel. The first test he underwent at the hospital was a blood test.

The "quick view" triage history reflects that Petitioner "fell from ladder approx. 10 ft," landing on gravel, and complained of a headache as well as left leg and right wrist pain.

Petitioner initially saw a physician's assistant, Christopher Ferron. Ferron described Petitioner as losing his balance at a construction site and falling from the first floor into the basement. Ferron indicated Petitioner fell feet first, landing initially on his left leg. After the left leg gave out, Petitioner "fell onto his right side on an outstretched right arm."

Ferron indicated that Petitioner rated his left leg pain at 9/10 and "worse with movement." He also noted that Petitioner complained of pain in his entire left leg but denied numbness or tingling. He further noted that Petitioner complained of "some mild lumbar pain and discomfort with movement."

Ferron noted that Petitioner denied any history of past medical problems.

Joel Sanchez v. Banner Home Construction
13 WC 34650

Procedural Background

A 19(b) hearing was previously held in this case on January 8, 2015 before then Arbitrator Luskin. After Arbitrator Luskin was appointed to the Commission, the case was reassigned to Arbitrator Mason, with the parties being given the option of the Arbitrator issuing a decision based on the January 8, 2015 transcript. After Respondent objected to proceeding in this manner, Arbitrator Mason conducted a new 19(b) hearing on March 24, 2015.

Arbitrator's Findings of Fact - Hearing of March 24, 2015

Petitioner testified through a Spanish-speaking interpreter.

The parties agree Petitioner sustained an accident while working for Respondent on September 12, 2013. Arb Exh 1. Petitioner testified that, two years before this accident, he held two jobs. During the day, from 8 AM to 5 PM, he worked at a window company where he cut, assembled and installed windows. He was required to lift up to 60 to 70 pounds. He performed this job for about 1 ½ years. During the same period, he worked at a restaurant from 7 PM to closing. The restaurant typically closed around midnight. He prepared food and washed dishes. He was required to lift up to 40 to 50 pounds.

Petitioner denied having any back injuries or experiencing any back or leg pain during the time he worked at the window company and restaurant. When these jobs came to an end, he worked at various offices through a temporary agency for about two months. He denied having any back injuries or experiencing any back or leg pain during this period. He then started working for Respondent.

Petitioner testified his job for Respondent consisted of cutting wood to various measurements and transporting the wood to carpenters. Essentially, he did what he was asked to do. The work was "pretty heavy." He regularly had to carry pieces of wood that were 20 feet long and 2 inches thick. He did not know how much the pieces weighed but they were heavy.

Petitioner testified his supervisor at Respondent was an individual named Francisco.

Petitioner testified that, during his tenure with Respondent, he worked 10 or 11 hours per day, Monday through Friday. He did not work on Saturdays. He regularly worked at least 50 hours per week and sometimes more. Regardless of how many hours he worked, Respondent paid him $1200 every two weeks. He was paid via check. Francisco drove the company truck to a location near his house and handed his check to him. He was always paid in this manner.

Ferron indicated that Petitioner was in a wheelchair. He deferred any gait analysis. He noted a small contusion to the left forehead, mild tenderness in the lower lumbar region, moderate edema and tenderness to the anterior aspect of the left knee, proximal tibia, moderate medial joint line tenderness in the left knee, no tenderness in the left hip and moderate edema noted to the right distal forearm over the distal radius.

Ferron ordered Norco for pain and X-rays of the following body parts: lower left leg, left hip, lumbar spine, right forearm, pelvis and thoracic spine. The lower left leg X-ray showed an oblique lateral tibial plateau fracture with 4 mm of depression at the articular margin, tibiotalar degeneration, mild patellofemoral degeneration and a moderate effusion. The left hip X-ray was negative. The lumbar spine X-rays showed levoscoliosis and multi-level spondylosis with mild chronic compression of L2 and L3. RX 6. The right forearm X-rays showed a non-displaced oblique fracture through the radial styloid and arthritic changes. The pelvis X-rays were negative, with the indication for the X-ray stating: "post fall, left hip pain today." The thoracic spine X-rays showed mild dextroscoliosis and no acute findings. PX 1.

The Emergency Room physician, Dr. Hall, indicated he went to Petitioner's room twice but never had the opportunity to examine Petitioner because, on both occasions, Petitioner "was in X-ray."

At discharge, Christopher Ferron, P.A. prescribed Motrin and instructed Petitioner to avoid bearing weight on his left leg and follow up with orthopedics the next day. PX 1.

Petitioner testified he went home after leaving the Emergency Room and later received a call from Dave Kirchmann of State Farm Insurance. Petitioner testified he asked Kirchmann whether he could undergo treatment closer to home because it would be complicated for him to travel to Elmhurst Memorial Hospital. Kirchman said "no problem." Petitioner testified he and Kirchmann then agreed on St. Anthony Hospital.

Respondent offered into evidence a Form 45 prepared by Pat Sheedy. The report is dated September 13, 2013, the day after the accident. The report reflects that Petitioner, a carpentry laborer, was injured at 1:45 PM on September 12, 2013 when he "fell from 1st floor to basement" while "laying plywood on joists" at a home that was under construction. The report also reflects injuries to the left foot and right hand. Petitioner's average weekly wage is described as "$12 x 40" and the duration of his employment is shown to be 3 to 4 weeks. RX 5.

On September 16, 2013, Petitioner saw Dr. Goldflies. The doctor noted he was seeing Petitioner for evaluation of a right wrist fracture and left tibial plateau fracture sustained on September 12th "secondary to falling off root-top [sic] at a construction worksite." He noted that Petitioner was "in severe pain" but denied paresthesia or numbness of the upper or lower extremities. He noted that Petitioner had undergone X-rays at Elmhurst Memorial and was currently taking Tylenol #3.

Dr. Goldflies indicated he examined Petitioner's right wrist and left knee. He described flexion and extension of both body parts as limited secondary to the fractures. He obtained X-rays and applied a short arm cast to Petitioner's right wrist and an immobilizer to Petitioner's left knee. He ordered CT scans of the left knee and right wrist/hand. PX 2.

On September 19, 2013, Petitioner underwent a left knee CT scan. The radiologist compared the results with the X-rays taken three days earlier. He noted that the scan "again demonstrated a comminuted fracture of the lateral tibial plateau." He indicated that the comminuted nature of the fracture made it "difficult to assess the degree of depression." He indicated the distal femur and fibula appeared to be intact. He noted a "large hemorrhagic effusion." His impression was: "severely comminuted lateral tibial plateau fracture." PX 2.

Petitioner also underwent a right wrist CT scan on September 19, 2013. The images were obtained through the cast. The radiologist noted non-displaced comminuted fractures involving the distal end of the radius and a chip fracture through the radial styloid. PX 2.

Petitioner saw Dr. Sompalli on September 20, 2013. The doctor noted a referral from Dr. Goldflies. He also noted the history of a construction site accident on September 12th. He indicated he examined Petitioner's left knee and right upper extremity. He reviewed the radiographic studies and scheduled ORIF left tibia and right radius surgery for September 24th. He also ordered a variety of pre-operative studies, including an EKG. Petitioner underwent the EKG on September 24, 2013. Because the study showed abnormalities, the surgery had to be rescheduled.

On the morning of September 24th, a nurse noted that Petitioner complained of 6/10 right wrist pain, 7/10 left tibial pain and an inability to put any pressure on his left leg. Petitioner was given Tylenol with codeine. A medical student examined Petitioner but indicated he deferred a back examination. Petitioner also saw Dr. Dahodwala for a cardiac consultation. The doctor admitted Petitioner to St. Anthony Hospital for a venous ultrasound of his lower extremity and overnight monitoring of his cardiac rhythm. A duplex sonography of both legs performed the next day did not show abnormalities. A chest CT scan showed no specific evidence of pulmonary embolism. Petitioner was discharged in the evening, with instructions to return the next morning for surgery.

On September 26, 2013, Dr. Sompalli performed the following surgical procedures: open reduction and internal fixation of the left lateral tibial plateau fractures, using plates, a right closed reduction and percutaneous screw fixation of the right distal radius fracture using screws and a repair of a left lateral meniscus tear.

On September 27, 2013, Lisa Schramm, R.N. noted that Petitioner reported "intermittent decreased sensation" of his left lower extremity. Schramm indicated she did not formally assess this complaint secondary to the bandaging.

On October 1, 2013, Petitioner was discharged from St. Anthony Hospital and transferred to the Rehabilitation Institute of Chicago [hereafter "RIC"]. At discharge, Dr. Sompalli instructed Petitioner to avoid bearing weight on his left leg for five weeks and to follow up with him on October 8, 2013.

A physician's assistant, Allison Elenbaas, PA, examined Petitioner at RIC on October 1, 2013, noting a history of the accident and subsequent treatment. Elenbaas noted that Petitioner complained of pain in his left knee, left hip and right wrist. On left hip examination, Elenbaas noted tenderness to palpation over the greater trochanter. She also noted that Petitioner's right wrist splint and left leg cast were in place. She ordered a left hip X-ray. PX 3, pp. 33-35 of 622. RX 10.

Dr. Huang evaluated Petitioner shortly after admission, noting the following: "reports he is obeying the weight bearing restrictions. Does report some left hip pain in addition to his knee and wrist pain. He reports he's had this since the accident." PX 3, p. 304 of 622.

On October 2, 2013, Lawrence Gross, P.T. noted a complaint of "global numbness distal to the [left] mid hip at night." PX 3, p. 18 of 622.

On October 2, 2013, Petitioner underwent left hip X-rays. The X-rays were negative.

On October 8, 2013, Christine Gin, R.N. noted a complaint of "L groin and upper LE into buttock rated 7/10 with exercises and during ambulation." PX 3, p. 531 of 622.

On October 9, 2013, Petitioner was fitted with a wrist brace and hinged knee immobilizer.

On October 16, 2013, Evelyn Newton, R.N. noted a complaint of 7/10 pain in the left medial hamstring insertion and minimal left groin/upper left leg pain. PX 3, p. 521 of 622. On October 17, 18 and 19, 2013, RIC nurses noted complaints of left foot and medial hamstring pain rated 8/10. PX 3, pp. 607-608 of 622.

Petitioner was transferred from RIC to Park House Nursing and Rehabilitation Center on October 21, 2013, with plans for readmission to RIC at such time that Petitioner's weight bearing restrictions were lifted. PX 3, pp. 444 and 570 of 622.

On October 22, 2013, Petitioner followed up with Dr. Sompalli. The doctor noted that Petitioner rated his pain at 5/10 and denied any paresthesia or numbness of his left leg or right upper extremity. The doctor sent Petitioner to the X-ray department for X-rays of his left tibia/fibula, pelvis and right wrist. He directed Petitioner to return in four weeks. PX 2.

Petitioner returned to Dr. Sompalli on November 19, 2013. The doctor noted that Petitioner "states that he has been having groin pain that is exacerbated when he is sitting." He

also noted that Petitioner denied any paresthesia or numbness of his lower extremities. He indicated that Petitioner presented with X-rays of the pelvis and left knee.

Dr. Sompalli described Petitioner's gait as within normal limits. He noted flexion of 0 to 100 of the left knee and flexion/extension of the right wrist from 0 to 50 degrees. With respect to the knee and wrist, he instructed Petitioner to return in four weeks. With respect to the left hip, he indicated there were "no abnormalities in imaging studies." He directed Petitioner to continue attending therapy. PX 2.

On November 23, 2013, Petitioner was readmitted to RIC for "acute inpatient rehabilitation." On that date, RIC providers listed the following as "problems" for Petitioner: arthralgia of the pelvic region and thigh, closed fracture of tibial plateau and closed fracture of radius. PX 2, PX 3, p. 613 of 622.

On November 27, 2013, Petitioner underwent a multi-planar MRI of the left hip at Northwestern Memorial Hospital. The interpreting radiologist noted: 1) no avascular necrosis, fracture or significant osteoarthritis; 2) an anterosuperior labral undersurface tear and a posterior labral detachment; 3) a Grade 1 vastus lateralis muscle origin strain; 4) moderate left and mild right facet arthropathy at L5-S1 with prominent subchondral marrow edema but no discrete fracture seen; 5) an "indeterminate 10 x 4 mm subcutaneous structure overlying the posterior lateral right femoral diaphysis posterior to the vastus lateralis muscle"; and 6) left quadrates femoris muscle edema "that can be seen in ischiofemoral impingement." The radiologist indicated that a targeted ultrasound could be performed for further evaluation of the "indeterminate" structure. PX 4, 5. There is no evidence indicating that Petitioner ever underwent this ultrasound.

Petitioner was discharged home from RIC on December 10, 2013. The following day, he began attending a "day rehab" program at RIC. On that date, Andrea Klusman, P.T. [hereafter "Klusman"], noted that Petitioner complained of left hip pain. She described the characteristics of this pain as follows: "described as pain from groin through upper hip into back bone, some tendinous pain." PX 3, p. 37 of 780. The same day, December 11, 2013, a different therapist, Sarah Snyder, P.T. [hereafter "Snyder"], noted that Petitioner "reported increased pain" in his left knee during ramp- and curb-related therapy, while attempting to increase left knee flexion. PX 3, pp. 428-429 of 780. On December 12, 2013, another therapist, Allison Wehunt, P.T., noted that Petitioner was unable to perform reciprocal stepping "due to discomfort at L posterior knee." PX 3, p. 416 of 780.

On December 13, 2013, Dr. Supanwanid of RIC conducted a "day rehab" evaluation. He noted that Petitioner complained of "pain in the back and occasionally to the L hip and knee." He also noted a complaint of foot numbness. PX 3, p. 48 of 780.

On December 17, 2013, Snyder noted that Petitioner "reported increase in L knee pain" and complained of tenderness in the posterior medial aspect of the knee. PX 3, p. 390 of 780.

On December 23, 2013, an occupational therapist noted that Petitioner complained of left hip and knee pain. PX 3, p. 665 of 780.

The following day, December 24, 2013, Petitioner underwent left knee and lumbar spine X-rays. The radiologist who interpreted the left knee films noted almost complete healing "with no change in alignment and position compared to study on 11/19/13." He indicated that only a tiny fracture line remained visible at the subarticular region of the lateral plateau. A different radiologist interpreted the lumbar spine X-rays as negative for fracture or dislocation and showing "degenerative osteoarthritis and possibly disc disease with bilateral facet arthopathy of L5-S1." PX 2.

Petitioner also saw Dr. Sompalli on December 24, 2013, with the doctor noting that Petitioner was "full weight bearing on the knee at home." The doctor recommended additional therapy. He directed Petitioner to return in five weeks with new X-rays. He noted that Petitioner had brought along an MRI disc but that the MRI was "inaccessible." PX 2.

On January 9, 2014, Petitioner saw Dr. Supanwanid of RIC for a "day therapy" evaluation. The doctor noted that Petitioner was still complaining of pain in his left hip/groin, back and left knee as well as numbness over the left lateral knee and distal leg. He also noted that Petitioner was relying on various pain medications, including Hydrocodone and Lidoderm. On lateral left leg examination, he noted patchy areas of altered sensation to light touch. After noting the previous left hip MRI results, he suggested EMG/NCV testing, indicating he would have to obtain authorization for same from Petitioner's case manager. PX 3, pp. 127-129 of 780.

Petitioner continued engaging in physical and occupational therapy thereafter. PX 4.

In a progress note dated January 23, 2014, Klusman noted that Petitioner was making progress, balance- and walking-wise, but was continuing to complain of left knee and left hip pain during exercise and functional activity. PX 3, p. 94 of 780.

On January 28, 2014, Petitioner underwent left knee and right wrist X-rays. The interpreting radiologist noted an internally fixed and healing fracture of the proximal left tibia and an internally fixed, healing fracture of the distal right radius. PX 2.

Petitioner also saw Dr. Sompalli on January 28, 2014. The doctor noted that Petitioner complained of 6/10 left knee pain but denied any paresthesia or numbness in his lower extremities. He indicated he planned to seek "work comp approval" for a left knee arthroscopy. He referred Petitioner to Dr. Chunduri for evaluation of his lower back pain and indicated that, if this pain persisted after the evaluation, Petitioner should see Dr. Domb "for evaluation of his left labral tear" [with reference to the left hip MRI]. PX 2.

Petitioner saw Dr. Chunduri on January 31, 2014. The doctor noted that Petitioner reported experiencing 8/10 knee, low back and left leg pain since falling at work on September

12, 2013. The doctor also noted that Petitioner's low back pain and left leg numbness, tingling and weakness had been "present since the injury."

On back examination, Dr. Chunduri noted paralumbar and buttocks tenderness, greater on the left, decreased extension, lateral bending and rotation, decreased ankle dorsiflexion strength, decreased medial malleolus sensation, decreased great toe dorsiflexion strength, decreased sensation in the mid dorsal foot and positive straight leg raising on the left. He diagnosed lumbago with left radiculitis. He indicated that Petitioner "was injured at work, resulting in his current symptoms." He recommended CT and MRI scans of the lumbar spine and directed Petitioner to return to him in one week. PX 2, 7.

On February 10, 2014, Petitioner underwent a lumbar spine CT scan. The interpreting radiologist noted degenerative facet disease at L4-L5 and L5-S1 with ligamentum flavum and facet joint hypertrophy along with "mild diffuse disc bulges that contribute to central canal narrowing." PX 2, 7. RX 7.

Petitioner returned to Dr. Chunduri on February 13, 2014, with the doctor noting the recent CT scan results. The doctor indicated that the CT did not show any significant nerve compression. Based on Petitioner's ongoing radicular complaints, he recommended a lumbar spine MRI and EMG of the left lower extremity. He noted that Petitioner had previously undergone a left hip MRI but that this MRI was not available. He instructed Petitioner to stay off work and to bring this MRI with him to the next visit. PX 7.

Petitioner underwent the recommended lumbar spine MRI on February 17, 2014. The radiologist described the study as "limited by motion." He noted a congenitally small spinal canal, Grade 1 spondylolisthesis of L5 on S1 with questionable bilateral L5 spondylolysis, mild to moderate diffuse disc bulging at L5-S1 "which contributes to mild bilateral foraminal stenosis and mild central canal stenosis," hypertrophic degenerative change of the facet joints, most significant at L4-L5 and L5-S1 and a small posterior disc bulge at L4-L5 "which contributes to mild central canal and bilateral foraminal stenosis." PX 7. RX 8.

On February 27, 2014, Dr. Sompalli performed a left knee arthroscopy. In his operative report, he noted an anterior cruciate ligament tear. He opined that this tear was "most likely" due to Petitioner's accident.

On March 4, 2014, Dr. Sompalli examined Petitioner's left knee and recommended physical therapy. He anticipated the need for Synvisc injections and possibly additional surgery in the future "because of [the] articular surface damage in [the] plateau secondary to the plateau fracture." He directed Petitioner to remain off work. PX 7.

On March 7, 2014, Dr. Arayan evaluated Petitioner and performed a left lower extremity EMG. He recorded a history of the work accident and subsequent care. He indicated that Petitioner was currently complaining of 9/10 pain in his left leg along with numbness and tingling in the same extremity. On examination, he noted decreased sensation to light touch in

the left lower leg compared with the right. He also noted 3-/5 left hip flexion, compared with 5/5 on the right, and an antalgic gait.

Dr. Arayan described the EMG results as abnormal, albeit "limited by patient pain." He found electrodiagnostic evidence of a left L5 and S1 lumbar spine radiculopathy. He found no electrodiagnostic evidence of a distal left lower extremity peripheral neuropathy. PX 7.

At Respondent's request, Petitioner underwent a Section 12 examination by Dr. Boone Brackett of Westgate Orthopaedics on March 10, 2014. See below for a summary of Dr. Brackett's deposition testimony.

On March 11, 2014, Dr. Supanwanid of RIC evaluated Petitioner and noted that "day therapy" had been on hold since late January due to Petitioner's left knee pain and surgery. He also noted that "day therapy" was being reinstituted. He indicated that Petitioner complained of a little pain in his left knee, pain in his hip, back and left leg and "constant numbness from the left hip down to the toes." He described Petitioner's gait as antalgic. He indicated Petitioner used in a cane in his right hand while walking. He noted that Petitioner had recently undergone an EMG and was seeing Dr. Chunduri for his back and hip issues. He referred Petitioner to Dr. Stanos at a chronic pain center for medication management of multiple pain complaints. PX 3, pp. 123-125 of 780.

Petitioner returned to Dr. Chunduri on March 17, 2014. The doctor noted that Petitioner complained of 8/10 pain in his low back, radiating down his left leg, and in his left hip, radiating to his groin. He also noted that Petitioner described his left leg as "essentially constantly numb." He described Petitioner's gait as antalgic. His lumbar spine examination findings were unchanged. He noted positive left hip tenderness to palpation and with extension, flexion and rotation of the left hip. He recommended an epidural injection and indicated he needed to gain access to the left hip MRI. He directed Petitioner to remain off work. PX 7.

In a progress note dated March 20, 2014, Klusman noted that Petitioner was making "slow and steady progress" but had been "limited this interim due to L knee, L hip and low back pain." PX 3, p. 58 of 780.

Petitioner returned to Dr. Sompalli on March 24, 2014. On that date, the doctor noted that Petitioner was attending therapy only twice a week when he had recommended three sessions per week. He also noted that some of the therapy was directed to the wrist even though Petitioner had already reached maximum medical improvement with respect to the wrist. He recommended that Petitioner participate in knee therapy three times per week and remain off work. He also recommended a patellar tendon strap. PX 7.

On April 17, 2014, Dr. Chunduri administered a left L5-S1 epidural steroid injection. PX 7.

On April 21, 2014, Dr. Sompalli noted that Petitioner reported some left knee improvement and was seeing Dr. Chunduri for his back. He recommended a home exercise program and released Petitioner to seated work with respect to his knee. He directed Petitioner to return in six weeks. PX 7.

On April 24, 2014, Dr. Chunduri noted that Petitioner reported no improvement following the injection. He referred Petitioner to a spine surgeon and directed him to stay off work. PX 7.

On May 2, 2014, Petitioner saw Dr. Dixon, a neurosurgeon affiliated with Illinois Orthopedic Network. Dr. Dixon obtained a history of the work accident and subsequent treatment. He noted he had been provided with the lumbar spine MRI report but not the scan itself. He also noted Petitioner was still undergoing knee-related care. On examination, he noted normal strength in both legs except for 3/5 weakness of the quadriceps and hamstring on the left "due to knee instability" and 4/5 strength in the left tibialis anterior and EHL. After discussing various spine-related treatment options, he directed Petitioner to return in one month and to stay off work in the interim. At a subsequent visit, on May 30, 2014, Dr. Dixon reviewed the lumbar spine MRI scan and EMG. He directed Petitioner to return in one month, pending intervening left knee care. He instructed Petitioner to remain off work in the interim. PX 7.

On June 2, 2014, Dr. Sompalli recommended a series of Supartz injections for Petitioner's left knee. He administered several of these injections thereafter, with the last injection taking place on July 21, 2014. He kept Petitioner off work during this period. PX 7.

Petitioner returned to Dr. Dixon on August 29, 2014. On re-examination, the doctor noted normal strength in both legs except for 3/5 weakness of the quadriceps and hamstring on the left "due to knee instability" and 4/5 strength in the left tibialis anterior and EHL. Dr. Dixon discussed various treatment options with Petitioner and indicated Petitioner planned to consult with Dr. Chunduri again concerning another injection. He directed Petitioner to return to him in one month and to stay off work in the interim.

Dr. Dixon indicated he disagreed with Dr. Brackett's assertion that Petitioner was magnifying his symptoms. He indicated that Dr. Brackett made this assertion "without review of the MRI films of the lumbar spine or any mention of the EMG findings."

Dr. Dixon opined that Petitioner "is suffering from radiculopathy due to spondylolisthesis and stenosis at L5-S1 and L4-L5, respectively." He further opined that these conditions were "almost certainly exacerbated to the point of becoming symptomatic by his work-related fall." He indicated Petitioner required additional spine-related care in order to be able to return to work. PX 7.

On September 18, 2014, Dr. Chunduri administered another left L5-S1 epidural steroid injection. He directed Petitioner to remain off work. PX 7. A week later, Dr. Chunduri noted

that Petitioner reported some improvement but was still complaining of numbness and tingling in his left leg. He recommended that Petitioner follow up with Dr. Dixon and remain off work. PX 7.

Dr. Sompalli testified by way of evidence deposition on September 18, 2014. PX 12. He testified he specializes in orthopedic trauma. He does not treat spinal conditions. PX 12 at 5.

Dr. Sompalli testified he first treated Petitioner in September or October 2013, at the referral of Dr. Goldflies. Petitioner provided a history of slipping and falling at a wet construction site. After examining Petitioner and reviewing the radiographic studies, he diagnosed a Schatzker Type 2 tibial plateau fracture and a distal radius fracture. PX 12 at 6. While he would typically not address a distal radius fracture via surgery, he did so in Petitioner's case in order to allow early right wrist motion, given that Petitioner experienced fractures in opposite extremities, i.e., the right upper extremity and left lower extremity. PX 12 at 7, 15. If he had merely casted Petitioner's right wrist, Petitioner's mobility would have been delayed. PX 12 at 15. Petitioner had depression and gapping in his tibial plateau fracture, which required insertion of a plate and screws. Such a fracture causes pain, sometimes down the leg, along with swelling and burning. The burning sensation could result from peroneal nerve involvement. PX 12 at 10.

Dr. Sompalli testified he last saw Petitioner in August 2014, at which point Petitioner still had left knee pain. It was his impression Petitioner was developing traumatic arthritis, "which is what happens" as a consequence of a tibial plateau fracture. He decided to administer a series of Supartz injections to address the arthritis. PX 12 at 10. Petitioner also exhibited some valgus instability of the left knee. PX 12 at 14. During the left knee arthroscopy, he noted articular damage, i.e., "multiple cracks" in the tibial cartilage secondary to the fracture. PX 12 at 14, 40. In the future, Petitioner might need to have the plate and other surgical hardware removed. PX 12 at 16-17, 30. In contrast, Petitioner's right wrist is doing very well. PX 12 at 16. Petitioner also has a complaint of low back pain radiating down his leg but he does not treat back conditions. PX 12 at 16.

Dr. Sompalli opined that the costs associated with the knee and wrist care and surgery were reasonable, necessary and related to the work accident. PX 12 at 17.

Under cross-examination, Dr. Sompalli testified that, as of August 2014, Petitioner was at the end of the road, treatment-wise, with respect to his left knee and right wrist. Petitioner has damaged cartilage in his knee. The type of fracture Petitioner sustained tends to result in chronic pain. PX 12 at 22. A very low percentage of patients with damaged cartilage go on to require knee replacement surgery. PX 12 at 20. In Petitioner's case, serial knee X-rays have shown the alignment to be good. PX 12 at 22. When he last examined Petitioner, Petitioner still had tenderness around the joint line but no swelling or atrophy. PX 12 at 23-25. When you administer Supartz injections, you administer a series of five and then wait six to eight weeks to determine whether there is improvement. PX 12 at 24. With respect to the knee, Petitioner does not require a brace or gait assist. PX 12 at 26. Petitioner does not require restrictions

with respect to his wrist but, with respect to his left knee, is restricted from lifting over 10 pounds, due to his pain. PX 12 at 29. He can only address restrictions insofar as the wrist and knee are concerned. PX 12 at 30. He is not able to state whether Petitioner will require more surgery for his traumatic arthritis. PX 12 at 31. The initial left leg surgery was open, not arthroscopic. PX 12 at 31. When you operate on the type of leg fracture Petitioner had, the one knee structure you can easily visualize is the lateral meniscus. He does not recall whether he was able to visualize the anterior cruciate ligament. PX 12 at 31. From a clinical perspective, he did not have a reason to look for an anterior cruciate ligament tear, since Petitioner did not have a positive Lachman's pre-operatively. PX 12 at 32. After the first surgery, Petitioner could not undergo a left knee MRI, due to the plate, so he had to perform a second, diagnostic surgery. He provisionally diagnosed a medial meniscal tear but it turned out that it was the anterior cruciate ligament that was torn. PX 12 at 33. He cannot say whether that tear stemmed from the accident because he cannot recall looking at the anterior cruciate ligament during the first surgery. PX 12 at 33. He prescribed therapy three times weekly for a period of weeks. He cannot recall prescribing "day therapy" for Petitioner. Whether such a regimen was appropriate may depend on whether the therapy also involved the back. PX 12 at 35. With respect to the left knee and wrist, Petitioner did not need eight hours of therapy per day. PX 12 at 35. As of March 24, 2014, he found the wrist to be at maximum medical improvement. PX 12 at 36. There are two schools of thought, operative and non-operative, when it comes to treating tibial plateau fractures. He is in the operative "camp" based on his training. PX 12 at 39. In his opinion, surgical fixation results in a better outcome with respect to the type of split, depressed fracture Petitioner had. PX 12 at 39. Petitioner speaks "very broken, very little" English, so he always had an interpreter available when he saw Petitioner. PX 12 at 39.

On September 25, 2014, Petitioner returned to Dr. Chunduri, with the doctor noting ongoing complaints of 6/10 lower back pain and numbness/tingling down the left leg to the big toe. On examination, Dr. Chunduri noted positive straight leg raising on the left at 45 degrees and decreased sensation in the left leg compared with the right. He recommended that Petitioner follow up with Dr. Dixon due to his failure to respond favorably to the recent injection. He directed Petitioner to remain off work. PX 7.

On September 27, 2014, Petitioner returned to Dr. Sompalli, with the doctor noting a complaint of 5/10 left knee pain, associated with flexion/extension and walking. On left knee examination, the doctor noted full extension, flexion to 100, no effusion, mild joint line tenderness, negative valgus and varus stress testing and intact sensation in the left lower extremity. Dr. Sompalli indicated that he told Petitioner "there is not much else to be done for his knee." He found Petitioner to be at maximum medical improvement with respect to the knee, noting that the knee might remain painful, "as is what happens with tibial plateau fractures." He did not believe that further therapy would be helpful. PX 7. RX 9.

Dr. Dixon testified by way of evidence deposition on October 21, 2014. PX 11. Dr. Dixon testified he obtained Illinois licensure in 2003. PX 11 at 3. He is a neurosurgeon. PX 11 at 5.

Dr. Dixon did not independently recall Petitioner and thus relied on his notes. PX 11 at 5-6. Dr. Chunduri, a pain physician, referred Petitioner to him for consideration of the appropriateness of back surgery. PX 11 at 6-7. He initially examined Petitioner on May 2, 2014, at which time Petitioner gave a history of the accident and primarily complained of back and left leg pain. PX 11 at 7-8. Based on his examination, he concluded that Petitioner was suffering from a radiculopathy on the left side "which included pain derangements of sensation as well as weakness." PX 11 at 9. At a subsequent visit, on May 30, 2014, he reviewed Petitioner's lumbar spine MRI scan. PX 11 at 9. He interpreted the MRI as showing a broad-based disc protrusion with central canal and lateral recess stenosis with some nerve root compression at L4-L5 and Grade 1 spondylolisthesis at L5-S1. PX 11 at 10. Both the L4-L5 disc and the L5-S1 disc would have been contributing to Petitioner's symptoms. PX 11 at 10.

Dr. Dixon testified his notes show Petitioner fell on September 12, 2013, while laying tile. PX 11 at 11. Petitioner's spondylolisthesis and stenosis pre-existed this accident. In his opinion, Petitioner's spondylolisthesis was congenital. More likely than not, the spondylolisthesis became symptomatic when Petitioner fell. PX 11 at 12. Petitioner's pre-existing conditions made him more vulnerable to having significant and refractory pain due to the fall. PX 11 at 12. The lower extremity weakness he detected on examination was consistent with the EMG and MRI. PX 11 at 13. He discussed various treatment options with Petitioner but "tabled" the idea of back surgery because of the left knee surgery. PX 11 at 14. He last saw Petitioner in August 2014. At that time, he read Dr. Brackett's report. He disagrees with Dr. Brackett's opinion that Petitioner is magnifying his symptoms, since Dr. Brackett voiced this opinion without reviewing the EMG or lumbar spine MRI. PX 11 at 16. He also disagrees with Dr. Brackett's opinion that Petitioner does not need additional back care in order to be able to return to work. PX 11 at 16. In his view, there is a significant possibility that Petitioner will need a decompressive laminectomy with interbody instrumented fusion. PX 11 at 17. He regularly performs this surgery. He performs between three and five surgeries per week. PX 11 at 18. He believes Petitioner was unable to return to work as of his last visit in August 2014, due to his demonstrable neurologic weakness and severe pain. PX 11 at 19.

Under cross-examination, Dr. Dixon could not recall whether Petitioner had difficulty communicating in English. He relies on interpreters in such cases. PX 11 at 19-20. He has not seen Petitioner for two months and does not know his current condition. He cannot speak to whether Petitioner is currently able to work. PX 11 at 20. Spondylolisthesis is progressive but can improve with conservative care. PX 11 at 21. When he examined Petitioner, he consistently noted 3/5 quadriceps and hamstring weakness on the left and 4/5 strength in the left tibialis anterior and EHL. PX 11 at 22. He attributes these findings to Petitioner's left knee condition, based on the EMG results, because the weakness Petitioner exhibited is not referable to either the L5 or S1 nerve root. PX 11 at 22. He did not perform an orthopedic knee examination. PX 11 at 23. The weakness does not necessarily have to stem from instability. It can be pain-related. PX 11 at 24. He does not know specifically how Petitioner fell but Petitioner told him he did not have pain before he fell. He does not know when Petitioner first reported back pain after the fall. PX 11 at 25. He takes Petitioner at his word in terms of his lack of symptoms before the accident. PX 11 at 26. Petitioner may have been experiencing left

leg numbness but he did not note this. PX 11 at 27. When he examined Petitioner, he did not note sensory deficits. PX 11 at 27. If Petitioner is experiencing stocking-glove numbness of his entire leg, that would typically be associated with a neuropathy but the EMG excluded this. PX 11 at 28. The EMG does not provide a physiological basis for a complaint of numbness in the entire left leg. PX 11 at 29. He does not agree with Dr. Brackett's conclusion that Petitioner was magnifying his symptoms. PX 11 at 30. A patient who has spondylolisthesis would typically experience pain when standing or walking but he could also experience severe pain while sitting or lying flat. PX 11 at 32. Over time, Petitioner could have become symptomatic absent trauma. PX 11 at 36.

On December 5, 2014, Petitioner filed a 19(b) petition and a petition for penalties and fees. Arb Exh 2.

Respondent's Section 12 examiner, Dr. Brackett, testified by way of evidence deposition on December 8, 2014. RX 4. Dr. Brackett testified he has been a medical doctor since 1961. He obtained board certification in orthopedic surgery in 1969 and board certification in neurological orthopedic surgery in 1982. RX 4 at 4-5.

Dr. Brackett testified he regularly treats individuals with orthopedic injuries involving the hands, arms, knees and spine. He was on his own until 2013, when he sold his practice. He stopped performing spine surgery at that point, due to the cost of liability insurance. After he sold his practice, he began working for Perry Memorial Hospital and "Locum Tenens," a company that provides substitutes for physicians who are ill or on vacation. In these capacities, he continues to perform non-spine surgery. RX 4 at 5-7.

Dr. Brackett testified he examined Petitioner once, on March 10, 2014. RX 4 at 7. He prepared a report in connection with his examination. After receiving additional information, he later prepared two supplemental reports. RX 4 at 8.

Dr. Brackett testified he has an independent recollection of examining Petitioner but needed to refer to his reports for specific details. RX 4 at 8.

Dr. Brackett testified that, on March 10, 2014, Petitioner presented with an interpreter who "did a very good job." RX 4 at 9-10. Via the interpreter, Petitioner indicated he was working on the first floor of a house immediately before his accident. It had rained. The floor was wet and he had mud on his shoes. He slipped and fell through a hole in a stairwell, initially landing with all of his weight on his left leg and then breaking his fall with his right hand. RX 4 at 10.

Dr. Brackett testified that Petitioner denied having any problems with his right hand or left leg before the accident. Petitioner complained of pain in his front left pelvic area, his back, his right wrist and down his left leg. RX 4 at 11. He also complained of numbness in his entire left leg, from the iliac crest to the sole of his left foot. RX 4 at 11. When Petitioner walked, he leaned quite heavily on a cane, which he held in his right hand. Petitioner used his left hand to

support his left knee. Petitioner indicated he used his left hand to do this because of right wrist pain. RX 4 at 11.

Dr. Brackett opined that Petitioner's complaint of left leg numbness was either factitious or indicative of either "some bizarre neurological disease." Each area of a leg is enervated by a particular nerve root. In order for an individual's entire leg to be numb he would have to have global involvement of the nerve roots, "which is just plainly impossible to have without concomitant wasting of muscle." RX 4 at 12.

Dr. Brackett testified that, during his examination, Petitioner was alert and cooperative. Petitioner did not appear to be in any acute distress. RX 4 at 13. On left knee examination, the doctor noted three healed arthroscopic portals and a healed lateral scar. Petitioner had equal and normal measurements in both calves, knees and thighs. RX 4 at 13. Petitioner's right knee range of motion was normal. His left knee range of motion was "not as complete" but he could flex to about 105 degrees. The left knee was stable to stress testing. RX 4 at 14. On straight leg raising to 90 to 100 degrees, Petitioner did not complain of radiating pain but did complain of back pain. This was "not normal." Straight leg raising should duplicate sciatic radiation, if present, but Petitioner did not voice radicular complaints. RX 4 at 15. Petitioner voiced no back complaints during "Tisch" testing. This was an inconsistent finding. RX 4 at 16. FABRE testing of the hip joint was negative, although Petitioner complained of slight pain in both hips during this testing. RX 4 at 17. Petitioner's ankle and knee reflexes were symmetrical. RX 4 at 17.

Dr. Brackett acknowledged he did not have access to any previous radiographic studies when he examined Petitioner. RX 4 at 19-20. As part of his examination, he obtained X-rays of Petitioner's pelvis, right wrist, lumbar spine and left knee. The pelvis X-rays were not remarkable. The right wrist X-rays showed a healed styloid fracture with two parallel screws. RX 4 at 19. The lumbar spine X-rays showed some arthritic change in the lower two lumbar areas, with a very slight loss of lumbar curve, and Grade 1 to Grade 2 spondylolisthesis, or vertebrae slippage, at the L5-S1 interspace. RX 4 at 19. The left knee X-rays showed the presence of a reverse tibial plate and five screws, a "distal healed lateral plateau fracture" and adequate joint space. RX 4 at 18.

Dr. Brackett described Petitioner as exhibiting a "very exaggerated type of limp." Petitioner's gait was "factitial, meaning fraudulent to some degree." RX 4 at 20.

Dr. Brackett testified that at a later time, prior to his supplemental report of June 2, 2014, he received the initial X-ray films from Elmhurst Memorial Hospital. The left leg X-rays showed "very slight skiving," or shaving off, of the subchondral portion of the lateral portion of the lateral tibial plateau. They also showed a "slight depression" of the lateral tibial plateau. This depression was not so large as to "demand" open reduction/internal fixation. Rather, you "could argue about whether" fixation should be performed. This "could go either way." Surgical fixation was not the wrong thing to do. RX 4 at 21. The right wrist X-rays showed a radial styloid fracture which was very minimally displaced. Dr. Brackett testified that, during his

47 years in practice, he always casted and never pinned such fractures. While he would not have operated on Petitioner's right wrist, he did not fault Petitioner's surgeon for doing so. "That's certainly something that two people could disagree on." RX 4 at 22. The hip X-rays looked good. There was no obvious loss of joint cartilage. RX 4 at 22. The lumbar spine X-rays showed Grade 1 spondylolisthesis and some degenerative changes. RX 4 at 22-23.

Dr. Brackett testified he reviewed Dr. Sompalli's operative reports but did not review any of Petitioner's rehabilitation records. RX 4 at 23.

Based on his examination, X-ray review and experience, Dr. Brackett opined that, as of June 2, 2014, Petitioner did not require any additional right wrist care. RX 4 at 24.

Dr. Brackett acknowledged he examined Petitioner only a couple of weeks after Dr. Sompalli operated on Petitioner's left knee. During that operation, Dr. Sompalli found a "ball valve type of finding on an anterior cruciate ligament," meaning that, when the ligament avulsed from the femur, it rolled up into a ball and could have led Dr. Sompalli to believe he was dealing with a medial semilunar cartilage tear or a meniscal tear. RX 4 at 25. Dr. Brackett opined that, during the first left leg surgery, it would have been difficult for Dr. Sompalli to evaluate the medial semilunar cartilage through the lateral joint. On the other hand, if Petitioner indeed had a torn anterior cruciate ligament at the time of that surgery, that tear would have been "not so difficult to evaluate." RX 4 at 25-26.

Dr. Brackett opined that he found no indication, either via symptoms or his examination, of any condition of ill-being in Petitioner's left hip. RX 4 at 27.

Under cross-examination, Dr. Brackett testified he no longer practices out of the Westgate Orthopedics office. He typically uses that office only for examinations and depositions. RX 4 at 32-33. He no longer has any ownership interest in Westgate Orthopedics. RX 4 at 33. At the present time, he writes about 15 to 20 IME reports each year and gives about 15 depositions each year. RX 4 at 33. Not all of those IMEs and depositions are for defendants but most of them are. RX 4 at 34. He has performed the surgeries Dr. Sompalli performed "countless times," with the exception that he might have operated on only one radial styloid fracture. He typically casted such fractures. RX 4 at 34. He agrees that the conditions Dr. Sompalli treated via surgery were caused by the work accident of September 12, 2013. RX 4 at 34. He agrees that these conditions would have residual effects for some time. RX 4 at 34-35. The wrist fracture would have residual effects for a maximum of six weeks and the knee condition would have effects for "maybe three months." RX 4 at 35. Dr. Brackett acknowledged he did not read Dr. Sompalli's or Dr. Dixon's depositions. What he knows of these doctors' opinions is based on his review of their reports and his review of the initial Emergency Room X-rays and the X-rays he took on his own. RX 4 at 35-36.

Petitioner testified he returned to Dr. Dixon on March 23, 2015, the day before the rehearing. Dr. Dixon discussed lumbar spine surgery with him. [In his note of March 23, 2015, Dr. Dixon indicated that Petitioner's low back and left leg remained symptomatic despite the

intervening injections. He went on to state that Petitioner "continues to have numbness and pain in the right leg including the toes." His examination findings were unchanged. He recommended a L4-L5/L5-S1 decompression and interbody fusion with instrumentation. He instructed Petitioner to remain off work. PX 7.] Petitioner testified he is scheduled to return to Dr. Dixon on April 20, 2015. He wants to undergo the recommended lumbar spine surgery because of his pain and numbness. Dr. Dixon is keeping him off work pending surgery.

Petitioner clarified he currently has two dependent children, both daughters. One of those daughters is 21 years old but she is disabled due to a head injury. The other is 17 years old.

Under cross-examination, Petitioner testified he has experienced numbness in his entire left leg since the accident. The numbness extends from his back down to his toes. He experiences this numbness about 90 to 95% of the time. When he returned to Dr. Dixon the day before the rehearing, he complained to the doctor of left leg numbness. Dr. Dixon touched his leg. In his opinion, Dr. Dixon's examination was more thorough than Dr. Brackett's. He has always felt that Dr. Brackett's examination was "very superficial." Dr. Brackett stuck needles in both of his legs. Dr. Dixon also stuck needles in his legs but was more focused on his back. Dr. Brackett's physical examination lasted 40 minutes but he was in the doctor's office for an hour.

Over objection, Petitioner testified he came to the United States in August 2004. His wife and children continue to live in Mexico. They have always lived there. Before he worked at the restaurant, he worked through temporary agencies for three years and also worked as a taco maker. Before that, he worked at the airport in Mexico City. When he lived in Mexico, he also worked as a taco maker for six years. He is now 48 years old.

Petitioner testified he does not recall exactly when he began working for Respondent but he is sure he worked there for three or four months, and not just a few weeks, before the accident. He remembers getting a call from David Kirchmann of State Farm after the accident but he does not recall being asked about the duration of his employment. He is unable to recall much of his conversation with Mr. Kirchmann because he was in a lot of pain when they spoke. He was also very concerned about whether/when he would be able to return to work because he needed to be able to pay for his disabled daughter's medication. He told Mr. Kirchmann he was worried about this.

Petitioner acknowledged receiving checks from State Farm until State Farm suspended payment. [A letter in PX 7 reflects that Respondent discontinued the payment of temporary total disability benefits on June 20, 2014, based on Dr. Brackett's examination.]

Petitioner testified that Pat Sheedy did not hire him to work for Respondent. It was Francisco who took him to Respondent. He always earned $1200 every two weeks, regardless of how many hours he worked. Respondent did not ask him to complete any tax forms. It was Francisco who gave him his checks. The checks did not have stubs attached to them. During

the time he worked for Respondent, he did not add up his earnings. Respondent never told him he would be earning $12 per hour.

Petitioner acknowledged he did not file income tax returns. Over objection, he acknowledged he did not have a legal Social Security number at the time of the accident. He was born on August 31, 1965.

Petitioner testified the accident occurred when he slipped and fell through an opening over an area where stairs were going to be built. He fell approximately 12 to 14 feet. He recalled testifying at a previous hearing, in January, but he did not recall testifying he fell 9 to 10 feet. He recalls telling the arbitrator at that hearing that he fell from a height that was a little higher than the ceiling of the hearing room. He does not recall telling anyone he fell 9 feet. He does not recall telling Emergency Room personnel how far he fell. Right now he would estimate he fell 12 to 14 feet. He is sure he fell from a height a little higher than the ceiling of the hearing room. He never measured the distance because his job did not require him to take such measurements. He never said he fell head first. He said he turned in the air, while falling, in order to land in a standing position. He felt he was going to land on his head but he was able to turn and thus land in a standing position. He did not land correctly, however. He landed on gravel, with most of his weight on his left leg, and then "sprang" to the right. He experienced an immediate onset of pain in his lower back and pain and numbness in his left leg. At the Emergency Room, he was experiencing severe lower back pain and numbness in his entire left leg. Before the accident, he never experienced any lower back pain or even achiness. Two years before the accident, he regularly worked at least twelve hours per day and his back never bothered him. He always complained of left leg numbness to Dr. Dixon. He also complained of this to the therapists at RIC. He further complained of groin pain. He still has this pain. He uses a cane. Dr. Sompalli prescribed this. Apart from Dr. Sompalli's recommendation, he uses the cane because he experiences left knee and groin pain when he walks a lot. He would like not to have to rely on the cane. He was in a wheelchair before he graduated to a cane. Dr. Sompalli never told him to stop using a cane. He received the cane the last day he was at RIC. Dr. Sompalli released him to work but Drs. Chunduri and Dixon have told him to stay off work. Because of his knee complaints, he avoids stairs and tries not to walk much.

On redirect, Petitioner testified he complained to Dr. Dixon of left leg numbness on March 23, 2015. If Dr. Dixon wrote down that he complained of his right leg, that is a mistake. It is his left leg that is the problem. When he underwent therapy, he would complain about certain exercises. He asked to undergo testing. He has not undergone any treatment or surgery for his groin complaints. He does not speak English. If an interpreter was available, he communicated through that individual. No interpreter was available at the Emergency Room but a nurse who knew a little Spanish did try to talk with him. At RIC, there were two occasions on which an interpreter was not available. He wants to undergo the recommended back surgery because he is in pain.

Respondent did not call any witnesses.

Arbitrator's Credibility Assessment

Petitioner's testimony concerning his pre-accident activity level and the mechanics of the accident was detailed and highly credible. The voluminous RIC records support Petitioner's testimony that he complained of left leg, hip and groin numbness and that he had difficulty performing various exercises during therapy.

Respondent's examiner, Dr. Brackett, described Petitioner's gait and complaints as exaggerated, while readily acknowledging he saw Petitioner in the early post-operative phase, only two weeks after the left knee arthroscopy. Drs. Sompalli, Chunduri and Dixon did not note any symptom magnification. The numerous therapists who saw Petitioner at RIC did not note malingering or lack of effort. Petitioner did not come across as a fabricator at the hearing. Rather, he presented as an individual who is understandably concerned about his injuries and who is willing to undergo back surgery in an effort to get better.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between his undisputed work accident and his multiple claimed current conditions of ill-being?

The Arbitrator finds that Petitioner established a causal connection between his undisputed work fall and his various claimed current conditions of ill-being, namely his left leg/knee, right wrist, hip/groin and lower back conditions. The Arbitrator further finds that Petitioner established causation with respect to the treatment rendered to date, including but not limited to the left knee arthroscopy of February 27, 2014, and the need for future care (see below).

In making the foregoing findings, the Arbitrator relies in part on Petitioner's testimony as to his ability to perform physically strenuous duties prior to the accident, his denial of any pre-accident left leg, back or right wrist complaints and the lack of evidence of any new, post-accident trauma. The Arbitrator also relies in part on Petitioner's detailed account of his fall and landing. In the Arbitrator's view, it matters not that Petitioner might have fallen a distance of 9 or 10 feet versus 12 feet. What is significant is that Petitioner fell from a height, contorting himself so as to land on his feet, landed with most of his weight on his left foot and leg and then rebounded to the right. The force of the fall was sufficient to cause a significant, splintered fracture of the tibial plateau along with a lateral meniscal tear and a distal radius fracture of the right wrist. From the outset, Petitioner voiced other complaints, relative to his left hip and lower back, but these complaints were overshadowed by the other, immediately noticeable fractures, which required emergent care. It makes sense to the Arbitrator that the left hip and lower back complaints resurfaced at such time that Petitioner began bearing weight, increasing his activity level and performing therapeutic exercises. While left hip X-rays did not show any fracture, the left hip MRI, ultimately performed on November 27, 2013, showed significant pathology, including a labral tear, with the radiologist recommending an ultrasound that was apparently never performed. Dr. Chunduri twice expressed a desire to

review the left hip MRI but it appears he never did so. The left hip cannot logically be excluded as a cause of Petitioner's ongoing complaints.

In finding causation as to the lower back, the Arbitrator also relies on Dr. Dixon's testimony that the fall caused Petitioner's congenital pars defect/spondylolisthesis to become symptomatic. Overall, the Arbitrator found Dr. Dixon more persuasive than Respondent's examiner, Dr. Brackett. Dr. Brackett saw Petitioner on one occasion, did not review the EMG or MRI scans and admitted that the vast majority of the medical-legal consulting he performs is for defendants.

In finding causation as to the need for the left knee arthroscopy of February 27, 2014, the Arbitrator relies in part on Petitioner's credible testimony concerning his pre-accident activity level and the manner in which he landed on his left leg. The Arbitrator also relies on the RIC therapy notes, which document ongoing left knee complaints, and Dr. Sompalli's testimony. At his deposition, Dr. Sompalli explained that, following the initial left leg surgery, he could not explore the etiology of Petitioner's persistent left knee complaints via MRI, due to the plate, and thus was compelled to perform a diagnostic procedure, i.e., an arthroscopy. He expected to find a medial meniscus tear during that procedure but instead found an anterior cruciate ligament tear. He could not directly attribute this tear to the work accident, since he could not recall looking for such a tear during the first surgery, but there is no evidence suggesting Petitioner was having problems with his left knee before the accident. The Arbitrator also notes that, under cross-examination, Dr. Brackett conceded that the conditions Dr. Sompalli addressed via surgery were caused by the work accident. RX 4 at 34.

Much has been made of Petitioner's complaint of numbness in his left leg, hip and groin. While the physician's assistant who evaluated Petitioner at the Emergency Room indicated Petitioner denied numbness in his extremities, a therapist recorded a complaint of intermittent left leg numbness only two weeks after the accident. She indicated this complaint could not be fully addressed due to Petitioner's post-operative bandaging. On October 2, 2013, a different therapist noted a complaint of distal left hip numbness, especially at night. These entries support Petitioner's testimony that he tried to alert his providers to the numbness, despite some communication difficulties. Dr. Brackett described Petitioner's complaint of numbness as "factitious" but there is no evidence indicating the doctor ever reviewed the RIC records, the EMG results or the lumbar spine MRI. Dr. Brackett testified he found "no indication" of a left hip condition on examination (RX 4 at 27) but the Arbitrator finds this testimony unpersuasive since there is no evidence Dr. Brackett's examination was informed by the left hip MRI. Dr. Brackett readily admitted he reviewed only X-rays. As stated above, it appears to the Arbitrator that no hip specialist has attempted to correlate Petitioner's complaints with the positive left hip MRI. More than a year ago, Dr. Sompalli noted that this MRI showed a labral tear and recommended Petitioner see Dr. Domb if he remained symptomatic after seeing Dr. Chunduri. Petitioner clearly remains symptomatic and apparently has never seen Dr. Domb.

What is Petitioner's average weekly wage?

At the hearing, Petitioner claimed an average weekly wage of $600 while Respondent claimed $480. Arb Exh 1. Neither party offered any time cards, paychecks or payroll records into evidence.

Petitioner testified he always received his checks from his supervisor, Francisco. Francisco would drive a company vehicle to a location near his home and personally deliver his check to him. Petitioner testified he received a check every two weeks. He also testified that, throughout his three- or four-month tenure with Respondent, he received $1200 every two weeks, regardless of how many hours he worked. He indicated the checks lacked any accompanying stubs or explanatory information.

Respondent did not call any witness to rebut Petitioner's testimony concerning his earnings. The only wage-related evidence Respondent offered was a Form 45 (authored by Patrick Sheedy) dated September 13, 2013 reflecting that Petitioner was hired "3-4 wks" earlier and earned "$12 x 40." RX 5. Under cross-examination, Petitioner denied being hired by Sheedy and indicated it was Francisco who put him in touch with Respondent and interacted with him post-hiring. Petitioner also denied being told he would be paid $12 per hour.

Petitioner's testimony concerning the duration of his employment, the method by which he was paid and the fixed amount he received every two weeks was detailed and credible. Petitioner provided a rational explanation for his failure to produce any checks – namely, that the checks he received lacked stubs or any other tear-off information he could have retained. Petitioner's testimony that he typically worked about 50 hours per week is echoed in the records from RIC. PX 3, p. 38 of 780. The Arbitrator relies on Petitioner's credible testimony in finding his average weekly wage to be $600.

Is Petitioner entitled to temporary total disability benefits?

At the hearing, Petitioner claimed he was temporarily totally disabled from September 13, 2013 through March 24, 2015 (the date of rehearing) while Respondent claimed he was temporarily totally disabled from September 13, 2013 through March 10, 2014 (the date of Dr. Brackett's Section 12 examination). Arb Exh 1.

The Arbitrator has previously found in Petitioner's favor on the issue of causation. The Arbitrator concludes that Petitioner's causally related lower back and hip/groin conditions remain unstable and that he has not reached maximum medical improvement. The Arbitrator also notes that Dr. Dixon did not release Petitioner to any form of employment on August 29, 2014 or March 23, 2015 and that Dr. Chunduri instructed Petitioner to remain off work on September 25, 2014. PX 7. In reliance on Interstate Scaffolding, Inc. v. IWCC, 236 Ill.2d 132 (2010), the Arbitrator finds that Petitioner was temporarily totally disabled from September 13, 2013 (the day after the accident) through March 24, 2015 (the date of the 19(b) rehearing), a period of 79 5/7 weeks, with Respondent receiving credit for the temporary total disability benefits it paid prior to March 25, 2015. Arb Exh 1. Having previously found Petitioner's

average weekly wage to be $600, the Arbitrator awards temporary total disability benefits at the rate of $400 per week.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims the following outstanding medical bills:

Illinois Medi-Car (PX 6)		
11/23/13	$	63.00
12/10/13	$	51.00
Illinois Orthopedic Network (PX 7)	$	3,223.02
Archer Open MRI (PX 9)		
7/30/14, left knee X-ray	$	185.00
Metro Anesthesia Consultant (PX 10)		
9/18/14 (epidural steroid injection)	$	2,332.00
TOTAL:	$	5,854.02

The Arbitrator awards the two Medi-Car bills, subject to the fee schedule, noting these bills relate to transportation provided to Petitioner prior to Dr. Brackett's Section 12 examination, during the time Petitioner was non weight bearing and undergoing long-term therapy at RIC.

The remaining bills relate to post-IME treatment of the disputed lower back and left knee conditions. The Arbitrator awards these bills, subject to the fee schedule, having already found that Petitioner established causation as to those conditions and as to the need for treatment of those conditions.

Is Petitioner entitled to prospective care?

Based on the foregoing findings as to causation and instability of Petitioner's lower back and hip/groin conditions, the Arbitrator finds that Petitioner is entitled to prospective care as deemed necessary for those conditions, including but not limited to the left hip consultation with Dr. Domb recommended by Dr. Sompalli on January 28, 2014 and the lumbar spine surgery recommended by Dr. Dixon on March 23, 2015.

Is Respondent liable for penalties and fees?

Respondent paid temporary total disability benefits for a significant period (Arb Exh 1), apparently suspending same in June 2014, based on Dr. Brackett's opinions. Respondent also paid for much of Petitioner's medical care. Petitioner filed a petition for penalties and fees on

December 5, 2014, about one month before the original 19(b) hearing. Arb Exh 2. The petition is generic in nature and does not include any demand for payment of specific medical bills. There is no evidence indicating that Respondent learned of the claimed bills prior to the original January 8, 2015 hearing. The post-hearing reassignment of this case arose from unusual circumstances. Although the Arbitrator finds Dr. Brackett unpersuasive, the Arbitrator declines to award penalties and fees in this case, noting the foregoing and the wage dispute.

12 WC 09191

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

Brett Briney,
Petitioner,

vs. NO: 12 WC 09191

16IWCC0135

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 10, 2015 is hereby affirmed and adopted.

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

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

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

12 WC 09191

16IWCC0135

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: FEB 2 5 2016
MJB:ell
O-11/09/15
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

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

BRINEY, BRETT
Employee/Petitioner

Case# **12WC009191**

16IWCC0135

AMEREN
Employer/Respondent

On 2/10/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0225 GOLDFINE & BOWLES PC
ATTN: WORK COMP DEPT
4242 N KNOXVILLE AVE
PEORIA, IL 61614

0080 PRUSAK WINNE & McKINLEY LTD
JOSEPH WINNE
300 N MAIN ST SUITE 300
PEORIA, IL 61603

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)

BRETT BRINEY
Employee/Petitioner

v.

AMEREN
Employer/Respondent

Case # 12 WC 09191

Consolidated cases: _____

16IWCC0135

An *Application for Adjustment 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 DOUGLAS McCARTHY**, Arbitrator of the Commission, in the city of **PEORIA, ILLINOIS**, on **01/16/2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident 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 _____

16IWCC0135

FINDINGS

On the date of accident, **05/17/2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**69,086.05**; the average weekly wage was $**1,328.58**.

On the date of accident, Petitioner was **52** 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 $**11,893.43** for TTD, $**-0-** for TPD, $**-0-** for maintenance, and $**-0-** for other benefits, for a total credit of $**11,893.43**.

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

ORDER

Respondent shall authorize the proposed surgery recommended by Doctor Gibbons as the Petitioner's condition of ill being is causally related to his 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

Feb. 6, 2015
Date

ICArbDec19(b)

FEB 10 2015

ATTACHMENT TO ARBITRATOR'S DECISION

Brett Briney vs. Ameren

IWCC No.: 12 WC 09191

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

Petitioner testified he worked for Respondent as a lineman. Petitioner alleged he sustained accidental injury on May 17, 2010 to his left knee. Petitioner testified he was sent to fix a light in a backyard. After assessing that the light was out, Petitioner descended a ladder attached to a pole and felt a pop in his left knee. Petitioner testified that his equipment at the time of the incident included strap hooks attached to his legs, a belt around his waist, and shoes with spikes to allow for climbing up and down poles. Petitioner testified he felt discomfort in the left knee on the way back to the truck followed by pain and swelling. Petitioner's testimony, along with histories he provided to his medical providers, established that his job required him to climb poles and ladders as well as into and out of lift buckets. He was required to lift and carry 15 to 20 pound ladders as a regular part of his job.

Petitioner testified he first sought treatment with Dr. Ayers, his family doctor, on May 19, 2010. (PX-1). X-rays of Petitioner's left knee were obtained on this date indicating no fracture or acute osseous abnormality, moderate sized joint effusion, an entheosphyte present at the insertion of the quadriceps tendon on the patella and an impression of moderate sized joint effusion, no acute osseous abnormality. (Id.). An MRI of Petitioner's left knee was performed on May 28, 2010, indicating probable tear of

the medial meniscus, moderate sized joint effusion, contusion in the medial proximal tibia, and degenerative arthritis. The history obtained by the radiologist at that visit was that petitioner had noticed his left knee popping while climbing down a power pole, with medial pain and instability since the occurrence. (Id)

The Petitioner was referred by his family physician, Dr. Clyde Grady to Dr. Michael Gibbons at Midwest Orthopedic Center. The Petitioner was first seen by Dr. Gibbons on June 7, 2010 and gave a history consistent with his testimony at Arbitration. (Petitioner Exhibit 2) Dr. Gibbons concluded that the Petitioner had a left knee medial meniscus tear and recommended a left knee arthroscopy. (Petitioner Exhibit 2) That procedure was authorized and performed by Dr. Gibbons on July 23, 2010. (Petitioner Exhibit 2)

Following the surgery, the Petitioner continued to have pain and swelling in his left knee and continued to treat with Dr. Gibbons. The Petitioner had his knee aspirated and received injections on multiple occasions throughout the following three months. (Petitioner Exhibit 2) On October 26, 2010 the Petitioner had a visit with Dr. Gibbons, during which he stated that his knee was feeling a lot better and that he had less pain and swelling. Dr. Gibbons still noted small effusion during his examination. He was still doing light duty work and had not been climbing any ladders or polls. Dr. Gibbons felt that the Petitioner had a favorable response to the previous Synvisc injection. The Petitioner stated he was anxious to get back to regular duty work and therefore Dr. Gibbons allowed him to return to work on October 27, 2010 without restrictions. Dr. Gibbons further stated that he felt that the Petitioner would be at maximum medical

improvement in about four weeks and the Petitioner was to follow-up with Dr. Gibbons as needed for any recurrent symptoms. (Petitioner Exhibit 2)

Unfortunately, the Petitioner required additional treatment following the October 26, 2010 release to work due to continued pain and swelling in the knee. On January 20, 2011 and again on February 14, 2011 he was given the same treatment of aspiration and injection that he received prior to his full duty release. (Petitioner Exhibit 2) On a May 23, 2011 visit a knee replacement procedure was discussed but ultimately decided that the Petitioner was not far enough along to consider. Instead, Dr. Gibbons recommended a repeat arthroscopy. On his next visit, August 22,2011, Dr. Gibbons had x-ray's performed which showed progression of his arthritis. The medial aspect of the knee was now graded at moderate to severe. Accordingly, Dr. Gibbons recommended conservative care as opposed to a repeat arthroscopy. (Petitioner Exhibit 2)

During his treatment with Dr. Gibbons the Petitioner also saw Dr. Myron Stachniw, an orthopedic surgeon, for a second opinion. The Petitioner saw Dr. Stachniw on February 20, 2012 and gave a history consistent with his testimony at arbitration. (Petitioner Exhibit 4) Dr. Stachniw stated that the Petitioner was doing as well as he could, was receiving full conservative treatment, and that the next modality would be a knee replacement. In his report Dr. Stachniw wrote that the Petitioner's torn meniscus had a significant role in aggravating and accelerating his knee problem. (Petitioner Exhibit 4) After some further continued treatment with Dr. Gibbons, in a May 12, 2014 visit it was finally decided that a knee replacement was appropriate. (Petitioner Exhibit 2)

The Petitioner testified at arbitration that he had no prior left knee complaints or treatment sought before the date of accident of May 17, 2010 and this is consistent with

his treatment records of the previous ten years with his family physician Dr. Grady. (Petitioner Exhibit 1) There is some mention of rheumatoid arthritis in a note from Dr. Grady dated June 4, 2014. The petitioner was being seen at the time for right knee pain. The doctor's note states " He has known rheumatoid arthritis that has affected multiple joints, including his knees." (RX 6) The petitioner denied treating for rheumatoid arthritis and, again, there is nothing in any of the medical records of treatment pre-dating the accident to rebut his denial.

In his evidence deposition, Dr. Gibbons was asked if he felt the incident caused the need for the knee replacement surgery to which he responded:

> Again, I think that would, based on the information I have, be the trigger or the first domino to start this process. So that would likely be the start of this or the cause of the subsequent problems, yes.
> (Petitioner Exhibit 5, p.31)

In his evidence deposition, Dr. Stachniw was asked, presuming the Petitioner had no prior knee problems and that he has had problems ever since the incident and surgery, whether he had an opinion as to whether the recommendation for a knee replacement is related to the incident on May 17th, 2010 and stated that he thought it was related. (Petitioner Exhibit 6, p.15) Dr. Stachniw went on further to state that if the Petitioner was asymptomatic before this injury, that the accident was an aggravating and accelerating cause. (Petitioner Exhibit 6, p.15) He also referenced dominos in explaining his opinion. He said that the accident was like knocking over the first domino in a line of dominos that kept going. (Id at 36) Upon repeated questioning by Respondent's attorney aimed at establishing that the accident was a temporary aggravation at best, the doctor said that once the first domino fell, the subsequent dominos, like the progression of the

Petitioner's arthritis, did not stop. (Id at 42) He was questioned again as to whether the Petitioner had returned to his pre accident baseline after his arthroscopic surgery. Dr. Stachniw said that while the Petitioner's abilities and ability to work had returned to baseline, his knee did not. His knee, he said, was worse as he was now without a medial meniscus. (Id at 37-38) The need for surgery, he opined, was due to both the accident and the pre existing arthritis. (Id at 44)

At the request of the Respondent, the Petitioner was examined by a Dr. John Hoffman on September 15, 2011. It was Dr. Hoffman's opinion that the Petitioner had arthritic changes to the knee prior to the incident at work and that the incident may have exacerbated his pain but did not lead to his arthritic changes. (Respondent Exhibit 3) Dr. Hoffman also stated that with the Petitioner being 53 years old he should continue with conservative care as long as possible and that the next surgery would be a total knee replacement arthroplasty. (Respondent Exhibit 3)

At the request of the Respondent, the Petitioner was examined by a Dr. Richard Rende on August 16, 2012. It was Dr. Rende's opinion that the Petitioner had longstanding severe degenerative osteoarthritis of the left knee predating the alleged work injury. (Respondent Exhibit 9) Dr. Rende stated that he found it inconceivable that someone with that degree of degenerative osteoarthritis could be asymptomatic prior to May 17, 2010. (Respondent Exhibit 9, p.33-34) This is in direct conflict with the testimony of the Petitioner who stated that he never had problems with his knee prior to the incident on May 17, 2010. The Petitioner also provided treatment records from his primary care physician going back roughly ten years which show absolutely no treatment or complaints pertaining to his left knee. (Petitioner Exhibit 1) Petitioner also provided

two contrasting opinions from Dr. Gibbons and Dr. Stachniw who both stated it was possible to have this level of degeneration and remain asymptomatic. (Petitioner Exhibit 5 and 6)

A large part of Dr. Rende's deposition testimony involved his interpretation of the MRI which was performed on the petitioner just ten days after his accident. Dr. Rende maintained that the MRI contained only chronic findings which predated the accident. The radiologist who actually performed the test noted findings of edema along the medial aspect of the medial femoral condyle which probably represented a contusion. (PX 3) While Dr. Rende acknowledged that there was edema, he would not concede that it could represent a contusion. While admitting that the edema could be acute, the doctor concluded that it was not in this case.

It is well settled in our law that an employer takes an employee as it finds him. On May 17, 2010, the Petitioner had substantial degenerative arthritis in his left knee but had no evidence of prior symptoms or treatment for that condition. He had an accident which produced acute symptoms as evidenced by the x-ray and MRI performed soon thereafter. His symptoms to some extent have continued without interruption to the present time. As Dr. Stachniw persuasively opined, his arthritis has significantly worsened since the accident to the point where he now needs a knee replacement. ((PX 6 at 9, 15) Dr. Rende's opinions are not persuasive. His reluctance to admit that the MRI findings referenced above show an acute injury seem to be based on his belief that the Petitioner was lying about his absence of pre-accident symptoms, a belief which has no support in the evidence. As the Supreme Court said in its decision in Sisbro, the question is whether the accident accelerated or aggravated the pre existing condition. See 207 Ill. 2d 193

(2003) The evidence here shows that it did, and the Petitioner's request for surgical authorization is granted.

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 Causal connection	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EVA WINTERS,

Petitioner,

vs. NO: 11 WC 41259

HARDIN COUNTY GENERAL HOSPITAL,

Respondent,

16IWCC0136

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary total disability, and nature and extent, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of causation but adopts the Findings of Fact, which is attached hereto and made a part hereof, with the additions and modifications outlined below.

Petitioner sustained an accidental injury to her left knee on October 22, 2009, while transporting an obese patient into a bariatric bed. Respondent does not dispute that certain medical expenses, including arthroscopic surgery on January 28, 2011, are causally related to this injury. However, Respondent argues that Petitioner's need for a total knee replacement is causally related to her underlying osteoarthritis and not related to her work injury.

Petitioner testified that she had no history of left knee pain or treatment prior to her work injury and there are no medical records to dispute this. Dr. Young, who performed cortisone injections, an arthroscopy with tricompartmental chondroplasty and partial lateral meniscectomy on January 28, 2011, and a series of five Supartz injections, opined on October 13, 2011, that it is possible that Petitioner may have had some underlying arthrosis and this might have been exacerbated by her work injury.

Dr. Morgan, who Petitioner was referred to by Dr. Young, opined on November 4, 2011, that Petitioner has "at least aggravated her degenerative arthritis to the point that she needs a total knee." He performed the total knee replacement on December 19, 2011. He affirmed his

opinion in his deposition testimony that Petitioner's work injury aggravated her arthritis to the point that she became significantly more symptomatic necessitating surgery. He testified that Petitioner was "rather vague" in terms of her mechanism of injury but he thought it was during a lifting activity. He admitted that it could be very conceivable that Petitioner had an aggravation of her symptoms but not an actual change in her condition when she moved the patient. However, when asked if Petitioner could have had a temporary aggravation, he stated that Petitioner's symptoms were not temporary but, rather, ongoing and did not respond to therapy, arthroscopy, and viscoelastic therapy.

Respondent argues that Dr. Morgan did not have an adequate understanding of Petitioner's mechanism of injury to credibly opine that it had aggravated her osteoarthritis. Interestingly, Respondent had Petitioner examined, pursuant to §12 of the Act, by Dr. Odegard on April 26, 2010, about six months after her injury. He opined that Petitioner sustained a mild left knee injury and had knee pain consistent with mild osteoarthritis. He wrote, "Her current complaints do seem to be directly related to her injury of 10/22/09 as she had no symptoms prior to that point. She may have had some mild osteoarthritic changes, but we have no documentation of this." He felt that Petitioner had not reached maximum medical improvement and recommended another cortisone injection, continued physical therapy, and possible viscosupplementation injections "or eventually a knee arthroscopy as her symptoms do sound like they could be related to a meniscus tear despite her MRI," which only showed degenerative changes without a definite tear. In other words, Dr. Odegard found a causal connection between Petitioner's work injury and her increased symptoms after the work injury.

Instead of having Petitioner examined again by Dr. Odegard after her arthroscopic surgery on January 28, 2011, Respondent had her examined by a different §12 physician, Dr. Gross, on May 12, 2011. Dr. Gross opined that Petitioner sustained only a temporary aggravation of her pre-existing osteoarthritis and that her need for a total knee replacement is not related to the work injury. He believed that Petitioner lifting the patient with her left knee braced against the bed would not change the natural course of her arthritis and is similar to many activities of daily living such as putting groceries on your knee, opening your door with your knee, bringing groceries up the stairs, and taking a grocery bag and bracing it on your knee as you close the car door. He did not see any signs of acute trauma on Petitioner's MRI that would indicate a serious enough injury to permanently aggravate her arthritis.

We find two major problems with Dr. Gross' opinion. First, Petitioner's mechanism of injury at work is much more forceful than any of the activities of daily living that Dr. Gross compared it to. Second, it is undisputed that Petitioner did not have any left knee problems, pain, or treatment prior to her work injury. After the injury, she treated continually with physical therapy, medications, cortisone injections, and arthroscopic surgery (debriding and shaving the lateral meniscus, medial femoral condyle, and proximal tibia). These did not alleviate her condition and the records show that Petitioner's pain increased during "aggressive therapy" after the arthroscopy. (See Dr. Young, 3/24/11). When a series of five Supartz injections also gave no improvement, the next step was a total knee replacement. Dr. Gross admitted that it would be speculative to say that Petitioner would have needed treatment for her left knee in the absence of the work injury. The bottom line is that there was nothing "temporary" about her aggravation. Therefore, we find that Petitioner's work injury was a contributing factor in her need for the total knee replacement and reverse the Arbitrator's decision on the issue of causation.

Based on our finding regarding causation, we find that Petitioner is entitled to 70-1/7 weeks of temporary total disability from January 28, 2011, when Petitioner underwent her first

surgery, through June 1, 2012, which is the date that she was released by Dr. Morgan after her total knee replacement. We also award the outstanding medical bills contained in Petitioner's Exhibit 12, subject to the fee schedule in §8.2 of the Act. Finally, we find that Petitioner's injury has caused permanent partial disability to the extent of 45% loss of use of the left leg under §8(e) of the Act. Petitioner testified that standing makes her knee more painful and swells. Her pain is normally about a 4 or 5 out of 10. She takes prescribed pain medications occasionally when the pain is bad. Petitioner testified that she has issues with mobility and going up and down steps. She has difficulty squatting, pivoting, and running, which makes her unable to return to her previous job as an emergency room nurse. However, she is still able to work as a nurse in a different department.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $711.41 per week for a period of 70-1/7 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 $640.27 per week for a period of 96.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 45% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the outstanding medical expenses contained in Petitioner's Exhibit 12 under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: FEB 29 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 2/10/16
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WINTERS, EVA
Employee/Petitioner

Case# **11WC041259**

HARDIN COUNTY GENERAL HOSPITAL
Employer/Respondent

16IWCC0136

On 2/25/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

5236 CULLEY FEIST KUPPART & TAYLOR
KREIG B TAYLOR
617 E CHURCH ST SUITE 1
HARRISBURG, IL 62946

1109 GAROFALO SCHREIBER & STORM
JAMES CLUNE
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Eva Winters
Employee/Petitioner

v.

Hardin County General Hospital
Employer/Respondent

Case # **11** WC **41259**

Consolidated cases: _____

16IWCC0136

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ed Lee**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **1/8/2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0136

FINDINGS

On **10/22/2009**, 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, in part,** causally related to the accident.

In the year preceding the injury, Petitioner earned **$55,489.72**; the average weekly wage was **$1,067.11**.

On the date of accident, Petitioner was **49** 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 **$37,298.73** for TTD, $ for TPD, $ for maintenance, and **$5,000.00** for other benefits, for a total credit of **$42,298.73**.

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

ORDER

The petitioner is entitled to an award of 40% loss of use of her left leg due to cartilage damage to the knee related to the accident in question. The ongoing condition of the left knee, the degeneration prompting the prescription for an additional surgery (knee replacement) beyond the surgery of January 28, 2011 is related to a preexisting degenerative condition personal to the petitioner, to which she returned to baseline; the degenerative condition not being caused or permanently aggravated by the accident. The petitioner is entitled to 51 & 3/7 weeks of temporary total disability from January 28, 2011 through January 23, 2012. The respondent shall receive credit for all benefits paid and all related medical care associated with the conclusions of the Arbitrator in the attached findings under paragraph "J" shall be subject to the provisions of Sections 8(a) and 8.2 of the Act.

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

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

Signature of Arbitrator

2/17/15
Date

FEB 25 2015

Findings of Fact:

The petitioner, Eva Winters, was working as a registered nurse at Hardin County General Hospital, on October 22, 2009. She was assisting in the movement of a patient when she felt pain in her left knee. The specific mechanism of injury was that the petitioner had her left leg on the ground and her knee pushed against the bed. Her right knee was on the bed itself.

The incident was at the end of her shift. She continued to work for months thereafter while she treated. She received as many as five injections and received therapy. The treatment did not restore the knee to be symptom-free so surgery was recommended.

On January 28, 2011 underwent a left knee arthroscopy by Dr. Young. This included a tricompartmental chondroplasty with partial lateral menisectomy. At the time of the surgery it was noted that the petitioner had significant degeneration and wear of the cartilage.

Subsequent steroid injections and viscosupplementation injections were prescribed post surgery. The petitioner continued to have discomfort. Dr. Morgan (PX 9) saw the petitioner on June 1, 2011 and concluded that a knee replacement would be an option for the petitioner.

The petitioner was evaluated by Dr. Gross (RX 1) pursuant to Section 12 of the Act. Dr. Gross reviewed all of the medical records and diagnostic films associated with the petitioner's care. Gross concluded that the petitioner's ongoing condition was related to her personal, degenerative, osteoarthritic condition and that she had fully recovered from the temporary aggravation she had experienced due to the minor accident of October 22, 2009. (RX 1, pp. 14, 16 -17, 18 -19)

The petitioner was referred to Dr. Morgan by Dr. Young. Dr. Morgan concluded that the petitioner aggravated her preexisting degenerative arthritis when she was transferring the patient. (PX 9, pp. 8 – 9) Dr. Morgan agreed that the cartilage tears he saw on the MRI film could have resulted from the petitioner's degenerative condition. (PX 9, pp. 18 – 19) Dr. Morgan did not know the mechanism of the petitioner's claimed injury when moving the patient, only that the petitioner complained of pain thereafter. (PX 9, pg. 19) Dr. Morgan could not distinguish between what the accident allegedly caused and what the degenerative process caused. (PX 9, pg. 21) Dr. Morgan also agreed that the petitioner could have had an increase in symptoms without a change in her degenerative condition. (PX9, pp. 22 – 23)

On December 19, 2011 the petitioner had a knee replacement. (PX 9, pg. 9) The petitioner has since returned to work as a registered nurse, but in a capacity as a psychiatric nurse with less physical activity.

Legal Standard:

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). "[A]lthough medical testimony as to causation is not necessarily required, where the question is one within the knowledge of experts only, and not within the common knowledge or comprehension of laymen, expert testimony is necessary to show that a claimant's work activities caused the condition complained of." Interlake Steel v. Industrial Commission, 136 Ill. App. 3d 740 (1985). See also Ledbetter v State of Illinois, 13 IWCC 0131, regarding the relative knowledge of testifying experts.

The Illinois Supreme Court has held that a claimant's testimony standing alone may be accepted for the purposes of determining whether an accident occurred.

However, that testimony must be proved credible. Caterpillar Tractor vs. Industrial Commission, 83 Ill.2d 213, 413 N.E.2d 740 (1980). In addition, a claimant's testimony must be considered with all the facts and circumstances that might not justify an award. Neal vs. Industrial Commission, 141 Ill.App.3d 289, 490 N.E.2d 124 (1986). Uncorroborated testimony will support an award for benefits only if consideration of all facts and circumstances [emphasis added] support the decision. See generally, Gallentine v. Industrial Commission, 147 Ill.Dec 353, 559 N.E.2d 526, 201 Ill.App.3d 880 (2nd Dist. 1990), see also Seiber v Industrial Commission, 82 Ill.2d 87, 411 N.E.2d 249 (1980), and 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).

Conclusions of Law:

F.
Is Petitioner's current condition of ill-being causally related to the injury of October 22, 2009?

The petitioner sustained a knee strain on October 22, 2009 when she pressed her knee up against a bed while helping to move a patient. Conceivably this may have aggravated some underlying cartilage damage associated with the petitioner's preexisting left knee osteoarthritis. However, the nature of the alleged accident was so minor that her treating physician, Dr. Morgan (PX 9), agreed that she may merely have caused a symptom aggravation and did not necessarily aggravate her preexisting condition. In fact, Dr. Morgan conceded that he did not even know the nature or mechanism of her injury to give an opinion as to whether the accident could have aggravated her condition. Her relied on the petitioner's conclusion that she had injured herself in that fashion, having no independent knowledge of the accident himself from the petitioner or from other records.

Dr. Gross (RX 1) was very clear in his testimony about the lack of significant trauma and the nature of the significant trauma necessary to aggravate or permanently change a preexisting arthritic condition. Gross concluded that simply pressing one's knee against a hospital bed is an insufficient mechanism to aggravate a preexisting arthritic condition.

The Arbitrator agrees with the conclusions of Dr. Gross. The petitioner may have sustained a temporary exacerbation of her knee symptoms, but did not aggravate her arthritic condition. While the conservative care and the arthroscopy may have been related to the work event, the need for a knee replacement was not.

The preponderance of the evidence favors the opinions of Dr. Gross who had a greater knowledge of the facts associated with the accident and the diagnostics associated with the petitioner. The Arbitrator finds that the petitioner may have sustained an aggravation of some preexisting meniscal tears, but did not sustain an aggravation of the underlying arthritic condition. The degenerative process in the petitioner's knee was not aggravated or accelerated, but continued on and, independent of the work incident, was the precipitating factor in the need for the petitioner's knee replacement two years later.

J.

Were the medical services provided to the petitioner reasonable and necessary? Has respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator agrees with the conclusions of Dr. Gross regarding the treatment needed for the results of the accident of October 22, 2009. The arthroscopic surgery, the steroid injections, and the physical therapy are all related to the effort to diagnose and treat the petitioner's knee injury and possible meniscal aggravations. The viscosupplementation is a treatment for arthritis which, in this petitioner, was a preexisting condition which was not permanently changed or altered, nor permanently aggravated, nor accelerated as a result of the minor work accident.

K.

What temporary benefits are in dispute?

The petitioner lost time from work, but only after her arthroscopy on January 11, 2011. She continued to treat thereafter, but any lost time after December 19, 2011 appears to have been related to the knee replacement surgery and not to the residuals of the original accident of October 22, 2009. The parties stipulated to lost time from January 28, 2011 to January 23, 2012, with the petitioner seeking additional lost time thereafter. Temporary total disability is confined to 51 & 3/7ths weeks from January 28, 2011 to January 23, 2012.

L.

What is the nature and extent of the injury?

The petitioner, per the testimony of Dr. Gross, may have aggravated, on a temporary basis, her preexisting knee condition that may have had within it some meniscal tears. Both Dr. Gross and Dr. Morgan agreed that the petitioner's symptoms could have manifested or been aggravated by the work accident. However, the preexisting degenerative condition accounted for the need for the knee replacement.

The petitioner appears to have sustained some meniscal fraying and tears that could have been related to the arthritic condition in her knee and could have

been aggravated by the work accident without an aggravation of the underlying osteoarthritis. The Arbitrator concludes that the petitioner sustained a 40% loss of use of her left knee as a result of the aggravation of the preexisting soft tissue damage in her left knee, but does not conclude that the petitioner aggravated the degenerative osteoarthritic condition itself.

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

BRIAN JONES,

Petitioner,

vs.

NO: 14 WC 3039
14 WC 3338
14 WC 8433

SOUTHWEST AIRLINES,

Respondent,

16IWCC0137

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of nature and extent and being advised of the facts and law, 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.

Pursuant to Will County Forest Preserve Dist. v. IWCC, 2012 Ill. App. LEXIS 109, 361 Ill. Dec. 16 (2012), permanent partial disability for shoulder injuries resulting in internal structural changes should be compensated under §8(d)2 of the Act instead of §8(e). Regarding the left shoulder, we find that Petitioner has sustained a greater loss of use of the left shoulder than the Arbitrator found and increase the award to 2% loss of use of the person as a whole under §8(d)2.

Regarding the right shoulder, the disability of which was analyzed under the five factors listed in §8.1(b), we find that more weight should have been given to Petitioner's age. He is only 46 years old and will have to work with his disability for an extended period of time. We also find that the treating medical records do corroborate some of Petitioner's testimony regarding his current disability. Although there is no recent medical record to indicate that Petitioner's right shoulder is "only 70%" or that he ices his shoulder, the last physical therapy records do indicate that Petitioner was still complaining of 2-3/10 pain at the time he was released to full duty. Therefore, we increase the award for the right shoulder to 8% loss of use of the person as a whole under §8(d)2.

16IWCC0137

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $474.38 per week for a period of 10 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained to the left shoulder caused the 2% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $511.18 per week for a period of 40 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained to the right shoulder caused the 8% loss of use of the person as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $25,200. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 2 9 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 1/20/16
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JONES, BRIAN
Employee/Petitioner

Case# **14WC003039**

14WC003338
14WC008433

SOUTHWEST AIRLINES
Employer/Respondent

16IWCC0137

On 7/30/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

BRIAN JONES
Employee/Petitioner

Case #14 WC 3039
#14 WC 3338
#14 WC 8433

v.

SOUTHWEST AIRLINES
Employer/Respondent

16IWCC0137

An *Application for Adjustment 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 July 10, 2015. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

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

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

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

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

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On August 3, 2011, August 16, 2012, and October 13, 2013, the respondent was operating under and subject to the provisions of the Act.

- An employee-employer relationship existed between the petitioner and respondent on the above dates.

- On the above 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 on August 3, 2011, and August 16, 2012, the petitioner earned $41,113.08; the average weekly wage was $790.64. In the year preceding the injury on October 30, 2013, the petitioner earned $45,566.97; the average weekly wage was $851.96.

- At the time of injuries, the petitioner was 42 through 45 years of age, married with two children under 18.

- The parties agreed that the respondent is not liable for any unpaid medical services provided to the petitioner for each injury.

- The parties agreed that the respondent paid all the temporary total disability benefits due the petitioner for each injury.

ORDER:

- The respondent shall pay the petitioner the sum of $474.38/week for a further period of 5.06 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 2% loss of use of his left arm.

- The respondent shall pay the petitioner the sum of $511.18/week for a further period of 20.24 weeks, as provided in Section 8(d)2/8(e) of the Act, because the injuries to his

right arm on August 16, 2012, and October 30, 2013, caused the permanent partial disability to petitioner to the extent of 4.048% loss of use of the person as a whole (8% loss of use of his right arm).

- The respondent shall pay the petitioner compensation that has accrued from August 3, 2011, through July 10, 2015, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Robert E. Williams

Signature of Arbitrator

July 30, 2015

Date

JUL 30 2015

FINDINGS OF FACTS:

On August 3, 2011, the petitioner, a provisioning agent, injured his left shoulder while pulling a liquor kit. The incident is the subject matter of claim #14 WC 8433. He received immediate medical care at Occupational Health Centers of Illinois (OHC) for his left shoulder, where he was prescribed therapy and medication for a left shoulder strain. Improved symptoms were noted by Dr. Amir and Dr. Ross at OHC through September 8th. He reported no improvement on September 15th and was evaluated by Dr. Kevin Tu on September 28th. Dr. Tu opined on January 18, 2012, that an MR arthrogram revealed a partial thickness left rotator cuff tear and no labral tear. Dr. Tu noted that the petitioner's symptoms had improved and that he had minimal difficulty with overhead activity and mild pain localized to the biceps tendon. The petitioner was released to full-duty activities. At a follow-up on February 15, 2012, the petitioner reported no difficulty with daily work activities.

On August 16, 2012, the petitioner injured his right shoulder while pulling a guard rail. The incident is the subject matter of claim #14 WC 3039. The petitioner received immediate medical care at OHC. On October 10, 2012, Dr. Tu evaluated the petitioner and released him to unrestricted work beginning October 15, 2012. The petitioner received physical therapy through October 12, 2012.

On October 30, 2013, the petitioner re-injured his right shoulder while pulling a garbage can. The incident is the subject matter of claim #14 WC 3338. He received medical care at OHC and started physical therapy. On March 21, 2014, Dr. Tu performed a right shoulder arthroscopic subacromial decompression and distal clavicle excision. His post-operative diagnosis was right shoulder impingement and right shoulder AC joint

arthropathy. The petitioner received physical therapy and on July 16, 2014, Dr. Tu released him to unrestricted work. At the petitioner's last follow-up on August 6, 2014, he reported occasional shoulder pain and manageable symptoms. The doctor noted 5/5 supraspinatus and infraspinatus strength and no AC joint tenderness.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner complains of stiffness in his left shoulder with low temperatures. He is hesitant to pick up his child and, due to vibration, mowing his lawn. He needs to ice his left shoulder after a lot of activities. The respondent shall pay the petitioner the sum of $474.38/week for a further period of 5.06 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 2% loss of use of his left arm.

An impairment rating by Dr. Bryan Neal on December 29, 2014, based on a right shoulder impingement syndrome diagnosis by Dr. Tu and the MRI was a 3% default with an adjusted impairment of 4% right upper limb impairment or 2% whole person impairment. There is no evidence concerning the impact of the petitioner's right shoulder injuries in regard to his occupation, age or future earning capacity, as delineated in Section 8.1(b)(ii) through (iv) of the Act. The petitioner currently works in a full-duty capacity as a provisioning agent for the respondent. He is able to perform his job duties without assistance. No reasonable inference can be made regarding the impact of the petitioner's right shoulder injuries on his occupation, age or future earning capacity. Regarding Section 8.1(b)(v), the petitioner complains of only a 70% improvement with his right shoulder, stiffness and cautiousness with activities, lifting and moving. He ices

and favors his right shoulder. He is cautious with his workload. The treating medical records do not corroborate the petitioner's testimony.

The respondent shall pay the petitioner the sum of $511.18/week for a further period of 20.24 weeks, as provided in Section 8(d)2/8(e) of the Act, because the injuries to his right arm on August 16, 2012, and October 30, 2013, caused the permanent partial disability to petitioner to the extent of 4.048% loss of use of the person as a whole (8% loss of use of his right arm).

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

RUSSELL BUFFA,

Petitioner,

vs. NO: 13 WC 27893

BLUELINE FOOD SERVICE DIST.,

16IWCC0138

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causation, and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, except for the correction of the following clerical error and deletion of a portion of the decision as outlined below.

On page 1, the Arbitrator wrote, "...Petitioner reported the accident on March 9, 2013, and a Report of Injury was generated by Respondent's risk manager." However, the Commission notes that the Report of Injury was done on May 9, 2013 (not March). Also, Petitioner testified that he reported the injury on May 6th to Mark Thompson, the branch director. This is consistent with the "Authorization for Treatment" signed by Mr. Thompson on May 6, 2013, and Petitioner's initial visit to Concentra on May 7, 2013. The decision is hereby corrected to reflect these facts.

On page 3, we delete the sentence that states, "Dr. Mirkin acknowledged that in the past he has changed his favorable causation opinion to an unfavorable opinion upon request for respondents." (Citation omitted.) The Commission notes that Petitioner entered into evidence a workers' compensation decision from Missouri in an attempt to impugn Dr. Mirkin's credibility. In that case, Dr. Mirkin initially opined that the claimant's condition was causally related to his work injury on the basis that the claimant had not had any treatment for his condition in the few years prior. However, after Dr. Mirkin was provided with records showing that the claimant had, in fact, received ongoing treatment for his condition, he changed his opinion. This is hardly an

example of having "changed his favorable causation opinion to an unfavorable opinion upon request for respondents." Rather, Dr. Mirkin revised his opinion based on new evidence. Therefore, we hereby strike that sentence from the Arbitrator's decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 11, 2015, is hereby affirmed and adopted with the correction of a clerical error and deletion of a portion of the Decision as outlined above.

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 $8,500.00. 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: FEB 2 9 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 020916
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BUFFA, RUSSELL
Employee/Petitioner

Case# **13WC027893**

BLUELINE FOOD SERVICE DISTRIBUTION
Employer/Respondent

16IWCC0138

On 2/11/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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5365 BUSSE, BUSSE & GRASSE PC
KENNETH LUBINSKI
20 N WACKER DR SUITE 1363
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Russell Buffa
Employee/Petitioner

v.

Blueline Food Service Distribution
Employer/Respondent

Case # **13** WC **27893**

Consolidated cases: _____

16IWCC0138

An *Application for Adjustment 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 18, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 24, 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 $**36,274.69**; the average weekly wage was $**697.59**.

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

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

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

ORDER

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

Respondent shall pay Petitioner permanent partial disability benefits of $418.55/week for 20 weeks, because the injuries sustained caused the 4% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

2/9/15
Date

FEB 11 2015

FACTS

Petitioner filed a claim for injury to his low back sustained on April 24, 2013, while employed by Respondent as a warehouse worker in its freezer. (AX2). Petitioner testified that he was the only employee who worked in the freezer. (T.7). After accepting Petitioner's claim, paying all temporary total disability benefits, paying medical expenses, and having Petitioner examined by an orthopedic specialist who testified that Petitioner's lifting incident caused injury to Petitioner, at the hearing Respondent's counsel disputed accident, causal connection, notice, liability for medical expenses and the nature and extent of Petitioner's injury. (T.4).

Petitioner was the sole witness to testify. Petitioner testified that his employment required him to wear a special freezer suit. (T.8). Petitioner testified that on the above date, he was in the freezer stacking 25 to 35 pound boxes onto a pallet by hand when he felt pain in his back. (T.8). He described his onset of injury as follows:

> Q: On April 24, 2013, since it's disputed, can you describe for the Court what happened that day?
> A: Yes, sir. I was in the freezer in my freezer suit stacking 25-, 35-pound boxes onto a pallet by hand; and when I was stacking them on by hand, I felt back pain; and I stopped for a second. Then I kept working, thinking that it would go away or was nothing serious.
>
> Q: And ultimately, sir, did you continue performing the same job as a freezer man?
> A: Yes.
>
> Q: And what did you notice about your low back complaints over the next week, week and a half?
> A: Over the next six, seven days, as each day went, it got progressively worse to where I got shooting pains down my leg. When I even raised my head, it got so bad that I couldn't work anymore. (T.8).

When his symptoms got worse, Petitioner reported the accident on March 9, 2013, and a Report of Injury was generated by Respondent's risk manager. (RX9). While establishing notice, this report is computer generated and was clearly not prepared by Petitioner. *Id.* Petitioner reviewed the incident report and testified without rebuttal that he was not using a truck to move product onto the pallet, but rather was stacking the boxes by hand. (T.9, 10). He acknowledged that he told each of his medical providers, including Respondent's examiner, that he was moving product by hand. (T.10). Respondent produced no witnesses to rebut Petitioner's testimony.

When Petitioner reported the accident to his supervisor, he was ordered to treat with Respondent's physician at Concentra. (T.9). There, Petitioner was given x-rays and prescribed physical therapy which minimally improved his condition. (T.12; PX3). On June 11, 2013,

Petitioner was seen by Dr. David Raskas, a board certified orthopedic spine specialist who took the following history:

> The patient's onset of pain occurred on 4/24/13, where he was doing his normal routine of working in his freezer suit or boiler suit in a deep freeze cooler where he has a heavy labor job of stacking pallets with 25 to 50 pound boxes, each pallet having 35 to 40 boxes each. He has been doing the same routine for around 24 months. On Wednesdays it is a double load stated by patient where on Wednesdays there is a 41-pallet objective, which a typical objective is 21 [sic]. (PX4, 6/11/13).

Dr. Raskas also noted that Petitioner was required to wear a thermal suit and that his pain intensified upon arriving home that evening. (PX4, 6/11/13).

Dr. Raskas noted that Petitioner was a former drug user and smoker, but also noted that Petitioner rehabilitated himself to the point where he no longer uses those substances. *Id.* Dr. Raskas' examination showed moderately limited range of motion, tenderness and positive orthopedic signs. *Id.* He diagnosed a lumbar strain with a possible disc injury along with left SI joint dysfunction. *Id.* Dr. Raskas also recommended an MRI, which was performed on June 19, 2013. (PX4, 6/11/13; PX5).

Petitioner returned to Dr. Raskas on June 24, 2013, and Dr. Raskas agreed with the radiologist that annular tears were present at the L4-5 level. (PX4, 6/24/13). He recommended SI joint and epidural injections. *Id.* These improved Petitioner's condition significantly. (T.12; PX4). As of his last visit, Dr. Raskas noted Petitioner was having only minimal back pain with occasional stiffness and was tolerating work. (PX4, 8/13/13).

Respondent had Petitioner examined by Dr. Peter Mirkin, who testified, "I can find an annular tear in any 50 year old on an MRI." (RX13, p.33). In addition, when asked if Petitioner sustained an acute injury, Dr. Mirkin stated:

> Well, whether it's acute or not I think you have to depend on what the patient tells you. He says I was lifting at work and had back pain that particular day, unless he's blatantly lying to me I have no reason to not think he had a back strain that particular day. Now certainly I can't tell you why there was a delay of two weeks to go get treatment, I have seen people get hurt and not seek treatment for a long time in some cases. *Id.* at 32.

Respondent's counsel attempted to interject the issue of whether Petitioner's prior unfortunate drug use and hepatitis aggravated Petitioner's condition (*id.* at 39); however Dr. Mirkin gave the following testimony on cross-examination:

Q: Does Hepatitis C cause annular tears?

A: Not that I'm aware of.

Q: Does intravenous drug use cause annular tears?
A: Not that I'm aware of. *Id.* at 44.

Dr. Mirkin acknowledged that he was not aware of the level at which Dr. Raskas identified an annular tear, although he purportedly reviewed the radiology report and records which described same. *Id.* at 29, 45. In short, Dr. Mirkin's testimony supports the opinion that Petitioner's condition of ill-being is causally related to his lifting incident at work. Dr. Mirkin acknowledged that in the past he has changed his favorable causation opinion to an unfavorable opinion upon request for respondents. *Id.* at 45, 46; (RX13, Pet.Exh.B).

Dr. Raskas testified that Petitioner's MRI was of diagnostic quality and that he personally viewed an annular tear at L4-5 in addition to the typical age related changes one would expect in every 57-year-old patient. (PX8, p.6, 7, 9). His assessment of a lumbar strain was an initial working diagnosis. *Id.* at 21, 22. Dr. Raskas testified that is a tear in the outer wall of the disc that causes some of the disc material to protrude into that tear, and allows chemicals from within the disc to "communicate" with the tear and produce pain. *Id.* at 7. Since Petitioner failed to improve with physical therapy and non-steroidal anti-inflammatory medication, Dr. Raskas recommended injections to reduce inflammation. *Id.* at 8. Dr. Raskas testified that time away from heavy lifting and the cold environment in Respondent's freezer dramatically increased the odds of successful treatment. *Id.* at 8. Dr. Raskas testified that after Dr. Granberg performed the recommended epidural steroid injection and the sacroiliac joint injection, Petitioner experienced marked improvement. *Id.* at 9, 11.

Dr. Raskas linked Petitioner's annular tear to the repetitive heavy lifting done for Respondent on April 24, 2013. *Id.* at 18, 19. Dr. Raskas also testified that Petitioner's history of drug use and hepatitis C had absolutely no relation to Petitioner's injury or symptoms. *Id.* at 25, 26. He further testified that two weeks was not an unusual or unreasonable period of time between injury and treatment for a variety of reasons, including optimism toward improvement and physician appointment availability. *Id.* at 22, 23.

Although Petitioner reported minimal symptoms following his injections, Dr. Raskas testified that an increase in symptoms commensurate with the increased activity, especially laborious job duties like those performed by Petitioner, is expected. *Id.* at 11, 12. Dr. Raskas testified that both Petitioner's injury and his ongoing symptoms are causally related to his 24 April 2013 work injury. *Id.* at 12, 13.

At Arbitration, Petitioner testified that at times his pain is hardly noticeable. (T.14). However, there are times when it is intensely debilitating and affects his entire left side, which is consistent with his history and mechanism of injury. (T.14). He wakes up every 3 to 4 hours at

night with back pain. (T.16). He takes Aleve and Extra Strength Tylenol and utilizes disposable heating pads for his symptoms. (T.14, 15). His hobby of bike riding has been curtailed. (T.15, 16).

CONCLUSION

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

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Industrial Comm'n,* 797 N.E.2d 665, 671 (2003). If the injury coincides with these definitions and is traceable to a definite time, place, and cause, then said injury is accidental within the meaning of the Act. *Laclede Steel Co. v. Indus. Comm'n*, 128 N.E.2d 718, 720 (Ill. 1955).

"In the course of employment" refers to the time, place and circumstances surrounding the injury. *Lee v. Industrial Comm'n,* 656 N.E.2d 1084 (1995); *Scheffler Greenhouses, Inc. v. Industrial Comm'n,* 362 N.E.2d 325 (1977). That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment. *Sisbro supra.* An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal relationship between the employment and the accidental injury. *Orsini v. Indus. Comm'n*, 509 N.E.2d 1005 (1987). In order to meet this burden, a claimant must prove that the risk of injury is peculiar to the work ***or*** that he or she is exposed to the risk of injury to a greater degree than the general public. *Id.* Stated another way, "An injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he [or she] had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. [Citations]. A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Caterpillar Tractor Co. v. Industrial Comm'n*, 541 N.E.2d 665 (Ill. 1989); *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003).

For the reasons set forth below, the Arbitrator finds that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent.

Petitioner testified without rebuttal that he sustained injury to his low back while lifting heavy boxes in a deep freezer while wearing a thermal suit. (T.7, 8). This occurred in the course and scope of his employment and was a risk peculiar to and distinctly related to his employment with Respondent. While Respondent offered a report which indicated that Petitioner was not lifting these boxes by hand, this was completed by one of Respondent's risk managers rather than Petitioner himself. (RX9). Petitioner credibly testified without rebuttal at Arbitration to his

mechanism of injury, and his testimony is consistently corroborated in each medical history in the record, including the Concentra clinic to which Petitioner was sent by Respondent. (PX3). Petitioner's initial therapy evaluation at Concentra detailed the following:

> THERAPY INITIAL EVALUATION
> Patient is referred for therapy with medical diagnosis of back pain
> Mechanism of Injury: Patient reports that he was lifting repetitively
> Chief Complaint: pain in left hip and down leg intermittently
> Exacerbating Factors: pain down the leg with step down, sitting to long
> Alleviating Factors: standing and walking makes leg pain leave

(PX3, 5/8/13).

Accordingly, the Arbitrator finds that Petitioner is a credible witness and that he successfully traced his injuries to a definite time, place, and cause. Therefore, his injury is accidental within the meaning of the Act. *Laclede Steel Co. v. Indus. Comm'n*, 128 N.E.2d 718, 720 (Ill. 1955); *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003).

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

There is no legitimate dispute as to notice. Respondent's own report dated May 9, 2013, shows that it received notice of Petitioner's 24 April 2013 injury well within the statutory 45-day notice period. (RX9). Petitioner clearly provided timely notice under the Act.

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

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Compensation Comm'n*, 864 N.E.2d 266, 272-73 (5th Dist. 2007).

Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003). [Emphasis original]. "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 723 N.E.2d 846 (3d Dist. 2000). Employers are to take their employees as they find them. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003); *A.C. & S. v. Indus. Comm'n*, 710 N.E.2d 837 (1st Dist. 1999) citing *General Electric Co. v. Indus. Comm'n*, 433 N.E.2d 671, 672 (Ill. 1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003); *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65,

67-68 (Ill. 1967); *see also Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977).

The Supreme Court's decision in *Sisbro, Inc.* highlighted that even though a workers' compensation claimant has a preexisting condition which may make him or her more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003). The Supreme Court noted that although another incident could have triggered the same result, where a work-related injury is shown to be an *actual* causal factor in bringing about an employee's disabling condition, recovery should *not* be denied simply because a normal daily activity *could have* brought on claimant's disabling condition. *Id.* at 674-77.

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Indus. Comm'n,* 631 N.E.2d 724, 728 (4th Dist. 1994); *International Harvester v. Industrial Comm'n,* 442 N.E.2d 908 (Ill. 1982). A causal connection between work duties and a condition may also be established by a chain of events including petitioner's ability to perform the duties before the date of the accident, and inability to perform the same duties following that date. *Darling v. Indus. Comm'n of Illinois*, 530 N.E.2d 1135, 1140 (1st Dist. 1988).

Petitioner testified that following the unrebutted accident, his condition progressively worsened and "got so bad that he couldn't work anymore." (T.8). Dr. Raskas testified that the repetitive lifting done on 24 April 2013 caused an annular tear at L4-5. (PX8, p.18, 19). Dr. Raskas visualized this annular tear an MRI of diagnostic quality, which was also appreciated by the radiologist who conducted same. (PX5; PX8, p.6, 7). This tear was separate and distinct from typical age related changes typically seen in patients within Petitioner's age group. (PX8, p.6, 7, 9). Petitioner's condition showed a markedly favorable response to the treatment recommended by Dr. Raskas based on his diagnosis. (PX4; PX6). While Respondent's §12 physician, Dr. Mirkin, declined go as far as to say Petitioner's annular tear was acute and/or traumatic, he candidly acknowledged that Petitioner sustained an acute injury on April 24, 2013, which at least caused a strain or "transient" aggravation of the degeneration of his spine. (RX13, p.32, 33). He also agreed that Petitioner's past substance abuse had nothing to do with his work-related injury. *Id.* at 44.

The Arbitrator finds the causation opinion of Dr. Raskas to be more persuasive than that of Dr. Mirkin, who was not aware of the level at which Dr. Raskas identified an annular tear despite allegedly reviewing the objective radiology report and related records. *Id.* at 29-30, 45. Additionally, the evidence in the record raises serious concerns about Dr. Mirkin's credibility. (RX13, Pet.Exh.B). Dr. Mirkin believed that Petitioner's aggravation was temporary, but failed to give any logical explanation for the failure of conservative treatment short of injections, and for the latter Petitioner's positive response following same. (RX13).

The record evidences that Petitioner sustained at the least an aggravation of any pre-existing condition, and at the most, an annular tear. Respondent disputed causal connection at length on account of Petitioner's age and degeneration in his spine. However, the law is clear that where a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003); *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); *see also Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977). Therefore, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his work injury of April 24, 2013.

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

Upon establishing causal connection and the reasonableness and necessity of recommended medical treatment, employers are responsible for necessary medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 691 N.E.2d 13 (2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

The record shows that Petitioner exhausted all conservative measures short of the injections recommended by Dr. Raskas. (PX3; PX4). The injections, however, provided significant relief of Petitioner's increased symptoms which were the direct result of the 24 April 2013 injury. (PX4; PX6). Therefore, the Arbitrator finds that the treatment leading up to and including the injections administered by Dr. Granberg were reasonably necessary in the quest to relieve Petitioner of the effects of his work-related injury.

Respondent shall pay the medical expenses outlined in Petitioner's group exhibit and hall have credit for any amounts already paid, pursuant to §8(j) of the Act.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011, are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. The Arbitrator therefore considers the remaining factors.

(ii) **Occupation**: Petitioner is currently unemployed. (T.7,49). Accordingly, the Arbitrator gives no weight to this factor.

(iii) **Age**: Petitioner was 56 years old at the time of his injury and had significant spinal degeneration as a result of his age. (AX1; PX5). He has diminished healing capacity as a result thereof. The Arbitrator places some weight on this factor.

(iv) **Earning Capacity**: There is no direct evidence of reduced earning capacity contained in the record.

(v) **Disability**: Petitioner credibly testified to continued symptoms commensurate with his level of activity. Petitioner testified that at times his pain is hardly noticeable. (T.14). However, there are times when it is intensely debilitating and affects his entire left side, which is consistent with his history and mechanism of injury. (T.14). Dr. Raskas testified that this was typical for Petitioner's type of injury. (PX8, p.11, 12). Petitioner testified that he wakes up every 3 to 4 hours at night with back pain. (T.16). He takes Aleve and Extra Strength Tylenol and utilizes disposable heating pads for his symptoms. (T.14, 15). His hobby of bike riding has been curtailed. (T.15, 16). The Arbitrator places some weight on this factor.

Based upon the foregoing, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in the 4% loss of his body as a whole.

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

Carolyn Wallace,

Petitioner,

vs.

NO: 14WC 02509

16IWCC0139

FedEx Ground,

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, prospective medical, 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 May 28, 2015, is hereby affirmed and adopted.

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

16IWCC0139

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 $2,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 2 9 2016
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DLG/mw
45

David L. Gore

Mario Basurto

Stephen Mathis

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

WALLACE, CAROLYN
Employee/Petitioner

Case# **14WC002509**

16IWCC0139

FEDEX GROUND
Employer/Respondent

On 5/28/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

5019 SEIDMAN MARGULIS & FAIRMAN LLC
RYAN A MARGULIS
500 LAKE COOK RD SUITE 350
DEERFIELD, IL 60015

1401 SCOPELITIS GARVIN LIGHT
GERALD F COOPER JR
30 W MONROE ST SUITE 600
CHICAGO, IL 60603

16IWCC0139

FINDINGS

On the date of accident, **12/23/2013**, 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*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $**2,314.37 (12 weeks)**; the average weekly wage was $**192.86**.

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

Issue of medical bills reserved by the parties by agreement for the purposes of this 19(b) hearing.

Respondent shall be given a credit of $**10,993.02** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**10,993.02**.

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 $**192.83**/week for **69** weeks, commencing **12/24/2013** through **4/20/2015**, as provided in Section 8(b) of the Act. Respondent to be given credit for an amounts previously paid.

Respondent shall authorize and pay for the prescribed right knee total knee replacement and its *sequelae* as prescribed by Dr. Collins as such treatment is reasonable, necessary and causally related to the subject 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

May 10, 2015
Date

ICArbDec19(b)

MAY 28 2015

The records reflect that the Petitioner came under the care of Dr. Roger Collins of Greenleaf Orthopedics on January 9, 2014 (P x 2). Dr. Collins noted a history of an initial accident in October 2013, subsequent to which the Petitioner wore a patellar brace. Dr. Collins then noted the history of the December 23, 2013 accident involving the pivot motion and the Petitioner feeling a "pop" in her right knee. Dr. Collins released the Petitioner from all work activity and referred her for physical therapy (P x 2).

During the initial physical therapy evaluation on January 21, 2014, the history of both the October 2013 incident and the December 23, 2013 accident were noted (P x 2). Ultimately the Petitioner underwent an MRI of the right knee which revealed a tear of the posterior horn of the medial meniscus, an MCL sprain and small to moderate joint effusion (P x 2).

On April 4, 2014, the Petitioner underwent surgical intervention at Advocate Condell Medical Center performed by Dr. Collins. The surgery revealed a medial mensicus tear as well as advanced chondromolacia of the patella, throughout the trochlea and the patellofemoral articulation. Large chondral fragments were also floating in the joint (P x 2). Post-operatively the Petitioner underwent a series of three Supartz injections.

As of July 23, 2014, Dr. Collins noted that the Petitioner had failed the post-operative treatment and the knee was giving way, causing the Petitioner to fall occasionally. Dr. Collins referred the Petitioner to his partner, Dr. Thomas Baier, who noted that the Petitioner was "bone on bone". Dr. Baier prescribed a total knee replacement and continued the off-work status pending the surgery.

Conclusions of Law

IN SUPPORT OF THE ARBITRATOR'S DECISION PERTAINING TO ISSUE (F), WHETHER PETITIONER'S CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS THE FOLLOWING:

On the issue of causation, the Arbitrator is faced with the divergent opinions of the treating physician, Dr. Collins, and the examining physician, Dr. Wolin. In assessing the opinions of these two physicians, the Arbitrator the opinions of Dr. Collins more credible than those of Dr. wolin. In reviewing Dr. Wolin's report, it is clear that he did not review the entirety of the Plaintiff's medical records, but rather only a few office visit notes. There is no evidence that Dr. Wolin reviewed the MRI films or the intraoperative films.

Further, Dr. Wolin claims that the Petitioner lacks credibility by not telling her treating physician about the October incident at work that predated the subject accident. This claim is directly contradicted by the medical records. Not only did the Petitioner tell Dr. Collins about the October accident, but she also relayed this information to the Emergency Department and the physical therapist at the initial evaluation. Therefore, not only did the Petitioner not hide this fact from her treater, but she told every treating facility/provider about the October incident.

Dr. Wolin also claims that the Petitioner has "symptom magnificent" without explaining his basis for such an allegation. Given the description from Dr. Baier that the Petitioner's knee was essentially "bone on bone", Dr. Wolin's assessment is not supported by the records.

The Arbitrator finds the opinions of Dr. Collins credible. In his testimony, Dr. Collins methodically described the extent of the damage found in the Petitioner's knee,

As previously discussed, the Arbitrator finds the opinions of Dr. Collins more credible than those offered by Dr. Wolin. Dr. Wolin's recommendation to release the Petitioner to full duty work is contrary to the diagnosed injury and "bone on bone" situation in the Petitioner's right knee. The treating medical records and the credible testimony of Dr. Collins establish that the Petitioner was temporarily and totally disabled from December 24, 2013 through December 26, 2013, and again from January 9, 2014 through the date of hearing, September 20, 2015.

In reviewing the records, the Petitioner was authorized off of work from the Emergency Department through December 26, 2013 with a presumed follow-up visit scheduled to re-assess restrictions. The Petitioner credibly testified that, due to the Christmas holiday and New Year's holiday, she was unable to present to an orthopedist until January 9, 2014. Such a gap spanning 17 days from the accident date does not refute the Petitioner's claim for temporary total disability. Petitioner's testimony on this point was undisputed.

A reasonable inference can be made that, since the Emergency Department restricted the Petitioner from work on December 23, 2013 and Dr. Collins restricted the Petitioner from work on Janauary 9, 2014, the Petitioner remained disabled from work in the interim. This is further supported by the need for surgery and the continued "off work" status post-operatively pending the prescribed right total knee surgery.

Based on the foregoing, the Arbitrator finds the Petitioner temporarily and totally disabled from December 24, 2013 through the date of hearing, April 20, 2015, a period spanning 69 weeks. Respondent is ordered to pay the accrued disability benefits for this time period.